ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Hyannis, Massachusetts
October 10-11, 2002

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 10 - 11, 2002
Hyannis, Massachusetts

Agenda

Introductory Items

1. Approval of minutes of March 2002 meeting.

2. Report on the June 2002 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). (The Chairman and the Reporter will provide an oral report.)

3. Report on the June 2002 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report.)

Action Items

4. Amendment to Rule 1009(a) to require the debtor who amends a claim of exemption to give notice of the amendment to the trustee, all creditors, and all parties in interest.

5. Amendment to Rule 4008 to establish a deadline for filing a reaffirmation agreement.

6. Amendments to Rules 3017(a) and 2002(a) and (b) to resolve the potential inconsistency between the requirement in Rule 3017(b) for at least 25 days notice of the hearing on approval of the disclosure statement "and any objections or modifications thereto" and the requirement in Rule 2002(b) for at least 25 days notice of the time fixed for filing objections and the hearing to consider approval of a disclosure statement.

7. Amendment to Rule 8001 to permit the bankruptcy court to dismiss an appeal that is not timely perfected.

8. Amendments to Rule 3004 to permit a creditor on whose behalf the debtor has filed a proof of claim to file a superseding claim, even after the deadline for filing a proof of claim. Use the opportunity of the amendment to correct the impression given in the Committee Note to Rule 3004 to clarify that a debtor can file a proof of claim on behalf of a governmental unit at any time during which the governmental unit itself could file a proof of claim.

9. Consideration of whether to amend Rule 9031 to authorize the appointment of a special master.

10. Consideration of whether the bankruptcy rules or the civil rules should be amended expressly to permit the clerk to issue a summons electronically.

11. Consideration of whether to amend the instructions to Schedule G - Executory Contracts and Unexpired Leases to require a debtor to include parties to executory contracts and unexpired leases on the debtor's list or schedules of creditors.

12. Consideration of whether to amend Rule 7026 to exclude certain types of adversary proceedings similar to the exceptions provided in Federal Rule of Civil Procedure 26.

Information Items

13. Text and Committee Note to proposed amendment to Rule 2002(j).

14. Consideration of request by the Bankruptcy Noticing Group that Rule 2002(g) be amended to authorize a creditor to register one or more national addresses for receiving notices in bankruptcy cases.

15. Materials related to amendments to the rules and forms that would be needed in the event of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2002 (Bankruptcy Reform Act). [Materials were provided in the agenda book for the March 2002. Please bring with you to the meeting: 1) the March 2002 agenda book, and 2) the House-Senate Conference Report on the Bankruptcy Reform Act .]

The materials are behind Tabs 11A through 11E in the March 2002 agenda book:

a. Introduction: Reporter's Memorandum describing changes the pending Bankruptcy Reform Act would make to the Bankruptcy Code and the amendments to the rules and forms that would be required in the event of enactment.

b. Consideration of rules amendments and additions related to consumer bankruptcy issues necessary to implement pending bankruptcy reform legislation. Amendments to Rules 1006, 1007, 1009, 1017, 1019, 2002, 3002, 4007, and 9006 are included.

c. Proposed amendments to Rule 1005 and the official forms related to consumer bankruptcy issues necessary to implement pending bankruptcy reform legislation. Consumer-related amendments to Forms 1, 3, 4 (minor children, BRA), 5, 6, 7, 8, 9, 10, 16, 17, 18, and 19, and a new form of notice to a debtor to be furnished by a non-attorney bankruptcy petition preparer are included. A development draft of a form for the "means test" also is included. [Some forms have amendments related to both consumer bankruptcy issues and business bankruptcy issues; accordingly, there is some duplication of materials.]

d. Consideration of rules amendments and additions related to business bankruptcy issues necessary to implement pending bankruptcy reform legislation. Amendments to Rules 1007, 1020, 2002, 2003, 2007.1, 2015, 2020, 3002, 3003, 3005, 3016, 3017.1, 3019, 5003, and 9006.

e. Consideration of amendments and additions to the Official Forms necessary to implement business bankruptcy amendments in the pending bankruptcy reform legislation. Forms for the operating reports and small business plans and disclosure statements and amendments to Forms 1, 5, 6, 9, 10, 16A, and 16C are included.

f. Consideration of amendment to Rules 9011 and Part VIII of the rules (Appeals), including new rules to implement pending amendments to 28 U.S.C. § 157(d), necessary to implement pending bankruptcy reform legislation.

16. June 2002 report of the Bankruptcy Administration Committee's Subcommittee on Mass Torts.

17. Report on the implementation of the CM/ECF system (case management/electronic case files) and electronic filing.

18. List and progress chart of proposed amendments.

Administrative Matters

19. Next meeting reminder: *April 3 - 4, 2003, Longboat Key, FL.*

20. Discussion of date and location for fall 2003 meeting.

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Effective October 1, 2002

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Judge Thomas S. Zilly, Chair
Judge Bernice B. Donald
Judge Norman C. Roettger, Jr.
Judge Mark B. McFeeley

September 25, 2002
Projects

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 21-22, 2002
Tucson, Arizona

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Bernice B. Donald
District Judge Norman C. Roettger, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
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. District Judge Thomas W. Thrash, Jr., liaison to the Committee on Rules of Practice and Procedure (Standing Committee), attended. District Judge Adrian G. Duplantier, former chairman of the Committee, and Henry J. Sommer, Esquire, a former member of the Committee, also attended. Bankruptcy Judge Dennis Montali attended as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts (Administrative Office, also attended.

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, Acting Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; Professor Bruce A. Markell, and Professor Melissa B. Jacoby, consultants to the Committee; Bankruptcy Judge Eileen W. Hollowell, Tucson, AZ; John K. Rabiej, Chief, and James N. Ishida, staff attorney, Rules Committee Support Office, Administrative Office; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center.

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 the Committee's new member, Judge McFeeley, and welcomed all the members, liaisons, advisers, and guests to the meeting.

The Committee approved the minutes of the March 2001 meeting. [The meeting that had been scheduled for September 13-14, 2001, was canceled due to the September 11 attacks on New York City and Washington, DC.]

The Chairman briefed the Committee on the events of the June 2001 and January 2002 meetings of the Standing Committee and on certain actions taken by the Judicial Conference in September 2001. At the June 2001 Standing Committee meeting, the seven amended rules and one new rule the Committee had forwarded for adoption were approved and sent to the Judicial Conference, but amended Rule 2014 had drawn two negative votes. Later in the summer, Rule 2014 proved controversial again when the Judicial Conference's Executive Committee met to consider the calendar for the September meeting of the Judicial Conference. Rather than risk disapproval of the amendments, Judge Small said he and Judge Anthony J.Scirica, chairman of the Standing Committee, had decided to withdraw Rule 2014 from the package of proposed amendments and send the rule back to the Advisory Committee for further study. The Judicial Conference, which was in session on September 11 when the attacks occurred, adjourned and acted later by mail ballot to approve the reduced package of proposed rules amendments and to approve two further items of interest to the Committee, a compilation of "Model Local Bankruptcy Court Rules for Electronic Filing" and a "Policy on Privacy and Public Access to Electronic Court Files," both proposed by the Committee on Court Administration and Case Management (CACM). In January 2002, the Standing Committee approved publication of privacy-related amendments to Rule 1005 and eleven official forms previously considered by the Advisory Committee but withheld pending congressional action on bankruptcy reform legislation. Judge Small noted that Deputy Attorney General Larry D. Thompson had opposed publication of the privacy-related amendments at the Standing Committee meeting.

Judge Montali reported briefly on the January 2002 meeting of the Bankruptcy Committee. Of the matters currently before that committee, the one most likely to have an impact on the rules, he said, is the question of venue. Apart from the suggestion to amend the Bankruptcy Code to eliminate the state of incorporation as a basis for venue that has arisen from several quarters, he said, the Bankruptcy Committee is considering issues concerning the treatment of a case that is filed in an improper venue. Some of the questions are whether a bankruptcy judge can raise the question of venue sua sponte and whether a bankruptcy judge can

properly decide to retain a case filed in a wrong venue, once the question has been raised by a party.

Action Items

Proposed Amendments to Rules 1007, 2003, 2009, 2016, Proposed New Rule 7007.1, and Proposed Amendments to Official Forms 1, 5, and 17 Published for Comment August 2001. Professor Morris noted that the Committee had received only a few comments and that most of the comments had addressed the requirements in the proposed amendments to Rule 1007 and proposed new Rule 7007.1 to provide the court with financial disclosures that will assist a judge in determining whether the judge is disqualified from handling a case or proceeding. Two bankruptcy judges had commented that the required disclosures should be broader and include more types of entities than the proposed rules contemplate. Professor Morris said the Committee initially had discussed a draft with broader requirements. The other advisory committees, however, already had approved quite a narrow rule, and the Standing Committee had expressed a strong desire for consistency on the subject in all federal rules. Accordingly, he said, the only variations from the text adopted by the other advisory committees had involved use of "equity" (rather than "stock") interests and "governmental unit," as those are defined terms under § 101 of the Code. The only other subject addressed in the comments, he said, was a suggestion to delete from Official Form 1, the Voluntary Petition, the certificate by a non-attorney bankruptcy petition preparer in favor of the separate form for the purpose, Official Form 19. As Official Form 1 is being amended only to conform to legislation adding a "clearing bank" to the categories of entities that may file a petition, the suggestion was not germane.

A member asked whether the Rule 7007.1 should require members of a creditors committee to make disclosure. Professor Morris said the subject had been discussed but did not seem workable. A member suggested that it would be a good idea for the Committee Note to mention that the reason for not listing the debtor as a party to make disclosure under Rule 7007.1 is that the debtor is required to disclose the information at filing under the proposed amendment to Rule 1007. **A motion to forward to the Standing Committee the proposed amendments to Rules 1007, 2003, 2009, and 2016, and new Rule 7007.1, with the addition of a sentence to its Committee Note referencing the requirement in the proposed amendment to Rule 1007 for the debtor also to make disclosures, with a recommendation that the amendments and new rule be adopted, passed unanimously. A motion to forward the proposed amendments to the Official Forms with a request that their effective date be delayed to December 1, 2002, also passed without opposition.**

Proposed Amendments to Rule 1005 and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C,and 19 Published for Comment January 2002. Chairman Small announced that the hearing on the proposed amendments scheduled for April 12 had been canceled because no timely request to testify had been received. He observed that only three comments had been received, but that comments historically are filed close to the deadline, which for these proposals is April 22, 2002. A member noted that the comments received by CACM during the time it was

developing the policy adopted by the Judicial Conference in September 2001 had been balanced; advocates of full information available over the Internet and advocates for privacy both had contributed, with the Social Security number (SSN) the principal issue. Judge Walker said a member of CACM had told him that technology exists whereby court records can be searched either by name or by SSN. With this technology someone in possession of only an individual's name can search court records but will not learn the SSN, while someone in possession of an individual's nine-digit SSN can search the same database for a matching number. Such a system would enable a creditor having a person's SSN to determine whether that person had filed bankruptcy or, conversely, whether a specific bankruptcy debtor is the one who owes money to the creditor or simply has a similar name. A participant said the requirement to match a full SSN does not prevent identity theft, because a criminal-minded person can simply put in random nine-digit numbers until a name appears that the person wants to steal.

A member raised the matter of § 342(c) of the Code, which requires the debtor to provide the debtor's full SSN on any notice given by the debtor to a creditor, and another member suggested that the Judicial Conference policy seems to conflict with congressional policy as expressed in § 342(c). Judge Walker said CACM has submitted proposed amendments to the Bankruptcy Code to Congress and that his contact at CACM seems to believe that Congress will accede to the Judicial Conference on the issue of § 342(c). Chairman Small noted that the Judicial Conference policy is for the court to collect the full SSN, so it would be available to the trustee and other proper parties, but not to display it on the Internet. Mr. Sommer said that in 1994, when § 342(c) was enacted, there was no nationwide electronic access to bankruptcy court files. He said Congress now may hold the view that more protection of a debtor's SSN is needed and, therefore, be willing to amend the statute. He suggested that the SSN might be transmitted to the court in some way but not "filed," that it could be treated in the same way an attorney's login and password is handled under the electronic filing system. The court system uses the SSN to detect ineligible repeat filers. It also was suggested that some documents, such as summonses and § 341 Notices might include the SSN but be kept off the Internet by the court. Another member responded that every motion must be accompanied by a notice, which may result in many disclosures of SSN by a debtor and there could be practical problems for a court if these must be kept off the Internet.

Mr. Kohn said he is not comfortable with a simple "yes" or "no" vote on the published proposals and referred the Committee to the range of commentators and of comments submitted in response to CACM's proposals. Ms. Davis mentioned the new policy of the EOUST that requires each debtor to present a Social Security card together with some form of photo identification at the § 341 meeting as a means to combat fraud. She said the new requirement has produced about a one percent rate of mismatched SSNs when the trustee compares the SSN on the petition with the card presented at the meeting. Although some of the mismatches are typographical errors, she said, others are not. A member asked why the Committee should anticipate congressional policy and expressed concern about the idea that a debtor would submit a SSN that would be available only to the court and not to the creditors who also need it. He said he opposes the published proposal.

One participant in the meeting asked where the idea of truncating account numbers (in addition to SSNs) had originated, as such accounts likely are closed down and not useful to thieves. Others responded that the idea had originated in the Committee and that not all accounts are closed or useless, giving utility accounts as an example of the type that usually remain open. A member said that the Committee does not know whether four digits is enough, either for the SSN or for an account number. He said he doubted the Committee ever would know, although one reason for publishing the proposed amendments was to attempt to learn.

A member asked whether the Committee is bound by the Judicial Conference policy. Chairman Small said, although a Judicial Conference policy carries great weight with all committees, the Advisory Committee can decline to amend the rules and forms if it does not agree with the policy or believes it should not apply to the bankruptcy forms and rules. He added that he had told the Standing Committee that the Advisory Committee, although it had agreed to publish the proposed amendments, was not committed to conforming the rules and forms to the Judicial Conference policy. Judge Walker, who served as liaison from the Committee to CACM's privacy subcommittee starting in October 2001 said CACM expects the Committee to act to implement the policy, and act quickly, and said the Committee will be asked to explain any refusal to do so. He added that CACM expects Congress to amend § 107 of the Code to permit a bankruptcy judge to protect a filed document on privacy grounds and anticipates the development of a "privacy document" containing information that would be filed but not available over the Internet. Mr. Rabiej added that CACM also is working with the Department of Justice on a procedure for granting the Internal Revenue Service access to the full SSN. **A motion to refer the published amendments to the Subcommittee on Privacy and Public Access and directing the subcommittee to report at the next meeting passed without opposition.** Chairman Small suggested that the subcommittee should meet on April 12, the date formerly scheduled for a hearing on the proposed amendments, and invite representatives of interested entities for a "focus group" type of discussion on the published proposals. He suggested that representatives from CACM also could be invited, and **appointed Judge Walker and Mr. Shaffer as additional members of the subcommittee.**

Rule 2014. Chairman Small reviewed for the Committee the events of the summer of 2001 that led to the withdrawal of the Committee's proposed amendments from the package submitted to the September 2001 Judicial Conference. The Committee's proposed amendments had drawn two "no" votes and the June 2001 meeting of the Standing Committee, and two chief circuit judges who are members of the Judicial Conference's executive committee later had raised objections, thereby guaranteeing that the proposed amendments would be placed on the discussion calendar for the Judicial Conference where they possibly would have been defeated. Rather than risk the amendments' future, Chairman Small and Judge Anthony J. Scirica, chairman of the Standing Committee, had withdrawn the proposed amendments. One chief circuit judge, he said, opposes any change to the existing standard of disclosure, as the proposed amendments would establish a lower standard of disclosure, in that judge's opinion. The other chief circuit judge, he said, took issue with the proposed "catchall" disclosure of any interest, relationship, or connection that would lead the court or a party in interest reasonably to question

whether the professional seeking employment is disinterested in the case, apparently on the basis that such standard would substitute the professional's judgment for that of the judge. Mr. McCabe said he believed the judges who opposed the Committee's proposals want to retain the existing standard that the professional is required to disclose all "connections," no matter how trivial, and that the Judicial Conference would be uncomfortable with any standard that might appear to limit a judge's discretion. Other members commented that even good law firms violate the existing rule, with some stating in their applications that the firm performed a conflicts check on the largest 50 creditors in the case, admitting by implication that they did not go further. A member suggested routinely holding a hearing on an application for approval of employment 30 days after it was filed. Chairman Small said it could be dangerous to have a hearing when there is no issue, as the court then could appear to be blessing an arrangement that later proves to have been improper. Another member said the reported cases all arose from objections that were filed to fee applications and that one purpose of the proposed amendments would be to avoid allowing a firm to work for a year and not be paid. Others noted that using a hearing at the beginning of a case to create a "safe harbor" for professional would violate § 328(c) of the Bankruptcy Code, which authorizes the court to deny compensation to a professional if a conflict arises or is disclosed during the case, and that a professional takes the risk of such denial if the professional fails to make sufficient disclosure. One member commented that the Committee seemed to be facing a clear choice between bowing to political reality and making its point that the existing rule is not being complied with, and another said the risk of defeat looked so high that he would prefer the Committee to table the proposed amendments. **A motion to table the proposed amendments to Rule 2014 passed without opposition.**

Official Form 6 - Schedule G. The proposed amendments to Schedule G - Executory Contracts and Unexpired Leases were suggested as a means to provide notice of the bankruptcy case to those who are parties to executory contracts or unexpired leases with the debtor. One attendee commented that the proposed change might do more harm than good, because parties who are not owed any money might think they nevertheless need to file a proof of claim. Another said that in the context of intellectual property, especially computer software, nearly everyone is a licensee, and may not realize it or know either the identity or the address of the licensor. A member said a party to an executory contract with a debtor may have a "claim" under the broad definition of that term in the Bankruptcy Code but that the Committee probably does not need to amend the form to make it resemble a schedule of creditors. Another member said it might be sufficient to amend the existing instructions to delete the statement that entities listed will not receive notice of the bankruptcy case unless they also are listed on a schedule of creditors. The consensus was that the Committee could provide for giving notice to parties listed in Schedule G by amending Rules 1007 and 2002. **A motion not to adopt the proposed amended schedule passed without opposition.**

Rule 4003(c). The Reporter introduced the proposed amendment concerning the allocation of the burden of proof of any objection to a debtor's claimed exemptions , which was suggested by Bankruptcy Judge Barry Russell. Judge Russell stated, in a letter to the Committee, that the burden of proof under Rule 403 had been on the objecting party, as it is today under Rule

4003. The difference is that under § 522(l) of the Bankruptcy Code, claiming an item of property as exempt by the debtor makes it so, in the absence of objection by the trustee or other party in interest. Under the Bankruptcy Act of 1898, to which Rule 403 applied, the trustee filed a report of exempt property and the debtor could object. When the identity of the party filing an objection changed, there was a ripple effect that shifted the burden of proof to the trustee. Judge Klein said he understood Judge Russell to believe that Congress did not intend such a shift. Judge Russell, in his letter, cited *Raleigh v Illinois Department of Revenue*, 530 U.S. 15, 120 S.Ct. 1951 (2000), in which the Supreme Court ruled that the burden of proof for tax claims is governed by substantive nonbankruptcy law, as support for his view that a debtor who claims exemptions under state law should bear the burden of proof in the event an objection is filed. **The consensus was to defer the proposal until the law has developed further, in light of the** *Raleigh* **decision.**

Rule 4008. The proposed amendment would provide a deadline for the filing of a reaffirmation agreement. The proposal arose from a suggestion by the Bankruptcy Judges Advisory Group that the absence of a filing deadline is leading to agreements being filed after the case is closed or not being filed at all, especially in courts which close a case immediately after the entry of the debtor's discharge. In addition, under Rule 4008, if the debtor was not represented by an attorney, the court must hold a hearing within 30 days of granting the discharge. If the agreement is not filed, the court has no way to know a hearing needs to be scheduled, and the deadlines Rule 4008 provides for noticing and holding the hearing may pass. Under section 524(c)(6) of the Code, the agreement is not enforceable if no hearing is held. One problem with amending the rule as suggested, the Reporter said, is that in order to give notice and hold the hearing within the existing deadline of 30 days after the entry of the discharge order, the court would have only a six-day window in which to hear the matter. Chairman Small inquired whether late filing of reaffirmation agreements were a problem for the courts, and received varying responses from members, all of which indicated that any problems are minimal. Mr. Sommer recalled having raised the issue some years previously and said the Committee had been skeptical about the need for an amendment at that time. A member noted that the Code contains a deadline for making the agreement but not for filing it, and another member suggested that what is needed is a deadline for filing the agreement when the procedure for any hearing left up to each court. **A motion to re-draft the rule to provide a deadline for filing a reaffirmation agreement but not for any hearing that might be required was not opposed.** The Report presented a new draft on the second day of the meeting. The chairman said he would delete the provision requiring a debtor not represented by counsel to file a motion for approval of the agreement. If the debtor does not have an attorney, the court automatically schedules a hearing, he said. Mr. Sommer noted that the Bankruptcy Reform Act would require a motion and provides the text it must contain. Members commented that the rule should provide for the creditor to receive notice of the hearing. It also was pointed out that a filing deadline could have a punitive effect on the debtor if the debtor were to lose a car or other property because the agreement were not filed. A member suggested providing for the court to extend the time, and another said the rule should require the creditor to file the agreement, with no penalty to the debtor permitted in the event the creditor fails to do so. **The consensus was to refer the**

proposal to the Subcommittee on Consumer Issues.

Rule 5002. The Reporter introduced the discussion and referred to his memorandum to the committee concerning a suggestion that Rule 5002(a) on the appointment of relatives be amended to forbid employment of a law firm in which a relative of the judge is a partner or other owner, but permit the judge to approve the employment if the relative is an associate or non-equity partner. Such a change would conform the rule to "Committee on Codes of Conduct Advisory Opinion No. 58" which the Committee on Codes of Conduct has interpreted to forbid a judge to handle a case in a participating law firm has a partner or other owner who is a relative of a judge. If the relative does not have an ownership interest, recusal is not required. Members suggested, however, that it may not be advisable to base a rules amendment on an advisory opinion and recommended looking to the relevant canon of the Code of Conduct for United States Judges. Another member noted, however, that the Canon is concerned with recusal of a judge, while the rule is concerned with the eligibility of a private individual for appointment to perform professional services in a bankruptcy case, and that the Canon might not solve the actual problem presented. Another noted that even associates receive bonuses and thus have an "interest" because they share in the profits of the firm, and another suggested that many firms would not want to invest an entire summer in someone who could never make partner. It also was pointed out that there are statutory provisions limiting the appointing authority of judges, in particular, 18 U.S.C. § 1910, which makes it a crime for a judge to appoint a relative as trustee, and 28 U.S.C. § 458, which forbids the appointment as an employee any relative of any judge of that court. **A motion to defer the matter indefinitely was not opposed.**

Rule 2002(j). The Reporter explained that shortly before the meeting a member had called to his attention that fact that the rule requires that notice to the Internal Revenue Service (IRS) be sent to the "District Director," a position the IRS has abolished. In addition, an amendment to Rule 5003 which took effect in late 2000 requires the clerk to maintain a register of addresses of government entities for notice purposes. Replacing the obsolete job title now in the rule with a cross reference to the Rule 5003 would resolve the problem, he said, adding that Mr. Kohn had reported that such an amendment would be acceptable to both the IRS and the Department of Justice. As a technical amendment reflecting a structural change within the IRS, the Reporter said, publication of the amendment should not be required. **A motion to approve the amendment and recommend its adoption without publication passed unanimously.**

Information Items

Bankruptcy Abuse Prevention and Consumer Protection Act of 2001. The Committee discussed with its consultants and the Director and Acting Deputy Director of the EOUST the various provisions of the pending Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 and the amendments to the rules and forms, as well as the new forms, that would be required in the event of the bill's enactment.

Rule 2002(g). The Administrative Office's Bankruptcy Noticing Working Group had requested the Committee to 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. As most volume noticing for all courts now is done centrally by a contractor to whom each court sends the information to be used, amending the rule as suggested would speed the updating of a creditor's address and be more efficient for the courts as well. Although noting that the suggestion appeared to be designed also to facilitate actual notice to creditors, members of the Committee raised several concerns. A member said the certificate of service should say if the notice was sent to the address requested by the creditor. Another member asked whether there would be a similar system for registering addresses for paper notices not sent through the noticing contractor, and noted that it is not unusual for a creditor to have multiple addresses, with different ones used for different purposes during a bankruptcy case. Another asked whether creditor addresses registered at a court, especially those filed later as requests or on proofs of claim, are transmitted to the noticing center. Mr. Waldron said newly filed addresses for a creditor are added to existing lists and that automated systems are used by the contractor to reconcile variations on each creditor's name and to match name variants with registered addresses. **The Chairman referred the suggestion to the Technology Subcommittee for further study.**

Suggestion for Amendment

Judge Klein suggested that Rule 7026 should be amended to allow exemption or selective opt-out from its requirements in the simpler adversaries and those involving low dollar amounts, such as student loan dischargeability actions filed by a debtor. A member said it might not be necessary to amend the rule, because the only sanction for noncompliance is that discovery is not available. The Chairman requested Judge Klein to compile a list of specific exceptions for the Committee to consider.

Next Meeting

The Committee discussed Longboat Key, FL, as a possible location for the spring 2003 meeting, with Seattle, WA, as a possible alternate. The Committee also agreed on March 27-28 or April 3-4 as acceptable dates, with the choice to be made based on when the better hotel rates can be obtained.

Respectfully submitted,

Patricia S. Ketchum

Items 2 and 3 will be oral reports.

4

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: OBJECTIONS TO AMENDED EXEMPTION CLAIMS

DATE: SEPTEMBER 12, 2002

Debtors claim exemptions by listing those assets they wish to exempt on Schedule C of Official Form 6 as required by Rule 4003(a). The listing usually accompanies the debtor's petition, although Rule 1007(c) permits the debtor in a voluntary case to file the schedules within 15 days after the commencement of the case. Rule 1009(a) provides further that the debtor may amend a schedule "as a matter of course at any time before the case is closed." The liberal amendment rule carries forward the practice under the Bankruptcy Act. The rule also provides, however, that the debtor "must give notice of the amendment to the trustee and to any entity affected thereby." As the original Committee Note to the section states, giving notice to the trustee of an amendment to the list of exemptions is particularly important. The Committee Note is silent, however, as to the debtor's duty to notify the creditors of the amended exemption claim. Nevertheless, creditors clearly have an interest in the allowance or disallowance of exemptions, and they are parties in interest who have standing to file an objection to a claimed exemption under Rule 4003(b). Thus, debtors (or the person claiming the exemption on behalf of the debtor) should give notice to creditors of any amendment to the list of exempt property.

Rule 4003(b) requires a party in interest to file an objection to the list of exempt property "within 30 days after the meeting of creditors held under § 341(a) is concluded *or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later.*"

(Emphasis added.) The rules anticipate that the debtor will file an amendment to Schedule C (exempt property listing) and will immediately give notice to the trustee and all creditors. Every creditor is an "entity affected" by the amendment because if the property is not exempted, it is available to be liquidated with the proceeds therefrom being distributed to the creditors.

The deadline for filing objections applies equally to creditors as to the trustee. There has been little difficulty in applying these rules to objections to exemptions that are set out on a Schedule C form filed with the debtor's petition. In Taylor v. Freeland & Kronz, 503 US 638 (1992), the Supreme Court held that an objection made outside the 30 day period was barred, and the property claimed as exempt was not subject to the trustee's attempts to recover the property for the benefit of the bankruptcy estate. Thus, it is important for creditors and the trustee to act quickly if they object to an exemption claim. Since the triggering mechanism for the objection period is the time when the amendment is filed under Rule 4003(b), several problems can arise. While the rule requires the debtor to notify all affected parties, including all creditors, In re Casani, 214 B.R. 4549 (D. Vt. 1997); In re Ginn, 186 B.R. 898 (Bankr. D. Md. 1995), the debtor might fail to provide the notice. In that event, the courts generally have held that the time for objections to those exemptions does not begin to run. See, e.g., In re Woodson, 839 F.2d 610 (9th Cir. 1988); In re Robertson, 105 B.R. 440 (Bankr. N.D. Ill. 1989). Some courts, on the other hand, have held that actual notice of the amendment will trigger the commencement of the objection period. In re Sadkin, 36 F.ed 473 (5th Cir. 1994); In re Peterson, 929 F.2d 385 (8th Cir. 1991). The court in Sadkin noted that since Rule 1009 does not require any particular form of notice, actual notice meets the requirement of the rule.

The notion that actual notice is sufficient to trigger deadlines exists elsewhere in the

Bankruptcy Code. Section 523(a)(3) excepts unlisted claims from the discharge "unless such creditor had notice or actual knowledge of the case" in time to file a claim and nondischargeability complaint. Thus, it seems appropriate to begin the exemption objection period when a creditor or the trustee obtains actual knowledge of the exemption. Nonetheless, Rule 1009(a) clearly anticipates that the debtor will give notice to creditors immediately upon filing an amended list of exemptions. In that event, the thirty day objection period set out in Rule 4003(b) works well. Therefore, it may be appropriate to amend Rule 1009(a) to reinforce the debtor's obligation to notify creditors of these amendments. Inserting creditors into the list of entities who should be notified rather than relying on the catch all "any entity affected thereby" would highlight the need to serve creditors and reduce the number of disputes over the timeliness of objections to exemptions claimed by way of amended schedules. The amendment cannot be made simply by inserting "creditors" into the existing language of the rule because the rule covers a variety of amendments other than to the list of exempt property. Therefore, I would suggest the following amendment to Rule 1009(a).

RULE 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements

(a) General Right to Amend. The debtor may amend a ~~A~~ voluntary petition, list, schedule, or statement ~~may be amended by the debtor~~ at any time before the case is closed. The debtor shall give notice of any amendment to the schedule of exempt property to the trustee, creditors, and any other entity affected thereby. The debtor shall give notice of any other ~~the~~ amendment to the trustee

and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order the amendment of any voluntary petition, list, schedule, or statement, ~~to be amended~~ and the clerk shall give notice of the amendment to entities designated by the court.

* * * * *

COMMITTEE NOTE

The rule is amended to make explicit the obligation of the debtor to give notice to creditors of any amendment to the schedule of exempt property. Notice is important because creditors have a limited time in which to object to exemptions, including amendments to the schedule of exemptions, under Rule 4003(b). Including an explicit requirement of notice to creditors is intended to highlight the debtor's obligation and increase the likelihood that creditors will receive the notice.

The change in the rule is not intended to overrule any decisions holding that actual notice or knowledge of an amendment to the schedule of exempt property triggers the objection period for a particular creditor. Nor is the change intended to create a duty to notify creditors who are not affected by the amendment, such as those who have not filed timely claims and those who will be paid in full in the case. If the value of the property would be sufficient to pay even tardily filed claims, then those creditors would be affected entities that the debtor must notify.

Other changes are stylistic.

The Committee Note attempts to address the issue of the need to notify creditors who have not filed timely claims and who would therefore not be eligible to receive a distribution in the case. Rule 2002(h) permits the withholding of mail notice to these creditors in appropriate circumstances. If the estate contains more assets than necessary to pay all timely filed claims in

full, however, even tardily filed claims are eligible for a distribution. Bankruptcy Code § 726(a)(3). If the property that the debtor claims as exempt would more than satisfy the timely filed claims, then creditors who have not filed claims would be "other entities" affected by the exemption claim and should receive notice of the amendment. This can create difficulties for debtors in determining which creditors to notify, but the fail safe position of notifying all creditors in the face of doubt resolves the dilemma.

The primary counter argument to the amendment is that the rules already sufficiently address the matter. Rule 1009 requires the debtor to serve affected parties, and the courts have not read Rule 4003(b) to preclude objections by creditors as untimely when made more than thirty days after the filing of the amendment if those creditors had no notice or knowledge of the amendment. Only creditors with actual knowledge of the amendment are cut off by the Rule 4003(b) deadline. Furthermore, it is in the debtor's best interest to serve the creditors in order to preclude them from objecting at some time after the thirty days has run.

Although debtors have an incentive to notify creditors of amendments to the schedule of exemptions, it appears that a great many do not give the notice. This creates a need for the courts to determine whether a particular creditor had actual notice or knowledge of the amendment when evaluating the timeliness of an objection. If the percentage of debtors who serve all affected parties is increased, it would set the objection time in motion in a concrete fashion and would avoid the need to engage in litigation over the existence of notice before even getting to the merits of any objection to a debtor's exemptions.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM JEFF MORRIS, REPORTER

RE: REAFFIRMATION AGREEMENTS

DATE: SEPTEMBER 17, 2002

The Bankruptcy Judges Advisory Group has requested that the Advisory Committee on Bankruptcy Rules consider amending Rule 4008 to establish a deadline for filing reaffirmation agreements. The Committee discussed the issues briefly at the last meeting in Tucson, and this memorandum attempts to reflect that discussion.

Reaffirmation agreements are enforceable only if they meet the requirements of § 524(c) of the Bankruptcy Code. The agreement must be (1) in writing (it must contain a clear and conspicuous statement regarding the debtor's rescission rights), (2) "made" prior to the entry of the debtor's discharge, (3) approved by the debtor's attorney, and (4) 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. Finally, the debtor may rescind the agreement "at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever is later."

Rule 4008 also governs reaffirmation agreements, but only in small measure. The rule provides no direction as to the timing of the filing of a reaffirmation agreement. Instead, it simply requires that at least ten days notice be given to the debtor and trustee of a reaffirmation hearing. The hearing is required under § 524(d), however, only if the debtor was not represented by counsel during the negotiation of the reaffirmation agreement. The hearing provides the court

with an opportunity to determine whether the agreement meets the requirements of § 524 and to inform the debtor of the consequences of the agreement. The rule also requires the debtor to file a motion for approval of the reaffirmation agreement "before or at the hearing."

While the statute requires that the agreement be made prior to the discharge and also requires that it be filed, it sets no deadline for filing the reaffirmation agreement with the court. Therefore, a reaffirmation agreement could be entered into prior to the entry of the discharge, but not filed with the court for quite some time. The reaffirmation agreement would meet the other requirements of § 524(c), but the debtor still would have sixty days after any filing to rescind the agreement. Bankruptcy Code § 524(c)(4). This arguably operates to the benefit of the debtor who preserves the right of rescission; however, late filing of reaffirmation agreements appears to be creating problems for some courts and clerks who must reopen closed cases to permit the filing of these agreements. *See, e.g., In re Davis*, 273 B.R. 152 (Bankr. S.D. Oh. 2001)(court reopened case to permit filing of reaffirmation agreement); *In re Pettet*, 271 B.R. 855 (Bankr. S.D. Ind. 2002)(court has no authority to reopen case to permit filing of reaffirmation agreement); *In re Gibson*, 256 B.R. 786 (Bankr. W.D. Mo. 2001)(court would not reopen case when reaffirmation agreement was made after the entry of discharge). These decisions suggest that there is at least some problem with late filing of reaffirmation agreements, but further study would seem appropriate to determine if the problem is widespread enough to warrant a rule change. A survey of the bankruptcy courts could provide the data necessary to determine the scope of the problem. Other research methods might provide insight into specific solutions to the problems identified through the survey. See Thomas E. Willging, "Past and Potential Uses of Empirical Research in Civil Rulemaking," 77 Notre Dame L. Rev. 1121

(2002).

Since a reaffirmation hearing is required only if the debtor is not represented by counsel in the negotiation of the agreement, some mechanism must be put in place to inform the court that a hearing is necessary. The current rule permits the debtor to file a motion to approve a reaffirmation agreement even at the reaffirmation hearing. Until such a motion is filed, however, the court would have no reason to schedule such a hearing. The Bankruptcy Judges Advisory Group notes that the triggering event for scheduling these hearings is typically the filing of a reaffirmation agreement without an accompanying affidavit from counsel for the debtor. If the agreement is not filed, no hearing is scheduled. Thus, setting a deadline in Rule 4008 for filing a reaffirmation agreement with the court would permit the orderly consideration of the agreements and avoids the need to reopen cases at some later time to permit the filing of the agreement. Including the deadline in the rule may also serve to highlight the significance of reaffirmation agreements to both the debtor and counsel to the debtor.

In our discussion of the matter in Tucson, several Committee members noted that the creditor seeking the reaffirmation has the ability to file the reaffirmation agreement and thereby protect itself against the possibility that the agreement would be unenforceable either because it was not filed or no hearing was held in a case of an unrepresented debtor. In that event, the creditor either can continue to collect on the unenforceable reaffirmation agreement, or it can notify the debtor that the agreement is unenforceable. Since most of the reaffirmation agreements involve secured claims, the creditor can take action against the collateral. The prospect of repossession of the property, however, suggests that the debtor may have a greater interest in ensuring the enforceability of the reaffirmation agreement. Whether it is sensible for

the debtor to commit post bankruptcy funds to retain the collateral is subject to debate. See Culhane & White, "Debt After Discharge: An Empirical Study of Reaffirmation," 73 Amer. Bankr. L. J. 709,713 (1999) ("[T]he claims most often reaffirmed were those secured by household goods."). Nevertheless, the debtor did enter into the reaffirmation agreement, and if it is a particularly unwise bargain, the court would be in a position to withhold approval of the agreement or encourage a renegotiation of its terms.

Section 524(c)(1) requires that the reaffirmation agreement be made before the entry of the discharge. The courts have noted that the statute requires only that the agreement be "made" by the date of the discharge, but not that it be filed by that date. *See, e.g., In re Whisenant,* 265 B.R. 164 (Bankr. E.D. Ark. 2001); *In re LeBeau*, 247 B.R. 537 (Bankr. M.D. Fla. 2000). An agreement reached any time prior to the entry of the discharge may still be enforceable as long as it meets the other requirements of § 524(c). The only remaining prerequisites are the filing of the agreement, and, if the debtor was unrepresented, the discharge and reaffirmation hearing. The deadline for filing must be a date after the entry of the discharge, but it must also be relatively short to avoid unnecessary delay in the closing of cases. Rule 4008 currently sets thirty days after the entry of the discharge as the deadline for holding a hearing under § 524(d). The parties must have reached agreement prior to the entry of the discharge, so the agreements must have been entered into at least thirty days prior to the hearing. The parties necessarily would know that the discharge had not been granted at the time they reached agreement on the reaffirmation, so there should be no need for delay in filing the agreement. Setting the deadline for filing a reaffirmation agreement at 10 days after the entry of the discharge gives the parties at least 10 days (and usually much more) to file a copy of an agreement they have reached. The clerk would

then have notice that a discharge and reaffirmation hearing is necessary within 10 days of the entry of the discharge. The court could then notify the debtor, the trustee and creditors of the § 524(d) hearing. Under current Rule 4008, the court must give ten days notice of the hearing, and this would still be possible if the agreements must be filed not later than10 days after the entry of the order of discharge. The revised text of Rule 4008 to impose the filing deadline requirement for reaffirmation agreements follows.

RULE 4008. FILING OF REAFFIRMATION AGREEMENT; DISCHARGE AND REAFFIRMATION HEARING

(a) Filing of Reaffirmation Agreement. The debtor or creditor shall file a copy of any reaffirmation agreement not later than 10 days after the entry of an order granting the discharge.

(b) Discharge and Reaffirmation Hearing. Not more than 30 days following the entry of an order granting ~~or denying~~ a discharge, or confirming a plan in a chapter 11 case concerning an individual debtor and on not less than10 days notice to the debtor, the creditor and the trustee, the court may hold a hearing ~~as provided in~~ under § 524(d) of the Code.

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements must be entered into prior to the entry of the discharge, and they must be filed with the court. The rule sets the deadline for filing these agreements

> with the court. Since the parties must enter into the agreements prior to the entry of the discharge, they will have at least 10 days to file them with the court. The rule also authorizes either party to file the agreement. Thus, whichever party has a greater incentive to enforce the agreement will see to its filing.
>
> Setting a deadline for the filing of reaffirmation agreements is also necessary to inform the court of the need for a hearing under § 524(d). If the debtor is not represented by counsel in the negotiation of those agreements, then the court must approve the agreement. A reaffirmation agreement that is not accompanied by the appropriate declaration or affidavit from counsel for the debtor informs the court that a discharge and reaffirmation hearing must be held. Since the debtor or creditor must file the agreement not later than 10 days after the entry of the discharge, the clerk will have an opportunity to give 10 days notice of the reaffirmation and discharge hearing and still schedule the hearing within 30 days of the entry of the discharge. These deadlines also allow completion of the reaffirmation process before the case is closed.

The proposed revision requires that all reaffirmation agreements be filed by the ten day limit. An argument can be raised that the rule should set different deadlines for the filing of these agreements depending on whether the debtor was represented by counsel. The need to schedule Rule 4008 hearings does not arise if the debtor has counsel, so there is no need to have the agreements filed early enough for the court to schedule the hearing. As long as the agreement is filed prior to the closing of the case, the problem identified by the Bankruptcy Judges Advisory Committee is avoided. On the other hand, setting different deadlines for filing the reaffirmation agreements could create unnecessary confusion. Consequently, I would not recommend a different deadline for filing the agreements based on the presence or absence of counsel for the debtor.

