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Subject Proposed Amendments to Bankruptcy Rule 8002

**07-BR-031**

The Honorable S. Martin Teel, Jr., Judge of the US Bankruptcy Court for the District of Columbia and Nancy Mayer-Whittington, Clerk of the US Bankruptcy and District Courts of the District of Columbia are submitting comments in response to the Memorandum of Honorable Laura Taylor Swain, Chair of the Judicial Conference Advisory Committee on Bankruptcy Rules. The Memorandum requests comments regarding proposed amendments to Bankruptcy Rule 8002 no later than February 15, 2008.

The proposed change of 14 days for filing a notice of appeal would be a good change. The current 10-day deadline is extremely short. The critical issue is whether the order is stayed, not whether an appeal is taken. If someone takes an appeal, whether within a 10-day deadline, a 14-day deadline, or a 30-day deadline, the order appealed is enforceable unless it has been stayed. If parties insert into the order a provision that it is not effective if someone takes a timely appeal, they have effectively consented to a stay of the order, and there is little reason why the timing of the appeal should be a critical factor. Seldom if ever has this Court seen a provision within an order that automatically makes the order unenforceable pending the disposition of any timely appeal.

As to the stay of an order, the rules compel an appellant promptly to seek a stay if the appellant wants to prevent the order from becoming enforceable, and that would not change based on a change in the time for taking an appeal. Under Rule 7062, there generally is an automatic 10-day stay of an order in an adversary proceeding. In contested matters, Rule 9014 does not incorporate Rule 7062 as applicable in all contested matters. Accordingly, unless another rule provides otherwise (as in the case of Rule 4001 providing an automatic 10-day stay of certain orders like lift stay orders) there is no automatic stay of an order in a contested matter. So the bottom line, for both adversary proceedings and contested matters, is that no later than after any automatic 10-day stay has expired, the parties are free to enforce the order unless and until someone obtains an order staying the order being appealed.

Moreover, now that the Bankruptcy Noticing Center is utilized to send out orders, there is a two-day delay in the mailing of the orders, so that those entities receiving an order by mail are, under the current 10-day appeal deadline, really given only 8 days after the date of the mailing within which to file a notice of appeal. That is an extremely short period of time within which to file a notice of appeal. This is particularly the case for pro se litigants who often are not able to react as quickly as those parties represented by counsel. This is exacerbated by the inability of the court to enlarge the time for appeal (by reason of Rule 8002(c)(1)) in the case of many types of orders that are encountered by pro se litigants (for example, lift stay orders, and orders confirming a chapter 11, 12, or 13 plan).

Consideration should also be given to changing the deadline to 30 days. As in the case of the comments above regarding the 14-day proposal, the critical issue is whether the order is stayed, not whether it is appealed. However, a 30-day deadline might better be a 28-day deadline for ease of computation. Four weeks is plenty of time to decide whether to file a notice of appeal, be it a bankruptcy case or a district court case. In any event, a protective notice of appeal can be filed even if the appellant has not yet had sufficient time to decide whether the appeal ought to be pursued.

If you should have any questions, please feel free to contact me.

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