

# BUSINESS LAW SECTION

## COUNCIL OFFICERS & MEMBERS

**CHAIR**  
MICHAEL S KHOURY  
277 FRANKLIN ST. 1900  
SOUTHFIELD 48034-8214

**VICE CHAIR**  
DIANE L AKERS  
190 S WASHINGTON ST. 1100  
LANSING 48226

**SECRETARY**  
TANIA E (DFF OFF) FULLER  
900 W. FRENDALE ST. 1100  
LANSING 48201

**RE-SURGENT**  
ROBERT E WILSON  
1500 BERRY ST. 1100  
LANSING 48201

**COUNCIL**  
JUDY B CALTON  
OF ROE  
MATTHEWA CASE  
OF FISH  
DAVID C C ELLERHARD  
STURLING DR. 1100  
MICHAEL R KENNEDY  
OF FISH  
EDWIN J LUKAS  
OF ROE  
CHRISTOPHER C MAESO  
OF CAMBERVILLE  
PATRICK L MEARS  
GRAND RAPIDS  
PAUL R BENTENBACH  
OF FISH  
CYNTHIA L UMPIREY  
OF ROE

JEFFREY J VANWINKLE  
OF SANDRIDGE  
STEPHEN C WALTERBURY  
OF SANDRIDGE  
KANDRIDGE  
JOHN R DRESSER  
OF SANDRIDGE  
DIANE L AKERS  
OF FISH  
ASHFORD JOSH  
OF SANDRIDGE  
JUSTIN G KLIMKO  
OF SANDRIDGE  
CYRIL MOSCOW  
OF SANDRIDGE

JUDY B CALTON  
JUDITH GREENSTONE MILLER  
OF SANDRIDGE  
JAMES H BIRBY  
OF SANDRIDGE  
MATTHEWA CASE  
OF SANDRIDGE  
AGNES D HAGERLY  
OF SANDRIDGE  
JEROME M SCHWARZ  
OF SANDRIDGE  
PATRICK L MEARS  
OF SANDRIDGE  
DANIEL H MINKUS  
OF SANDRIDGE  
ERIC J LARK  
OF SANDRIDGE  
JEFFREY S AMMON  
OF SANDRIDGE

ERIC J LARK  
CHRISTOPHER C MAESO  
DANIEL H MINKUS  
MARK W PETERS  
GREGORY J SCHMIDT  
OF SANDRIDGE  
CYNTHIA L UMPIREY  
OF SANDRIDGE

ROBERT E WILSON  
TIMOTHY R DAMSCHRODER  
OF SANDRIDGE  
MICHAEL S KHOURY

07-BR-030

February 14, 2008

Honorable Laura Taylor Swain  
United States District Court for  
the Southern District of New York  
Chair, Advisory Committee on Bankruptcy  
Rules for the Judicial Conference

VIA EMAIL  
Rules\_Comments@ao.uscourts.gov

Professor Jeffrey Morris  
University of Dayton Law School  
Reporter, Advisory Committee on Bankruptcy  
Rules for the Judicial Conference

VIA EMAIL  
Rules\_Comments@ao.uscourts.gov

Re. Response to Request for Comments on Proposed  
Change to Federal Rule of Bankruptcy Procedure  
8002 Governing Time to File Notice of Appeal from  
Adverse Determinations of a Bankruptcy Court

Dear Judge Swain and Professor Morris

We are submitting these comments in response to the Request for Comments on the Time to File a Notice of Appeal in a Bankruptcy Case ("Request for Comments") that was issued by the Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Advisory Committee") in November 2007

The undersigned, respectively, are (i) the Chair of the Business Law Section of the State Bar of Michigan ("Section"), and (ii) the Co-Chairs of the Debtor/Creditors' Rights Committee of the Business Law Section of the State Bar of Michigan ("Committee"). The Section and the Committee each reviewed the Request for Comments and unanimously agreed that Federal Rule of Bankruptcy Procedure 8002 ("Rule 8002") that sets forth, among other things, the 10-day time period for a party filing a notice of appeal from an adverse ruling of a bankruptcy court should not be changed. In addition, the Board of Commissioners of the State Bar of Michigan at its recent meeting held on January 18, 2008 also approved the position taken by the Committee and the Section

## PAST COUNCIL CHAIRS

JEFFREY S AMMON  
G ANN BAKER  
HARVEY W BERMAN  
BRUCE D BIRGBAUMER  
IRVING I BOIGON  
CONRAD A BRADSHAW  
JAMES C BRUNO

JAMES R CAMBRIDGE  
THOMAS CARNEY  
TIMOTHY R DAMSCHRODER  
ALEX J DUYONKER  
LEE B DURHAM JR  
DAVID FOLTYN  
RICHARD B FOSTER JR

