ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

September 22, 2020

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

September 22, 2020

Virtual Meeting

Discussion Agenda

1. Greetings and introductions; acknowledgment of outgoing members Judge Stuart Bernstein, Judge A. Benjamin Goldgar; Attorney Jeffery J. Hartley; Attorney Thomas M. Mayer (Judge Dow).

   Tab 1 Committee Roster
   Subcommittee Liaisons
   Chart Tracking Proposed Rules Amendments
   Pending Legislation Chart

2. Approval of minutes of the April 2, 2020 virtual meeting (Judge Dow).

   Tab 2 Draft minutes

3. Oral reports on meeting of other committees:

   A. Standing Committee – June 23, 2020 (Judge Dow, Professors Gibson and Bartell).

   Tab 3A1 Draft minutes of the Standing Committee meeting

   Tab 3A2 September 2020 Report of the Standing Committee to the Judicial Conference

   B. Advisory Committee on Appellate Rules – April 4, 2020; October 20, 2020 (Judge Donald).

   C. Advisory Committee on Civil Rules –April 1, 2020; October 16, 2020 (Judge Goldgar).

   D. Bankruptcy Committee – June 11, 2020 (Judge Bernstein, Judge Isicoff).

4. Report of the Privacy, Public Access, and Appeals Subcommittee (Judge Ambro).

   A. Report on possible amendments to conform Bankruptcy Rule 8003 to proposed changes to Federal Rules of Appellate Procedure 3 (Professor Gibson).

   Tab 4A August 20, 2020 memo by Professor Gibson

   B. Report on Suggestion 20-BK-G from the Bankruptcy Committee to amend Rule 3011 (Professor Bartell).

   Tab 4B August 17, 2020 memo by Professor Bartell

5. Report of the Business Subcommittee (Judge Bernstein).

   A. Consider Suggestion 20-BK-D from member Thomas Moers Mayer regarding Rule 7007.1 (Professor Bartell).

      Tab 5A August 17, 2020 memo by Professor Bartell

6. Report of the Consumer Subcommittee (Judge Goldgar).

   A. Suggestion 20-BK-E from CACM (Judge Fleissig) for rule amendment establishing minimum procedures for electronic signatures of debtors and others (Professor Gibson).

      Tab 6A August 11, 2020 memo by Professor Gibson

   B. Consider Suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1 (Professor Gibson).

      Tab 6B August 25, 2020 memo by Professor Gibson

7. Report of the Forms Subcommittee (Judge Hoffman).

   A. Consider suggestion 20-BK-C, from Judge Eric Frank, for an amendment to Official Form 410A or its instructions. (Professor Bartell).

      Tab 7A August 17, 2020 memo by Professor Bartell

   B. Consideration of conforming amendments to Official Form 417A (Professor Gibson).

      Tab 7B August 12, 2020 memo by Professor Gibson

   C. Recommendation of no action regarding suggestion 20-BK-F (Vladislav Kachka) to revise the "Explanation of Discharge in a Chapter 7 Case" (Professor Bartell).

      Tab 7C August 17, 2020 memo by Professor Bartell

8. Report of the Restyling Subcommittee (Judge Krieger; Professor Bartell).

   Tab 8A August 17, 2020 memo by Professor Bartell

9. Report of the Emergency Rule Subcommittee (Hoffman: Gibson)

   Tab 9A August 28, 2020 memo by Professor Gibson

10. Future meetings: The spring 2021 meeting has not yet been scheduled.

11. New Business.

12. Adjourn.

Proposed Consent Agenda

The Chair and Reporters have proposed the following items for study and consideration prior to the Advisory Committee's meeting. **Absent any objection, all recommendations will be approved by acclamation at the meeting.** Any of these matters may be moved to the Discussion Agenda if a member or liaison feels that discussion or debate is required prior to Committee action. Requests to move an item to the Discussion Agenda must be brought to attention of the Chair by noon, Eastern Time, on **Tuesday, September 15, 2020.**

1. Business Subcommittee.

   A. Recommendation of no action regarding Suggestion 20-BK-A from the Foundation for Defense of Democracies for proposed rulemaking concerning national security matters (Professor Bartell).

      Consent Tab 1A August 17, 2020 memo by Professor Bartell

2. Consumer Subcommittee.

   A. Recommendation of referral of Suggestion 20-BK-B to make the court's database of electronic creditor notice addresses available to any case participant required to serve notices on creditors. (Professor Gibson).

      Consent Tab 2A August 11, 2020 memo by Professor Gibson

3. Recommendation for technical changes to all versions of Official Form 309 to update PACER internet address, to amend national instruction to Form 309 to list all versions of the form, and to permit courts to update the internet links as needed on those forms in the future.

   Consent Tab 3A August 26, 2020 memo by Scott Myers

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TAB 1

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RULES COMMITTEES — CHAIRS AND REPORTERS

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Advisory Committee on Bankruptcy Rules

Members	Position	District/Circuit	Start Date	End Date
Dennis Dow Chair	B	Missouri (Western)	Member: 2014 Chair: 2018	---- 2021
Thomas L. Ambro	C	Third Circuit	2016	2022
Stuart M. Bernstein	B	New York (Southern)	2014	2020
Bernice B. Donald	C	Sixth Circuit	2019	2022
A. Benjamin Goldgar	B	Illinois (Northern)	2014	2020
Jeffery J. Hartley	ESQ	Alabama	2014	2020
Melvin S. Hoffman	B	Massachusetts	2016	2022
David A. Hubbert*	DOJ	Washington, DC	----	Open
Marcia S. Krieger	D	Colorado	2017	2020
Thomas M. Mayer	ESQ	New York	2014	2020
Debra Miller	ESQ	Indiana	2017	2020
J. Paul Oetken	D	New York (Southern)	2019	2022
Jeremy L. Retherford	ESQ	Alabama	2018	2021
David A. Skeel	ACAD	Pennsylvania	2016	2022
George H. Wu	D	California (Central)	2018	2021
S. Elizabeth Gibson Reporter	ACAD	North Carolina	2008	Open
Laura B. Bartell Associate Reporter	ACAD	Michigan	2017	2022

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Updated: April 20, 2020

Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective October 15, 2019

Business Subcommittee Judge Stuart M. Bernstein, Chair Judge Thomas Ambro Judge J. Paul Oeken Judge Marcia S. Krieger Judge Melvin Hoffman Jeff J. Hartley, Esq. Tom Mayer, Esq. Professor David Skeel Ramona D. Elliott, Esq., *EOUST liaison* Kenneth S. Gardner, *ex officio*	**CARES Act Emergency Rules Taskforce** Judge Melvin Hoffman, Chair Debra L. Miller, Esq. Tom Mayer, Esq. Kenneth S. Gardner, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*
Consumer Subcommittee Judge A. Benjamin Goldgar, Chair Judge Bernice Donald Judge George H. Wu Jeff J. Hartley, Esq. Debra L. Miller, Esq. Jeremy L. Retherford, Esq. Ramona D. Elliott, Esq., *EOUST liaison* Kenneth S. Gardner, *ex officio*	**Forms Subcommittee** Judge Melvin Hoffman, Chair Judge George H. Wu Judge A. Benjamin Goldgar Debra L. Miller, Esq. Jeremy L. Retherford, Esq. Ramona D. Elliott, Esq., *EOUST liaison* David Hubbert, Esq., *ex officio* Kenneth S. Gardner, *ex officio*
Privacy, Public Access, and Appeals Subcommittee Judge Thomas Ambro, Chair Judge Bernice Donald Judge A. Benjamin Goldgar Tom Mayer, Esq. Ramona D. Elliott, Esq., *EOUST liaison* David Hubbert, Esq., *ex officio*	**Restyling Subcommittee** Judge Marcia S. Krieger, Chair Judge A. Benjamin Goldgar Judge Melvin Hoffman Jeff J. Hartley, Esq Debra L. Miller, Esq. Kenneth S. Gardner, *ex officio* John Rao, Esq. *consultant* Ramona D. Elliott, Esq., *EOUST liaison*
Technology and Cross Border Insolvency Subcommittee Judge J. Paul Oeken, Chair Judge Melvin Hoffman Professor David Skeel Ramona D. Elliott, Esq., *EOUST liaison*	
Civil Rules Liaison: Judge Benjamin Goldgar	**Appellate Rules Liaison:** Judge Bernice Donald

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. A. Benjamin Goldgar *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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Effective December 1, 2019

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2019)
- Approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Effective February 19, 2020

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code – adding a subchapter V to chapter 11 – made by the Small Business Reorganization Act of 2019

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2020

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2020)

REA History:

- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)
- Approved by Standing Committee (June 2019)
- Approved by relevant advisory committee (Spring 2019)
- Published for public comment (unless otherwise noted, Aug 2018-Feb 2019)
- Approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Approved by Standing Committee (June 2020) and transmitted to Judicial Conference (Sept 2020)

REA History:

- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendment to the proposed amendment to Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security • 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: The Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsors:* Booker (D-NJ) Cornyn (R-TX) Durbin (D-IL) Lee (R-UT) Paul (R-KY) Whitehouse (D-RI)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	• 5/8/19: introduced in the Senate; referred to Judiciary Committee • 5/20/20: reported out of Judiciary Committee and passed Senate without amendment by unanimous consent • 5/22/20: received in the House • 5/28/20: letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: introduced in the Senate; referred to Judiciary Committee

	H.R. 3993 *Sponsor:* Johnson (D-GA) *Co-Sponsors:* Cohen (D-TN) Lieu (D-CA)	AP 29	Identical to Senate bill (see above)	• 7/25/19: introduced in the House; referred to Judiciary Committee • 8/28/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet
Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/15/19: introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Cook (R-CA) Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	• 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security

Justice in Forensic Algorithms Act of 2019	**H.R. 4368** *Sponsor:* Takano (D-CA) *Co-Sponsors:* Evans (D-PA) Johnson (D-GA)		**Bill Text:** https://www.congress.gov/116/bills/hr4368/BILLS-116hr4368ih.pdf **Summary:** The stated purpose of the bill is, in part, "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings . . . ." The bill amends the Evidence Rules by adding two new rules and amends Criminal Rule 16(a)(1) by adding a new paragraph (H): • Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software. • Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence. • Criminal Rule 16(a)(1)(H). Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of the software,	• 9/17/19: introduced in the House; referred to Judiciary Committee and the Committee on Science, Space, and Technology • 10/2/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet

			necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include— (i) the name of the company that developed the software; (ii) the name of the lab where test was run; (iii) the version of the software that was used; (iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs; (v) documentation of procedures followed based on procedures outlined in internal validation; (vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and (vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards. **Report:** None.	

CARES Act	**H.R. 748**	CR (multiple)	**Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf **Summary:** Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings. Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act. **Report:** None.	• 3/27/20: became Public Law No. 116-136 • Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations
Abuse of the Pardon Prevention Act	**H.R. 7694** *Sponsor:* Schiff (D-CA) *Co-Sponsor:* Nadler (D-NY)	CR 6	**Bill text:** https://www.congress.gov/116/bills/hr7694/BILLS-116hr7694ih.pdf **Summary:** Under Section 2, subsection (a), when the President grants an individual a pardon for a covered offense, within 30 days the Attorney General must provide Congress with "all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned." Subsection (b) states that "Rule 6(e) [which addresses recording and disclosing of grand jury proceedings] of the Federal Rules of Criminal Procedure may not be construed to prohibit the disclosure of information required by subsection (a) of this section." **Report:** None. **Related Bills:** H.R. 1627 (introduced 4/12/19) and S. 2090 (introduced 7/11/19)	• 7/21/20: introduced in House; referred to Judiciary Committee • 7/23/20: mark-up session held; reported out of Judiciary Committee

TAB 2

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Draft – May 9, 2020

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 2, 2020
Held Remotely by Conference Call and Webex

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro
Bankruptcy Judge Stuart M. Bernstein
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge A. Benjamin Goldgar
Jeffery J. Hartley, Esq.
Bankruptcy Judge Melvin S. Hoffman
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Thomas Moers Mayer, Esq.
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Professor David A. Skeel
District Judge George Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
Professor Daniel Coquillette, consultant to the Standing Committee
Professor Catherine Struve, reporter to the Standing Committee
Professor Brian Garner, style consultant to the Standing Committee
Professor Joseph Kimble, style consultant to the Standing Committee
Bankruptcy Judge Laurel L. Isacoff, Liaison to the Committee on the Administration of the Bankruptcy System
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Brittany Bunting, Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Allison Bruff, Administrative Office
Beth Wiggins, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group and thanked them for their flexibility in holding this meeting remotely. He also thanked the staff of the Administrative Office for finding a platform for the meeting. He introduced Brittany Bunting, who is new to the staff of the Administrative Office, and thanked her for her work on this meeting. He also introduced new members Judge Donald and Judge Oetken. He introduced a new liaison, Judge Isacoff, from the Bankruptcy Committee. He noted that there is a supplement to the agenda book. Judge Dow also described technical issues relating to the software program used for the meeting.

2. Approval of minutes of Washington, D.C. Sept. 26, 2019 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) Jan. 28, 2020 Standing Committee meeting

Judge Dow gave the report. The Standing Committee commended the Advisory Committee for its fast work in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA).

The Advisory Committee presented proposed amendments to three official forms—Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period)—to implement the Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 which became effective on August 23, 2019. The Standing Committee retroactively approved (and undertook to provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Gibson also provided the Standing Committee information on the process by which the interim SBRA rules and forms were implemented, including the brief publication of the proposed interim SBRA rules and forms, their amendment in response to comments, their approval by the Advisory Committee and the Standing Committee and authorization by the Executive Committee of the Judicial Conference for distribution to the districts for adoption as

local rules. At this meeting, the Advisory Committee will begin the process of adopting permanent SBRA rules and forms for publication.

Professor Bartell described to the Standing Committee the progress of the restyling project and reported that the Advisory Committee expected to present Parts I and II of the restyled Bankruptcy Rules for publication at the next meeting of the Standing Committee.

(B) April 4, 2020 Meeting of the Advisory Committee on Appellate Rules

Judge Donald presented the report.

The Advisory Committee on Appellate Rules will be meeting remotely on April 4, 2020. Because the meeting had not yet taken place, there was no report.

(C) October 30, 2019 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report.

After extensive work, the MDL subcommittee concluded there was no reason to adopt rules governing third-party litigation funding ("TPLF") in the MDL context. The subcommittee reached that conclusion because (a) multi-district litigation doesn't appear to involve much TPLF, and (b) the TPLF phenomenon is evolving rapidly. The subcommittee referred the TPLF question back to the full Committee. Given the rapid evolution of TPLF, the Committee decided not to pursue possible rules for now and to reexamine the question in a year or two.

A joint subcommittee from the Appellate, Civil, and Bankruptcy Rules Committees is considering whether some amendment, probably to Fed. R. Civ. P. 42(a) or 54(b), would be appropriate in the wake of the Supreme Court's *Hall v. Hall* decision. At the subcommittee's request, the FJC is studying whether as a practical matter *Hall* poses enough of a problem to justify an amendment. That study is ongoing. No results should be expected for some time.

Another joint subcommittee is considering a proposal to move the deadline for papers filed electronically from midnight on the due date to the time when the clerk's office closes. The subcommittee is still in the information-gathering stage.

The Committee considered the same suggestion from "Sai" that the Bankruptcy Rules Committee considered at its fall meeting that would have required the clerk or the judge (or someone with the court) to calculate for each pro se litigant every potential deadline in the litigant's case. The Committee was sympathetic to the concerns Sai raised but agreed with the Bankruptcy Rules Committee and decided to take no action.

The Committee rejected amendments to Rule 68, Rule 26(b)(4)(B) and Rule 26.

The Mandatory Initial Discovery Pilot continues in N.D. Ill. and D. Ariz. and is reportedly "going pretty well," according to Judge Robert Dow. Five rounds of surveys have been sent to lawyers to gauge their reaction to the program. Results from the two participating districts have been positive and mostly similar, except that Illinois defense lawyers are more negative than their western counterparts.

Tom Mayer expressed the view that changing the time of electronic filing would be contrary to bankruptcy practice.

(D) Dec. 10-11, 2019 meeting of the Committee on the Administration of the Bankruptcy System

Judge Laurel Isacoff provided the report.

There was an emergency meeting this week precipitated by the CARES Act at which the Committee passed a motion directing staff to draft a proposal to present to the Committee regarding legislation allowing extension of deadlines that are not ordinarily subject to extension during a time of emergency.

Judge Dow commented that the Bankruptcy Committee had been approached with respect to the Bankruptcy Rules that impose deadlines on action. He intends to appoint a subcommittee to consider whether a new rule should be adopted to permit these extensions.

Subcommittee Reports and Other Action Items

4. Report by Appeals, Privacy, and Public Access Subcommittee

(A) Consideration of whether to propose amendments to Bankruptcy Rule 8003 to conform to proposed amendments to FRAP 3(c)

Judge Ambro introduced the issue; the Advisory Committee of Appellate Rules has published a proposed amendment to FRAP 3(c) (Contents of the Notice of Appeal), which is intended to resolve the different practices in different courts of appeals. Professor Gibson provided the report. The Subcommittee was asked to recommend to the Advisory Committee whether to propose amendments to Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) that conform to amendments to FRAP 3(c). A change would make a notice of appeal

encompass all issues that merge into the judgment, not merely those mentioned in the notice of appeal. At the fall 2019 meeting of the Advisory Committee, the Subcommittee reported that it had some doubts about whether conforming amendments were necessary and that it wanted to consider any comments received on the FRAP 3(c) before making a recommendation regarding Rule 8003.

The Subcommittee has decided to make no recommendation at this meeting regarding conforming amendments to Rule 8003 and to continue to consider whether the proposed amendments can be properly adapted to the bankruptcy context. While some members stressed the possible negative consequences of failing to conform Rule 8003 and Official Form 417A to FRAP 3(c) and Appellate Form 1, others raised concerns about how the amendments would be applied in appeals from contested matters, as opposed to adversary proceedings that mirror civil litigation.

The Subcommittee also noted that the Appellate Committee meets after the Advisory Committee meets. That means that the Advisory Committee will not know what action the Appellate Committee is going to take in response to the comments until after the conclusion of our meeting. Rather than try to take action by email in between the spring meeting and the preparation of the Standing Committee report, the Subcommittee concluded that the better course would be to see what proposal for FRAP 3(c) and Form 1 goes forward and then to carefully consider the extent to which that approach can be adapted for bankruptcy practice.

5. Report by the Business Subcommittee

(A) Recommended amendments to Rule 5005 concerning notices sent to the United States trustee

Professor Bartell provided the report. The changes to Fed. R. Bankr. P. 9036 (entitled "Notice or Service Generally"), which became effective December 1, 2019, provide that whenever the bankruptcy rules "require or permit sending a notice or serving a paper by mail, the clerk or other party may send the notice to – or serve the paper on – a registered user by filing it with the court's electronic-filing system." The rule "does not apply to any complaint or motion required to be served in accordance with Rule 7004."

Transmittal of papers to the U.S. Trustee is governed by Rule 5005, which requires that such papers be "mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee" and that the entity transmitting the paper file as proof of transmittal a verified statement.

For the last year, the EOUST has been considering whether any changes should be made to Rule 5005 in light of the changes to Rule 9036. The EOUST has proposed amendments to Rule 5005 to conform this USTP-specific rule to both amended Rule 9036 and current bankruptcy practice under Rule 5005(b). The proposed changes would allow papers to be transmitted to the U.S. Trustee by electronic means, and would eliminate the requirement that the filed statement evidencing transmittal be verified.

The Advisory Committee approved the proposed amendments to Rule 5005 and committee note and directed that they be submitted to the Standing Committee for publication.

(B) Recommended amendments to Rule 7004

Professor Bartell provided the report. George Weiss, an attorney in Potomac, MD, proposed in Suggestion 19-BK-D that Bankruptcy Rule 7004(h) should be amended by "importing the language of" Civil Rule 4(h) (permitting service of process on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process) to replace the requirement that service be made on "an officer," but retaining the requirement that such service be made by certified mail.

Several suggestions have been made in recent years requesting amendments to Rule 7004(h), most recently in 2017, 17-BK-E, which requested inclusion of credit unions in the Rule. Bankruptcy Rule 7004(h) was enacted verbatim by Congress in Section 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Because, under the Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, bankruptcy rules cannot override statutory provisions, the Advisory Committee lacks the authority to modify Rule 7004(h) in a manner that is inconsistent with federal statutes. Because the text of Rule 7004(h) is in fact statutory, an amendment that modifies that language in the manner suggested by Mr. Weiss is beyond the power of the Advisory Committee, whatever its substantive merits.

Mr. Weiss followed up his initial suggestion with two others in 19-BK-J. Rather than modifying the statutory language of the rule, he suggested first that the Advisory Committee supplement the rule with a new definition of "officer" to include a resident agent appointed to accept service of process. The Subcommittee concluded that it could not label someone an officer who was not in fact an officer, and declined to act on this suggestion.

Mr. Weiss's second additional suggestion is that Rule 7004 be amended to specify that any service made on an officer need not name the officer but rather can be addressed to "officer of [name of institution]."

This issue is not confined to Rule 7004(h); the same issue arises under the general service of process rule, Rule 7004(b)(3), with respect to service on corporations. Courts are divided on whether service is adequate if the officer is not named, both under Rule 7004(h) and under Rule 7004(b)(3).

The Subcommittee concluded that this suggestion had merit. In looking at the history of Rule 7004, the Associate Reporter found that there was an Advisory Committee Note to its predecessor, Rule 704, that explicitly stated that under the predecessor to Rule 7004(b)(3),

> "In serving a corporation or partnership or other unincorporated association by mail pursuant to paragraph (3) of subdivision (c), **it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title**." (Emphasis supplied).

When the Bankruptcy Rules were revised following the enactment of the Bankruptcy Reform Act of 1978, and Rule 704 became 7004, the original Advisory Committee Note to Rule 704 was no longer included in the published version. Instead, the Advisory Committee Note to Subdivision (b) of the Rule simply stated: "Subdivision (b), which is the same as former Rule 704(c), authorizes service of process by first class mail postage prepaid. This rule retains the modes of service contained in former Bankruptcy Rule 704. The former practice, in effect since 1976, has proven satisfactory."

The Advisory Committee also rejected a suggestion to require a specific name in service under Rule 7004(b)(3) at its Sept. 1999 meeting.

In light of this history, the Subcommittee concluded that Rule 7004 should be amended to include the substance of the former Advisory Committee Note to Rule 704. (The Advisory Committee Notes cannot be amended without a modification to the Rule itself.) Therefore, the Subcommittee recommended approval of a new Section 7004(i) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.

Judge Goldgar expressed the view that it is not difficult to find out the actual name of the officer or director, and he is therefore ambivalent about the proposed amendment. He also suggested that Rule 7004(i) seems to be a rule interpreting another rule, acting like a Committee Note. Professor Gibson stated that she sees this as comparable to FRAP 3(c). Dan Coquillette

said that he understands the concern, but agrees with Professor Gibson. Judge Donald also said that it is not always so easy to find the name of the officer or director, especially for pro bono filers, and supports the proposed rule.

The Advisory Committee approved the amendments to Rule 7004 and committee note and directed that they be submitted to the Standing Committee for publication.

(C) Recommended Rule amendments to implement the Small Business Reorganization Act of 2019

Professor Gibson provided the report. The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act of 2019 ("SBRA") took effect as local rules or standing orders on February 19, 2020, the effective date of SBRA. Now the Advisory Committee will begin the process of promulgating national rules governing cases under subchapter V of chapter 11. The first step in that process is to seek publication of the amended and new rules for comment this summer, along with the SBRA form amendments. The Subcommittee was asked to make a recommendation to the Advisory Committee regarding any changes or additions that are needed to the interim rules for which publication will be sought.

Because the interim rules just recently went into effect, there is little experience with them so far. As a result, the only suggested changes the Subcommittee is aware of are a few stylistic changes to Rules 3017.2 and 3019 suggested by the style consultants. The Subcommittee accepted the stylistic changes to Rule 3017.2, but concluded that stylistic changes to Rule 3019 should await the restyling process.

The Advisory Committee recommended that the Standing Committee order publication of the SBRA rules.

Ramona Elliot provided data on small business filings since SBRA; filings are at twice the rate before SBRA, and 75% of those filing are electing subchapter V treatment. Things are operating as they should to this point. She expects an uptick in all chapter 11 cases and subchapter V cases in light of the CARES Act.

(D) Proposed amendments to Rules 3007 and 7007.1

Professor Gibson provided the report. Amendments to Rules 3007(a)(2) (manner of service for objection to claims of an insured depository institution) and 7007.1 (disclosure requirements for recusal purposes) were published for public comment in August. Other than a general statement of support for the amendment to Rule 3007 by the National Conference of

Bankruptcy Judges ("NCBJ"), no comments were submitted regarding that rule. The NCBJ also expressed general support for the amendments to Rule 7007.1, but in addition it suggested one change, as did another commenter. The comment of the other commentator will be addressed in the restyling process. The change suggested by the NCBJ was to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning and for consistency with references in other rules. The Subcommittee agreed with that change.

The Advisory Committee gave final approval to Rule 3007 as published, and to Rule 7007.1 with the change suggested by the NCBJ.

(E) Proposed amendments to Rule 9036

Professor Gibson provided the report. For several years, this Subcommittee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic noticing and service in the bankruptcy courts. One set of amendments to Rule 9036 (Notice and Service Generally) went into effect on December 1, 2019. Proposed amendments to Rule 2002(g) and Official Form 410 that were published along with the 2019 amendments to Rule 9036—authorizing creditors to designate an email address on their proofs of claim for receipt of notices and service—were held in abeyance by the Advisory Committee for further consideration by the Subcommittee. Most recently, additional amendments to Rule 9036 were published for public comment last August.

The published amendments to Rule 9036 would encourage the use of electronic noticing and service in several ways. The rule would recognize a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. In anticipation of the simultaneous amendments of Rule 2002(g) and Official Form 410, it would also allow courts and parties to serve or provide notice to a creditor at an email address designated on its proof of claim. And it would provide a set of priorities for electronic noticing and service in situations in which a recipient had provided more than one electronic address to the courts.

Seven sets of comments were submitted regarding the proposed amendments to Rule 9036. Most of them were from clerks of court or their staff, and they expressed several concerns about the proposed amendments to Rule 9036, as well as to the earlier published amendments to Rule 2002(g) and Official Form 410.

The Subcommittee noted that there was enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. No comments

expressed opposition to it or concerns about it. The Subcommittee also recognized, however, that many clerks expressed opposition to several other aspects of the proposed Rule 9036 amendments. The concerns fell into 3 categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

In response to the concerns about clerk monitoring of email bounce-backs, the Subcommittee added a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

Because of the comments expressed about the administrative burden of a proof-of-claim opt-in, the Subcommittee decided that the proof-of-claim check-box option should not be pursued. Deciding not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410, and deleting references to that option in Rule 9036, would allow the courts to receive the benefits of the high-volume paper-notice program, which is anticipated to result in significant savings to the judiciary, without imposing what many clerks perceive as an undue burden on them of having to review proofs of claim for email addresses. It is anticipated that future improvements to CM/ECF will allow the entry of email addresses in a way that will be accessible to parties as well as to those within the court system. Language proposed by the Subcommittee in Rule 9036(b)(2) would allow for that future possibility.

The concern about the interplay of the proposed amendments to Rules 2002(g) and 9036 will disappear if the Subcommittee's recommendation not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410 is accepted, because amended Rule 9036 by itself will make the use of electronic noticing and service optional.

Ken Gardner endorsed the Subcommittee's recommendation.

The Advisory Committee gave final approval to the proposed amendments to Rule 9036 as presented and decided to take no further action on the previously published amendments to Rule 2002(g) and Official Form 410.

(F) Consideration of Rule and Form Revisions under CARES Act

Professor Gibson and Professor Bartell presented the report. On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the coronavirus crisis.

The CARES Act modifies the definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Previously, § 1182(1) defined "debtor" under subchapter V as "a small business debtor." Under the CARES Act, § 1182(1) was amended to include a separate definition for "debtor" for subchapter V purposes. The definition of "debtor" in § 1182(1) will revert to its prior version one year after the effective date of the CARES Act.