The primary competing argument for introducing a deadline for filing reaffirmation

agreements is that it will result in a significant harm to debtors. If the agreement is not filed, it will be unenforceable and debtors will lose their property. Moreover, the quality of debtor representation is uneven, and many more debtors proceed without counsel in bankruptcy cases than do creditors. The result will be that many reaffirmation agreements that debtors wish to enforce would become unenforceable. This would be in some ways comparable to a return to the day when debtor did not receive a discharge absent a separate application for a discharge. *See, e.g., Cohen v. Keller*, 108 F.2d 495 (2d Cir. 1940). Ignorance, inadvertence and negligence could lead to significant losses to under and unrepresented debtors. These losses would be avoided if the debtor could simply file the reaffirmation agreement with the court and thereby retain whatever rights and protections the agreement might provide.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: NOTICE OF DISCLOSURE STATEMENT HEARING AND TIME FOR FILING OBJECTIONS TO DISCLOSURE STATEMENTS UNDER RULES 3017(a) AND 2002(b)

DATE: SEPTEMBER 10, 2002

Section 1125(b) conditions the solicitation of votes to accept or reject a reorganization plan on the distribution of a court approved disclosure statement. Rule 3016(b) provides that the disclosure statement may be filed either "with the plan or within a time fixed by the court." Rule 2002(b) requires *not less than* 25 days' notice by mail of "the time fixed for filing objections and the hearing to consider approval of a disclosure statement." Thus, the rule permits the time for filing objections to the disclosure statement to coincide with the time set for the hearing to consider approval of the statement. This dual time reference allows for the simultaneous submission of objections to disclosure statements and the hearing on the disclosure statement itself. Rule 3017(a) requires that there be *at least* 25 days' notice of a hearing to consider a disclosure statement and any objections or modifications to the disclosure statement. Thus, these two rules encourage the transmission of a notice setting the same time for the filing of objections to a disclosure statement and for the hearing on approval of the disclosure statement itself.

Setting an identical time for filing objections to the disclosure statement and the hearing on the disclosure statement permits the submission of these objections at the actual hearing on the statement. An argument exists that permitting objections at the time of the hearing is at least inefficient, if not unfair, in that it allows the introduction of issues and allegations that require the

plan proponent to rebut without an opportunity to conduct any investigation of the matter. It seems likely that courts would continue the hearing on the disclosure statement to provide an opportunity to prepare a response to the objection thereby causing a delay in the process with its attendant additional costs. Furthermore, permitting parties to file objections at the hearing[1] creates an opportunity for strategic timing of objections. Delaying the process to allow the plan proponent a chance to prepare a response to the issues raised in the objection provides settlement leverage for the objecting party to obtain more favorable treatment of its claims.

I believe there are several arguments in favor of retaining the current process established under Rules 2002 and 3017. First, the rules do not require that the time for the filing of objections to the disclosure statement and the hearing on the statement coincide. The general practice appears to be that courts require objections to be filed at some time prior to the hearing on the disclosure statement. Both Rules 2002(b) and 3017(a) allow the courts discretion by requiring only that the hearing be held on at least 25 days' notice. Greater notice of the hearing obviously complies with the rule, so permitting 25 days' notice for filing objections and, for example, 30 days' notice for the hearing comports with the rule. It operates to prevent late filed objections (unless otherwise allowed by the court) that could cause unnecessary delay and costs. Since this is a widespread practice and is consistent with the rules, no amendment is necessary.

A second argument is that creating a rule requiring the filing of objections prior to a specific time might operate to limit the courts' discretion to consider significant objections from

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[1] Rule 3017(a) actually allows the filing of an objection to a disclosure statement "at any time before the disclosure statement is approved" unless the court fixes an earlier time. Thus, a party could file an objection after the hearing but before the court approves a disclosure statement if the court takes the matter under advisement.

parties who did not have as full an opportunity as others to participate in the process. Rule 3017(a) requires service of the disclosure statement on creditors only if they have requested in writing a copy of the statement. A creditor who has not previously requested a copy may decide to pay closer attention to the disclosure statement after they receive a notice from the court that a hearing is scheduled. Given some of the difficulties in mail delivery in the last year, it is possible that the creditor might not even receive a copy of the disclosure statement until shortly before the hearing. Creditors in this position often present a compelling case for permitting "late" objections.

There is also some question as to the need for any amendment to the current rules. Given the nature of the issue, it is not surprising that there is not a body of case law that addresses the matter. These are disputes that are resolved relatively quickly when they arise, and they are unlikely to reach the stage of a published opinion. Secondly, disputes over disclosure statements do not occur very frequently in smaller chapter 11 cases. In large cases, the interest of the parties and professionals in the process would seem sufficient to ensure that the process is operated efficiently and fairly for all parties. Thus, I have some doubt that amendment of the rule is necessary.

The rules nevertheless do permit the contemporaneous expiration of the notice for the hearing on the disclosure statement and the time for filing objections to the disclosure statement. The practice seems to be that these dates are separated by a short time, generally three to five days, so that the process is orderly and trial by ambush is avoided. The rules could be amended to adopt this practice and avoid the problems of the contemporaneous expiration of the two deadlines. If the Committee is inclined to adopt this position, the rules might be amended as

follows to accomplish that goal.

RULE 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES AND UNITED STATES TRUSTEE

(a) Twenty-day notices to parties in interest.

* * * * *

(7) the time fixed for filing proofs of claims ~~pursuant to~~ under Rule 3003(c); ~~and~~

(8) the time fixed for filing objections to a disclosure statement; and

~~(8)~~ (9) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

(b) Twenty-five-day notices to parties in interest.

Except as provided in subdivision ~~(1)~~ (a) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of (1) the ~~time fixed for filing objections and the~~ hearing to consider approval of a disclosure statement; and (2) the time fixed for filing objections and the hearing to consider confirmation of a chapter 9, chapter 11, or chapter 13 plan.

* * * * *

COMMITTEE NOTE

The rule is 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 disclosure statement. The shorter notice period avoids the problem of late objections to disclosure statements that can operate to delay the proceedings.

The change is made in conjunction with an amendment to Rule 3017(a) that requires that parties file and serve objections to disclosure statements at least three days prior to the hearing on approval of the disclosure statement. These changes are intended to prevent unnecessary delays at the hearing due to objections that are filed at the hearing. The prior version of the rule permitted the filing of objections at any time before the court approved the disclosure statement. Requiring parties to file the objections in advance of the hearing obviates the need to provide the plan proponent with additional time to submit a response, and it also serves to diminish the use of objections as a litigation strategy to delay the process and obtain greater leverage in settlement efforts in the case.

Other amendments are stylistic.

RULE 3017. COURT CONSIDERATION OF DISCLOSURE STATEMENT IN A CHAPTER 9 MUNICIPALITY OR CHAPTER 11 REORGANIZATION CASE

(a) Hearing on disclosure statement and objections.

Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b), the court shall hold a hearing on at least 25 days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider the disclosure statement and any objections or modifications thereto. The plan and disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee

or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any other entity designated by the court, at ~~any time before the disclosure statement is approved or by an earlier date as the court may fix~~ least three days before the hearing on the approval of the disclosure statement. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed ~~pursuant to~~ under this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

COMMITTEE NOTE

The rule is amended to establish a deadline for filing objections to a disclosure statement. Objections would be timely only if filed and served at least three days before the hearing on the approval of the disclosure statement. Requiring the filing and service prior to the hearing prevents unnecessary and costly delay by providing the plan proponent with an opportunity to prepare for and respond to the objections. Requiring parties to file any objections prior to the hearing also reduces the ability of the objectors to hold back their objections to gain an advantage in negotiations over the disclosure statement or the plan.

Other amendments are stylistic.

If the Committee decides to amend the rules in this manner to require the submission of objections prior to the hearing on the disclosure statement, then it would seem appropriate to

incorporate similar amendments to require the filing and service of objections to confirmation of plans in chapters 9, 11, 12, and 13. The rules currently allow the filing of objections to confirmation of chapter 9 and 11 plans "within a time fixed by the court" under Rule 3020(b)(1). Rule 2002(b) requires 25 days' notice of the time for filing objections and for the hearing on confirmation. Consequently, the problem described above could arise if courts set the hearing on confirmation and the time for filing objections to confirmation on the same date. It seems unlikely that courts would do so.

Rule 2002(a)(8) requires 20 days notice of the time fixed for filing objections to confirmation and the hearing on confirmation of chapter 12 plans. In chapter 13 cases, 25 days notice is required under Rule 2002(b). These rules state only the amount of notice required. They do not indicate when the objections must be filed or hearings held. Rule 3015(f) provides that objections to confirmation of chapter 12 and 13 plans must be filed "before confirmation of the plan." Thus, Rule 3020(b)(1) directs the court to set the dates for filing objections to confirmation in cases under chapters 9 and 11, but in chapters 12 and 13, objections could be filed at any time before confirmation. Rule 3020(b)(1) offers one kind of solution to the potential problem of contemporaneous expiration of the time for filing objections to confirmation and the confirmation hearing. The proposed amendment to Rules 2002(b) and 3017(a) above illustrates another way to protect against the possibility that objections to confirmation will be filed at or during the hearing on confirmation. The volume and nature of chapter 13 cases as compared to the other chapters might justify a different solution, if any solution is necessary. The usually active and dominant role of the chapter 13 trustee frequently is sufficient to ensure that the cases do not bog down and clog the docket. That level of oversight generally is not available in cases

under chapters 9 and 11, and even in chapter 12. Thus, the Committee has the following options to deal with the problem of deadlines for objections to disclosure statements and confirmation:

1. Take no action – the rules provide sufficient flexibility, the courts are handling the matters, and no significant case law developments demonstrate the need for change;

2. Amend Rules 2002(b) and 3017(a) as set out above to establish different notice periods for the filing of objections to a disclosure statement and the hearing on the disclosure statement;

3. Amend Rules 2002, 3015, and 3020 to establish different notice periods for filing objections to confirmation and the hearing on confirmation of plans under all or some of the chapters.[2]

[2] This option can be broken down into four separate options, one each for chapters 9, 11, 12, and 13.

7

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: INVOLUNTARY DISMISSAL OF INCOMPLETE APPEALS

DATE: SEPTEMBER 15, 2002

Mr. Richard Friedman, a trial attorney in the Office of the United States Trustee in Chicago, has proposed an amendment to Rule 8001 to address the problem of unperfected appeals. In particular, he notes that he has faced a number of situations in which the appellant failed to complete the record in a particular appeal thereby leaving an incomplete record for the district court to which the appeal was assigned. This has required a motion in the district court for dismissal of the appeal for the appellant's failure to designate the record under Rule 8006. This motion to dismiss is made in the district court, and Mr. Friedman argues that this wastes valuable time both for the appellee and for the district court. Instead, he suggests that the bankruptcy court be authorized to dismiss the appeal when the appellant's actions leave the clerk of the bankruptcy court unable to assemble and transmit the record under Rule 8006. Mr. Friedman proposes an amendment to Rule 8001 by including a new Rule 8001(d), a subsection that was abrogated in 1987. His suggested amendment follows.

RULE 8001. MANNER OF TAKING APPEAL; VOLUNTARY DISMISSAL

* * * * *

(d) Involuntary Dismissal Before Docketing. If an appeal has not been docketed and the appellant has not promptly taken

whatever action is necessary to enable the clerk to assemble and transmit the record as provided under Rule 8006, the appeal may be dismissed by the bankruptcy judge on the court's own motion or on the motion of the appellee.

COMMITTEE NOTE

The amendment facilitates the administration of unperfected appeals. Parties aggrieved by an adverse ruling may file a notice of appeal but then fail to take the steps necessary to perfect the appeal. They may fail to file the designation of items to be included in the record on appeal or fail to order the necessary transcripts of hearings. The clerk of the bankruptcy court can either do nothing, in which case the appeal languishes on the docket and inhibits the expeditious closing of the case. Conversely, if the clerk transmits the record, the district court or bankruptcy appellate panel receives an incomplete record and may not be able to properly determine the appeal, absent other procedural actions to complete the record. This results in a waste of judicial resources of the appellate court. The amendment provides a means to prevent this waste of resources and expedites case closure by authorizing the bankruptcy court or the appellee to move to dismiss the unperfected appeal.

The courts have dismissed appeals when the record is incomplete, but they have generally required some showing of bad faith on the part of the appellant or prejudice to the appellee. See, e.g., In re CPDC Inc., 221 F.3d 693 (5th Cir. 2000); In re SPR Corp., 454 F.3d 70 (4th Cir. 1995); In re Bulic, 997 F.2d 299 (7th Cir. 1993). In other cases, the courts have essentially held against the appellant based on the lack of a record on which to make a determination. See, e.g., In re McCarthy, 230 B.R. (9th Cir. BAP 1999). In either case, the result favors the appellee. Mr. Friedman's point, however, is that the delay inherent in the process and the fact that the dismissal has to come from the court to which the appeal was taken create unnecessary additional expense

for both the appellate court and the appellee. The difficulty with the amendment to the rule as proposed, however, is a jurisdictional one. Once the notice of appeal is filed, jurisdiction over the appeal is with the appellate court. The cited cases all assume that the appellate court is the appropriate forum to consider the dismissal of the appeal. Indeed, it could be seen as unseemly for the bankruptcy court to act on a motion to dismiss an appeal from its own order or judgment. This is also consistent with the approach in the Courts of Appeals. Rule 3(a)(2) of the Federal Rules of Appellate Procedure states that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground for the court of appeals to act as it considers appropriate, including dismissal of the appeal."

Mr. Friedman also argues that it is more appropriate to permit the bankruptcy court to dismiss the case because the appellate court, whether it be the district court or a bankruptcy appellate panel, will not have before it a complete record on which to base its decision. Rule 8006 does provide that the appellant has 10 days to "file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issue to be presented." Rule 8007(b) then provides that the bankruptcy clerk is to transmit the record to the clerk of the appropriate appellate court "when the record is complete for purposes of appeal." Thus, the argument is that the bankruptcy court clerk still has the record, so a motion for dismissal for failure to submit the necessary materials is proper in the bankruptcy court. There are a couple of difficulties with the argument. First, as noted above, this would require the bankruptcy court to determine whether the appellant has sufficiently compiled and filed the record for appeal. For example, the appellant may be content to rely solely on the notice of appeal and a copy of the order being appealed. It is for the appellee to supplement the record

with other materials if so desired, not for the bankruptcy court to rule on a motion to dismiss the appeal for a lack of a record. Secondly, the filing of the notice of appeal creates jurisdiction in the appellate court over the appeal. Moreover, as the Fifth Circuit has recently held,

> It is a fundamental tenet of federal courts that – subject to certain, defined exceptions – the filing of a notice of appeal from the final judgment of a trial court divests the trial court of jurisdiction and confers jurisdiction upon the appellate court.

In re Transtexas Gas Corp., 2002 WL 1938975 (5th Cir., Aug. 22, 2002). Accord, In re Marino, 234 B.R. 767, 769 (9th Cir. BAP 1999). Consequently, there is serious question as to whether the bankruptcy court has the authority to act on a motion to dismiss an appeal once an appellant files a notice of appeal. The nature of these motions, whether made by the appellee or on the court's own motion, is essentially whether the court should exercise the jurisdiction conferred on it by the notice of appeal, a decision that is never made by a court other than the one in which the jurisdiction resides.

8

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FORM: JEFF MORRIS, REPORTER

RE: PROOFS OF CLAIMS FILED BY THE DEBTOR OR TRUSTEE ON BEHALF OF CREDITORS – SUPERSEDING CLAIMS AND DEADLINES

DATE: SEPTEMBER 14, 2002

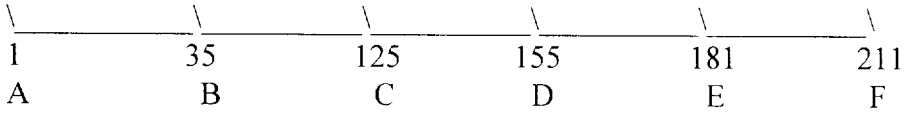
In most cases, creditors must timely file a proof of claim to have the claim allowed and to participate in the distribution of property of the estate. Sometimes creditors fail to file claims in a timely fashion, yet the debtor or trustee may want to ensure that the creditor receives a distribution in the case. A common example of such a scenario is where the creditor holds a claim that is nondischargeable, and the debtor wants to be sure that the creditor receives the maximum allowable distribution in the bankruptcy case in order to reduce the amount of the debt that will survive the discharge. Rule 3004 authorizes the debtor or the trustee to file a proof of claim in the name of the creditor. Mr. Frank and Judge Walker each have noted problems with the rule that warrant close consideration and possibly amendment to one or more rules.

The Right of a Creditor to File a Superceding Claim

Rule 3002 sets the time for filing a proof of claim by a nongovernmental unit at 90 days after the first date set for the § 341 meeting of creditors in a chapter 7, 12, or 13 case. Governmental units have 180 days after the date of the order for relief in the case in which to file their claims. In chapter 9 and11 cases, the court fixes the deadline for filing proofs of claims under Rule 3003(c)(3). Rule 3004 then provides that the trustee or debtor may file a claim on behalf of the creditor in cases under any of the chapters. The rule provides that the debtor or

trustee can take this action if the creditor does not file a proof of claim on or before the first date set for the meeting of creditors. The rule then sets the deadline for filing such a claim as "30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable." The rule further provides that the clerk must give notice to the creditor that a claim has been filed on its behalf, and the creditor then may file a proof of claim on its own behalf "pursuant to Rule 3002 or Rule 3003(c), [which claim] shall supersede the proof filed by the debtor or trustee."

A time line setting out the different deadlines for the filing of a proof of claim and the time for the debtor or trustee to file a claim on behalf of the creditor in a chapter 7 case may be helpful.



Assume that the debtor filed a voluntary petition under chapter 7 on day 1 (A). The first date set for the meeting of creditors is day 35 (B). See Bankruptcy Rule 2003(a). Day 125 (C) is the deadline for private creditors to file proof of their claims under Rule 3002(c) (not later than 90 days after the first date set for the § 341 meeting of creditors). Day 181 (E) is the deadline for governmental units to file a proof of claim in the case under Rule 3002(c)(1), not later than 180 days after the commencement of the case. Day 155 (D) and Day 211 (F) are each 30 days after the expiration of the time allowed for creditors (private and governmental, respectively) to file a proof of claim. Thus, the debtor and trustee have until Day 155 to file a proof claim on behalf of a private creditor and until Day 211 to file a proof of claim on behalf of a governmental unit. Under Rule 3004, the first day on which the debtor or trustee can file a proof of claim on behalf

of any creditor is Day 36 (B + 1), if the creditor had not filed a proof of claim on or before the first date set for the meeting of creditors.

Bankruptcy Code § 501(c) authorizes the debtor or trustee to file claims on behalf of creditors, and Rule 3004 implements that section. In doing so, however, the rule respects the interests of the creditor in two related ways. First, the rule requires the clerk to notify the creditor that a proof of claim has been filed on its behalf. Second, the rule provides that a "proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee." In this way, the creditor is not shackled with the claim filed on its behalf by a person who may be antagonistic to the interests of the creditor. As currently drafted, however, Rule 3004 may not provide the full protection of the creditor's interests as described above.

In re Townsville, 268 B.R. 95 (Bankr. E.D. Pa. 2001), illustrates the potential difficulty with Rule 3004. In that case, the debtor filed a proof of claim on behalf of a creditor stating a claim in the amount of $1.00. The creditor objected to the claim on several grounds including that it was untimely because it was filed more than 30 days after the expiration of the deadline for filing claims under Rule 3002. (On the hypothetical time line set out above, the debtor would have filed a proof of claim on behalf of the private creditor after Day 155 (D).) The debtor argued that the failure to file timely should be irrelevant because the creditor could simply file a superseding claim under Rule 3004 if it had any concerns about the accuracy of the claim the debtor filed on behalf of the creditor. The court rejected this argument because the "Debtor did not file the Proof of Claim until March 1, 2001, [the creditor] could not meed the claims deadline imposed by Rule 3002." 268 B.R. at 107. Correlating the facts in Townsville to our hypothetical time line, the court stated that a private creditor cannot file a superseding proof of claim after

Day 125 (C), while the debtor can file a proof of claim on behalf of the creditor at any time from Day 36 to Day 155. Thus, if the debtor files the claim after Day 125 and before Day 155, the creditor cannot file a superseding claim. The court in In re Cook, 205 B.R. 617, 623 n.4 (Bankr. N.D. Ala. 1996), came to the same conclusion.

The Committee Note to the 1987 amendment to Rule 3004 states that "a proof of claim filed by a creditor supersedes a claim filed by the debtor or trustee only if it is timely filed within the 90 days allowed under Rule 3002(c)." Thus, the intention of the rule as evidenced by the Committee Note is that creditors may not file a superseding claim if their time to file has expired under Rule 3002 or 3003 as the case may be. The Note does not state any reason for denying a creditor the opportunity to file a superseding claim in that circumstance, but the language of the Rule is consistent with denial of that right. If the purpose of the opportunity to file the superseding claim is to protect the creditor against the filing of an artificially deflated claim by the debtor, it is hard to see why that protection should not continue until after the debtor or trustee has filed a claim on behalf of the creditor. The primary reason for allowing debtors to file these claims is to provide relief for the debtor, particularly as to nondischargeable debts such as tax claims. If the debtor files a claim, the creditor can receive a distribution from the estate and thereby reduce the amount of the claim that survives the bankruptcy. This benefit to the debtor would be magnified if the debtor could file a claim that is significantly less than what the creditor asserts is due, or is for only a part of the claim that the creditor holds against the debtor. If the claim filed by the debtor would be paid in full, the remaining portion of the otherwise nondischargeable debt could be discharged.

The reason to permit supersession of a claim filed by the debtor or trustee only from the

period immediately after the § 341 meeting of creditors and 90 days thereafter for a private creditor or the remaining portion of the 180 days after the commencement of the case for governmental units with claims would appear to be to expedite the claims process. Once the creditor's deadline for filing a proof of claim either under Rule 3002 or 3003 has passed, the debtor or trustee can file a claim and that filing does not revive the creditor's right to file a proof of claim. While the creditor has a right to move to amend the claim, that right is somewhat limited. In re Kolstad, 928 F.2d 171 (5th Cir. 1991), *cert. denied*, 502 U.S. 419 (1991). The creditor could not introduce claims other than the claim filed by the debtor. Id. at 175 ("Amendments do not vitiate the role of bar dates: indeed, courts that authorize amendments must ensure that corrections or adjustments do not set forth wholly new grounds of liability." (citations omitted.)). Nonetheless, the right to amend arguably protects the creditor as to the underlying claim filed on its behalf by the debtor, and denying the creditor a right to participate in the proceedings because of a failure to file a timely proof of claim is consistent with longstanding bankruptcy policy as evidenced by Bankruptcy Code § 502(a). If, however, the Advisory Committee believes that creditors should retain a right to file a superseding proof of claim whenever a debtor or trustee files a claim on its behalf, a proposed amendment to Rule 3004 is set out below. The amendment would address both issues discussed in this paper.

The Misleading 1987 Committee Note and the Deadline for Filing on Behalf of a Governmental Unit

Rule 3004 was last amended in 1987. Since that time, Congress has amended § 502(b)(9) of the Code to provide a longer time for governmental units to file timely claims in bankruptcy cases. Under that section, governmental units have at least 180 days from the commencement of

the case in which to file a proof of claim. Until the amendment to that section, the statement in the Committee Note to Rule 3004 that "the debtor or the trustee in a chapter 7 or 13 case has 120 days from the first date set for the meeting of creditors to file a claim for the creditor" was accurate. The amendment providing a longer time to governmental units pushed the time for a debtor or trustee to file a claim on behalf of a governmental unit to 210 days after the commencement of the case (180 days plus "30 days after expiration of the time for filing claims under Rule 3002(c)"). Judge Walker noted this discrepancy in the attached decision in In re Tonner, Case No. 01-42216-JDW (Feb. 26, 2002)(unreported decision). In Tonner, the debtors sought to file a claim on behalf of a governmental unit more than 180 days after the commencement of the case. At that time, an attempt to file a claim by the creditor would have been untimely, but the debtor asserted that the plain language of Rule 3004 gives the debtor 30 days beyond the creditor's deadline in which to file a claim on behalf of the creditor. Judge Walker noted that the language of the applicable rules is inconsistent with the commentary in the Committee Notes to both Rule 3002 and Rule 3004.

The 1983 Committee Note to Rule 3002 states that the debtor or trustee have no right to file a claim on behalf of a governmental creditor until that creditor's time to file has expired. The 1987 amendment to Rule 3004 rendered this statement inaccurate. The Committee Note to the 1987 amendments to Rule 3004 is also inaccurate due to a subsequent amendment to § 502 (b)(9) of the Code. The extension of the deadline for governmental creditors to 180 days from the commencement of the case rendered the 1987 Committee Note inaccurate because it stated that the debtor and trustee have only 120 days from the first date set for the meeting of creditors to file a claim on behalf of a creditor. Yet, the subsequent statutory amendment in 1994 turned

that 120 days into 210 days thus leaving the Committee Note inaccurate. In Tonner, Judge Walker generously described the Committee Notes as "unhelpful"given the changes that have taken place since the Notes were first published. They are inaccurate. The problem is that there is no mechanism for amending or revising a Committee Note in the absence of an amendment to the rule in question. Neither Rule 3002 nor Rule 3004 has been amended since the statutory amendment to § 502(b)(9), so there has been no opportunity to change the notes to reflect these differences. Thus, an amendment to Rule 3004 to allow the creditor to file a superseding claim within 30 days after the debtor or trustee files a claim on behalf of the creditor would provide an opportunity to attach an updated Committee Note that would accurately reflect the operation of the rules and the Code. An amendment to Rule 3004, however, would not lead to a new Committee Note to Rule 3002. The problems presented are not with the rules, but rather exist in the Committee Note. We have not to my knowledge amended rules solely to revise Committee Notes. The potential for harm in the amendment of an otherwise workable rule generally outweighs the benefits derived from a revised note.

Amended Rule 3004 to Preserve Creditors' Supersession Rights

If the Committee believes that creditors should have a right always to file a claim that will supersede a claim filed on the creditor's behalf either by the debtor or the trustee, then Rule 3004 must be amended. To accomplish this, I would suggest that the "right to supersede" those claims be tethered to an obligation to file the superseding claim in a definite time. The proposed amendment for consideration follows.

RULE 3004. FILING OF CLAIMS BY DEBTOR OR TRUSTEE

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors ~~called pursuant to~~ under § 341 (a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days of the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor before the later of the applicable deadlines imposed under Rule 3002 or Rule 3003(c), and thirty days after the filing of a claim by the debtor or the trustee, shall supersede the proof filed by the debtor or trustee.

COMMITTEE NOTE

The rule authorizes the debtor or trustee to file a proof of claim on behalf of a creditor who has not filed a claim by the time of the § 341 meeting of creditors. The ability to file a claim on behalf of the creditor ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable. Payments on those claims out of the estate reduce the amount that survives the discharge as well as furthering the bankruptcy policy of bringing all claims together in the case.

Under the rule, the debtor or trustee can file a claim on behalf of a creditor even before the creditor's time to file the claim has expired. The rule also allows the debtor to wait until 30 days after the creditor's filing period has expired before filing a claim on behalf of the creditor. Thus, for example, the debtor or trustee would have 120 days from the first date set for the meeting of

> creditors in which to file a claim on behalf of a nongovernmental creditor in a chapter 7 case, and 210 days from the date of the commencement of the case to file a claim on behalf of a governmental unit. In turn, the rule is amended to permit the creditor thereafter to file a proof of claim that will supersede the claim filed by the debtor or trustee. As amended, the creditor can file a superseding claim up to 30 days after the debtor or trustee has filed a claim on behalf of the creditor, even if that time exceeds the bar date set for filing a proof of claim under Rule 3002 or Rule 3003. The filing of a claim by the debtor or trustee will not, however, shorten the time that a creditor has under Rules 3002 or 3003, whichever is applicable.

In addition to determining whether the rule should permit a creditor to file a superseding claim in every instance, the Committee might also consider whether the filing of a claim on behalf of a creditor should shorten the filing period for the creditor. For example, if the debtor files a claim on behalf of a nongovernmental creditor immediately after the meeting of creditors, the rule as proposed above would give the creditor an additional 89 days to decide whether to file a superseding claim. For a governmental creditor, the debtor would also have additional time, although the calculation of the exact amount of additional time depends on the date of the commencement of the case. An argument can be made that these times should be the lesser of 30 days after the filing of the claim by the debtor or trustee, and the time available to the creditor under Rule 3002 or 3003, whichever applies. The rule requires the clerk to give notice to the creditor that someone has filed a claim on behalf of the creditor, and that filing could not have been made prior to the meeting of creditors. Thus, the creditor should be aware that the case is ongoing as well as that it is proceeding under an assumption that the creditor's claim equals the amount set out in the filed proof of claim. The claims resolution process would be expedited if the rule required the creditor to respond to the surrogate proof of claim within 30 days. This

could operate to reduce the creditor's overall time to prepare a proof of claim, although the time for filing would still be nearly two months from the commencement of the case.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:	)	CHAPTER 13
	)	CASE NO. 01-42216-JDW
JAMES L. TONNER,	)	
SUN P. TONNER,	)	
	)	
DEBTORS	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtor: John E. Pytte
P.O. Box 949
Hinesville, Georgia 31310

For Trustee: Angela Hinton
P.O. Box 10556
Savannah, Georgia 31412

MEMORANDUM OPINION

This matter comes before the Court on Trustee's objection to a claim filed by Debtors on behalf of a governmental unit. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(B). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

Debtors filed a Chapter 13 petition on July 30, 2001, which constituted an order for relief.[1] In the petition, Debtor listed as one of its creditors a Jefferson County, Ohio, agency for child support recovery. By the date set for the first Section 341(a) meeting of creditors on September 7, 2001, the agency had not filed a claim. The deadline for the filing of a claim by the agency was January 28, 2002. A confirmation hearing was held on January 9, 2002, and was continued until February 6, 2002. At the confirmation hearing on February 6 less than 30 days after Jefferson County's time to file had run Debtors sought to file a claim on behalf of the agency. Trustee objected on the ground that the time to file government claims had expired.

Conclusions of Law

Federal Rule of Bankruptcy Procedure 3004 states that

> [i]f a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the

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[1] "The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." 11 U.S.C.A. § 301 (West 1993).

> name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c).

FED. R. BANKR. P. 3004. Under Rule 3002(c), the time for the government to file a proof of claim expires 180 days after entry of the order for relief. Id. 3002(c)(1). For all other creditors, the time to file a proof of claim expires 90 days after the first date set for the 341(a) meeting. Id. 3002(c).[2]

Trustee argues that Congress did not intend for a debtor's time to file a government claim to extend beyond the time the debtor has to file a claim on behalf of other creditors. Trustee does not cite, nor has the Court located any authority to support Trustee's argument. On the contrary, in Section 501(c) of the Bankruptcy Code, Congress specifically gives the debtor the right to file a proof of claim on behalf of a creditor if the creditor fails to do so in the time allowed,[3] and in Section 502(b)(9), Congress specified that the government must have at least 180 days to file a claim.[4] Therefore, the language of the Bankruptcy Code

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[2] Rule 3002(c) reads in relevant part as follows:

> In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:
>
> (1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief.

FED. R. BANKR. P 3002(c).

[3] "If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim." 11 U.S.C.A. § 501(c) (West 1993).

[4] "[A] claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide." 11 U.S.C.A. § 502(b)(9) (West Supp. 2001).

permits a debtor to file a proof of claim on behalf of the government after 180 days following the order for relief. The Bankruptcy Rules flesh out the specifics, and are plain on their face in giving the debtor 30 days to file a proof of claim for the government after the government's 180 days have run. FED. R. BANKR. P. 3002(c)(1), 3004.

Although the Court has found no cases on the issue of when a debtor may file a claim for the government, In re Jones, 238 B.R. 338 (Bankr. W.D. Mich. 1999) is consistent with a plain language reading of the Bankruptcy Rules. In Jones, the debtor filed a proof of claim on behalf of the IRS 205 days after the entry of the order for relief. Id. at 341. The court stated in dicta that the debtors had filed the claim "as allowed under [Bankruptcy Code] § 501 and [Bankruptcy] Rule 3004." Id. at 342. Collier on Bankruptcy also provides support for a plain reading of Rules 3002 and 3004, noting that "[t]he 180 day bar date for governmental units created in section 502(b)(9) of the Code and Fed. R. Bankr. P. 3002(c)(1) is the proper point from which to calculate timeliness for purposes of a Fed. R. Bankr. P. 3004 or Fed. R. Bankr. P. 3005 filing." 9 COLLIER ON BANKRUPTCY ¶ 3002.03[1] n.2 (15th ed. revised 2001).

The Court has considered the Advisory Committee Notes to the Bankruptcy Rules, but found them to be unhelpful on the issue before the Court. For example, the note to Rule 3002 indicates that the government can move for an extension of time to file a claim, but that the debtor or trustee need not do so "because the right to file does not arise until the government's time has expired." FED. R. BANKR. P. 3002 advisory committee note (1983) [5]

[5] The quoted material is part of the note to Rule 3002 as originally promulgated in 1983. Additional notes have been added to Rule 3002 with each amendment of the Rule in 1987, 1991, and 1996. However, none of the subsequent notes or amendments to the Rule

The language of the comment is inconsistent with Rule 3004 and its Advisory Committee Notes, which indicate that the right to file arises on the day after the date set for the 341(a) meeting, rather than when the creditor's right to file has terminated. If the debtor's right to file arises only after the creditor's time to file has run, the language in Rule 3004 that "[a] proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee," would be superfluous. FED. R. BANKR P. 3004. If the debtor could not file until after the creditor's right to file had terminated, the creditor would be unable to file a superseding claim because a creditor's time to file is not extended when the debtor files a claim on its behalf..

The note to Rule 3004 is similarly unhelpful. It states that "the debtor or trustee in a chapter 7 or 13 case has 120 days from the first date set for the meeting of creditors to file a claim for the creditor." FED. R. BANKR. P. 3004 advisory committee note (1987). The note does not distinguish between government creditors and other creditors. However, this note was included with the 1987 amendments to the Rules. When the Rules were amended in 1996 to reflect changes in the Bankruptcy Code including the requirement that government creditors be given at least 180 days to file a proof of claim–no clarification was made to the note.

Because the language of Rules 3002 and 3004 is plain on its face and is consistent with Sections 501(c) and 502(b)(9) of the Bankruptcy Code, the Court concludes that the debtor's time to file a claim on behalf of a government creditor that has failed to file a claim by the first date set for the 341(a) meeting runs from the day after the date set for the meeting

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appear to render the quoted material ineffective.

until 210 days after the order for relief. In this case, Debtors filed a claim on behalf of Jefferson County both after the date set for the 341(a) meeting and 191 days after the order for relief. Debtors were therefore within the time allowed to file a claim, and Trustee's objection to the filing of the claim is overruled.

An Order in conformance with this Opinion will be entered on this date.

Dated this 26th day of February, 2002.

James D. Walker, Jr.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that the attached and foregoing have been served on the following:

John E. Pytte
P.O. Box 949
Hinesville, Georgia 31310

Sylvia Ford Brown
Chapter 13 Trustee
P.O. Box 10556
Savannah, Georgia 31412

Jefferson County Child
P.O. Box 367
Steubenville, Ohio 43952

This 26th day of February, 2002.

Cheryl L. Spilman

Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court

9

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: APPOINTMENT OF SPECIAL MASTERS

DATE: SEPTEMBER 18, 2002

Bankruptcy Rule 9031 provides that Rule 53 of the Federal Rules of Civil Procedure does not apply in bankruptcy cases. The attached law review articles by Professor Delk and Mr. Clift argue that the Bankruptcy Rules should be amended to permit bankruptcy courts to appoint special masters to assist the courts in appropriate circumstances. They assert generally that since bankruptcy courts adjudicate matters as complex as matters heard in the district courts, the bankruptcy courts should be able to call on the expertise of a special master to the same extent as the district courts. Under Rule 53 of the Federal Rules of Civil Procedure, the court may authorize a special master to conduct hearings, rule on the admissibility of evidence, and examine witnesses under oath. The special master, in a non-jury action, files a report with the court. Parties have 10 days after being served with the report to file any objections, and the court must accept the special master's findings of fact unless they are clearly erroneous. Special masters are appointed to conduct accountings and computations of damages, advise courts on technical issues requiring special training or access, and to summarize and evaluate voluminous claims in complex cases. Under Rule 53, the court will set the scope of the appointment as well as the compensation of the special master. As to compensation, Rule 53(a) provides that it is fixed by the court "and shall be charged upon such of the parties or paid out of any fund or subject matter of the auction...."

The Advisory Committee considered the importation of FRCP 53 into the Bankruptcy Rules in 1995-96. The Committee concluded that the ability to appoint a trustee or an examiner in cases provided a sufficient alternative for the courts. Professor Delk, and especially Mr. Clift, assert that this decision was erroneous and should be reconsidered. They argue that trustees and examiners cannot perform all of the functions of a special master.

The Committee may want to investigate the matter further. The bankruptcy courts have appointed examiners to perform a wide range of functions, and the Code specifically includes a mechanism for compensating an examiner. There is no provision in the Code for compensating a special master, and Mr. Clift's argument that compensation is available under § 330(a)(1) is subject to some doubt. He argues at pages 392-395 of his article that a special master would be a "professional person" under § 327 of the Code, but that section refers to professional persons who are employed by the trustee. He also suggests that the court could appoint a special master sua sponte under § 105(a). In support of this argument, he notes that the courts have appointed examiners sua sponte. However, the Code specifically recognizes examiners while it makes no mention of a special master. Thus, there may be greater question as to the courts' authority to appoint a special master under § 105.

The question before the Committee at this time is whether we should reconsider the position last taken in 1996. I will be happy to provide a more detailed description of the articles and the attached Committee Minutes during our meeting in Massachusetts.

United States Bankruptcy Court
Western District of Tennessee

Chambers
David S. Kennedy
Chief U.S. Bankruptcy Judge

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Suite 950
Memphis, Tennessee 38103
(901) 328-3522
Fax 328-3527

July 8, 2002

The Honorable A. Thomas Small
United States Bankruptcy Court
P O. Drawer 2747
Raleigh, North Carolina 27602

Re: The Topic of Whether the Federal Rules of Bankruptcy Procedure Should be Amended to Expressly Provide that United States District and Bankruptcy Judges Have the Express Authority to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding

Dear Tom:

I write to you in your capacity as Chair of the Judicial Conference Advisory Committee on the Bankruptcy Rules.

Whether WorldCom, Inc. with $103.8 billion in assets (and other similarly situated entities) will eventually seek protection under the Bankruptcy Code and join other high profile corporations as chapter 11 debtors-in-possession remains to be seen. The size and complexities of some of the recent bankruptcy cases and proceedings are significant and even overwhelming at times (*e.g.*, Enron, Inc., Global Crossing, Ltd., XO Communications, Farmland Industries, Kaiser Aluminum, Pacific Gas & Electric Corp., K-Mart, Adelphia Communications, and Service Merchandise). It has been reported that last year 255 publicly traded companies placed $260 billion of assets under bankruptcy court protection, and so far this year, 113 companies with $149.3 billion in assets have sought protection under the Bankruptcy Code!

I noticed in a recent article about the SEC's pending non-bankruptcy civil fraud suit for asserted accounting improprieties against WorldCom, Inc. that United States District Judge Jed Rakoff of the Southern District of New York appointed a "court monitor" for a specific purpose (to ensure that certain documents are not destroyed and executives do not receive "outsize payouts from the faltering communications giant"). Reading this article about WorldCom, for some reason, rekindled my interest in the future possibility of the Federal Rules of Bankruptcy Procedure being amended to provide that district and bankruptcy judges have the express authority to appoint special masters in appropriate and rare bankruptcy cases and proceedings.

In my opinion, and also many others as well, bankruptcy judges and district judges, as an additional case management tool, should have the specific authority to appoint (or at the very least cause the appointment of) a "special master" in appropriate and rare bankruptcy cases and proceedings. The addition of this valuable case management tool, of course, would help foster and effectuate the judicial goal of the bankruptcy system that is set forth in FED. R. BANKR. P. 1001 and *Katchen v. Landy*, 382 U.S. 323, 328 (1966), which essentially is, as you know, to secure the expeditious and economical administration of every bankruptcy case and proceeding. For your convenience, I attach a copy of University of Memphis Law Review Article that supports the amending of the Federal Rules of Bankruptcy Procedure to expressly authorize district and bankruptcy judges to appoint a special master in an appropriate bankruptcy case or proceeding. (Incidentally, it would not unduly trouble me if the Bankruptcy Administrator or United States Trustee actually selected the special master or made the appointment after the district or bankruptcy judge found a need or cause for such appointment. Compare 11 U.S.C. § 1104(b).)

I was curious and interested to know if the Advisory Committee on the Bankruptcy Rules has (or will in the future) discuss and address the matter involving the appointment of special masters in appropriate bankruptcy cases and proceedings. I believe that it's an idea whose time has come (perhaps even whose time is overdue), especially in light of the huge bankruptcy cases that are being filed these days, some of which are saddled with, among other things, corporate scandals. and thousands of creditors. An additional case management tool would be very helpful in some bankruptcy cases and proceedings (*i.e.*, utilization of special masters where appropriate to do so).

I hope that this finds you well and also that you will have an opportunity to take some well deserved time off this summer and indulge yourself and your Family.

Kind personal regards.

Sincerely,

David S. Kennedy
Chief United States Bankruptcy Judge

DSK/rgw

Attachments: 1

cc: Hon. Bernice B. Donald (w/o attachment)

United States Bankruptcy Court
Western District of Tennessee

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May 6, 2002

Hon A. Thomas Small
United States Bankruptcy Court
P. O. Drawer 2747
Raleigh, North Carolina 26702

Professor Jeffrey W. Morris
University of Dayton School of Law
300 College Park
Dayton, Ohio 45469

Re. Suggested Amendments to Federal Rules of Bankruptcy Procedure to Expressly Authorize District and Bankruptcy Courts to Appoint Special Master in Certain Bankruptcy Cases and Proceedings

Dear Judge Small and Professor Morris.

