ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 24 -25, 1994

Sea Island, Georgia

Minutes

The Advisory Committee on Bankruptcy Rules met at The Cloister in Sea Island, Georgia. The following members were present:

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 James J. Barta

Bankruptcy Judge James W. Meyers

Professor Charles J. Tabb

Henry J. Sommer, Esquire

Kenneth N. Klee, Esquire

Gerald K. Smith, Esquire

Leonard M. Rosen, Esquire

Neal Batson, Esquire

Professor Alan N. Resnick, Reporter

The following former members also attended the meeting:

District Judge Joseph L. McGlynn, Jr.

Ralph R. Mabey, Esquire

Herbert P. Minkel, Esquire

The following additional persons also attended all or part of the meeting:

District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee

Bankruptcy Judge Lee M. Jackwig, member, Committee on Automation and Technology

Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure

Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, and Assistant Director, Administrative Office of the U.S. Courts

John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts

Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U. S. Courts

Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern District of California

Gordon Bermant, Director, Planning and Technology Division, Federal Judicial Center

Elizabeth C. Wiggins, Research Division, Federal Judicial Center

District Judge Alicemarie H. Stotler, chair, Committee on Rules of Practice and Procedure, was ill and could not attend. Circuit Judge Edward Leavy, former chair of the Advisory Committee, was unable to attend due to an en banc hearing. District Judge Paul A. Magnuson, chair of the Committee on the Administration of the Bankruptcy System, also was unable to attend. William F. Baity, acting director, Executive Office for United States Trustees, U.S. Department of Justice, was unable to attend.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure.

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

INTRODUCTORY MATTERS

Minutes of the September 1993 Meeting. The Committee approved the minutes of the September 1993 meeting with one change. On page 3, paragraph 3, of the draft, the phrase "bankruptcy rules require" should be changed to "Bankruptcy Rule 8002 will require."

Report on the January 1994 Meeting of the Committee on Rules of Practice and Procedure, ("Standing Committee"). The Reporter reviewed the issue of filing by facsimile transmission ("fax filing"). Fed.R.Civ.P. 5(e) and Fed.R.App.P. 25(a) allow fax filing under Judicial Conference guidelines, and Fed.R.Bankr.P. 7005 incorporates the civil rule for adversary proceedings. The Advisory Committee on Bankruptcy Rules is on record as strongly opposing fax filing, because it is outdated technology and a burden on the clerks. Guidelines for fax filing were proposed in 1993, however, by the Judicial Conference Committee on Court Administration and Case Management. Both the Standing Committee and the Committee on Automation and Technology opposed the draft guidelines, and the Judicial Conference declined to adopt them. The Standing Committee, however, must put forward a substitute proposal at the September 1994 meeting of the Judicial Conference. At its January 1994 meeting, the Standing Committee decided not to allow fax filing on a routine basis and to exempt bankruptcy courts from any requirement to accept fax filings.

Professor Resnick also reported that the Standing Committee had expressed concern about Congress enacting rules changes outside the Rules Enabling Act process, as a provision in S. 540, the bankruptcy bill currently pending, would do. Amendments to Rule 8002 and 8006 are pending at the Supreme Court and will take effect August 1, 1994, absent congressional action to the contrary. No bankruptcy rules amendments were before the January 1994 Standing Committee meeting, and there was sentiment by Standing Committee members, he said, that advisory committees should exercise restraint in proposing amendments.

With respect to the style revisions to the rules, Professor Resnick reported that Bryan Garner had submitted the proposed draft of the civil rules and the Advisory Committee on Civil Rules is in the process of line-by-line review. The intent is to make only style changes, not substantive ones, he said.

Professor Resnick said that the Judicial Conference has guidelines on access to materials. He said that committee members should be careful about circulating memoranda that do not represent committee positions. Mr. Sommer observed in response that rules committee meetings are open to the public (28 U.S.C.

§ 2073(c).) and that committee records also are public.