For the next year there are three categories of debtors – (1) debtors that do not satisfy the requirements for "small business debtor" or "debtor" under subchapter V; (2) debtors that satisfy the requirements for "small business debtor" who do not elect to proceed under subchapter V; and (3) "debtors" who meet the requirements for subchapter V and elect to employ those procedures.

In existing Form 101, line 13 asks the debtor whether he or she intends to file under chapter 11, whether he or she is a small business debtor, and if so whether he or she intends to elect treatment under subchapter V of chapter 11. This line must be amended to ask not only whether the individual debtor is a small business debtor, but also whether he or she is a debtor as defined in § 1182(1) and whether he or she wishes to proceed under subchapter V.

In existing Form 201, line 8, if the debtor files under chapter 11 the debtor is asked to check a box (if applicable) to confirm its aggregate debts are less than the $ 2,725,625 figure in the definition of "small business debtor." The debtor is also asked to check a box if the debtor is a small business debtor, and a separate box if the debtor is a small business debtor and wishes to elect subchapter V treatment. Because of the amended definition of "debtor" in § 1182(1), line 8 must be modified to permit the debtor to confirm that its aggregate debts are less than $7,500,000 (the figure in the definition of "debtor" in § 1182(1)) and elects subchapter V treatment. The proposed amendments provide more language explaining the elections (which was modified during the meeting) and modify the elections to permit disclosure of whether the debtor is a "debtor" within the meaning of § 1182(1) and elects subchapter V treatment.

Ramona Elliot asked whether the form itself should disclose the time limit on the provisions. Scott Myers stated that the revised form would be withdrawn after the one-year period so it will not be misleading. In addition, there is a notation in the committee note that the legislation sunsets in one year.

Rule 1020 provides procedural rules for "small business chapter 11 reorganization cases." Because of the revised definition of "debtor" for purposes of subchapter V elections, it is proposed that the rule be amended to include separate references to a "debtor as defined in § 1182(1)" whenever the rule previously mentioned a "small business debtor."

The CARES Act also amends the definition of "current monthly income" in § 101(10A)(B)(ii) to add a new exclusion from the computation of "current monthly income" for ''(V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID–19).'' An identical exclusion was inserted in § 1325(b)(2) for computing disposable income. As a result, Forms 122A-1 (chapter 7 statement of current monthly income), 122B (chapter 11 statement of current monthly income), and 122C-1 (chapter 13 statement of current monthly income) must be amended to insert the same exclusion in line 10 of each of the proposed amended forms. These amendments have a duration of one year after the effective date of the CARES Act, at which time the Forms will revert to their former versions.

Because the CARES Act is immediately effective, the Advisory Committee exercised its delegated authority to make confirming changes to the Official Forms and approved the proposed amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference.

The Advisory Committee approved the amendments to Rule 1020 and will seek the approval of the Standing Committee and the Judicial Conference by electronic vote to issue the amended rule as an interim rule to be implemented by each district as a local rule or standing order. Because of the immediate effective date of the CARES Act, the limited duration of its bankruptcy provisions, and relatively minor nature of the amendments, the Advisory Committee concluded that the interim rule should be issued without publication.

Judge Campbell described the background of the language in the CARES Act asking the Judicial Conference to consider whether there should be rules that are applicable in a national emergency. The CARES Act includes the following provision:

(6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the ''Rules Enabling Act''), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

The Rules Committee chairs are being asked to establish subcommittees to identify rules that might be affected in national emergencies and consider what should be done to those rules in such a situation. They are to report to the full Advisory Committee in the fall, and approve any emergency rules for publication the next year. Such rules would become effective at the end of 2023. Judge Campbell does not know whether any emergency procedures need to be built into the bankruptcy rules.

Judge Dow said he intended to appoint a special subcommittee to address these issues and invited members of the Advisory Committee who would be interested in serving on that subcommittee to let him know.

6. Report by the Consumer Subcommittee

(A) Proposed amendments to Rule 2005

Professor Bartell presented the report. Judge Brian Fenimore of the Western District of Missouri brought to the attention of Judge Dennis R. Dow that Federal Rules of Bankruptcy Procedure 2005(c) (dealing with conditions for release) contains references to repealed provisions of the Criminal Code, 18 U.S.C. §§ 3146(a) and (b). The topic of conditions is in 18 U.S.C. § 3142. Although much of Section 3142 is completely inapplicable to the subject of Federal Rule of Bankruptcy Procedure 2005(c) (conditions designed to assure attendance for examination or appearance before the court), the easiest technical fix is that suggested by Judge Fenimore, which is simply replacing the reference to "§ 3146(a) and (b)" in Rule 2005(c) with a reference to "§ 3142."

The Subcommittee recommended that change to the Advisory Committee at its spring meeting to be approved without publication. Although the Advisory Committee agreed with that recommendation, the Standing Committee decided to insert the word "relevant" before the word "provisions" and to publish the proposed modifications to the rule.

The only mention of the proposed change in the comments was a supportive statement from the National Conference of Bankruptcy Judges.

The Advisory Committee gave final approval to the amended Rule 2005(c) and accompanying committee note as published.

(B) Proposed amendments to Rule 3002.1

Professor Gibson provided the report. As was discussed at the spring and fall 2019 meetings, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).

Judge Goldgar appointed a working group to review the suggestions and make a recommendation to the Subcommittee. The Subcommittee began its consideration of the proposed amendments last summer by reviewing a draft presented by a working group of the Subcommittee. During its most recent conference call, the Subcommittee began reviewing an alternative draft presented by Subcommittee member Deb Miller, along with drafts of implementing forms. The alternative draft would simplify the mid-case review of the status of the mortgage, an approach that has been endorsed by several of members of the groups that made the original suggestions. The Subcommittee plans to continue its review of the proposed amendments and forms, and it hopes to have drafts to present to the Advisory Committee for discussion at the fall meeting.

(C) Proposed amendments to Rule 3002(c)(6)(A)

Professor Bartell provided the report. The Advisory Committee received a suggestion from George Weiss of Potomac, MD, 19-BK-F, with respect to Fed. R. Bankr. P. 3002(c)(6)(A). Rule 3002 requires creditors to file proofs of claim for their claims to be allowed, and specifies, in Rule 3002(c), the deadline for filing those proofs of claim in cases filed under chapter 7, 12 and 13. Rule 3002(c) then provides certain exceptions, including for domestic creditors, in clause (6)(A), when "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a)." Mr. Weiss noted that this would not permit an extension of the deadline for creditors who actually did not get notice either because they were omitted from the matrix or were listed with an improper address.

The most recent amendments to Rule 3002(c) were made in connection with the adoption of the national chapter 13 plan, and were published twice, in 2013 and 2014. There were extensive comments on the amendments, many of which made the same point that Mr. Weiss is making now. There is no indication that these comments were considered by the Advisory Committee at the time, probably because of the volume of comments on the national chapter 13 plan.

At its meeting in September 2019, the Advisory Committee referred the suggestion to the Subcommittee to make a recommendation on the appropriate amendment to the Rule to address the problem. The Subcommittee recommended that the Rule be amended to allow an extension of time to file proofs of claim for both domestic creditors and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." That is the standard now applicable to foreign creditors under Rule 3002(c)(6)(B)). The Subcommittee endorsed this amendment because it provides a uniform standard for all creditors and gives bankruptcy judges maximum discretion.

David Hubbard noted that there may be concern about the interplay between Rule 3002(c)(1) and the amended Rule 3002(c)(6). The Advisory Committee decided that this is a separate issue and can await future developments.

The Advisory Committee approved the proposed amendments to Rule 3002(c)(6) and committee note for submission to the Standing Committee for publication.

7. Report by the Forms Subcommittee

(A) SBRA forms for publication

Professor Gibson provided the report. The new and amended forms that the Advisory Committee promulgated in response to the enactment of the Small Business Reorganization Act ("SBRA") took effect on February 19, the effective date of the Act. Unlike the interim SBRA rules, the forms were officially issued under the Advisory Committee's delegated authority to make conforming and technical amendments to Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. Nevertheless, the Advisory Committee has committed to publishing them for comment this summer, along with the SBRA rule amendments, in order to ensure that the public has a thorough opportunity to review them.

The Subcommittee considered whether any changes or additions are needed to the forms that will be published, and it recommends that they be published as they now appear, along with a minor amendment to an additional form.

A staff member at the Administrative Office of the Courts has pointed out the need to add an exception to the instructions set out at the beginning of Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). It currently begins, "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11." That statement is incorrect for individuals filing under subchapter V of chapter 11. The Subcommittee proposes that the first sentence of those instructions be amended as follows: "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 (other than under subchapter V)."

The Advisory Committee agreed to seek the publication of the amended Official Form 122B and Official Forms 101, 201, 309E1, 309E2, 309F1, 309F2, 314, 315, and 425.

(B) Proposed conforming amendments to Official Form 417A (Notice of Appeal and Statement of Election)

Professor Gibson provided the report. The Subcommittee was asked to recommend to the Advisory Committee whether to propose amendments to Official Form 417A that conform to amendments to Appellate Form 1 (Notice of Appeal) that have been proposed by the Advisory Committee on Appellate Rules and published for public comment. At the fall 2019 meeting of the Advisory Committee on Bankruptcy Rules, this Subcommittee and the Subcommittee on Privacy, Public Access, and Appeals ("Appeals Subcommittee") jointly reported that they had some doubts about whether conforming amendments to Form 417A and Rule 8003 were necessary and that they wanted to consider any comments received on the amendments to FRAP 3(c) and Appellate Form 1 before making a recommendation regarding the bankruptcy rule and form.

As is explained in the Appeals Subcommittee's report, that Subcommittee voted to await further actions on the FRAP amendments before making a recommendation about possible conforming amendments to Rule 8003. This Subcommittee decided that it should follow the lead of the Appeals Subcommittee and hold off on making a recommendation about amendments to Official Form 417A. That approach will allow both subcommittees to know exactly what the Appellate and Standing Committees approve regarding FRAP 3(c) and Appellate Form 1 and to carefully consider the amendments' fitness for bankruptcy appeals. Joint conference calls of the two subcommittees before the fall meeting will be arranged for this purpose.

(C) Discharge orders for Subchapter V cases

Professor Gibson provided the report. The Bankruptcy Clerks' Advisory Group has suggested that it would be helpful to have one or more form orders of discharge for subchapter V cases. Currently the only chapter 11 discharge form is for individual debtors (Director's Form 3180RI). While it can be adapted for subchapter V cases, it is not appropriate in its entirety for those cases because the scope of discharge differs. As with the other discharge-order forms, forms that are adopted for subchapter V cases should be Director's Forms in order to allow individual courts flexibility in using them. Issuing Director's Forms will also expedite implementation since they will only have to be reviewed by the Advisory Committee, rather than going through the approval process for Official Forms issued by the Judicial Conference.

The Subcommittee recommended the approval of three forms. One is for an individual case in which confirmation is consensual under § 1191(a). In those cases, discharge is governed by § 1141(d)(1)-(4). If, however, the plan is confirmed nonconsensually under § 1191(b), § 1192 governs the discharge. Two different forms are proposed for that situation, one for individuals and another for corporations and partnerships.

The Advisory Committee gave final approval to the proposed three Director's Forms.

8. Report by the Restyling Subcommittee

Judge Marcia Krieger, chair of the Subcommittee, and Professor Bartell provided the report. Judge Krieger began with an expression of gratitude to Judge Campbell for his leadership in this area, and to those staff members at the Administrative Office who assisted with the programs to facilitate the process. She also thanked the style consultants for their contributions. She provided a general overview of the restyling process.

Judge Krieger then described the basic principles followed by the Subcommittee in the restyling process: make no substantive changes, respect defined terms, preserve terms of art, remain open to new ideas, and defer on matters of pure style.

Professor Bartell highlighted the area in which the Subcommittee had disagreements with the style consultants – the desire of the style consultants to restyle terms that are defined in the Bankruptcy Code, the differing views on terms of art, and the language of Rule 2002(n) (currently designated as Rule 2002(o)) that was enacted directly by Congress in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, rather than issued by the Supreme Court through the bankruptcy version of the Rules Enabling Act, 28 U.S.C. § 2075. The style consultants were invited to explain their position with respect to those issues and Bryan Garner and Joe Kimble both spoke, supporting their view that restyling defined terms and terms of art and Congressional language was desirable.

Judge Campbell expressed concern about Congressional sensitivity about modifications to something Congress has done. If a change were made in legislative language, it would have to be highlighted in every communication with respect to the restyled rules.

David Skeel said that he agrees with the reporters on the position the Subcommittee took with respect to defined terms. Tom Mayer agreed. Judge Goldgar said that the rules have to function with the Code, and he is not prepared to differ from the statute. Catherine Struve said that search functionality on electronic legal research programs will change with compound words. The Advisory Committee voted to support the position of the Subcommittee and not restyle defined terms.

The Advisory Committee discussed the use of terms of art, such as "property of the estate" and "meeting of creditors." The Advisory Committee agreed with the Subcommittee that these terms "should not be changed to "estate property" and "creditors' committee" and that other potential terms of art will be considered one by one, in context.

The Advisory Committee then turned to the language of Rule 2002(n). Judge Dow expressed the view that we should restyle the provision, as long as we do not change the substance. Judge Goldgar expressed the contrary view. Upon a vote, the Advisory Committee concluded that it would not change Rule 2002(n) from the language enacted by Congress.

The Subcommittee presented to the Advisory Committee for approval and publication Parts I and II of the restyled Federal Rules of Bankruptcy Procedure and the proposed committee note. Professor Bartell then asked the Advisory Committee for comments as to specific changes made during the process and an identification of any mistakes or substantive changes that the Subcommittee may have missed. The Advisory Committee made comments on various sections of the restyled rules and the committee note.

The Advisory Committee approved the restyled rules in Parts I and II and the committee note as amended at the meeting and recommended they be forwarded to the Standing Committee for publication for comment.

9. Future meetings

The fall 2020 meeting will be in Washington, D.C. on September 22, 2020.

10. New Business

There was no new business.

11. Adjournment

The meeting was adjourned at 5:10 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Consumer Subcommittee

   (A) Recommendation of no action regarding suggestions 19-BK-I and 19-BK-K with respect to DSO Certification for Deceased Debtor

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff Analysts; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. "Testimony" as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees' response to the CARES Act directive to consider emergency rules.

MULTI-COMMITTEE REPORTS

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court's decision in *Hall v. Hall*, 138

S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee's work to determine whether any rule change is needed. This process will take time.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

Action Items

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal "may [be] dismiss[ed]" by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase "if provided by applicable statute" to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as "well taken" but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys' responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word "mere" was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule's statement that a court "must" dismiss. He noted that several circuits' local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit's local rule, for example, requires in criminal cases that a stipulation

of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a "simple, non-substantive act." Consistent with *Garza*, the proposed amendments seek to simplify an

d make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an expressio unius conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that "and limit" be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term "trap" in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding "inadvertently" to the first sentence using the word "trap" in the committee note – thus: "These decisions inadvertently create a trap . . . ." Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

Publication of Proposed Amendment to Rule 25 (Filing and Service). The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public's right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee's mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

Information Items

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

Suggestion Regarding Decision on Grounds Not Argued. Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

Suggestion Regarding In Forma Pauperis Standards. Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

Suggestion Regarding Rule 4(a)(2). Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

Suggestion Regarding Rule 43 (Substitution of Parties). Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

Review of Recent Amendments. Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court's electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee's clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge's disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

Action Items

Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims). Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for "insured depository institution[s]." "Insured

depository institution" has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for "insured depository institution" from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines "insured depository institution," in 11 U.S.C. § 101(35), and the Code's definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement). Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from "Corporate Ownership Statement" to "Disclosure Statement." The Advisory Committee received two comments in response to publication. One comment suggested that the word "shall" in Rule 7007.1 be changed to "must." While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to "corporate ownership statement." The comment offered two reasons: (1) "disclosure statement" is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title ("Corporate Ownership Statement") retained and the word "disclosure" in subparagraph (b) changed to "corporate ownership," with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally). Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee's ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee's revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act's public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1. Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of "debtor" for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from $2,725,625 to $7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most $2,725,625; (2) a debtor with debts over $2,725,625 but not more than $7,500,000; and (3) a debtor that doesn't meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of "current monthly income" in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Publication of Restyled Parts I and II of the Bankruptcy Rules. Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

Publication of SBRA Rules and Official Forms. The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim). Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal). Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

Information Items

Amendment to Interim Rule 1020. As previously noted, the CARES Act altered the definition of "debtor" under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

Director's Forms for Subchapter V Discharge. The Advisory Committee approved three Director's Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

Actions Items

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

Another judge member asked whether subparagraphs (A) and (B) are intended to qualify "file" or "attributed." Professor Cooper responded that the provisions are intended to qualify "attributed." A different member shared concerns about the "or" structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as "if ordered by the court or if an alternative situation applies." He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of "unless the court orders otherwise" earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): "is attributed to that party or intervenor at the time that controls the determination of jurisdiction." Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties' obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding "unless the court orders otherwise." The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify "file" or "attributed." This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify "attributed." A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state "In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement at the time provided in subdivision (b) of this rule." A second sentence would then state that the disclosure statement must name and identify the "citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court." Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – "unless the court orders otherwise" – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

Publication of Proposed Amendment to Rule 12(a)(4). Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

Information Items

Report of the Subcommittee on Multidistrict Litigation (MDL). Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – "opt outs"

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases. The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading). The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

Suggestion Regarding Rule 17(d) (Public Officer's Title and Name). The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

Action Items

Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony). Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its "case-in-chief." Following Judge Campbell's suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence "at trial" or in a party's "case-in-chief." The Advisory Committee concluded that "case-in-chief" was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26's much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to "prompt notice" of any "modification, expansion, or contraction" of the party's expert testimony. She suggested that "contraction" might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is "correction." The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the "contraction" language could lead to a party being penalized for disclosing too much. This member recommended removing "contraction" from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word "modification," which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

Information Items

Proposals to Amend Rule 6 (The Grand Jury). The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee's role to provide advisory opinions on what a court's power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to "occupy the field" or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee's intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer's previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at $30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office's COVID-19 Task Force to inform the future work of this Committee.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
September 2020

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 5-8

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 23, 2020, due to the Coronavirus Disease 2019 (COVID-19) pandemic. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; and John S.

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Jeffrey A. Rosen.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five rules advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on pending legislation that would affect the rules and the judiciary's response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that

order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." The proposed amendment further provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 25 (Filing and Service), with a request that it be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 25(a)(5) responds to a suggestion regarding privacy concerns for cases under the Railroad Retirement Act. The proposed amendment would extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. The Advisory Committee will identify specific stakeholder groups and seek their comments on the proposed rule amendment.

Information Items

The Advisory Committee met by videoconference on April 3, 2020. Agenda items included continued consideration of potential amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) in an effort to harmonize the rules. The Advisory Committee decided not to pursue rulemaking to address appellate decisions based on unbriefed grounds. It tabled a suggestion to amend Rule 43 (Substitution of Parties) to require the use of titles rather than names in cases seeking relief against officers in their official capacities, pending inquiry into the practice of circuit clerks. The Advisory Committee also decided to establish two new subcommittees to consider suggestions to regularize the standards and procedures governing

in forma pauperis status and to amend Rule 4(a)(2), the rule that addresses the filing of a notice of appeal before entry of judgment, to more broadly allow the relation forward of notices of appeal.

The Advisory Committee will reconsider a potential amendment to Rule 42 (Voluntary Dismissal) following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 42 was published in August 2019. As published, the proposed amendment would have required the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. (The amendment would accomplish this by replacing the word "may" in the current rule with "must.") The proposed amendment would have also added a new paragraph (a)(3) providing that a court order is required for any relief beyond the dismissal of an appeal, and a new subdivision (c) providing that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. At the Standing Committee meeting, a question was raised concerning the proposed amendment's effect on local circuit rules that impose additional requirements before an appeal can be dismissed. The Advisory Committee will continue to study Rule 42, with a particular focus on the question concerning local rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036. The amendments were published for public comment in August 2019.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of title 18, U.S.C., § 3146(a) and (b)" – sections that have been repealed

– with a reference to "the relevant provisions and policies of title 18 U.S.C. § 3142" – the section that now deals with the topic of conditions of release. The only comment addressing the proposal supported it. Accordingly, the Advisory Committee unanimously approved the amendment as published.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007(a)(2)(A)(ii) clarifies that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. The clarification addresses a possible reading of the rule that would extend such special service not just to banks, but to credit unions as well. The only relevant comment supported the proposed amendment and the Advisory Committee recommended final approval of the rule as published.

Rule 7007.1 (Corporate Ownership Statement)

The proposed amendment extends Rule 7007.1(a)'s corporate-disclosure requirement to would-be intervenors. The proposed amendment also makes conforming and stylistic changes to Rule 7007.1(b). The changes parallel the recent amendment to Appellate Rule 26.1 (effective December 1, 2019), and the proposed amendments to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020) and Civil Rule 7.1 (published for public comment in August 2019).

The Advisory Committee made one change in response to the comments. It agreed to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning. With that change, it recommended final approval of the rule.

Rule 9036 (Notice and Service Generally)

The proposed amendment to Rule 9036 would encourage the use of electronic noticing and service in several ways. The proposed amendment recognizes a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. The proposed amendment also reorganizes Rule 9036 to separate methods of electronic noticing and service available to courts from those available to parties. Under the amended rule, both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. But only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The proposed amendment differs from the version previously published for comment. The published version was premised in part on proposed amendments to Rule 2002(g) and Official Form 410. As discussed below, the Advisory Committee decided not to proceed with the proposed amendments to Rule 2002(g) and Official Form 410.

The Advisory Committee received seven comments regarding the proposed amendments, mostly from court clerks or their staff. In general, the comments expressed great support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. But commenters opposed several other aspects of the proposed amendment. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

The Advisory Committee addressed concerns about clerk monitoring of email bounce-backs by adding a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

The Advisory Committee was persuaded by clerk office concerns that the administrative burden of a proof-of-claim opt-in outweighed any benefits, and therefore decided not to go forward with the earlier proposed amendments to Rule 2002(g) and Official Form 410 and removed references to that option that were in the published version of Rule 9036. This decision also eliminated the concerns raised in the comments about the interplay between the proposed amendments to Rules 2002(g) and 9036. With those changes, the Advisory Committee recommended final approval of Rule 9036.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 2005, 3007, 7007.1, and 9036 be approved and transmitted to the Judicial Conference

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to three categories of rules and forms with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The three categories are: (1) proposed restyled versions of Parts I and II of the Bankruptcy Rules; (2) republication of the Interim Rule and Official Form amendments previously approved to implement the Small Business Reorganization Act of 2019 (SBRA); and (3) proposed amendments to Rules 3002(c)(6), 5005, 7004, and 8023.

Restyled Rules, Parts I and II

At its fall 2018 meeting, after an extensive outreach to bankruptcy judges, clerks, lawyers and organizations, the Advisory Committee began the process of restyling the bankruptcy rules. This endeavor follows similar projects that produced comprehensive restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. The Advisory Committee now proposes publication of restyled drafts of approximately one third of the full bankruptcy rules set consisting of the 1000 series and 2000 series of rules. The proposed restyled rules are the product of intensive and collaborative work between the style consultants who produced the initial drafts, and the reporters and the Restyling Subcommittee who provided comments to the style consultants on those drafts. In considering the subcommittee's recommendations, the Advisory Committee endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes*. Most of the comments the reporters and the subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rule changes unrelated to restyling will be incorporated before the restyled rules are finalized.

2. *Respect Defined Terms*. Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms "equity security holder," "small business case," "small business debtor," "health care business," and "bankruptcy petition preparer." On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as "personal financial-management course," "credit-counseling statement," and "patient-care ombudsman."

3. *Preserve Terms of Art*. When a phrase is used commonly in bankruptcy practice, the Advisory Committee recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was "meeting of creditors."

4. *Remain Open to New Ideas*. The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.

5. *Defer on Matters of Pure Style*. Although the subcommittee made many suggestions to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. As a result, the restyled rules will designate current Rule 2002(o) (Notice of Order for Relief in Consumer Case) as 2002(n) as set forth in Section 321 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, and the Advisory Committee will not recommend restyling the wording as it was set forth in the Act. Other bankruptcy rules that were enacted by Congress in whole or in part are Rule 2002(f), 3001(g), and 7004(h).

Although the Advisory Committee requested that the Part I and II restyled rules be published for public comment in August 2020, those proposed amendments will not be sent forward for final approval until the remaining portions of the Bankruptcy Rules have been restyled. Work has already begun on a group of rules expected to be published in 2021, and the Advisory Committee anticipates that the final batch of rules will be published for comment in 2022. After all the rules have been restyled, published, and given final approval by the Standing Committee, the Rules Committees hope to present the full set of restyled Bankruptcy Rules to the Judicial Conference for approval at its fall 2023 meeting.

SBRA Rules and Forms

On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the

Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they could be adopted locally, prior to the February 19, 2020 effective date of the SBRA, to facilitate uniformity of practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. The Advisory Committee has now begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment in August 2020, along with the SBRA form amendments.

The SBRA rules consist of the following:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits),
- Rule 1020 (Small Business Chapter 11 Reorganization Case),
- Rule 2009 (Trustees for Estates When Joint Administration Ordered),
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting),
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case),
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The Advisory Committee recommended publishing the SBRA rules as they were recommended to the courts for use as interim rules with some minor stylistic changes to Rule 3017.2.

Unlike the SBRA interim rules, the SBRA Official Forms were issued on an expedited basis under the Advisory Committee's delegated authority to make conforming and technical amendments to official forms (subject to subsequent approval by the Standing Committee and notice to the Judicial Conference, (JCUS-MAR 16, p. 24)). Nevertheless, the Advisory Committee committed to publishing the forms for comment in August 2020, along with the SBRA rule amendments, in order to ensure that the public has an opportunity to review the rules and forms together.

The SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),
- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

In addition, the Advisory Committee recommends one additional SBRA-related form amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). The instructions to that form currently require that it be filed "if you are an individual and are filing for bankruptcy under Chapter 11." This statement is not accurate if the debtor is an individual filing under subchapter V of Chapter 11. The proposed amendment to the form clarifies that it is not applicable to subchapter V cases.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002 (Filing Proof of Claim or Interest). Under Rule 3002(c)(6)(B), an extension of time to file proofs of claim may be granted to foreign creditors if "the notice was insufficient

under the circumstances to give the creditor a reasonable time to file a proof of claim." The Advisory Committee recommended an amendment that would allow a domestic creditor to obtain an extension under the same circumstances.

Rule 5005 (Filing and Transmittal of Papers). The Advisory Committee recommended publication of an amendment to Rule 5005(b) that would allow papers to be transmitted to the U.S. trustee by electronic means and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Rule 7004 (Process; Service of Summons, Complaint). The Advisory Committee recommended publication of a new subsection (i) to clarify that Rule 7004(b)(3) and Rule 7004(h) permit use of a title rather than a specific name in serving a corporation or partnership, unincorporated association or insured depository institution. Service on a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," or "Officer" (or other similar titles) or, in the case of Rule 7004(b)(3), directed to the attention of the "Managing Agent," "General Agent," or "Agent" (or other similar titles) suffices, whether or not a name is also used or such name is correct.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to changes currently under consideration for Appellate Rule 42(b). As noted earlier in this report, the proposed amendment to Appellate Rule 42 was published for comment in August 2019, but the amendment is not yet moving forward for final approval because the Advisory Committee will study further the amendments' implications for local circuit provisions that impose additional requirements for dismissal of an appeal. The proposed amendment to Rule 8023 will be published for comment in the meantime.

Information Items

The Advisory Committee met by videoconference on April 2, 2020. In addition to its recommendations for final approval and for public comment discussed above, it recommended five official form amendments and one interim rule amendment in response to the CARES Act.

Notice of Conforming Changes to Official Forms 101, 201, 122A-1, 122B, and 122C-1

The CARES Act made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the COVID-19 pandemic. For the one-year period after enactment, the definition of "debtor" for subchapter V cases is changed, requiring conforming changes to Official Forms 101 and 201. For the same one-year time period, the definitions of "current monthly income" and "disposable" income are amended to exclude certain payments made under the CARES Act. These changes required conforming amendments to Official Forms 122A-1, 122B, and 122C-1. The Advisory Committee approved the necessary changes at its April 2, 2020 meeting pursuant to its authority to make conforming and technical changes to Official Forms subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee approved the amendments at its June 23, 2020 meeting, and notice is hereby provided to the Judicial Conference. The amended forms are included in Appendix B. These amendments have a duration of one year after the effective date of the CARES Act, at which time the former version of these forms will go back into effect.