For your convenience, I attach a law review article essentially suggesting that the Federal Rules of Bankruptcy Procedure be amended to expressly provide that the United States district and bankruptcy courts have the authority to appoint a special master in a given and appropriate bankruptcy case or proceeding. I was curious to learn if this subject matter has engendered any recent discussion or debate by any of the current members of the Judicial Conference Advisory Committee on Bankruptcy Rules.

I believe that it is important to note that the complexities and difficulties of many of today's bankruptcy cases and proceedings have increased significantly (as has the sophistication level of many bankruptcy attorneys). It seems that the reality or likelihood is that such increases will probably continue into the future. See, for example and among other pending chapter 11 cases, *Bethlehem Steel, Enron, Inc., Global Corssing, Ltd., K-Mart, Pacific Gas & Electric, and Service Merchandise*. Additionally, it is noted that on occasion the use of a special master, as a case management tool, in a chapter 7, 9, 12, or 13 case also may be appropriate and needed in order to achieve the judicial goal set forth in Rule 1001 ("to secure the just, speedy, and inexpensive determination of every case and proceeding").

Thank you for your consideration of this proposal and also thank you both for serving on this highly important Committee.

Kind personal regards.

Sincerely,

David S. Kennedy
Chief United States Bankruptcy Judge

DSK/rgw

Attachments: 1 each

cc. Hon. Bernice B. Donald (w/ enclosure)

University of Memphis Law Review
Winter 2001

Article

*353 SHOULD THE FEDERAL RULES OF BANKRUPTCY PROCEDURE BE AMENDED TO EXPRESSLY AUTHORIZE UNITED STATES DISTRICT AND BANKRUPTCY COURTS TO APPOINT A SPECIAL MASTER IN AN APPROPRIATE AND RARE BANKRUPTCY CASE OR PROCEEDING?

R. Spencer Clift, III [FNa1]

***355** I Introduction

This article attempts to justify the utilization and appointment of special masters in appropriate and rare bankruptcy cases and proceedings by explaining the unique case management role special masters contribute in exceptional

circumstances. [FN1] Specifically, this article calls for an amendment to the Federal Rules of Bankruptcy Procedure to provide expressly that United States district and bankruptcy courts may appoint a special master in a highly complex and rare bankruptcy case or proceeding. Notwithstanding the appropriateness of the appointment of a special master, Federal Rule of Bankruptcy Procedure 9031, a procedural rule, currently prohibits the appointment of a special master by both the United States district and bankruptcy courts in any "case" under the Bankruptcy Code ("Code").

This article focuses on the distinctive need for special masters to be appointed and authorized to participate in appropriate and rare bankruptcy "cases" and "proceedings." The article does not address the overwhelmingly vast majority of cases and proceedings filed under the Code because it is not contemplated that special masters should be routinely appointed. Instead, this article is dire ***35(** primarily toward highly complex, commercial, fact-intensive bankruptcy cases and proceedings warranting the unique expertise of a special master as a valuable case management tool to, inter alia, reduce costs and delays.

Concomitantly, this article respectfully suggests that the Federal Rules of Bankruptcy Procedure should be amended pursuant to the Rules Enabling Act [FN2] to expressly authorize the appointment of a special master by United States district and bankruptcy courts in appropriate and rare bankruptcy cases and proceedings. This article also respectfully requests the current United States Judicial Conference Advisory Committee on Bankruptcy Rules to reconsider its two prior declinations and thereafter recommend and transmit to the United States Judicial Conference Standing Committee on Rules of Practice and Procedure a proposed amendment to the Federal Rules of Bankruptcy Procedure providing that United States bankruptcy and district courts have the express authority to appoint special masters in highly complex and rare bankruptcy cases and proceedings. For the reasons to be discussed hereinafter, the judicial officers (i.e., United States district and bankruptcy judges) administering the federal bankruptcy laws should have the unambiguous authority on a case-by-case and proceeding-by-proceeding basis to utilize this highly effective and valuable case management tool and exercise their inherent, equitable authority to appoint special masters where appropriate to do so.

More specifically, Part I of this article provides an historical development of the role of the special master. Part II analyzes the role and powers covering the appointment of special masters. Part III addresses whether Federal Rule of Bankruptcy Procedure 9031, which currently prohibits the appointment of special masters in any "case" under the Code, was an intended result. Part IV suggests why special masters should be authorized and appointed in appropriate and rare bankruptcy cases and proceedings. Part V addresses the earlier negative views of the 1995 Judicial Conference Advisory Committee on Bankruptcy Rules on the issue of special masters in bankruptcy cases and proceedings. Part VI addresses the reasons why the 19(***357** Advisory Committee on Bankruptcy Rules did not recommend the abrogation of Rule 9031. Part VII respectfully calls for the current Judicial Conference Advisory Committee on Bankruptcy Rules to re-examine and reconsider its prior position on the scope and impact of the existing procedural rule (i.e., Rule 9031) and the accompanying Advisory Committee note prohibiting the appointment of special masters in any bankruptcy case or proceeding by United States district and bankruptcy courts.

A. Historical Development of the Role of the Special Master

The British pioneered the role of the special master as a useful case management tool in chancery courts in order to more efficiently administer guardianships and probate estates. [FN3] The first legislative authority ratifying the appointment of a special master can be traced to the British Parliament's passage of the Superior Courts Officers Act of 1837. [FN4]

Since the creation of our system of government, American courts have employed the services of special masters on a case-by-case basis deriving their authority from the English precedent. [FN5] Prior to the promulgation of the Federal Rules of Civil Procedure in 1938, the appointment of special masters was expressly recognized in Equity Rules 52, 59, 62 and also as an inherent power of the court. [FN6] Equity Rules 52 and 62, which were adopted in 1912, resemble current Federal Rules of Civil Procedure and contain the identical and important caveat that special masters are only authorized in exceptional circumstances. [FN7]

This caveat is simply that the appointment of a special master in any bankruptcy case, whether a bankruptcy case or proceeding, would ***358** be the rare "exception, not the rule," and will serve as an important and recurring underlying theme throughout this article. [FN8] When such rare and exceptional circumstances exist, special masters, serving as valuable case management tools, can greatly contribute to the simplification and efficient advancement of speedier and less costly litigation. [FN9]

The role of the special master in non-bankruptcy civil matters is focused, inter alia, on discovery and difficult accounting issues in extremely complex cases. Other tasks include, for example, mediating between and among parties, making highly specialized reports and recommendations, evaluating scientific information, conducting and managing discovery, and guiding consensual settlement negotiations. [FN10] Special masters enter the litigation process (1) after the parties consent to such an appointment, (2) by virtue of the inherent authority of the court, or (3) by virtue of Federal Rule of Civil Procedure 53(b). [FN11]

II. Powers of Appointment of Special Masters

A. Inherent Authority of the Court to Appoint Special Masters

For many years, United States district judges have possessed the inherent authority to appoint special masters, especially in matters where neutral third party expertise would aid the disposition of a civil action. [FN12] This point was manifested even before the promulgation of the Federal Rules of Civil Procedure in 1938. The inherent power of the court is noted in In re Peterson [FN13] as follows:

Courts have (at least in the absence of legislation to the ***359** contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court . . . such as special masters, auditors, examiners and commissioners . . . with or without the consent of the parties, to simplify and clarify issues and to make tentative findings. [FN14]

In the event a district court chooses not to exercise its inherent authority and appoint a special master, it may appoint a special master pursuant to the authority set forth in Federal Rule of Civil Procedure 53.

B. The Power of the Court to Appoint Special Masters Pursuant to Federal Rule of Civil Procedure 53

Rule 53 of the Federal Rules of Civil Procedure provides separate guidelines in non-bankruptcy civil matters, depending upon whether the district court action is a jury or non-jury case. [FN15] Special masters are authorized in jury cases only when the issues are especially complicated. [FN16] In non-jury cases in the district court, special masters are authorized for appointment only when, for example, the issues involve very difficult accountings, multi-variable damage computations, or other "exceptional conditions." [FN17] Additionally, it is noted that special masters play a vital role in modern, non-bankruptcy civil litigation by implementing remedial decrees. [FN18] Remedial decrees (e.g., court decisions ordering the expedited desegregation of public facilities) manifest the skill and talent specia ***360** masters contribute in complex civil actions. [FN19] Bankruptcy courts, like district courts adjudicating non- jury civil actions, would have to find "exceptional circumstances" in order to appoint a special master in a case or proceeding. A thorough discussion and explanation of the "exceptional circumstances" requirement is necessary.

C. The Exceptional Circumstances Requirement

The United States Supreme Court has invalidated and condemned the appointment of a special master when the circumstances and facts of the civil actions fail to merit the need for such an appointment. [FN20] In La Buy v. Howes Leather Co., the Supreme Court held that congested dockets, complex civil actions, and lengthy trials failed to justify the appointment of a special master. [FN21] Of course, courts should not use a special master to abdicate judicial responsibilities, exceptional circumstances must exist in an appropriate civil action.

A better understanding of the "exceptional conditions" requirement is exemplified by the following case summaries:

. Burlington Northern Railroad Co. v. Department of Revenue [FN22]--The court failed to find exceptional circumstances to support a Rule 53 reference to a special master where the reference was "in the interest of judicial economy" and the master's reported recommendations were affirmed in a one sentence order.

. In re Agent Orange Product Liability Litigation [FN23]--The court allowed the appointment of a special master pursuant to Rul ***361** 53 based upon the fact that the information sought in discovery was scientific, highly technical, and complex in nature.

. Caldwell Industries, Inc. v. New York Hospital-Cornell Medical Center [FN24]--The court refused to allow for the appointment of a special master pursuant to Rule 53 where counsel for the litigants was deemed capable of explaining difficult medical and scientific materials and theories to an audience unfamiliar with the subjects.

. Mobil Oil Corp. v. Altech Industries, Inc. [FN25] --The court found exceptional conditions existed and authorized the appointment of a special master pursuant to Rule 53 in order to supervise discovery due to conflicting factual evidence, the anticipated addition of new parties by the defendants, and the high volume of documentary evidence.

. U.S. v Microsoft Corp. [FN26] --The court relied on La Buy in refusing to appoint a special master pursuant to Rule 53 stating that there was no apparent need for an expert to interpret the "plain English" of a consent decree drafted by the parties and failed to see the technological complexities in this particular circumstance. [FN27]

Accordingly, the judicial definition of "exceptional circumstances" under Rule 53(b) seems to call for the appointment of a special master in complex, resource-exhausting civil actions such as n ***362** tort cases (e.g., asbestos, agent orange, or DDT cases), massive commercial litigation. or remedial decrees rendered to formulate institutional change. [FN28]

Such complex issues also may arise in certain types of bankruptcy cases and proceedings, yet the plain text of Rule 9031 and its accompanying Advisory Committee note expressly prohibit the courts--both United States district and bankruptcy--from appointing a special master under any circumstance. Specifically, Rule 9031 and its accompanying Advisory Committee note, read collectively, provide that Rule 53 of the Federal Rules of Civil Procedure does not apply in cases and proceedings under the Code. [FN29]

Interestingly, Federal Rule of Civil Procedure 81(a)(1) states the applicability of the Federal Rules of Civil Procedure and provides, in relevant part here, that the Rules of Civil Procedure do not apply to "proceedings" in bankruptcy. There is no parallel Federal Rule of Bankruptcy Procedure 7081 to Federal Rule of Civil Procedure 81(a)(1). However, Federal Rule of Civil Procedure 81(a)(1) is not applicable to bankruptcy "cases" under the Code. Although Rule 81(a)(1) carefully limits its restrictive language on the appointment of special masters to bankruptcy "proceedings," Federal Rule of Bankruptcy Procedure 9031 extends the prohibition to bankruptcy "cases," even though there is an absence of both statutory and civil rule authority for this restrictive prohibition. The Advisory Committee note accompanying Rule 9031 further extends the prohibition to bankruptcy "proceedings."

Accordingly, Federal Rule of Civil Procedure 53 regarding the appointment of special masters does not apply in a bankruptcy "proceeding" under the Code, even if the district court withdraws the reference under 28 U.S.C § 157(d) and desires to appoint a special master while exercising original bankruptcy jurisdiction (or the district court withdraws the reference for the special and limite ***363** purpose of making such an appointment on behalf of the bankruptcy court as a valuable case management tool and immediately thereafter "re-refers" the proceeding to the bankruptcy court).

III. Federal Rule of Bankruptcy Procedure 9031: An Intended Result or a Misinterpretation of Former Bankruptcy Rule 513?

A. Former Bankruptcy Rule 513: The Origin of Federal Rule of Bankruptcy Procedure 9031

Prior to 1983, former Bankruptcy Rule 513 governed and provided the authority regarding whether a special master could be appointed in a bankruptcy case. [FN30] Pursuant to former Bankruptcy Rule 513, United States district judges had the authority to appoint special masters in bankruptcy cases based on the fact that Rule 53 of the Federal Rules of Civil Procedure applied in bankruptcy cases. [FN31] It appears that former Bankruptcy Rule 513 did "not contemplate that a referee (or bankruptcy judge) [FN32] would ever make a special master reference or appointment." [FN33]

The impact of the inhibiting words found in former Bankruptcy Rule 513, which apparently limited the powers of the bankruptcy referee (known today as "United States bankruptcy judges"), [FN34] should not be overemphasized here. Scholarly commentary on the effect of former Bankruptcy Rule 513 curtailed what seemed to be a manifest procedural restriction upon a referee or bankruptcy judge's appointment of a special master. The commentary indicates this point by stating as follows: "As there is no specifically conferred power on the bankruptcy referee to make special master references it follc *36< that Bankruptcy Rule 513 confers no added power " [FN35] Although the utilized language fails to equate to a flat restriction upon the appointment of a special master, the commentary on the rule seemingly fails to offer a clear answer regarding the authority for the appointment of a special master by a referee in bankruptcy or by a bankruptcy judge.

If former Bankruptcy Rule 513 failed to provide a definitive answer regarding the validity of a special master appointment by a referee or bankruptcy judge, other developments may have justified the appointment of special masters The enactment of the 1978 Code, the revised rules of bankruptcy procedure, and distinct statutory provisions, such as section 105 of the Code, offer grounds for special master appointments.

The issue regarding the appointment of a special master under the bankruptcy court's inherent, equitable powers, codified in section 105 of the 1978 Code, first arose in In re White Motor Credit Corp. [FN36] Although the court, on appeal, ultimately nullified the special master appointment in In re White, the United States district court, acting as an appellate court, recognized the bankruptcy court's authority to appoint a special master when it stated that "(t)his (the nullification of the special master appointment) is not to suggest that a bankruptcy court has no power to appoint a Special Master." [FN37] On appeal, the district court stated that claims in bankruptcy could be referred to a special master with the direction that Rule 53 should be followed. [FN38]

On various other occasions, the appointment of a special master has been efficiently utilized by district courts as a highly effective and valuable case management tool, notwithstanding some constitutional debate. [FN39] In any event, before the national Bankruptcy Rules o *365 Procedure were amended in 1983, United States district courts clearly had the authority pursuant to former Bankruptcy Rule 513 to appoint special masters in bankruptcy cases. [FN40]

On August 1, 1983, the Federal Rules of Bankruptcy Procedure became effective pursuant to the Rules Enabling Act under 28 U.S.C §§ 2071- 2077. At this point, the authority under the rules to appoint a special master in bankruptcy "cases" under the Code, even by the district court, was eliminated. [FN41] As noted earlier, the Advisory Committee note accompanying Federal Rule of Bankruptcy Procedure 9031 states that this appointive prohibition also extends to bankruptcy "proceedings" under the Code as well as "cases." [FN42] Yet, there is no statutory authority nor a Federal Rule of Bankruptcy Procedure 7081 (i.e., no procedural rule mirroring Federal Rule of Civil Procedure 81(a)(1)).

B. Federal Rule of Bankruptcy Procedure 9031

The promulgation of Federal Rule of Bankruptcy Procedure 9031 and its accompanying Advisory Committee note created and marked a significant alteration regarding the appointment of special masters in bankruptcy cases and proceedings under the Code and the role of Federal Rule of Civil Procedure 53 in such cases and proceedings Specifically, Federal Rule of Bankruptcy Procedure 9031 is entitled "Masters Not Authorized" and provides that "Rule 53 F R Civ. P. does not apply in cases under the Code." [FN43]

The accompanying Advisory Committee note to Rule 9031 emphasizes the intent of the drafters of the rule by

stating that "(t)his ***366** rule precludes the appointment of masters in cases and proceedings under the Code." [FN44] This restriction, coupled with the phrase "in cases under the Code," inhibits both bankruptcy and district judges from appointing special masters even in appropriate and rare cases or proceedings under the Code. [FN45] Therefore, the restrictive scope of Federal Rule of Bankruptcy Procedure 9031 is ostensibly very broad. Interestingly, however, "Rule 9031 by its own terms would not preclude the appointment of a special master in a civil proceeding which involves the debtor but does not arise under the Code." [FN46] Thus, it is the Advisory Committee note, not Rule 9031, that specifically restricts the appointment of a special master in a "proceeding" under the Code.

C. The Scope of Federal Rule of Bankruptcy Procedure 9031

1. Federal Rules of Bankruptcy Procedure 9031, Federal Rule of Civil Procedure 81(a)(1), Federal Rule of Bankruptcy Procedure 1001, and 28 U.S.C. S157(a) and (d).

United States district judges may from time to time adjudicate complex claims and related litigation under the Code. Unfortunately, it appears that district judges, like bankruptcy judges, believe that they may not appoint a special master in a bankruptcy case or proceeding because Rule 9031 and its accompanying Advisory Committee note, when read collectively, prohibit it. After considering the language in the rule and Advisory Committee note, the rule and note preclude both district and bankruptcy courts from appointing special masters based upon the fact that the utilized language applies to both "cases and proceedings under the Code " [FN47]

Due to the comprehensive scope of the Federal Rules of Bankruptcy Procedure, as set forth in Rules 1001 and 9031 , district judges, as stated earlier, also are precluded from appointing a spec ***367** master in a bankruptcy "case" under the Code, even if the reference is withdrawn under 28 U.S.C § 157(d) and the district judge exercises original bankruptcy jurisdiction. [FN48] In contrast, however, Federal Rule of Civil Procedure 81(a)(1) only applies to "proceedings" in bankruptcy--not to bankruptcy "cases." [FN49] Does this mean or suggest that a district judge may appoint a special master in a bankruptcy case, notwithstanding Federal Rule of Bankruptcy Procedure 9031? Are the Federal Rules of Bankruptcy Procedure (i.e., Rule 9031) and the Federal Rules of Civil Procedure (i.e., Rule 81(a)(1)) in conflict on this point? If a rules conflict exists, was the restriction regarding the appointment of a special master in Federal Rule of Bankruptcy Procedure 9031 an intended result? Perhaps clarification is required.

The clear distinction between a bankruptcy "case" and "proceeding" under the Code must be thoroughly analyzed and is worth further clarification considering its great significance under the Code, its accompanying relevant Title 28 provisions, and the Federal Rules of Bankruptcy Procedure. [FN50] First, the bankruptcy "case" is described as a term of art which refers to the entire case or the "whole ball of wax" that is created upon the filing of the bankruptcy "petition" under § 101(42) of the Code. [FN51] Second, "proceedings" are spec ***368** "subactions" within a bankruptcy "case" and are commenced by the filing of, for example, a complaint, motion, notice, an objection, or an application. [FN52]

The Congress officially recognized the statutory distinction between a "case" and "proceeding" when it enacted the former bankruptcy rules approved by the Supreme Court and Congress in 1973. [FN53] Although these distinctively different terms are not statutorily defined under the 1978 Code, nothing indicates that Congress intended a different meaning for these terms than the meanings historically used under the 1898 Act. [FN54] Congress has frequently drawn distinctions between bankruptcy cases and the civil proceedings arising under, arising in, or related to such cases since the enactment of the 1978 Code. [FN55] Thus, the terms bankruptcy "case" and "proceeding" must be considered according to their respective differences when analyzing the impact of the procedural rules promulgated under the Rules Enabling Act. [FN56]

When analyzing the distinctive differences of the terms "case" and "proceeding," one also should consider the intended results of Federal Rule of Civil Procedure 81(a)(1) and Federal Rule of Bankruptcy Procedure 9031. As noted earlier, these two rules and the Advisory Committee Note accompanying Rule 9031 simply do not accord. These inconsistencies prompt the following questions: What did the drafters actually intend? What is best for the bankruptcy ***369** system and its users?

In summary, Rule 9031 and its accompanying Advisory Committee Note collectively act to restrict and otherwise preclude both United States district and bankruptcy judges from appointing special masters in an appropriate, complex, and rare case or proceeding under the Code regardless of the need for such an appointment. This unfortunate restriction exists even though there is no express statutory prohibition and only a partial prohibition on "proceedings" under the Federal Rules of Civil Procedure.

2. Federal Rules of Bankruptcy Procedure 9031, 9001(4), and 9002(4)

The restriction found in Rule 9031 regarding the appointment of special masters is substantiated by the text of Rules 9001(4) and 9002(4) of the Federal Rules of Bankruptcy Procedure. Rule 9001(4), entitled "General Definitions," states that "'Court' or 'judge' means the judicial officer before whom a case or proceeding is pending " [FN57] Moreover, Federal Rule of Bankruptcy Procedure 9002 explains the meanings of words in the Federal Rules of Civil Procedure applicable to cases under the Code.

Rule 9002(4) states that a "'(d)istrict court,' 'trial court,' 'court,' 'district judge,' or 'judge' means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge." [FN58] The broad scope of these terms and definitions makes Rule 9031 applicable to both bankruptcy and district court judges. Therefore, the rules, read collectively and accurately, restrict and otherwise preclude both district and bankruptcy "judges" from appointing a special master under Federal Rule of Civil Procedure 53 in cases under the Code. [FN59]

3. Former Bankruptcy Rule 513 Compared to Federal Rule of Bankruptcy Procedure 9031

The rules and definitions discussed above are significant beca ***370** the terms, especially as they applied to former Bankruptcy Rule 513, were not identically defined. Under former Bankruptcy Rule 513, the word "judge" meant United States district judge and not "bankruptcy judge." [FN60] The significance of the possible ambiguity is diminished when one considers that district judges, after the reference to the bankruptcy referee (or bankruptcy judge), ceased to officially administer bankruptcy cases and proceedings (i e , failed to exercise original bankruptcy jurisdiction). [FN61]

Nonetheless, one may reasonably question the underlying rationale of Rule 9031 because it summarily restricts the authority of "any judge" to appoint a special master in an appropriate bankruptcy case or proceeding under the Code [FN62] Perhaps, one may even reasonably question whether this restriction was an intended result. It seems clear that in 1983 the Federal Rules of Bankruptcy Procedure intended to prohibit the appointment of special masters by bankruptcy judges in cases under the Code. [FN63] Did the Federal Rules of Bankruptcy Procedure, however, actually intend to take away the procedural and inherent power to appoint a special master from the United States district court in a case or proceeding under the Code?

Former Bankruptcy Rules 513 and 102(b) allowed district judges to appoint a special master in a bankruptcy case in the event the district judge retained the bankruptcy case or withdrew the reference of the case from the bankruptcy court. [FN64] The fact that the former bankruptcy rules of procedure allowed for district judges to appoint special masters might suggest that the scope of Federal Rule of Bankruptcy Procedure 9031 is far too broad. [FN65] Stated another way, one may reasonably question whether Rule 9031, a procedural rule, really intended to strip the United States district court of its equitable and inherent power of appointing a special master in an appr ***371** e, complex, and rare bankruptcy case or proceeding.

IV. Why Special Masters Should Be Appointed in Appropriate and Rare Bankruptcy Cases or Proceedings

In an appropriate and rare bankruptcy case or proceeding, a special master can greatly contribute to the simplification and advancement of speedier and less costly litigation in numerous capacities. [FN66] As noted earlier, the appointment of special masters (or other technical advisors) should be a last resort, or as one court articulated "hen's-teeth rare." [FN67] This innovative case management tool (i.e., the authority to appoint a special

master) possesses utility and can significantly contribute in an appropriate and rare bankruptcy case or proceeding as it does in complex and rare, non- bankruptcy civil matters.

When a bankruptcy or district court is faced with unusually difficult bankruptcy problems or unique issues of such complexity and sophistication beyond questions of law and fact, special masters may serve to actually expedite a case or proceeding more efficiently and competently. [FN68] Special masters can, for example, contribute substantially in the areas of complex accounting and computation, discovery, and settlement. [FN69]

A. Special Masters In Matters of Account and Difficult Computation

The role of the special master can be most efficiently utilized in matters of account and difficult computation of damages as fully recognized by Federal Rule of Civil Procedure 53(b). [FN70] Likewise, *372 use of special masters should be utilized in highly complex and extraordinary bankruptcy cases and proceedings for computing and analyzing claims. [FN71] Interestingly, one commentator suggested that a special master, rather than the bankruptcy court, was the most effective method to estimate contingent and unliquidated claims. [FN72] In suggesting the appointment of special masters by the bankruptcy court, the commentator plainly stated:

A bankruptcy court should consider appointing special masters, despite their expense, when it must estimate the values of a large number of claims in which the debtor has admitted liability. In these situations, special masters may obviate the need for any oral hearing, since valuation of damages often involves more concrete, objective factors than does evaluating liability. Moreover, special masters can save time and expense by traveling to the evidence. Finally, by estimating the value of claims outside the confines of the court, special masters can expedite bankruptcy proceedings for other debtors who need the attention of the bankruptcy judge [FN73]

This suggestion, of course, should not be interpreted as a call for the appointment of a special master in a routine bankruptcy case or proceeding. However, litigants involved in contentious bankruptcy cases or proceedings requiring analysis of multiple, contingent, and unliquidated claims might greatly benefit from a special master appointment. [FN74] Unquestionably, the use of special masters should be utilized in extremely complex and rare bankruptcy cases or proceedings involving, for example, multiple, contingent, or unliquidated claims in highly complicated antitrust, product liability, or securities fraud litigation. A bankruptcy court, like other courts administering and adjudicating statutory provisions, should be *373 allowed to implement "abbreviated procedures" [FN75] and use innovative case management tools on a case-by-case and proceeding-by-proceeding basis to serve the interest of all parties and to accomplish the judicial goal set forth in Federal Rule of Bankruptcy Procedure 1001 "to secure the just, speedy, and inexpensive determination of every case and proceeding." [FN76]

Difficult accountings often require a special master to compute damage award or interest amounts in non-bankruptcy civil litigation where competing statistical methods are at issue. [FN77] In appropriate and rare bankruptcy cases and proceedings, litigants and courts would greatly benefit from the appointment of a special master, especially where complex and difficult computations are necessary For example, issues such as employee compensation in corporate litigation, [FN78] fee disputes requiring complex scientific analysis, [FN79] and business marketing analysis [FN80] can be synthesized and organized by technically trained, skilled professionals alleviating the bankruptcy court's substantial workload. Additionally, special masters additionally may provide expertise when the "court's machinery" is insufficient. [FN81] The utilization of such special masters or technical advisors also may provide an expertise and procedural fluidity not possessed by courts or generalist judges. [FN82] Moreover, litigants and busy federal courts could utilize the unique skills of a special n *374 who could perform the function of organizing and analyzing the claims and estimates of adversaries who have a stake in a highly complex bankruptcy case or proceeding.

The bankruptcy court is the de facto commercial court of America and manages more people and funds than all the other federal courts combined. [FN83] Of all the bankruptcy courts in the world, it is said that the United States bankruptcy court has become the most sophisticated and progressive, and its influence is being felt worldwide as the needs of the global economy reach out for meaningful, international solutions to financial distress.

Many in the bankruptcy community believe that the bankruptcy and district courts, as courts of equity and

adjudicators of highly complex, commercial bankruptcy litigation, should be entitled to the use of such an equitable case management device to efficiently adjudicate highly complex issues arising out of appropriate and rare bankruptcy cases and proceedings for the financially challenged and their creditors, especially in resource-exhausting areas of litigation such as discovery. [FN84]

B. Special Masters' Contribution in the Discovery Phase

Another role special masters serve in complex litigation is in the discovery phase. Special masters can serve effectively in the pretrial stage of litigation by managing pretrial discovery, especially when scientific and technical questions are threshold issues. [FN85] Special masters can efficiently handle highly contentious and complex discovery disputes when the amount in controversy is substantial and multiple parties exist. [FN86]

Furthermore, litigants and courts can justify the expense of tl *375 special master when the financial stakes are especially high and the amount of judicial involvement required would impose an undue burden on the court. [FN87] For example, in the "Ohio Asbestos Litigation," [FN88] two special masters collected data, managed experts, and approved computer programs to run simulations necessary for settlement negotiations in a mass tort case which cried out for some sort of an abbreviated procedure. [FN89] Another instance where special masters can contribute to the litigation process is where multiple documents are claimed to be privileged. [FN90] In another mass tort lawsuit, a special master devised a method to obtain discovery information without the use of formal depositions and interrogatories. [FN91]

Francis E. McGovern served as an innovative special master in the Northern District of Alabama DDT cases. [FN92] The special master introduced a questionnaire that was administered to claimants in order to expedite and elicit relevant factual information from claimants. [FN93] The parties in the litigation accepted the procedure because it minimized disputes, allowed discovery to progress inexpensively, and eliminated some 2,500 groundless claims [FN94] The procedure evidently yielded higher quality information than standard discovery procedures. [FN95] Procedures like the one implemented in the Alabama DDT cases manifest the inherent value special masters could contribute to complex litigation in extraordinary bankruptcy cases and proceedings.

Likewise, the court and the parties in the In re Dow Corning Corp. [FN96] litigation may now more fully appreciate and recognize th *376 inherent value that a special master could contribute to a mammoth bankruptcy case, especially when one considers the volume of evidence the litigants offered in the form of foreign and domestic experts in an effort to classify claims and determine the effect of foreign law. [FN97] A special master might be gratefully utilized in such difficult cases, if the prohibition in Federal Rule of Bankruptcy Procedure 9031 did not exist Although the experts in In re Dow Corning Corp. were not expressly classified as special masters, the use of such experts represent a reality prevalent in modern, complex, non-bankruptcy and bankruptcy litigation. A special master, offering specialized analysis for all the parties in interest, would serve as an efficient and valuable case management tool in highly complex bankruptcy cases and proceedings.

The role of a court appointed expert pursuant to Federal Rule of Evidence 706(a) or a party's expert of its own selection pursuant to Federal Rule of Evidence 706(d) in highly complex bankruptcy cases and proceedings offers a substantial contribution completely separate and apart from the contribution a bankruptcy judge, trustee, examiner, or special master offers. The use and designation of a special master in an appropriate and rare bankruptcy case or proceeding would preserve the intended role of the other players in the bankruptcy process. Concomitantly, a special master facilitates complex dispute resolution since special masters would be specifically created and charged with, inter alia, the duty to efficiently manage the litigation process for financially troubled debtors and other parties in interest. Special masters also offer the management skills and flexibility that facilitate and promote settlement of disputes. [FN98]

C. Special Masters as Facilitators for Settlement of Complex Cases and Proceedings

Even opponents of special masters concede that the role defined as "settlement facilitator" is the least intrusive and

objectionable role in the special master issue. [FN99] Special masters offer litigants a " qu; *377 mediator" or "para-judge" while minimizing ex parte contacts with the judge and avoiding bias or prejudgment on key issues. [FN100] Special masters also provide neutral, disinterested, and detached possibilities and recommendations for settlement. [FN101] With an ability to understand the practical needs of the parties, attorneys, and issues, special masters possess the ability to informally interact with both sides and guide adversaries into settlement more efficiently. [FN102]

Special masters may provide a greater likelihood for settlement because of an in-depth command of the relevant facts, evidence, and law of a particular case or proceeding. [FN103] Busy judges ordinarily have little time to develop an intricate and thorough understanding in complex, non-bankruptcy litigation because of the generalist nature that judges must maintain. [FN104] Special masters, on the other hand, can develop an in-depth understanding and detailed knowledge of the lawsuit without causing the concerns that counsel possess when judges consistently monitor such lawsuits. [FN105] Since special masters are not the final arbiters of litigation, lawyers can exude a negotiable disposition without the fear of consistently being "on the record" like one would feel in front of the ultimate arbiter of the case--the judge. [FN106]

Special masters have the luxury to incorporate and introduce a wide range of flexible proposals. Without the time or the resources possessed by the private sector, courts and judges sometimes may fail to provide litigants with the highest degree of creativity or innovative procedures and ideas. [FN107] The flexibility inherently possessed by special masters more than justifies their cost while concomitantly making the litigation more manageable. [FN108] When settlements are attained in complex litigation, the costs of special masters are minimal compared to the potential costs litigants face when the tr *378 and appeal process continues for years. [FN109] Despite the potential contribution special masters could make in complex bankruptcy cases and proceedings, the Federal Rules of Bankruptcy Procedure (Rule 9031) and its accompanying Advisory Committee note, unfortunately, prohibit such an appointment by any court in any case or proceeding under the Code.

V. The View of the 1995 United States Judicial Conference Advisory Committee on Bankruptcy Rules Regarding the Issue of Special Masters

In 1995, Judge Paul A. Magnuson, Chief Judge of the United States District Court for the District of Minnesota, [FN110] n his capacity as Chairman of the United States Judicial Conference Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), offered a suggestion to the Judicial Conference Advisory Committee on Bankruptcy Rules. This suggestion emanated from the Bankruptcy Committee's Long Range Subcommittee which proposed to abrogate Federal Rule of Bankruptcy Procedure 9031 in order to allow for the appointment of a special master by district and bankruptcy judges in an appropriate and rare bankruptcy case or proceeding.

Specifically, Judge Magnuson suggested the adoption of a newly promulgated Federal Rule of Bankruptcy Procedure 7053 (i.e., a modified Rule 53) [FN111] to apply in Part VII adversary proceedings and contested matters governed by Federal Rule of Bankruptcy Procedur *379 9014. The suggested new procedural rule, if promulgated, would expressly authorize a district and bankruptcy judge to appoint a special master in an appropriate and rare bankruptcy case or proceeding. To the surprise of many, the Advisory Committee on Bankruptcy Rules rejected Judge Magnuson's recommendation and failed to recommend and transmit a proposed modified Rule 53 to the Judicial Conference Standing Committee on Rules of Practice and Procedure for consideration and public comment under the Rules Enabling Act.

In rejecting the suggestion of Judge Magnuson and the Bankruptcy Committee's Long Range Subcommittee, the Advisory Committee on Bankruptcy Rules stated as follows:

The Committee (Advisory Committee on Bankruptcy Rules) rejected the suggestion that there be authorization to appoint a special master in a bankruptcy proceeding. The consensus was that a special master is too reminiscent of the former bankruptcy referee and that adequate alternatives exist in the authority to appoint a trustee and an examiner. [FN112]

Based on the historical and statutorily defined roles of the bankruptcy referee, bankruptcy judge, district judge, bankruptcy trustee, chapter 11 examiner, and the realities of modern American bankruptcy laws and practice, many continue to respectfully disagree with the rationale and position of the Advisory Committee on Bankruptcy Rules.

A. The Bankruptcy Referee/Bankruptcy Judge Analogy

The terms "bankruptcy referee" and "referee system" are not only antiquated terms, but also reflect a less than full appreciation of the current role and powers of a bankruptcy judge (and district judge) under the Code as opposed to a bankruptcy referee under the referee ***380** system of the former Act of 1898. [FN113] Under the former 1898 Act, the bankruptcy referee was charged with the dual responsibility of being primarily an administrator. [FN114] Under the Chandler Act of 1938, the bankruptcy referee was given the duties of a judicial officer and performed fewer administrative duties. [FN115] Since the promulgation of the Rules of Bankruptcy Procedure in 1973, judicial officers of the bankruptcy system have been denominated "United States bankruptcy judges." [FN116] Even before bankruptcy judges received this title, their role as full-scale judicial officers and the ultimate adjudicators of America's bankruptcy laws increased in all respects. [FN117]

The administrative functions performed by referees in bankruptcy under the former 1898 Act resulted in frequent, yet arguably permissible, ex parte contacts between parties in interest and the bankruptcy judge. [FN118] The appearance of bias and prejudice, however, manifested itself when the referee performed certain functions other than adjudication. As bankruptcy judges and the tribunals where they presided received more statutory and procedural authority and respect, the administrative duties and capabilities of the judges diminished.

With the enactment of the Code in 1978, the former referee system unquestionably disappeared. [FN119] After almost ten years of study, Congress essentially eliminated the bankruptcy judge's dual role as an estate administrator and a judicial officer. [FN120] In complex bankruptcy cases and proceedings under the former Act of 1898, referees often served litigants as both a judicial officer and an estate ***381** administrator. [FN121] Extreme inefficiencies and perceived biases resulted when judicial officers served as an administrator and a judge in complex cases and proceedings.

Under the 1978 Code, United States bankruptcy judges no longer perform or supervise purely administrative functions in bankruptcy cases or proceedings (i.e., most case and non-case related administrative functions) due to the fact that bankruptcy judges are now judicial officers of the United States district court by virtue of 28 U.S §. 151 and 152. Instead, such purely administrative functions and supervisory roles statutorily have been transferred to the United States trustee or United States bankruptcy administrator, as discussed more fully, infra.

Entities now seeking protection under the Code, their creditors, and other parties in interest may suffer undue and unnecessary delays and transaction costs at a time when thrift and economy should be paramount. Special masters can alleviate, if not substantially eliminate, these inefficiencies presently arising in some complex bankruptcy cases and proceedings. Litigants and lawyers in such complex cases and proceedings face increased costs and delays when matters such as discovery disputes and evidentiary exchanges are formally litigated before the bankruptcy or district judge. Besides the role of calculating damage figures in complex cases and proceedings, one of the clearest advantages that a special master offers is in the discovery stage of complex bankruptcy litigation. [FN122]

Special masters also can save time and resources because masters provide greater flexibility in, for example, contentious areas in the discovery process. [FN123] Furthermore, special masters may provide a more efficient administration of complex cases and proceedings than a judge whose focus is on multiple, complex cases and proceedings. [FN124] Special masters develop a detailed knowledge of cases and proceedings and offer greater accessibility and flexibility for litigants ***382** which is required for effective, complex case management. [FN125]

Professor Peter Schuck described some of the proven advantages of a special master in his book, Agent Orange on Trial as follows:

For the parties, he (the special master) offered a means to obtain swift decisions on discovery and related issues from someone with detailed knowledge of the case that was unavailable to a busy, generalist judge Although the

parties could always appeal the special master's decisions to the judge, they knew that frequent appeals would arouse resentment and probably be fruitless. . . . The special master could insulate the court from messy, time-consuming details, distancing it from the lawyers' incessant posturings and wrangling. The master also constituted a new tactical resource with which the court could hope to manipulate the parties toward agreement. [FN126]

As the above quoted text illustrates, the services that a bankruptcy or district judge and a special master can provide litigants are clearly distinguishable. Currently, the role a bankruptcy (or district) judge plays in complex bankruptcy litigation is as an adjudicator. Judges sometimes lack the time and resources to efficiently manage highly complex litigation. On the other hand, special masters can contribute substantially to the dispute resolution process due to their ability to focus and specialize on specific cases and proceedings. [FN127]

The use of special masters in extraordinary bankruptcy cases and proceedings also would help fulfill the tenet set forth in Federal Rule of Bankruptcy Procedure 1001 which encourages adjudication of bankruptcy cases and proceedings in a "just, speedy, and inexpensive" manner. [FN128] The skill level and in-depth understanding a special *383 master furnishes litigants in complex cases and proceedings provide speedier and less costly case and estate administrations and more efficient settlements. The evolution of the role of the United States bankruptcy judge, compared to the contributions made by a special master in complex litigation, substantiates and differentiates the significant difference between the bankruptcy judge and the special master

B. The Bankruptcy Trustee Analogy

In an effort to further improve the efficiency of the bankruptcy court, the bankruptcy trustee evolved into an intricate player in the bankruptcy system while the bankruptcy judge performed the role as an adjudicator. [FN129] An assertion that a bankruptcy trustee is equipped to perform the same unique functions as a special master, in reality, is simply misplaced. [FN130] As discussed earlier, the Advisory Committee on Bankruptcy Rules rejected Judge Magnuson's suggestion stating, inter alia, that the bankruptcy trustee could perform the special master's role. [FN131] The bankruptcy trustee, however, has distinctive statutory duties and a clearly demarcated role in the bankruptcy process. [FN132] The bankruptcy trustee serves the estate and litigants in several clearly-defined capacities, but the trustee's role is certainly different than the intended role of a special master.