PUBLISHED DRAFT RULES

Published (Preliminary Draft) Amendments to Rules 8018, 9029, and Proposed New Rule 9037. Professor Resnick reviewed the history of these proposals for "common rules" concerning local rules and technical amendments. He described the initiating of the amendments by the Standing Committee, the negotiating of the language with the other advisory committees, and the publication of similar

amendments for the appellate, civil, and criminal rules. The last time the proposals were considered by the Advisory Committee was in February 1993, and several changes were introduced after that, which the committee had not had a chance to consider prior to publication of the preliminary draft. Most of these were stylistic or involved minor changes to the committee notes. There were two changes that were substantive, however.

The first was an insert to the amendments to Rules 8018(a)(2) and 9029(a)(2) that would prohibit a court from enforcing any local rule imposing a requirement of form in a way that would cause a party to lose rights if the failure to conform to the requirement was a "negligent failure." Mr. Rosen asked how other "non willful" failures would be treated under the rule and suggested that the appropriate standard ought to be "non willful," rather than negligence. Professor Coquillette said this was a good suggestion and might be adopted if the other advisory committees concur. Judge Robreno said he thought it "revolutionary" to have rules that do not have to be followed, but wondered whether his comment might be too late to have any effect. The Reporter said it was not too late. Judge Meyers said he thought the concept of repeated noncompliance (as an indicator of willfulness) should be part of the committee note, and the Reporter agreed to suggest it, if it is not already in there. **A motion to approve the amendment to Rule 9029(a) subject to changing the word "negligent" to "non willful" carried by a vote of 10-1.**

The second substantive change is in Rules 8018(b) and 9029(b) and involves the prohibition of sanctions for noncompliance with a local requirement unless the alleged violator had actual notice of the requirement "in the particular case." The Reporter stated that the proposed standard would relieve an attorney of any duty to seek rules out and could spawn additional disputes in a bankruptcy setting, due to the incidence of litigation within a case. Participants in such litigation may not have been active in the earlier stages of a case; they may enter a proceeding months, or even years, after any mass mailing of the judge's rules and likely were not present when such rules may have been stated orally. These conditions, which are typical of bankruptcy litigation, may generate disputes over whether a party had actual notice of a requirement. Although the committee directed that the record reflect its consideration of this issue, no motion was made and no vote taken concerning the addition of "in the particular case" to the rule.

Professor Resnick reviewed the three comment letters the committee had received concerning the published draft. Bankruptcy Judge Fenning's letter cautioned the committee against appearing to support one-judge-only standing orders, so long as they are published, rather than court-wide procedures under local rules applicable to all judges in a district. Judge Barta said he was surprised that no comments had been received about proposed Rule 9037, the technical amendments rule. The committee is on record as opposing this rule, the Reporter said, but the Standing Committee published it anyway. **A motion to reaffirm the committee's opposition to Rule 9037 failed on a tie vote.**

AMENDMENTS RELATED TO CIVIL RULES AMENDMENTS

Rule 9014 and the 1993 Amendments to Fed.R.Civ.P. 26. The Reporter stated that the recent amendments to Rule 26 governing discovery automatically apply in adversary proceedings (through Rule

7026) and in contested matters (through Rule 9014), which are expedited proceedings initiated by motion. Although there does not appear to be any reason to exclude adversary proceedings from the provisions of Rule 26, contested matters could suffer undue delay if the requirements of Rule 26(a)(1)-(4), (mandatory disclosure), and 26(f), (mandatory discovery meeting), are followed. Rule 26 itself permits courts, by local rule or order, to opt out of the mandatory disclosure and meeting requirements. In the event the committee thought it appropriate to make the mandatory disclosure and meeting requirements inapplicable to contested matters nationally, the Reporter had drafted an amendment to Rule 9014 for this purpose. After discussion, **a motion to defer action and study the operation of discovery deadlines in contested matters overall carried by a 6-0 vote.**