Interim Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V)

One of the interim rules that was adopted by courts to implement the SBRA, Interim Rule 1020, required a temporary amendment due to the new definition of a Chapter 11, subchapter V debtor that was introduced by the CARES Act.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each

judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the Advisory Committee's recommendation, and, on April 14, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, approved the request. Because the CARES Act definition of a subchapter V debtor will expire in 2021, the temporary amendment to Interim Rule 1020 is not incorporated into the proposed amendments to Rule 1020 that are recommended for public comment (under the Rules Enabling Act, permanent amendments to Rule 1020 to address the SBRA would not take effect before December 1, 2022).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 12, as well as new Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing)

The proposed amendment to Rule 12(a)(4) extends the time to respond (after denial of a Rule 12 motion) when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rule, the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or has postponed its disposition until trial is 14 days. The DOJ, which often represents federal employees or officers sued in an individual capacity, submitted a suggestion urging that the rule be amended to extend the time to respond in these types of actions to 60 days.

The Advisory Committee agreed that the current 14-day time period is too short. First, personal liability suits against federal officials are subject to immunity defenses, and a denial of a

qualified or absolute immunity defense at the Rule 12 motion-to-dismiss stage can be appealed immediately. The appeal time in such circumstances is 60 days, the same as in suits against the federal government itself. In its suggestion, the DOJ points out that, under the current rule, when a district court rejects an immunity defense, a responsive pleading must be filed before the government has determined whether to appeal the immunity decision.

The suggestion is a logical extension of the concerns that led to the adoption several years ago of Rule 12(a)(3), which sets the time to serve a responsive pleading in such individual-capacity actions at 60 days, and Appellate Rule 4(a)(1)(B)(iv), which sets the time to file an appeal in such actions at 60 days.

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) is the result of three years of extensive study by the Advisory Committee.

This project was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

A subcommittee was formed to consider the suggestion. The subcommittee's first tasks were to gather additional data and information from the various stakeholders and to determine whether the issues revealed by the Administrative Conference's study could – or should – be

corrected by rulemaking. With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules for discussion.

Over time, the draft rules were revised and simplified. During this process, the subcommittee continued to discuss whether a better approach might be to develop model local rules or best practices. Ultimately, with feedback from the Advisory Committee, the Standing Committee, and district and magistrate judges, the subcommittee determined to press forward with developing proposed rules for publication. A continuing question that has been the focus of discussion in both the Advisory Committee and the Standing Committee is whether the benefits of the proposed supplemental rules would outweigh the costs of departing from the usual presumption against substance-specific rulemaking. The federal rules are generally trans-substantive and the Rules Committees have, with limited exceptions, avoided promulgating rules applicable to only a particular type of action.

The proposed supplemental rules – eight in total – are modest and drafted to reflect the unique character of § 405(g) actions. The proposed rules set out simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of presenting the actions as appeals to be decided on the briefs and the administrative record. While trans-substantivity concerns remain, the Advisory Committee believes the draft rules are an improvement over the current lack of uniform procedures and looks forward to receiving comments in what will likely be a robust public comment period.

Information Items

The Advisory Committee met by videoconference on April 1, 2020. In addition to the action items discussed above, the agenda included a report by the Multidistrict Litigation (MDL) Subcommittee and consideration of suggestions that specific rules be developed for MDL

proceedings. As previously reported, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members have also participated in numerous conferences hosted by different constituencies, most recently a virtual conference focused on interlocutory appeal issues in MDLs hosted by the Institute for Complex Litigation and Mass Claims at Emory University School of Law. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

The Advisory Committee will continue to consider a potential amendment to Rule 7.1, the disclosure rule, following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 7.1(a) was published for public comment in August 2019. The proposed amendment to Rule 7.1(b) is a technical and conforming amendment and was not published for public comment. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to the recent amendment to Appellate Rule 26.1 (effective December 1, 2019) and the proposed amendment to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity that is attributed to a party.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Criminal Rule 16 (Discovery and Inspection), with a request that it be published for public

comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would expand the scope of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

In considering the suggestions and developing a proposed amendment, the Advisory Committee drew upon two informational sessions. First, at the Advisory Committee's fall 2018 meeting, representatives from the DOJ updated the Advisory Committee on the DOJ's development and implementation of policies governing disclosure of forensic and non-forensic evidence. Second, in May 2019, the Rule 16 Subcommittee convened a miniconference to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. At the miniconference, defense attorneys identified two problems with the current rule: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors.

Over the next year, the subcommittee worked on drafting a proposed amendment. Drafts were discussed at Advisory Committee meetings and at the Standing Committee's January 2020 meeting. The proposed amendment approved for publication addresses the two shortcomings in the current rule identified at the miniconference – the lack of timing and the lack of specificity – while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

Information Item

The Advisory Committee met by videoconference on May 5, 2020. In addition to finalizing for publication the proposed amendment to Rule 16, the Advisory Committee formed a subcommittee to consider suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012.

The Advisory Committee has received two suggestions that the secrecy provisions in Rule 6(e) be amended to allow for disclosure of grand jury materials under limited circumstances. A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In addition to these two suggestions, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee did not hold a spring 2020 meeting, but is continuing its consideration of several issues, including: various alternatives for an amendment to Rule 106 (the rule of completeness); Rule 615 and the problems raised in case law and in practice

regarding the scope of a Rule 615 order; and forensic expert evidence, *Daubert*, and possible amendments to Rule 702. The DOJ has asked that the Rules Committees hold off on amending Rule 702 in order to allow time for the DOJ's new policies regarding forensic expert evidence to take effect. The Advisory Committee will discuss this request along with other issues related to Rule 702 at its upcoming meetings.

OTHER ITEMS

An additional action item before the Committee was a request by the Judiciary Planning Coordinator that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* for the years 2020-2025. The Committee did so and had no changes to suggest.

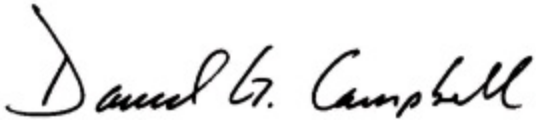
The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Finally, the Committee discussed the CARES Act, including its impact on criminal proceedings and its directive to consider the need for court rules to address future emergencies. On March 29, 2020, on the joint recommendation of the chairs of this Committee and the Committee on Court Administration and Case Management, the Judicial Conference found that emergency conditions due to the national emergency declared by the President under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, with respect to the COVID-19 pandemic will materially affect the functioning of the federal courts. Under § 15002(b) of the CARES Act,

this finding allows courts, under certain circumstances, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings.

Section 15002(b)(6) of the CARES Act directs the Judicial Conference to develop measures for the courts to address future emergencies. In response to that directive, the Committee heard reports on the subcommittees formed by each advisory committee to consider possible rules amendments that would provide for procedures during future emergencies. As a starting point, the advisory committees solicited public comments on challenges encountered during the COVID-19 pandemic in state and federal courts from lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. Over 60 substantive comments were received. The Standing Committee asked each advisory committee to identify rules that should be amended to account for emergency situations and to develop discussion drafts of proposed amendments at the committees' fall meetings for consideration by the Standing Committee at its January 2021 meeting.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Jeffrey A. Rosen
William J. Kayatta Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpt)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as ''all plaintiffs,'' ''the defendants,'' ''the plaintiffs A, B, et al.,'' or ''all defendants except X'';

(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

[1] New material is underlined in red; matter to be omitted is lined through.

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

(~~5~~) (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various

orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions inadvertently create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of

appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties. . . ."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Rule 3(c)(5) is limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, Rule 3(c)(7) provides that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was

filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

The new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Rule 6. Appeal in a Bankruptcy Case

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to ‘‘Forms 1A and 1B in the Appendix of Forms’’ must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as used in

any applicable rule, means ‘‘appellate panel’’; and

(D) in Rule 12.1, ‘‘district court’’ includes a bankruptcy court or bankruptcy appellate panel.

* * * * *

Committee Note

The amendment replaces ‘‘Form 1” with ‘‘Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ ___(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment~~)~~ ~~(from an order (describing it))~~ entered ~~in this action~~ on _____(state the date the judgment was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ _____(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order _____(describe~~ing~~ the order ~~it))~~ entered ~~in this action~~ on _____(state the date the order was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

United States Tax Court
Washington, D.C.

Docket No. _____

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Notice of Appeal

~~Notice is hereby given that~~ _____ (~~here~~ name all parties taking the appeal*)~~___~~ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision ~~of this court~~ entered ~~in the above captioned proceeding~~ on _____ (state the date the decision was entered)~~the _____ day of _____, 20__ (relating to _____)~~.

(s) _____
~~*Counsel*~~ *Attorney for* _____
Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

To: Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure

From: Honorable Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

Re: Report of the Advisory Committee on the Appellate Rules

Date: June 1, 2020

I. Introduction

The Advisory Committee on the Appellate Rules met by telephone conference call on Friday, April 3, 2020.

* * * * *

II. Action Items for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 6, and 42, as well as Forms 1 and 2. These amendments were published for public comment in August 2019.

A. Rule 42 – Voluntary Dismissal

The proposed amendment to Rule 42 would require the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. The current Rule gives a discretionary power to dismiss by using the word "may." Prior to restyling, the word "may" was "shall"; the proposed amendment would replace the word "may" with the word "must."

Here is the proposed text of Rule 42 as published:

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

The Committee received two comments on this proposal.

The Association of the Bar of the City of New York (ABCNY) suggested adding language to proposed Rule 42(b)(3). First, it suggested that the phrase "setting aside or enforcing an administrative agency order" be added to the list of examples of the kinds of actions that require a court order. Second, it suggested that the phrase "if provided by applicable statute" be added to the end of the subsection.

The Committee decided against making either change. Proposed Rule 42(b)(3) does not purport to be exhaustive, nor does it purport to authorize courts of appeals to take actions by order that are not otherwise authorized by law.

The National Association of Criminal Defense Lawyers (NACDL) found the proposal "well taken," but suggested that two sentences should be added to protect criminal defendants from inappropriate dismissals by counsel.

The Committee decided against making this change. The Federal Rules of Appellate Procedure do not generally address the particular responsibilities that counsel owe to criminal defendants, leaving that to other bodies of law.

Further reflection on a drafting suggestion made in connection with the January meeting of the Standing Committee did lead the Committee to make a minor revision to proposed Rule 42(b)(3): rephrasing it to eliminate the word "mere" and to make clear that it applies only to dismissals under Rule 42(b) itself. The Committee changed the relevant sentence of the Committee Note to reflect this rephrasing.

This is the only change to the proposed Rule made by the Committee since publication:

> **(3) Other Relief.** A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.
>
> **Committee Note**
>
> The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

The style consultants have suggested adding the article "a" before the word "payment" in proposed Rule 42(c).

Here is the proposed amendment recommended for final approval, including both the changes made by the Committee and the one suggested by the style consultants:

> **Rule 42. Voluntary Dismissal**
>
> * * * * *
>
> **(b) Dismissal in the Court of Appeals.**
>
> **(1) Stipulated Dismissal.** The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement

specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, a payment, or other consideration.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, a payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

B. Rules 3 and 6; Forms 1 and 2 – Content of Notice of Appeal

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. But a variety of decisions from around the circuits have made drafting a notice of appeal a somewhat treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal. The proposed amendment to Rule 3 is designed to reduce the inadvertent loss of appellate rights. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment. Accordingly, discussion has focused on Rule 3.

Here is the proposed text of Rule 3 as published:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment~~,~~ ~~—~~or the appealable order~~—~~from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Nine public comments were submitted. Five were generally supportive. Two were critical. Two were nonresponsive.*

Thomas Mayes offers his "full support" and urges adoption "without delay" because filing a notice of appeal "ought to be straightforward and ministerial." Professor Bryan Lammon also supports the proposed amendments, finding them "important and necessary," but as discussed below, offered a proposed simplification and expansion. The ACBNY supports the amendments, but offered a minor edit. The NACDL "supports these amendments, which are of particular importance in criminal cases," and suggested an expansion, discussed below. (Its stylistic suggestions for the forms were referred to the style consultants.) The Council of Appellate Lawyers of the American Bar Association has no objection to the proposed rule except, as discussed below, it suggested that it would be better not to allow appellants to limit the scope of a notice of appeal.

The two critical comments, one submitted by Michael Rosman and one submitted by Judge Steven Colloton, are discussed below.

* These two comments questioned some bankruptcy matters.

Wholesale Critiques

The Committee received two critical comments that, if accepted, would derail the project.

At the Fall 2019 meeting, the Committee considered the comments of Michael Rosman, who contends that the proposal is inconsistent with Civil Rule 54(b). As he sees it, Civil Rule 54(b), properly understood, requires a district court to enter a separate document that lists "all the claims in the action . . . and the counterclaims, cross-claims, and intervenors' claims, if any—and identify what has become of all of them." On this understanding, if a district court dismisses one count of a two count complaint under Civil Rule 12(b)(6) and then grants summary judgment for the defendant on the second count, there is no final judgment until the court files a document that recites both the action on the first count and the action on the second count—and until this is done, an appeal should be dismissed for want of appellate jurisdiction.

The Committee was not persuaded in the Fall. It is generally understood that a decision disposing of all remaining claims of all remaining parties to a case is a final judgment, without the need for the district judge to recite the prior disposition of all previously decided claims. At the January meeting of the Standing Committee, no member expressed agreement with Mr. Rosman's critique. And at the Spring meeting, the Committee adhered to its view; it does not recommend any changes in response to Mr. Rosman's comment.

The second critical comment was submitted by Judge Steven Colloton, who urged the Committee to abandon the proposal. Judge Colloton pointed to cases across the circuits, written by illustrious judges, that appropriately read the existing rule to hold appellants to their choices to limit the notices of appeal. He observed that it is not hard for appellants to designate everything for appeal, and does not think we should encourage appellate counsel to expand the scope of the appeal beyond what was in the notice.

In contrast to Judge Colloton, the comment submitted by the NACDL emphasized the importance of appellate counsel being able to review record material that may not be available at the time the notice of appeal is filed.

As the Supreme Court has recently explained, at the time a notice of appeal is filed, "the defendant likely will not yet have important documents from the trial court, such as transcripts of key proceedings, and may well be in custody, making communication with counsel difficult. And because some defendants receive new counsel for their appeals, the lawyer responsible for deciding which appellate claims to raise may not yet even be involved in the case." *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019) (citations omitted). Accordingly, filing a notice of appeal is "generally

speaking, a simple, nonsubstantive act," and filing requirements for notices of appeal "reflect that claims are . . . likely to be ill defined or unknown" at the time of filing. *Id*.

As a result, the Committee was not persuaded to abandon the project.

Judge Colloton also urged that if the project goes forward, references to "trap for the unwary" should be deleted from the committee note as pejorative.

The Committee declined to delete the phrase, not viewing it as pejorative. As reflected in Black's Law Dictionary, a trap can exist even if no one intended to set it.

Suggested Simplification

Professor Bryan Lammon suggested simplification by deleting proposed (c)(4) and (c)(5) and instead adding the following to the end of (c)(1) the sentence: "Unless the notice states otherwise, the designation of a judgment or order does not affect the scope of appellate review."

The Committee declined to adopt this suggestion, concerned both that it would seem to make the designation irrelevant and that it might not clearly overcome the *expressio unius* rationale that is the target of the proposed amendment.

Suggested Broadening

Two comments were submitted suggesting that the project be broadened.

First, the NACDL suggested that proposed Rule 3(c)(5) be expanded to cover criminal cases.

The Committee declined to do so. First, such an expansion would require further review and republication. Second, the NACDL did not point to a particular problem currently occurring in criminal cases, and indicated that there are not many criminal cases where the issue addressed by proposed (c)(5) is presented. Its concern was that a rule limited to civil cases might lead some courts, using an *expressio unius* rationale, to abandon their current precedent that takes an approach in criminal cases similar to that of the proposed rule. To deal with this concern, the Committee added a passage to the committee note:

> These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

Second, Professor Bryan Lammon suggested that the proposed amendment provide that there is no need to file a new or amended notice of appeal after the denial of a Rule 4(a)(4)(A) motion. The Committee declined to adopt this suggestion because it would require further review and republication. It decided to roll this suggestion into the new agenda item (20-AP-A) dealing with the relation forward of notices of appeals, discussed below in Part IV.

Attorney's Fees

At the January meeting of the Standing Committee, a concern was raised about whether the proposed amendment might inadvertently change the rule that there is an appealable final judgment even though a motion for attorney's fees is outstanding. One suggestion was that perhaps the proposal should use the conjunction "or" rather than "and" in connecting "claims" with "rights and liabilities" or perhaps the phrase "rights and liabilities" should be deleted.

The Committee decided against making either change. While part of Civil Rule 54(b) uses the conjunction "or," the last sentence of 54(b) uses the conjunction "and," referring to "entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." In addition, keeping "rights and liabilities" in the proposed amendment preserves the intended connection between the proposal and Civil Rule 54(b).

To deal with the concern about attorney's fees, the Committee added to the committee note a statement that the amendment does not change the principle established in the Supreme Court decisions *Budinich* and *Ray Haluch*. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988); *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014). Under these cases, attorney's fees incurred in the action are collateral—and can be understood as neither "claims" nor "rights and liabilities of the parties" within the meaning of Civil Rule 54(b). As the Court put it in *Budinich*:

> As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

Budinich, 486 U.S. at 200.*

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* The Committee also considered a related question about Civil Rule 58(e), a rule that allows a district court to treat a motion for attorney's fees as if it were a Civil Rule 59 new trial motion for purposes of Appellate Rule 4(a)(4)(A). The Committee concluded that this

The addition to the committee note is as follows:

> The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

Avoiding the Creation of a New Trap for the Unwary

Judge Colloton also suggested that the proposed rule might create its own trap for the unwary. Suppose a party waits until final judgment, but instead of designating the final judgment (or the final judgment and some interlocutory order or orders) designates *only* an interlocutory order in the notice of appeal. If Rule 3(c)(1)(B) requires that either a final judgment or an appealable order be designated, might a court conclude that the notice is ineffective?

To guard against this possible result, the Committee added a provision to what would become Rule 3(c)(7):

> ~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

It also added an explanation to the committee note:

> On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly

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situation is covered by Rule 4(a)(4)(A)(iii) because such a district court order is effectively an extension of time and Civil Rule 58(e) is the intended reference of subsection (iii).

designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

Designating Only Part of a Judgment or Order in a Notice of Appeal

Throughout the pendency of this proposed amendment, a persistent question has been whether to permit a party to limit the scope of a notice of appeal or to leave such limitations to the briefs. It is a difficult and close issue. Indeed, on all of the issues discussed above, the Committee reached consensus. But on this issue, it was closely divided, five to three.

Rule 3(c)(1)(B) currently permits a party to designate "the judgment, order, or part thereof being appealed." Believing that the phrase "or part thereof" has contributed to the problem of confusing the judgment or appealable order with the issues sought to be reviewed on appeal, the Committee deleted that phrase in the proposed amendment. But to preserve the ability of a party to limit the scope of a notice of appeal by deliberate choice, proposed Rule 3(c)(6) as published provides: "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

The Council of Appellate Lawyers of the American Bar Association submitted a comment suggesting that it would be better not to include a provision allowing for a limitation of the scope of a notice of appeal. The Council is concerned that proposed 3(c)(6) may give rise to strategic attempts to limit the jurisdiction of the court of appeals, particularly when cross-appeals are involved. It supports leaving the narrowing of the issues on appeal to the briefing.

The majority of the Committee decided not to change this aspect of the proposal as published. Current law allows limited notices of appeal, and the point of the current project is to avoid miscommunication, not to change what a party can and cannot do. Retaining the ability to expressly limit the scope of the notice of appeal is valuable, particularly in multi-party cases, enabling an appellant to assure a party that no challenge is being raised as to that party.

Eliminating the ability to limit the scope of the notice of appeal might upset settlement agreements, in which a defendant might have agreed not to appeal a judgment's award of damages to one plaintiff but is still free to appeal the same judgment's award of damages to a second plaintiff. There is utility in binding oneself in the notice of appeal rather than with some assurance on the side.

Eliminating the ability to limit the scope of the notice of appeal might also interfere with the district court's ability to reconsider or modify existing rulings if a

particular order does multiple things, of which some may be appealable, some may be unappealable, and some may be uncertain.

Moreover, the current proposal does not appear to give cause for the Council's worries regarding cross-appeals. Rules 4(a)(3) and 4(b)(1) give other parties additional time to file a notice after a timely notice of appeal, but they do not limit such cross-appeals to the same part of the judgment or order referenced in the initial notice.

While not persuaded to eliminate the ability to limit the scope of the notice of appeal, the Committee, cognizant of the competing concerns, decided to retain the matter on its agenda, with a plan to revisit the issue in three years.

A minority of the Committee, on the other hand, would delete proposed (c)(6) and add the following sentence to the end of proposed (c)(4): "Specific designations do not limit the scope of the notice of appeal."

In their view, such an approach would be a "cleaner" alternative, create less uncertainty, and avoid inadvertent loss of appellate rights. Concerns supporting the retention of proposed (c)(6) could be managed in other ways. For example, in multi-party cases where some parties settle, assurance that the appealing party is not breaching the settlement agreement could be provided separate from the text of the notice of appeal. Similarly, issues regarding the ability of a district court to modify existing rulings could be handled on a case-by-case basis. A motion in the district court, or a statement in a brief, could signal to the courts and parties the limits of what was sought to be raised on appeal.

Disagreement about this aspect of the proposal did not lead any member to withhold support for the proposal as a whole. Once the Committee resolved this issue by a divided vote, the Committee without dissent approved submitting the proposed amendment to the Standing Committee for final approval.

The style consultants suggested a minor change to proposed (c)(4): changing "all orders that merge for purposes of appeal into the designated judgment" to "all orders that, for purposes of appeal, merge into the designated judgment."

Here is the proposed amendment recommended for final approval, including both the changes made by the Committee and the one suggested by the style consultants:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders,

but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*,

571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties. . . ."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These two provisions are limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, existing Rule 3(c)(4) is amended to provide that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

The~~se~~ new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

The proposed amendment to Rule 6 is a conforming amendment. No comments directed to Rule 6 were received, and the Committee requests final approval as published.

The NACDL also noted with approval a minor stylistic change to the forms as published and suggested more stylistic streamlining. The style consultants reviewed

those suggestions, and the following revised forms are presented first in redline and then as the clean result:

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ _____(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment~~) (from an order (describing it))~~ entered ~~in this action~~ on _____ (state the date the judgment was entered)~~the _____ day of _____, 20__~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

~~Notice is hereby given that~~ _____ (~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants)~~ ~~in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(from the final judgment) (~~ from ~~an~~ the order _____ (describe~~ing~~ the order ~~it))~~ entered ~~in this action~~ on _____ (state the date the order was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

United States Tax Court
Washington, D.C.

Docket No. _____

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Notice of Appeal

~~Notice is hereby given that~~ _____ (~~here~~ name all parties taking the appeal)*_____ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision ~~of this court~~ entered ~~in the above captioned proceeding~~ on _____ (state the date the decision was entered)~~the _____ day of _____, 20__ (relating to _____)~~.

(s) _____
~~*Counsel*~~ *Attorney for* _____
Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment of a District Court.

United States District Court for the _____
District of _____
Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

_____(name all parties taking the appeal)* appeal to the United States Court of Appeals for the _____ Circuit from the final judgment entered on _____ (state the date the judgment was entered).

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From an Appealable Order of a District Court.

United States District Court for the _____
District of _____
Docket Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

_____(name all parties taking the appeal)* appeal to the United States Court of Appeals for the _____ Circuit from the order _____(describe the order) entered on _____ (state the date the order was entered).

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

United States Tax Court
Washington, D.C.

Docket No. _____

A.B., Petitioner v. Commissioner of Internal Revenue, Respondent	Notice of Appeal

_____ (name all parties taking the appeal)* appeal to the United States Court of Appeals for the _____ Circuit from the decision entered on _____ (state the date the decision was entered).

(s) _____
Attorney for _____
Address:_____

* * * * *

* See Rule 3(c) for permissible ways of identifying appellants.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 2005. Apprehension and Removal of Debtor to Compel Attendance for Examination.

* * * * *

(c) CONDITIONS OF RELEASE. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the relevant provisions and policies of title 18~~,~~ U.S.C.~~,~~ § ~~3146(a) and (b)~~ 3142.

Committee Note

The rule is amended to replace the reference to 18 U.S.C. § 3146(a) and (b) with a reference to 18 U.S.C. § 3142. Sections 3141 through 3151 of Title 18 were repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, § 203(a), 98 Stat. 1979 (1984), and replaced by new provisions dealing with bail. The current version of 18 U.S.C. § 3146 deals not with conditions to assure attendance or appearance, but with penalties for failure to appear. The topic of conditions is in 18 U.S.C. § 3142. Because 18 U.S.C. § 3142 contains provisions bearing on topics not

[1] New material is underlined in red; matter to be omitted is lined through.

included in former 18 U.S.C. § 3146(a) and (b), the rule is also amended to limit the reference to the "relevant" provisions and policies of § 3142.

Rule 3007. Objections to Claims

(a) TIME AND MANNER OF SERVICE

* * * * *

(2) *Manner of Service.*

(A) The objection and notice shall be served on a claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated; and

* * * * *

(ii) if the objection is to a claim of an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act, in the manner provided in Rule 7004(h).

* * * * *

Committee Note

Subdivision (a)(2)(A)(ii) is amended to clarify that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994. It applies only to insured depository institutions that are insured by the Federal Deposit Insurance Corporation and does not include credit unions, which are instead insured by the National Credit Union Administration. A credit union, therefore, may be served with an objection to a claim according to Rule 3007(a)(2)(A)—by first-class mail sent to the person designated for receipt of notice on the credit union's proof of claim.

Rule 7007.1. Corporate Ownership Statement

(a) REQUIRED DISCLOSURE. Any nongovernmental corporation that is a party to an adversary proceeding, other than the debtor, ~~or a governmental unit,~~ shall file ~~two copies of~~ a statement that identifies any parent corporation and any publicly held corporation~~, other than a governmental unit, that directly or indirectly~~ that owns 10% or more of ~~any class of the corporation's equity interests,~~ its stock or states that there ~~are no entities to report under this subdivision~~ is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. ~~A party shall file the~~ The corporate ownership statement shall: ~~required under Rule 7007.1(a)~~

(1) be filed with ~~its~~ the corporation's first appearance, pleading, motion, response, or other request addressed to the court~~.~~; and

(2) be supplemented whenever the information required by this rule changes ~~A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose~~.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. Bankr. P. 8012, Fed. R. App. P. 26.1., and Fed. R. Civ. P. 7.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene. Stylistic changes are made to subdivision (b) to reflect that some statements will be filed by nonparties seeking to intervene.

Rule 9036. Notice and Service ~~Generally~~ by Electronic Transmission

(a) IN GENERAL. This rule applies ~~W~~whenever these rules require or permit sending a notice or serving a paper by mail or other means.~~, the clerk, or some other person as the court or these rules may direct, may send the notice to or serve the paper on~~

(b) NOTICES FROM AND SERVICE BY THE COURT.

(1) *Registered Users.* The clerk may send notice to or serve a registered user by filing the notice or paper ~~it~~ with the court's electronic-filing system.

(2) *All Recipients.* For any recipient, the clerk may send notice or serve a paper ~~Or it may be sent to any person~~ by ~~other~~ electronic means that the ~~person~~ recipient consented to in writing, including by designating an electronic address for receipt of notices. But these exceptions apply:

(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk shall send the notice to or serve the paper at that address; and

(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the notice to or serve the paper electronically at an address designated by the Director, unless the entity has designated an address under § 342(e) or (f) of the Code.

(c) NOTICES FROM AND SERVICE BY AN ENTITY. An entity may send notice or serve a paper in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).

(d) COMPLETING NOTICE OR SERVICE. ~~In either of these events,~~ Electronic ~~service or~~ notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. It is the recipient's responsibility to keep its electronic address current with the clerk.