Unlike the former referee system, a bankruptcy panel trustee is now appointed by the United States trustee or the bankruptcy administrator and not the court. [FN133] Once appointed, the bankruptcy trustee, inter alia, serves in a general role in the management and disposition of the case and estate, not just for a distinct or limited purpose like a special master. [FN134] By virtue of § 323(a) of the Code, a *384 bankruptcy trustee is the statutory representative of the estate created under § 541(a) of the Code. [FN135] Additionally, the bankruptcy trustee has certain investigatory and reporting obligations imposed by the Code during the trustee's appointment. [FN136]

Simply put, the duties and responsibilities of a bankruptcy trustee under the Code are significantly and uniquely different from those of a special master. For example, the bankruptcy trustee in a Chapter 11 case is required, among other things, to perform all the statutory duties of a trustee specified in §§ 704(2), (5), (7), (8), and (9) of the Code [FN137] Chapter 11 cases and proceedings may become quite complex and require substantial involvement by the trustee, if a trustee is appointed. [FN138] The Chapter 11 trustee, who serves effectively as the debtor's management during the administration of the case, owes a fiduciary duty to the estate created under section 541(a) of the Code and all parties in interest to maximize the value of the properties of the estate. [FN139]

The trustee also has a virtual arsenal of special avoiding powers under §§ 544(a), 545, 548, 544(b), 547(b), 553(b), 549, and 724 of the Code in order to foster the equitable concept of equality of distribution among creditors similarly situated. [FN140] The statutory duties performed under the avoiding powers position the trustee in a highly adversarial role in the litigation process. The trustee must investigate potential causes of action against the debtor's officers, creditors, and other third parties which makes the trustee a potential, or in many cases and proceedings, an actual adversary. [FN141]

By virtue of Federal Rule of Bankruptcy Procedure 6009, "with *385 or without court approval", the bankruptcy

trustee may prosecute or defend any action "by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal." [FN142] Thus, bankruptcy trustees may become major litigants in cases and proceedings since bankruptcy trustees have statutorily defined and highly distinctive roles. Trustees are in reality and theory incapable of performing neutral, facilitative roles traditionally and typically performed by a special master.

The intended role of the special master can be distinguished from the statutorily defined role of the bankruptcy trustee. The investigatory and interested role of the bankruptcy trustee precludes a trustee from providing litigants with expedited discovery techniques or disinterested recommendations for settlement Moreover, the bankruptcy trustee owes a fiduciary duty to the bankruptcy estate as the statutory representative of the bankruptcy estate created under section 541(a) of the Code which precludes the trustee from serving as a detached, neutral arbiter when analyzing complex claims in a case or proceeding. Unlike the bankruptcy trustee, no limitations or statutorily prescribed duties bind a special master; therefore, a special master offers litigants a detached specialist to resolve complex, threshold issues in extremely difficult cases and proceedings.

C. The Chapter 11 Examiner Analogy

As stated earlier, the Advisory Committee on Bankruptcy Rules rejected Judge Magnuson's suggestion of a modified Rule 53 (i.e., a newly promulgated Federal Rule of Bankruptcy Procedure 7053) in appropriate and rare bankruptcy cases and proceedings, stating that the bankruptcy examiner could perform the unique role suggested for a special master. [FN143] However, the bankruptcy examiner has distinctive, limited statutory duties set forth under the Code discernable from the intended duties of a special master. [FN144]

Section 1104(b) of the Code defines the role of an examiner and specifically provides as follows:

***386** If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if -

(1) such appointment is in the interests of creditors, any equity security holders, and other interest of estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000. [FN145]

Examiners are appointed only in Chapter 11 cases (not in cases under Chapter 7, 9, 12, or 13) and only on a motion by a party in interest, the United States trustee, bankruptcy administrator, or the court on its own initiative, and before the confirmation of a plan. [FN146] Once appointed, the Chapter 11 examiner may perform investigative functions similar to those performed by the bankruptcy trustee, but differences exist which make their contributions distinctive. [FN147]

Examiners have a statutory duty, inter alia, to investigate and report to the court any misconduct or fraud perpetrated by the debtor or others. [FN148] Like the intended role of a special master, an examiner serves in a manner that is by its nature "disinterested and non-adversarial." [FN149] Chapter 11 examiners (and bankruptcy trustees), ***387** however, report, investigate, and scrutinize the debtor's financial affairs. Unlike the bankruptcy trustee, however, the examiner does not serve as a statutory representative of the bankruptcy estate created under section 541(a) of the Code. [FN150] The statutorily defined role of the examiner and trustee, therefore, preclude either one of performing the neutral, facilitative role intended for a special master.

The examiner's active participation in a Chapter 11 case apparently transforms the examiner into a "party in interest" based upon, for example, the examiner's powers in sections 343 and 1106(a)(3)-(4) of the Code. [FN151] It is emphasized that the examiner ordinarily is not a litigator. Actually, section 1109(b) of the Code does not expressly illustrate an examiner as even being a party in ***388** interest. [FN152]

It is noted that Federal Rule of Civil Procedure 53(a) defines "master" to include "a referee, an auditor, an examiner, and an assessor." [FN153] The role of the examiner originated in part from the need to create an alternative to the special master in corporate reorganizations under Chapter X of the 1898 Act. [FN154] The examiner, however, was not the same as the special master under the former Act. The special master served as an assistant judge or referee, but the examiner served as an investigator. [FN155]

The statutory duties of the Chapter 11 examiner under the Code essentially are threefold. Examiners investigate the financial condition of the debtor, the operation of the debtor's business, and the desirability or feasibility of continuing the debtor's business. [FN156] By virtue of sections 1106 and 1107 of the Code, the Chapter 11 debtor in possession does not have to investigate itself. [FN157] An examiner, if one is appointed, is required to make such an investigation and file a statement of the investigation performed. [FN158] The examiner must file and distribute a copy or a summary of the investigation to certain parties in interest as designated by the court. [FN159]

Thus, the role of the examiner is clearly distinguishable from that of a special master (or trustee). The intended role of the examiner in Chapter 11 cases is to serve as an investigator rather than a litigator or mediator. [FN160] Additionally, the fact that an examiner probably is a party in interest clearly distinguishes it from a special master. ***389** Arguably, a special master in a Chapter 11 case would not be a party in interest under section 1109(b) of the Code, but the examiner's investigations would curtail any potential for the examiner to serve as a neutral arbitrator for contentious, threshold issues in complex cases and proceedings. If special masters were authorized to be appointed in appropriate and rare cases and proceedings under the Code, their role would be as a passive, neutral arbiter during estate administration and/or specific litigation, not as special investigators.

Like examiners, special masters could provide very valuable case management assistance in extraordinary and rare bankruptcy cases and proceedings and even contribute substantially in such matters under Chapters 7, 9, 12, and 13 of the Code. [FN161] Working concurrently in certain bankruptcy cases and proceedings, the special master and examiner would facilitate adjudication in their respective and well-defined capacities. [FN162] Furthermore, developing case law seems to approve of the practice that has developed in the bankruptcy court for the Southern District of New York of appointing an "examiner" in some highly complex Chapter 11 cases to help coordinate and resolve cross border insolvency disputes. [FN163]

VI. The Issue of Special Masters Revisited--The Failure of the 1996 Advisory Committee on Bankruptcy Rules to Recommend the Abrogation of Federal Rule of Bankruptcy Procedure 9031

In September 1996, the Advisory Committee on Bankruptcy Rules, at the request of the Judicial Conference of Committee on the Administration of the Bankruptcy System, revisited the issue of special masters. The suggested amendment submitted by the Judi ***390** Conference Bankruptcy Committee to abrogate Federal Rule of Bankruptcy Procedure 9031 and promulgate a modified Rule 53 failed by a vote of eight to five. [FN164] The five bankruptcy judges on the Advisory Committee on Bankruptcy Rules voted for the proposed amendment, but noted its limited application (i.e., it would only apply in a very rare bankruptcy case or proceeding). [FN165] The eight committee members who voted against the suggested amendment cited two important issues of concern. The two issues were the standard of review to be applied to a special master's findings of fact and conclusions of law, if required by the court, and the method and source of compensation to be allowed to the master. [FN166]

A. Circumventing Multiple Referrals

By virtue of 28 U.S.C. S157(a), each United States district court may refer any or all bankruptcy cases and proceedings under Title 11 to the bankruptcy judges for the district. [FN167] Opponents of the special masters issue intimate that abrogating Federal Rule of Bankruptcy Procedure 9031 and allowing Federal Rule of Civil Procedure 53 to apply in bankruptcy cases and proceedings would amount to an impermissible "referral upon a referral." [FN168] Specifically, if all of the provisions in Rule were adopted, in particular Rule 53(f), bankruptcy judges would be expressly authorized to refer extraordinary bankruptcy cases and proceedings to magistrate judges. The proposed modified Rule 53, as suggested here, however, avoids the multiple referral problem because the modified

rule simply would not adopt or incorporate Rule 53(f) regarding magistrate judges. Thus, bankruptcy judges would not wield the authority to appoint or refer cases or proceedings under Title 11 to magistrate judges because Rule 53(f) would be excluded in the modified Rule 53.

*391 B. Clearly Erroneous Standard of Review

Another concern regarding the special master issue was the standard of review to be applied to a special master's report, if required by the court (i.e., the master's proposed findings of fact and conclusions of law, if required by the court). The "clearly erroneous" standard contained in Federal Rule of Civil Procedure 53(e)(2) would not apply in the suggested modified Rule 53. Instead, the proposed findings and conclusions of the special master, if required, would be reviewed de novo by the district court utilizing language similar to 28 U.S.C. S157(c)(1). [FN169]

Accordingly, the utilization of a special master in only rare and highly complex bankruptcy cases and proceedings affords litigants the appropriate appellate standard of review and accords constitutionally. Concomitantly, the use of special masters in extraordinary Title 11 cases and proceedings will curtail costly delays and scheduling conflicts incurred during protracted litigation. [FN170] Additionally, increased appeals will not result as long as special masters are used only in exceptional circumstances and serve the intended purpose--as a valuable, complex case management tool.

C. Compensation of the Special Master

The source and amount of compensation to be paid to special masters under Title 11 cases and proceedings must be analyzed and substantiated, especially when one considers the financial limitations facing many debtors and their creditors. Volumes of material exist regarding the fees, justification, and utility of special masters. [FN171] While the subjectivity of the scholarly debate is appreciated and highly respected, the utilization of special masters in extraordinary bankruptcy cases and proceedings provides litigants, the public, and the court with an efficient and less costly method of dispute resolution. [FN172] Special masters minimize transaction costs for litiga *392 implementing informal procedures ultimately procuring, for example, enlightened settlements. [FN173] In order to avoid potential inefficiencies and excessive costs, courts must explicitly define the master's scope, duties, and responsibilities. [FN174] Compensable activities and services, as well as the source of payment, must be defined by the district or bankruptcy court in a formal appointment order. [FN175]

It is respectfully asserted that the statutory authority for compensation of special masters currently exists under the Code. [FN176] The proposed "modified Rule 53" and the existing statutory sections of the Code regarding compensation preclude the need for legislative amendments to the Code. The mechanics of the proposed "modified Rule 53" can be applied in a bankruptcy case or proceeding.

1. Compensation of Special Masters in Bankruptcy Cases

In bankruptcy cases § 327 of the Code authorizes the trustee or the debtor in possession to employ "professional persons" with the approval of the court. [FN177] The term "professional person" is broadly illustrated and includes individuals involved in the administration of t § 541(a) estate equipped with some special knowledge or skill achieved through years of experience and/or educational achievement. [FN178] A special master fits within the definition of a "professional person" under § 327(a) of the Code. [FN179] A special master would play an important role in the administration of the bankruptcy case and estate. Once the court approves the employment of the special master under § 327 of the Code and Federal Rule of Bankruptcy Procedure 2014, the special master's costs and fees ultimately *393 would be approved by the court unde § 330(a)(1) of the Code, after notice to the parties in interest and a hearing. [FN180]

Absent an application by the trustee or debtor-in-possession seeking to employ a special master in a case under Title 11, the court may appoint a special master sua sponte. By analogy, the court's inherent authority to appoint an examiner or a trustee sua sponte is firmly entrenched in bankruptcy case law unde §§ 1104 and 105(a) of the Code. [FN181] Similarly, special masters, like other professionals, may be appointed, sua sponte, by the court pursuant to

Federal Rule of Evidence 706(a), the inherent authority of the court, and unc § 105(a) of the Code. [FN182] In any event, examiners, trustees and "other professional persons" (e.g., special masters), would file applications for compensation and reimbursement of expenses under §§ 330 and 331 of the Code. [FN183]

Unless otherwise ordered by the court, the fees earned by a special master under a Title 11 case would be paid out of the funds of the bankruptcy estate as an administrative expense. [FN184] The statutory authority and priority of special master's compensation in a bankruptcy case are addressed in the Code as a first priority, administrative expense. [FN185] This specific statutory authority and source already exists if one considers the effect and significance of the word "including" found in § 503(b) of the Code. [FN186]

The reach and extent of the word "including," as it is used in Title 11 cases (and proceedings), is defined and clarified in § 102(3) of the Code and states, in relevant part, that the word "including" is not limiting. [FN187] The significance of the statutory definition means tha ***394** the listed administrative expenses found unde § 503(b) are not exhaustive. Thus, the statutory authority addressing the costs and fees of a special master, who facilitates the efficient administration of a complex bankruptcy case and makes a "substantial contribution," exists under the current provisions of the Code. Finally §§ 330(a)(1)-(2) of the Code provide statutory safeguards against excessive professional fees and expenses because the court ultimately approves the amount of professional compensation, only after notice and a hearing and subject to the traditional appellate process. [FN188]

2. Compensation of Special Masters in Bankruptcy Proceedings

While the existing provisions of the Code (e.g., section 330) provide statutory authority for compensation of special masters in bankruptcy cases, Federal Rule of Civil Procedure 53(a) currently governs the appointment and compensation of a special master in an extraordinary nonbankruptcy case. The modified Rule 53, as suggested here, would substantially incorporate some, but not all, of the existing language in Federal Rule of Civil Procedure 53(a). Since Rule 53(a) utilizes the word "action," the definition of "action" found in Federal Rule of Bankruptcy Procedure 9002(1) must be applied. [FN189]

It is noted that Rule 9002(1) defines "(a)ction" or "civil action" as an adversary proceeding. [FN190] Therefore, the modified Federal Rule of Civil Procedure 53 and Rule 9002(1) would provide the authority for the appointment of special masters in bankruptcy cases and proceedings. Moreover, Federal Rule of Civil Procedure 53(a), as incorporated in the modified Rule 53, would provide for the compensation of special masters in extraordinary bankruptcy cases and proceedings and the expenses would be assessed by the court. [FN191]

Currently, however, Federal Rule of Bankruptcy Procedure 903 ***395** and its accompanying Advisory Committee note impose procedural barriers that restrict the use of this very valuable case management tool in any bankruptcy case or proceeding by either the district or bankruptcy court, regardless of the appropriateness. [FN192] A procedural improvement (i.e., the use of a special master) could be achieved by an amendment to the Federal Rules of Bankruptcy Procedure in accordance with the Rules Enabling Act process.

VII. A Call for the United States Judicial Conference Advisory Committee on Bankruptcy Rules to Reconsider its Prior Position Regarding Federal Rule of Bankruptcy Procedure 9031

A. Rules Enabling Act and How It Works

28 U.S.C § 2075 (i.e., the Rules Enabling Act) statutorily addresses the specific rule-making process in the bankruptcy system. [FN193] Under this section, Congress delegates initial rule making authority to the Supreme Court, which in turn solicits the aid and expertise of the Judicial Conference of the United States and both its standing rules committee of practice and procedure and its rules advisory committee before transmitting amended and/or new rules to Congress for consideration. [FN194] If the rule amendments are not altered by Congress, the amended and/or new rules become effective on December 1 of the year in which they are transmitted to Congress, unless otherwise provided by law. [FN195]

Members of the Advisory Committee on Bankruptcy Rules consist of highly distinguished lawyers, judges, and professors who study and submit proposed procedural amendments and improvements to the bankruptcy rules to the Standing Committee. Likewise, highly distinguished individuals serve on the Standing Committee. Pursuant to the provisions of 28 U.S.C § 2073(d), the Judicial Conference Committee making recommendations or rule changes ***396** must " provide a proposed rule, an explanatory note on the rule, . . . a written report" including any dissenting views made by other committee members, and a solicitation for public comment. [FN196]

This specific call for the Rules Enabling Act to cause the Federal Rules of Bankruptcy Procedure to be amended to allow for the appointment of a special master in appropriate and rare bankruptcy cases and proceedings by United States district and bankruptcy judges serves every interest group or litigant striving for "justice, dispatch, thrift, and economy in litigation." [FN197]

B. The Call for a Reconsideration by the Current Members of the Judicial Conference Advisory Committee on Bankruptcy Rules Regarding Federal Rule of Bankruptcy Procedure 9031

Of course, the Rules Enabling Act should cautiously promulgate new procedural rules and amendments to existing rules. The Rules Enabling Act process, inter alia, is charged with the duty and responsibility to improve the efficiency of the federal courts. For the reasons articulated in this article, a procedural rule authorizing the appointment of a special master in highly complex bankruptcy cases and proceedings should be promulgated, but actually utilized only in rare and exceptional bankruptcy cases and proceedings.

The Judicial Conference Advisory Committee on Bankruptcy Rules is respectfully requested to revisit and thereafter reconsider its prior views regarding the appointment of special masters in appropriate and rare bankruptcy cases and proceedings. The bankruptcy system and its users would greatly benefit by the promulgation of a new rule (i.e., a modified Rule 53) authorizing the district and bankruptcy courts to appoint a special master on a case-by-case and proceeding-by-proceeding basis.

***397** VIII. Conclusion

The United States bankruptcy courts have become the de facto commercial courts of America. Indeed, highly complex litigation occurs daily in the bankruptcy courts. With all due respect to the Judicial Conference Advisory Committee on Bankruptcy Rules, this valuable and effective case management tool (i.e., the appointment of a special master in appropriate and rare bankruptcy cases and proceedings) should be expressly authorized. The commercial realities of modern American bankruptcy law and practice and related cross-border insolvency disputes cry out for the utilization of a special master in appropriate and rare bankruptcy cases and proceedings.

To deprive the United States district and bankruptcy courts of this valuable case management tool will only continue to force litigants to absorb undue costs and delays in such bankruptcy cases and proceedings. Obviously, courts should not use a special master to abdicate judicial responsibilities. As noted earlier, exceptional circumstances must exist in an appropriate and rare bankruptcy case or proceeding to warrant the appointment of a special master. [FN198 ***398** Since the role of the special master is clearly distinguishable from the role of the trustee and chapter 11 examiner, the Federal Rules of Bankruptcy Procedure, pursuant to the Rules Enabling Act, should be amended to expressly allow for the appointment of a special master by district and bankruptcy courts in an appropriate and highly complex bankruptcy case or proceeding. By virtue of the 1984 restructuring of the bankruptcy court system, the bankruptcy court is now a statutory unit of the United States district court, and the bankruptcy judges serve as judicial officers of the district court. [FN199] The distinctive and clearly defined role of the adjudicators in the current bankruptcy system hardly resembles the former referee system. It is respectfully stated that the evolution of these roles now compels the current members of the Advisory Committee on Bankruptcy Rules to revisit and reconsider the current status of Rule 9031. The utility of special masters in a limited number of highly complex bankruptcy cases and proceedings certainly exists today and will exist in the future. It is an idea whose time has come.

Due to a procedural rule and an accompanying Advisory Committee note thereto, United States district and bankruptcy judges currently do not wield this valuable and pragmatic case managemen ***399** tool in any bankruptcy case or proceeding. regardless of the circumstances. [FN200] The bankruptcy courts in America handle millions of dollars in complex litigation daily [FN201] Tribunals, such as the United States bankruptcy and district courts, should be afforded the use of this equitable and uniquely valuable case management tool in an appropriate case or proceeding. These tribunals preside over highly complex and sometimes colossal commercial cases and proceedings involving both domestic and cross border insolvency disputes. [FN202] As stated, neutral third party expertise would aid the disposition of extraordinary bankruptcy cases and proceedings. [FN203]

For the reasons mentioned above, the current members of the United States Judicial Conference Advisory Committee on Bankruptcy Rules are respectfully urged to re-examine and reconsider its prior views and position on special masters. This article further encourages the Advisory Committee to thereafter recommend and transmit to the United States Judicial Conference Standing Committee on Rules of Practice and Procedure a proposal to amend the Federal Rules of Bankruptcy Procedure in order to accomplish the needed result (i.e., the promulgation of a modified Rule 53 for the utilization of special masters in exceptional and rare bankruptcy cases and proceedings). At the very least, the Rules Enabling Act process. via the relevant committees of the United States Judicial Conference, should solicit opinions and public comments from the bench and bar regarding this highly important issue.

Finally, the addition of this valuable case management tool will help foster the judicial goal of the bankruptcy system which is "to secure the expeditious and economical administration of every case under the Code and the just, speedy, and inexpensive determination of every proceeding therein." [FN204]

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[FN1]. At the outset, it is important to note that this article does not attempt to argue or even suggest that bankruptcy courts should possess broad discretion to routinely appoint special masters. Rather, this option should be available only in "rare and appropriate" cases and proceedings where extraordinary circumstances exist. See infra Part IV.

[FN2]. See infra part VII.

[FN3]. James S. DeGraw. Rule 53, Inherent Powers, and Institutional Reform· The Lack of Limits on Special Masters, 66 N.Y.U. L. Rev. 800 (1991).

[FN4]. Margaret G. Farrell, Coping with Scientific Evidence: The Use of Special Masters, 43 Emory L.J. 927 (1994)
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[FN5]. In re Peterson, 253 U.S. 300, 312-13 (1920); see also Kimberly v. Arms, 129 U.S. 512, 524-25 (1889) (citations omitted).

[FN6]. Margaret G. Farrell, The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts, 2-FALL Widener L. Symp. J. 235, 247 (1997).

[FN7]. Jerome I. Braun, Special Masters in Federal Court, 161 F.R.D. 211, 213 (1995); see also In re Peterson, 253 U.S. at 312; Kimberly, 129 U.S. at 524-25

[FN8]. Braun, supra note 7, at 213 (citing former Equity Rule 59): see also Matthews v. Weber, 423 U.S. 261, 274-75 (1976) (discussing the limitations placed upon the appointment of a special master); La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

[FN9]. Braun, supra note 7, at 214.

[FN10]. Margaret G. Farrell, The Role of Special Masters in Federal Litigation, C842 ALI-ABA 931, 947-51 (1993).

[FN11]. Id. at 937.

[FN12]. See, e.g., Farrell, supra note 6, at 264; Farrell, supra note 10, at 935.

[FN13]. 253 U.S. 300 (1920).

[FN14]. Farrell, supra note 10, at 937 (citing In re Peterson, 253 U.S. at 314).

[FN15]. Fed. R. Civ. P. 53.

[FN16]. Id.

[FN17]. Linda J. Silberman, Masters and Magistrates Part I: The English Model, 50 N.Y U. L. Rev. 1070 (1975).

[FN18]. See, e.g., Nat'l Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536 (9th Cir. 1987); Morgan v. Kerrigan, 530 F.2d 401, 425-27 (1st Cir. 1976); Alberti v. Klevenhagen, 660 F. Supp. 605 (S.D. Tex. 1987); Hart v. Cmty. Sch. Bd., 383 F Supp. 699 (E.D.N.Y. 1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291, 1313 (W.D.N.C 1969), vacated on other grounds, 431 F.2d 138 (4th Cir.), on remand, 318 F. Supp. 786 (1970), aff'd, 402 U.S. 1 (1971).

[FN19]. Curtis J. Berger, Away From the Court House and Into the Field: The Odyssey of a Special Master, 78 Colum. L. Rev. 707, 730-31 (1978) (involving the special master's contribution and the mechanics of developing complex remedies in matters where diverse interests are represented in extraordinary cases).

[FN20]. La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957) (finding that the factual conditions failed to merit the "exceptional conditions" requirement under Rule 53(b)).

[FN21]. Id.

[FN22]. 934 F.2d 1064, 1070 (9th Cir. 1991).

[FN23]. 94 F.R.D. 173 (E.D.N.Y. 1982).

[FN24]. No. 88 Civ. 7307, 1993 U.S. Dist. Lexis 2263, at *1 (S.D.N.Y. Feb. 26, 1993).

[FN25]. 117 F.R.D. 650 (C.D. Cal. 1987).

[FN26]. 147 F.3d 935 (D.C. Cir. 1998).

[FN27]. But see Farrell, supra note 6, at 281 (stating that the failure to employ a master to aid the parties' interpretation of the technological complexities "seems inconsistent with the statement in the Notes of the Advisory Committee on Rules relating to the 1983 amendments to Rule 53 . ." which authorizes such appointments when specialized expertise is desired or helpful to the parties); see also John R. Wilke, Microsoft Judge Names Mediator to Seek Accord, Wall St. J., Nov. 22, 1999, at A3 (ultimately the case received what some might call expert settlement guidance in the form of a mediator with the appointment of the highly skilled Chief Judge of the Seventh Circuit, the Honorable Richard A. Posner).

[FN28]. Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev. 394, 398 (1986); Patricia M. Wald, "Some Exceptional Condition"--The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b), 62 St. John's L. Rev. 405 (1988).

[FN29]. Fed. R. Bankr. P. 9031. The Advisory Committee note accompanying Rule 9031 states that the rule additionally precludes the appointment of special masters in "proceedings" under the Code.

[FN30]. See Former Bankr. Rule 513 entitled Special Masters (1979) (stating as follows: "If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply").

[FN31]. 4 Collier on Bankruptcy ae 513.1 (14th ed. 1978).

[FN32]. The term "Referee" served as the proper name for adjudicators of bankruptcy matters prior to 1973. In 1973, the Rules of Bankruptcy Procedure were first promulgated changing the title of "referee" to "United States bankruptcy judge." See Former Bankr. Rule 901(7) (1973).

[FN33]. 4 Collier on Bankruptcy, supra note 31, ae 513 1.

[FN34]. 28 U.S.C. §§ 151,152 (1994).

[FN35]. 4 Collier on Bankruptcy, supra note 31, ae 513.1.

[FN36]. 11 B.R. 294 (Bankr. N.D. Ohio 1981), rev'd. 23 B.R. 276, 279 (N.D. Ohio 1982).

[FN37]. Citibank, N.A. v. White Motor Corp. (In re White), 23 B.R. at 279 (reversing based upon the fact the bankruptcy court delegated a claim to a special master which the bankruptcy court lacked authority to entertain. However, the court stated: "This is not to suggest that a bankruptcy court has no power to appoint a Special Master In appropriate circumstances, perhaps it can. However, it cannot appoint a Master to resolve claims which the bankruptcy court itself lacks the authority to entertain.").

[FN38]. White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 265 (6th Cir. 1983).

[FN39]. See, e.g., id. (stating that in an effort to promote good bankruptcy administration the district court could appoint a magistrate judge as a special master but it should comply with Federal Rule of Civil Procedure 53); Pension Benefit Guar. v. Ouimet Corp., 630 F.2d 4, 8 n.11 (1st Cir. 1980) (stating the district court appointed the bankruptcy judge hearing the proceedings to serve as a master); Crateo, Inc v. Intermark, Inc., 536 F.2d 862-68 (9th Cir. 1976) (approving the reference to a special master based on the complexity of the case involving an involuntary bankruptcy petition filed against an allegedly insolvent company which had tangled financial affairs and a duplication of problems after purchasing two additional subsidiary corporations).

[FN40]. White, 704 F.2d at 265; Former Bankr. Rule 513.

[FN41]. See Fed. R. Bankr. P. 9031.

[FN42]. Id As noted and discussed infra, the words bankruptcy "cases" and "proceedings" are terms of art and should not be used synonymously or interchangeably. See, e.g., 28 U § 1334(a) ("cases") an § 1334 (b) ("proceedings") (1994).

[FN43]. Fed. R. Bankr. P. 9031.

[FN44]. Advisory Committee's note accompanying Fed. R. Bankr. P. 9031 (emphasis added).

[FN45]. Leonard L. Gumport, The Bankruptcy Examiner, 20 Cal. Bankr. J. 71, 141 (1992).

[FN46]. Id.

[FN47]. Fed. R. Bankr. P. 9031 and accompanying Advisory Committee note.

[FN48]. See Fed. R. Bankr. P. 1001 (stating that "(t)he Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code"); see also 28 U.S § 157(a) (1993) (establishing as the district court's authority to refer any or all title 11 cases and proceedings to the bankruptcy judges for the district; 28 U.S.C. 157(d) (1993) (emphasizing the district court's authority to withdraw (either mandatorily or discretionarily) a case or proceeding from the bankruptcy court; however, a special master would still not be authorized due to Federal Rule of Bankruptcy Procedure 9031, the Advisory Committee note accompanying Rule 9031, and Federal Rule of Civil Procedure 81(a)(1)).

[FN49]. Fed. R. Civ. P. 81(a)(1) (describing the scope and application of the Federal Rules of Civil Procedure and stating, in relevant part, as follows: "They (these rules) do not apply to proceedings in bankruptcy. . . .").

[FN50]. Clearly, Congress recognized the distinction between a case and proceeding as manifested by the numerous times the terms are appropriately used under the Code of Judiciary and Judicial Procedure. See, e.g., 28 U.S §§ 1334 (a)-(b),157(a),1408, 1409, 1412; 11 U.S.C § 307, and Fed. R. Bankr. P.1001; see also Kenan v. Fed. Deposit Ins. Corp. (In re George Rodman, Inc.), 33 B.R. 348, 349 (Bankr. W.D. Okla. 1983).

[FN51]. Blevins Elec. Inc. v. First Am. Nat'l Bank (In re Blevins Elec., Inc.) 185 B.R. 250, 253 (Bankr. E.D. Tenn. 1995); 995 Fifth Avenue Assocs., L.P. v. New York State Dept. of Taxation and Fin. (In re 955 Fifth Ave. Assocs., L.P.) 157 B.R. 942, 949-50 (Bankr. S.D.N.Y. 1993) (citing 5 Collier on Bankruptcy ae 1109.02 (15th ed. 1993)).

[FN52]. See Fed. R. Bankr. P. 7003 (incorporating Fed. R. Civ. P. 3), 2 Collier on Bankruptcy ae 301 03 (15th ed. 1994).

[FN53]. Blevins, 185 B.R. at 254 (emphasizing the language in the Advisory Committee note to former Bankruptcy Rule 101 which stated:

A proceeding initiated by a petition for an adjudication under the Bankruptcy Act is designated a "bankruptcy case" for the purpose of these rules. The term embraces all controversies determinable by the court of bankruptcy and all matters of administration arising during the pendency of the case. . . . The word "proceeding" as used in these rules generally refers to a litigated matter arising within a case during the course of administration of an estate (quoting 2 Collier on Bankruptcy ae 301.03 (15th ed. 1994)) (citing 12 Collier on Bankruptcy ae 101.101 (14th ed. 1978)).

[FN54]. 5 Collier on Bankruptcy ae 1109.02 (15th ed. 1993).

[FN55]. Fuel Oil and Supply Terminaling v. Gulf Oil Corp., 762 F.2d 1283, 1286-87 (5th Cir. 1985); see also 28 U.S.C. §§ 1334(a)-(b), 157(a)-(b) and (d), 1408, 1409, 1412; 11 U.S.C § 307 (for additional distinctions between "cases" and "proceedings"); cf. 28 U.S.C. S1471(a)- (b) (repealed)

[FN56]. See infra Part VII.

[FN57]. Fed. R. Bankr. P. 9001(4).

[FN58]. Id.

[FN59]. See 10 Collier on Bankruptcy ae 9031.01 (15th ed. 1997).

[FN60]. See J. Adriance Bush, The National Bankruptcy Act of 18 § 1(20) (1st ed. 1899); former Bankr. Rule 901.

[FN61]. See J. Adriance Bush, supra note 60, § 23a; 11 U.S.C. § 46(a).

[FN62]. Fed. R. Bankr. P. 9031 (disallowing Fed. R. Civ. P. 53 to apply in cases under the Code).

[FN63]. William L. Norton, Jr., ed., Norton Bankruptcy Law and Practice xxii-xxiv (2d ed. 1999).

[FN64]. See former Bankr. Rule 513; former Bankr. Rule 102(b) (stating the authority for district courts to remove a case from the bankruptcy court).

[FN65]. Norton, supra note 63.

[FN66]. Braun, supra note 7, at 214.

[FN67]. Reilly v. United States, 863 F.2d 149, 157 (1st Cir. 1988).

[FN68]. Johnathan S. Liebowitz, Special Masters: An Alternative Within The Court System, 48 Disp. Resol. J. 64 (1993); see, e.g, Reilly, 863 F.2d at 158 (adjudicating a medical malpractice case under the Federal Tort Claims Act, the court validated the appointment of a technical advisor (special master) to compute future earnings estimates over a 70 year time period).

[FN69]. Fed. R. Civ. P. 53(b).

[FN70]. Id.

[FN71]. David Kaufman, Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy, 35 Stan. L. Rev. 153, 173 (1982).

[FN72]. Id. at 174.

[FN73]. Id. at 173.

[FN74]. Id.

[FN75]. Id. (noting in this article that any "abbreviated procedure"-- employed and utilized after a district or bankruptcy court clearly determines that the appointment of a special master would be an efficient case management tool--would not be contrary to due process procedural protections just because it significantly deviated from traditional procedures used by bankruptcy courts). Constitutional issues may exist, however, they are beyond the scope of this article.

[FN76]. Fed. R. Bankr. P. 1001.

[FN77]. Trout v. Ball, 705 F. Supp. 705, 707 (D.D.C 1989) (involving an employment discrimination lawsuit where the special master appointment was manifestly appropriate in order to properly make adjustments for lost promotions and past wages for the litigants).

[FN78]. Id.; see also McLendon v. Cont'l, 749 F. Supp. 582 (D.N.J. 1989), aff'd sub nom. McLendon v. Cont'l Can Co., 908 F.2d 1171 (3d Cir. 1990) (involving a special master calculating damages for firings in violation of ERISA).

[FN79]. In re Activision Sec. Litig., 723 F. Supp. 1373, 1379 (N.D. Cal. 1989).

[FN80]. Danville Tobacco Ass'n v. Bryant-Buckner Assoc., Inc., 333 F.2d 202, 208-09 (4th Cir. 1964) (allowing the utilization of a tobacco market analyst in an antitrust lawsuit to determine the validity of warehouse time for commodities).

[FN81]. Id. at 209.

[FN82]. Id.

[FN83]. See Nat'l Bankr. Rev. Comm'n., Bankruptcy: The Next Twenty Years, at 722 & nn.1738 & 1739 (1997).

[FN84]. See, e.g., Curtis v. Loether, 415 U.S. 189, 195 (7th Cir. 1974); Bank of Marin v. England Trustee in Bankr., 385 U.S. 99, 103 (9th Cir. 1966); Honorable Marcia S. Krieger, The Bankruptcy Court Is a Court of Equity: What Does That Mean?, 50 S.C. L. Rev. 275 (1998)

[FN85]. Farrell, supra note 10, at 947.

[FN86]. See Paul R. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters 305 (1983); Linda J. Silberman, Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure, 137 U. Pa. L. Rev 2131, 2146 (1989).

[FN87]. Manual for Complex Litigation Third § 21.52 (1995).

[FN88]. Ohio Asbestos Litigation: Case Management Plan and Case Evaluation and Appointment Process Order No. 6 (Dec. 16, 1983).

[FN89]. Id.

[FN90]. See In re United States Dep't. of Defense, 848 F.2d 232, 239 (D.C. Cir 1988); see also Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 288-89 (E.D. Tex. 1985).

[FN91]. Brazil, supra note 28, at 403.

[FN92]. Id.

[FN93]. Id.

[FN94]. Id. at 404.

[FN95]. Id. at 403-04.

[FN96]. 244 B.R. 634 (Bankr. E.D. Mich. 1999) (involving classification of unsecured nonpriority claims and complex issues of tort recovery in domestic and foreign forums in a case involving Chapter 11 of the Bankruptcy Code).

[FN97]. See id.

[FN98]. Liebowitz, supra note 68, at 67.

[FN99]. Silberman, supra note 86, at 2159.

[FN100]. Farrell, supra note 10, at 950-51.

[FN101]. Brazil, supra note 28, at 411.

[FN102]. Braun, supra note 7, at 222.

[FN103]. Brazil, supra note 28, at 411.

[FN104]. Id.

[FN105]. Id.

[FN106]. Id.

[FN107]. Id.

[FN108]. Liebowitz, supra note 68, at 67.

[FN109]. Id.; see David I. Levine, Calculating Fees of Special Masters, 37 Hastings L.J. 141 (1985) (offering an analysis and study of the fee and compensation techniques of special masters in complex cases).

[FN110]. Gregory L. Wilmes, Chief Judge Paul A. Magnuson, 45 Fed. Law. 18 (1998) (noting the experience of Chief Judge Magnuson considering that he has presided over numerous large class actions, multidistrict litigation panel cases, and other complex civil actions as well as serving on and chairing several Judicial Conference committees).

[FN111]. See infra Part IV.C. (discussing a modified Rule 53). What is meant by the use of the phrase "modified Rule 53" is that any newly promulgated procedural bankruptcy rule authorizing the appointment of a special master by the district and bankruptcy courts would not adopt Federal Rule of Civil Procedure 53 in its entirety. The power and scope of appointment would clearly differ in a bankruptcy case or proceeding. For example, it is not contemplated under such a modified Rule 53 that a magistrate judge would be appointed in a bankruptcy case or proceeding.

[FN112]. Advisory Committee on Bankruptcy Rules March 21-22, 1996 Meeting Agenda Materials, Introductory Items, p. 13 (Minutes of Sept. 7-8, 1995).

[FN113]. See supra note 32; Former Bankr. Rule 901(7) (1973); H.R. Rep. No. 95-595, at 8 (1977) (regarding the semantics and misnomer of bankruptcy officials and the idea that a referee was to be considered more of a judicial officer).

[FN114]. Melodie Freeman-Burney, Jurisdiction Under the Bankruptcy Amendments of 1984: Summing Up the Factors, 22 Tulsa L.J. 167, 171 (1986); see also Chandler Act of 1938, ch. 575, 52 Stat 840 (1938).

[FN115]. Freeman-Burney, supra note 114, at 171.

[FN116]. Id.; H.R. Rep. No. 95-595, at 7-9 (1977); see also Donald A. Brittenham, Jr., The Pros and Cons Behind the First Circuit's Decision to Establish Bankruptcy Appellate Panels and the Growing Question of Whether the Panels Will Last, 32 New Eng. L. Rev. 215, 218-19 (1997).

[FN117]. Brittenham, supra note 116, at 218-19.

[FN118]. Compare Fed. R. Bankr. P. 9003(a), entitled "Prohibition of Ex Parte Contacts."

[FN119]. See Brittenham, supra note 116, at 218-19.

[FN120]. See id. at 218.

[FN121]. See Freeman-Barney, supra note 114, at 171.

[FN122]. Silberman, supra note 86, at 2145-46

[FN123]. Id.

[FN124]. See Kenneth R. Feinberg, Creative Use of ADR: The Court- Appointed Special Settlement Master, 59 Alb. L. Rev. 881, 884-85 (1996).

[FN125]. Id. at 887.

[FN126]. Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 82-83 (1986) (articulating the reliability and utility that all but one of the special master's decisions were confirmed and even the unconfirmed decision was simply modified).

[FN127]. In re "Agent Orange" Prod. Liab. Litig., 94 F.R.D. 173, 174 (E.D.N.Y. 1982); Avco Corp. v. Am. Tel. & Tel. Co., 68 F.R.D. 532, 534 (S.D. Ohio 1975); Gautreaux v. Chicago Hous. Auth., 384 F. Supp. 37, 38 (N.D. Ill. 1974).

[FN128]. Fed. R. Bankr. P. 1001.

[FN129]. Charles J. Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 40 (1995).

[FN130]. 1 Norton Bankruptcy Law and Practice 2d S23.2 (1994).

[FN131]. See supra text accompanying note 111.

[FN132]. See 11 U S.C § 704 (1994) (setting out the duties of a trustee), see also 11 U.S §§ 1106, 1202, and 1302 (1994).

[FN133]. 28 U.S.C. § 586(a) (1994).

[FN134]. 11 U.S.C. § 704 (setting out the duties of the trustee); see also 11 U.S.C. §§ 1106, 1202, and 1302.

[FN135]. 11 U.S.C.S 323 (1994) (setting forth the role and capacity of the trustee).

[FN136]. Id. § 704 (setting out the duties of the trustee); see also 11 U.S C. §§ 1106, 1202, and 1302.

[FN137]. 11 U.S.C. § 1106(a)(1).

[FN138]. See, e.g., In re Sharon Steel Corp., 86 B.R. 455 (Bankr. W.D. Pa. 1988); In re Main Line Motors, Inc., 9 B.R. 782 (Bankr. E.D. Pa. 1981); In re L.S. Good & Co., 8 B.R. 312 (Bankr. N.D. W. Va. 1980).

[FN139]. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352-56 (1985).

[FN140]. In re Lockard, 884 F.2d 1171, 1178 (9th Cir. 1989); In re Jet Fla. Sys., Inc , 841 F.2d 1082, 1083 (11th Cir. 1988); In re Dow Corning Corp., 237 B.R. 380, 393 (Bankr. E.D. Mich 1999).

[FN141]. 11 U.S.C § 323(b) (1994); see, e.g.Commodity Futures Trading Comm'n, 471 U.S. at 352 (stating that "(t)he powers and duties of a bankruptcy trustee are extensive.").

[FN142]. 11 U.S.C. § 323(b); Fed. R Bankr. P. 6009.

[FN143]. See supra note 112

[FN144]. 11 U.S.C. § 1104 (1994).

[FN145]. 11 U.S.C. § 1104(b).

[FN146]. Id. § 1104(c).

[FN147]. Gumport, supra note 45, at 99-100.

[FN148]. 11 U.S.C. § 1104.

[FN149]. See, e.g., In re Interco, Inc., 127 B.R. 633, 638 (Bankr. E.D. Mo. 1991); In re Baldwin-United Corp., 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985).

[FN150]. Compare 11 U.S C § 70 (1994) with 11 U.S.C § 1106(a)(1) (1994). Section 704 of the Code is entitled "Duties of trustee" and provides as follows:

The trustee shall-

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest; (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

Section 1106(a)(1) of the Code is entitled "Duties of trustee and examiner" and provides as follows.