CONNIE R GALE  
PALL K GASTON  
VERNE C HAMPTON III  
MARK R HIGH  
JUSTIN G KLIMKO  
GORDON W UMPIREY  
ERIC J LARK

TRACY J LARSEN  
HUGH H MARFINS  
CHARLES E McALUM  
DANIEL H MINKUS  
ALEXANDRA A MIZIOLLA  
CYRIL MOSCOW  
MARTIN C OETTING

RONALD R PENTECOST  
DONALD F RYMAN  
ROBERT W SCHROEDER  
LAURENCE S SCHULTZ  
LAWRENCE K SAIDLER  
JOHN R TRENTACOSTA

Honorable Laura Taylor Swain  
Professor Jeffrey Morris  
February 14, 2008  
Page 2

At its recent mid-year meeting held on February 11, 2008, a resolution was overwhelmingly approved by the House of Delegates of the American Bar Association ("ABA") upon recommendation of the Ohio State Bar Association, the State Bar of Michigan, the ABA Sections of Business Law, Litigation, and Real Property, Trust and Estate Law, and the ABA General Practice, Solo and Small Firm Division. A copy of the ABA's resolution and a detailed background report that explains the issue and the various legal and policy reasons for their opposition to this proposed change to Rule 8002 (collectively, "ABA Comments") is attached as Appendix A. The Section and the Committee also oppose the proposed change to Rule 8002 and adopt and incorporate by reference in their entirety the ABA Comments to support their opposition to this proposed rule change.

We appreciate your consideration of the views of the Section and the Committee on this important bankruptcy matter. If the opportunity is available, we would welcome the chance to appear before the Advisory Committee to testify with respect to our opposition to the proposed rule change. We would also be happy to respond to any additional questions or concerns that the Advisory Committee may have with respect to this subject. If you would like more information regarding our position on this issue, you may contact any of the undersigned.

Thank you for your consideration of our views on this matter. We are most appreciative.

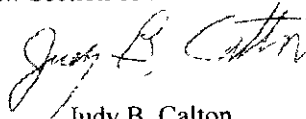
Very truly yours;



Michael S. Khoury  
Jaffe, Raitt, Heuer & Weiss, P.C.  
Southfield, Michigan  
Chair, Business Law Section  
of the State Bar of Michigan



Judith Greenstone Miller  
Jaffe, Raitt, Heuer & Weiss, P.C.  
Southfield, Michigan  
Co-Chair, Debtor/Creditors' Rights Committee of the  
Business Law Section of the State Bar of Michigan



Judy B. Calton  
Honigman Miller Schwartz & Cohn LLP  
Detroit, Michigan  
Co-Chair, Debtor/Creditors' Rights Committee of the  
Business Law Section of the State Bar of Michigan

cc Members of the Business Council (Via Email)  
Members of the Debtor/Creditors' Rights Committee (Via Email)  
1495803 03

**APPENDIX A**

**RESOLUTION ADOPTED BY THE  
HOUSE OF DELEGATES  
OF THE  
AMERICAN BAR ASSOCIATION  
FEBRUARY 11, 2008\***

RESOLVED, That the American Bar Association supports the retention of the 10-day time limit in Rule 8002 of the Federal Rules of Bankruptcy Procedure for filing a notice of appeal from a judgment, order or decree in a bankruptcy case and opposes any proposed amendments to Rule 8002 that would lengthen the time for filing a notice of appeal

---

\*Note The "Resolution," but not the attached background "Report," constitutes official ABA policy.

## REPORT

### Introduction

Subdivision (a) of Rule 8002 of the Federal Rules of Bankruptcy Procedure ["Rule 8002"] specifies a 10-day period for filing a notice of appeal from a judgment, order or decree in a bankruptcy case.<sup>1</sup> The Advisory Committee on Bankruptcy Rules ("Bankruptcy Rules Committee") of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has published a Request for Comment on a proposal to amend Rule 8002 to change the time for filing a notice of appeal from 10 days to 14 days. Comments must be submitted by February 15, 2008. The Request for Comment explains that this change is intended to make the bankruptcy appeal period consistent with a more general time computation principle setting deadlines as multiples of seven days. The Request for Comment also seeks comment on a proposal to amend Rule 8002 to lengthen the appeal period even further -- to 30 days -- in order to promote consistency between bankruptcy practice and the general civil appellate deadline in Federal Rule of Appellate Procedure 4(a)(i).

The Bankruptcy Rules Task Force of the Ad Hoc Committee on Bankruptcy Court Structure and the Insolvency Process of the Business Law Section ("Bankruptcy Rules Task Force"), which is comprised of representatives of the co-sponsoring Sections, has reviewed the issues raised by the Request for Comment. This Report is the work of the Bankruptcy Rules Task Force.