(e) INAPPLICABILITY. This rule does not apply to any ~~pleading or other~~ paper required to be served in accordance with Rule 7004.

Committee Note

The rule is amended to take account of the Administrative Office of the United States Courts' program for providing notice to high-volume paper-notice recipients. Under this program, when the Bankruptcy Noticing Center ("BNC") has sent by mail more than a designated number of notices in a calendar month (initially set at 100) from bankruptcy courts to an entity, the Director of the Administrative Office will notify the entity that it is a high-volume paper-notice recipient. As such, this "threshold notice" will inform the entity that it must register an electronic address with the BNC. If, within a time specified in the threshold notice, a notified entity enrolls in Electronic Bankruptcy Noticing with the BNC, it will be sent notices electronically at the address maintained by the BNC upon a start date determined by the Director. If a notified entity does not timely enroll in Electronic Bankruptcy Noticing, it

will be informed that court-generated notices will be sent to an electronic address designated by the Director. Any designation by the Director, however, is subject to the entity's right under § 342(e) and (f) of the Code to designate an address at which it wishes to receive notices in chapter 7 and chapter 13 cases, including at its own electronic address that it registers with the BNC.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. Only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The title of the rule is revised to more accurately reflect the rule's applicability to methods of electronic noticing and service. Rule 9036 does not preclude noticing and service by physical means otherwise authorized by the court or these rules.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter you are filing under:

❑ Check if this is an amended filing

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 04/20

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx –____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx –____ ____ ____ ____
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code

6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

❑ Chapter 7

❑ Chapter 11

❑ Chapter 12

❑ Chapter 13

8. How you will pay the fee

❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).

❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

❑ No

❑ Yes. Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship to you _____
District _____ When _____ Case number, if known_____
MM / DD / YYYY

11. Do you rent your residence?

❑ No. Go to line 12.

❑ Yes. Has your landlord obtained an eviction judgment against you?

❑ No. Go to line 12.

❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it as part of this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code, and are you a *small business debtor* or a debtor as defined by 11 U.S. C. § 1182(1)?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor or a debtor choosing to proceed under Subchapter V so that it can set appropriate deadlines. If you indicate that you are a small business debtor or you are choosing to proceed under Subchapter V, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

❑ No. I am not filing under Chapter 11.

❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

❑ Yes. I am filing under Chapter 11, I am a small business debtor according to the definition in the Bankruptcy Code, and I do not choose to proceed under Subchapter V of Chapter 11.

❑ Yes. I am filing under Chapter 11, I am a debtor according to the definition in § 1182(1) of the Bankruptcy Code, and I choose to proceed under Subchapter V of Chapter 11.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

19. How much do you estimate your assets to be worth?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

20. How much do you estimate your liabilities to be?

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____
Signature of Debtor 1

Executed on _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Executed on _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- ❑ No
- ❑ Yes. Name of Person_____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

Committee Note

The form is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law provides a new definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Line 13 of the form is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check one box only as directed in this form and in Form 122A-1Supp:

- ❑ 1. There is no presumption of abuse.
- ❑ 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 122A–2).
- ❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 122A–1

Chapter 7 Statement of Your Current Monthly Income

04/20

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 122A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

				Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2.	**Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3.	**Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4.	**All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5.	**Net income from operating a business, profession, or farm**	**Debtor 1**	**Debtor 2**		
	Gross receipts (before all deductions)	$_____	$_____		
	Ordinary and necessary operating expenses	− $_____	− $_____		
	Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here** → $_____	$_____
6.	**Net income from rental and other real property**	**Debtor 1**	**Debtor 2**		
	Gross receipts (before all deductions)	$_____	$_____		
	Ordinary and necessary operating expenses	− $_____	− $_____		
	Net monthly income from rental or other real property	$_____	$_____	**Copy here** → $_____	$_____
7.	**Interest, dividends, and royalties**			$_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ↓		
For you	$_____	
For your spouse	$_____	
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19); payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11. **Copy line 11 here** → $_____

Multiply by 12 (the number of months in a year). x 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. _____

Fill in the number of people in your household. _____

Fill in the median family income for your state and size of household. 13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ☐ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3. Do NOT fill out or file Official Form 122A-2.

14b. ☐ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 122A-2.* Go to Part 3 and fill out Form 122A–2.

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A–2.

If you checked line 14b, fill out Form 122A–2 and file it with this form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 122B

Chapter 11 Statement of Your Current Monthly Income

04/20

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A **Debtor 1**	*Column B* **Debtor 2**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**	**Debtor 1**	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	− $_____	− $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here** →	$_____	$_____
6. **Net income from rental and other real property**	**Debtor 1**	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	− $_____	− $_____			
Net monthly income from rental or other real property	$_____	$_____	**Copy here** →	$_____	$_____

	Column A **Debtor 1**	*Column B* **Debtor 2**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ↓		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19); payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total current monthly income

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 122C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

04/20

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**

	Debtor 1	Debtor 2			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	− $_____	− $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	Copy here →	$_____	$_____

6. **Net income from rental and other real property**

	Debtor 1	Debtor 2			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	− $_____	− $_____			
Net monthly income from rental or other real property	$_____	$_____	Copy here →	$_____	$_____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔

For you ..... $_____

For your spouse ..... $_____

9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title. $_____ $_____

10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act; payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19); payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below.

_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____

11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

$_____ + $_____ = $_____

Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 below.
- ❑ You are married and your spouse is filing with you. Fill in 0 below.
- ❑ You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 below.

_____	$_____
_____	$_____
_____	+ $_____
Total	$_____ Copy here ➔ − _____

14. **Your current monthly income.** Subtract the total in line 13 from line 12. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. ..... $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... $_____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Your Disposable Income* (Official Form 122C–2).

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3 and fill out Calculation of Your Disposable Income (Official Form 122C–2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13.

19a. If the marital adjustment does not apply, fill in 0 on line 19a. ..... – $_____

19b. **Subtract line 19a from line 18.** $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b.. ..... $_____

Multiply by 12 (the number of months in a year). **x** 12

20b. The result is your current monthly income for the year for this part of the form. $_____

20c. Copy the median family income for your state and size of household from line 16c..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

☐ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 122C–2.

If you checked 17b, fill out Form 122C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

Committee Note

Official Forms 122A-1, 122B, and 122C-1 are amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law modifies the definition of "current monthly income" in §101(10A) and the definition of "disposable income" in §1325(b)(2) to exclude "payments made under the Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19)." Each form is modified to expressly exclude these amounts from line 10. These amendments will terminate one year after the date of enactment of the CARES Act.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

☐ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy 04/20

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. **Debtor's name** _____

2. **All other names debtor used in the last 8 years**
   Include any assumed names, trade names, and *doing business as* names
   _____
   _____
   _____
   _____
   _____

3. **Debtor's federal Employer Identification Number** (EIN) __ __ – __ __ __ __ __ __ __

4. **Debtor's address**

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. **Debtor's website** (URL) _____

6. Type of debtor

- ❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ❑ Partnership (excluding LLP)
- ❑ Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. § 101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ❑ None of the above

B. *Check all that apply:*

- ❑ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ❑ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ❑ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes .

___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

Check one:

- ❑ Chapter 7
- ❑ Chapter 9
- ❑ Chapter 11. *Check **all** that apply*:
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,725,625. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000, **and it chooses to proceed under Subchapter V of Chapter 11.** If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ A plan is being filed with this petition.
  - ❑ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ❑ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ❑ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ❑ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

- ❑ No
- ❑ Yes. Debtor _____ Relationship _____
  District _____ When _____
  MM / DD / YYYY
  Case number, if known _____

11. Why is the case filed in *this district*?

Check all that apply:

- ❑ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- ❑ No
- ❑ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

- ❑ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
  What is the hazard? _____
- ❑ It needs to be physically secured or protected from the weather.
- ❑ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- ❑ Other _____

Where is the property?_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

- ❑ No
- ❑ Yes. Insurance agency _____
  Contact name _____
  Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

- ❑ Funds will be available for distribution to unsecured creditors.
- ❑ After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

15. Estimated assets

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

16. Estimated liabilities

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____ _____
Signature of authorized representative of debtor Printed name

Title _____

18. Signature of attorney

✘ _____ Date _____
Signature of attorney for debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

Committee Note

The form is amended in response to the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281. That law provides a new definition of "debtor" for determining eligibility to proceed under subchapter V of chapter 11. Line 8 of the form is amended to reflect that change. This amendment to the Code will terminate one year after the date of enactment of the CARES Act.

Excerpt from the May 18, 2020 Report of the Advisory Committee on Bankruptcy Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Honorable David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 18, 2020

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met virtually via WebEx on April 2, 2020. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee gave its final approval to amendments to four rules that were published for comment last August. The amendments are to Rules 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination), 3007 (Objections to Claims), 7007.1 (Corporate Ownership Statement), and 9036 (Notice and Service Generally).

* * * * *

The action items are organized as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2019—

- Rule 2005;
- Rule 3007;
- Rule 7007.1; and
- Rule 9036.

* * * * *

II. Action Items

A. Items for Final Approval

(A1) Rules published for comment in August 2019.

The Advisory Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2019 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of 18 U.S.C. § 3146(a) and (b)"—sections that have been repealed—with a reference to "the relevant provisions and policies of 18 U.S.C. § 3142"—the section that now deals with the topic of conditions of release. The only mention of the proposed change in the comments received in response to publication was a supportive statement from the National Conference of Bankruptcy Judges ("NCBJ"). Accordingly, the Advisory Committee unanimously approved the amendment as published.

Action Item 2. Rule 3007 (Objections to Claims). Rule 3007(a)(2)(A)(ii) requires service of an objection to a claim "on an insured depository institution[] in the manner provided by Rule 7004(h)." Some bankruptcy judges have questioned whether "insured depository institution" under Rule 7004(h) includes credit unions as well as banks, a question that the Advisory Committee previously decided in the negative, and whether the meaning of "insured depository institution" is the same under Rule 3007(a)(2)(A)(ii) as under Rule 7004(h)

Rule 7004 governs service of a summons and complaint in adversary proceedings, and Rule 9014(b) makes Rule 7004 applicable to service of a motion initiating a contested matter. Rule 7004(b) provides generally for service by first class mail, in addition to the methods of service specified by Civil Rule 4(e)-(j). Rule 7004(b), however, is made subject to an exception set out in subdivision (h). The latter provision states:

> (h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary

> proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> >
> > (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Section 114 of that law declared that "Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended" to add the text of new subdivision (h).

At the spring 2018 Advisory Committee meeting, the Committee concluded that Rule 7004(h) is not applicable to credit unions because, being insured by the National Credit Union Administration, credit unions do not fall within section 3 of the Federal Deposit Insurance Act.[1] The Committee also decided not to take further action on Suggestion 17-BK-E, which sought an expansion of Rule 7004(h) to include credit unions.

Because of the limited scope of Rule 7004(h), other rule provisions that require service in the manner provided "by Rule 7004" allow service by first class mail under Rule 7004(b) on credit unions. These rules include Rules 3012(b) (request for a determination of the amount of a secured claim in a chapter 12 or 13 plan), 4003(d) (avoidance of a lien on exempt property in a chapter 12 or 13 plan), 5009(d) (motion for an order declaring a lien satisfied and released), 9011(c)(1) (motion for sanctions), and 9014(b) (motion initiating a contested matter).

The 2017 amendments to Rule 3007 were intended to clarify that objections to claims are generally not required to be served in the manner provided by Rule 7004. Instead, those objections may be served on most claimants by mailing them to the person designated on the proof of claim. But that rule is subject to two exceptions. The one relevant here is set forth in subdivision (a)(2)(A)(ii). It provides that "insured depository institutions" must be served "in the manner provided by Rule 7004(h)." The Advisory Committee added that exception in an effort to comply with the legislative mandate in Rule 7004(h) that such institutions be served by certified mail in contested matters and adversary proceedings.

The Advisory Committee subsequently realized that the promulgation of Rule 3007(a)(2)(A)(ii) failed to take account of the Bankruptcy Code definition of "insured depository

[1] Section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(c)(2), provides, "The term 'insured depository institution' means any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter." The "Corporation" is the Federal Deposit Insurance Corporation. *Id.* at § 1811(a).

institution."[2] The Code definition, which includes credit unions in addition to banks insured by the FDIC, is made applicable to the Bankruptcy Rules by Rule 9001. However, the Committee concluded that the definition does not change the scope of Rule 7004(h), because in the latter provision Congress expressly included a specific and narrower definition of insured depository institution—one defined in section 3 of the Federal Deposit Insurance Act. That specific reference in Rule 7004(h) overrides the more general definition in § 101(35).

The existence of a Code definition of insured depository institution does, however, affect the scope of Rule 3007(a)(2)(A)(ii). That provision does not say that service according to Rule 7004 is required; instead, it specifically requires service according to Rule 7004(h). And it applies to an "insured depository institution" without providing any special definition of that term. Accordingly, the § 101(35) definition applies, and credit unions are brought within the requirement that Rule 7004(h) service be made. That means that only under this one rule are credit unions required to receive service by certified mail.

The Advisory Committee proposed the amendment to Rule 3007(a)(2)(A)(ii) to eliminate the inclusion of credit unions by limiting the term "insured depository institution" to the meaning set forth in section 3 of the Federal Deposit Insurance Act. The underlying intent of the Advisory Committee in previously proposing the amendments to Rule 3007 was to clarify that Rule 7004 service is generally not required for objections to claims. The exception in subdivision (a)(2)(A)(ii) was included based on the belief that it was required by the congressionally imposed requirement of Rule 7004(h); there was no intent, however, to expand the scope of that heightened service requirement.

In response to publication of the amendment to Rule 3007(a)(2)(A)(ii), the only comment submitted was the general statement by the NCBJ that it "supports the amendments." Accordingly, the Advisory Committee voted unanimously to recommend that the Standing Committee give final approval to the rule as published.

Action Item 3. Rule 7007.1 (Corporate Ownership Statement). Continuing the advisory committees' efforts to conform the various disclosure-statement rules to the amendments made to FRAP 26.1, which went into effect in December, the Advisory Committee proposed for publication conforming amendments to Rule 7007.1. Similar amendments to Rule 8012—the bankruptcy appellate disclosure-statement rule—have been sent to Congress. Rule 7007.1 requires corporate-ownership disclosure in the bankruptcy court and is proposed for amendment to parallel the relevant amendments to Civil Rule 7.1 that were also published last August. Like that rule, amended Rule 7007.1 would be made applicable to nongovernmental corporations seeking to intervene and would no longer require the submission of two copies of the statement.

Two comments were submitted in response to publication. The first, submitted by Aderant, suggested that the word "shall" be changed to "must" to conform to the wording of the parallel rules. The Advisory Committee concluded that this change should be made when the Part VII rules are restyled. In the meantime, the Bankruptcy Rules (other than Part VIII) are continuing to

[2] Section 101(35) provides that the "term 'insured depository institution'—(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and (B) includes an insured credit union (except in the case of paragraphs (21B) and (33A) of this subsection)."

use "shall" rather than "must" so that the change can be made at the same time throughout the rules and not on a piecemeal basis.

The other comment was submitted by the NCBJ. It suggested that, rather than conforming to Civil Rule 7.1's terminology "disclosure statement," Rule 7007.1 should retain the terminology "corporate ownership statement." It pointed out that "disclosure statement" is a bankruptcy term of art with a different meaning and that there are five other Bankruptcy Rule references to Rule 7007.1 that use the term "corporate ownership statement."

The Advisory Committee agreed with the NCBJ and voted unanimously to approve Rule 7007.1 with the current title retained and the word "disclosure" in subdivision (b) changed to "corporate ownership."

Action Item 4. Rule 9036 (Notice and Service Generally). For several years, the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic noticing and service in the bankruptcy courts. One set of amendments to Rule 9036 went into effect on December 1, 2019. Proposed amendments to Rule 2002(g) and Official Form 410 that were published along with the 2019 amendments to Rule 9036—authorizing creditors to designate an email address on their proofs of claim for receipt of notices and service—were held in abeyance by the Advisory Committee for further consideration. Additional amendments to Rule 9036 were published for public comment last August.

The recently published amendments to Rule 9036 would encourage the use of electronic noticing and service in several ways. The rule would recognize a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. In anticipation of the simultaneous amendments of Rule 2002(g) and Official Form 410, it would also allow courts and parties to serve or provide notice to a creditor at an email address designated on its proof of claim. And it would provide a set of priorities for electronic noticing and service for situations in which a recipient had provided more than one electronic address to the courts.

Seven sets of comments were submitted regarding the proposed amendments to Rule 9036. Most of them were from clerks of court or their staff, and they expressed several concerns about the proposed amendments to Rule 9036, as well as to the earlier published amendments to Rule 2002(g) and Official Form 410.

There was enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. No comments expressed opposition to it or concerns about it.

Many clerks, however, expressed opposition to several other aspects of the proposed Rule 9036 amendments. In addition to individual commenters, commenters included the Bankruptcy Clerks Advisory Group, the Bankruptcy Noticing Working Group, and an ad hoc group of 34 clerks of court. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

Clerk monitoring of email bounce-backs. Proposed Rule 9036(d) provides that "[e]lectronic notice or service is complete upon filing or sending but is not effective if the filer or

sender receives notice that it did not reach the person to be served." One clerk expressed concern that this provision imposes an administrative burden on the clerk's office by requiring it to monitor undeliverable emails. He advocated for the addition of a sentence to subdivision (d) that would relieve clerks of that burden. No other comments raised this concern.

The Advisory Committee noted that the provision to which objection was raised is also included in the version of Rule 9036 that went into effect in December. The same provision is also in Rule 8011(c)(3), which became effective in 2018. In considering the provision in Rule 8011, the Advisory Committee spent considerable time discussing this provision, and it determined that all users of electronic noticing and service—clerks as well as parties—should be required to make effective service or noticing, which means continuing their efforts if they become aware that their prior attempt failed. The Advisory Committee voted not to change the language in question.

It did, however, decide that the other part of the comment's suggestion—that an additional sentence be added that would make the electronic notice recipient responsible for maintaining and updating its electronic address with the bankruptcy clerk—would be helpful. That directive could reduce the number of bounce-backs. The Advisory Committee therefore voted to add the following sentence to the end of subdivision (d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

Administrative burden of allowing a creditor to opt-in to email noticing and service on its proof of claim. This was the chief concern of the clerks and the Bankruptcy Noticing Working Group and was a concern that was expressed when the amendments to Rules 2002(g), 9036, and Form 410 were published in 2017. Without an automated process to retrieve email addresses in proofs of claim, clerks say that they will have to manually review every proof of claim to determine if the email box was checked and an email address was listed. According to one clerk, even automation will not solve all the problems because paper proofs of claim will still be filed, and they will contain errors and illegible entries that will require staff time to resolve. Several of the comments noted that the high-volume paper-notice program will produce significant savings for the courts, and that any savings resulting from low-volume users opting into email notice will be outweighed by administrative costs.

The proposal for email opt-in on proofs of claim would not be just for the benefit of the judiciary, which already has the Electronic Bankruptcy Noticing program. Instead, it was also intended to benefit parties, who could save mailing costs in serving creditors who opt into email notice. Because parties cannot be forced to accept electronic service and notice, an opt-in procedure seemed to be the best approach. And providing that opportunity in the proof of claim seemed the best mechanism to pursue since Rule 2002(g)(1)(A) already provides that "a proof of claim filed by a creditor . . . that designates a mailing address constitutes a filed request to mail notices to that address." Under subdivision (g)(1) of that rule, notices required to be mailed to a creditor "shall be addressed as such entity . . . has directed in its last request filed in the particular case." The amendment to Rule 2002(g) published in 2017 would expand that rule to include email addresses, and Rule 9036 would recognize transmission to that email address as a proper means of service or noticing.

In deciding not to go forward in 2018 with the amendments to Rule 2002(g) and Form 410 that would provide for opting into email service, the Advisory Committee accepted the concerns that were raised then by clerks about the lack of an automated means of retrieving the designated

email addresses. The Advisory Committee was told then that such automation would not be feasible until 2021. The decision in 2019 to propose the new amendments to 9036, with the anticipation that approval would also be sought for the Rule 2002(g) and Form 410 amendments, was made with the expectation that automation would be feasible by the amendments' December 1, 2021 effective date.

One clerk said, however, that even with automation, the burden on the clerk's office will still be too great because of the number of paper proofs of claim that will be filed. While the comment from the Bankruptcy Noticing Working Group suggested some ways that burden might be reduced, the Advisory Committee decided that the proof-of-claim check-box option should not be pursued. Deciding not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410, and deleting references to that option in Rule 9036, would allow the courts to receive the benefits of the high-volume paper-notice program, which is anticipated to result in significant savings to the judiciary, without imposing what many clerks perceive as an undue burden on them of having to review proofs of claim for email addresses. This approach does not provide any benefit to parties, however, because they will not have access to electronic addresses registered with the BNC, but it is anticipated that future improvements to CM/ECF will allow the entry of email addresses in a way that will be accessible to parties as well as to those within the court system. Language proposed by the Subcommittee in Rule 9036(b)(2) would allow for that future possibility. Accordingly, the Advisory Committee voted unanimously to approve the revised version of the published amendments to Rule 9036 that is set forth in the appendix.

Interplay of the proposed amendments to Rules 2002(g) and 9036. Given the Advisory Committee's recommendation not to go forward with the proposed amendments to Rule 2002(g) and Official Form 410, this concern raised by the comments is no longer an issue.

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TAB 4A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: CONFORMING AMENDMENTS TO RULE 8003

DATE: AUGUST 20, 2020

The Subcommittee decided before the spring meeting that it wanted to wait and see what action was taken on the Appellate Rules Advisory Committee's proposed amendments to FRAP 3 before making a recommendation about whether similar amendments should be made to Bankruptcy Rule 8003. The Standing Committee has now given its final approval to the amendments to FRAP 3, and the Subcommittee recommends that conforming amendments be made to Rule 8003.

After providing a brief review of the FRAP 3 amendments and the Subcommittee's past consideration of them, this memo discusses the version of the rule that the Standing Committee approved, how the merger doctrine applies in bankruptcy cases, and what effect making conforming amendments to Rule 8003 would have. The memo concludes with a draft of conforming amendments to Rule 8003 that the Subcommittee recommends for publication.

I. FRAP 3 Amendments and Past Discussions

In its June report to the Standing Committee, the Appellate Rules Advisory Committee explained the reason for its proposed amendments as follows:

> The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. But a variety of decisions from around the circuits have made drafting a notice of appeal a somewhat treacherous exercise, especially for any litigant taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal. The proposed amendment to Rule 3 is designed to reduce the inadvertent loss of appellate rights.

In pursuit of this goal, the Appellate Rules Advisory Committee published the following amendments to FRAP 3(c):

- Subsection (c)(1)(B) was revised as follows: "(B) designate the judgment~~,~~—or the appealable order—from which the appeal is taken~~, or part thereof being appealed.~~

- A new paragraph (4) instructed that the "notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal."

- A new paragraph (5) was added in an effort to avoid the inadvertent loss of appellate rights when the notice of appeal designates an order disposing of all remaining claims or denying reconsideration. It provided as follows: "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates: (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or (B) an order described in Rule 4(a)(4)(A)."

- Finally, a new paragraph (6) explained that an "appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of a notice of appeal."

In the Subcommittee's prior deliberations about proposing similar amendments to Bankruptcy Rule 8003, some members expressed doubts about the appropriateness of these amendments for the bankruptcy context. In particular, uncertainty was expressed about how the merger doctrine would apply to contested matters, as opposed to adversary proceedings which are similar to civil actions. Accordingly, the Subcommittee decided to proceed cautiously and await the decision by the Standing Committee on the approval of any amendments to FRAP 3.

II. FRAP 3 As Approved by the Standing Committee

At its June meeting, the Standing Committee gave final approval to the amendments to FRAP 3, with a few changes made following publication. There was only one change to the rule itself. In subdivision (c)(7)—which in the current rule is (c)(4)—language was added stating that an appeal must not be dismissed "for failure to properly designate the judgment if the notice of

appeal was filed after entry of the judgment and designates an order that merged into that judgment." The Appellate Rules Advisory Committee explained that this addition was made to guard against the possibility that a notice of appeal, filed following entry of judgment, that designates only an interlocutory order would be deemed ineffective because it did not designate either a judgment or an appealable order.

Several changes were made to the Committee Note. First, a paragraph was added explaining the change to (c)(7) that was just described. Second, a paragraph was added to clarify that the amendments do not change the principle that a decision on the merits is a final decision whether or not there remains for adjudication a request for attorney's fees attributable to the case. Third, a paragraph was added explaining that while similar treatment of criminal cases may be appropriate, no inference should be drawn about criminal cases from the new provisions that are limited to civil cases. Finally, the word "inadvertently" was inserted in the sentence that previously said, "These decisions create a trap for the unwary."

The final version of FRAP 3 and its Committee Note are attached to this memo.

III. The Merger Doctrine in Bankruptcy Cases

There are numerous cases that recognize and apply the merger doctrine in bankruptcy cases. As one court explained, "The general rule is that interlocutory orders merge into the final judgment of the case, and an appeal can be had from these interlocutory orders by timely filing a notice of appeal from the entry of that final judgment." Miller v. Deutsche Bank Nat'l Trust Co., 2013 U.S. Dist. LEXIS 126888, *7-10, 2013 WL 4776054 (D. Colo. Sept. 4, 2013). *See also, e.g., In re* Akbari-Shahmirzadi, 2015 U.S. Dist. LEXIS 164737, *16-18, 2015 WL 8329208 (D.N.M. Nov. 25, 2015) (The fact that "Akbari designated a non-final order in addition to the final order on appeal does not render inapplicable 'the line of cases holding that

naming a final judgment generally as the matter being appealed from is sufficient to include for appellate review all the earlier orders that have merged into the judgment.'"); Maxim Healthcare Servs. v. Miles (*In re* Miles), 2005 U.S. Dist. LEXIS 17121, *7-8, 2005 WL 1981040 (N.D. Tex. Aug. 17, 2005) ("[A] bankruptcy court's final order or disposition merges with all prior interlocutory orders, giving the right to appeal all orders at the same time."); Briggs v. Rendlen (*In re* Reed), 2017 U.S. Dist. LEXIS 141762, *12-13, 2017 WL 3838621 (E.D. Mo. Sept. 1, 2017) ("[T]he Court agrees that in general, related interlocutory orders, opinions, and non-final partial judgments are subject to review along with an appealable judgment in bankruptcy proceedings."); Denbeste v. Mandy Power (*In re* Denbeste), 2012 Bankr. LEXIS 5207, *11-12, 2012 WL 5416513 (B.A.P. 9th Cir. Nov. 6, 2012) ("[I]nterlocutory orders merge into a final order, when it is eventually entered; a timely appeal taken from a final order may cover both the final order as well as any interlocutory order leading up to the entry of the final order.").

Bankruptcy decisions applying the merger doctrine include appeals from contested matters as well as adversary proceedings. For example, *Miller v. Deutsche Bank* involved an appeal from three orders entered before the court's order granting a creditor's motion for relief from the stay. The district court explained that those interlocutory orders were properly appealed because they were "preliminary steps in the phase of the bankruptcy proceeding dedicated to resolving Deutsche Bank's motion for stay relief" and "were merged in the final order granting relief from the automatic stay." 2013 U.S. Dist. LEXIS 126888, *9-10, 2013 WL 4776054. Similarly, the Tenth Circuit BAP held that interlocutory orders merged into the bankruptcy court's order sustaining an objection to the debtor's claim of exemption. Glapion v. Mashburn (*In re* Glapion), 2020 Bankr. LEXIS 271, *4, 2020 WL 486865 (B.A.P. 10th Cir. Jan. 30, 2020).

The acceptance of the merger doctrine does not mean that it is always easy to determine which interlocutory orders merge into an order resolving a contested matter. The question is really the other side of the coin of determining what is an appealable final order in a bankruptcy case—an issue that has produced much case law and is based on principles that differ from those applied to ordinary civil appeals. An appeal from an order that is later determined to be final will often be untimely if not taken until the court enters a subsequent order. On the other hand, if the earlier order is deemed to be interlocutory and involving the same discrete dispute as the order resolving the contested matter, it will merge into the final order and be reviewable upon appeal of the latter.