(a) A trustee shall-

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7). 704(8). and 704(9), of this title;

[FN151]. 11 U.S.C. §§ 343 (1994). 1106(a)(3) and (4)(A)-(B).

[FN152]. Id. § 1109(b) (1994). But see 2 Collier on Bankruptcy ae 343.02 (15th ed. 1997) (stating that it "would seem obvious" that parties entitled to conduct examination unc § 343 would each be parties in interest for the purpose of conducting an examination under Federal Rule of Bankruptcy Procedure 2004).

[FN153]. Fed. R. Civ. P. 53(a) (emphasis added).

[FN154]. Gumport, supra note 45, at 141.

[FN155]. See Chandler Act of 1938 §§ 117, 167-68; 52 Stat. 885, 890, repealed by Bankruptcy Reform Act of 1978; 11 U.S.C. §§ 517, 567-68 (West 1970) (repealed).

[FN156] 11 U.S.C. § 1106(a)(3).

[FN157]. Id. §§ 1106, 1107.

[FN158]. Id. § 1106(a)(4)(A).

[FN159]. Id. § 1106(a)(4)(B).

[FN160]. Gumport, supra note 45, at 79, 141 n.49 and 425; see also In re Utils. Power & Light Corp., 90 F.2d 798, 800 (7th Cir. 1937) (appointing an "investigator" based upon inherent power and judicial necessity, the district judge expressly declined to utilize a special master).

[FN161]. Gumport, supra note 45 at 141.

[FN162]. See Bankr. Ct. Dec., Weekly News & Comment, Vol. 35, Issue 2, p. 28 (Nov. 16, 1999).

[FN163]. Id. (citing the practices and case management tools employed in In re Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994) which seem to smear the statutorily defined role of an examiner by assigning the examiner duties that strongly resemble the suggested role of a special master despite the limitation of the examiner's role as defined under S1106(b)); see also In re Leslie Fay Co., 207 B R. 764, 769 (Bankr S.D.N.Y. 1997).

[FN164]. The Advisory Committee on Bankruptcy Rules, Minutes from the September 26-27, 1996 meeting.

[FN165]. Id.

[FN166]. Id.

[FN167]. 28 U.S.C. § 157(a) (1994).

[FN168]. See Bankruptcy Judges Advisory Group, minutes from the September 22-23, 1999 meeting.

[FN169]. See 28 U.S.C. § 157(c)(1) (1994); Fed. R. Bankr. P. 9033(d).

[FN170]. Liebowitz, supra note 68, at 67.

[FN171]. Levine, supra note 109, at 141.

[FN172]. Farrell, supra note 6, at 274-75.

[FN173]. Id. at 275; see also In re A.H. Robins Co., 880 F.2d 709, 725 (4th Cir. 1989); Burroughs v. N. Telecom., Inc. (In re Repetitive Stress Injury Cases), 142 F R.D. 584, 585-87 (E D.N.Y. 1992) (suggesting that special masters, as well as other procedural devices, curtail transaction costs and control protracted litigation).

[FN174]. Levine, supra note 109, at 199-200.

[FN175]. Id. at 200 (providing an in-depth analysis of how special masters are compensated).

[FN176]. 11 U.S.C. §§ 327 (1994), 503(b) (1994).

[FN177]. Id. § 327(a).

[FN178]. 3 Collier on Bankruptcy ae 327.02(5)(a) (15th ed. 1997). But see In re Seatrain Lines, Inc., 13 B.R. 980, 981 (S.D.N.Y. 1981) (recognizing two maritime engineers as consultants rather than "professional persons" under 11 U.S.C. § 327(a)).

[FN179]. 11 U.S.C. § 327(a).

[FN180]. Id. § 330 (a)(1) (1994).

[FN181]. See, e.g., In re Bibo, Inc., 76 F.3d 256, 258 (9th Cir. 1996); In re Mother Hubbard, Inc., 152 B.R. 189, 197 (Bankr. W.D. Mich. 1993); In re Public Serv Co. of N.H., 99 B.R. 177, 182 (Bankr. N.H. 1989); In re UNR

Indust., Inc., 72 B.R. 789, 794-95 (Bankr. N.D. Ill. 1987); In re Landscaping Servs., Inc. 39 B.R. 588, 590-91 (Bankr. E.D.N.C. 1984).

[FN182]. See, e.g., In re Maruko, Inc., 160 B.R. 633 (Bankr. S.D. Cal. 1993) (utilizing Federal Rule of Evidence 706(a) and 11 U.S.C § 105(a), the court, sua sponte, appointed a "Fee Examiner" to provide invaluable assistance reconciling, reviewing, and summarizing multiple fee applications in a mega-bankruptcy case).

[FN183]. 11 U.S.C. §§ 330, 331 (1994); Fed. R. Bankr. P. 2016.

[FN184] 11 U.S.C. § 503 (1994).

[FN185]. 11 U.S.C. § 503(b); see also 11 U.S.C.SS 507(a)(1) (1994), 1129 (a)(9)(A)(1994)

[FN186]. 11 U.S.C. § 503 (b)(2).

[FN187]. See 11 U.S.C. § 102(3) (1994).

[FN188]. 28 U.S.C §§ 157(b)(1)-(b)(2)(a) (1994); In re Drexel Burnham Lambert Group, Inc., 133 B.R. 13, 15 (Bankr. S.D.N.Y. 1991) (stating that review of professional fees is mandated under § 330).

[FN189]. Fed. R. Bankr. P. 9002 ("The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context . . . .").

[FN190]. Fed. R. Bankr. P. 9002(1).

[FN191]. Fed. R. Civ. P. 53(a).

[FN192]. Fed R. Bankr. P. 9031.

[FN193]. 28 U.S.C. § 2075 (1994).

[FN194]. Id.

[FN195]. Id. § 2074(a) (1994).

[FN196]. Id. § 2073(d) (1994).

[FN197]. Paul D. Carrington, Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2077 (1989); cf. James E. Bailey, III, Legislating Procedure in the Bankruptcy System: A Level Playing Field or Slippery Slope?, 24 Mem. St U. L. Rev. 717, 719 (1994) (discussing Fed. R. Bankr. P. 7004(h) enacted as a result of special interest procedural legislation).

[FN198]. It is noted that H.R. 1752, cited as the "Federal Courts Improvement Act of 2000," introduced in the House of Representatives on May 22, 2000, is silent on the matter of special masters; however, it is observed that on January 19, 1999, S. 248, cited as the "Judicial Improvement Act of 1999," was introduced in the Senate in the 1st Session of the 106th Congress to modify the procedures of the federal courts in certain matters Relevant here is section 3(b) of the pending S. 248, entitled Special Masters, addressing proposed legislation applicable in any civil action in a federal court utilizing special masters. Specifically, section 3(b) of S.248 provides, in relevant part, as follows:

(b) SPECIAL MASTERS.-

(1) IN GENERAL -

(A) APPOINTMENT.-In any civil action in a Federal court, the Federal court may appoint a special master who shall be disinterested and objective.

(B) REMEDIAL PHASE.-The court shall appoint a special master under this subsection only during the remedial phase of the action and only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) APPOINTMENT.-

(A) SUBMISSION OF LIST.-If the court determines that appointment of a special master is necessary, the court shall request that the defendant (or group of defendants) and the plaintiff (or group of plaintiffs) each submit a list of not more than 5 persons to serve as a special master.

(B) REMOVAL.-Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) SELECTION.-The court shall select the special master from the remaining names on the lists after the operation of subparagraph (B).

(3) COMPENSATION.-The compensation to be paid to a special master shall be based on an hourly rate not greater than the hourly rate established under Section 3006A of Title 18, United States Code, for payment of court-appointed counsel, and costs reasonably incurred by the special master Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(4) REGULAR REVIEW OF APPOINTMENT.-The court shall review the appointment of the special master every 6 months to determine whether the services of the special master continued (sic) to be justified under the standards of paragraph (1).

(5) LIMITATIONS ON POWERS AND DUTIES.-A special master appointed under this subsection-

(A) shall not make any finding or communication ex parte; and

(B) may be removed by the judge at any time, but shall be relieved of the appointment upon termination of relief.

[FN199]. See 28 U.S.C. §§ 151, 152 (1994).

[FN200]. Fed. R. Bankr. P. 9031.

[FN201]. See Nat'l Bankr. Rev. Comm'n., Bankruptcy: The Next Twenty Years, at 722, nn.1738-39 (1997).

[FN202]. Id.

[FN203]. Gumport, supra note 45, at 141.

[FN204]. Fed. R. Bankr. P. 1001 and the accompanying Advisory Committee note thereto (derived from former Bankr. Rule 903 which emphasizes the Code's objective); see also Katchen v. Landy, 382 U.S. 323, 328 (1966) ("chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period").

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Article

*29 SPECIAL MASTERS IN BANKRUPTCY: THE CASE AGAINST BANKRUPTCY RULE 9031

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I. Introduction

Although American bankruptcy courts hear hundreds of individual, partnership, and corporate bankruptcy cases every year involving complex environmental, tax, tort, and contract issues, bankruptcy courts and the parties before them may not benefit from the assistance of special masters. Rule 9031 of the Federal Rules of Bankruptcy Procedure [FN1] makes Rule 53 of the Federal Rules of Civil Procedure ("FRCP") [FN2] governing the appointment and duties of the special master inapplicable in bankruptcy cases. While many courts and commentators recognize that federal courts have inherent authority to appoint special masters, [FN3] bankruptcy courts have not relied upon this inherent power freely in light of Rule 9031, which could be construed as so restricting the bankruptcy court's authority to appoint special masters as to foreclose the possibility of relying on any other power completely. In this Article, the Author attempts to demonstrate that bankruptcy courts regularly hear cases in which the court and the parties could benefit from the services of a special master and that bankruptcy courts are hampered in their ability to handle cases in the most just and efficient manner possible because of their inability to appoint special masters. Part II of this Article examines the role of the special master in the federal courts generally. It examines the scope of tasks traditionally performed by special masters, as well as the expanded role that special masters have played in recent years as the courts increasingly have relied on special masters in case management. Part III examines the nature of complex bankruptcy cases and the role that special masters could play in these cases. Part IV provides background ***30** on the history and rationale for Rule 9031. Part V explores the roles of the examiner and trustee in bankruptcy, and compares those roles with the role of the special master. Part VI discusses the concept of the federal courts' inherent authority to appoint persons to assist the court in performing specific, well-delineated judicial tasks in furtherance of the efficient administration of cases.

II. Special Masters in Federal Courts Generally

A. A Brief History

The practice of appointing special masters to provide assistance to courts is a long and well-established one. Some historians believe that the practice of appointing persons to assist the court, through a formal process, was first established in early Roman law through the use of the judex--a private person appointed by a praetor, with the consent of the parties to an action, to hear and decide the case. [FN4] Special masters were used in England at least as far back as the seventeenth century (introduced in the British legal system by the Normans, some historians believe), although the actual benefit to the court, and, especially to the parties, was questionable at that time. [FN5] The practice of appointing special masters to assist the court continued in America beginning at least as early as the eighteenth century. [FN6] Not long thereafter, the federal judiciary began to ***31** special masters on a regular basis to handle discrete aspects of cases, such as taking and reporting testimony, [FN7] determining questions at issue where facts and evidence were complex and voluminous, [FN8] and auditing and stating accounts. [FN9] Early on, federal courts held that they had the authority to appoint special masters through their "inherent power to provide themselves with appropriate instruments required for the performance of their duties." [FN10] Courts pointed to this inherent power as their authority to appoint special masters even over the objections of the parties. [FN11] Many courts held, however, that this inherent power was bound by limitations imposed through Article III of the United States Constitution [FN12] and determined that it was inappropriate to refer to the special master matters that were determinative of a "fundamental issue of liability" because the special masters do not meet the requirements imposed

by Article III. [FN13] As a result, in the absence of the full consent of all of the parties, the most widely accepted practice was to refer matters to the special master that were narrow, well-defined, and specific. [FN14]

***32** B. Current Use of Special Masters

As a part of the 1938 enactment of the FRCP, Rule 53(b) specifically authorized the appointment of special masters. [FN15] FRCP 53(b) was drafted to follow the basic practices and guidelines of the earlier Equity Rules [FN16] and to clarify certain of those practices. Like the Equity Rules, FRCP 53(b) contemplates specific and well-defined duties for the special master in the federal court system. Although some courts have expanded the role of the special master in a manner that has generated some controversy [FN17] and have justified the appointment of special masters for controversial reasons, [FN18] there remain some clear-cut and uncontroversial roles for special masters. These roles involve duties, such as accounting and computation, determining relevant issues under circumstances where the evidence is voluminous, [FN19] and advising the court on severable issues that are highly technical in nature. [FN20] The appointment of special masters to perform these duties is seldom questioned by the parties, courts, or commentators. These tasks and duties assigned to and performed by special masters are generally held to be invaluable aids to the federal courts. In complex litigation, where there are often hundreds, and sometimes thousands, ***33** of claims in a single case, special masters have been assigned to assist the court in performing a variety of discrete functions. [FN21] In complex cases, district court judges often appoint special masters to summarize and evaluate claims, and to develop and implement case management and evaluation plans. [FN22] Two frequently cited, complex cases in which special masters were appointed to evaluate claims and develop case management plans are the Alabama DDT case [FN23] and the Ohio asbestos case. [FN24] In these cases, the special masters are credited with developing innovative plans and data collection systems that greatly aided the courts in streamlining the cases and bringing about their resolution. [FN25] The Alabama DDT and Ohio asbestos cases involved an extraordinary amount of evidence and claims, and, for that reason, may be viewed as unusual cases. But there are other complex litigation cases, without the extraordinary volumes of evidence and claims found in the Alabama DDT and the Ohio asbestos cases, in which special masters have been used quite effectively. Special masters were appointed, in these more commonplace c ***34** to supervise discovery depositions, evaluate services, conduct surveys, receive confidential and privileged documents, and review highly technical documents. [FN26]

In recent years, judges and lawyers have given increased attention to active judicial case management, including devices such as pretrial scheduling, and settlement conferences; discovery limits and deadlines; innovative methods of hearing and disposing of motions; and case monitoring. Judicial intervention through these case management devices reduces both the duration and expense of litigation. Costs are reduced when judicial management causes settlement of a case at an earlier stage of the process--thus eliminating the transaction costs of motions and discovery that otherwise might have occurred. Costs and duration are also reduced when pretrial conferences succeed in refining issues, which, in turn, may reduce the number and extent of motions and discovery. [FN27]

***35** Special masters have come to represent an important element in the use of these case management devices and in the overall search for ways of bringing cases to a just and acceptable end as quickly as possible. [FN28] Special masters have been important to the courts, particularly in settlement discussions, because of the more informal nature of the role of the special master. [FN29] Courts also have begun to appoint special masters with increasing frequency at the pretrial stage to facilitate settlements by delegating some tasks to the special master to minimize direct judicial involvement in settlement efforts early on and to avoid the appearance of bias or prejudgment. [FN30] Effective and efficient case management requires flexibility. [FN31] Lawyers and judges have come to accept tha ***36** differences in complexity and subject matter of lawsuits present the need for different types of case management practices The appointment of special masters is one of the case management practices frequently employed by the courts because it has proven to be particularly effective and efficient.

III. Potential Use of Special Masters in Bankruptcy Cases

In bankruptcy cases requiring the estimation of claims, computation of damages, valuation hearings, and, in cases of corporate debtors, highly technical companies, the appointment of a special master could prove to be particularly

beneficial to the bankruptcy court. Often, a large, complex, corporate Chapter 11 [FN32] case with numerous claimants [FN33] requires estimation of claims, computation of damages, and valuation hearings. The bankruptcy court is required to estimate any unliquidated or contingent claim, the "fixing or liquidation of which . . would unduly delay the closing of the case." [FN34] Where there are numerous claims of this type, a special master could be appointed by the bankruptcy court to review the potential claims and to develop a method or propose a formula for estimating the claims in question. [FN35] Particularly in cases where the debtor *37 involved in highly technical areas, the appointment of a special master with specific expertise could prove to be an invaluable service to the court and could expedite matters considerably.

In In re White Motor Credit Corp , [FN36] the bankruptcy court, presiding over a Chapter 11 case involving a corporation and five of its affiliates in which there were 160 products liability suits pending in state and federal courts across the country, with the potential for the existence of many more unfiled suits, proposed the appointment of a special master for just that purpose. [FN37] The court proposed appointing the special master to assist it in developing a program for resolving the 160 pending product liability cases and for identifying and resolving the potential unfiled product liability cases, and to "conduct hearings on non-settled claims." [FN38] The court cited as reasons for the use of the special master: (1) the amount of time that it was already spending on this case on a daily basis; (2) the fact that travel to the residences of the parties and the witnesses may be required; and (3) the inappropriate use of the court's time in addressing what would be "'matters of account and . . . difficult computation of damages.'" [FN39] These are the same reasons why district courts appoint special masters, and they are the same tasks that special masters appointed by the district courts perform. [FN40] Ultimately, the bankruptcy court was unable to appoint a special master in this case--not because the services of a special master were not warranted--but due to jurisdictional issues. [FN41]

The only case in which a bankruptcy court successfully appointed a special master is a case in a Puerto Rican bankruptcy court, which involved the reorganization of a broadcasting company. [FN42] Upon the petition of the creditors' committee, the bankruptcy court appointed a special master for the express purpose of negotiating and conducting the sale of two television stations. [FN43] Th *38 sale of this kind of asset requires special knowledge and expertise, and the court saw the need for the assistance of an individual with special knowledge in this area. The court did not give the special master the final decision in this matter; rather, it retained the power to make the final decision regarding whether to allow the sale to go forward, thus maintaining the special master's duty as a specific, discrete one--not one that was case determinative. [FN44] The order appointing the special master was appealed by the losing bidder, the debtor, but the appeal was unsuccessful because both the district court and the court of appeals held that the order was not a final one--thus, it could not be appealed unless an applicable exception existed (and the court of appeals held that no such exception applied in this case). [FN45] This case stands alone among reported bankruptcy cases in which a bankruptcy judge appointed a special master and in which the special master actually performed the designated services.

In many districts, the most frequent need for a special master in a bankruptcy case is in the self-employed, small-business Chapter 13 cases [FN46] in which there is reason to believe that greater assets and income exist than noted in the schedules, but where the debtor's records are in a chaotic state, and require extensive effort to track down and sort through to verify the accuracy of the bankruptcy schedules. This assistance could be very helpful to the creditors and to the court, but it would not be an efficient use of the court's time. The standing Chapter 13 trustees [FN47] are unable to devote the time that would be required to fulfill this task because of the sheer volume of Chapter 13 cases in many districts. [FN48] As a result, the potential benefit to creditors, in many of these cases, would merit the appointment of a special master

In Chapter 11 cases, there are frequent motions to modify the automatic stay [FN49] in which the court must determine the value of the property at the center of the controversy in order to decide if the automatic stay should be modified. *39 Often, both the creditor and the debtor present appraisals of the property, but the court must reach an independent decision as to the actual value of the property for purposes of deciding whether the creditor's motion to modify the automatic stay should be granted. Also, in Chapter 11 cases, the court must determine whether the plan of reorganization is feasible. [FN50] Whether the plan is feasible or not depends, in large part, on financial information regarding the debtor and whether the data demonstrate, inter alia, that the debtor's capital structure and earning

power are adequate to support the plan of reorganization. [FN51] Creditors who object to the plan of reorganization may present data to dispute the debtor's projections. The court must analyze all of the information in order to make an independent determination regarding the feasibility of the plan of reorganization. In both instances, a special master could provide valuable assistance to the court in analyzing the various appraisals and financial data provided by the debtor and creditors.

Among the multitude of bankruptcy cases filed annually, [FN52] there are many cases that require specific and easily delineated tasks, such as the estimation of claims, [FN53] computation of damages, and analysis and assessment of appraisals and ***40** financial data. These kinds of tasks make the appointment of a special master a practical and desirable addition to the tools available to assist the district court and bankruptcy judge in bankruptcy cases Moreover, these tasks involve the kind of services that masters historically have performed. [FN54]

IV Special Masters Prohibited in Bankruptcy

A. Source of the Prohibition

Although there are many kinds of proceedings in which a bankruptcy court may benefit from the services of a special master, bankruptcy courts are not authorized to appoint special masters at this time Because of a bankruptcy rule that expressly prohibits the appointment of a special master in bankruptcy cases, special masters may not be appointed by bankruptcy judges. [FN55] The Bankruptcy Code provides no statutory prohibition against the appointment of special masters; the only prohibition against the appointment of a special master in bankruptcy cases is set forth in a procedural rule that states: "Masters Not Authorized: Rule 53 F.R.Civ.P. does not apply in cases under the Code." [FN56]

This procedural rule, Bankruptcy Rule 9031, is a single, simple sentence providing neither guidance nor elucidation. [FN57] A Committee Note, also a single, simple sentence, follows the rule, stating: "Committee Note: This rule precludes the appointment of masters in cases and proceedings under the Code." [FN58] The note only adds the word "proceedings" to the word "cases" in its "discussion" of the Bankruptcy Rule that makes FRCP 53 of the FRCP inapplicable under the Code. [FN59] This single-sentence rule and the lack of a true explanation or discussion in the Committee Note calls into question the authority of even the district court to appoint a special master in a bankruptcy case. [FN60] The rule is not limited in its application to bankruptcy cases that are before the ***41** bankruptcy court. [FN61] Rather, it is apparently applicable to all courts hearing a bankruptcy case, including the district court. [FN62]

The only other published and official explanation for Rule 9031 comes from the Advisory Committee on Bankruptcy Rules' preface to the then-proposed Rules of Bankruptcy Procedure in which the Committee provided discussion of each of the proposed rules. [FN63] In its discussion of proposed Rule 9031, the Advisory Committee reviewed former Bankruptcy Rule 513, [FN64] which made FRCP 53 applicable in bankruptcy cases, and explained: "There does not appear to be any need for the appointment of special masters in bankruptcy cases ***42** by bankruptcy judges. The Advisory Committee, therefore, has decided that former Rule 513 not be continued in the rules and that Rule 53 F. R. Civ. P not be made applicable " [FN65] The Advisory Committee has given no further explanation for its decision that there no longer would be a need for the appointment of special masters in bankruptcy cases. [FN66] Given the language of Rule 9031, [FN67] making FRCP 53 inapplicable in all bankruptcy cases, no judge, whether of the district court or bankruptcy court, is authorized to appoint a special master. This kind of prohibition did not extend to district court judges under the Bankruptcy Act. [FN68] It is difficult to believe that this was the intended result of the rule, but it is the necessary result when the clear and unambiguous language of the rule is applied as written.

B. Evolution of the Bankruptcy Rules

Having a grasp of the history of the Bankruptcy Rules is helpful in understanding the absence of a more complete discussion in the Committee Notes [FN69] and in understanding the Committee's failure to recognize that the rule is broad enough to prevent district court judges from exercising what has come to be considered by many as an inherent

power. [FN70] The concept of having a formal, separately published set of rules to govern procedure in the bankruptcy courts is a relatively recent one [FN71] Until 1976, when the final rules of the initial set of procedural rules were promulgated by the Supreme Court and became effective, [FN72] the Bankruptcy Act of 1898 [FN73] contained all of the procedural, as we ***43** as the substantive provisions, of bankruptcy law [FN74] Prior to that time, experience in drafting separate procedural rules for bankruptcy was extremely limited. [FN75]

In 1964, Congress granted bankruptcy rulemaking authority to the Supreme Court. [FN76] For the first time, it was possible to draft a complete set of rules to provide for all procedural matters that may arise in bankruptcy cases. The Advisory Committee charged with drafting the rules decided to approach this awesome task chapter by chapter [FN77] As draft rules were completed by the Committee, they were disseminated to the bench and bar for comment. Finally, in April of 1976, after many years of tedious and faithful work by the Committee, the final set of rules were promulgated. [FN78]

The enactment of the Bankruptcy Code, [FN79] with its extensive changes to the bankruptcy laws, made revisions to the rules an absolute necessity. The Code was enacted in 1978 with an effective date of October 1, 1979, but it was not until January 1, 1979, that a new Advisory Committee began its work on the new set of rules. This gave the Advisory Committee a mere nine months to draft a new set of rules to complement extensively modified bankruptcy laws. Even with the existence of a model to follow, nine months was a very short time w ***44** compared to the twelve years that the first Advisory Committee took to draft the initial set of rules. [FN80] In light of this short time period, the Advisory Committee decided that the best course of action was to draft a set of interim rules. [FN81] The sole goal of the Advisory Committee in drafting the interim rules was to fill the gaps between the new Code and the existing rules; this goal was completed in August of 1979. [FN82] These interim rules were adopted as local rules and were used between the effective date of the new Code and the promulgation of the replacement rules No effort was made at that point to make a detailed study of the existing rules to determine which rules required modification or deletion in light of the broader range of cases that the bankruptcy court could hear under the Code

The Advisory Committee then began its work on the permanent set of rules. During the time that the Committee was taking comments on the interim rules, the United States Supreme Court decided a landmark case, Northern Pipeline Construction Co. v Marathon Pipe Line Co. [FN83] The far-reaching implications of this case caused concern among members of the bankruptcy bar and bench, who promptly turned their attention to it. No changes were made to the proposed permanent rules as a direct result of this case because the Committee did not think that the rules contained anything that pertained to jurisdiction and because it was hoped that proposed legislation would resolve the entire issue. [FN84] If the Committee had reviewed its work on the rules in light of the Northern Pipeline decision before sending them on to the Judicial Conference and the Supreme Court, it is possible that matters, like the appointment of special masters, might have been discussed more thoroughly and different decisions might have been made.

***45** C. Evolution of the Bankruptcy Court

A discussion of the role and status of the bankruptcy judge under the Bankruptcy Act provides some background against which the prohibition against special masters in bankruptcy cases under the Code can be better understood. This is helpful in understanding why the Committee thought that there would be no need to make FRCP 53 applicable under the Code.

Until 1973 under the Bankruptcy Act, the person who presided over bankruptcy cases held the position of "referee in bankruptcy." [FN85] The "referee in bankruptcy" had limited jurisdiction over most bankruptcy cases. In Chapter X corporate reorganizations, the jurisdiction of the "referee in bankruptcy" was so limited that the "referee" served only as a special master to hear and report generally or upon specified matters to the district court judge. [FN86] When the "referee" acted in a Chapter X case, former Bankruptcy Rule 513 applied to make FRCP 53 applicable in those instances, rendering the "referee in bankruptcy" a special master appointed by the district court. [FN87] Under the Chandler Act of 1938, [FN88] the duties and workload of the "referee in bankruptcy" increased tremendously, but the jurisdiction of the court was still limited. In 1973, the title "referee in bankruptcy" was changed to "United States bankruptcy judge" due, in part, to recognition of the increased duties required of ***46** position. [FN89]

Nevertheless, the new bankruptcy judges still did not have any greater jurisdiction than before.

In 1978, Congress enacted dramatically new bankruptcy legislation, which created and conferred on the bankruptcy courts very broad jurisdiction. [FN90] One of Congress's goals in reforming the bankruptcy laws was to create more efficient procedures for administering bankruptcies. To achieve this goal, Congress chose to vest broad powers and jurisdiction directly in the bankruptcy courts. [FN91] Even before Congress had an opportunity to enact permanent Bankruptcy Rules to accompany its newly enacted Bankruptcy Code, [FN92] its efforts were very quickly and successfully challenged in the landmark Northern Pipeline case. [FN93] The Supreme Court in Northern Pipeline held that the jurisdictional provisions of the Bankruptcy Code of 1978 were unconstitutional primarily because the Code had vested Article III [FN94] judicial power in non-Article III judges--judges who lacked lifetime tenure and protection against salary diminution [FN95] Under the Bankruptcy Code, Congress granted to the bankruptcy courts all of the usual powers of the district courts, including the power to hear jury trials and to issue final judgments that were binding and enforceable in the absence of an appeal. [FN96] The Supreme Court held that this grant of judicial power without a grant of Article III status was unconstitutional as a violation of the separation of powers. [FN97] After the Northern Pipeline decision, Congress enacted amendments to the Bankruptcy Code to address the jurisdictional issues raised by the case. [FN98] In the 1984 Amendments, Congress gave federal district cou *47 exclusive jurisdiction "over all cases under title 11" and nonexclusive jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." [FN99] The district courts have exclusive jurisdiction, under *48 the 1984 Amendments, over all property of the bankruptcy estate wherever it is located. [FN100] Through these amendments, Congress chose to give broader jurisdiction over bankruptcy matters to the district courts. Congress dealt with the status of the bankruptcy judges by declaring that they constitute a "unit" of the district court called the bankruptcy court. [FN101] The district courts may refer all bankruptcy cases and proceedings within their jurisdiction to the bankruptcy courts, [FN102] but, under the 1984 Amendments, the proceedings are divided into "core" and "non-core" matters with bankruptcy judges being permitted to "hear and determine" the matter and enter final judgment only in the "core" proceedings. [FN103] During and after the time that Northern Pipeline was making its *49 way to the Supreme Court, bankruptcy courts were operating under the rules adopted under the Bankruptcy Act and interim rules designed to fill the gaps between the Bankruptcy Code and the original rules under the Act [FN104] The first permanent rules were being drafted for the new Bankruptcy Code at the same time as amendments were being made to the Code to address the Northern Pipeline jurisdictional issues. [FN105] These jurisdictional issues also needed to be addressed in the rules. It may have been the haste and confusion of the day that led to the unexplained conclusion that special masters could not be appointed in bankruptcy cases. [FN106] Whatever the reason, what resulted was Rule 9031 with its inadequately explained prohibition against the appointment of special masters in bankruptcy cases. [FN107] A court's inability to use as important a case management device as special masters hinges on Rule 9031, a rule with virtually no explanation or justification--and one that appears to have been drafted in haste, without significant consideration given to its significant impact.

V. No Comparable Role Exists

Special masters are appointed by the court to assist in cases where the issues are complicated and where exceptional conditions exist, or in matters of account and where there are difficult damages computations. [FN108] The special master is appointed to assist the court in cases in which the court deems help ne *5(further the administration of justice. [FN109] The role of the special master is to represent the court in carrying out specified duties, as directed by the appointing court. The Bankruptcy Code does not provide for the appointment of a person in a comparable position. The Bankruptcy Code does provide for the appointment of trustees and examiners. [FN110] In fact, the Code mandates that, under certain circumstances, the court must appoint examiners and trustees after a request to do so [FN111] is made by a party in interest [FN112] or the United States Trustee. [FN1 *51 When they are appointed, trustees and examiners represent the bankruptcy estate, have very broad duties, and are required to perform comprehensive acts for the benefit of the entire estate, [FN114] such as accounting for property received, *52 examining proofs of claims, furnishing information concerning the estate to parties in interest who have made requests, filing periodic reports of the operation of the business with taxing authorities, and making final reports to the court on the administration of the estate. [FN115]

In contrast, the special master is appointed by the court to represent the court by performing narrow, well-

delineated tasks. [FN116] District courts order the special master to perform these well-delineated tasks in a very limited manner and for a specific proceeding within a case-not for the entire case [FN117] Special masters have a different mission, different loyalties, and different supervisors than do trustees and examiners Trustees and examiners are not authorized under the Code to perform the vast majority of tasks that a court would need and appoint a special master to perform [FN118]

It is the general goal of all courts to conserve judicial resources and to enhance the efficiency of the court with regard to its case management. [FN119] Even as "units" of the district court, [FN120] bankruptcy courts share this same goal. Trustees and examiners, however, cannot help the bankruptcy courts in reaching this goal of conserving judicial resources and enhancing the efficiency of the courts with regard to case management. In Section 1104, where the Code provides for the appointment of trustees and examiners, there is nothing within ***53** the outlined duties that would reflect the goal of providing assistance to the court. [FN121] There are alternate standards provided for the appointment of trustees and examiners, [fn122] AND THE TRUSTEe and the examiner have different duties. however, the appointment of these individuals is not designed to assist the courts in the management of the case.

The trustee's duties are to protect the debtor's assets for its creditors and equity security holders. [FN123] The trustee has broad powers to carry out this goal, including ousting the debtor's current management and operating the business directly. The examiner is appointed to conduct an investigation of the debtor. [FN124] The Code appears to contemplate that what the examiner will investigate is improper conduct by, toward, or involving the debtor. [FN125] The goal of the investigation by the examiner is directed at providing information about the feasibility and wisdom of the continued operation of the Chapter 11 debtor's business The goal does not appear to be directed at the courts' management of the case as much as it is at the protection of the Chapter 11 debtor's creditors and equity security holders. [FN126] The examiner's investigation may provide information that ultimately effects the management of the cases, however, it is not the management of the case itself that the examiner's appointment is designed to effect.

Traditionally, special masters have been appointed in complicated two-party and class-action litigation. [FN127] In bankruptcy cases, particularly in proceedings brought to determine the dischargeability of debts [FN128] in complex commercial cases, problems related to the computation of damages may be quite complicated and may involve voluminous documents and repeated disputes among different claimants regarding quite similar matters, in much the same way as in two-party and class-action litigation. Although trustees and examiners may be appointed by the bankruptcy court, [FN129] the duties of the trustee and examiner as described in the Code [FN130] do not include providing case management assistance to the court in litigation matters like the discharge of debts, one of the very areas where complicated matters of account or computation are most likely to occur In ***54** matters, the bankruptcy court is not authorized to appoint an individual with the expertise to assist the court in expediting these matters.

VI. Inherent Authority of Courts of Equity

The authority of courts to control and direct the business of the court in the interest of the sound and efficient administration of justice flows from the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction. In fact, much of what courts must do in the conduct of their business is not provided for in any rule or statute and necessarily relies on inherent authority The court's inherent authority to direct its business in the interest of the efficient administration of justice provides courts with significant leeway in conducting the business of the court. This inherent authority is well established and widely accepted in the federal judiciary. [FN131]

The historical development of the courts' authority to appoint special masters began in English courts of equity. [FN132] In this country, former Equity Rule 68, "Appointment and Compensation of Master," and former Equity Rule 59, "Reference to Master--Exception, Not Usual," provided the first statutory basis for the appointment of special masters; FRCP 53 developed as a modification of those rules. [FN133] Courts and commentators have emphasized that beyond FRCP 53, courts of equity have the inherent power to appoint special masters. [FN134] While ***55** some commentators have suggested that FRCP 53 is not applicable to pretrial phases of a civil lawsuit,

they have observed that federal courts may have the power to appoint a special master in pretrial matters under their inherent authority. [FN135]

The fact that the federal courts' inherent authority to appoint special masters existed prior to FRCP 53 has been throughly researched and discussed by Wayne D. Brazil. [FN136] He noted that "the Advisory Committee's intent in drafting Rule 53 was to preserve the essentials of the system of referencing as it existed under the Federal Equity Rules between 1912 and 1938." [FN137] The "essentials of the system," as they relate to the duties of the special master, included appointing special masters to assist the courts by gathering and analyzing relevant data from complex financial records and making recommendations to the court, to aid in computing damages and in providing other well-defined assistance on specific, narrow issues. [FN138]

This is exactly the kind of assistance that bankruptcy courts need-- assistance in performing very specific and well-focused tasks. [FN139] Bankruptcy courts are recognized as courts of equity, [FN140] and, as such, they have the inherent authority to appoint special masters to perform these same specific, narrow, well-defined tasks that special masters were appointed to perform b ***56** courts of equity prior to the enactment of FRCP 53. Bankruptcy courts have not relied upon this inherent authority to appoint special masters presumably because of the existence of Rule 9031. [FN141]

The only current prohibition against the appointment of a special master in bankruptcy is this procedural rule. There is no statutory provision within the Bankruptcy Code that prohibits the appointment of special masters. The Code expressly prohibits the appointment of receivers [FN142] through a specific statuto ***57** provision If the drafters had specific and strong reasons why special masters should not be appointed in bankruptcy cases, it is likely that they would have drafted an express statutory provision, as opposed to a procedural rule, as they did regarding receivers. [FN143] However, the drafters failed to do so.

VII. Conclusion

There are many reasons to permit bankruptcy courts to benefit from the unique services of special masters in the unusually complex bankruptcy case or proceeding--chief among them is an interest in the sound and efficient administration of justice. There are very few sound reasons to deny bankruptcy courts the benefit of special masters. In fact, Rule 9031, which is the sole prohibition against the appointment of special masters in bankruptcy cases, cites no reason at all for denying courts the benefit of this well-accepted case management device.

Many authorities have concluded that no express statutory basis is required for courts of equity to appoint a special master. [FN144] These authorities hold that courts of equity have inherent power and authority to do that which is necessary to carry out their duties, including appointing persons unconnected with the case to assist the courts in performing their duties. [FN145]

The effect of Federal Rule of Bankruptcy Procedure 9031 is to deny both the district court and the bankruptcy court the right to appoint a special master in appropriate cases. In denying these courts the power to appoint special masters in bankruptcy cases, Rule 9031 abridges the inherent power of both the district court and the bankruptcy court to act as courts of equity by employing a traditional tool available to a court of equity. [FN146] But, more significantly, it deprives debtors and creditors of the opportunity to benefit from this traditional judicial resource.

Congress expressly has authorized the Supreme Court to prescribe rules for the Bankruptcy Court. [FN147] However, in authorizing the Court to prescribe these rules, Congress provided that: "(s)uch rules shall not abridge, enlarge, or modify any substantive right " [FN148] The inherent power of courts to appoint special masters is a long-standing and well-accepted substantive right that, arguably, has been impermissibly abridged by this procedural rule. A procedural rule shoul ***58** not function in a way that, even arguably, modifies an inherent right of the court [FN149] Rule 9031 should be abrogated, and a new rule that would permit the appointment of special masters in bankruptcy cases consistent with the substantive rights of a court of equity should be promulgated.

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[FN1]. Fed R. Bankr P 9031; see infra note 56 and accompanying text.

[FN2] Fed. R. Civ. P 53.

[FN3]. See, e.g., Veneri v. Draper, 22 F.2d 33, 35 (4th Cir. 1927); United States v. Conservation Chem. Co., 106 F.R.D. 210, 217-21 (W.D. Mo. 1985); Jordan v. Wolke, 75 F.R.D. 696, 700-01 (E.D. Wis. 1977); Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev. 394, 415 n.80 (1986) (hereinafter Brazil, Special Masters); Margaret G. Farrell, Coping with Scientific Evidence· The Use of Special Masters, 43 Emory L J. 927, 943 (1994) (hereinafter Farrell, Coping with Scientific Evidence); I H Jacob, The Inherent Jurisdiction of the Court, 23 Current Legal Probs. 23, 34 (1970); see infra notes 131-43 and accompanying text.

[FN4]. See 1 Dan B. Dobbs, Law of Remedies § 2.8(1), at 190 (2d ed. 1993); 1 William S. Holdsworth, A History of English Law 416 (A Goodhart & H. Hanbury eds., 7th ed. rev. 1956); 1 Frederick Pollock & Frederic W. Maitland, History of English Law 193 (1959); 2 Charles P. Sherman, Roman Law in the Modern Wor §§ 849, 881, at 404, 434 (1937); James R. Bryant, The Office of Master in Chancery: Early English Development, 40 A.B.A. J. 498, 498 (1954); see also Simpson v. Canales, 806 S.W.2d 802, 806-11 (Tex. 1991) (reviewing the history of special masters).

[FN5]. See generally 1 Holdsworth, supra note 4, at 424-25 (describing generally the abuses in the system). Irving R. Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452, 452 (1958) (citing 6 The Works of Jeremy Bentham 43 (Bowring ed., 1843); 9 William S. Holdsworth, A History of English Law 360 (3d ed. 1944) (describing the masters' practice of delaying proceedings for the purpose of charging a special fee for acceleration, and increasing the number of appearances before the master and the number of services that the masters were required to perform to increase fees), Linda J. Silberman, Masters and Magistrates Part I: The English Model, 50 N.Y.U. L. Rev. 1070, 1075-79 (1975) (describing the history of the special master system in England)).

[FN6]. See James R. Bryant, The Office of Master in Chancery: Colonial Development, 40 A.B.A. J. 595, 598 (1954) (describing the history and process of development of the special master in colonial America). Linda J. Silberman, Masters and Magistrates Part II: The American Analog, 50 N.Y U. L Rev 1297, 1321-22 (1975) (noting that special masters have been a part of the federal judiciary of the United States since its inception).

[FN7]. See, e.g., Holt Mfg. Co. v. C.L. Best Gas Traction Co., 245 F. 354, 357 (N.D. Cal. 1917).

[FN8]. See, e.g., United States ex rel. Brading-Marshall Lumber Co. v. Wells, 203 F. 146, 148-49 (E.D. Tenn 1913)
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[FN9]. See, e.g., Thompson v. Smith, 23 F. Cas. 1092 (C.C. Ohio 1869)

[FN10]. In re Peterson, 253 U.S 300, 312 (1920); see also supra notes 131-43 and accompanying text.

[FN11]. Peterson, 253 U.S. at 312 According to the Peterson court:
This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters. . . .
Id.

[FN12]. U.S. Const. art. III, § 1:
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold

their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[FN13]. See Stauble v. Warrob, 977 F.2d 690, 695-96 (1st Cir. 1992) (citing In re Bituminous Coal Operators' Ass'n, 949 F.2d 1165, 1168 (D.C. Cir. 1991); Burlington N. R.R. v. Dep't of Revenue, 934 F.2d 1064, 1073 (9th Cir. 1991)). The attributes most commonly cited are lifetime tenure and the protection from the diminution of salary.