Rule 7004 and the 1993 Amendments to Fed.R.Civ.P. 4. The 1991 amendments to the bankruptcy rules "froze" the Fed.R.Civ.P. 4 (to which reference is made in Rule 7004 and parts of which are incorporated into the bankruptcy rules by Rule 7004) to the version of the rule that was in effect on January 1, 1990. This action was taken because amendments to Rule 4 were pending, but their final form was still uncertain. Rule 4 now has been amended, and it is time to amend Rule 7004 to conform to the new Rule 4. The Reporter had prepared a draft for this purpose. In addition, the Reporter had drafted a new subdivision (f) to cover service and personal jurisdiction over a party who is a non-resident of the United States having contacts with the United States sufficient to justify application of United States law but insufficient contact with any single state to support jurisdiction under a state long-arm statute. The new subdivision tracks a similar new provision in Rule 4. **A motion to adopt the Reporter's draft carried by a vote of 6-2.** The amendments to Rule 4 included creating a new Rule 4.1 to cover "other" process, not a summons or subpoena. These provisions formerly were in a subdivision of Rule 4 that was not incorporated by Rule 7004. The Reporter said he had consulted with Professor Lawrence P. King, a former member and former Reporter to the committee, about the history of not incorporating the subdivision. Professor King had said the subdivision was left out intentionally so that it would not apply to the service of motions. Rule 4.1 also contains territorial limits on service that are inconsistent with the nationwide service provisions of Rule 7004. **There was no opposition to the Reporter's recommendation that Rule 4.1 not be incorporated into the bankruptcy rules.**

PROPOSED AMENDMENTS

Rule 1006. Professor Resnick stated that the Judicial Conference in 1992 had prescribed a $30 administrative fee for chapter 7 and chapter 13 cases, payable at filing. As originally prescribed, this fee was not payable in installments as is the filing fee for such cases. In late 1993, however, the Judicial Conference had amended the schedule of fees prescribed under 28 U.S.C. § 1930(b) to permit payment of the $30 fee in installments. Professor Resnick had proposed two drafts to incorporate the administrative fee into the rule on installment payments. **A motion to adopt the shorter draft, amending Rule 1006(a), carried on an 8-3 vote.** The Reporter stated that there also had been a proposal by the president of the National Association of Consumer Bankruptcy Attorneys to amend Rule 1006(b) to permit installment payments of filing fees to be made to a standing chapter 13 trustee (who would pay the fees to the clerk). The Reporter had drafted an amendment to implement the suggestion, and also had asked the Federal Judicial Center to conduct a survey to evaluate the suggested amendment. Ms. Wiggins reported the results of the survey. Most respondents thought such an amendment unnecessary and that no purpose would be served by mixing court fees and payments intended for creditors, she said. Nine courts permit such arrangements under the existing rule and are satisfied with how their systems work. **A**

motion to adopt the proposed amendment to Rule 1006(b) failed by a vote of 0-9.

Rules 1007(c) and 1019. At the September 1993 meeting, the Committee had voted to delete from Rule 1007(c) the reference to "chapter 7," which dated to a time when there were separate schedules for a chapter 7 case and a chapter 13 case. At that meeting, a member of the Committee had suggested that the phrase "superseding case" or "superseded case" should be replaced to avoid giving the erroneous impression that conversion of a case to another chapter creates a new case. The Reporter, accordingly, presented draft amendments to the two rules in which these phrases appear. Rule 1019 also contains the phrase "original petition," which gives the erroneous impression that there is a second petition in a converted case. **There was a consensus that the amendments to Rule 1007(c) should be approved. With respect to Rule 1019, the Committee discussed a number of changes to the draft, but referred the rule back to the Reporter for further study.**

Rule 2002(f)(8). The present rule requires notice to the debtor, all creditors, and indenture trustees of "a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500." The trustee's "final report" is a separate document than the trustee's "final account," and the current practice is to mail only the final report. The final report is filed and mailed prior to distribution of dividends, while the final account is completed after the distribution. The Reporter's memorandum to the committee points out that, once the final report is circulated, there probably is no reason to incur the expense of mailing the final account to all creditors. The United States trustee receives the final account and, as the supervisor of chapter 7 trustees, should review it. The proposed amendment would delete the words "and account" from the rule. **A motion to adopt the proposed amendment carried, 12-0. The Committee rejected a proposal to amend Rule 2002(f)(8) to restrict the mailing of the summary of the trustee's final report to only those creditors who have filed claims.**