IV. Effect of Conforming Rule 8003 to FRAP 3(c)

Adopting the amendments to FRAP 3(c) for Rule 8003 would not introduce any new doctrine or difficulty for bankruptcy appeals that does not already exist. Indeed, the effect of the amendments is intended to be just the opposite—to ease the procedures for appealing in order to prevent the inadvertent loss of rights. The merger doctrine already exists for appeals of bankruptcy adversary proceedings and contested matters, and the proposed amendments would ensure that an appeal was not unintentionally narrowed by the wording of a notice of appeal.

After consideration and discussion, **the Subcommittee recommends seeking the publication of conforming amendments to Rule 8003**. The Advisory Committee has generally tried to keep the Part VIII rules parallel to the Appellate Rules so that procedures are consistent throughout two stages of a bankruptcy appeal. Furthermore, the statutory directive is for appeals from a bankruptcy court to "be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from district courts." 28 U.S.C. § 158(c)(2). A failure to make changes similar to those made to FRAP 3(c) might suggest that

the case law the amendments reject for appeals to courts of appeals is still applicable under Rule 8003.

V. Proposed Conforming Amendments to Rule 8003

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

(a) FILING THE NOTICE OF APPEAL.

* * * * *

(3) *Contents.* The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment~~,~~ —or the appealable order~~,~~ or decree~~,~~ —from which the appeal is taken ~~or the part of it, being appealed~~; and

(C) be accompanied by the prescribed fee.

(4) *Merger.* The notice of appeal encompasses all orders that, for purposes of appeal, merge into the identified judgment or appealable order. It is not necessary to identify those orders in the notice of appeal.

(5) *Final Judgment.* The notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Rule 7058, if the notice identifies:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 8002(b)(1).

(6) *Limited Appeal.* An appellant may identify only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific identifications do not limit the scope of the notice of appeal.

(7) *Impermissible Ground for Dismissal.* An appeal must not be dismissed for failure to properly identify the judgment or appealable order if the notice of appeal was filed after entry of the judgment or appealable order and identifies an order that merged into that judgment or appealable order.

~~(4)~~ (8) *Additional Copies.* * * * * *

Committee Note

Subdivision (a) is amended to conform to recent amendments to Fed. R. App. P. 3(c), which clarified that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order. These amendments reflect that a notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the appellate court. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.

Subdivision (a)(3)(B) is amended in an effort to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires the attachment of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to identify and attach only the judgment or the appealable order from which the appeal as of right is taken.

Subdivision (a)(4) now calls attention to the merger principle. The general merger rule can be stated simply: an appeal from a final judgment or appealable order permits review of all rulings that led up to the judgment or order. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law. The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' . . . whether or not there remains for adjudication a request for attorney's fees attributable to the case."

Sometimes a party who is aggrieved by a final judgment will make a motion in the bankruptcy court instead of immediately filing a notice of appeal. Rule 8002(b)(1) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that identifies only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the appellate court for review. To reduce the unintended loss of appellate rights in this situation, subdivision (a)(5) is added. This amendment does not alter the requirement of Rule 8002(b)(3) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Subdivision (a)(6) is added to enable deliberate limitations of the notice of appeal. It allows an appellant to identify only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, however, specific identifications do not limit the scope of the notice of appeal.

On occasion, a party may file a notice of appeal after a judgment or appealable order but identify only a previously nonappealable order that merged into that judgment or appealable order. To deal with this situation, subdivision (a)(7) is added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order if the notice of appeal was filed after entry of the judgment or appealable order and identifies an order that merged into the judgment or order from which the appeal is taken. In this situation, a court should act as if the notice had properly identified the judgment or appealable order. In determining whether a notice of appeal was filed after the entry of judgment, Rule 8002(a)(2) and (b)(2) apply.

Attachment

Attachment

Here is the amendment approved by the Standing Committee:

Rule 3. Appeal as of Right—How Taken

* * * * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment~~,~~ ~~—~~or the appealable order~~—~~from which the appeal is taken~~, or part thereof being appealed~~; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, ~~or~~ for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

~~(5)~~ (8) Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of ~~a~~ notices of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. § 1291, but some other orders are considered final within the meaning of 28 U.S.C. § 1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. § 1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The judgment or order to be designated is the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders,

but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of "the judgment—or the appealable order—from which the appeal is taken"—and the phrase "or part thereof" is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions inadvertently create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

The amendment does not change the principle established in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988), that "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *See also Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 179 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.").

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties…."

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document

under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): "In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A)." This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

Rule 3(c)(5) is limited to civil cases. Similar issues may arise in a small number of criminal cases, and similar treatment may be appropriate, but no inference should be drawn about how such issues should be handled in criminal cases.

On occasion, a party may file a notice of appeal after a judgment but designate only a prior nonappealable decision that merged into that judgment. To deal with this situation, Rule 3(c)(7) provides that an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment. In this situation, a court should act as if the notice had properly designated the judgment. In determining whether a notice of appeal was filed after the entry of judgment, Rules 4(a)(2) and 4(b)(2) apply.

The new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON FEDERAL RULES OF BANKRUPTCY PROCEDURE

FROM: PRIVACY, PUBLIC ACCESS, AND APPEALS SUBCOMMITTEE

SUBJECT: 20-BK-G – PROPOSAL TO AMEND RULE 3011 REGARDING UNCLAIMED FUNDS

DATE: AUG. 17, 2020

We received a suggestion from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), 20-BK-G, requesting the Advisory Committee recommend amendments to Federal Rule of Bankruptcy 3011 for the purpose of requiring the clerk to publish notice of funds paid into court pursuant to § 347(a) of the Bankruptcy Code.[1]

Under 11 U.S.C. 347(a), "[n]inety days after the final distribution . . . in a case under chapter 7, 12, or 13 of this title, as the case may be, the trustee shall stop payment on any check remaining unpaid, and any remaining property of the estate shall be paid into the court and disposed of under chapter 129 of title 28."

28 U.S.C. § 2041, entitled "Deposit of moneys in pending or adjudicated cases," states as follows:

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.
>
> This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

Withdrawal of such funds is governed by 28 U.S.C. § 2042, which states:

[1] The Task Force previously proposed amendments to Rule 3011 (and conforming amendments to Rule 9006(b)), 19-BK-A, to set a deadline for seeking withdrawal of unclaimed funds. The Advisory Committee concluded that such an amendment does not fall within the scope of the Supreme Court's authority under the Rules Enabling Act for bankruptcy rules.

> No money deposited under section 2041 of this title shall be withdrawn except by order of court.
>
> In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

Millions of dollars of unclaimed funds are held in the bankruptcy court and in the U.S. Treasury. The Bankruptcy Committee established an Unclaimed Funds Task Force in December 2017 comprised of district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the EOUST. The Task Force examined ways to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds.

The Task Force is seeking amendment to 11 U.S.C. § 347(a) to provide that unclaimed funds remain with the bankruptcy court for five years, and at the end of that period all parties (including any claimant entitled to those funds) would be barred from asserting any claim against them. The clerks of court would have no further obligations with respect to the funds after that time. The proposal was endorsed by the Judicial Conference in March 2019 and was delivered to Congress in April 2019. In response to concerns expressed by Congressional staffers, the Administrative Office's Office of Legislative Affairs asked the AO Office of General Counsel to consider whether the proposed legislation raised procedural due process concerns. The Office of General Counsel responded that the legislation might be subject to challenge if an application for unclaimed funds was denied as untimely and the claim holder argued the he or she did not receive notice of the bankruptcy case or the deposit of unclaimed funds. The Office of General Counsel noted that, whether or not the legislation was enacted, improved notification would be beneficial, and suggested that the Task Force pursue amendments to the Bankruptcy Rules and/or the Guide to Judiciary Policy[2] to achieve that result.

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[2] The Task Force is working with the appropriate office of the Administrative Office to modify the Guide to Judiciary Policy to require courts to post notice of unclaimed funds on their websites. The new language in the Guide would read as follows:

> Unless a bankruptcy court orders otherwise, the clerk must publish unclaimed funds data free of charge in a manner that is easily accessible to the public, by either: (1) participating in and providing a link to the U.S. Bankruptcy Unclaimed Funds Locator on the court's website; or (2) providing the unclaimed funds data in a local, searchable format on the court's website. The court's website must also provide easily accessible instructions on how to apply for the withdrawal of unclaimed funds.

The proposed amendment to Rule 3011 would designate the current language of the Rule as paragraph (a) and would add a new paragraph (b) to require the clerk to publish notice of the unclaimed funds on its website unless the court ordered otherwise.[3] The Subcommittee had two concerns with the language of the suggestion. First, the Subcommittee saw no reason to qualify the obligation by the phrase "unless the court orders otherwise" because there is no reason a court would so order.[4] Second, to avoid any implication that the language requiring the clerk to "publish" would require courts to post names and amounts of unclaimed funds,[5] the Subcommittee endorsed the suggestion with revised language as follows:

Rule 3011. Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases

(a) The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to §347(a) of the Code.
(b) The clerk must provide searchable access on the court's website to data about funds deposited pursuant to § 347(a).

Committee Note

A new paragraph (b) is included in the Rule to require clerks to provide searchable access on the court's website to data about unclaimed funds. Increased notification to claim holders by way of a uniform location for searching for unclaimed funds in every district is intended to assist litigants and their lawyers in determining how to locate and request disbursement of unclaimed funds. Clerks can satisfy their obligation under this provision by participating in and providing a link to the U.S. Bankruptcy Unclaimed Funds Locator.

The Subcommittee recommends that the Advisory Committee approve the proposed amendment and seek approval from the Standing Committee to publish it.

The Task Force believes that a change to Rule 3011 is a necessary addition to the modifications to the Guide because the Guide is not available to the public and lawyers and pro se litigants do look to the Bankruptcy Rules to guide them where to locate and request unclaimed funds,

[3] The language suggested by the Bankruptcy Committee read as follows: "(b) Unless the court orders otherwise, the clerk shall publish notice of the funds deposited pursuant to § 347(a) on the court's website."

[4] This language currently appears in the proposed modifications to the Guide as well, ad perhaps should be deleted.

[5] The proposed language for the Guide uses the term "publish," but characterizes participation in and providing a link to the U.S. Bankruptcy Unclaimed Funds Locator as a method of satisfying that publication requirement.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCTY RULES

FROM: BUSINESS SUBCOMMITTEE

SUBJECT: RULE 9014 – INCLUSION OF RULE 7007.1

DATE: AUG. 17, 2020

Thomas Moers Mayer has made a suggestion, 20-BK-D, that Rule 9014(c) be modified to include Rule 7007.1 in the list of bankruptcy rules from Part VII that are applicable to contested matters.

Rule 7007.1 requires disclosure by any corporation that is party to an adversary proceeding (other than the debtor or a governmental unit) of any corporation that owns, directly or indirectly, 10% or more of any class of the corporation's equity interests. The Rule was derived from Fed. R. App. P. 26.1 and is similar to Fed. R. Civ. P. 7.1. The purpose of the disclosure required by the Rule is to assist the judge in making an informed decision on disqualification.

Rule 7007.1 was drafted at the direction of the Standing Committee acting at the request of the Committee on Codes of Conduct. It was approved by the Advisory Committee in 2001. At the time, the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements declined to make it applicable to contested matters. The Agenda Book for the March 2001 meeting of the Advisory Committee contained the following explanation:

> "The Subcommittee considered whether the rule should extend as well to contested matters. Contested matters include some of the most significant decisions a court must make in a case, but the Subcommittee concluded, after lengthy discussion, that the rule should not apply to contested matters because it would be ineffective in many instances. Contested matters are so varied in terms of their complexity and the speed in which they are presented to the court and resolved, that the Subcommittee rejected a single rule governing all contested matters. For example, the court may hold expedited hearings on relief from the automatic stay or similar contested matters and may enter orders at the conclusion of the hearing. It may not be realistic to expect that all parties can supply the requested information. After attempting to create a list of contested matters to which a financial disclosure rule might apply, the Subcommittee concluded that the list would be over or under inclusive. Thus, the Subcommittee concluded that the financial disclosure rule should not extend to contested matters."

The minutes for that March 2001 meeting include the following information about that decision:

> "The subcommittee had decided to limit the scope of the rule to adversary proceedings only, Professor Morris said, because in many circumstances that arise in contested matters it would be difficult - or even impossible - to obtain compliance and afford the court time to review the volume of disclosures that could be received. In motions seeking relief from the automatic stay, for example, the motion may be filed on behalf of a national organization by a local attorney who does not have access to the information required. There is no requirement in Rule 9014 that a party file a response, and bankruptcy cases present many situations - such as multiple liens on the same collateral, settlements, plan confirmations - in which affected creditors fail to respond or respond shortly before the commencement of a hearing, effectively preventing the disclosure rule from operating. Moreover, Rule 9014 would authorize the presiding judge to direct that Rule 7007.1 should apply in any particular contested matter in which disclosures appeared to be warranted. The subcommittee determined that the debtor should make its disclosures at the beginning of the case, so the judge could review them before signing the orders presented on the first day of the case. A proposed amendment to Rule 1007 had been drafted to accomplish that, the Reporter said."

There is no indication in the minutes that anyone on the Advisory Committee disagreed with that decision, and Rule 7007.1 became effective in 2003 without any modification to Rule 9014.

The Business Subcommittee tends to agree that including Rule 7007.1 in the list of Part VII rules applicable to all contested matters in Rule 9014(c) may not be advisable, although the Subcommittee did not find all the reasons itemized by the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements particularly persuasive. For example, the Subcommittee did not see any logic in distinguishing contested matters based on whether they sought relief from the stay or something else. However, the Subcommittee believes that in certain contested matters – perhaps those involving a significant amount in controversy -- disclosure of the type described in Rule 7007.1 is highly desirable to allow the bankruptcy judge to make an informed decision on disqualification.

One response to this concern may be that Rule 9014(c) includes language that permits the court to make Rule 7007.1 applicable to any contested matter if the court wishes to do so. The language reads as follows: "The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." The problem with relying on this discretion is that the court may not realize that a particular contested matter involves a corporate party whose ownership creates a problem for the judge.

The Subcommittee discussed whether disclosure should be mandatory in contested matters initiated in non-consumer cases, for example, in chapter 11 or 15 cases only. But the Subcommittee did not reach any conclusion on how to limit the situations in which disclosure should routinely be made or if, indeed, there are such situations. Instead, the Subcommittee decided to table the suggestion and forward the issue to the Advisory Committee to solicit its views on whether disclosure should be required in all or some contested matters, and if in only

some contested matters, which ones. With the advice of the Advisory Committee, the Subcommittee will revisit the suggestion at its spring meeting.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTION REGARDING ELECTRONIC SIGNATURES

DATE: AUGUST 11, 2020

Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management ("CACM"), has submitted a suggestion (20-BK-E) based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig notes that in 2013 CACM "requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules." That effort was eventually abandoned, however, largely because of opposition from the Department of Justice.

Judge Fleissig points out that recent amendments to Rule 5005(a)(2) provide that a "filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature," but that the rule is silent about electronic signatures of persons without a CM/ECF account. She says that her committee believes that courts are hesitant to allow such signatures "without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes, particularly for petitions, lists, schedules and statements, amendments, pleadings, affidavits, or other documents that must contain original signatures, require verification under Fed. R. Bankr. P. 1008, or require an unsworn declaration under penalty of perjury, pursuant to 28 U.S.C. § 1746."

Judge Fleissig asks the Advisory Committee to consider the issue raised by Judge Zurzolo, as well as whether security standards should be required for electronic signatures that would eliminate the need for the retention of wet signatures. With regard to the latter, she says that "DocuSign is a product that allows signatures and documents to be uploaded, electronically signed, and encrypted for security. The product contains a number of security features that ensure the validity of electronic signatures."

Judge Fleissig's letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to our Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that our Committee take the lead in pursuing the issues.

As Judge Fleissig indicates, the use of electronic signatures by debtors and others without a CM/ECF account is a matter that our Committee spent several years considering (2012-2014), only to abandon the proposed rule after reviewing the comments received following publication. Attached to this memo is the final memo to the Committee regarding that earlier effort. It provides some background information about the project, discussion of the comments, and an explanation for why the Committee decided not to proceed with the amendments.

The Subcommittee recommends that the Advisory Committee authorize it to pursue the CACM suggestion. Based on the Committee's earlier experience, the Subcommittee believes it would be desirable to get some input regarding the DOJ's position as early as possible. While it doubts that the Department will take any definitive position before seeing what is proposed, it does not want to get too far down the road without knowing whether the DOJ remains opposed, given currently available technology, to any use of electronic signatures (without the retention of wet signatures) by debtors and others without CM/ECF filing privileges.

If this project goes forward, the Subcommittee will seek the involvement of someone with knowledge of current e-signature products, their security safeguards, and the feasibility of their use with bankruptcy software and the CM/ECF filing system. It will explore whether someone at the AO or FJC could provide this expertise. It will also reach out to relevant bankruptcy organizations for input on the desirability of allowing e-signatures by non-registered users.

Attachment

Attachment

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

SUBJECT: SUMMARY OF COMMENTS AND RECOMMENDATION ON THE ELECTRONIC SIGNATURE AMENDMENT TO RULE 5005

DATE: MARCH 16, 2014

At the spring 2013 meeting, the Advisory Committee voted to propose for publication an amendment to Rule 5005(a) to govern electronic signatures. As proposed, this national rule would replace local rules and would permit the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. That scanned signature could be used with the same force and effect as an original signature, and retention of the original document with the wet signature would not be required.

After the Advisory Committee meeting, the proposed amendment to Rule 5005(a) was considered by the Standing Committee's CM/ECF Subcommittee. That subcommittee suggested that the rule provide an additional means of ensuring the integrity of a scanned signature, and it proposed two alternatives: (1) to deem the filing attorney's act of filing the document and the scanned signature to certify that the signature was part of the original document, and (2) to require the acknowledgment of a notary public that the scanned signature was part of the original document. At its June meeting, the Standing Committee approved the Rule 5005(a) amendment for publication with the alternative provisions included. The publication package contained a note that called attention to the alternative provisions and specifically sought comment on

whether one of the provisions was preferable. The amendment, as published, is attached to this memorandum as Attachment A.

Comments Received

Nineteen comments were submitted on the Rule 5005(a) amendment. Everyone who commented on the alternatives preferred Alternative 1. Most of those comments explained the reasons for the preference without commenting more broadly on the desirability of the overall amendment. Seven comments expressed opposition to adoption of the amendment. Included in that group is the detailed comment submitted by the Deputy Attorney General. Among the reasons for opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult. Four of the comments gave suggestions for revising the wording or scope of the amendment.

A summary of each of the comments is included in Attachment B. They were all considered by the Subcommittee during its March 5 conference call. This memorandum discusses the comments by topic and provides the reasons for the Subcommittee's **recommendation that the Advisory Committee not proceed with the proposed amendment to Rule 5005(a).**

Alternative 1 vs. Alternative 2

Comments submitted by the following individuals or groups expressed opposition to Alternative 2: Bankruptcy Judges Margaret M. Mann, Diane Finkle, and Terrence L. Michael; Bankruptcy Clerks Dana McWay and Scott W. Ford; the National Association of Consumer

Bankruptcy Attorneys, the Bankruptcy Clerks Advisory Group, the National Conference of Bankruptcy Judges, Community Legal Services of Philadelphia, the Department of Justice; and attorneys Michael W. Gallagher, Craig Goldblatt (on behalf of several mortgage servicers), and Penelope Souhrada. No one commented favorably on Alternative 2.

Many of the comments stated that requiring the acknowledgment of a notary public would be at odds with 28 U.S.C. § 1746, which dispenses with notarization. Several also stated that the requirement would entail additional delay and expense and would be infeasible because many law offices no longer have notaries readily available. Clerks commented that Alternative 2 would impose additional work on the clerk's office, as they would be required to perform a new quality assurance step for each filing covered by the rule. The general view expressed was that Alternative 2 would be awkward, cumbersome, and a step backwards.

The Advisory Committee did not propose the notarization requirement, and some of its members questioned its feasibility when it was added to the proposed amendment. Based on the comments, the Subcommittee concluded that, if the Committee does decide to seek final approval of the amendment, Alternative 2 should not be included in the rule.

More Trouble, More Storage Space

The chief complaints of those opposing the proposed amendments were that having to scan signature pages (or entire documents) would be more trouble than the current procedures for electronic signatures and that the use of scanned pages would require more electronic storage capacity on the courts' CM/ECF systems. One or both of these concerns were expressed by attorneys Scott Racop, Warren Agin, Penelope Souhrada, and Pam Bassel; Judge Terrence L. Michael; and Clerk Michael Willliams.

Commenters who said that using scanned signature pages would require more work than current procedures require appeared to be accustomed to using an s/ electronic signature for debtors, and they did not express any dissatisfaction with having to retain documents with an original signature. They said the current procedures work well and have streamlined the filing of documents in bankruptcy courts. A couple of these comments stated that some debtors' attorneys do not have scanners or do not know how to merge scanned and electronically created documents. One clerk questioned whether software packages allow the use of scanned pages and asserted that a majority of attorneys probably do not know how to file documents using the CM/ECF system. An attorney stated that filing a 50-page petition and related documents would require the scanning of a number of signature pages, which would be a burden on the filing attorney and the court. One comment stated that the clerk's office in her district has been discouraging the uploading of scanned signatures for years.

Some of the concerns that were expressed about the courts' need for increased storage capacity seemed to be based on the belief that entire documents would have to be scanned, rather than just their signature pages. Some noted that scanned documents are not searchable and will take longer to upload and download.

Prospects for Improved Technology

Three comments expressed opposition or questions about the proposed amendment from a technological point of view. Attorney Warren Agin was critical that the rule fails to accommodate the use of "true electronic signatures – electronic documents signed using a click-through process or using a Signature Capture Pad." The Department of Justice commented that the use of a scanned signature page may soon be obsolete. It noted that thumbprint readers and other biometric devices are already available and may soon become sufficiently inexpensive to

eliminate traditional signatures altogether. The Department suggested that the proposed amendment is premature and that rulemaking should await the availability of technology that will "solve the twin goals of eliminating paper retention requirements and ensuring that bankruptcy fraud prosecutions proceed unimpeded." Finally, the National Association of Bankruptcy Trustees questioned whether the use of scanned signatures, inserted in the petition and other documents, "will be compatible with the contemplated technology changes for NextGen and the integrity of the .pdf document metadata."

Adverse Impact on Law Enforcement

The main basis for the Department of Justice's opposition to the proposed rule is that, by eliminating the requirement for retaining original signatures, it would adversely affect the Department's ability to successfully prosecute bankruptcy crimes and to pursue civil enforcement actions for bankruptcy fraud and abuse. The Deputy Attorney General's comment was informed by a poll of federal prosecutors across the country who are involved in prosecuting white collar crime. Ninety-two percent of respondents indicated that they saw no problem that needs fixing, and 57% said that eliminating the retention of original signatures would make their job of prosecuting bankruptcy crimes more difficult. They expressed concern that debtors' repudiation of signatures is more likely with electronic signatures and that proving that a signature belongs to the defendant will be more difficult. Circumstantial proof of authenticity will be required because the FBI will not provide conclusive expert testimony on handwriting analysis without the original signatures. The Deputy Attorney General also stated that "a scanned signature is easily appended to a[] . . . document [amended by a lawyer after it was signed by a debtor] and difficult to disprove."

The Department of Justice's comment distinguished the proposed amendment from the IRS's use of electronic signatures. The IRS practice is supported by a federal statute, 26 U.S.C. § 6061(b)(2), which provides that an electronic signature on a return "shall be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though signed or subscribed." The Department commented that there is no equivalent statute for bankruptcy and argued that it would be premature for it to endorse such legislation at this time. It also noted that other federal agencies, such as the SEC, require the retention of original signatures for a period of time.

Although some of the views expressed in this comment were shared with the Advisory Committee by Chris Kohn at the spring 2013 meeting, the support of attorneys' retention of original signatures is not entirely consistent with the Department's earlier views. In connection with the development of NextGen, the Department made a report to the Additional Stakeholders Functional Requirements Group regarding the use of electronic signatures. It recommended that "to the extent that original wet-signature documents are legally required, they should be held by the clerk of court, rather than counsel, absent *a nationwide rule* to the effect that electronic (PDF) copies of such documents in the courts' official ECF system constitute legally sufficient 'best evidence' in the absence of an original hard copy" (emphasis added). Based on this recommendation, in August 2012 the Committee on Court Administration and Case Management ("CACM") requested the various rules committees to consider creating "a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM's preferred approach was the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature.

Is There A Need for A Change?

The Department of Justice comment questioned the need for a change in the procedure regarding electronic signature, as did two other comments. The Deputy Attorney General argued that the impact on law enforcement would outweigh the reasons given for the proposed amendment. He stated that any concern that the retention requirement could be inconsistent with a lawyer's duty to the client is unwarranted, that having different retention periods among the districts is no different than other local rule differences, and that the burden on attorneys to retain documents is a fairly constant one, as older documents can be destroyed each year as their retention period expires. Judge Terrence Michael commented that the current system works well and that there is no need for change. Finally, the National Association of Bankruptcy Trustees stated that the debtor's signatures on case-opening documents are verified at the § 341 meeting, so no additional signature authentication requirements are needed for them. It noted that documents subsequently filed are not subject to that authentication, but that many courts require wet signatures on amended schedules and amended covers sheets.

The Subcommittee's March 2013 memo to the Advisory Committee summarizes the reasons that the Rule 5005(a) amendment was proposed:

> This issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing wet signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's ECF

system constitute legally sufficient best evidence in the absence of an original signed document.

The CACM request provided yet another reason for the Committee's pursuit of the rule amendment, which was later supported by the Standing Committee's CM/ECF Subcommittee.

The Subcommittee concluded that the comments shed new light on the factors that prompted the amendment. Comments from attorneys did not indicate dissatisfaction with current procedures. No comment expressed relief that retention would no longer be required, and some attorneys said that the current procedures work well. While the concerns of the Department of Justice about existing procedures for the retention of documents with wet signatures had prompted the Committee's pursuit of an amendment to Rule 5005(a), the Department's current position is one of opposition to the proposed amendment. The Subcommittee attached significant weight to the Department's views and concluded that, given the lack of indication of a need for change, the Committee should not proceed further with the amendment.

Suggestions for Revisions in Wording or Scope

Four of the comments suggested changes to either the wording of the rule or the scope of its coverage. They are set forth here. Should the Committee disagree with the Subcommittee's recommendation and decide to proceed with the amendment to Rule 5005(a), these comments will require further consideration by the Subcommittee or the Committee as a whole and perhaps will require republication.

(1) The National Conference of Bankruptcy Judges suggested that Alternative 1 be reworded as follows: "By filing the document and signature page, the registered user ~~certifies~~ declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the scanned signature was part of the original document and that the signature was signed by the person whose name appears there."

(2) Clerk Dana McWay commented that the proposed amendment would cause problems for the electronic proof of claim (ePOC) program, which allows the submission of electronic proofs of claim by claimants who are not registered users of CM/ECF. Forty-three bankruptcy courts currently use the program. She suggested that the rule or committee note make clear that the new requirements do not apply to automated programs such as ePOC that streamline the court's work.

The comment calls attention to the fact that the proposed rule assumes that only a registered user can file a document electronically. The existence of ePOC demonstrates that the assumption is incorrect. Neither proposed Rule 5005(a)(3)(A) or (B) covers this situation since a registered user is not involved in filing a claim via ePOC.

(3) Clerk Michael Williams pointed out another possible gap in the proposed amendment. He said that Rule 5005(a)(3)(B) would allow an attorney representing someone who happens to be a registered user of CM/ECF to electronically file a document signed by the client without also filing a scanned signature page. Mr. Williams is correct that subparagraph (B) does not apply because the client's signature would not be that of a non-registered user. Subparagraph (A) literally applies since the document would have the signature of a registered user, but this situation is not contemplated by the rule because that person's user name and password are not being used in the filing.

(4) Attorney Pam Bassel commented that the proposed rule should not apply when the non-registered user is an attorney who is signing the document as an attorney or a trustee. She said that in some law offices only one attorney is a registered user. The other attorneys may orally or by email authorize the registered user to sign their names without there ever being a wet

signature. The filer would therefore not be able to certify that the non-registered attorney actually signed the document.

Attachment A

Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

(a) FILING and SIGNATURES.

(1) *Place of Filing*.