[FN14]. Where the parties have not consented, the courts traditionally treat the special master's report as advisory, to be adopted by the court only to the extent that the court agrees with it after making an independent review of the entire record. See, e.g., Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 131-33 (1864); Mastin v Noble, 157 F 506, 508 (8th Cir. 1907); Holt Mfg. Co. v. C L. Best Gas Traction Co , 245 F 354, 356 (N.D Cal 1917); In re Thomas, 45 F. 784, 787 (D.C.S.C. 1891).

[FN15]. Fed. R. Civ. P. 53(b).

[FN16]. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli-lxx (1842).

[FN17]. The use of special masters in pretrial management has been questioned by many as an improper expansion of the traditional use of special masters because it requires the exercise of judicial authority, which special masters do not have. See, e.g., Manual for Complex Litigati § 20.14, at 16 (3d ed. 1982); Wayne D. Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?, 1 Am B. Found. Res. J 143, 143-44 (1983) (hereinafter Brazil, Referring Discovery Tasks) (The author found that, although Rule 53 may not authorize the use of special masters to perform pretrial management matters, courts still may appoint special masters to perform these duties through their inherent authority.).

[FN18]. See LaBuy v. Howard Leather Co., 352 U.S. 249, 251-55 (1957). In LaBuy, the Supreme Court indicated that under Rule 53, calendar congestion, complexity of the issues, and the possibility of a lengthy trial were insufficient reasons to appoint a special master whose duties were to carry out the full fact-finding function on the merits of the case. Id. at 259. The Court determined that the use of the master in this manner displaced the court rather than aiding it. Id.

[FN19]. See In re Peterson, 253 U S. 300, 312 (1920)

[FN20]. See Danville Tobacco Ass'n v. Bryant-Buckner Ass'n, 333 F.2d 202, 208-09 (4th Cir. 1964) (where a district court appointed an official in a tobacco association to assist it in making judgments regarding tobacco marketing, a highly technical market).

[FN21]. For a thorough analysis of the use of special masters in complex litigation, see Brazil, Special Masters, supra note 3, at 394. See also Francis E. McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. Chi. L Rev. 440, 478-91 (1986) (noting that special masters are used often in complex litigation to provide expert, technical assistance, but, just as frequently, they are used to provide advice on techniques for gathering and analyzing large amounts of empirical data).

[FN22]. To the extent that the special master's assigned duties include discovery responsibilities, some have questioned the district court's authority under Rule 53 to make such assignments to special masters See generally Brazil, Special Masters, supra note 3, at 395-98. Nevertheless, special masters are frequently appointed to supervise discovery in complex cases. See, e.g , Nat'l Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 (N D Cal. 1987) (special master appointed to resolve discovery disputes where egregious discovery disputes found to exist), United States v. Conservation Chem. Co , 106 F R D 210, 214 (W D Mo 1985) (affirming the appointment of a special master in a case involving voluminous technical and scientific data); In re Agent Orange Prod. Liab Litig., 94 F.R.D. 173, 173-75 (E.D N.Y. 1982) (affirming the appointment of a special master in a case involving more than four million documents); United States v. Int'l Bus. Machs. Corp., 76 F.R.D 97, 98-99 (S.D.N.Y. 1977), Fisher v. Harris, Upham & Co., 61 F.R.D. 447, 449-53 (E.D.N.Y. 1973).

[FN23]. Wilhoite v. Olin Corp., No. CV-83-C-5021-NE (N.D. Ala. filed 1983), Hagood v Olin Corp., No. CV-83-C-5917-NE (N.D. Ala. filed 1983).

[FN24]. In re Related Asbestos Cases (N.D. Ohio filed 1983).

[FN25]. See, e.g., Jerome I. Braun, Special Masters in Federal Court, 161 F.R.D. 211, 215-20 (1995); Margaret G. Farrell, The Role of Special Masters in Federal Litigation, C842 ALI-ABA 931, 946-51 (1993) (hereinafter Farrell, Role of Special Masters); Jonathan S. Liebowitz, Special Masters: An Alternative Within the Court System, 48 Disp. Resol. J. 64, 66-67 (1993).

[FN26]. See, e.g., In re U.S. Dep't of Def., 848 F.2d 232, 235-37 (D.C. Cir. 1988) (special master appointed to review sensitive government documents because the special master already had security clearance and was an intelligence expert with the ability to develop a sample of the documents and to summarize the reasonable positions that the parties might take on the possible exemption of each document); In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985) (affirming the district court's appointment of the special master to supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact, and the power to hear motions for summary judgment or dismissal); First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613, 628 (8th Cir. 1957) (special masters appointed to take discovery depositions that the court felt needed continuous supervision, and externally imposed an order that a master could provide), cert denied, 355 U.S. 871 (1957); Costello v. Wainwright, 387 F. Supp. 324, 327-28 (M.D. Fla. 1973) (In this class action suit brought by Florida prisoners alleging constitutional deprivations caused by inadequate health care provided in the prison system, the court appointed a special master to aid the court in evaluating the quality of medical services provided to the inmates. The special master assisted the court by "organizing, directing and conducting a comprehensive survey of the health care services provided by the Florida Division of Corrections to inmates committed to its custody, and to report his findings to the Court."), TransAmerican Natural Gas Corp v. Mancias, 877 S.W.2d 840, 843 (Tex. App. 1994) (The appellate court affirmed a district court's appointment of a special master to receive discovery documents that opposing counsel alleged to be confidential and privileged by ruling that it was proper for the court to appoint a special master with special training to assist in reviewing documents of such a technical nature to determine questions of privilege and discoverability.); see also United States v Conservation Chem. Co., 106 F.R D 210, 216 (W.D. Mo. 1985); In re Agent Orange Prod. Liab. Litig., 94 F.R.D. 173, 174 (E.D.N.Y. 1982).

[FN27]. See generally Jaquette v. Black Hawk County, Iowa, 710 F.2d 455, 463 (8th Cir. 1983); Maureen Solomon & Douglas Somerlot, Task Force on Reduction of Litig. Cost and Delay, Jud. Admin. Division, A B.A., Caseflow Management in the Trial Court (1987); Maureen Solomon& Douglas Somerlot, Law Conf Task Force on Reduction of Litig Cost and Delay, A.B A., Defeating Delay· Developing and Implementing a Court Delay Reduction Program (1986); Terry Hackett, California Adopts New Case Management Rules to Reduce Delay, 75 Judicature 108 (1991); Maureen Solomon & Holly Bakke, Case Differentiation: An Approach to Individualized Case Management, 73 Judicature 17 (1989); Hubert L. Will, Judicial Responsibility for the Disposition of Litigation, 75 F.R.D. 117, 125 (1978).

[FN28]. See generally Liebowitz, supra note 25 (describing how special masters can assist the courts in controlling the length of complex litigation). Federal courts also are increasingly turning to court-appointed managerial experts for assistance. For a thorough discussion of the courts' use of these experts and their authority to appoint them, see generally Ellen E. Deason, Managing the Managerial Expert, 1998 U. Ill. L. Rev. 341

[FN29]. See, e.g., Jerome I. Braun, Special Masters in Federal Court, 161 F.R.D. 211, 218 (1995) (noting the role of the special master in facilitating settlement discussions, advising the court, and evaluating the claims of parties); Farrell, Role of Special Masters, supra note 25, at 946-49 (noting the role of the special master in discovery and settlements, and as advisors, fact finders, and case managers); Liebowitz, supra note 25, at 65 (reviewing a case in which a special master held eighty-five hearings in which 166 plaintiffs had claims against three defendants and in which the use of the special master had a significant impact on the court's ability to conclude the case at all).

[FN30]. Judicial participation in the settlement process is the subject of much debate. While some believe that judges

can and should play a major role in helping parties achieve settlement, others believe that the extent and nature of the judge's role in settlement matters should be limited so that the judge can maintain neutrality and can render a disinterested opinion should settlement discussions fail. See, e.g., Doris Marie Provine, Settlement Strategies for Federal District Judges 23 (1986) (discussing disagreement among trial judges as to the proper involvement of the judiciary in the use of particular settlement techniques); E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306, 322-23 (1986) (reviewing and discussing the change in emphasis from narrowing issues in the pretrial phase to promoting settlement)

[FN31]. Increasingly, courts have found a variety of innovative ways in which special masters can assist the court See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 129 F.R.D. 434, 435 (E D.N.Y. & S D.N.Y. 1990) (special master appointed expressly to achieve settlement of this complex case); In re Agent Orange Prod. Liab. Litig., 94 F.R D. 173, 173-75 (E.D.N.Y. 1982) (The use of a special master to supervise discovery and prepare the pretrial order was justified in light of the "sheer volume of documents to be reviewed, the number of witnesses to be deposed, (and) the need for a speedy processing of all discovery problems in order to meet the trial date"); Costello v. Wainwright, 387 F. Supp. 324, 325-26 (D.C. Fla. 1973) (special master appointed to evaluate the quality of medical services).

[FN32]. 11 U.S.C §§ 1101-1174 (2000). Chapter 11 is primarily designed for the reorganization of the debts of a business through a reorganization plan. The plan must be voted upon by specified creditors and shareholders, and must be confirmed by the court.

[FN33]. Corporations and sole proprietorships filed 9,947 Chapter 11 cases in the twelve-month period ending June 30, 2000. See Filings, Bankr. L. Daily (BNA) (Aug 15, 2000) (reporting based on data released by the Administrative Office of the United States Courts); see also Alexander D. Bono, Class Action Proofs of Claim in Bankruptcy, 96 Com. L J. 297, 297 (1991) (noting the rise in class action issues arising in bankruptcy cases).

[FN34]. 11 U.S.C § 502(c) (2000). For examples of situations in which the courts have estimated claims in a Chapter 11 context, see In re Thomson McKinnon Securities, Inc., 191 B R 976, 979-81 (Bankr S.D.N.Y. 1996) (estimation of claims involving trust accounts and churning claims against the debtor), Beatrice Co. v. Rusty Jones, Inc., 153 B.R. 535, 536-37 (N.D. Ill 1993) (estimation of contingent claims and validation of liquidated claims in a Chapter 11 case).

[FN35]. At least one commentator has suggested that special masters could be helpful to a bankruptcy court "when it must estimate the values of a large number of claims in which the debtor has admitted liability. In these situations, special masters may obviate the need for any oral hearing, (because) valuation of damages often involves more concrete, objective factors than does evaluating liability." David Kauffman, Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy, 35 Stan L. Rev. 153, 170 (1982) (internal citations omitted).

[FN36]. 11 B.R. 294 (Bankr. N.D. Ohio 1981).

[FN37]. See id. at 296. The appointment of a special master to assist in the formulation of a program to determine and resolve product liability claims was approved in this case, but, on appeal, the court determined that the state courts where cases were initially pending were the proper forums for resolving these cases and not the bankruptcy court. In re White Motor Credit, 761 F.2d 270, 275 (6th Cir. 1985). The state courts were deemed to be the proper forums because there were some defendants in the tort cases who could not be transferred out of the jurisdiction, meaning that the cases would "have to be tried twice in different courts" if the federal court heard some of the cases Id. at 273-74. Thus, in the interest of justice and judicial economy, and because state issues predominated, these cases remained in the state courts and were tried by state judges.

[FN38]. In re White, 11 B.R. at 295.

[FN39]. Id. at 297 (quoting Fed. R. Civ. P. 53(b)).

[FN40]. See supra notes 22-26 and accompanying text.

[FN41]. In re White, 761 F.2d at 271.

[FN42]. In re Am. Colonial Broad. Corp., 758 F.2d 794 (1st Cir. 1985).

[FN43]. Id. at 796.

[FN44]. See supra note 14 and accompanying text.

[FN45]. In re Am. Colonial, 758 F.2d at 798-803.

[FN46]. 11 U.S.C §§ 1301-1330 (2000). This Chapter, as its title suggests, is designed to provide for the "Adjustment of Debts of an Individual with Regular Income." Debtors propose a payment plan generally of a three- to- five-year duration, which must be confirmed by the court, and, in return, the debtors receive a discharge from most remaining debts upon completion of the plan.

[FN47]. 11 U.S.C. § 1302(a) (2000); see also 28 U.S.C § 586(b) (1994). These statutes permit the appointment of a person to serve as the trustee in the Chapter 13 cases filed in a particular region when the number filed in the region warrants the full-time attention of a single trustee. Many districts have the services of a standing trustee, and some districts with extremely large Chapter 13 filings have the services of more than one standing trustee.

[FN48]. See Filings, supra note 33 (For the twelve-month period ending June 30, 2000, there were 380,770 Chapter 13 cases filed.).

[FN49]. 11 U.S.C. § 362 (2000).

[FN50]. 11 U.S.C. § 1129 (a)(11) (2000).

[FN51]. See, e.g., In re Merrimack Valley Oil Co., 32 B.R. 485, 488-91 (Bankr. D Mass. 1983); In re Landmark at Plaza Park Ltd., 7 B.R. 653, 658- 60 (Bankr. D N.J 1980).

[FN52]. See Filings, supra note 33. In the twelve-month period ending June 30, 2000, there were 1,276,922 bankruptcy petitions filed; in the twelve-month period ending June 30, 1999, 1,352,030 petitions were filed.

[FN53]. Under the Bankruptcy Act of 1898, ch. 54 § 57(d), 30 Stat 544 (repealed 1979), not all claims were required to be estimated. Section 57(d) of the Act provided that if the estimation of a contingent or unliquidated claim would unduly delay the administration of the estate or any proceeding under this Act, the claim would not be allowed. The result was that the creditor's claim would be unaffected by the discharge in bankruptcy, and the creditor could pursue the debtor after the claim was fixed or liquidated despite the debtor's discharge. Section 502(c) of the Code requires the estimation of contingent or unliquidated claims when the fixing or liquidation of those claims would unduly delay the administration of the case. 4 Collier on Bankrup ¶ 502.04(1), at 502-51 (Lawrence P. King ed., 15th ed. rev. 2001). Congress wanted "to afford the debtor complete bankruptcy relief," an § 502(c) was one means that Congress used to achieve this goal. H.R. Rep. No. 95- 595, at 352 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6308. Section 502(c)'s estimation of the claims requirement adds to the number of claims in which the court directly must involve itself by taking evidence to determine the proper estimation Where a claim is fixed, liquidated, and well-documented, the claim is automatically allowed without a review by the court, unless a party in interest objects to the claim. 11 U.S C. § 502(c) (2000).
In the reorganization under Chapter 11 of one chemical company, the potential existed for the individual estimation of 187 contingent and unliquidated claims against the debtor. In re Borne Chem. Co , 16 B.R. 509, 512 (Bankr. D.N.J. 1980).

[FN54]. 1 Dobbs, supra note 4. § 6.6(1), at 133 (noting that masters traditionally performed specific tasks associated with taking evidence).

[FN55]. Fed. R. Bankr. P. 9031.

[FN56]. Fed. R. Bankr. P. 9031. In contrast, the Bankruptcy Code expressly prohibits bankruptcy judges from appointing receivers in bankruptcy cases. 11 U.S.C § 105(b) (2000).

[FN57]. Fed. R. Bankr. P. 9031.

[FN58]. Fed. R. Bankr. P. 9031.

[FN59]. Fed. R. Bankr. P. 9031.

[FN60]. See supra notes 56-58 and accompanying text.

[FN61]. Fed. R. Bankr. P. 1001 provides: "The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. . . . These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." Should the United States district court withdraw the reference of a bankruptcy case or proceeding from the bankruptcy court, the district court judge would be prohibited from appointing a special master in the bankruptcy case or proceeding because of Rule 9031, despite the fact that the case or proceeding is one in which the appointment of a special master greatly would assist the court in "secur(ing) the just, speedy, and inexpensive determination of (the) case." Id.

[FN62]. See Jack B. Weinstein, Some Benefits and Risks of Privatization of Justice Through ADR, 11 Ohio St. J. on Disp. Resol. 241, 271 ("The propriety of appointing special masters in bankruptcy cases is subject to some dispute This consideration led the author to use a semantic substitute--the court- appointed 'special advisor'--in the Manville Bankruptcy-Trust litigation." (footnotes omitted)). Mark Peterson, the special advisor to the court in In re Joint E & S. Dist. Asbestos Litig., 878 F Supp. 473, 573 (E D.N.Y. & S.D.N Y 1995), aff'd, 100 F 3d 944 (2nd Cir 1996), the case referred to by Judge Weinstein, was appointed to develop a plan for restructuring the trust payment schedule and refinancing the trust, and to evaluate the claims by the type of disease. These are duties traditionally assigned to special masters. See also Minerex Erdoel, Inc. v Sina, Inc., 838 F.2d 781, 783 (5th Cir. 1988), cert. denied, 488 U.S. 817 (1988); In re Elcona Homes Corp., 810 F.2d 136, 140 (7th Cir.1987) (Both cases support the proposition that district courts may not allow the appointment of a special master in a bankruptcy case through their reference powers.).

[FN63]. (A) Collier on Bankruptcy app. pt. 2(b), at 2-120 to 2-124 (Lawrence P. King ed., 15th ed. rev. 2001).

[FN64]. Fed. R. Bankr. P. 513, titled Special Masters, provided: "if a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply." Fed R. Bankr P 513 (repealed Aug. 1, 1983), reprinted in 12 Collier on Bankruptcy, at 5-103 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978). Collier on Bankruptcy explains: "The word 'judge' meant the United States district judge, not the bankruptcy judge " (A) Collier on Bankruptcy app. pt 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev. 2001). Accordingly, former Rule 513 generally applied only when a Chapter X case was retained by the district judge although it probably would apply when a district judge removed any case from the bankruptcy court to the district court. See Fed. R. Bankr. P 102(b) (repealed Aug. 1, 1983).

[FN65]. (A) Collier on Bankruptcy app. pt. 2(b), at 2-122 (Lawrence P King ed., 15th ed. rev. 2001)

[FN66]. One commentator has suggested that Rule 53 was made inapplicable to bankruptcy cases through Rule 9031 because of "the expense of special masters in bankruptcy, and . . 'public perceptions of cronyism.'" Kauffman, supra note 35, at 171 n.82. Rule 53 has been construed as requiring the parties' consent. Where the creditors and the court agree that the special masters can preform certain tasks more efficiently, the creditors agree to bear that expense The bankruptcy estate would not bear the cost The expense of the special master should not be a concern because it would be incurred only if the parties consent.

[FN67]. See supra notes 56-58 and accompanying text.

[FN68]. See infra notes 85-89 and accompanying text.

[FN69]. See supra notes 58-59 and accompanying text.

[FN70]. See infra notes 131-43 and accompanying text.

[FN71]. See generally Lawrence P. King, The History and Development of the Bankruptcy Rules, 70 Am. Bankr. L.J. 217 (1996) (discussing in great detail the history and process of bankruptcy rulemaking).

[FN72]. See Bankruptcy Rules & Official Forms, 425 U.S. 1003 (1975); Bankruptcy Rules & Official Bankruptcy Forms, 411 U.S. 989, 991 (1972); King, supra note 71, at 220 (describing the decision to draft and promulgate the rules in parts, so that the effective dates of the first set of rules are different for different parts of the package of rules).

[FN73]. Bankruptcy Act of 1898, Pub. L. No. 55-171, 30 Stat 544 (repealed 1978).

[FN74]. See King, supra note 71, at 217 ("At least seventy percent of the Bankruptcy Act, if not more, was procedural.").

[FN75]. See King, supra note 71, at 217-18. An Advisory Committee on Bankruptcy Rules was appointed in 1960 by the Chief Justice as Chair of the Judicial Conference of the United States to study the bankruptcy procedural rules contained in the General Orders in Bankruptcy and Official Forms and to recommend amendments. These committee members gained experience with drafting proposed rules, although the scope of their review was quite limited

[FN76]. The statute read as follows:
The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act. Such rules shall not abridge, enlarge, or modify any substantive right. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
Bankruptcy Act, Pub. L. No. 88-623, § 1, 78 Stat. 1001 (current version at 28 U S.C § 2075 (1994))

[FN77]. King, supra note 71, at 224.

[FN78]. See Bankruptcy Rules and Official Bankruptcy Forms, 425 U.S. 1003 (1975).

[FN79]. 11 U.S.C. §§ 101-1330 (2000) (as enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)) (hereinafter Bankruptcy Code).

[FN80]. King, supra note 71, at 220-33.

[FN81]. See King, supra note 71, at 237.

[FN82]. Jud. Conf. of the U.S., Comm. on Rules of Prac & Proc., Preliminary Draft of Proposed New Bankruptcy Rules and Official Forms, xix (1982).

[FN83]. 458 U.S. 50 (1982). In this case, a Chapter 11 debtor filed suit in the bankruptcy court against Marathon for damages based on a breach of contract and warranty, as well as misrepresentation, coercion, and duress. Id. at 56. Under the Bankruptcy Act of 1898, this kind of action would have been outside of the jurisdiction of the bankruptcy court, and the proper place to bring the action would have been the state court The Bankruptcy Code had broadened

the jurisdiction of the bankruptcy court so that it had jurisdiction to hear this kind of claim--one that was not directly a part of the bankruptcy matter. Id. at 54-55. The Supreme Court held that this broadened jurisdiction unconstitutionally vested the bankruptcy judges with "judicial power" without granting them the protection of Article III status. Id. at 87.

[FN84]. H.R. 6978, 97th Cong. (2d Sess. 1982) (reintroduced in the 98th Congress as H.R. 3, 98th Cong. (1983)). Granting bankruptcy judges Article III status would have done much toward resolving the jurisdictional issue.

[FN85]. See H.R. Rep. No. 95-595, at 8 (1978), reprinted in 1978 U.S C.C.A.N. 5963, 5969.

[FN86]. The Bankruptcy Act of 1898, ch. 54 § 117, 30 Stat. 544 (1898) (repealed 1978); see, e.g., Faucher v. Lopez, 411 F.2d 992, 995 (9th Cir. 1969) (The district court appointed the bankruptcy referee as special master to decide issues of fraud in the bankruptcy case.).

[FN87]. Fed. R. Bankr. P. 513 (repealed Aug. 1, 1983), reprinted in 12 Collier on Bankruptcy, at 5-103 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978) ("If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply."); see also 12 Collier on Bankruptcy ¶ 513.6, at 5-106 (James Wm. Moore & Lawrence P. King eds., 14th ed 1978) (discussing the district court judge's retention of jurisdiction in Chapter X corporate reorganization proceedings and that judge's reference of a proceeding under Chapter X to a referee in bankruptcy acting as a special master). The court in United States v Manning, 215 F. Supp 272, 293 (W.D. La. 1963), described the role of the bankruptcy referee:
Rule 53 of the Federal Rules of Civil Procedure allows a district court to appoint a 'standing' master for its district or a 'special master'. As used in (the) rules the word "master" includes a referee, an auditor, and an examiner. Rule 53. . . . A Referee in Bankruptcy has even more power than a master: he may render a binding judgment

[FN88]. Chandler Act, ch. 575. § 60e, 52 Stat. 883 (1938) (repealed 1979).

[FN89]. Fed. R. Bankr. P. 901(7) (repealed Aug. 1, 1983); see Joseph C. Zavatt. The Use of Masters in Aid of the Court in Interlocutory Proceedings, 22 F.R.D. 283, 285 (1958) ("Over the years since the Act of 1898, (the powers of referees in bankruptcy) (subject to review) have been extended . . . to the point where (since 1938) they have the power to grant or deny discharges--a power formerly reserved to the District Court Judge sitting as a bankruptcy court.").

[FN90]. See supra note 76.

[FN91]. See generally Charles J. Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. Rev. 5 (1995).

[FN92]. Bankruptcy Rules, 461 U.S. 973 (1982) (Permanent rules for the 1978 Bankruptcy Code were not promulgated until 1983.).

[FN93]. 458 U.S. 50 (1982).

[FN94]. See supra note 12.

[FN95]. Northern Pipeline, 458 U.S. at 63.

[FN96]. See 28 U.S.C § 1471(b) (This Section was added by Act of Nov. 6, 1978, Pub. L. 95-598, 92 Stat. 2668 (1978), but did not become effective pursuant to § 402(b) of such Act.).

[FN97]. Northern Pipeline, 458 U.S. at 85.

[FN98]. Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 378 (1984). The amendments to the Code to

address the issues in Northern Pipeline took a considerable period of time, during which bankruptcy cases were in limbo. The obvious solution was to make the bankruptcy judges Article III judges, but this had been rejected during the enactment process of the Reform Act and continued to be opposed. In a later amendment to the Bankruptcy Code, however, Congress created a Bankruptcy Review Commission, which recommended Article III status for bankruptcy judges to increase the efficiency of the bankruptcy process. The Commission pointed to the costs caused by the Article I status of bankruptcy judges, including those primarily associated with the necessity of drawing jurisdictional lines between core and non-core proceedings, and those caused by the constitutional uncertainty over the definition of core proceedings. Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Ye § 3.1, at 718, 722-24, 732-35, 737-39 (1997). Both before and after this recommendation, many commentators advocated Article III status for bankruptcy judges. See, e.g., Susan Block-Lieb, The Costs of a Non- Article III Bankruptcy Court System, 72 Am. Bankr. L.J. 529, 544-46 (1998) (pointing to the costs caused by dividing bankruptcy jurisdiction between the district and bankruptcy courts, including the delays caused by the division, and the doctrinal and constitutional uncertainty caused, and advocating Article III status for bankruptcy judges), Christopher F Carlton, Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century, 14 BYU J. Pub. L. 37, 45-46 (1999). In his article, Mr. Carlton examined several proposals to amend the Bankruptcy Code and recommended Article III status for bankruptcy judges. He quoted the legislative history of the Reform Act of 1978's discussion of granting Article III status to bankruptcy judges:

(T)he Constitution suggests that an independent bankruptcy court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions . . . . Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the Framers intended for an independent judiciary.

Carlton, supra, at 45 n.55 (quoting H.R. Rep. No. 95-598, at 390 (1978), reprinted in 1978 U.S.C.C.A N. 5963, 6000). But see generally Thomas E. Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L.J. 567 (1998) (citing historical and constitutional policy reasons why Article I status is desirable for bankruptcy judges).

Granting Article III status to bankruptcy judges, however, would not resolve the problem of the appointment of special masters in bankruptcy. Rule 9031 prohibits the appointment of special masters in any bankruptcy case, whether before an Article III judge or not. See supra note 61-62 and accompanying text

[FN99]. 28 U.S.C § 1334(a)-(b) (1994) (granting district courts original and exclusive jurisdiction over "all cases under title 11," and original but not exclusive jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11"). "Case" refers to the procedure followed in the administration of the debtor's estate and "proceeding" refers to the disputes occurring during the bankruptcy case. See 1 Collier on Bankrupt¢ ¶¶ 3.01(1)(c)(i)-(ii), at 3-20 to 3-27 (Lawrence P. King ed., 15th ed. rev. 2001).

[FN100]. 28 U.S.C. § 1334(e) (1994).

[FN101]. See 28 U.S.C. § 151 (1994). Section 151, "Designation of bankruptcy courts," states:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (1994).

[FN102]. 28 U.S.C. § 157(a) (1994). Section 157(a) states that: "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S C. § 157(a) (1994).

[FN103]. 28 U.S.(§ 157(b)(1) (1994). Dividing the bankruptcy proceedings into "core" and "non-core"

proceedings permitted Congress to allow bankruptcy judges to hear bankruptcy cases while maintaining Article I status without running afoul of Marathon. In its opinion in Northern Pipeline, the Court recognized an exception to the separation of powers that permitted Congress to set up legislative courts in specialized areas like bankruptcy where the adjudication of a "public right" is involved. The "core" matters involve issues directly related to the restructuring of the debtor-creditor relationship, the "public right;" these matters may be heard by the bankruptcy judge subject only to appeal. 28 U.S.C § 158 (1994). Under 28 U.S C § 157(c)(1), there are circumstances under which bankruptcy judges may hear "non- core" proceedings:

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(c)(1) (1994).

[FN104]. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in (A) Collier on Bankruptcy app. pt. 2(b), at 2-116 to 2-119 (Lawrence P. King ed., 15th ed. rev. 2001).

[FN105]. See supra notes 83-84 and accompanying text.

[FN106]. See generally (A) Collier on Bankruptcy app. pt. 2(b), at 2-122 (Lawrence P. King ed., 15th ed. rev 2001).

[FN107]. The possibility exists that the Committee Notes were drafted with the former practice of having bankruptcy referees act as special masters in Chapter X cases under the former Bankruptcy Act in mind. At least one judge has suggested that Rule 9031 was drafted with this former practice in mind. See In re S. Portland Shipyard & Marine Rys. Corp., 32 B.R. 1012, 1020 n.9 (D. Me. 1983). The In re S. Portland court stated:

Rule 9031 was enacted because the new Code, if left intact, would have made the reference of bankruptcy cases superfluous. . . . The new Code was not left intact, however; . . . Rule 9031, which specifically addressed the situation in which all bankruptcy cases are to be heard by Bankruptcy Judges in the first instance, is incongruous in the situation created by Northern Pipeline whereby the District Court is to exercise bankruptcy jurisdiction.

Id. at 1021 n.10. The Committee never may have contemplated bankruptcy judges appointing special masters in bankruptcy cases.

[FN108]. Fed. R. Civ. P. 53(a)-(b).

[FN109]. See Ex parte Peterson, 253 U.S. 300, 312 (1920) (Justice Brandeis, referring to the role of the special master, stated that he or she is an "instrument for the administration of justice (to be employed by the court) when deemed by it essential."); United States v. Manning, 215 F. Supp. 272. 293 (W.D. La 1963) (noting that the special master is charged with the same obligations of a judicial officer).

[FN110]. 11 U.S.C §§ 704, 1104, 1106, 1202, 1302 (2000) (explaining the duties of a trustee in a Chapter 7 case, the appointment of a trustee or examiner in a Chapter 11 case, the duties of a trustee and examiner, and the duties of trustee in a Chapter 12 case, respectively). For an excellent discussion of the role of the examiner and a comparison of that role to that of the trustee, see Leonard L. Gumport, The Bankruptcy Examiner, 20 Cal. Bankr. J. 71 (1992).

[FN111]. 11 U.S.C. § 1104 (2000) provides in relevant part:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate,

without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

. . .

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by curent or former management of the debtor, if

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

[FN112]. No definition for the term "party in interest" is provided in the Bankruptcy Code. Some guidance is provided in 11 U.S.C § 102 (2000). The Legislative Statement provides that· "(r)ules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question. . ." 11 U.S.C. § 102 (2000).

[FN113]. 28 U.S.C §§ 581-589 (1994) (These provisions describe the United States Trustee system, which was designed, in large part, to perform and oversee the administration of bankruptcy cases.).

[FN114]. 11 U.S.C § 323(a) (2000) provides, in relevant part, that "(t)he trustee in a case under this title is the representative of the estate." 11 U.S.C. § 1106 (2000) provides, in relevant part:

A trustee shall--

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable--

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates . . . .

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

11 U.S.C. § 704 (2000) provides:

The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received,

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United

States trustee.

[FN115]. 11 U.S.C. § 704 (2), (7), (8), (9) (2000).

[FN116]. See supra notes 14, 21-31, and accompanying text.

[FN117]. See supra note 14 and accompanying text. In fact, it is when courts have appointed a special master to perform tasks that amount to full and complete fact-finding in the case that courts find the appointment improper as a substitute for the judicial role.

[FN118]. Compare the duties of the trustee and examiner under 11 U.S.C. §§ 704, 1106, 1202, 1302 (2000), with the powers of the special master under Fed. R. Civ. P. 53. See also supra notes 15-31 and accompanying text.

[FN119]. See supra notes 27-28 and accompanying text.

[FN120]. 28 U.S.C. § 151 (1994).

[FN121]. 11 U.S.C. § 1104(c) (2000).

[FN122]. 11 U.S.C. § 1104(a)(1), (c) (2000).

[FN123]. See 11 U.S.C. § 704 (2000).

[FN124]. 11 U.S.C. §§ 1104(c), 1106(a)(3)-(4), (b) (2000).

[FN125]. 11 U.S.C. § 1104(c) (2000).

[FN126]. 11 U.S.C. § 1104(c) (2000).

[FN127]. See, e.g., Brazil, Special Masters, supra note 3.

[FN128]. 11 U.S C. § 523(a)(1)-(16) (2000).

[FN129]. Examiners only may be appointed in Chapter 11 cases. See 11 U.S.C. §§ 103, 901 (2000).

[FN130]. See supra note 110 and accompanying text.

[FN131]. See, e.g., Veneri v Draper, 22 F.2d 33, 35 (4th Cir 1927) ("There can be no question, we think, that under the federal practice the judge has the power in a proper case to refer a cause to an auditor for the purpose of simplifying the issues and thereby enabling the court and the jury to more readily determine the matters in dispute "); United States v. Conservation Chem. Co., 106 F.R.D. 210, 217-21 (W.D Mo. 1985) (citing and reviewing numerous cases in which special masters were appointed to assist the court in various ways); Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) (appointing a special master pursuant to its inherent authority); Farrell, Coping with Scientific Evidence, supra note 3, at 943-44; Jacob, supra note 3, at 34.

[FN132]. See supra text accompanying notes 4-5.

[FN133] Rules of Practice for the Courts of Equity of the United States, 42 U S. (1 How.) xli-lxx (1842).

[FN134]. See, e.g., Ex parte Peterson, 253 U.S 300, 312 (1920) ("Courts have . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982) (The federal courts'

equitable power to appoint special masters to supervise implementation of decrees long has been established.), cert. denied, 460 U.S. 1042 (1983); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) ("Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U.S.C.A., for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" (quoting Peterson, 253 U.S. at 312)); Westchester Fire Ins Co. v. Bringle, 86 F.2d 262, 263 (6th Cir. 1936); Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) ("This appointment (of a special master) is made pursuant to the court's general equity powers and not under Rule 53, Federal Rules of Civil Procedure."); Conn. Importing Co. v. Frankfort Distilleries, Inc., 42 F. Supp. 225, 226 (D. Conn. 1940) ("The power of the court so to proceed (to appoint a special master) is beyond question. It exists independent of the rule. Rule 53 serves but to outline the procedure to be followed when the power is exercised."); Thompson v Smith, 23 F. Cas 1092, 1093 (C.C. Ohio 1869) ("(A)cted under the authority of a well-established principle, that the courts of the United States, in the exercise of their chancery powers, possess an inherent authority, in proper cases, to order a reference to a master."); Kaufman, supra note 5, at 462 ("There has always existed in the federal courts an inherent authority to appoint masters. . . .").

[FN135]. See generally Manual for Complex Litigatic § 20.14, at 16 (3d ed. 1982); Brazil, Referring Discovery Tasks, supra note 17, at 143.

[FN136]. Brazil, Referring Discovery Tasks, supra note 17, at 149-60.

[FN137]. Brazil, Referring Discovery Tasks, supra note 17, at 149 (citing statements of Robert G. Dodge, a member of the original Advisory Committee, and Edgar B. Tolman, the secretary of the Advisory Committee on the rules for civil procedure).

[FN138]. Brazil, Referring Discovery Tasks, supra note 17, at 155.

[FN139]. See supra notes 33-41 and accompanying text.

[FN140]. See Curtis v. Loether, 415 U.S. 189, 195 (1974); Bank of Marin v. England, 385 U S. 99, 103 (1966)

[FN141]. Significant controversy exists regarding the relationship between written procedural rules and inherent judicial authority, and the extent to which procedural rules can and should limit courts' inherent authority over their process and procedure. The fact that a procedural rule addresses specific issues does not necessarily mean that a court successfully cannot assert its inherent authority to allow it to deal with those same issues. Courts sometimes find that the rules can be interpreted so that pre-existing inherent authority simply supplements the rules. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991); Link v. Wabash R.R., 370 U.S. 626, 629-33 (1962) (holding that Fed. R. Civ. P. 41(b) authorizing dismissals on the motion of the defendant did not deprive courts of their inherent authority to dismiss without such a motion). The Court in Chambers rejected the argument that the sanction provisions of Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 restrict the court's inherent authority, and stated:

We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct (in this case). These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.

Chambers, 501 U.S. at 46. But see Brooks Fashion Stores v. Mich. Employment Sec. Comm'n, 124 B.R. 436, 440 (Bankr. S.D.N.Y. 1991) ("The Bankruptcy Rules were promulgated by the Supreme Court pursuant to authority granted by Congress in 28 U.S.C § 2075. As such, the Rules have the force of law."); John Papachristo, Comment, Inherent Power Found, Rule 11 Lost· Taking a Short Cut to Impose Sanctions in Chambers v NASCO, 59 Brook L. Rev. 1225, 1250-65 (1993) (arguing that the rules should be construed generally to pre-empt inherent authority).

Bankruptcy judges have not appointed special masters routinely pursuant to the inherent equitable powers granted the bankruptcy court under Bankruptcy Code § 105(a): "(t)he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C § 105(a) (2000). Although § 105 serves as the depository of the bankruptcy court's inherent equitable powers, vesting the court with the power to issue orders necessary to carry out the provisions of the Bankruptcy Code, bankruptcy judges apparently have felt constrained by

Rule 9031.

[FN142]. 11 U.S.C § 105(b) (2000) ("Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title."). Under the former Act, the bankruptcy judge had the power to appoint receivers in bankruptcy cases, but the Bankruptcy Code replaced the role of the receiver in bankruptcy with the interim trustee. Under the Bankruptcy Code, there no longer was a need to appoint the receiver as under the former law. See generally Benjamin Weintraub & Alan N. Resnick, Bankruptcy Law Manual ¶ 6.02, at 6-4 to 6-7 (3d ed. 1992).

[FN143]. 11 U.S.C. § 105(b) (2000).

[FN144]. See supra notes 131-38 and accompanying text.

[FN145]. See supra notes 131-38 and accompanying text.

[FN146]. See supra notes 131-38 and accompanying text.

[FN147]. 28 U.S.C § 2075 (1994) ("The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11.").

[FN148]. 28 U.S.C § 2075 (1994).

[FN149]. See In re Oliver, 452 F.2d 111, 114 (7th Cir. 1971) ("(N)o rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law ").

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

MEMORANDUM

TO: Judge Small

FROM: Tracy Davis

DATE: August 28, 2002

SUBJECT: Request to Consider Rule Amendment Allowing Appointment of Special Masters in Bankruptcy Proceedings

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The letter and materials you recently received from David Kennedy, Chief U.S. Bankruptcy Judge for the Western District of Tennessee, raise the issue of whether the Federal Rules of Bankruptcy Procedure should be amended to expressly authorize district and bankruptcy court judges to appoint special masters in appropriate bankruptcy proceedings. Judge Kennedy commented that he believes the authority to appoint special masters would be a useful case management tool, especially given the increasing number of large and complicated corporate bankruptcy cases being filed, and also indicated his interest in knowing whether the Advisory Committee on Bankruptcy Rules plans to discuss potential changes to Bankruptcy Rule 9031. Per your request, I reviewed the law review article provided by Judge Kennedy and other materials, and have prepared the following summary. The information set out in this summary is derived in large part from the article authored by Judge Kennedy's law clerk, R. Spencer Clift III.

I. OVERVIEW AND RELEVANT RULES

Rule 53 of the Federal Rules of Civil Procedure (hereinafter "Federal Rule 53") authorizes the appointment of special masters. It sets out a comprehensive overview of the circumstances in which a master may be appointed and compensated, the means of referral, and the master's powers, among other things. However, Rule 9031 of the Federal Rules of Bankruptcy Procedure (hereinafter "Bankruptcy Rule 9031") specifically provides: "Rule 53 FR Civ P does not apply in cases under the Code." The 1983 Advisory Committee's Note to Bankruptcy Rule 9031 clarifies further that the rule "precludes the appointment of masters in

cases and proceedings under the Code." This memorandum considers the arguments in support of abrogation of Bankruptcy Rule 9031 and adoption of the key provisions of Federal Rule 53, but concludes that amendment of the rule is not warranted.

Many of Federal Rule 53's provisions prompt debate among those considering whether to incorporate a modified version of the rule into the bankruptcy rules. Some of the most significant are these: Subsection (b) provides that the reference to a master "shall be the exception and not the rule." Fed. R. Civ. P. 53(b). And, the order of reference may "specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only." Id. Rule 53(c). Subject to any limitations specified under Federal Rule 53(c), the master otherwise "has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order." Id. The master is empowered to require the production of evidence, to rule on its admissibility, to examine witnesses under oath, to prescribe the form of accounts submitted to the court and require the statement of a certified public accountant who may be called as a witness, and to prepare findings of fact and conclusions of law. Id. Rule 53(c), (d)(3), (e). The ability of a master to prepare findings of fact and conclusions of law is, for some, of especially great significance.

II. ADVISORY RULES COMMITTEE'S PRIOR CONSIDERATION AND REJECTION OF PROPOSED AMENDMENT OF BANKRUPTCY RULE 9031

The Judicial Conference Advisory Committee on Bankruptcy Rules ("Advisory Committee") has twice considered, and rejected, suggestions to amend the rules to provide for the appointment of special masters. In 1995, the Committee considered a suggestion offered by its Long Range Subcommittee, and specifically put forth by Judge Paul Magnuson, United States Bankruptcy Court Judge for the District of Minnesota (and then Chairman of the US Judicial Conference Committee on the Administration of the Bankruptcy System), to allow the appointment of special masters by district and bankruptcy court judges in "rare and appropriate" bankruptcy cases, thereby abrogating Bankruptcy Rule 9031. The Advisory Committee declined to amend the rule, and reported that "[t]he consensus was that a special master is too reminiscent of the former bankruptcy referee and that adequate alternatives exist in the authority to appoint a trustee and an examiner." R. Spencer Clift III, Should the Federal Rules of Bankruptcy Procedure be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint A Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?, 31 U. Mem. L. Rev. 353, 379 (2001).