Rule 2002(h). This rule authorizes the court to direct that, after the period for filing claims has expired, the court may direct that notices be sent only to creditors who have filed claims. The Reporter reviewed his memorandum dated January 9, 1994, which detailed various suggestions for amendments, two from deputy clerks of court, several related to deleting references to Rule 3002(c)(6) which the Committee separately had voted to abrogate, and several further amendments suggested by Professor Resnick. **The Committee approved amendments to Rule 2002(h) that would assure the mailing of notices to the debtor, the trustee, and all creditors during any 90-day claims filing period arising from notification by the trustee that newly discovered assets may be available for distribution. The Committee rejected a proposal to amend subdivision (h) to extend the period during which all creditors receive notices until the time has expired for the filing of a claim on behalf of a creditor by the debtor or the trustee. The Committee referred the proposed amendments to Rule 2002(h) and the Committee Note to the style subcommittee with the following instructions: 1) make sure line 12 does not exclude the debtor, the trustee, and the U.S. trustee from receiving notices, 2) make sure that creditors who filed claims late are not excluded from receiving notices, and 3) reorganize the Committee Note to state simply that the rule is being amended "as follows" and list the changes. A motion to approve the proposed amendments as described above, subject to further work by the style subcommittee, carried unanimously.**

Rule 3002. The Reporter briefly reviewed the history of various proposals to amend this rule that have been considered by the Committee and noted that the case law concerning the status of a late-filed proof of claim remains very unsettled. The Committee did not take any action on the issue. Nevertheless, the language of Rule 3002(a), especially when read together with Rule 3009, leads to the conclusion that an

unsecured creditor who misses the deadline for filing claims may not have an "allowed claim" and may not receive any distribution in a chapter 7 case. This conclusion, however, conflicts with the provisions of § 726 of the Code that indicate that a late-filed claim can be an "allowed" claim, at least in some instances, and expressly direct payment of "tardily filed" claims under certain circumstances. To clear up any conflict between the Code and the rules on this issue, the Reporter had drafted amendments that would add a new subdivision (d) to the rule and delete existing subdivision (c)(6) as unnecessary if (d) were added. The proposed subdivision (d) would state that a late claim may be allowed to the extent the creditor would be authorized to receive a distribution by § 726. Mr. Rosen offered alternative language to accomplish the same result. **A motion to approve the amendments as redrafted to incorporate Mr. Rosen's suggestions carried, with none opposed. A motion to approve conforming changes to the proposed Committee Note also carried, with none opposed.**

Rules 3017, 3018, and 3021 and Proposed Amendments Regarding the Record Date for Voting and Distribution. Rule 3017(d) requires that certain documents in a chapter 11 case be mailed to creditors and equity security holders so that they can vote on the plan. Rule 3018(a) governs the right to vote on a plan. The Reporter explained that both provisions contain language stating that the record date for determining who the equity security holders are is the date the order approving the disclosure statement was entered on the court's docket. The Reporter stated that Mr. Klee had suggested that these rules be amended because using the entry date of the order causes unnecessary delay. The Reporter, accordingly, had drafted alternate amendments to the two rules, one set of amendments would give the court discretion to order that the record date be the date the court announces its approval of the disclosure statement, and the other set would give the court greater flexibility in fixing a record date. **A motion to postpone consideration of these proposals to the next meeting carried, with none opposed.** The proposed amendment to Rule 3021 would permit the plan or order confirming the plan to designate a record date for distribution that is different from the date on which distribution commences. This change would permit the debtor to ascertain who are the equity security holders entitled to receive distribution prior to commencing actual distribution. **A motion to adopt the Reporter's draft amendment carried, 11-0.**

Rule 8002. The Reporter had drafted an amendment creating a new subdivision (d) of the rule that would deem a prisoner's notice of appeal to have been timely filed if it was deposited in the prison's internal mail system on or before the last day for filing. The proposal would conform Rule 8002 to a 1993 amendment to Fed.R.App.P. 4(c) and would reflect the decision in In re Flanagan, 999 F.2d 753 (3rd Cir. 1993), in which the court of appeals held that a pro se prisoner's notice of appeal from an order of the bankruptcy court is "filed" at the moment of delivery to prison authorities for forwarding to the bankruptcy court. **A motion to take no action carried by a vote of 8-4.**

SUBCOMMITTEE REPORTS

Subcommittee on Technology

At the request of the Subcommittee on Technology, Mr. Bermant led a discussion of "the virtual bankruptcy court." Committee members expressed divergent views concerning the pros and cons of technological developments that could largely replace the courtroom, in which a judge, lawyers, and parties are physically present, with video conferencing equipment and computers operated by a judge, lawyers, and parties who all may be in different locations. Judges and lawyers both stated that people will continue to need and want direct contact with colleagues and adversaries, even if such contact is not absolutely necessary to accomplish their work. On the other hand, if the individuals do not all have to be physically present at every proceeding, much time and energy can be saved and other efficiencies realized in the utilization of judicial time. For example, a judge could handle a case from another district without having to travel.