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents to be filed~~, signed, or verified~~ by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper ~~for the purpose of applying~~ under these rules~~, the Federal Rules of Civil Procedure made applicable by these rules,~~ and § 107 of the Code.

(3) *Signatures on Documents Filed by Electronic Means*.

(A) *The Signature of a Registered User*. The user name and password of an individual who is registered to use the court's electronic filing system serves as that individual's signature on any electronically filed document. The signature may be used with the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

(B) *Signature of Other Individuals*. When an individual other than a registered user of the court's electronic filing system is required to sign a document that is filed electronically, the registered user shall include in a

single filing with the document a scanned or otherwise electronically replicated copy of the document's signature page bearing the individual's original signature. **[Alt. 1: By filing the document and signature page, the registered user certifies that the scanned signature was part of the original document.] [Alt. 2: The document and signature page shall be accompanied by the acknowledgment of a notary public that the scanned signature was part of the original document.]** Once a document has been properly filed under this rule, the original document bearing the individual's original signature need not be retained. The electronic signature may then be used with the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

* * * * *

Attachment B

COMMENTS SUBMITTED ON PROPOSED AMENDMENTS TO RULE 5005

Comment BK-2013-0001-0003. Scott Racop (Attorney, Terre Haute, Ind.): The current use of electronic signatures (/s/) works well and has streamlined the filing of documents in the bankruptcy court. Requiring the scanning of actual signatures or the use of a notary public will be a step backwards. Scanned documents have a larger footprint and will require courts to have much greater electronic storage capacity.

Comment BK-2013-0001-0005. Traci Cotton: Will a registered user still have to retain hard copies of documents filed with the registered user's electronic signature? If so, that requirement should be eliminated for registered users as well as nonregistered users.

Comment BK-2013-0001-0026. Judge Margaret M. Mann (Bankr. S.D. Cal.): The first alternative presented in the published rule is preferable. Obviating the notary requirement will reduce the cost and burden on bankruptcy administration and litigation. There is no clear justification for adding burdens to the bankruptcy process. The validity of signatures can still be challenged, and sanctions can be imposed for the improper submission of documents. Requiring affidavits is also at odds with 28 U.S.C. § 1746.

Comment BK-2013-0001-0037. Judge Diane Finkle (Bankr. D.R.I.): I support the amendment, but not Alternative 2. Requiring a notarized signature would present problems for debtors who need to file bankruptcy at the last minute before a foreclosure sale. Alternative 1 is a good middle course. The rule places an appropriate burden on the attorney and will prevent the practice sometimes seen of a debtor not signing the petition and schedules until the meeting of creditors.

Comment BK-2013-0001-0040. Warren Agin (Chapter 7 trustee): The proposed rule will require a lot of extra work as compared to the current practice of using /s/ preceding a printed name and retaining the original document with the wet signature. Having the attorney certify the signature could be problematic if the debtor later disclaims the signature. Also the rule doesn't explain how you file the notarization. Perhaps the rule should give the filing attorney a choice: scan and toss or use the /s/ and retain the original. More amazing is the rule's failure to accommodate the use of true electronic signatures—electronic documents signed using a click-through process or a signature capture pad. Technology is available to use truly enforceable electronic signatures, although perhaps bankruptcy attorneys aren't using that technology yet. Vendors will incorporate the available technology into their products if the rules accommodate it.

Comment BK-2013-0001-0042. Henry Sommer, on behalf of the National Association of Consumer Bankruptcy Attorneys: NACBA strongly prefers Alternative 1. Requiring a notary would be a big step backward from 28 U.S.C. § 1746, which largely dispensed with notarization. It would also require unnecessary time and expense since many law offices no longer have notaries readily available.

Comment BK-2013-0001-0056. Scott W. Ford, on behalf of the Bankruptcy Clerks Advisory Group: BCAG prefers Alternative 1. Alternative 2 would require a great deal more work on the part of the clerk's office to confirm that the document is accompanied by a notary signature. BCAG notes that the proposed rule is a significant departure from the current practice of many courts.

Comment BK-2013-0001-0058. Michael W. Gallagher (Attorney): Alternative 2 would be a complete nightmare. Many law offices no longer have notaries on hand. Requiring notarization would be a strange and massive step backwards.

Comment BK-2013-0001-0059. Judge A. Benjamin Goldgar (Bankr. N.D. Ill.), on behalf of the National Conference of Bankruptcy Judges: NCBJ prefers the first alternative with modifications. Instead of providing that the registered user "certifies" that the scanned signature was part of the original document, it should state: "By filing the document and signature page, the registered user declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the scanned signature was part of the original document and that the signature was signed by the person whose name appears there."

Comment BK-2013-0001-0065. Judge Terrence L. Michael (Bankr. N.D. Ok.): I, along with Judge Tom Cornish (Bankr. E.D. Ok.), oppose the proposed amendments to Rule 5005. The current local practice—use of s/ on the electronic copy of a document and retention of the original document with wet signature for a period of years—works well, and there is no need for change. Requiring the use of a scanned signature page will cause logistical problems. Scanned documents consume more memory than electronic documents and are not searchable in the same manner. Many practicing attorneys are not experts in either scanning or merging scanned and electronic documents. The result will be more time demands on the court's IT staff and a less accessible court record. Alternative 2 is inconsistent with 28 U.S.C. § 1746, which allows non-notarized verified statements. Finally, contrary to the Committee Note, it is not clear why retention of original documents by attorneys causes any conflict of interest. If documents are signed fraudulently, no privilege attaches to them.

Comment BK-2013-0001-0067. Dana C. McWay (Clerk of Court, E.D. Mo.): Alternative 2 would impose an additional burden on the clerk's office—a new quality assurance step for each pleading to which the rule applies. More work should not be added to the clerk's office staff during this time of reduced budgets and staff if an alternative is available. The proposed amendments would also cause problems for the electronic proof of claim (ePOC) program, which many courts use to reduce the number of paper proofs of claim that are filed. The program allows the submission of electronic claims by claimants who are not registered users of CM/ECF. The rule or Committee Note should make clear that the new requirements do not apply to automated programs such as ePOC that streamline the courts' work.

Comment BK-2013-0001-0072. Michael Williams (Clerk of Bankruptcy Court): The proposed amendments to Rule 5005 will cause problems for the filing attorney, other

users, and the courts. Filing attorneys will have to buy or obtain access to scanners, although some might get creative and take pictures with their phone and then convert their jpeg to PDF with bad results. Currently, filing a petition can be accomplished through petition preparation software, but it is not clear that the software will allow the substitution of a scanned petition packet. A majority of attorneys probably don't know how to file a petition using the CM/ECF system. A scanned petition will be many times the size of electronically created ones, thus requiring more storage capacity and time to upload and download. The scanned documents will also not be searchable. Use of scanned documents will be more costly for the courts, as they will have to increase storage capacity and spend more time dealing with larger documents. It would be better to provide that the scanned signature page can be filed as an additional page or attachment to an electronic document. Combining a scanned PDF with an electronically created PDF is beyond the knowledge of most users. Finally, Rule 5005(a)(3)(B) would allow an attorney representing someone who happens to be a registered user of CM/ECF to file without a scanned signature page.

Comment BK-2013-0001-0089. Scott W. Ford (Clerk of Court, Bankr. N.D. Ala.): Alternative 1 is preferable. Requiring the acknowledgement of a notary would create another item for the clerk's office to review and quality control and seems unnecessary.

Comment BK-2013-0001-0121. Peter D. Schneider, on behalf of Community Legal Services of Philadelphia: Alternative 2 is clumsy, awkward, and unnecessary. Many law offices do not have notaries on site. Alternative 1 is far preferable.

Comment BK-2013-0001-0124. Craig T. Goldblatt, on behalf of Bank of America, Wells Fargo Bank, JP Morgan Chase Bank, and Citibank: Of the two alternatives, these mortgage servicers strongly prefer Alternative 1. This alternative is consistent with the ethical obligations of attorneys and the obligations undertaken when registering with ECF; it also avoids imposing undue burden. Alternative 2 would be cumbersome and impose additional costs and delays. It is also inconsistent with 28 U.S.C. § 1746 and may impose duties on notaries that they do not usually undertake.

Comment BK-2013-0001-0128. Deputy Attorney General James M. Cole, U.S. Department of Justice: The Department opposes eliminating the requirement that original documents be retained for a defined period of time. This view is based, among other things, on the results of a survey of federal prosecutors across the U.S. Ninety-two percent of respondents perceived no problem with current procedures, and 57% indicated that eliminating the retention requirement would adversely affect the ability to prosecute bankruptcy crimes. There is a concern that electronic signatures are more easily replicated and more susceptible to abuse.

Enforcement problems. The FBI adheres to a policy of not providing conclusive expert testimony on handwriting analysis without the original signature. If the amendments to Rule 5005 were adopted, prosecutors would have to rely on circumstantial evidence to demonstrate that an electronic signature belonged to the defendant. The Department believes that the burdens and costs of making this proof outweigh any benefits of altering

the status quo. U.S. trustees also rely on wet signatures in civil enforcement actions to address bankruptcy fraud and abuse. Having the original signature may make it easier to demonstrate that a particular document was actually signed. A scanned signature, however, is easily appended to an amended document not seen by the debtor and will be harder for a debtor to disprove. Enforcement problems are not fully solved by the practice of asking debtors to affirm the authenticity of signatures at the meeting of creditors because (1) Rule 5005 applies to signatures of persons other than debtors and (2) debtors file signed documents after the § 341 meeting.

Comparison with IRS model. While the IRS has relied on electronic signatures for many years, its procedure rests on a combination of Fed. R. Evid. 902(10) and 26 U.S.C. §§ 6061 and 6064. Together those authorities allow an electronic signature to be presumptively genuine and authentic. A similar procedure in bankruptcy would require statutory authorization. The Department believes that it is premature to seek such legislation now. Other agencies that accept electronic signatures (e.g., the SEC) continue to require the retention of original signatures.

Reasons given for the proposed amendment. The reasons given for making a change are outweighed by the impact on law enforcement. First, the concern about the possible violation of a lawyer's duty to the client seems unwarranted. No privilege attaches to publicly filed documents, and canons of professional responsibility prevent an attorney from assisting a client in committing fraud. Second, having different retention periods in local rules is no different than variances in other local rules that attorneys successfully deal with. Finally, while retaining paper documents can create a burden on some debtors' attorneys, the quantity of paper required to be retained should remain fairly constant.

Developments in technology. The change proposed by the amendment may soon become obsolete. Before long thumbprint readers and other biometric devices may become sufficiently inexpensive to replace the traditional signature. New technology may allow eliminating paper retention requirements while ensuring that bankruptcy fraud prosecutions proceed unimpeded. Meanwhile it is premature to eliminate original signatures.

Alternative 1: The Department supports the principle found in Alternative 1, although attorney certification is not a sufficient substitute for retention of the original signature. Alternative 2 would entail additional time and expense and would be impractical for debtor who must file for bankruptcy relief under exigent circumstances. The Department does not support it.

Comment BK-2013-0001-0140. Penelope Souhrada: Would this rule require scanning and filing every signature page in a 50-page petition? If so, this would be a burden for filers and courts. Additional electronic storage capacity will be required. Retaining original documents with the wet signature is not too burdensome, and it provides protection for attorneys. Alternative 2 would be truly burdensome.

Comment BK-2013-0001-0141. Pam Bassel (Chapter 13 trustee, Fort Worth, Tex.): (1) Scanning or replicating a signature takes additional storage space on the clerk's computer system. The clerk's office has been discouraging the uploading of this kind of signature for years. (2) The rule should not apply when the signatory is an attorney and is signing the document as an attorney or when the signatory is a trustee. Some law practices have one registered user in whose name all documents are filed. Other lawyers authorize their signatures to be used, perhaps orally or by email but without an actual wet signature. In this circumstance the filer will not be able to certify that the attorney (who is not a registered user) actually signed the document. (3) Besides creating the exception just noted, the first option of subparagraph (B) should be deleted (scanning the signature), and Alternative 1 should be used. The term "original signature" should also be clarified to indicate that it includes both original inked signatures and other methods of signing a document (such as a signature sent by fax or electronic means).

Comment BK-2013-0001-0151. Raymond Obuchowski, on behalf of the National Association of Bankruptcy Trustees: Chapter 7 trustees confirm the authenticity of the debtor's signatures on the petition, schedules, and declarations at the meeting of creditors. Therefore there is no need to create additional signature authentication requirements for those documents. Subsequent filings by pro se chapter 7 debtors or other non-registered users are not subject to such authentication, although many courts require wet signatures on amended schedules or amended cover sheets. NABT questions whether the use of scanned signatures, inserted electronically in the petition and other documents will be compatible with Next Gen and with the integrity of the PDF document metadata.

TAB 6B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: PROPOSED AMENDMENTS TO RULE 3002.1

DATE: AUGUST 25, 2020

The Advisory Committee received Suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). The Suggestions, which were referred to this Subcommittee, were made in response to the two groups' perception that there is an insufficient degree of compliance with the current rule, as well as a need for a more streamlined and familiar procedure for determining the status of a mortgage claim in a chapter 13 case.

The Subcommittee has carefully considered the Suggestions and the drafts of proposed amendments submitted by the two groups. At its meeting on July 21, it approved a draft to present to the Committee for discussion at the fall meeting. After obtaining that feedback, the Subcommittee hopes to prepare a final draft of the proposed amendments, along with a committee note and implementing forms, for consideration for publication at the spring 2021 Committee meeting.

Attached to this memo are a red-lined version of the proposed amendments and a clean version. The major changes to the existing rule are described below. In addition, stylistic changes were made throughout the rule.

Proposed Changes to Rule 3002.1

Subdivision (a). This provision describing the rule's applicability remains largely unchanged. However, the word "installment" was deleted on line 8[1] to clarify the rule's applicability to home equity lines of credit (HELOC), which are not paid in installments.

Subdivision (b). This provision is intended to provide the debtor and the trustee notice of any changes in the home mortgage payment amount during the course of a chapter 13 case so that the debtor can remain current on the mortgage. The two main changes to this subdivision are the addition of provisions about the effect of late payment change notices and detailed provisions about notice of payment changes for HELOCs.

The Suggestions submitted by the two organizations were based on the belief that the current rule lacks sufficient enforcement mechanisms. Proposed subdivision (b)(2) addresses that problem in part by providing that late notices of a payment increase would not go into effect until the required notice period (at least 21 days) expires. There would be no delay, however, in the effective date of an untimely notice of a payment decrease. Members of the Subcommittee debated whether the Rules Enabling Act, 28 U.S.C. § 2075, allows a rule to impose a delay in a payment increase. Some thought that it is permissible for the rule to impose such a consequence for failure to comply with a procedural requirement, while others thought that such a provision improperly modifies a substantive right. The Subcommittee decided that the best course would be to publish the rule with this provision in it and see whether it draws any concerns.

The treatment of HELOCs has been a continuing issue under this rule. The problem with applying the rule's requirements to this type of security interest is that the amount owed changes frequently, often in small amounts. Requiring a notice for each change would be overly

[1] References in the memo to line numbers are to the red-lined version.

burdensome. Initially Rule 3002.1(b) was silent on how its requirements applied to these types of loans. Then in 2018 subdivision (b) was amended to provide the court flexibility regarding a notice of payment change for a HELOC. Following the approach proposed by the Suggestions, the new draft would delete the 2018 language on lines 27-29 and add a new subdivision (b)(3). Under this provision, a HELOC claimant would only file annual payment change notices—which would include a reconciliation figure (net over- or underpayment for the past year)—unless the payment change in a single month was for more than $10. This provision, too, would ensure at least 21 days' notice before a payment change took effect.

Subdivisions (c) and (d). Only stylistic changes are made to these subdivisions. The provision that is currently subdivision (d) is relocated to subdivision (j) in the draft.

Subdivisions (e)-(f). A new feature included in the draft is a midcase assessment of the status of the mortgage. The Suggestions proposed such an addition so that a debtor would be informed of any deficiencies in payment while there is still time in the chapter 13 case to become current before the case is closed. As drafted, the procedure would begin with the trustee providing notice of the status of payments to cure any prepetition arrearage. In a conduit district—one in which the trustee rather than the debtor makes the postpetition mortgage payments—the trustee would also state the amount and due date of the next contractual payment. The mortgage lender would then have to respond (subdivision (f)) by stating any mortgage or arrearage amounts on which it contends the debtor is not current. The debtor or trustee could object to the response. If no objection was made, the amounts stated in the lender's response would be accepted as correct. New official forms would be created for both the notice and the response.

Subdivisions (g)-(i). As under the current rule, the draft provides for an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure would be changed, however, from a notice to a motion procedure. The Suggestions proposed proceeding by motion as being more direct and familiar than a notice procedure and also as one resulting in a binding order.

The trustee would begin the procedure (subdivision (g)) by filing a motion to determine the status of the mortgage. An official form would be created for this purpose. The claim holder would have to respond, again using an official form to provide the required information (subdivision (h)). Either the trustee or the debtor could object to the response. This process would end with a court order detailing the status of the mortgage (subdivision (i)). If the claim holder failed to respond to the trustee's motion, the order would state that the debtor is current on the mortgage. If there was a response and no objection to it was made, the order would accept as accurate the amounts stated in the response. If there was both a response and an objection, the court would determine the status of the mortgage. Subdivision (i)(4) specifies the contents of the order.

Subdivision (j). This is the relocated provision currently at subdivision (d). Added to the existing provision is a requirement for conforming to the new official forms.

Subdivision (k). This provision is the current sanction provision located at subdivision (i). Only stylistic changes have been made. The Suggestions proposed adding a provision for an order compelling the claim holder to respond to the trustee's notice under (e) or motion under (g), enforceable by contempt, but the Subcommittee concluded that this enforcement provision is not needed given the consequences in the rule for a failure to respond.

Attachments

Rule 3002.1. ~~Notice Relating to~~ Chapter 13—Claims~~
Secured by a Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to a claim~~s (1)~~ that ~~are~~ is secured by a security interest in the debtor's principal residence~~,~~ and ~~(2)~~ for which the plan ~~provides that~~ requires either the trustee or ~~the~~ debtor ~~will~~ to make contractual ~~installment~~ payments. Unless the court orders otherwise, the ~~notice~~ requirements of this rule cease ~~to apply~~ when an order terminating or annulling the automatic stay ~~becomes effective with respect~~ related to ~~the~~ that residence ~~that secures the claim~~ becomes effective.

(b) ~~NOTICE OF~~ PAYMENT CHANGE~~S~~ NOTICE; EFFECT OF UNTIMELY NOTICE; HOME EQUITY LINE OF CREDIT; OBJECTION.

(1) *Notice by Claim Holder*. The claim holder ~~of the claim~~ shall file ~~and serve on the debtor, debtor's counsel, and the trustee~~ a notice of any change in the ~~payment~~ amount of an installment payment~~,~~ ~~—~~ including any change resulting~~that results~~ from an interest-rate or escrow-account adjustment~~,~~. ~~no later than~~ At least 21 days before ~~a~~

~~payment in~~ the new ~~amount~~ payment is due~~.~~, the notice must be filed and served on:

- the debtor;
- the debtor's attorney; and
- the trustee.~~If the claim arises from a home-equity line of credit, this requirement may be modified by court order.~~

(2) *Effect of untimely notice.* If the claim holder fails to timely file and serve the notice required by (b)(1), the effective date of the payment change is as follows:

(A) *Payment Increase.* When the notice concerns an increase in the payment amount, the payment change will take effect on the first payment due date that is at least 21 days after the date the notice is filed.

(B) *Payment Decrease.* When the notice concerns a decrease in the payment

amount, the payment change will take effect on the date stated in the notice.

(3) *Home equity line of credit*. If the claim arises from a home equity line of credit, the notice shall be filed and served no later than one year after the petition was filed, and at least annually thereafter.

(A) *Contents.* The annual notice shall state the payment amount due for the month in which the notice is filed. It shall also include a reconciliation amount to account for any over- or underpayment during the prior year. The first payment due after the effective date of the notice shall be increased or decreased by the reconciliation amount.

(B) *Effective date.* The unadjusted payment amount stated in the annual notice shall be effective on the first payment due

date that is at least 21 days after the annual notice is filed and shall remain effective until a new notice is filed with the court.

(C) *Payment changes greater than $10.* If the monthly payment increases or decreases by more than $10 in any month, the holder shall file and serve, in addition to the annual notice, a notice under (b)(1) for that month.

(~~2~~4) *Party in Interest's Objection*. A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments ~~in accordance with~~under § 1322(b)(5) of the Code. ~~If~~ Unless the court orders otherwise, if no motion is filed by the day before the new ~~amount~~ payment is due, the change goes into effect~~, unless the court orders otherwise~~.

(c) ~~NOTICE OF~~ FEES, EXPENSES, AND CHARGES INCURRED AFTER THE CASE WAS FILED; NOTICE BY THE CLAIM HOLDER. The claim holder ~~of the claim~~ shall file ~~and serve on the debtor, debtor's counsel, and the trustee~~ a notice itemizing all fees, expenses, ~~or~~and charges ~~(1) that were~~ incurred ~~in connection with the claim~~ after the ~~bankruptcy~~ case was filed~~, and (2)~~ that the holder asserts are recoverable against the debtor or ~~against~~ the debtor's principal residence. ~~The notice shall be served within~~Within 180 days after ~~the date on which~~ the fees, expenses, or charges are incurred, the notice shall be served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

~~(d) FORM AND CONTENT. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and~~

~~filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).~~

(~~e~~d) ~~DETERMINATION OF~~ DETERMING FEES, EXPENSES, OR CHARGES. On ~~motion of~~ a party in interest's motion filed within one year after ~~service of a~~ the notice ~~under subdivision~~ in (c) ~~of this rule~~ is served, the court shall, after notice and hearing, determine whether ~~payment of~~ paying any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments ~~in accordance with~~ under § 1322(b)(5) of the Code.

(e) MIDCASE NOTICE OF THE STATUS OF THE MORTGAGE CLAIM. Between 18 and 24 months after the petition was filed, the trustee shall file a notice stating the allowed amount of the prepetition arrearage, the remaining balance of the prepetition arrearage to be paid by the trustee, and the amount and due date of the next

contractual payment if it will be paid by the trustee. The notice shall be served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

(f) RESPONSE TO THE NOTICE OF THE STATUS OF THE MORTGAGE CLAIM; OBJECTION TO THE RESPONSE.

(1) *Claim Holder's Response.* If the claim holder disagrees with the information in the notice under (e) or the debtor is not current on the ongoing mortgage payments, the holder shall file a response that itemizes the postpetition amounts, if any, that the holder contends remain unpaid and the prepetition arrearage calculation. The response shall be filed within 21 days after service of the notice under (e).

(2) *Objection.* The debtor or trustee may file an objection to the claim holder's response. Unless the court orders otherwise, if no objection is filed

within 21 days after the response is filed, the amounts stated in the response will be deemed correct.

(~~f~~g) ~~NOTICE OF FINAL CURE PAYMENT~~END-OF-CASE MOTION TO DETERMINE THE STATUS OF THE MORTGAGE CLAIM.

(1) *Trustee's Motion.* Within ~~30~~45 days after the debtor completes all payments under ~~the~~ a chapter 13 plan, the trustee shall file a motion to determine the status of the mortgage claim, including whether any arrearage has been cured. ~~and serve~~ The motion shall be served on:

- the claim holder~~, of the claim,~~
- the debtor~~,~~; and
- debtor's counsel. ~~a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision~~

~~(g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.~~

(2) *Contents of the Motion.* The motion shall provide the information required by the appropriate Official Form.

(~~g~~h) RESPONSE TO ~~NOTICE OF FINAL CURE PAYMENT~~THE MOTION TO DETERMINE THE STATUS OF THE MORTGAGE CLAIM; OBJECTION TO THE RESPONSE.

(1) *Claim Holder's Response.* Within ~~21~~ 28 days after service of the ~~notice~~ motion under ~~subdivision~~ (f) ~~of this rule~~, the claim holder shall file and serve on the debtor, debtor's counsel, and the trustee a response to the motion.~~statement indicating~~

~~(1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).~~

(2) *Contents of the Response.* The response shall provide the information required by the appropriate Official Form.

(3) Objection. Within 14 days after service of a response, the debtor or the trustee may file an objection to the response.

(i) ORDER DETERMINING THE STATUS OF THE MORTGAGE CLAIM.

(1) *No Response.* If the claim holder fails to timely respond under (h)(1) to the trustee's motion, the court shall enter an order declaring that, as of the date of the motion, the debtor is current on all payments required by the plan to be paid to the holder—including all escrow amounts—and that all postpetition legal fees, expenses, and charges imposed by the holder are satisfied in full.

(2) *No Objection.* If the claim holder timely responds under (h)(1) and no objection is filed under (h)(3), the court shall enter an order declaring that the amounts stated in the holder's response reflect the status of the claim as of the filing of the response.

(3) *Contested Motion.* If an objection is filed under (h)(3), the court shall, after notice and hearing, determine the status of the mortgage claim and enter an appropriate order.

(4) *Contents of the Order.*

(A) *Under (i)(2) or (i)(3).* An order entered under (*i*)(2) or (*i*)(3) shall include the following

information, current as of the date of the holder's response under subdivision (h)(1) or such other date as the court may determine:

- the principal balance owed;
- the date that the next installment payment from the debtor is due;
- the amount of the next installment payment—separately identifying the amount due for principal, interest, mortgage insurance, and taxes, as applicable;
- the amounts held in any escrow, suspense, unapplied funds, or similar accounts; and
- the amount of any fees, expenses or charges properly noticed under (c) that remain unpaid.

(B) *Under (i)(1).* An order entered under (*i*)(1) may include any of the information described in (A) and may address the treatment of any installment payments that become delinquent before the court enters an order granting the debtor a discharge.

(j) FORM AND CONTENT OF NOTICES AND RESPONSES. A notice filed and served under (b) or (c) shall be prepared as prescribed by the appropriate Official Form and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f). A notice filed and served under (e), a motion filed and served under (g), and a response filed and served under (f) or (h) shall be prepared as prescribed by the appropriate Official Form.

~~(h) DETERMINATION OF FINAL CURE AND PAYMENT. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing,~~

~~determine whether the debtor has cured the default and paid all required postpetition amounts.~~

(~~i~~k) CLAIM HOLDER'S FAILURE TO NOTIFY OR RESPOND. If the claim holder ~~of a claim~~ fails to provide ~~any~~ information as required by ~~subdivision (b), (c), or (g) of~~ this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information~~,~~ in any form~~,~~ as evidence in any contested matter or adversary proceeding in the case~~,~~ unless the court determines that the failure was substantially justified or is harmless; ~~or~~and

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Rule 3002.1. Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to a claim that is secured by a security interest in the debtor's principal residence and for which the plan requires the trustee or debtor to make contractual payments. Unless the court orders otherwise, the requirements of this rule cease when an order terminating or annulling the automatic stay related to that residence becomes effective.

(b) PAYMENT CHANGE NOTICE; EFFECT OF UNTIMELY NOTICE; HOME EQUITY LINE OF CREDIT; OBJECTION.

(1) *Notice by Claim Holder*. The claim holder shall file a notice of any change in the amount of an installment payment—including any change resulting from an interest-rate or escrow-account

adjustment. At least 21 days before the new payment is due, the notice must be filed and served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

(2) *Effect of untimely notice.* If the claim holder fails to timely file and serve the notice required by (b)(1), the effective date of the payment change is as follows:

(A) *Payment Increase*. When the notice concerns an increase in the payment amount, the payment change will take effect on the first payment due date that is at least 21 days after the date the notice is filed.

(B) *Payment Decrease.* When the notice concerns a decrease in the payment amount, the payment change will take effect on the date stated in the notice.

(3) *Home equity line of credit*. If the claim arises from a home equity line of credit, the notice shall be filed and served no later than one year after the petition was filed, and at least annually thereafter.

(A) *Contents.* The annual notice shall state the payment amount due for the month in which the notice is filed. It shall also include a reconciliation amount to account for any over- or underpayment during the prior year. The first payment due after the effective date of the notice shall be increased or decreased by the reconciliation amount.

(B) *Effective date.* The unadjusted payment amount stated in the annual notice shall be effective on the first payment due date that is at least 21 days after the annual

notice is filed and shall remain effective until a new notice is filed with the court.