The Advisory Committee considered the issue again in 1996, when the Judicial Conference Committee on the Administration of the Bankruptcy System again suggested that it "abrogate Federal Rule of Bankruptcy Procedure 9031 and promulgate a modified Rule 53." Id. at 390. By a vote of 5 to 8 (with all five of the bankruptcy judges on the committee voting in favor of amendment), the Advisory Committee declined to amend the rule. Id. The key concerns expressed by the Committee members were "the standard of review to be applied to a special

master's findings of fact and conclusions of law, if required by the court, and the method and source of compensation to be allowed to the master." Id.

III. PROPONENTS' MAIN ARGUMENTS IN FAVOR OF AMENDING BANKRUPTCY RULE 9031.

Proponents of an amendment to the rules emphasize that special masters would be appointed only in "rare and appropriate cases." These seem most likely to include cases that are by any standard enormous, such as the current cases involving corporate entities like Enron or K-Mart, to cite two of the several bankruptcies noted by Judge Kennedy. Proponents advance three main areas in which special masters could facilitate simpler, faster, more cost-effective litigation. Id. at 371. First, special masters could assist in cases involving "complex accounting and computation." Id. Commentator Clift suggests that these cases likely would involve antitrust, product liability, or securities fraud litigation, or issues of employee compensation, resolution of fee disputes, and business marketing analyses. Id. at 372-73.

Proponents also maintain that special masters can assist with complicated discovery issues, especially in truly huge cases, and with settlement facilitation. Id. at 374-78. As to discovery, special masters arguably could provide necessary oversight to limit the risk of document destruction in corporate fraud cases. Regarding settlement, special masters are recommended as being neutral, able to interact more informally, and more likely to be flexible and informed as to both the facts of an intricate case and the means most likely to resolve it. Id. at 377. And as to both discovery and settlement, proponents argue, special masters can at a minimum keep proceedings moving apace, reducing inefficiencies and benefitting all parties. (There are additional arguments to be made in favor of amending the rule, and proponents' responses to the arguments against amendment, but discussion of those is beyond the scope of this memo. The memo offers only an overview of the general trends of thinking, and sets out what I believe are the more basic reasons to again decline to pursue amendment.)

IV. ARGUMENTS IN OPPOSITION TO AMENDING BANKRUPTCY RULE 9031.

I did not locate any resources specifically discussing the reasons not to amend Bankruptcy Rule 9031 other than Mr. Clift's article, and so draw primarily on my own observations and the questions that came to mind while considering the arguments of those who favor abrogation of Bankruptcy Rule 9031 and adoption of a modified form of Federal Rule 53.

The most distinctive characteristic I can identify of the kind of exceptional case that would most likely be to be considered "appropriate and rare" is that it would be truly monstrous in size, such as the Enron and K-Mart bankruptcies. These cases are huge in terms of assets and debts, and in numbers of creditors and/or employees. Because the companies are publicly traded there also is a stock valuation factor, which raises the level of public interest. That level of interest leads to an increased level of participation by creditors and other interested groups.

There may well be complex legal issues that arise in these "monster cases," but it appears to me that the main source of any added complexity – in the current rash of accounting cases,

anyway – will primarily be due to the large number of participating parties. I haven't been convinced that the administrative burden of these cases is something that it would take a special master to handle – from a purely logistical point of view, dedicating a single person in a clerk's office staff to oversee a case like that for as long as the circumstances warrant should meet any unusual administrative needs. As for resolution of discovery disputes and other matters that currently would be resolved by the bankruptcy judge, arguably eating up court time to the detriment of other parties who need to have their cases heard, my thinking is that the very fact that these cases tend to be high-profile, often feature a "scandal" aspect, and also have parties with a lot at stake (who may therefore be more inclined to be adversarial), means that the official, impartial, fully by-the-book treatment they'd receive from the court is the most appropriate means of bringing the case to closure.

The random assignment of cases to judges as opposed to the specific selection of a special master thought to be uniquely qualified to handle a particular matter is, I think, more likely to foster confidence in the public and in the parties that the case will proceed as it should and be resolved in due course. Regardless of whether the assumption makes sense, changes designed to facilitate "special treatment" -- however useful, efficient, and generally good the special treatment may be -- may well be considered suspect. Allowing a special master to interact more informally with parties than can a bankruptcy judge, for example, would raise legitimate concerns about the substance of any ex parte communications. And, consider the negative associations many people likely draw with the term "special prosecutor" – whether right or wrong, the fundamentally simple, statutory role these individuals play also carries with it a whole range of politically charged connotations. I think it is reasonable to query whether those connotations might spill over into other areas and negatively affect the public's (and maybe even the parties') perceptions of any new and "special" treatment or course of dealing in a bankruptcy case.

With respect to the usefulness of a special master in discovery matters, it is logical to expect that a master authorized to serve the bankruptcy court in the same way that a master or magistrate judge currently can assist the district court certainly could be useful. However, I am skeptical that a master would be useful in any one case in all of the key areas that proponents describe -- such as with respect to case administration, computation, discovery and settlement facilitation, etc. I think it more likely that a master would be particularly useful with one, perhaps two facets of a case. And as to those one or two facets, the court probably would be able to use court personnel and expert witnesses as necessary or to appoint a chapter 11 examiner to meet its needs. (Proponents of amendment would respond that trustees cannot serve the role of a special master because their duty is to maximize the estate, which often places them in a role that is adversarial to the parties, and that examiners have an active duty to investigate the debtor and thus cannot hold a neutral position.)

Other specific provisions of Federal Rule 53 prompt concerns. The rule provides that in actions without a jury, the court "shall accept the master's findings of fact unless clearly erroneous." Fed. R. Civ. P. 53(e)(2). At least one commentator suggests that this concern would be alleviated by using a de novo standard of review in the bankruptcy version of Federal Rule 53. Clift, supra, at 391. Doing so would in one sense solve the problem, but it also would remove

the finality of the master's findings and encourage disappointed parties to always apply to the bankruptcy court for a de novo review. The presumed finality of the master's findings, in district court practice, appears to account for a good portion of the rule's value.

Proponents of amendment to the rules to allow the use of special examiners do emphasize that only exceedingly rare cases would warrant the use of special masters. While this is a solid point in favor of amending the rules, it also makes it harder to fully appreciate the role a special master could play in a "rare and appropriate" case because every case I've been able to think of seems to be one that could be managed through conventional means. Maybe it really is just one case in many thousands that could use the services of a special master for discovery, accounting, and settlement facilitation, but that one case really, really could benefit from a special master. Ironically, the rare and appropriate case appears to be so exceptional and rare that it's hard to make the argument for amending the rules without making too broad an argument, thereby diluting what may be a good point. In sum, however, my sense is that the resources currently available to the bankruptcy courts are sufficient to meet the needs of the parties in virtually all cases.

The following excerpt from the minutes of the Committee's September 1996 meeting summarizes the discussion and "no action" vote taken on whether Rule 9031 should be amended.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 26 - 27, 1996

San Francisco, California

Minutes

The following members were present at the meeting:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Professor Charles J. Tabb
R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Alan N. Resnick, Reporter

District Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and District Judge Thomas S. Ellis, III, liaison to the Committee from the Standing Committee, also attended. Circuit Judge Edward Leavy, former Chairman of the Committee, attended part of the meeting. District Judge Paul A. Magnuson, Chairman of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), and District Judge Donald E. Walter, a member of the Bankruptcy Administration Committee, also attended part of the meeting. In addition, Bankruptcy Judge A. Thomas Small, who recently had been appointed to the Committee for a term beginning October 1, 1996, attended.

The following additional persons attended the meeting: Peter G. McCabe, Assistant Director of the Administrative Office of the United States Courts ("Administrative Office") and Secretary to the Standing Committee; Joseph G. Patchan, Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon, Bankruptcy Judges Division, and Mark D. Shapiro,

The Committee had requested the FJC to conduct a study to determine the existing practices under Rule 2004, which requires a motion to be filed. The Committee Note states that the motion may be heard either ex parte or on notice. The Committee had asked the FJC also to survey the courts concerning the dispositions of the motions and whether it would be advisable to adopt a procedure similar to that for taking depositions under the civil rules. The FJC study showed that the bankruptcy bench is about equally divided between judges who consider the motions ex parte and those who consider them on notice, with few objections being filed (or granted) under either practice. The Reporter had prepared a memorandum presenting several alternatives for the Committee's consideration.

After a discussion of the various alternative approaches and the findings of the FJC study, there was **a motion for the appointment of a subcommittee to study further the materials prepared by the Reporter and the FJC and make recommendations to the Committee, which motion carried with none opposed. Chairman Mannes appointed Judge Cordova to chair the subcommittee and Judge Robreno, Judge Kressel, Professor Tabb, Mr. Batson, and Mr. Kohn to serve as members.**

Rule 9031 and Special Masters. The Reporter briefly stated the history of the proposal and referred the Committee to several alternative amendments, starting at page 17 of his memorandum. Judge Walter said the Bankruptcy Administration Committee had offered the idea of authorizing a bankruptcy judge to appoint a special master as simply another tool that could be used in appropriate cases, adding that any such authorization should be tailored to the bankruptcy situation. Judge Magnuson added that the Bankruptcy Administration Committee had its own long range planning subcommittee which had recommended bringing the proposal to the Advisory Committee as a form of help to the judge.

Judge Robreno, noting that the Reporter's memorandum seemed to indicate that the special master concept might be at odds with several provisions of the Bankruptcy Code, asked whether it is appropriate for the Committee to decide these underlying policy issues. Mr. Klee

noted that, prior to the enactment of the 1978 Code, there had been a history of patronage in bankruptcy and that receivers (which are prohibited in the Code) and special masters were part of that patronage. Even today, he said, bankruptcy judges are appointing mediators in cases. Judge Ellis suggested that the Committee should hear from Judges Merhige and Shelley in Richmond, who had managed the "Dalkon Shield" case with the help of an examiner (an officer specifically authorized by the Code). Mr. Rosen said he thought the idea of special masters might be workable if limited to appointment by a district judge when the reference has been withdrawn. Professor Tabb said he thought Alternative No. 6, which contains the fewest restrictions on an appointment, was acceptable. He said he has confidence in both bankruptcy judges and district judges and added that judges already make such appointments under the name "examiner." Judge Kressel said he thinks the Bankruptcy Administration Committee's proposal seems acceptable and that he would like to have the tool, even though in 14 years he could think of only one case in which he might have considered using it.

Mr. Batson, however, said he is not convinced the authority is needed. He said the mass tort situation, such as the "Dalkon Shield" case, calls for estimation of the claims under § 502 of the Code, a core matter that is not delegable. He said he could not think of a case over the prior 15 years where a court would have used a special master. Judge Magnuson noted that the "Dalkon Shield" case was filed in Virginia and that Judge Merhige also was the multi-district litigation judge who had been appointed to hear the civil tort actions involving the Dalkon Shield device. He said he thinks the Dow Corning case is different because the multi-district litigation and the bankruptcy case are in different jurisdictions. Mr. Batson said he is participating in the Dow Corning case and that he expects the bankruptcy court to estimate the claims, after which the plan will establish a trust from which to pay them. He said he is not convinced there is a role a special master could play.

Judge Cordova said he has never needed a special master, but favors removal of the prohibition. Judge Cristol said he had experienced coordinating with a special master who was appointed in a criminal case. Judge Small said he sees no harm in adding suitably limited

authority for special masters. Mr. Rosen said he sees appointments of examiners or fee experts because judges are frustrated when a case does not move; then, he said, the parties are frustrated at having a person in the case that they don't want.

Mr. Sommer said he was concerned about conflict with the Bankruptcy Code if the estate were to pay a special master. Judge Restani said she believes the issue was thought out during the drafting of the 1978 Code and that she disfavors special masters generally, even in district court, and particularly in jurisdictional matters.

Mr. Klee pointed out that the Bankruptcy Code currently contains checks and balances, one of them being that any examiner is appointed by the United States trustee, not the judge, although Rule 706 of the Federal Rules of Evidence permits a judge to appoint an expert. He asked what differentiates a special master from an examiner or an expert. Judge Walter said the difference is that a special master's findings must be accepted unless clearly erroneous. **Judge Batchelder made a motion, seconded by Judge Restani, that the rules not be amended to permit special masters, which motion carried by a vote of 8 to 5.**

Rules 1019(6) and 9006. The Reporter referred the Committee to his memorandum. Rule 1019, he said, currently provides for the filing of claims for debts incurred postpetition but before conversion in a case that is converted to chapter 7. The rule invokes Rules 3001(a) - (d) and 3002, which govern the filing of proofs of claim. Most postpetition claims, however, are for administrative expenses, for which § 503(a) of the Code directs the filing of a "request for payment" rather than a proof of claim. Several courts have ruled, however, that an administrative expense claimant must file a proof of claim in a converted case in order to obtain payment. One recent decision, In re Pro Set, Inc., states affirmatively that no provision of the Code or the rules imposes such a requirement. Accordingly, the Reporter said, he had drafted amendments to clear up the growing confusion over the proper procedure.

The proposed amendments would expressly require an administrative expense claimant to file a request for payment and would set the same 90-day deadline that already is in place for a

The Advisory Committee on Civil Rules has proposed extensive amendments to Rule 53 on special masters. The following material includes: a clean copy of the proposed amendments, the underline/strikeout version showing the changes proposed, and the committee note. The proposal has been approved by the Judicial Conference and forwarded to the Supreme Court. Absent action to disapprove the propose either by the Court or the Congress, the amended rule will take effect December 1, 2003.

the request — also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

* * * * *

Rule 53. Masters

(a) Appointment.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master.

(1) Notice. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances — if any — in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(4) Amendment. The order appointing a master may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.

(1) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or

affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) Time To Object or Move. A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) Fact Findings. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation.

(1) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(2) Payment. The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

* * * * *

Rule 54. Judgments; Costs

* * * * *

(d) Costs; Attorneys' Fees.

close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

Changes Made After Publication and Comment

The changes made after publication and comment are indicated by double-underlining and overstriking on the texts that were published in August 2001.

Rule 51(d) was revised to conform the plain-error provision to the approach taken in Criminal Rule 52(b). The Note was revised as described in the Recommendation.

~~**Rule 53. Masters**~~

~~**(a) Appointment and Compensation.** The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct, provided that this~~

~~provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.~~

~~**(b) Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.~~

~~**(c) Powers.** The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may~~

~~examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.~~

~~**(d) Proceedings.**~~

~~(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of their parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an~~

~~order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.~~

~~(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.~~

~~(3) *Statement of Accounts.* When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a~~

~~statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.~~

~~**(c) Report.**~~

~~(1) *Contents and filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless~~

~~otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.~~

~~(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.~~

~~(3) *In Jury Actions.* In an action to be tried to a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.~~

~~(4) *Stipulation as to Findings.* The effect of a master's findings is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.~~

~~(5) *Draft report.* Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.~~

~~**(f) Application to Magistrate Judges.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.~~

(a) Appointment.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve 0a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an

available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of ~~a~~ any potential grounds for disqualification.

~~**(3)** A master must not, during the period of the appointment, appear as an attorney before the judge who made the appointment.~~

(34) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master.

(1) ~~Hearing~~ Notice. The court must give the parties notice and an opportunity to be heard before appointing

a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances — if any — in which the master may communicate ex parte with the court or a party ~~limiting ex parte communications with the court to administrative matters unless the court in its discretion permits ex parte communications on other matters~~;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(34) Entry of Order. ~~Effective Date. A master's appointment takes effect~~ The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(43) Amendment. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend ~~to the court for the court's approval~~ a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file

the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.

(1) Action. In acting on a master's order, report, or recommendations, the court ~~may~~ must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) Time To Object or Move. A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) Fact Findings ~~or Recommendations~~.

{Recommended New Version} The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

~~*{Version 1}* The court must decide de novo all fact issues on which a master has made or recommended findings unless: **(A)** the order of appointment provides that the master's findings will be reviewed for clear error, or **(B)** the parties stipulate with the court's consent that the master's findings will be final.~~

~~*{Version 2}* When a master has made or recommended findings of fact:~~

~~(A) the court must decide de novo all substantive fact issues unless: (i) the order of appointment provides that the master's findings will be reviewed for clear error, or (ii) the parties stipulate with the court's consent that the master's findings will be final.~~

~~(B) the court may set aside non-substantive fact findings or recommended findings only for clear error, unless (i) the order of appointment provides for de novo decision by the court, (ii) the court receives evidence and decides the facts de novo, or (iii) the parties stipulate with the court's consent that the master's findings will be final.~~

(4) Legal Conclusions questions. The court must decide de novo all objections to conclusions of law made or recommended by a master. ~~In acting under Rule 53(g)(1), the court must decide questions of law de~~

~~novo., unless the parties stipulate with the court's consent that the master's disposition will be final.~~

~~[~~**(5) Procedural Matters ~~Discretion~~.** Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.~~]~~

(h) Compensation.

(1) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(2) Payment. The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule. ~~Unless authorized by a statute other than 28 U.S.C. § 636(b)(2), a court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under Rule 53(h).~~

Committee Note

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

Subdivision (a)(1). District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does

not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court,

only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

Pretrial and Post-Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or post-trial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not

be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial

responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

Post-Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2) and (3). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances — and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety — consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly

limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

Subdivision (b). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master

must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, or recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a possible ground for disqualification, the order can enter

only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Subdivision (c). Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

Subdivision (d). The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e). Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f). Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to

support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

Subdivision (g). The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of — a master's order, report, or recommendations, are important. They are not jurisdictional.

Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or — with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters — that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as

matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

Subdivision (h). The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

Subdivision (i). Rule 53(i) carries forward unchanged former Rule 53(f).

Changes Made After Publication and Comment

Subdivision (a)(3), barring appearance by a master as attorney before the appointing judge during the period of the appointment, is deleted. Subdivision (a)(4) is renumbered as (a)(3).

Subdivision (b)(2) is amended by adding new material to the subparagraph (A), (B,) (C), and (D) specifications of issues that must be addressed in the order appointing a master. (A) now requires a statement of any investigation or enforcement duties (B) now establishes a presumption that ex parte communications between master and court are limited to administrative matters; the court may, in its discretion, permit ex parte communications on other matters. (C) directs that the order address not only preservation but also filing of the record. (D) requires that the order state the method of filing the record.

Subdivision (b)(3) is changed by requiring an opportunity to be heard on an order amending an appointment order. It also is renumbered as (b)(4).

Subdivision (b)(4), renumbered as (b)(3), is redrafted to express the original meaning more clearly.

Subdivision (c) has a minor style change.

Subdivision (g)(1) is amended to state that in acting on a master's recommendations the court "must" afford an opportunity to be heard.

Subdivision (g)(3) is changed to narrow still further the opportunities to depart from de novo determination of objections to a master's findings or recommendations for findings of fact.

Subdivision (g)(4) is changed by deleting the opportunity of the parties to stipulate that a master's conclusions of law will be final.

Subdivision (i), addressing appointment of a magistrate judge as master, is deleted.

Rule 54. Judgments; Costs

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(d) Costs; Attorneys' Fees.

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(2) ***Attorneys' Fees.***

* * * * *

(D) By local rule the court may establish special procedures by which issues relating to such fees may

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: ISSUANCE OF ELECTRONIC SUMMONS

DATE: SEPTEMBER 18, 2002

As more courts convert to the CM/ECF system, there is an increasing interest in the possibility of issuing summonses electronically. We have received the attached request from the Chief Deputy Clerk of the Bankruptcy Court for the Western District of Pennsylvania for an amendment of the rules to permit the electronic issuance of a summons. The proposal is to revise the rule to authorize the clerk to issue a summons electronically. This can be accomplished either by providing that the clerk's signature and the seal of the court can be affixed to the summons electronically, or by amending the rule to delete those requirements if the summons is issued electronically. It is important to distinguish between the action of the clerk in issuing a summons under Rules 4(a) and 4(b), Fed. R. Civ. P., incorporated into the Bankruptcy Rules under Rule 7004(a), and the service of that summons by the plaintiff's attorney. In an electronic environment, a clerk can issue a summons electronically only to an attorney who is a registered electronic filing user of the court's Case Management/Electronic Case Files (CM/ECF) system. The attorney then must download and print the issued summons and serve it in any manner authorized under Bankruptcy Rule 7004(b).

The Advisory Committee on Civil Rules may be quite interested in a proposal to amend the rules to authorize the electronic issuance of a summons. They may take the position that electronic issuance of a summons is already allowed under the rule. If the Civil Rules

Committee believes that a change is appropriate, it would seem most prudent to have the change made in the Civil Rules with any appropriate restrictions for bankruptcy cases handled under Bankruptcy Rule 9032 . In any event, it make sense to coordinate study of the issue with the Advisory Committee on Civil Rules.

The first issue for our Committee to decide, however, is whether to pursue the matter at all, and whether to expand the matter from issuance of the summons to service of the summons electronically. Even where electronic service is allowed, it applies only after the case has proceeded beyond the complaint, and the party being served has consented in writing to accepting service electronically. Fed. R. Civ. P. 5(b)(1)(D); Bankr. R. 7005. Thus, the rules already seem to have made the decision to not allow the service of a summons and a complaint electronically. One can argue that bankruptcy is different from the district court practice because many creditors prefer to be served electronically. To that end, if further study leads to the adoption of a rule to create and maintain a national address registry of creditors, that registry could include consent by those creditors listed to accepting service of a summons and complaint by electronic means. Absent such a national registry, and perhaps even if such a registry exists, electronic service of a summons may not seem proper. Nonetheless, if the Committee desires, the matter can be studied and amendments proposed.

UNITED STATES BANKRUPTCY COURT
OFFICE OF THE CLERK
WESTERN DISTRICT OF PENNSYLVANIA
Suite 5414 US Steel Tower
600 Grant Street
Pittsburgh, Pennsylvania 15219-2801

Telephone (412) 644-4052

THEODORE S HOPKINS
CLERK OF COURT

JOHN J HORNER
CHIEF DEPUTY CLERK

April 4, 2002

The Honorable A. Thomas Small
U. S. Bankruptcy Court, Eastern District of North Carolina
Century Station Post Office
Post Office Drawer 2747
Raleigh, NC 27602-2747

Re: Summonses Issued by CM/ECF

Dear Judge Small:

The Bankruptcy Court in Western Pennsylvania is in the implementation phase of CM/ECF, and it is reviewing the feasibility of issuing summonses electronically when an adversary complaint is filed. There are at least two courts already issuing electronic summonses Members of the court's CM/ECF implementation team, including me, are concerned that the existing federal rules regarding the issuance of summonses do not adequately address electronic summonses. Chief Judge Fitzgerald suggested that I address this concern with you in your capacity as the Chairman of the Judicial Conference's Advisory Committee on Bankruptcy Rules.

Federal Rule of Civil Procedure 4 (a) states in part that the summons shall be signed by the clerk and bear the seal of the court. It is unclear from Rule 4 (a) and the existing case law what constitutes the seal of the court or the signature of the clerk The court now has the technology to issue an electronic summons bearing a watermark designed to look like the court's seal and an electronic image or typed signature of the clerk. The concern is that defendants may challenge such an electronic summons as defective under the requirements set forth in Rule 4 (a).

The issuance of an electronic summons is faster than the traditional method of issuing a summons and saves staff time. The court in Western Pennsylvania has seen an increase in adversary cases in which more than a hundred defendants are named in a complaint. It is very time consuming to place an embossed seal on more than one hundred summonses It would be a great benefit if a summons could be issued in these cases that does not require an embossed seal.

The Federal Rules have been amended over the past several years to take electronic filing and service into consideration. Federal Rule of Civil Procedure 4 (a) may also require review due to the changing nature of communications and the manner in which bankruptcy courts implement electronic case filing.

Thank you for your consideration of this matter.

Sincerely,

John J. Horner, Chief Deputy
U.S. Bankruptcy Court

cc: Chief Judge Judith K. Fitzgerald
Theodore S. Hopkins, Clerk

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: INCLUDING ENTITIES LISTED ON SCHEDULE G AS CREDITORS

DATE: SEPTEMBER 22, 2002

A debtor must list on Schedule G all of its executory contracts and unexpired leases of real and personal property. The Schedule directs the debtor to provide the name and address of the other parties to the contracts and leases, as well as to describe the contract or lease and the property covered by the agreement. There is also a cautionary reminder for the person completing the form that listing a party to the contract or lease on Schedule G will not result in that party receiving notice of the bankruptcy case unless that party is also listed on the appropriate schedule of creditors. The Committee considered only briefly whether the form should be changed in any way to provide a different warning or to direct the debtor to list the parties set out on Schedule G on either Schedule D (Creditors Holding Secured Claims) or Schedule F (Creditors Holding Unsecured Nonpriority Claims).

The difficulty is that many unexpired leases are not in default at the time of the commencement of the case, and debtors see no reason to inform the lessor of the pending bankruptcy case. Moreover, the debtor can assume the lease, particularly where there is no prepetition default, so bringing the lessor into the case is only likely to cause conflict among the parties with no real benefit or change in their relationship. On the other hand, the definition of claim under § 101(5) of the Code is extremely broad. It includes contingent claims, such as the claim of a lessor of an unexpired lease with the debtor. If the debtor rejects the lease as a part of

the case, the lessor would have a claim, at least to the extent allowed under § 502(b)(6). Section 502(g) provides further that claims arising out of the rejection of an unexpired lease or executory contract under § 365 are treated as if they "had arisen before the date of the filing of the petition." Thus, it would seem that these entities are holders of claims and should be listed on an appropriate schedule of creditors. If they are so listed, they will receive notice of the case and can take action to protect their interests. If they are not listed, the claim may not be discharged. See Bankruptcy Code § 523(a)(3).

Another problem with these listings can arise in cases in which the debtor is a software licensor and there are tens of thousands of software users. Arguably, each user is a party to an executory contract with the vendor who has agreed to provide upgrades of the software, while the user has consented to restrictions on the use or transmission of the software. Similarly, a manufacturer may have warranty obligations under agreements with thousands of customers that may fit under the definition of executory contracts. In these cases, the debtor may choose not to list these parties on the assumption that they will not have any claims at the conclusion of the case.

Schedule G reminds these debtors that including a particular entity on the list is not a designation of that entity as a creditor, and the entity will not receive the notices that creditors will receive in the case. The question for the Advisory Committee is whether this directive on Schedule G is sufficient, or whether the form should be changed to require the debtor to list all of the entities on Schedule G on Schedules D, E, or F, as well.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: MANDATORY DISCLOSURE IN ADVERSARY PROCEEDINGS

DATE: SEPTEMBER 18, 2002

Rule 26 of the Federal Rules of Civil Procedure requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. This rule is made applicable to adversary proceedings by Rule 7026. The Advisory Committee has recently proposed an amendment to Rule 9014 to exempt contested matters from these mandatory disclosure requirements. Exempting these actions from the operation of the mandatory disclosure rules is necessary because many, if not most, contested matters conclude before the expiration of the mandatory disclosure periods. The question has been raised as to whether some categories of adversary proceedings should likewise be exempted from the mandatory disclosure requirements.

Rule 26 itself excludes certain kinds of actions from the mandatory disclosure requirements. Under Rule 26(a)(1)(E), there are eight categories of cases to which the disclosure obligations are inapplicable. The Committee Note to the Rule accompanying the 2000 amendment states that the enumerated actions involve "little or no discovery in most cases." Thus, the Civil Rules recognize that it is appropriate to limit the application of the mandatory disclosure rules when they are not necessary.[1] There may be a number of categories of adversary

[1] Interestingly, Rule 26(a)(1)(E)(vi) excludes "an action by the United States to collect on a student loan guaranteed by the United States." Section 523 (a)(8) actions may often present the same issues, although matters of proof relevant to an finding of undue hardship can sometimes

proceedings that should be exempted from these disclosure on the grounds that they generally are resolved prior to the conclusion of the mandatory disclosure periods. The range of adversary proceedings is essentially unlimited, and the premise of Rule 26 is that it applies to all civil actions except the eight listed in Rule 26(a)(1)(E). It seems appropriate to determine whether any particular categories of adversary proceedings should be exempted from the mandatory disclosure provisions made applicable in adversary proceedings by Rule 7026.

The primary reason to exclude some adversary proceedings from the mandatory disclosure requirements is that the actions are resolved quickly. Determining which actions conclude quickly enough might be accomplished most effectively by studying the case statistics compiled by the Administrative Office. To the extent that the information is unavailable or insufficient to reach a conclusion, it may be appropriate to conduct additional study through the Federal Judicial Center to identify categories of adversary proceedings that usually involve limited discovery and that are resolved relatively quickly. I conducted an unscientific survey of attorneys throughout the country, and it would appear that the mandatory disclosure requirements of Rule 26, made applicable to both adversary proceedings and contested matters by Bankruptcy Rules 7026 and 9014, respectively, are honored much more in their breach than followed. If these requirements are to be followed, and the integrity of the rules protected, then it would seem prudent to determine the appropriate limits of the rule and propose an amendment that will exclude some adversary proceedings from the mandatory disclosure rules and leave them in place, consistent with district court practice, for the remaining actions.

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require significant factual and expert testimony discovery.

RULE 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES, AND UNITED STATES TRUSTEE

* * * * * *

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance or a written request to receive notice; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C., (3 in a chapter 11 case to the ~~District Director of~~ Internal Revenue Service at the address of the Service set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

* * * * * *

COMMITTEE NOTE

The rule is amended to reflect that the structure of the Internal

Revenue Service no longer includes a District Director. Thus, rather than sending notice to the District Director, the rule now requires that the notices be sent to the location designated by the Service and set out in the register of addresses maintained by the clerk under Rule 5003(e). The other change is stylistic.

United States Bankruptcy Court
Office Of The Clerk
Eastern District Of New York

Joseph P. Hurley
Clerk of Court

75 Clinton Street
Brooklyn, New York 11201

(718) 330-2188
FTS 656-2188

September 9, 2002

Mr. Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. McCabe:

On behalf of the Administrative Office's Bankruptcy Noticing Working Group, I am writing to follow-up the group's recommendation to the Advisory Committee on Bankruptcy Rules to modify Bankruptcy Rule 2002(g), and other noticing-related rules, to permit an entity to register an address to be used in any case in any district. At the Advisory Committee's Spring 2002 meeting, the Chairman referred the suggestion to the committee's Technology Subcommittee for further study.

In response to some of the questions raised at the last advisory committee meeting, and to address certain implementation concerns, I ask that you share with the Technology Subcommittee the following:

1. *Certificates of service*. A member of the rules committee indicated the certificate of service should say if the notice was sent to the address requested by the creditor. A procedure currently being used by the judiciary's Bankruptcy Noticing Center (BNC) program would meet this requirement. Currently, parties can request notices to be redirected to a single electronic mailbox as part of the Electronic Bankruptcy Noticing (EBN) program. The certificate of service will list two addresses for a registered EBN participant: 1) the address listed on the debtor's schedules and provided as part of the mailing list transmitted by the court, and 2) the electronic mailbox address registered by the entity to which the notice was sent.

2. *Notices not sent through the noticing contractor*. Of the 90 bankruptcy districts, 88 utilize the services of the national noticing contractor. Over 94 million notices were sent through the center in fiscal year 2001, and that number is expected to reach approximately 100 million this fiscal year. It is envisioned that a national database would be maintained by the judiciary's contractor, and a process would be devised to provide courts that do not use the BNC's service the ability to develop scripts that would "pass" addresses through the database to identify those entities that have registered a standard address for notification. In addition, the database could be accessed for certain notices locally by courts that use the BNC. However, with the national implementation of CM/ECF, the Administrative Office's Bankruptcy Court Administration Division has reported that the volume of court noticing being directed through the Bankruptcy Noticing Center contractor by CM/ECF sites has increased, indicating that local noticing has decreased or been eliminated.

3. *Creditors with multiple addresses*. As indicated in the minutes of the March Advisory Committee meeting, some creditors have multiple addresses, and during the course of an individual bankruptcy case, different ones might be used depending on the purpose. The judiciary's experience using the "name and address matching" software developed for the EBN program has provided a great deal of flexibility to creditors in meeting their addressing needs. By using an address list provided by the creditor, the program can accommodate a range of options, including regional addresses as well as circumstances where the creditor is represented by an authorized agent.

The noticing working group is encouraged that the committee has agreed to further consider its recommendation through the Technology Subcommittee. Thank you for your continued attention and support. I would be pleased to respond to any questions or provide additional information to you or any of the subcommittee members.

Sincerely,

Joseph P. Hurley

Joseph P. Hurley

cc: Honorable A. Thomas Small, USBC, North Carolina Eastern
Mr. Jeffrey W. Morris, Esq., Reporter to the Committee
Glen Palman, AOUSC, Bankruptcy Court Administration Division
✓Mrs. Patricia Ketchum, AOUSC, Bankruptcy Judges Division

Attachment

The pending bankruptcy reform legislation contains provisions that would accomplish the result the Mr. Hurley and the Bankruptcy Noticing Group are seeking. The legislation may not be enacted, but the attached excerpt shows the language permitting a creditor to designate one or more addresses to be used in all cases as those provisions appear in the conference report on the bill. See lines 3 through 16 of the attached page 166.

days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.

"(f)(1) An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

"(2) In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).

"(3) A notice filed under paragraph (1) may be withdrawn by such entity.

"(g)(1) Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or an organizational subdivision of such creditor to be responsible for

As of the compilation of the agenda book, the bankruptcy reform legislation continues to be stalled. The work product from the Consumer and Business Subcommittee meetings held during the summer of 2001 was provided to the Committee in the agenda book for the March 2002 meeting held in Tucson.

Please bring your Tucson meeting agenda book with you to the meeting. The material at Tab 11A through Tab 11E will inform the Committee's discussion of the pending legislation.

Attached for your information is a copy of the June 2002 report of the Bankruptcy Administration Committee's Subcommittee on Mass Torts. The subcommittee has received comments from other interested committees and is revising the report for presentation to the January 2003 meeting of the Bankruptcy Administration Committee.

estimation; (4) statutes of limitations and repose; and (5) conflicts of interest and inappropriate incentives. Following further study, the Subcommittee herewith presents its views as to each of the problem areas.

1. Due Process

A. Some Concerns*

The primary due process problem presented by any attempt to deal with future claims is the problem of lack of notice. As the Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

> "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394. . ." This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Commission's recommendations pose due process problems in that some persons whose rights are to be affected may not receive notice and an opportunity to be heard before their rights are substantially limited. Moreover, certain potential claimants, at the time that their claims are discharged, may not yet have experienced any injury or have any way of knowing that they will one day have a claim.[1]

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Marjorie O. Rendell, U.S. Circuit Judge, Third Circuit.

[1] In his article, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045 (2000), Professor Alan N. Resnick refers to these claims, as a group, as "unmanifested." Id. at 2067. However, it should be noted that the harm may not even have occurred, based on the definitions proposed, so that the holders may well have claims that are unknowable, not merely unknown or "unmanifested."

Under the Commission's proposals, debtors would be able to affect and discharge "mass future claims." A "mass future claim" would be defined as a "claim arising out of a right to payment, or equitable relief that gives rise to a right to payment, that has or has not accrued under non-bankruptcy law that is created by one or more acts or omissions of the debtor," if certain things have occurred. See Commission Recommendation 2.1.1. By adopting this "conduct" test, the Commission essentially gives a claim to all those who could be harmed by a debtor's act or omission, whether or not the claim has yet accrued or is even known.

It is true that the proposed definition of "mass future claim," found at section 2.1.1 of the Commission's Recommendations, does contain further limitations, including:

> . . . .
> (3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
> (4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
> (5) the amount of such liability is reasonably capable of estimation.

But even with these limitations, the holders of future claims need not be able to be "identified" but, instead, can be merely "described" with reasonable certainty.[2] It is thus apparent

[2] Professor Resnick argues that even the concept of claimholder identification or description can be eliminated because there is a provision for a future claims representative (discussed infra). Interestingly, nowhere in the Commission's comments is there any reference to the "description" requirement, while the other "gatekeeping" provisions are discussed to some extent. While the concept of claims identification or description may be somewhat hollow assurance, if it were eliminated would a claims representative know whom he or she is representing?

that holders of these claims are not intended to necessarily receive prior personal notice of the proceedings, let alone of the determination of their claims.

This is made even more apparent by the express provision for a "mass future claims representative," and a recommendation that the Bankruptcy Code should authorize the bankruptcy court to order the appointment of a mass future claims representative. The recommendation thus embraces the concept of some kind of constructive notice, or substitute for notice altogether, noting that in Mullane the Supreme Court discussed the impracticalities of personal notice in every case. See 339 U.S. at 313. While the Commission does recognize the potential for due process concerns in such an approach, see Bankruptcy: The Next Twenty Years, supra, at 331 n. 818, it nevertheless concludes that such constructive notice is sufficient.

Admittedly, some courts have already been willing to deal with future claims in bankruptcy proceedings, and discharge them, where the "conduct" test was employed and there was no actual notice;[3] but query whether approval of such across-the-board constructive notice should be legislated in this manner? And even if it should as a matter of policy, query whether the Due Process Clause permits such substitute notice in the bankruptcy arena, let alone in such wholesale fashion. Just because a claimholder cannot be notified and there is a need to discharge his claim so that bankruptcy policies can be advanced, does that make an alternative -- such as a

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[3] See, e.g., Grady v. A.H. Robins Co., 839 F.2d 198, 201 (4th Cir. 1988) (holding that "claim" existed prior to filing of bankruptcy petition where shield was inserted before bankruptcy); In re Texaco Inc., 182 B.R. 937, 955 (S.D.N.Y. 1995) (stating that publication was sufficient to discharge potential environmental claims of landowners); In re Waterman S.S. Corp., 141 B.R. 552, 556 (S.D.N.Y. 1992) (finding that claims of future asbestos claimants were not discharged where attempt to notify them was unreasonable and Court did not appoint a representative), vacated on other grounds, 157 B.R. 220 (S.D.N.Y. 1993).

future claims representative -- a permissible and satisfactory guarantee of due process?

Perhaps the key to this issue lies in assessing, and predicting, the scope of the Supreme Court's disapproval of the class action treatment of future claimants in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and of its disposition in Flannigan v. Ahearn, 521 U.S. 1114 (1997), which vacated the Court of Appeals' judgment and remanded the case in light of Amchem. Can a Bankruptcy Code that embodies the same objectionable traits pass constitutional muster?

It should be noted that in Amchem, the public notice was designed to reach out to anyone and everyone who might possibly be exposed. The Court was concerned, however, with the "sufficiency" of the notice. 521 U.S. at 628.[4] Here, the situation is slightly different in that, while actual notice might be attempted to the maximum extent possible, it is still contemplated that there would be instances where a complete substitute for notice by way of a class

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[4] The Supreme Court made the following observation in Amchem:

> Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciated the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.
> . . . .
> . . . In accord with the Third Circuit . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

521 U.S. at 628 (emphasis added).

representative would be relied upon as sufficient. How the Supreme Court would view that, in the context of the Bankruptcy Code, is difficult to say. Does the presence of a class representative reduce due process concerns? Does constructive notice add to the attempts at actual notice in a way that improves the "sufficiency" of notice?

As Professor Gibson notes in her article on this topic, the Supreme Court has not granted certiorari in a mass torts bankruptcy case. S. Elizabeth Gibson, A Response to Professor Resnick: Will this Vehicle Pass Inspection, 148 U. Pa. L. Rev. 2095, 2098 n.18 (2000). While one could argue that there are considerations in bankruptcy that could weigh differently on the Supreme Court's view of the requisite notice, nonetheless, Professor Gibson notes that class actions actually are an exception to the general due process requirement "that everyone be afforded her own day in court." Id. at 2107. The rationale for such an exception in the class action context is based on the legal principle that "the certification of classes . . . is confined to the situations in which there is a sufficient identity of interest between the class members and their representatives that the members' rights may be fairly adjudicated in their absence." Id. Therefore, while it could be said that bankruptcy policy considerations might support a relaxed notice requirement as part of a bankruptcy solution, nonetheless, it should be noted that policy considerations did not in the end prove sufficient to avoid due process impediments in the class action setting in Amchem. See Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 805 (1997).

Some further due process problems should also be noted. One is conflicts of interest among future claimants. As Professor Gibson notes, based upon the Supreme Court's statements in Amchem,

> [O]ne might question whether the Supreme Court will view constructive notice as providing much protection for future claimants in bankruptcy. If not, the Court may be unwilling to allow future claimants to be bound by a reorganization plan confirmed in a bankruptcy case in which their interests were litigated by an appointed representative unless great care was given to insuring the absence of conflicting interests within the group represented by each future claims representative.

Gibson, supra at 2115. Another problem is the difficulty of putting effective advance limits on future claims. As Professor Gibson notes further, in her penultimate footnote:

> Even if the "practicalities and peculiarities" of a mass tort bankruptcy case, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), justify the provision of constructive notice to such future claimants, I fear that it pushes the limits of due process too far to include within the group of future claimants persons who, at the time of bankruptcy, have not been exposed to the offending product. It cannot even be pretended that someone who has not yet purchased, used, or come in contact with a product that precipitates a mass tort bankruptcy will have any reason to understand that the bankruptcy might affect her rights.

Id. at 2115 n. 97.

Finally, due process also implicates issues of fairness as between future claimants and as between the class of future claimants compared with the classes of known claimants. Some of these problems are discussed, infra, in the section on Future Claims Representatives.