Judge Barta, chairman of the subcommittee, reported that the subcommittee had met twice and had drafted two amendments that would authorize courts to accept electronic filings. These are discussed below. Judge Barta stated that the report requested by the Committee on the future of technology and the rules was not yet complete due to the raising at the first subcommittee meeting of several issues that require further inquiry. The philosophy anchoring the report would be that the Advisory Committee should take a leading role in adopting rules to implement changing technology, he said. One result of the Committee's having stepped forward is Rule 9036, which now permits delivery of information from the court by means other than paper; the next step, he said, is to authorize the court to receive documents other than on paper. Judge Barta said he expects the report to be finished in time for the Standing Committee to consider it in connection with any request to publish the proposed electronic filing amendments.

Rule 5005. The subcommittee on technology proposed adding a new subdivision (a)(2) that would authorize a court by local rule to "permit documents to be filed, signed or verified by electronic means" consistent with any technical standards established by the Judicial Conference. **A motion to adopt the proposed amendment carried, with none opposed. On further motions, the Committee approved the deletion of lines 12 - 15 (no intent to permit filing by facsimile transmission) and lines 68 - 71 (no intent to affect any statute requiring a "writing" or "signature") of the proposed Committee Note.**

Rule 8008(a). The subcommittee's proposed amendment to the rule would authorize a district court or bankruptcy appellate panel by local rule to accept electronic filings. **A motion to adopt the amendment carried, with none opposed.**

Subcommittee on Alternative Dispute Resolution

Professor Tabb, chairman of the subcommittee, requested guidance on the need for proposed amendments concerning alternative dispute resolution. The consensus was that, although some districts operate local, voluntary programs, there is not a need for national rules at this time. A need could arise if Congress were to mandate an ADR program for the bankruptcy courts. Accordingly, the subcommittee's work remains investigatory at this time.

Subcommittee on Forms

Mr. Sommer, chairman of the subcommittee, reported that, in addition to considering proposals for amendments that had been referred to it at the September 1993 meeting, the subcommittee would undertake a conversion to "plain English" for forms that go to the public.

Subcommittee on Local Rules

Judge Duplantier, chairman of the subcommittee, reported that the subcommittee had met to discuss the outstanding issues concerning the proposed uniform numbering system for local rules developed by Ms. Channon. The system is based on the national rule numbers and the subcommittee had requested that Ms. Channon add uniform numbers based on the Part VIII rules governing appeals for use by a district court or bankruptcy appellate panel. The subcommittee had approved the proposed numbering system subject to that addition. The subcommittee also had requested Ms. Channon to prepare a new memorandum explaining the system and stating the topics on which rules now exist that had been omitted and the reasons for the omission. The memorandum also would describe the difficulties a district might experience in adapting certain types of rules, such as those titled "Chapter 13 Cases," to the numbering system. Judge Duplantier said that at this point the subcommittee favored some kind of publication and solicitation of comment from the courts and the bar. **A motion to approve the proposed system, circulate it to the judges and clerks for comment, and release it to the "bankruptcy press," carried unanimously.**

"EXCUSABLE NEGLECT"

The Committee discussed briefly whether to undertake a review of the rules for the purpose of restricting the "balancing test" standard announced by the Supreme Court in Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489 (1993). The consensus appeared to be that it is too soon to assess the impact of the Court's decision, and **a motion to table the matter carried by a vote of 6-2.**

FUTURE MEETINGS

The next meeting of the Committee will be September 22-23, 1994, in New York City.

The chairman requested Judge Duplantier to investigate whether the Committee could meet in Lafayette, Louisiana, in mid-to-late March 1995. The Committee also agreed on Portland, Oregon, as the site for a meeting in August 1995, and on Arizona for a meeting in February or March of 1996.

Respectfully submitted,

Patricia S. Channon