### Discussion

As the Request for Comment recognizes, the 10-day appeal period has been the governing rule since enactment of the Bankruptcy Act of 1898 -- more than 100 years ago. *See, e.g., Williams Bros. v. Savage*, 120 F. 497 (4th Cir. 1903) (enforcing 10-day appeal period in Bankr. Act 1898 § 25).

The reason for the 10-day time period is succinctly set forth in the Advisory Committee Note to Rule 8002: "The shortened time is specified in order to obtain prompt appellate review, often important to the administration of a case under the [Bankruptcy] Code." The Advisory Committee Note thus recognizes that in bankruptcy practice -- particularly chapter 11 practice -- unlike general civil practice, the courts not only adjudicate commercial disputes, but also have a significant role in supervising the conduct of on-going commercial entities that need to fund operations, settle disputes, sell assets, and the like.

Lenders, asset purchasers, entities funding settlements, contract assignees, and other parties in interest often require final and non-appealable bankruptcy court orders before they will fund or close significant transactions -- including exit financing for debtors emerging from chapter 11, other financing transactions, settlements during a case, and other major payments and asset transfers. Not infrequently, debtors are strapped for cash and time is of the essence.

The 10-day rule has worked well for over a century. The Sponsors are aware of no empirical data or study showing that it is "a potential trap for new or infrequent bankruptcy practitioners" -- a

---

<sup>1</sup> Intermediate Saturdays, Sundays and holidays are not excluded from the computation of the 10-day period. Pursuant to B.R. 9006, such intermediate days are excluded only when the period of time prescribed or allowed is less than 8 days.

concern raised in the Request for Comment. To the contrary, with the advent of electronic dockets, parties who have an interest in a particular order have the ability to be apprised of entry of the order on the day it is entered. The 10-day bankruptcy appeal rule is well known and practitioners in bankruptcy court, including commercial litigators, take the time to read the applicable Bankruptcy Rules, including the rules as to how to take an appeal, and avail themselves of the PACER system.

Given the long-standing 10-day rule -- which has worked well -- the addition of four days would only serve to create possible confusion and potential prejudice for cash-strapped debtors. *A fortiori*, a change to thirty days would be even more prejudicial.

The Bankruptcy Rules Committee notes that an argument made in favor of amending Rule 8002 is that "many practitioners" rely on principles of "equitable mootness" and the statutory mootness protections of §§ 363(m) [asset sales] and 364(e) [post-petition credit] "rather than the expiration of the deadline for commencing appeals, to ensure the finality of orders approving transactions." In the Sponsors' experience, however, parties in interest only infrequently rely on such "mootness" principles -- and for good reason.

For example, lenders often require a final, non-appealable plan confirmation order as a condition precedent to exit financing for debtors emerging from chapter 11. Such lenders rarely rely on equitable mootness because that doctrine is too uncertain. There is no statute that renders appeals from confirmation orders moot. The standards for mootness differ among circuits. In a leading Third Circuit decision, *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996), the court applied a five-factor test for equitable mootness of appeals from a plan confirmation order. Judge (now Justice) Alito, in dissent, calls "equitable mootness" a "curious doctrine" and states that he disagrees with the majority's upholding dismissal of a confirmation order appeal. In a leading Seventh Circuit case, *In re UNR Industries*, 20 F.3d 766, 769 (7th Cir. 1994), Judge Easterbrook, writing for the court, "banish[ed] 'equitable mootness' from the (local) lexicon," and ruled (upholding dismissal of an appeal) that the issue is "whether it is prudent to upset the plan of reorganization at this late date."

As for Sections 363(m) and 364(e), which deal with asset sales and post-petition credit, those sections do not bar or "moot" appeals to the extent the appellant asserts lack of good faith on the part of an asset purchaser or credit provider. And, as might be expected, there are additional judicially recognized exceptions to these statutes. *E.g.*, *In re Swedeland*, 16 F.3d 552 (3d Cir. 1994) (appeal from order authorizing loan not moot to extent loan not fully disbursed), *In re Saybrook Mfg. Co., Inc.*, 963 F.2d 1490 (11th Cir. 1992) (appeal from cross-collateralization order not moot because such order not authorized by the Bankruptcy Code); *In re BCD Corp.*, 119 F.3d 852 (10th Cir. 1997) (appeal from sale order not moot because equitable relief available).

In sum, the current 10-day rule is long-established, well-known, serves a proper purpose, and works. It does not need to be fixed.

Dated February 2008

Respectfully submitted,

Robert F. Ware  
President, Ohio State Bar Association