B. Some Countervailing Considerations and Suggestions*

Notwithstanding the potential due process problems described above, it is worth remembering that the Due Process Clause is designed to make the legal process work fairly, not

* This portion of the Subcommittee's Report was primarily drafted by Hon. Jed S. Rakoff, U.S. District Judge, S.D.N.Y.

to prevent it from working at all. As a practical matter, if procedures cannot be devised consistent with due process to provide for present protection of future claims and future claimants, in many cases there will be nothing left to satisfy future claims and compensate future claimants when their injuries become manifest and they most deserve help. Accordingly, notwithstanding cases like Amchem, it may be that the Supreme Court will not interpret due process so as to entirely eliminate any solution to the future claims problem in mass tort bankruptcies, especially since the bankruptcy process -- with its automatic stays, nationwide jurisdiction, and in rem approach -- seems otherwise so well suited to addressing the mammoth problems presented by mass torts.

The key to the Commission's response to the due process concerns discussed above is the appointment of a future claims representative who, as mandated by the Commission's recommendations and further discussed in section 2 of this report, infra, has a fiduciary responsibility to future claimants. Both state and federal law recognize that a fiduciary can sometimes act on behalf of a person who lacks notice without thereby offending due process, not just because of the legal fiction of "constructive notice" but because of the very strict standards to which the fiduciary will be held and the ultimate accounting she will have to render. Thus, for example, courts, consistent with due process, regularly appoint guardians to represent both infants, who will not have any meaningful notice of the guardian's actions until the infant reaches an age of understanding, and incompetents, who will never have any meaningful notice of the guardian's actions. The analogy to a future claims representative is not perfect for the guardian at least knows exactly who he is representing, whereas a future claims representative may not know her actual "clients" until sometime in the future, but the point is that due process is not so

rigid a concept as to preclude practical accommodations to situations where notice is inherently impossible at the very time when action is required.

If the future claims representative is to serve as a genuine fiduciary, however, she must have a reasonably tight idea of the characteristics of the persons she serves, even if she doesn't yet know their identity. A somewhat narrower definition of "future claimant" than the one suggested by the Commission may therefore be in order. At a minimum, this Subcommittee would recommend that subparagraph "4" of the Commission's definition of a mass future claim be amended so that it is limited, inter alia, to situations where "the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty and the nature and extent of their rights to payment can be described with specificity" (new language underscored). Likewise, as suggested by the Commission itself and discussed further in section 2, infra, there may be a need for separate future claims representatives to represent definably separate groups of future claimants.

The fiduciary responsibilities of the future claims representative are not the only due process protection that future claimants will receive in the bankruptcy context. As the Commission notes, bankruptcy "rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case, make bankruptcy more protective of future claimants [than are class actions] . . . The fundamental structure of the bankruptcy system, with restrictions such as the 'absolute priority rule,' provides safeguards for the interests of mass future claimants that are unmatched in the class action system." Bankruptcy: The Next Twenty Years, supra, at 340-41. Similarly, Prof. Gibson, after carefully comparing mass tort limited fund settlements under Rule 23 with mass tort bankruptcy

reorganizations, concludes that "bankruptcy comes out ahead of limited fund class action settlements with respect to the fairness of the resolution process and the effectiveness of judicial review." Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations at 5 (2000).

In practice, to be sure, some of these protections operate better in some contexts than in others. In a Chapter 7 liquidation, a failure to deal with future claims, however difficult, means, in effect, that future claimants will be deprived of any recovery whatever. If ever some substitute for personal notice would seem direly required, it would be in such a case. By contrast, in the case of a Chapter 11 reorganization there is at least the possibility of meaningful assets being available for future claimants even if no future claims representative is appointed, and, conversely, there is more of a danger of future claimants' rights being unfairly compromised if negotiated by a future claims representative who does not yet know exactly who the future claimants will be. In the case of a Chapter 11 reorganization, therefore, the Subcommittee is of the view that it might better comport with due process for the amount of any fund set aside to pay future claims not to be forever fixed at the time of discharge but rather to be subject to possible future expansion in situations where the estimates on which the fund was based prove later to have been materially mistaken.

Will any or all of this be enough to satisfy the Supreme Court? Prof. Gibson, in the article cited in the preceding subsection, is uncertain, noting that "the Court has not shown itself to be pragmatic in its approach to the judicial resolution of mass torts." Gibson, supra, at 2116. Moreover, there are a wide variety of situations in which mass tort bankruptcies may arise, and it may be that a solution that satisfies due process in some such situations may not satisfy it in

others. But it is respectfully submitted that, short of far more radical legislation than anything suggested by the Commission, no better solution has been proposed to the problem of future mass tort claims than the bankruptcy approach utilizing future claims representatives.

2. Future Claims Representatives*

The issues raised by the selection and responsibilities of a future mass tort claims representative in bankruptcy proceedings, especially as contemplated by the proposals of the Commission, are usefully considered against the backdrop of similar issues presented by Rule 23 class representatives in dispersed mass tort class actions involving future claimants. In dispersed mass tort cases involving exposure to toxic substances that may produce injury or death after a long latency period, there are at least two different categories of future claimants. First, there is the category of those who know that they have been exposed but do not yet show signs of illness. Those in this category know, or can be provided with notice, that there is some risk of future illness, but they do not presently know that they will develop symptoms, when such symptoms will occur, or to what degree of severity. Second, there is the category of those who have been exposed, but do not know of the exposure. They are an "amorphous and unself-conscious" group, Amchem, 521 U.S. at 628; they do not know of the risk of future illness and cannot even be given notice of such a risk. In the context of the class action, the courts have made it clear that special obligations and limitations accompany a judge's ability to appoint an

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Larry J. McKinney, U.S. District Judge, S.D. Ind., and the Hon. Lee H. Rosenthal, U.S. District Judge, S.D. Tex.

adequate representative for such claimants. These obligations and limits inform the need for specific standards governing the appointment and duties of the future claims representative and the threshold decision whether the future claims representative is merely a professional or more closely akin to a fiduciary.

In Amchem, supra, the Supreme Court addressed the problem of future claimants in the context of settlement class actions. The Court held that a settlement class of asbestos claimants must meet all the requirements for certification under Rule 23(a) and (b), with the sole exception of trial manageability. In so holding, the Court emphasized that the presence of different categories of future claimants raised a large obstacle to finding adequacy of representation, a necessary finding for class certification. The Court's discussion made it clear that the problem was not limited to Rule 23, but included constitutional dimensions.

In Amchem, the Court rejected a proposed nationwide settlement of thousands of asbestos claimants. The Court held that the class representatives and their attorneys did not meet the Rule 23(a)(4) adequacy of representation requirement because of conflicts of interest. Those who were presently ill wanted a large present recovery. Those who were exposed but had no manifest symptoms, one category of future claimants, had a conflicting interest in preserving assets for future claims. The Court raised doubts that those who did not even know that they had been exposed to asbestos could ever be given constitutionally sufficient notice. However, such claimants have an identifiable interest in preserving sufficient assets far into the future to respond to the most delayed manifestations of illness.

After Amchem, courts and parties have addressed the problem of cohesiveness in determining whether adequacy of representation can be assured for the purpose of Rule 23.

Courts have relied upon subclasses, with separate representation for each discrete group, to avoid problems of conflicting settlement goals and disparate interests that would otherwise defeat Rule 23 certification. For example, courts have attempted to create subclasses, and appoint separate representatives for each subclass, of presently injured and exposed but not yet injured groups, who require measures to assure that assets are available in the future to respond to later manifestations of symptoms; of groups for whom medical monitoring is the only present relief; and of groups that have similar types of present symptoms, who require the availability of an appropriate amount of assets in the present to respond to present symptoms. The success of these efforts has varied. In some cases, the courts have found that proposed classes present such diversity of interests that adequacy of representation cannot be achieved even with subclasses and separate representatives. See, e.g., Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (refusing to certify for settlement a proposed class of past and present cigarette smokers, their families and estates, those exposed to secondhand smoke, and those who paid medical claims). Other courts have relied upon subclasses for different types of claims, particularly to separate out future claims, with separate representatives, to achieve cohesiveness and adequacy of representation. See, e.g., O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 275-76 (C.D. Cal. 1999); Cook v. Rockwell Int'l Corp., 181 F.R.D. 473 (D. Colo. 1998). However, since Amchem, courts appear to recognize that those who do not even know that they have been exposed and could be class members in the future cannot be provided notice or adequate representation under Rule 23, even in a separate subclass certified as part of a settlement class.

Can this problem be solved in the context of bankruptcy? As already suggested in the

preceding sections of this report, the solution, if there is one, must rest with the creation of a future claims representative who has a reasonably specific idea of whom she represents and has the power to do so adequately. So armed, the future claims representative for the class of exposed but not yet ill claimants should attempt to create as large a fund as possible to protect those who move from a quiescent to an active condition. Such a future claims representative must also administer that fund so as to assure that the fund is protected into the future and will grow to meet increasing demands. Also, the future claims representative must pay out funds only under specifically enumerated circumstances, to be agreed upon at the creation of the fund.

While that pay-out itself might be considered an administrative task, depending upon the nature of the qualifications imposed upon the claimants, the duties imposed on the future claims representative are, under the Commission's proposals, fiduciary in nature. The fiduciary relationship is much like that between the administrator of an ERISA plan and beneficiaries under that plan. Many of the already established principles of insurance law and ERISA law could be applied to the future claims representative as criteria governing the responsibility for amassing and preserving the fund, administering the fund, and paying claimants from the fund. In order to insure the integrity of the fund in the most efficient manner, the future claims representative should be regarded from the outset as a fiduciary.

As the Commission also recognizes, it is necessary for a separate future claims representative to be appointed for each separate class if a separate fund is required. The same reasons that require the creation of subclasses under Rule 23 require the creation of separate funds for groups with disparate interests with respect to those funds, with different representatives that have undivided loyalties -- the hallmark of the fiduciary.

It is also vital that each future claims representative be empowered to vote on a plan of reorganization on behalf of his class of future claimants, with the number of votes determined by the reasonably estimated amount of the future claims. The difficulties inherent in giving a group of existing creditors more power than future creditors can be avoided if they are treated in the same fashion.

A future claims representative possessing these powers and particulars may possibly avoid the due process objections earlier described. To draw again on the analogous principles from insurance and ERISA law, the presence of presently unknown claimants does not necessarily defeat or alter the ability to represent such interests, consistent with fiduciary obligations. The fiduciary nature of the responsibility the future claims representative owes the class of claimants represented is analogous to the responsibility of the insurance adjustor to the policy holder or the ERISA administrator to beneficiaries. The point here is not to specifically list all the powers and responsibilities of the future claims representative but to suggest that there are sources of familiar and developed principles from which the duties and responsibilities could be derived and applied.

3. Estimation*

It has been suggested that the bankruptcy process is appropriate for disposition of mass tort claims, in part, because Section 502(c) of the Bankruptcy Code allows for estimation of

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Marcia S. Krieger, U.S. Bankruptcy Judge, D. Colo., and the Hon. Jed S. Rakoff, U.S. District Judge, S.D.N.Y.

present and future tort claims. However, as presently written, the function of Section 502(c) is so limited that, without modification, it would offer little benefit in a mass tort context. This is one of the reasons why, if bankruptcy is to play a successful role in resolving mass tort litigations, the Commission's proposal for estimation, or something akin to that proposal, should be enacted.

Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purpose of allowance under this section----
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) any right to payment arising from a right to an equitable remedy for breach of performance.

Section 502(c) is intended to facilitate allowance of claims against a bankruptcy estate. It permits the court to estimate the amount of a contingent or unliquidated claim for purposes of distribution of estate assets to the claimholder. Once the claim has been estimated, the estimated amount can be used to determine the holder's vote for or against a proposed Chapter 11 plan. (Acceptance by a class of creditors requires that a majority in number and at least 2/3 in the amount of claims actually voting vote to accept.) Because claims are payable in accordance with the statutory hierarchy, senior claims must be satisfied (by payment in full or acceptance by class) before payment of junior claims. Estimation of contingent or unliquidated claims thus fixes the amount necessary to satisfy such claims (or classes of claims), and therefore when junior claims can be paid. Ordinarily, a contingent or unliquidated debt is scheduled by the debtor, but for such a claim to be allowed, the claimholder must timely file a proof of claim. Once the proof of claim is filed, the claim can be estimated upon notice to the claimholder.

Future claims are, by nature, unliquidated and in some instances may be contingent. The

debtor may schedule such claims by group designation, but it is unlikely that they will be scheduled individually. Without identification of the claimholder(s), the claimholder(s) will receive no individual notice of the bankruptcy case, likely will not file a proof of claim, and will not receive notice of and therefore will not participate in the estimation process.

The recommendations of the Commission do not solve all these problems, but they do mitigate many of them. Recommendation 2.1.3 proposes amending § 502 to expressly empower the bankruptcy court to estimate mass future claims and determine the amount of mass future claims prior to confirmation of a reorganization plan for purposes of distribution as well as allowance and voting. Recommendation 2.1.4 proposes expanding § 524 to authorize courts to issue in all cases involving future claims so-called "channeling injunctions," which would prohibit future claimants from pursuing any of the debtor's present or future assets other than those specifically designated assets that, as part of the plan of confirmation, had been placed into a trust to be administered by the future claims representative for the payment of future claims.

Although these two recommendations would resolve or reduce many of the legal problems described above, they are not without difficulties of their own. The multiple contingencies inherent in the Commission's definition of future claims make it very difficult to estimate the dollar amount of future claims with a high degree of confidence; and, indeed, the limited experience with such estimation thus far (chiefly in the context of asbestos bankruptcies) has been that the actual amount of future claims has sometimes materially exceeded both the estimated amounts and the value of the assets put aside for their satisfaction. But the Commission's recommendations expressly provide that future claims will only apply to liabilities that are "reasonably capable of estimation," see 2.1.1(5), and the Subcommittee would expect

that this would be applied much as in the insurance industry to estimate insurable risks but exclude as uncovered those risks too diffuse or speculative to be reasonably estimated.

Channeling injunctions, by effectively placing a "cap" on the amount of money available to future assets, are also vital if meaningful reorganization is to occur to a company confronting a mass torts problem. But at the same time placing such a cap on recovery may mean that difficult questions will arise as to whether preference should be given to certain kinds of future claimants over others; and it may also mean that some distant future claimants may not realize any recovery at all (although, because of statutes of limitations, see infra, this may be a small group). As previously noted, the Subcommittee believes these problems (as well as due process problems) can be reduced if the "cap" thus created is subject to periodic reconsideration in light of new information and experience. It should also be noted that channeling injunctions can also be used for other positive purposes, such as mandating arbitration of future claims.

With experience, moreover, the extent of the problems sketched above should be reduced. As the Commission points out, while the future claims estimates made in the Johns-Manville case proved woefully inadequate, the trust established in the subsequent A.H. Robins case turned out to be, if anything, over-funded. Inherent in the bankruptcy approach to mass torts is the recognition that all kinds of creditors, including future tort claimants, will recover less than they would be entitled to in the absence of all other creditors, and the problem of estimation, while difficult, is essentially just a variation on that theme.

4. Statutes of Limitations and Repose*

The Commission's recommendations do not address the issue of whether future claimants should be entitled to seek payment from the estate (or trust created by the plan) when their claims would have been denied under state law because of the expiration of the state's statute of limitations. This Subcommittee, however, is of the view that state statutes of limitation should determine the enforceability and therefore the allowability of claims in bankruptcy.[5] Stated otherwise, if the victim had a cause of action that could have been pursued under state (or if applicable, other federal law), and that cause of action expired before bankruptcy, that victim should be precluded from asserting a claim against a bankruptcy estate. The approach is consistent with the interaction between bankruptcy and non-bankruptcy law in general,[6] and there is no sound reason to alter this principle as it applies to claimants in a mass tort bankruptcy case.

Integrated into the concerns about affording future claimants due process is the issue of whether state statutes of limitations should apply. The main objective of these recommendations is to balance the concerns of procedural due process with finality and with the predictability of estimating the number of claimants and extent of claims.

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Dennis Montali, U.S. Bankruptcy Judge, N.D. Cal.

[5] 11 U.S.C. § 502(b)(1) provides in pertinent part: "[T]he court . . shall determine the amount of such claim. . . as of the date of filing of the petition, and shall allow such claim in such amount, except to the extent that . . .such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law."

[6] In most circumstances, a "claim" arises for bankruptcy purposes when the event or conduct giving rise to liability occurs, though injury is manifested post-petition. In re Jensen, 995 F.2d 925, 928-30 (9th Cir. 1993); Grady v. A.H. Robins, 839 F.2d 198, 201 (4th Cir. 1988), cert. dismissed, 487 U.S. 1260 (1988).

It should be acknowledged that, depending on the type of the cause of action, the state statute of limitations may be difficult to apply. For catastrophic events, the victims will likely be readily aware they have a claim, although the exact extent may be unknown. For personal injuries caused by mass torts, the discovery rule generally applies: the claimant's rights are triggered when he or she knows or should have known that his/her rights existed. The clearest situation involves a present tort claimant with manifested personal injuries that directly relate to the tortious conduct or product. For other types of claims, such as claims based on breach of contract, state law statutes of limitation seem relatively easy to apply. For example, the date payment on a note is due readily triggers the running of time in which the holder may sue.

A more difficult situation is presented when the prospective plaintiff (much like the victim of a classic mass tort who experiences no symptoms) has no way of knowing a claim exists as of the date the prospective defendant files bankruptcy. Take the situation of a developer of real property, or a contractor or architect who works on the project, who negligently performs services that result in latent defects. The California statute of limitations for suits against such a party runs ten years after the conduct took place, regardless of discovery of the injury.[7] Is it a denial of due process for state law to bar a claim before the claimant knows of the claim? Apparently the California legislature favors finality.

On the assumption that such a statute of limitations could survive a constitutional challenge, there does not appear to be a reason to make a different rule in bankruptcy. If the

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[7] California Code of Civil Procedure § 337.15 bars actions based upon a "latent deficiency" after ten years from substantial completion, except in cases of fraudulent concealment or wilful misconduct. "Latent deficiency" is defined in the statute to mean "not apparent by reasonable inspection."

developer files for relief nine years after completing the project, the homeowner who is yet to discover the defect should be allowed to file a claim, assuming that homeowner can discover it in time. The real problem comes along when the homeowner (with or without knowledge of the developer's bankruptcy) has no reason even to suspect that something was done negligently nine years earlier. If the court confirms a plan that says nothing about the class of homeowners who bought latently defective homes but do not know it, it seems as though post-confirmation it would be best to let state statutes of limitations control. If the developer files eleven years after completion, then state law would bar the claim regardless of when it is discovered.

If, instead of a single home, the developer builds 10,000 homes, all with lead-based paint as a primer, -- now the developer faces mass tort litigation and files for bankruptcy under the provisions contemplated by the National Bankruptcy Review Commission. But we see no reason why the same principles regarding choice and application of statutes of limitations should not apply.

Possibly the most difficult application of the state statute of limitations in the mass tort context arises in a case of an insidious tort, such as toxic torts, where injuries may be latent for a period of years. See The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits, 96 Harv. L. Rev. 1684 (May 1983). Where appropriate, notice procedures should be applied so as to reach those claimants to which the "should have known" branch of the discovery rule applies, and to give them an opportunity to participate. While it may still be impossible to achieve total fairness, this would minimize unfairness and accord with minimal due process (see section on due process, supra).

Although applying state law statutes of limitations to claimants against bankruptcy

estates in a mass tort case may be complex and may lead to different results in different states, it is consistent with interpretation of the bankruptcy code generally, and promotes the goal of finality in bankruptcy litigation. By inherently limiting the pool of claimants, it minimizes the "floodgate" problem, and properly discriminates in favor of legitimate claimants.

5. Conflicts of Interest and Inappropriate Incentives*

A forceful and independent future claims representative is critical to the Commission's approach. The question therefore arises as to what safeguards can be created to prevent a mass tort future claims representative from colluding with, or simply being overswayed by, counsel for present claimants and debtors.

It should first be noted that the classic kind of collusion said to arise in certain "prepackaged" bankruptcies is very unlikely to arise in mass tort bankruptcies involving future claim representatives. The term prepackaged bankruptcy applies to plans where the negotiations and solicitation of acceptance occurred before commencement of a chapter 11 case. Sandra E. Mayerson, Current Developments in Prepackaged Bankruptcy Plans, 804 PLI/Comm 979, 981 (2000). Although the term has also been used sometimes to apply to "hybrids where all or part of the plan has been negotiated prepetition and/or certain but not all creditors have been solicited prepetition," id., the essence of a "prepack" is that most or all of the negotiation and solicitation occurs prebankruptcy and therefore is presented to the Court as a fait accompli. A future claims representative, however, would always be appointed after the bankruptcy petition has been filed.

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Jack B. Schmetterer, U.S. Bankruptcy Judge, N.D. Ill.

Because that additional party would be interjected, any prebankruptcy agreements among other parties could be challenged, and the future claim representative would often have a fiduciary duty to do so. By contrast, without that new party the "prepack" collusion would not likely be challenged. Therefore, appointment of a future claims representative would likely reduce rather than enhance collusive or otherwise unfair arrangements in "prepack" cases.

This is not the end of the issue, however. Some articles have expressed concerns regarding possible conflicts of interest or other inappropriate incentives to which a future claims representative might be subject, see, e.g., Frederick Tung, The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry, 3 Chap. L. Rev. 43 (2000); Hon. Edith Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform, 76 Tex. L. Rev. 1695 (1998). For example, Judge Jones writes in pertinent part:

> In bankruptcy, as in future claims class actions, the claimants are absent, invisible, and passive, creating room for exploitation in several ways. The class representative, delegated extraordinary exclusive power under the proposal to file and compromise class claims, operates without the supervision or control of real clients. Because the claims themselves are not concrete, but rather amorphous and conjectural, the representative's bargaining position is weak. The representation of future claims thus carries with it a tendency toward conflicts of interest. There is no vigorous check on a class representative's accepting a settlement that provides generous fees for the representative but modest relief for the class. A conflict may arise if the representative undertakes to settle claims of both present and future "future" claimants. In short the Commission proposal offers no protection analogous to "[t]he adequacy inquiry under Rule 23 [which] serves to uncover conflicts of interest between named parties and the class they seek to represent."

Jones, 76 Tex. L. Rev. at 1713.

The concerns raised by Prof. Tung and Judge Jones stem from their asserted apprehension that the future claims representative would be an agent without a principal. They contend that

conflicts of interest are inherent in representation of this type. Both authors are skeptical as to whether the future claims representative mechanism would truly provide zealous representation for future claimants when those persons would have no role in choosing or monitoring their agent. Tung, at 67. In addition, the debtor and creditors might initiate the process of whom to appoint, as well as terms of the appointment, of the future claims representative, Tung, at 61 and 67, even though debtors and creditors as moving parties would have interests in likely conflict with those of future claimants. (See Amchem, supra).

But the actual Commission recommendation 2.1.2. urges that any "party in interest" have standing to petition for appointment of the future claims representative. While the U.S. Trustee is not defined by statute or rule as a "party in interest," that officer is allowed under the Code to "raise . . . appear and be heard on any issue . . ." (except filing of a plan). 11 U.S.C. § 307. Therefore, the U.S. Trustee could initiate a motion to appoint the future claims representative and nominate the person to be appointed, and this Subcommittee recommends this approach since the U.S. Trustee has no financial interest at stake and would likely be viewed as a source of objective recommendations. Furthermore, this Subcommittee would favor a further modification of the Commission's recommendations to make explicit that the Bankruptcy Court itself is expected to play an active role in both the selection and the supervision of the future claims representative. Finally, of course, the future claims representative should be required to make the same kind of disclosures regarding possible conflicts of interest as is required for any professional to be employed by a trustee or debtor-in-possession under Rule 2014(a) Fed. R. Bankr. P. See Resnick, supra, 148 U. Pa. L. Rev. at 2078-79.

The other point of concern expressed is that the bargaining power of the future claims representative would be weak because future claimants and their losses are abstract and prospective, while competing present claimants and their losses are concrete and present. Tung, at 75; Jones, at 1713. Moreover, within bankruptcy cases involving mass torts, there is a culture that values consensual reorganization. Lawyers for different interests in large cases may have to "forego strict enforcement of their clients' legal entitlements in order to achieve consensus." Tung, at 73. The future claims representative must operate in this culture, and because future clients are abstract and conceptual, she may be vulnerable to group pressure to compromise interests because the other players have clients to answer to.

On the other hand, as Prof. Tung recognizes, under the Commission's proposals the future claims representative would have an extraordinary amount of independence to resist such pressure. Tung, at 75. Moreover, as described above, the Subcommittee would favor increasing the powers of the future claims representatives even beyond the Commission's recommendations.

As mentioned in section 1.B, supra, the future claims representative is in some respects called upon to play a role akin to the classic role of a guardian appointed to protect minors or future interests. While the use of such a representative is not without possible problems, see Hon. Sheila Murphy, Guardian Ad Litem: The Guardian Angels of our Children in Domestic Violence Court, 30 Loy. U. Ch. L.J. 281 (1999); David M. Johnson, The Role of the Guardian Ad Litem; Changes in the Wind, 27 Colo. Law 73 (1998), state courts using such appointments have recognized that the alternative of leaving the future interests and minors unprotected by a representative could result in little or no protection of their interests, see id. Critics of the

Commission's future claims representative proposal have not shown why difficulties in use of such representatives in bankruptcy would justify doing nothing to appoint a champion for future claims merely because that champion might not be perfect.

Giving the future claims representative economic motivation has also been suggested as one way to create a further safeguard of independence. Giving that party a financial stake in recovery by future claimants might provide the greatest incentive to maximize recovery, as by compensation giving a percentage of the amount held back for future claimants. Tung, at 78. One concern expressed in creating a compensation arrangement of this sort, however, is that the future claims representative might "unreasonably" scuttle a deal in hopes of obtaining more for the future claimants and thereby increasing the representative's personal compensation. On balance, the Subcommittee is unpersuaded that the economic incentive approach is either necessary or helpful.

In sum, while appointment of a future claims representative is not a perfect solution, in the absence of such a representative the other parties are free to collude with each other without adequately considering future claims of unrepresented parties, leaving only the judge and U.S. Trustee to question projection of future needs, without benefit of an adversarial presentation by someone charged with concern for the future. The recommendation to add a future claims representative provides a check on collusive or self-interested behavior by others, an imperfect check, but a check nonetheless.

Conclusion

This report is not intended to be a comprehensive discussion of every issue raised by the

Commission's proposals but rather a selective discussion of some of the more prominent issues. Overall, however, the Subcommittee believes that, while the Recommendations of the National Bankruptcy Review Commission do not solve all the problems inherent in dealing with the thorny thicket of future claims, they are an important step in the right direction.

Respectfully submitted,

Subcommittee on Mass Torts

Hon. Jed S. Rakoff, Chair
Hon. Marcia S. Krieger
Hon. Larry J. McKinney
Hon. Dennis Montali
Hon. Marjorie O. Rendell
Hon. Lee H. Rosenthal*
Hon. Jack B. Schmetterer**

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* Liaison from the Advisory Committee on Civil Rules

** Liaison from the Committee on Federal-State Jurisdiction

Appendix

1997 Recommendations of the National Bankruptcy Review Commission for Amendments to the Bankruptcy Code Regarding Mass Torts

2.1.1 Definition of Mass Future Claim

A definition of "mass future claim" should be added as a subset of the definition of "claim" in 11 U.S.C. § 101(5). "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one more acts or omissions of the debtor if:

1) the act(s) or omission(s) occurred before or at the time of the order for relief;
2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
5) the amount of such liability is reasonably capable of estimation.

The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim;" which would be an entity that holds a mass future claim.

2.1.2 Protecting the Interests of Holders of Mass Future Claims

The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.

The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.

The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed.

2.1.3 Determination of Mass Future Claims

Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.

2.1.4 Channeling Injunctions

Section 524 should authorize courts to issue channeling injunctions.

2.1.5 Plan Confirmation and Discharge; Successor Liability

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the, trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.

Item 17 will be an oral report. The attached memorandum concerning the CM/ECF Working Group announces the appointment of Judge McFeeley to serve as liaison from the Advisory Committee to the group's Claims Processing Subcommittee.

Robby Robinson

09/24/02 12:11 PM

To: Barry Lander@USCOURTS, Brenda Argoe/SCB/04/USCOURTS@USCOURTS, Chuck Nail/SDB/08/USCOURTS@USCOURTS, Cindy Korbol/WIWB/07/USCOURTS@USCOURTS, Diane Zech, Gary Gfeller, Geraldine Lester/ALSB/11/USCOURTS@USCOURTS, James Massey/GANB/11/USCOURTS@USCOURTS, Jon Igo, Kathleen Farrell/NYSB/02/USCOURTS@USCOURTS, Kenneth Gardner/ILNB/07/USCOURTS@USCOURTS, Larry Bick@USCOURTS, Marjorie Lynch/NCEBA/04/USCOURTS@USCOURTS, Monica Menier/LAMB/05/USCOURTS@USCOURTS, Ralph Kirscher/MTB/09/USCOURTS@USCOURTS, sheila wintermantel, Stephen Mitchell/VAEB/04/USCOURTS@USCOURTS, Terry Dunn@USCOURTS, Thomas Glover/WAWB/09/USCOURTS@USCOURTS

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Subject: CM/ECF Working Group - New Claims Processing Subcommittee

To: Bankruptcy CM/ECF Working Group

During your last meeting in Washington in May 2002, and during the August conference call, the Group discussed the thorny issue of claims processing. You and others (trustees, governmental agencies and large creditors) have expressed frustration with the current paper-based rules and procedures. You have complained that the noticing required by Rule 3001, inconsistent practices among the courts, and the lack of a bulk electronic filing capability in CM/ECF are preventing large creditors from participating in electronic filing and thereby creating a claims processing backlog in the clerk's office. You recommended that a Subcommittee of the Working Group be formed and tasked with working with the AO and affected entities to make recommendations for improved claims processing procedures and CM/ECF software modifications.

New Claims Processing Subcommittee Members

The Director has approved your recommendation and has appointed four new members to the Bankruptcy CM/ECF Working Group to work with a few existing members and Judge Mark McFeeley, NM, liaison to the Bankruptcy Rules Committee, on a Claims Processing Subcommittee. The Claims Processing Subcommittee will be chaired by Larry Bick, Clerk, TX-W, and will be comprised of the following members:

1)	Larry Bick	Clerk	TX-W Chair
2)	Kathleen Farrell	Clerk	NY-S
3)	James Massey	Judge	GA-N
4)	Brenda Argoe *	Clerk	SC

5)	Gerri Lester *	Clerk	AL-S
6)	Tom Glover *	Judge	WA-W
7)	Margie Lynch *	BA	NC-E
8)	Mark McFeeley	Judge	NM Liaison from the Bk Rules Committee

* New member of the Bankruptcy CM/ECF Working Group

Tom Lane, Bankruptcy Court Administration Division (BCAD), will provide the primary AO staff support for the Subcommittee. The Claims Subcommittee will begin work soon with conference calls and may meet in Washington prior to the full Working Group meeting on December 10-11. Welcome new members, and thanks to all serving on the Claims Processing Subcommittee for accepting this challenge. Attached is an updated working group membership list.

WG Tel List.wpd

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BCAD Working Group Staff

202-502-1545

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2002

1004
1004.1
2004
2015(a)(5)
4004
9014
9027
Official Forms 1, 5, and 17

December 1, 2003

1007
2003
2009
2016
7007.1 (new rule)

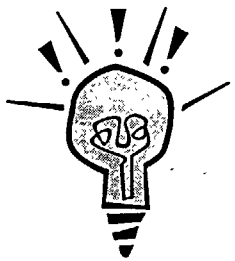
December 1, 2003, Privacy Amendments

1005
1007
2002
Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19

December 1, 2004

2002(j)
9014

THE GESTATION OF AN AMENDMENT



YEAR 1

1.Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.

2. This period is of indeterminate length.

3. Proposals come from Committee members, the Reporter, judges, clerks, or the public, or result from statutory changes, case law developments, or experience.

Advisory Committee approves draft of proposed amendments. (January-May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited.

(August)

Proposed amendments may be at different stages of the process at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). Public comment period closes.

(January - March)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate).

(March -April)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress.

(March or April)

(must be by May 1)

Congress can alter or reject during the next seven months. If Congress does not act, amendments take effect December 1.

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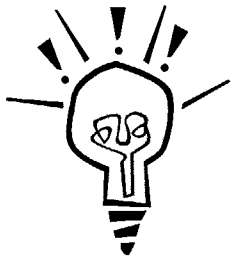
3/99

THE GESTATION OF AN AMENDMENT



YEAR 1

YEAR 2

YEAR 3

9014,*

*2002 (j) does not require publication

1005, 1007,2002, 2003, 2009, 2016,and new rule 7007.1. Official forms 1,3,5,6,7,8,9,10, 16A, 16C, and 19.

1004,1004.1
2004, 2015(a)(5)
4004, 9014, 9027

Official Forms 1, 5, and 17. Official Forms are prescribed by the Judicial Conference. They do not require Supreme Court or Congressional approval.)

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

10/2002

Next Meeting Reminder: April 3 - 4, 2003
Longboat Key, Florida

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The committee will discuss dates and locations for the September 2003 meeting.
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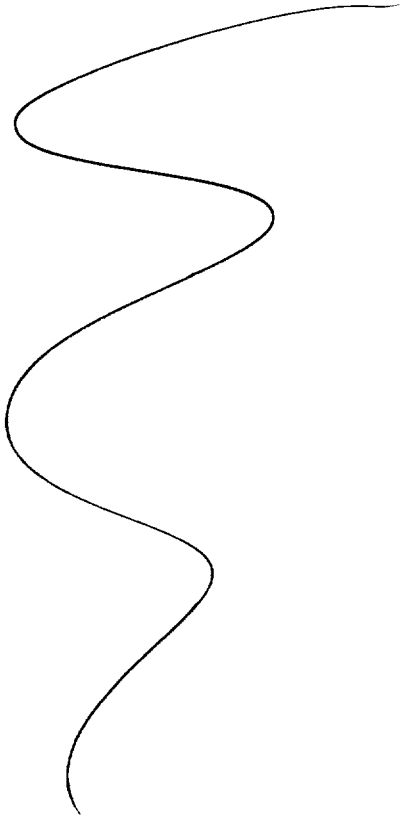
Supplemental

Agenda

Book

Materials



RULE 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements

(a) General Right to Amend. The debtor may amend a ~~A~~ voluntary petition, list, schedule, or statement ~~may be amended by the debtor~~ at any time before the case is closed. The debtor shall give notice of any amendment to the schedule of exempt property to the trustee, creditors, and any other entity affected thereby. The debtor shall give notice of any other ~~the~~ amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order the amendment of any voluntary petition, list, schedule, or statement, ~~to be amended~~ and the clerk shall give notice of the amendment to entities designated by the court.

* * * * *

COMMITTEE NOTE

The rule is amended to make explicit the obligation of the debtor to give notice to creditors of any amendment to the schedule of exempt property. Notice is important because creditors have a limited time in which to object to exemptions, including amendments to the schedule of exemptions, under Rule 4003(b). Including an explicit requirement of notice to creditors is intended to highlight the debtor's obligation and increase the likelihood that creditors will receive the notice.

The change in the rule is not intended to overrule any decisions holding that actual notice or knowledge of an amendment to the schedule of exempt property triggers the objection period for a particular creditor. Nor is the change intended to create a duty to notify creditors who are not affected by the amendment, such as those who have not filed timely claims and those who will be paid in full in the case. If the value of the property would be sufficient to

RULE 3004. FILING OF CLAIMS BY DEBTOR OR TRUSTEE

If a creditor ~~fails to file~~ has not filed a proof of claim in a timely manner under Rule 3002(c) or 3003(c), ~~on or before the first date set for the meeting of creditors called pursuant to under § 341 (a) of the Code,~~ the debtor or trustee may file a proof of such claim ~~do so in the name of the creditor~~, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith ~~mail~~ issue notice of the filing to the creditor, the debtor and the trustee. ~~A proof of claim filed by a creditor shall supersede the proof filed by the debtor or trustee.~~

COMMITTEE NOTE

The rule authorizes the debtor or trustee to file a proof of claim on behalf of a creditor who has not filed a timely claim. The ability to file a claim on behalf of the creditor ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable. Payments on those claims out of the estate reduce the amount that survives the discharge as well as furthering the bankruptcy policy of bringing all claims together in the case.

The rule no longer permits the debtor or trustee to file a claim on behalf of the creditor prior to the expiration of the time for the creditor to file a proof claim under either Rule 3002(c) or 3003(c). Section 501(c) of the Code authorizes the debtor or trustee to file a claim on behalf of a creditor who has not timely filed a claim in the case. The amendment brings the rule into conformity with that provision as well as with Rule 3005(a) which implements § 501(b) of the Code by authorizing codebtors to file claims on behalf of creditors who have not timely filed claims.

RULE 4008. ~~Discharge and Reaffirmation Hearing~~ Filing of Reaffirmation Agreement

Unless the court, for cause, extends the time, a reaffirmation agreement must be filed not later than 30 days after the entry of an order granting a discharge. ~~Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.~~

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements be entered into prior to the discharge and that they be filed with the court. Since the parties must make their agreement prior to the entry of the discharge, they will have at least 30 days to file the agreements with the court. Requiring the filing of reaffirmation agreements by a certain deadline also serves to inform the court of the need to hold a hearing under § 524 (d) whenever the agreement is not accompanied by an appropriate declaration or affidavit from counsel for the debtor.

The rule allows any party to the agreement to file it with the court. Thus, whichever party has a greater incentive to enforce the agreement can see to its filing. In the event that the parties fail to timely file the reaffirmation agreement, the rule grants the court broad discretion to permit a late filing.

The rule also is amended by deleting the provisions formerly in the rule regarding the timing of the reaffirmation and discharge hearing. Instead, the rule leaves to the courts discretion to set the hearing at a time appropriate for the particular circumstances presented in the case and consistent with the scheduling needs of the parties.

RULE 3004. FILING OF CLAIMS BY DEBTOR OR TRUSTEE

If a creditor ~~fails to file~~ has not filed a proof of claim in a timely manner under Rule 3002(c) or 3003(c), ~~on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code,~~ the debtor or trustee may ~~do so in the name of the creditor,~~ file a proof of such claim within 30 days ~~of~~ after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith ~~mail~~ give notice of the filing to the creditor, the debtor and the trustee. ~~A proof of claim filed by a creditor shall supersede the proof filed by the debtor or trustee.~~

COMMITTEE NOTE

The rule is amended to conform to § 501(c) of the Code. Under that provision, the debtor or trustee can file proof of a claim if the creditor fails to do so in a timely fashion. The rule previously authorized the debtor and trustee to file a claim as early as the day after the first date set for the meeting of creditors under § 341(a). Under the amended rule, the debtor and trustee must wait until the creditor's opportunity to file a proof of claim has expired. Providing the debtor and trustee with the opportunity to file a claim ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable.

Since the debtor and trustee cannot file a proof of claim until after the creditor's time to file has expired, the rule no longer permits the creditor to file a proof of claim that will supersede the claim filed by the debtor or trustee. The rule leaves to the courts the issue of whether to permit subsequent amendment of the proof of claim ~~filed by the debtor or the trustee.~~

Other changes are stylistic.

RULE 3005 FILING OF CLAIM, ACCEPTANCE, OR REJECTION BY GUARANTOR, SURETY, INDORSER, OR OTHER CODEBTOR

~~(a)~~ FILING OF CLAIM. If a creditor has not filed a proof of claim ~~pursuant to~~ under Rule 3002 or 3003(c), and entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c) whichever is applicable, execute and file a proof of claim such claim ~~in the name of the creditor, if known, or if unknown, in the entity's own name~~. No distribution shall be made on the claim except on satisfactory proof that that original debt will be diminished by the amount distribution. ~~A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.~~

* * * * * *

COMMITTEE NOTE

The rule is amended to delete the last sentence of subdivision (a). The sentence is unnecessary because if a creditor has filed a timely claim under Rule 3002 or 3003(c), the codebtor cannot file proof of such claim. The codebtor, consistent with § 501(b), may file a proof of such claim only after the creditor's time to file has expired. Therefore, the rule no longer permits the creditor to file a superseding claim. The rule leaves to the courts the issue of whether to permit subsequent amendment of the proof of claim filed by the codebtor.

The amendment also deletes language providing that the codebtor files proof of the claim in the name of the creditor to ~~avoid any implication that the filing is made on behalf of the creditor~~ — cafa to § 501

Other changes are stylistic.

RULE 4008. FILING OF REAFFIRMATION AGREEMENT ~~DISCHARGE AND REAFFIRMATION HEARING~~

Any reaffirmation agreement must be filed not later than 10 days after the entry of an order granting the discharge.

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. It also deletes the requirements formerly included in the rule regarding the timing of a reaffirmation and discharge hearing.

The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements be entered into prior to the entry of the discharge and filed with the court. The rule sets the deadline for filing these agreements with the court. Since the parties must enter into the agreements prior to the entry of the discharge, they will have at least 10 days to file them with the court. The rule also authorizes either party to file the agreement. Thus, whichever party has a greater incentive to enforce the agreement can see to its filing.

Setting a deadline for the filing of reaffirmation agreements is also necessary to inform the court of the need for a hearing under § 524(d). If the debtor is not represented by counsel in the negotiation of those agreements, the court must approve the agreement. A reaffirmation agreement that is not accompanied by the appropriate declaration or affidavit from counsel for the debtor informs the court that it must hold a discharge and reaffirmation hearing.

The amended rule no longer requires the court to hold the hearing within a stated time and to provide the debtor and the trustee with at least 10 days notice of the hearing. Instead, the rule reposes in the court the discretion to set the time of the hearing required under § 524(d).