(C) *Payment changes greater than $10.* If the monthly payment increases or decreases by more than $10 in any month, the holder shall file and serve, in addition to the annual notice, a notice under (b)(1) for that month.

(4) *Party in Interest's Objection*. A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments under § 1322(b)(5) of the Code. Unless the court orders otherwise, if no motion is filed by the day before the new payment is due, the change goes into effect.

(c) FEES, EXPENSES, AND CHARGES INCURRED AFTER THE CASE WAS FILED; NOTICE BY THE CLAIM HOLDER. The claim holder shall file a notice itemizing all fees, expenses, and charges incurred after the case was filed that the holder asserts are recoverable against the debtor or the debtor's principal residence. Within 180 days after the fees, expenses, or charges are incurred, the notice shall be served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

(d) DETERMINING FEES, EXPENSES, OR CHARGES. On a party in interest's motion filed within one year after the notice in (c) is served, the court shall, after notice and hearing, determine whether paying any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a

default or maintain payments under § 1322(b)(5) of the Code.

(e) MIDCASE NOTICE OF THE STATUS OF THE MORTGAGE CLAIM. Between 18 and 24 months after the petition was filed, the trustee shall file a notice stating the allowed amount of the prepetition arrearage, the remaining balance of the prepetition arrearage to be paid by the trustee, and the amount and due date of the next contractual payment if it will be paid by the trustee. The notice shall be served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

(f) RESPONSE TO THE NOTICE OF THE STATUS OF THE MORTGAGE CLAIM; OBJECTION TO THE RESPONSE.

(1) *Claim Holder's Response.* If the claim holder disagrees with the information in the notice under (e) or the debtor is not current on the ongoing

mortgage payments, the holder shall file a response that itemizes the postpetition amounts, if any, that the holder contends remain unpaid and the prepetition arrearage calculation. The response shall be filed within 21 days after service of the notice under (e).

(2) *Objection.* The debtor or trustee may file an objection to the claim holder's response. Unless the court orders otherwise, if no objection is filed within 21 days after the response is filed, the amounts stated in the response will be deemed correct.

(g) END-OF-CASE MOTION TO DETERMINE THE STATUS OF THE MORTGAGE CLAIM.

(1) *Trustee's Motion.* Within 45 days after the debtor completes all payments under a chapter 13 plan, the trustee shall file a motion to determine the status of the mortgage claim, including whether any arrearage has been cured. The motion shall be served on:

- the claim holder;
- the debtor; and
- debtor's counsel

(2) *Contents of the Motion.* The motion shall provide the information required by the appropriate Official Form.

(h) RESPONSE TO THE MOTION TO DETERMINE THE STATUS OF THE MORTGAGE CLAIM; OBJECTION TO THE RESPONSE.

(1) *Claim Holder's Response*. Within 28 days after service of the motion under (f), the claim holder shall file and serve on the debtor, debtor's counsel, and the trustee a response to the motion.

(2) *Contents of the Response.* The response shall provide the information required by the appropriate Official Form.

(3) *Objection.* Within 14 days after service of a response, the debtor or the trustee may file an objection to the response.

(i) ORDER DETERMINING THE STATUS OF THE MORTGAGE CLAIM.

(1) *No Response.* If the claim holder fails to timely respond under (h)(1) to the trustee's motion, the court shall enter an order declaring that, as of the date of the motion, the debtor is current on all payments required by the plan to be paid to the holder—including all escrow amounts—and that all postpetition legal fees, expenses, and charges imposed by the holder are satisfied in full.

(2) *No Objection.* If the claim holder timely responds under (h)(1) and no objection is filed under (h)(3), the court shall enter an order declaring that the amounts stated in the holder's response reflect the status of the claim as of the filing of the response.

(3) *Contested Motion.* If an objection is filed under (h)(3), the court shall, after notice and hearing, determine the status of the mortgage claim and enter an appropriate order.

(4) *Contents of the Order.*

(A) *Under (i)(2) or (i)(3).* An order entered under (*i*)(2) or (*i*)(3) shall include the following information, current as of the date of the holder's response under subdivision (h)(1) or such other date as the court may determine:

- the principal balance owed;
- the date that the next installment payment from the debtor is due;
- the amount of the next installment payment—separately identifying the amount due for principal, interest, mortgage insurance, and taxes, as applicable;

- the amounts held in any escrow, suspense, unapplied funds, or similar accounts; and
- the amount of any fees, expenses or charges properly noticed under (c) that remain unpaid.

(B) *Under (i)(1).* An order entered under (*i*)(1) may include any of the information described in (A) and may address the treatment of any installment payments that become delinquent before the court enters an order granting the debtor a discharge.

(j) FORM AND CONTENT OF NOTICES AND RESPONSES. A notice filed and served under (b) or (c) shall be prepared as prescribed by the appropriate Official Form and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f). A notice filed and served under (e), a motion filed and served under

(g), and a response filed and served under (f) or (h) shall be prepared as prescribed by the appropriate Official Form.

(k) CLAIM HOLDER'S FAILURE TO NOTIFY OR RESPOND. If the claim holder fails to provide information as required by this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information in any form as evidence in any contested matter or adversary proceeding in the case—unless the court determines that the failure was substantially justified or is harmless; and

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

TAB 7

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TAB 7A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: FORM 410A (MORTGAGE PROOF OF CLAIM ATTACHMENT)

DATE: AUG. 17, 2020

We have received a suggestion, 20-BK-C, from Bankruptcy Judge Eric Frank of the E.D. Penn. with respect to the instructions (Instructions for Mortgage Proof of Claim Attachment) to Form 410A (Proof of Claim, Attachment A) regarding the "Information required in Part 2: Total Debt Calculation." He notes that the instructions are unclear when applied to mortgage debts that have been reduced to judgment through a foreclosure proceeding.

Background

Form 410A is the successor to Attachment A to former Official Form 10, an attachment that was adopted in 2011 to implement Rule 3001(c)(2) added the same year. Rule 3001(c)(2) requires as follows:

> (c) Supporting Information.
>
> ***
>
> (2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:
>
> (A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.
>
> (B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.
>
> (C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

Attachment A required an itemization of prepetition interest, fees, expenses and charges included in the claim (as required by Rule 3001(c)(2)(A)) and a statement of the amount necessary to cure

any default (as required by Rule 3001(c)(2)(B)). In 2015, Attachment A became Form 410A and was modified to require the claimant to provide a loan history showing when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. The form is intended to provide specificity with respect to the components of a claim secured by an individual debtor's principal residence and, if the debtor was in default prior to the bankruptcy filing, the amount necessary to cure that prepetition default.

Merger Rule

The so-called merger rule, which is recognized under state law in many states, contemplates that when a final judgment is entered on a claim in favor of a claimant, the claim itself merges with the judgment and the claim as a separate basis for remedy against the defendant is extinguished. *See generally* Restatement (Second) of Judgments § 18, Comment a (1982). However, the "incidents" of the original claim – such as a security interest if the claim was secured – are not lost upon merger. The judgment obtains the benefits of those incidents. *See* Restatement (Second) of Judgments § 18, Comment g:

> *"*When by reason of the plaintiff's obtaining judgment upon a claim the original claim is extinguished and rights arise upon the judgment, advantages to which the plaintiff was entitled with respect to the original claim may still be preserved despite the judgment. Thus if a creditor has a lien upon property of the debtor and obtains a judgment against him, the creditor does not thereby lose the benefit of the lien."

The problem with Rule 3001(c)(2) and Form 410A is that they assume that the mortgage debt being described by the claimant is represented by a contractual obligation of the debtor – a note and a mortgage. Any such debt will therefore have a principal amount, will accrue interest from its inception until it is paid in full, and may carry with it contractual obligations to pay fees and costs and escrow amounts for taxes and insurance. Once the note and mortgage have merged into a judgment, the amounts owing by the debtor will be determined not by the note and mortgage but by the judgment itself.

Applying Form 410A to Prepetition Foreclosure Judgments

The first question is whether a creditor who had a security interest (defined in Section 101(51) of the Bankruptcy Code as a "lien created by an agreement" and includes a mortgage) and obtains a foreclosure judgment before the bankruptcy filing is required under Rule 3001(c)(2) to complete Form 410A if the merger agreement has extinguished the secured note and mortgage. Courts that have considered whether the merger rule transforms a security interest into a judicial lien (defined in Section 101(36) as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding") which would not be covered by Rule 3001(c)(2) have uniformly concluded that it does not. A consensual security interest in the debtor's primary residence retains that character for purposes of the Bankruptcy Code – such as Section 522(f) and Section 1322(b)(2) -- even after the secured debt merges into the judgment. *See, e.g,* First Nat'l Fidelity Corp. v. Perry, 945 F.2d 61, 64 (3d Cir. 1991); *In re* Byrom, No. 18-

50647, 2018 WL 7016627 at *2 (Bankr. M.D. N.C. Oct. 12, 2018); *In re* Carr, 318 B.R. 517, 519 (Bankr. W.D. Wis. 2004); *In re* Chu, 258 B.R. 206, 209 (Bankr. N.D. Ca. 2001); *In re* Gelletich, 167 B.R. 370, 376 (Bankr. E.D. Pa. 1994).

As a result, there are several examples of creditors holding a claim based on a prepetition foreclosure judgment filing Form 410A. *See In re* Simpson, No. 16-24013, 2019 WL 1453069 (Bankr. W.D. Pa. Mar. 29, 2019); Bernadin v. U.S. Bank Nat'l Assoc. (*In re* Bernadin), 610 B.R. 787 & 609 B.R. 26 (Bankr. E.D. Pa. 2019); In re Sheed, 607 B.R. 470 (Bankr. E.D. Pa. 2019); In re Culler, 584 B.R. 516 (Bankr. E.D. Pa. 2018).

This raises the second issue: How should such a creditor complete Form 410A, in particular, the Total Debt Calculation in Part 2? This section calls for adding the specified principal balance, interest due, fees, costs due, and escrow deficiency for funds advanced, and subtracting total funds on hand, to find the total debt as of the filing date. The instructions to Form 410A with respect to the information to be included in Part 2 currently read as follows:

> Information required in Part 2: Total Debt Calculation
>
> Insert:
> □ the principal balance on the debt;
> □ the interest due and owing;
> □ any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
> □ any *Escrow deficiency for funds advanced*—that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.
>
> Also disclose the *Total amount of funds on hand*.
> This amount is the total of the following, if applicable:
> □ a positive escrow balance,
> □ unapplied funds, and
> □ amounts held in suspense accounts.
>
> Total the amounts owed—subtracting total funds on hand—to determine the total debt due.
>
> Insert this amount under *Total debt*. The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

If a secured claim has merged into a foreclosure judgment, the term "principal balance on the debt" is misleading; it could be read to be either the amount of the judgment or alternatively the principal balance on the debt if no judgment had been obtained. In addition, any postjudgment interest, fees, costs and escrow deficiencies specified in the mortgage will be continuing obligations of the debtor only insofar as the judgment recognizes those obligations or

state law otherwise provides that they survive the merger of the mortgage into the judgment. After discussing Judge Frank's suggestion, the Subcommittee recommends inserting a single new paragraph before the paragraph beginning with: "Also disclose the *Total amount of funds on hand.*" This new paragraph would read as follows:

If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the amount of the judgment. Any post-judgment interest due and owing, fees and costs and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

Recommendation

The Subcommittee recommends to the Advisory Committee the modification to the instructions to Official Form 410A described above. This change does not require publication.

Official Form 410A

Instructions for Mortgage Proof of Claim Attachment

United States Bankruptcy Court 12/15

Introduction

This form is used only in individual debtor cases. When required to be filed, it must be attached to *Proof of Claim* (Official Form B410) with other documentation required under the Federal Rules of Bankruptcy Procedure.

Applicable Law and Rules

Rule 3001(c)(2)(A) of the Federal Rules of Bankruptcy Procedure requires for the bankruptcy case of an individual that any proof of claim be accompanied by a statement itemizing any interest, fees, expenses, and charges that are included in the claim.

Rule 3001(c)(2)(B) requires that a statement of the amount necessary to cure any default be filed with the claim if a security interest is claimed in the debtor's property.

If a security interest is claimed in property that is the debtor's principal residence, Rule 3001(c)(2)(C) requires this form to be filed with the proof of claim. The form implements the requirements of Rule 3001(c)(2)(A) and (B).

If an escrow account has been established in connection with the claim, Rule 3001(c)(2)(C) also requires an escrow statement to be filed with the proof of claim. The statement must be prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law.

Directions

Definition

This form must list all transactions on the claim from the *first date of default* to the petition date. The *first date of default* is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Information required in Part 1: Mortgage and Case Information

Insert on the appropriate lines:

- the case number;
- the names of Debtor 1 and Debtor 2;
- the last 4 digits of the loan account number or any other number used to identify the account;
- the creditor's name;
- the servicer's name, if applicable; and
- the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, or other method).

Information required in Part 2: Total Debt Calculation

Insert:

- the principal balance on the debt;
- the interest due and owing;
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
- any *Escrow deficiency for funds advanced*—that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.

If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the amount of the judgment. Any post-judgment interest due and owing, fees and costs and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

Also disclose the *Total amount of funds on hand*. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under *Total debt*. The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

Information required in the Part 3: Arrearage as of the Date of Petition

Insert the amount of the principal and interest portion of all prepetition monthly installments that remain outstanding as of the petition date. The escrow portion of prepetition monthly installment payments should not be included in this figure.

Insert the amount of fees and costs outstanding as of the petition date. This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P.

Insert any *escrow deficiency for funds advanced*. This amount should be the same as the amount of *escrow deficiency* stated in Part 2.

Insert the *Projected escrow shortage* as of the date the bankruptcy petition was filed. The *projected escrow shortage* is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O.

This calculation should result in the amount necessary to cure any prepetition default on the note or mortgage that arises from the failure of the borrower to satisfy the amounts required under the Real Estate Settlement Practices Act (RESPA). The amount necessary to cure should include 1/6 of the anticipated annual charges against the escrow account or 2 months of the monthly pro rata installments due by the borrower as calculated under RESPA guidelines. The amount of the projected escrow shortage should be consistent with the escrow account statement attached to the *Proof of Claim*, as required by Rule 3001(c)(2)(C).

Insert the amount of funds on hand that are unapplied or held in a suspense account as of the petition date.

Total the amounts due listed in Part 3, subtracting the funds on hand, and insert the calculated amount in *Total prepetition arrearage*. This should be the same amount as "Amount necessary to cure any default as of the date of the petition" that your report on line 9 of Official Form 410.

Information required in Part 4: Monthly Mortgage Payment

Insert the principal and interest amount of the first postpetition payment.

Insert the monthly escrow portion of the monthly payment. This amount should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage. Therefore, a claimant should assume that the escrow deficiency and shortage will be paid through a plan of reorganization and provide for a credit of a like amount when calculating postpetition escrow installment payments.

Claimants should also add any monthly private mortgage insurance amount.

Insert the sum of these amounts in *Total monthly payment*.

Information required in Part 5: Loan Payment History from the First Date of Default

Beginning with the First Date of Default, enter:

- the date of the default in Column A;
- amount incurred in Column D;
- description of the charge in Column E;
- principal balance, escrow balance, and unapplied or suspense funds balance as of that date in Columns M, O, and Q, respectively.

For (1) all subsequently accruing installment payments; (2) any subsequent payment received; (3) any fee, charge, or amount incurred; and (4) any escrow charge satisfied since the date of first default, enter the information in date order, showing:

- the amount paid, accrued, or incurred;
- a description of the transaction;
- the contractual due date, if applicable;
- how the amount was applied or assessed; and
- the resulting principal balance, accrued interest balance, escrow balance, outstanding fees or charges balance, and the total unapplied funds held or in suspense.

If more space is needed, fill out and attach as many copies of *Mortgage Proof of Claim Attachment: Additional Page* as necessary.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

SUBJECT: CONFORMING AMENDMENTS TO OFFICIAL FORM 417A (NOTICE OF APPEAL)

DATE: AUGUST 12, 2020

The Subcommittee decided before the spring meeting that it wanted to wait and see what action was taken on the Appellate Rules Advisory Committee's proposed amendments to FRAP 3 and Appellate Form 1 before making a recommendation about whether similar amendments should be made to Bankruptcy Official Form 417A. The Standing Committee has now given its final approval to the amendments to FRAP 3 and Form 1, and the Subcommittee recommends that some conforming amendments be proposed for Official Form 417A.

After providing a brief review of the FRAP 3 and Form 1 amendments and the Subcommittee's past consideration of them, this memo discusses the Standing Committee's approval of the amendments to the rule and form and our Appellate Subcommittee's decision to recommend conforming amendments to Bankruptcy Rule 8003. The memo concludes with a discussion of the options for Form 417A considered by the Subcommittee and its recommendation.

I. FRAP 3 and Form 1 Amendments and Past Discussions

In its June report to the Standing Committee, the Appellate Rules Advisory Committee explained the reason for its proposed amendments as follows:

> The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. But a variety of decisions from around the circuits have made drafting a notice of appeal a somewhat treacherous exercise, especially for any litigant

taking a final judgment appeal who mentions a particular order that the appellant wishes to challenge on appeal. The proposed amendment to Rule 3 is designed to reduce the inadvertent loss of appellate rights.

In pursuit of this goal, the Appellate Rules Advisory Committee published several amendments to FRAP 3(c). Of greatest relevance to the matter considered by this Subcommittee is the following amendment to FRAP 3(c)(1)(B). That provision was revised as follows: "(B) designate the judgment~~,~~ ~~—~~or the appealable order ~~—~~from which the appeal is taken~~, or part thereof being appealed~~." The Appellate Rules Committee explained that these changes are intended

- "to highlight the distinction between the ordinary case in which an appeal is taken from the final judgment from the less-common case in which an appeal is taken from some other order;"
- to clarify that a designated order must be appealable; that is, like a judgment, it must provide the basis for appellate jurisdiction; and
- to remove the reference to "or part thereof," which the committee thought contributed to the interpretation problems.

To further highlight this distinction, the Appellate Rules Committee proposed subdividing Appellate Form 1 (Notice of Appeal) into Form 1A for appeals from judgments and Form 1B for appeals from appealable orders.

In the Subcommittee's prior deliberations about proposing similar amendments to Official Form 417A, some members expressed doubts about whether there is a need for making similar amendments to the bankruptcy notice of appeal. Among other things, it was pointed out that Rule 9001(7) defines "judgment" to mean "any appealable order," so it was questioned whether there is a basis for creating separate notices of appeal. Prior to the spring meeting, the

Appeals Subcommittee voted to await further actions on the FRAP amendments before making a recommendation about possible conforming amendments to Rule 8003. This Subcommittee decided that it should follow suit and hold off on making a recommendation about amendments to Official Form 417A in order to see what the Standing Committee approved regarding FRAP 3(c) and Appellate Form 1.

II. The Standing Committee's Approval

At its June meeting, the Standing Committee gave final approval to the amendments to FRAP 3 and Appellate Form 1, with a few changes made to the rule and committee note following publication. There was only one change to the rule itself. In subdivision (c)(7)—which in the current rule is (c)(4)—language was added stating that an appeal must not be dismissed "for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment." The Appellate Rules Advisory Committee explained that this addition was made to guard against the possibility that a notice of appeal, filed following entry of judgment, that designates only an interlocutory order would be deemed ineffective because it did not designate either a judgment or an appealable order.

The only changes made to proposed Forms 1A and 1B were stylistic. The forms as approved by the Standing Committee are attached to this memo.

III. The Appeals Subcommittee's Recommendation

As discussed elsewhere in the agenda book, the Subcommittee on Privacy, Public Access, and Appeals is recommending conforming amendments to Rule 8003. It concluded that the bankruptcy rule should track the appellate rule as much as possible because the Committee has generally tried to keep the Part VIII rules parallel to the appellate rules so that procedures are

consistent throughout two stages of a bankruptcy appeal. Furthermore, the statutory directive is for appeals from a bankruptcy court to "be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from district courts." 28 U.S.C. § 158(c)(2). The Appeals Subcommittee feared that a failure to make changes similar to those made to FRAP 3(c) might suggest that the case law the FRAP amendments reject for appeals to courts of appeals is still applicable under Rule 8003.

III. Options Considered Regarding Official Form 417A

This Subcommittee considered the following three options regarding possible amendments to Form 417A.

1. Do nothing. The bankruptcy form currently does not track Appellate Form 1, and the signal sent by subdividing the form is at best subtle. The Subcommittee therefore considered the possibility of recommending that no changes be proposed for Official Form 417A.

This option would leave Parts 2 and 3 of Form 417A reading as follows:

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

* * * * *

2. Without creating a new form, amend Form 417A to track the language of proposed Rule 8003. Sections 2 and 3 would then read as follows:

Part 2: Identify the subject of this appeal

1. Describe the judgment~~,~~ —or the appealable order~~,~~ or decree—from which the appeal is taken ~~appealed from~~: _____

2. State the date on which the judgment~~,~~ —or the appealable order~~,~~ or decree—was entered:

_____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment~~,~~ —or the appealable order~~,~~ or decree—from which the appeal is taken ~~appealed from~~ and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

* * * * *

3. Divide Form 417A, like Appellate Form 1, into two forms: one for notices of appeal from judgments and one for notices of appeal from appealable orders or decrees.[1] Form 417A-1 would then be titled NOTICE OF APPEAL FROM A JUDGMENT AND STATEMENT OF ELECTION, and Form 417A-2 would be NOTICE OF APPEAL FROM AN APPEALABLE ORDER OR DECREE AND STATEMENT OF ELECTION. Each form would then refer only to the particular type of ruling it covered.

IV. Recommendation

The Subcommittee recommends that the second option—using the language of the proposed amendment to Rule 8003(a)(3)(B) but not creating two separate notice-of-appeal forms—be proposed for publication. The purpose underlying the proposed FRAP and appellate form amendments is to eliminate confusion and possible traps in drafting a notice of appeal. In comparison to civil appeals, bankruptcy appeals from orders deemed to be final are more common. The Subcommittee was concerned that having separate notice-of-appeal forms for judgments and for appealable orders and decrees will increase, rather than decrease, confusion. Appellants may select the wrong form, and appellate courts will have to decide if there is any consequence of doing so. Because the Supreme Court has said that filing a notice of

[1] The Subcommittee assumed that there is no reason to distinguish between orders and decrees for this purpose.

appeal is "generally speaking, a simple, nonsubstantive act," *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019), appeals should not be dismissed for filing the wrong, but similar, form. Rather than creating two forms when it may not matter which one is filed, the Subcommittee recommends keeping one form for all appeals as of right.

As between options 1 and 2 described above, the Subcommittee prefers option 2. The form would track the amendments to Rule 8003, which are intended to remind appellants that appeals as of right from orders and decrees are limited to those that are "appealable"—that is, either deemed final or issued under § 1121(d). *See* 28 U.S.C. § 158(a)(2).

Official Form 417A, as proposed for amendment, follows this memo. It would be accompanied by the following Committee Note.

Committee Note

> Parts 2 and 3 of the form are amended to conform to wording in the simultaneously amended Rule 8003. The new wording is intended to remind appellants that appeals as of right from orders and decrees are limited to those that are "appealable"—that is, either deemed final or issued under § 1121(d). *See* 28 U.S.C. § 158(a)(2). It also seeks to avoid the misconception that it is necessary or appropriate to identify each and every order of the bankruptcy court that the appellant may wish to challenge on appeal. It requires identification of only "the judgment—or the appealable order, or decree—from which the appeal is taken."

Attachment

Form 1A
Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

_____
A.B., Plaintiff

v. Notice of Appeal

C.D., Defendant
_____

~~Notice is hereby given that~~ _____(~~here~~ name all parties taking the appeal)__, ~~(plaintiffs) (defendants) in the above named case,~~* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from the final judgment~~) (from an order (describing it))~~ entered in this action on _____ (state the date the judgment was entered)~~the _____ day of _____, 20__~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

Form 1B
Notice of Appeal to a Court of Appeals From ~~a Judgment or~~ An Appealable Order of a District Court.

United States District Court for the _____
District of _____
~~File~~ Docket Number _____

_____
A.B., Plaintiff

v. Notice of Appeal

C.D., Defendant
_____

~~Notice is hereby given that~~ _____(~~here~~ name all parties taking the appeal)~~__, (plaintiffs) (defendants) in the above named case,~~ ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit ~~(~~from ~~the final judgment) (from an~~ the order _____ (describe~~ing it~~ the order)~~)~~ entered in this action on _____ (state the date the order was entered)~~the _____ day of _____, 20___~~.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration ~~along~~ with this Notice of Appeal.*]

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

   For appeals in an adversary proceeding.

   ❑ Plaintiff
   ❑ Defendant
   ❑ Other (describe) _____

   For appeals in a bankruptcy case and not in an adversary proceeding.

   ❑ Debtor
   ❑ Creditor
   ❑ Trustee
   ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment—or the appealable order, or decree—from which the appeal is taken:
   _____

2. State the date on which the judgment—or the appealable order, or decree—was entered:
   _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment—or appealable order, or decree—from which the appeal is taken and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[**Note to inmate filers:** If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4170 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: FORMS SUBCOMMITTEE

SUBJECT: FORM 318 (CHAPTER 7 DISCHARGE)

DATE: AUG. 17, 2020

We have received a suggestion, 20-BK-F, from Vladislav Kachka, an attorney in Pennsylvania, seeking changes to the language included in the section labelled "Explanation of Bankruptcy Discharge in a Chapter 7 Case" in Official Form 318 (Discharge of Debtor). The concern of Mr. Kachka is that under Pennsylvania law a civil judgment creates an automatic lien against real property that a defendant owns at the time of the judgment and property acquired by the defendant thereafter. If the defendant obtains a discharge of the judgment in bankruptcy after the judgment is entered, the lien no longer attaches to postpetition property of the defendant. However, an abstract of judgment entered against the defendant continues to appear on a title report and many underwriters will not certify that the property has clear title when the defendant attempts to obtain financing for a post-discharge property purchase because the underwriters fail to understand that the judgment lien does not attach to that property.

Mr. Kachka suggests that if the Explanation of Bankruptcy Discharge in a Chapter 7 Case includes language specifically stating that a discharged judgment does not create a lien on property acquired after the discharge, it will provide debtors something they can show the underwriters without having to embark on a detailed explanation of § 524 of the Bankruptcy Code.

Prepetition Judgment Liens and Post-Discharge Property

The problem raised by Mr. Kachka is not unique to Pennsylvania. Most states have statutes that provide that a plaintiff may register a judgment in the real estate records and it automatically becomes a lien on real property that the defendant owns or acquires thereafter, often for a period as long as five to ten years. *See, e.g.*, Ala. Code §§ 6-9-210 – 6-9-211; Ariz. Rev. Stat. Ann. § 33-964; Ark. Code Ann. § 16-65-117; Cal. Civ. Proc. Code §§ 697.310, 697.340; Colo. Rev. Stat. § 13-52-102; Fla. Stat. Ann. §§ 55.202 to .205, 55.081, 55.10; 735 Ill. Comp. Stat. §§ 5/12-101, 105, 106, 108; Mich. Comp. Laws §§ 600.2809, .4035, .6004, .6017, .6018; Tex. Prop. Code Ann. §§ 52.001 to .006; Va. Code Ann. §§ 8.01-251(c), 8.01-458.

If the defendant files for bankruptcy protection and obtains a discharge of the debt represented by the judgment, under § 524(a)(1) the judgment is void to the extent that it is a determination of the debtor's personal liability on the debt. The judgment lien on any existing property of the debtor is unaffected unless the judgment lien has been avoided, for example under § 522(f)(1). However, the discharge operates as an injunction against any act to collect or

recover such debt as a personal liability of the debtor (§ 524(a)(2)), which would include the attachment of a prepetition judgment lien to postpetition property of the debtor.

