

**RECOMMENDATION OF BANKRUPTCY JUDGE S. MARTIN TEEL, JR. RE
PROPOSED AMENDMENTS TO RULES 7008, 7012, 7016, 9027, AND 9033**

Issue Not Addressed by the Amendments Dealing With *Stern v. Marshall*. The proposed changes to Rules 7008, 7012, 7016, 9027, and 9033 do not address this issue:

Can a bankruptcy court's rulings incident to issuance of a final judgment be treated as proposed findings of fact and conclusions of law if the bankruptcy judge lacked authority to decide the proceeding?

This issue can arise when the bankruptcy court lacked authority because:

- the proceeding was non-core; or
- the proceeding fell within the subset of core proceedings, like *Stern v. Marshall*, in which the bankruptcy judge cannot issue a final order or judgment consistent with Article III of the United States Constitution.

Reasons Why the Issue Needs to be Addressed. Whether the bankruptcy court has authority to issue a final judgment is sometimes unclear. If the bankruptcy court decides that it has such authority and enters a final judgment, the district court might nevertheless vacate the judgment for lack of such authority. If the rulings incident to issuing the final judgment **cannot** be treated as proposed findings of fact and conclusions of law, then that will engender unnecessary delay.¹ It would be much more efficient for the district court to proceed to address the bankruptcy court's rulings as proposed findings of fact and conclusions of law under Rule 9033 upon vacating the final judgment instead of making a formalistic remand for the bankruptcy court to say to the parties that it submits its rulings as proposed findings of fact and conclusions of law, with

¹ That would necessitate a remand upon a reversal by the district court; then the bankruptcy judge would have to issue its rulings as proposed findings of fact and conclusions of law; then the objections would be filed; then the responses to objections would be filed; then the objections would be transmitted to the district court clerk; and then the district court clerk would transmit the rulings to the district court judge for de novo review of the rulings. Filing objections and responses alone could take as much as 34 days (objections: 14 days + 3 days under Rule 9006(f); responses: 14 days + 3 days under Rule 9006(f)) even if no extension of time for filing those is obtained.

the whole review process starting all over again.

My Suggested Rules Amendment. To address the issue, I think Rule 9033 should have a new paragraph (e) added that states:

(e) **Applicability to Proceedings Decided by the Bankruptcy Court.** In addition to proceedings in which the bankruptcy court has concluded that it is only authorized to issue proposed findings of fact and conclusions of law, this rule applies when each of these conditions exist:

(1) the bankruptcy court has heard and issued a final judgment or order deciding a proceeding it was authorized to hear but not authorized to decide;

(2) the bankruptcy court indicated that its rulings in the proceeding are to be treated as proposed findings of fact and conclusions of law if it lacked authority to decide the proceeding; and

(3) a party adversely affected by the judgment or order is not prepared to concede that the bankruptcy court had authority to decide the proceeding.

When each of those conditions exist, such adversely affected party must both appeal the bankruptcy court's final order or judgment (to obtain an order to vacate the final order or judgment as unauthorized) and file objections pursuant to this rule to the bankruptcy court's rulings that were conditionally treated by the bankruptcy court as proposed findings of fact and conclusions of law.

The concluding paragraph could be put in the Advisory Committee Notes instead of appearing in the Rule itself.

My Suggested Alternative Rules Amendment. Alternatively, the new Rule 9033(e) could strike paragraph (2) and read:

(e) **Applicability to Proceedings Decided by the Bankruptcy Court.** In addition to proceedings in which the bankruptcy court has concluded that it is only authorized to issue proposed findings of fact and conclusions of law, this rule applies when each of these conditions exist:

(1) the bankruptcy court has heard and issued a final judgment or order deciding a proceeding it was authorized to hear but not authorized to decide; and

(2) a party adversely affected by the judgment or order is not prepared to concede that the bankruptcy court had authority to decide the proceeding.

When both of those conditions exist, such adversely affected party must both appeal the bankruptcy court's final order or judgment (to obtain an order to vacate the final order or judgment as unauthorized) and file objections pursuant to this rule to the bankruptcy court's rulings that gave rise to the final order or judgment.

The concluding paragraph could be put in the Advisory Committee Notes instead of appearing in the Rule itself.

I recommend the first alternative because it alerts parties that the rulings may be Rule 9033 proposed findings of fact and conclusions of law, and bankruptcy judges will be alert to indicate that its rulings are conditionally Rule 9033 rulings.

Alternative of Including Comment in Advisory Committee Note to Rule 7016 that the Bankruptcy Court May Treat Decision Upon Which a Final Judgment is Based as a Proposed Ruling Under Rule 9033 if the Judgment is Vacated for Lack of Authority. If the Committee opts not to propose a rule addressing the issue addressed herein, I suggest that the Advisory Committee Note to Rule 7016 be amended by adding the underlined language appearing below:

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the extent of the district court's order of reference to the bankruptcy court and by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies. When the bankruptcy court determines

that it has authority to enter a final order or judgment, the bankruptcy court may nevertheless order that its findings of fact and conclusions of law are proposed findings of fact and conclusions of law should the district court order that the bankruptcy court's final order or judgment be vacated as beyond the authority of the bankruptcy judge. In that event, any party that wishes to contend that the bankruptcy judge lacked authority to enter the final order or judgment, and to obtain de novo review by the district court, must not only appeal the final order or judgment, but must also file objections under rule 9033 to the bankruptcy court's rulings that gave rise to the final order or judgment.

The Shortcomings of an Existing Approach Taken By Some Courts. The foregoing proposal is similar to an approach illustrated by the United States District Court for the Southern District of New York's *Amended Standing Order of Reference*, which directs:

If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. **The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.**

The difficulty with the S.D.N.Y. approach, however, is that it does not set a deadline for the parties to object to the proposed findings of fact and conclusions of law. The briefs on appeal from the bankruptcy court's final order or judgment would not always raise all of the objections that a Rule 9033 set of objections would raise, and thus could not be treated as Rule

9033 objections.²

In contrast, my approach ensures that any objections that could be raised under Rule 9033 would have already been filed when the district court decides that the proceeding was one the bankruptcy court could not decide.

S. Martin Teel, Jr.
United States Bankruptcy Judge
January 15, 2013

² A party could appeal on the ground that the bankruptcy court lacked authority to decide the proceeding and decline to address other grounds for reversal. Or the appellant might realize that the bankruptcy court's findings of fact would pass muster on appeal if not clearly erroneous, whereas those findings of fact could be reviewed de novo once Rule 9033 objections are pursued.