Bankruptcy courts have consistently found prepetition judgment liens do not attach to property acquired by the debtor postpetition, whether real property, *see, e.g*., *In re* Yates, 47 B.R. 460 (D. Colo. 1985); *In re* Kenney, No. 10-11635, 2018 WL 6039094 (Bankr. C.D. Cal. Nov. 16, 2018); *In re* Kitzinger, No. 99-2671, 1999 W 977076 (Bankr. N.D. Ill. Oct. 22, 1999); Ogburn v. Southtrust Bank (*In re* Ogburn), 212 B.R. 984 (Bankr. M.D. Ala. 1995); *In re* Thomas, 102 B.R. 199 (Bankr. E.D. Cal. 1989); Clowney v. North Carolina Nat'l Bk. (*In re* Clowney), 19 B.R. 349 (Bankr. M.D.N.C. 1982); *cf*. Mechling v. Bonner County (*In re* Mechling), 284 B.R. 127 (Bankr. D. Idaho 2002) (prepetition statutory lien in favor of county for cost of medical services did not attach to postpetition real property of the debtor), or personal property, *see, e.g*., *In re* Baker, 217 B.R. 609 (Bankr. N.D. Cal. 1998); *In re* Warren, 7 B.R. 201 (Bankr. N.D. Ala. 1980) (garnishment lien). *See generally* 3 Lawrence P. King, Collier on Bankruptcy ¶ 524.02, at 524-18 (15th ed. 1995).

The rationale of these decisions is that, in order for a lien to attach, there must be both property of the debtor to which the lien may attach **and** a debt owing by the debtor at the time of the attachment. Because the debt was discharged in the bankruptcy case, the lien cannot attach to property that did not exist prior to that discharge. The Supreme Court reached the same conclusion with respect to a prepetition wage assignment that the creditor sought to enforce against postpetition wages in Local Loan Co. v. Hunt, 292 U.S. 234 (1934), where the Court stated as follows:

> "An adjudication of bankruptcy, followed by a discharge, releases a debtor from all previously incurred debts, with certain exceptions not pertinent here; and it logically cannot be supposed that the [Bankruptcy] [A]ct nevertheless intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, preexisting property, but brought into being solely as the fruit of the subsequent labor of the bankrupt."

Id. at 243.

Proposed Modification to Forms

The Subcommittee considered the substance of Mr. Kachka's suggestion, and language that might be added to Form 318 (and the other forms used for discharge under other chapters of the Code), and ultimately concluded not to recommend any change to the forms. There were two reasons for the Subcommittee's decision.

First, the Subcommittee does not think that an amendment to the language in the Explanation section of the discharge orders would alleviate the problem Mr. Kachka seeks to address. The Subcommittee believes that a title company or other party involved in a real estate transaction would be unlikely to rely on language in the Explanation section of the discharge order, and would still demand a "comfort order" signed by the bankruptcy judge explicitly

stating that the post-petition property is not subject to the lien before insuring title to that property.

Second, although Mr. Kachka is absolutely correct that a post-petition lien cannot attach to property obtained by a debtor after bankruptcy to secure a debt that has been discharged, putting language into the forms to that effect could open the door to further requests for specific language describing exactly what is and is not discharged and the effect of the discharge. The Subcommittee was not willing to start down the road of providing legal advice about the meaning and scope of § 524 of the Code, even when there is no dispute about its accuracy, especially where any benefit in doing so would be questionable.

For those reasons, the Subcommittee recommends no action be taken on this suggestion.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: RESTYLING SUBCOMMITTEE

SUBJECT: STATUS OF RESTYLING PROJECT

DATE: AUG. 17, 2020

The Subcommittee has received a draft of Part III of the restyled bankruptcy rules (drafted by the style consultants, reviewed by the reporters, and revised by the style consultants) and has been meeting to provide comments on that draft for the style consultants. The Subcommittee has also received a draft of Part IV of the restyled rules and will consider that draft after it finishes with Part III.

Meetings will continue with a goal of producing final drafts of Parts III and IV for approval by the Advisory Committee and recommendation for publication to the Standing Committee at the spring meetings.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: EMERGENCY RULE SUBCOMMITTEE

SUBJECT: DISCUSSION DRAFT OF EMERGENCY RULE

DATE: AUGUST 28, 2020

Section 15002(b)(6) of the CARES Act, Pub. L. 116-136, provides as follows:

> NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

The Subcommittee was appointed to make recommendations to the Advisory Committee about whether to propose any amendments to the Bankruptcy Rules in response to the congressional directive.

In an email message to the chairs of the rules advisory committees, Judge David Campbell, chair of the Standing Committee, provided guidance about carrying out this task:

> [O]ur task is to move forward with Congress's instruction. I think we should do this in the normal course of rulemaking . . . . I also think we should move forward at a somewhat faster pace than normal rulemaking might take.
>
> Here is my suggestion. I think each of the committees other than evidence . . . should designate a subcommittee to undertake this task (criminal already has one in place). The subcommittees could then, between now and the fall 2020 meetings, identify all rules that might need adjustments in emergencies and sketch out possible amendments that would provide the adjustments. This work could be reviewed by the full committees in their fall 2020 meetings, and then refined and reviewed again in the spring 2021 meetings, with an eye to publication in the summer of 2021. This would put the amendments on a track to become effective in December of 2023 – a fairly fast schedule for rulemakers, but undoubtedly slow to Congress and other observers.

> The experience with the CARES Act and the video and telephone conferencing being done in civil cases should provide valuable information for this process. It may also be that the subcommittees could hold miniconferences or use other methods to obtain broader input in early 2021, before the full committee spring meetings. Of course, the CARES Act does not direct the Supreme Court and JCUS to adopt rules, only to "consider" them, so it is possible that we could end up recommending that changes not be made.

Acting pursuant to these instructions, each of the rules committees other than evidence appointed subcommittees that have been considering possible rules to govern in emergency circumstances. Professor Dan Capra, reporter for the Evidence Advisory Committee, was appointed to coordinate these deliberations among the four subcommittees.

This Subcommittee's Deliberations

The Subcommittee, chaired by Judge Hoffman, has met 5 times since the middle of April. It began its work by considering examples of emergency provisions contained in the CARES Act (pertaining to criminal cases), proposed by the Bankruptcy Administration Committee (to allow extensions of Bankruptcy Code time periods during the Covid-19 emergency), and ordered by bankruptcy courts during the current emergency. Subcommittee members then surveyed the Bankruptcy Rules to identify rules that might be impacted by an emergency situation.

The Subcommittee concluded that it should consider an emergency rule that, among other things, would allow time periods in the Bankruptcy Rules to be extended on a district-wide basis when there is a declared emergency that adversely affects the operation of the bankruptcy courts. While Rule 9006(b)(1) provides considerable flexibility to extend time periods, the Subcommittee thought that a new emergency rule is needed for several reasons. First, there are certain time periods that cannot be extended according to Rule 9006(b)(2). Second, it appears that Rule 9006(b)(1) may not permit the extension of requirements in the rules for prompt action—requiring an act to be done "promptly," "forthwith," "immediately," or "without

delay"—since those rules do not impose "a specified period" for action. Finally, there is a question about whether Rule 9006(b)(1) allows extensions on a district-wide rather than case-by-case basis. A new rule for declared emergencies could expressly authorize district-wide extensions and provide the conditions under which such extensions could be granted. The Subcommittee has considered several drafts of such a rule.

The Subcommittee concluded that an emergency rule would need to address the following topics:

- how the emergency situation is defined;
- who is authorized to invoke the emergency provisions;
- whether the authorization is case-specific or applies district-wide;
- what departures from the existing rules are permitted;
- whether party consent is required;
- what findings must be made; and
- how long the emergency authorization remains in effect.

While each set of the federal rules presents its own issues, the goal of coordination led the four subcommittees to seek uniformity on the basic issues in common. These issues include what constitutes an emergency and how an emergency is declared. Although that uniformity has not yet been completely achieved, the current drafts of the bankruptcy, civil, and criminal rules have many elements in common.[1]

[1] The appellate emergency rule is somewhat an outlier, because FRAP 2 already provides that "[o]n its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." The appellate subcommittee is currently proposing to add the following language to FRAP 2: "(b) If extraordinary circumstances relating to public health or safety or affecting physical or electronic access to a court of appeals substantially impair the ability of a court of appeals to perform its functions in compliance with these rules, the Chief Circuit Judge may suspend any provision of these rules in that circuit. The Chief Circuit Judge must end the suspension when the

The Subcommittee presents its most recent draft of an emergency rule in the next section of this memo for the Committee's consideration. The memo discusses issues presented by the provisions and the extent to which its provisions are consistent with or diverge from the current drafts of the other subcommittees.

Discussion Draft

Rule 9038. Procedure During an Emergency

(a) DEFINITION OF A RULES EMERGENCY. A rules emergency may be declared when:

(1) extraordinary circumstances relating to public health or safety or affecting physical or electronic access to a court substantially impair the ability of a court to perform its functions in compliance with these rules; and

(2) no viable alternative measures would eliminate such substantial impairment within a reasonable time.

(b) DECLARATION OF A RULES EMERGENCY.

(1) *Authority to Declare.* Upon finding that there is a rules emergency as defined by (a) affecting one or more courts, a rules emergency may be declared by:

(A) the Judicial Conference of the United States for all federal courts or for one or more designated courts;

(B) the chief judge of a circuit for one or more designated courts within the circuit; or

substantial impairment no longer exists. The Judicial Conference of the United States may exercise this same power to suspend in one or more circuits, and may review and revise any determination by a Chief Circuit Judge under this Rule."

(C) the chief judge of a bankruptcy court for one or more designated locations in the district.

(2) *Contents*. Each declaration of a rules emergency must identify:

(A) the courts or locations affected;

(B) any restrictions in addition to those provided in sections (c)-(e) on the authority to modify the rules; and

(C) a date, no later than 90 days from the date of the declaration, on which the emergency declaration will terminate.

(3) *Additional Declarations.* The Judicial Conference of the United States, the chief judge of a circuit, or the chief judge of a bankruptcy court may issue additional declarations under (b) if emergency conditions change or persist.

(4) *Early termination.* A chief judge that declared a rules emergency under (b) or the Judicial Conference of the United States may terminate a declaration before its stated termination date, as to one or more courts or locations affected by the declaration, upon finding that a rules emergency no longer affects those courts or locations.

(c) EXTENDING TIME.

(1) *Tolling and Extensions.* When a rules emergency is declared under (b) and remains in effect for a court, the chief bankruptcy judge may—for all cases and proceedings in the district, or for specific cases or proceedings—:

(A) order the extension or tolling of a Bankruptcy Rule, local rule, or order that requires or allows a court, clerk, party in interest, or the United States trustee to take an action, commence a proceeding, file or send a document, or hold or conclude a hearing by a specified deadline—except one also imposed by the

Bankruptcy Code—notwithstanding any other Bankruptcy Rule, local rule, or order;

(B) order that when a Bankruptcy Rule, local rule, or order requires that action be taken "promptly," "forthwith," "immediately," or "without delay," that such action be taken as soon as is practicable or by a date set by the court in a specific case or proceeding; or

(C) authorize any bankruptcy judge in the district to take the action described in (A) and (B) in a specific case or proceeding.

(2) *Termination of Extensions and Tolling*. A time period or deadline extended or tolled under (c)(1) terminates on the later of—

(A) the last day of the deadline as extended or tolled or the date that is 30 days after the date on which the rules-emergency declaration terminates, whichever is earlier; or

(B) the last day of the period of time originally required, imposed, or allowed by the relevant Bankruptcy Rule, local rule, or order that was the subject of the extension or tolling under (c)(1).

(3) *Additional Extension of Time or Shortening of Extension*. On its own motion or on motion of a party in interest or the United States trustee, and for good cause shown after notice and a hearing, a court may lengthen or shorten the duration of an extension or tolling under (c)(1) in a specific case or proceeding.

[(d) REMOTE HEARINGS]

[(e) UNAVAILABILTY OF THE UNITED STATES MAIL]

[(f) EFFECT OF TERMINATION**.** The termination of a declaration as to a court ends that court's authority under (c)-(e) to depart from these rules. But if a particular proceeding is underway when a declaration is terminated, and compliance with these rules for the remainder of that proceeding would be infeasible or work an injustice, the court may order the proceeding to be completed as if the declaration had not terminated.]

Definition of a rules emergency. The definition in subdivision (a) is identical to the one in the criminal rule draft and similar in some respects to the civil rule draft. In earlier drafts it expressed two requirements for a rules emergency: extraordinary circumstances and a resulting impairment of the court's ability to function in accordance with the rules. The extraordinary circumstances must relate either to public health or safety or to access to the court.

Subsequently the criminal rules subcommittee decided to make the definition more restrictive, adding the requirement that "no viable alternative measures would eliminate such substantial impairment within a reasonable time." A draft of their committee note stresses the narrowness of the emergency rule and explains that "[c]ompliance with rules cannot be cast aside because of cost or convenience, or without consideration of alternatives that would permit compliance with the rules to continue."

The current draft of the civil rule does not include the no-viable-alternative requirement. Members of our Subcommittee also expressed some concern about the requirement. It was agreed that the Bankruptcy Rules should not be easily cast aside and that if alternative means are available for a court to function in compliance with the rules, those means should be adopted. For example, if hearings and meetings of creditors can be held remotely within the time limits of the rules, there may be no need to extend the time periods. However, some members thought that this calculation is better performed at the court level than by the Judicial Conference of the U.S. ("JCUS"). In the

end, the Subcommittee agreed to add the requirement for the sake of uniformity (not knowing at the time that the civil rules subcommittee would not adopt it) and because the Subcommittee also included a provision allowing chief bankruptcy judges to declare an emergency.

Discussions among the reporters have revealed that the members of the criminal rules subcommittee have a greater concern about judges being too quick to depart from the rules than has been expressed by members of the civil and bankruptcy subcommittees. If this difference is shared by the respective advisory committees, Professor Capra has suggested that uniformity may not be required on this point. The Subcommittee therefore seeks guidance from the Advisory Committee about whether to include a requirement that there be no viable alternative.

Declaration of an emergency. The various subcommittees are not in agreement about who should be authorized to declare a rules emergency. The civil and criminal drafts give this authority only to the JCUS. The appellate draft also authorizes the chief judge of a circuit to do so for the courts in that circuit. Our Subcommittee thought it important to also provide authority at the bankruptcy court level because of the specialized nature of the Bankruptcy Rules and the belief that emergency action could be taken more swiftly and with greater knowledge of local conditions at that level.

If these differences remain after the fall advisory committee meetings, the issue will be presented to the Standing Committee for its resolution at the January 2021 meeting. It is probably unlikely that chief bankruptcy judges will be given authority to declare an emergency if chief district judges are not so authorized under the civil and criminal rules.

The remaining provisions in subdivision (b) are identical to the current criminal rule draft, other than the inclusion of chief judges in (b)(3) and (b)(4). The civil rule draft is similar, but it does not require new findings of an emergency if the declaration is extended beyond 90 days.

Extensions of time periods. Because different issues are presented by the different sets of rules, uniformity is not required for the provisions specifying which rule departures are permitted. To date the Subcommittee has focused on extensions of time periods in the Bankruptcy Rules. As drafted, the authority to permit extensions of time limits on a district-wide basis is given to the chief bankruptcy judge, regardless of who made the declaration under subdivision (b). The Subcommittee thought this approach was appropriate because a local actor will be in the best position to assess conditions and determine the rule departures that are needed.

Subdivision (c)(2), which addresses the termination of extensions and tolling, looks to three possible dates. An extended or tolled time period will terminate either 30 days after the rules-emergency declaration terminates or when the original time period would have expired, whichever is later—unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, that date would be compared to the original termination date (and of course will be the later of the two dates since it is an extension).

Subdivision (c)(3) allows fine tuning in individual cases of extensions of time that have been granted.

Other types of rule provisions. Subdivisions (d) and (e), which have not been drafted, show the Subcommittee's current thinking about other types of rules provisions that might be considered for inclusion in an emergency rule. The first is an authorization for remote hearings. Virtually all bankruptcy courts switched to remote means of conducting any hearings that could not be postponed following the declaration of the Covid-19 emergency. Such action could be required in any type of emergency that endangers public health and safety or impairs access to the court. A question the Subcommittee has begun considering is whether local orders providing

for remote hearings constitute a departure from the Bankruptcy Rules and therefore require authorization by an emergency rule.

The most relevant rule is Rule 5001(b). That rule provides as follows:

> (b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. Except as otherwise provided in 28 U.S.C. § 152(c), all other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

The wording of the rule suggests that "in open court" means something other than "in a regular court room," and the authority to conduct a hearing or trial outside a regular court room is based on convenience. The rule therefore seems sufficiently flexible to allow remote hearings in times of emergencies without additional authorization.

The "open court" requirement does mean that provision must be made for public access to remote hearings and trials. And in the case of trials, Civil Rule 43(a), which is made applicable by Rule 9017, provides that "witnesses' testimony must be taken in open court." That rule goes on to say, however, that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." The latter provision thus permits some remote participation in compelling circumstances.

The civil rules subcommittee is currently considering emergency rule provisions that would add "or by remote means" to Rules 43(a) and 77(b) (from which Rule 5001(b) is derived) for times when rule emergencies are declared. Their reporter has suggested the need to consider whether, given the flexibility of the rules, an emergency provision is needed and whether such

provisions would raise the inference that remote hearings are impermissible in the absence of an emergency declaration.

The other rules that the Subcommittee has identified for consideration are those requiring service or transmission by first class mail. It has been suggested that in some types of emergencies, the U.S. postal system might be disrupted, and thus compliance with mailing requirements in the rules might be difficult or impossible.

There could be an emergency so severe that all means of communication and delivery are disrupted. But assuming electronic transmission is still available, recent amendments to the Bankruptcy Rules provide a partial solution to mail disruption. The amendments to Rule 9036 just approved by the Standing Committee allow electronic notice and service in many instances when the rules otherwise require mailing. Not covered, however, are the following:

- noticing and servicing entities that are not registered users of CM/ECF and have not consented to electronic service; and
- service of summonses and complaints, motions, and other documents under Rule 7004.

The Subcommittee will continue its consideration of the need for an emergency rule provision directed to these situations, and it welcomes any advice that the Advisory Committee wishes to offer.

Other procedures that the Subcommittee considered and decided not to address in an emergency rule are ones governing electronic filing by unrepresented parties, payment of filing fees online by unrepresented parties, and electronic signature requirements. The Subcommittee determined that the existing Bankruptcy Rules on these topics either contain sufficient flexibility to allow adjustments during an emergency or leave the issues to regulation by local rules or orders.

Soft landing provision. Subdivision (f), which is in brackets, is the last provision of the current criminal rule draft. This "soft landing" provision is intended in part to do what subdivision (c)(2) of the Subcommittee's draft aims for—to prevent unfairness in the transition period after the termination of an emergency declaration. Subdivision (c)(2) addresses only time period extensions and tolling, whereas the criminal rule provision applies to all types of rule departures authorized by the emergency rule. The Subcommittee will consider whether to include this provision after it decides whether to add any provisions relating to rules other than those imposing time limits.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: BUSINESS SUBCOMMITTEE

SUBJECT: NATIONAL SECURITY MATTERS

DATE: AUG. 17, 2020

We received a suggestion, 20-BK-A, from the Foundation for Defense of Democracies, entitled "Comments Related to U.S. Bankruptcy Court Rules AND THEIR Impact on U.S. National Security." These comments were not in the form of specific suggestions for rule changes, and the Foundation did not respond to a request to provide such suggestions.

1. Their first recommendation was: "**To help judges identify sensitive or critical technology with potential national security implications, require North American Industry Classification System ('NAICS') codes and export classifications for each technology at issue in a case**." (footnote omitted). They stated that"[m]odification to the Bankruptcy Court process to require such codes in all filings would provide bankruptcy court judges the opportunity to identify technologies that may have national security implications and require proof of export license or CFIUS review."

The suggestion seems to focus on the filing of the bankruptcy petition (assuming the words "all filings" does not actually refer to every filed document in a case). Line 7(C) of Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy) specifically asks for the NAICS code "that best describes debtor." The codes describe various types of businesses, not specific technologies. The suggestion states that "[c]ompanies sometimes use more than one NAICS code, depending upon the circumstances." The suggestion may be recommending that Form 201 be modified to allow for inclusion of more than one NAICS code, but that was not stated.

The suggestion also refers to "export classifications." An Export Control Classification Number (ECCN) is a five-character alphanumeric key used in the Commerce Control List (CCL) to classify U.S. exports and determine whether an export license is needed from the Department of Commerce. An ECCN categorizes a product based on its commodity, software, or technology. A debtor may produce dozens of products, each of which may have its own ECCN. It does not seem useful to provide such numbers in a bankruptcy petition.

The Subcommittee decided to take no action in response to this recommendation.

2. The second suggestion was "**Provide guidance to judges to utilize existing in camera review, where appropriate, for proceedings that have export-controlled or otherwise sensitive technology at issue**." The Foundation seems to be suggesting that the bankruptcy judges should be more aggressive in protecting against the discussion of technology

or technical information in an open court setting when such technology or technical information is subject to U.S. export controls. Section 107(b)(1) of the Bankruptcy Code contemplates that a bankruptcy judge may sua sponte, or must on motion of a party in interest, "protect an entity with respect to a trade secret or confidential research, development, or commercial information." In addition, Rule 9018 allows the court, on motion or sua sponte, to "make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, . . . or (3) to protect governmental matters that are made confidential by statute or regulation." Rule 2015.3(e) allows an entity in which a chapter 11 debtor has a substantial or controlling interest that is not itself a publicly-traded corporation or a chapter 11 debtor, or a person holding an interest in that entity, to request protection of information under § 107 in connection with the required periodic reporting requirements of Rule 2015.3(a).

It is unclear from the suggestion in what way the Foundation finds the current rules insufficient to implement the requirements of § 107 of the Bankruptcy Code or otherwise to protect against disclosure of matters of a national security nature. The Subcommittee decided to take no action in response to this suggestion.

3. The final suggestion of the Foundation is to **"Leverage protective orders to limit access to sensitive technology and intellectual property during bankruptcy proceedings."** The comments state that "Bankruptcy Courts have individually, though inconsistently, recognized the importance of protective orders when handling export-controlled information." The Foundation cites *In re* Iridium Operating LLC, 329 B.R. 403 (S.D.N.Y. 2005) as an example of a bankruptcy court recognizing the importance of protective orders. In fact, the decision was issued by the district court, not the bankruptcy court, and the issue whether the bankruptcy court appropriately denied a shareholder of the debtor the right to intervene in an adversary proceeding to seek modification of a protective order to gain access to materials produced during discovery that the shareholder sought to use in its own litigation. The district court affirmed the decision of the bankruptcy court denying intervention. The protective order itself was not at issue in the case.

Bankruptcy Rule 7026 makes Fed. R. Civ. P. 26 applicable to adversary proceedings. Fed. R. Civ. P. 26(c) allows parties or persons from whom discovery is sought to move for a protective order, which the court may grant "for good cause, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" and specifically allows the order to require "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Even outside of the adversary proceeding context, the bankruptcy judge has the authority under Rule 9018 to issue protective orders. *See, e.g., In re* Handy Andy Home Improvement Centers, Inc., 199 B.R. 387 (Bankr. N.D. Ill. 1996). There are many examples of bankruptcy courts issuing protective orders in bankruptcy cases and proceedings to protect confidential commercial information. *See, e.g.*, Albert v. Clark Constr. Gp., Inc. (*In re* Shelton Federal Gp., LLC), No. 15-00623, 2018 WL 4482560 (Bankr. D.D.C. Aug. 21, 2018); *In re* Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169 (Bankr. S.D.N.Y. 2017); Trevino v. Caliber Home Loans, Inc. (In re Trevino), 564 B.R. 890 (Bankr. S.D. Tex. 2017). *See generally* William T. Bodoh & Michelle M. Morgan, *Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107*

and its Constitutional Implications, 24 HASTINGS CONST. L.Q. 67 (1996). The suggestion identifies no aspects of the rules that are inadequate in this regard.

The Subcommittee decided to take no action in response to this suggestion.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: ACCESS TO COURT DATABASE OF ELECTRONIC ADDRESSES

DATE: AUGUST 11, 2020

Wes Scott, a consumer debtors' attorney in Minnesota, submitted Suggestion 20-BK-B, seeking a rule that would allow attorneys needing to serve creditors to have access to the courts' database of creditors' electronic addresses. He explained that he has generally been unsuccessful in obtaining creditors' consent to electronic service and that service by mail is costly and burdensome. He therefore would like to access the courts' database, which he believes "could be shared with lawyers easily."

The desire to have access to electronic addresses maintained by the Bankruptcy Noticing Center ("BNC") has been expressed to the Committee in the past and was explored by the Subcommittee on Business Issues when it was considering amendments to Rule 9036 to increase the use of electronic noticing and service. That subcommittee was told by AO personnel that access to the BNC by persons outside the judiciary was not possible because the terms of the contract with the BNC provider limit its service to the bankruptcy courts, and creditors entering into user agreements with the BNC only agree to service and noticing by the courts. Because there did not appear to be any flexibility in this limitation or possibility of change in the near future, the Business Subcommittee pursued the idea of allowing creditors to opt into electronic service on their proofs of claim. That effort was eventually abandoned, leaving parties with only the option of seeking creditor consent for electronic service.

Because of these limitations, the Subcommittee concluded that Mr. Scott's suggestion is not one that can be pursued by a rule amendment now. The Subcommittee did, however, agree that the idea of allowing party/attorney access to the BNC database should be considered. **It therefore recommends that the Advisory Committee refer the suggestion to the Bankruptcy Administration Committee and the Court Administration and Case Management Committee for their consideration.**

From: Wes Scott
To: RulesCommittee Secretary
Subject: Federal Rule of Bankruptcy 9036
Date: Monday, February 03, 2020 4:46:19 PM

Greetings and salutations—

My name is Wes Scott and I am a bankruptcy lawyer from Minnesota. I practice with the firm of Kain & Scott.

We are reading Federal Rule of Bankruptcy 9036 to require permission from the creditor to serve the creditor electronically (email for example).

We have been reaching out to creditors requesting their permission and we have had almost no success in doing so.

One thought would be to make the Bankruptcy Court's database of those creditors who request electronic notice from the court to be shared with lawyers who need to serve the same creditors.

We are finding it to be time consuming and prohibitive to go to each creditor when the court already presumable has the creditors notice preference in their database that could be shared with lawyers easily.

Our firm exclusively represents debtors in Chapter 7 and 13 bankruptcy.

We could also make it one sweeping change and requires debtors and everyone to get bk notices electronically.

The regular mail is becoming increasingly costly and burdensome given how easy electronic notice can be accomplished.

Thank you for reading this email.

Wes

Wesley W. Scott,
Managing Partner

FUN FACT: *"When I was in 8th grade I played Pig Pen in our high school play, Charlie Brown"*

How am I doing? Speak to my boss: elopau@kainscott.com

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SCOTT MYERS

SUBJECT: OFFICIAL FORM 309 (MEETING OF CREDITOR FORMS)

DATE: AUG. 26, 2020

REVISIONS TO OFFICIAL FORMS 309A-I

Rules Committee Staff was recently notified that the web address for PACER (Public Access to Court Electronic Records) has been changed from www.pacer.com to www.pacer.uscourts.gov. Because the old PACER address is incorporated in several places on the 11 versions of the "Meeting of Creditor" forms (Official Forms 309A-I), those forms need to be updated with the new web address.

Although I've been advised that the old PACER address is currently 'redirecting' to the new address, it seems at least possible that users will experience broken links in the year or so it would take to update the forms in the normal approval process. Accordingly, I recommend that the Advisory Committee approve changing the web addresses using the authority granted to it by the Judicial Conference in 2016 to make "non-substantive, technical, or conforming" changes to the Official Forms immediately, subject to later approval by the Standing Committee and notice to the Judicial Conference[1].

REVISION TO NATIONAL INSTRUCTIONS

Bankruptcy Rule 9009(a) provides that "[t]he Official Forms prescribed by the Judicial Conference of the United States shall be used ***without alteration***, except as otherwise provided in these rules, in a particular Official Form, ***or in the national instructions*** for a particular Official Form." (emphasis added). Changes to form instructions are made by the Advisory Committee.

Two changes are needed to the national instructions for Official Form 309. Currently, the instructions allow courts to add information to the notices, but not to change any of the existing form language, even if it is wrong as is the case with the PACER address now. The instructions provide:

> Courts, or, in the event that the noticing function has been delegated, the individual or entity providing notice, may modify this form by adding additional information.

Because internet links sometimes change or are broken for technical reasons it seems prudent to narrowly expand the ability of courts to make immediate changes to the meeting of

[1] JCUS-MAR 16, p. 24.

creditors notices to account for this possibility in the future. This expansion of authority can be accomplished by amending the sentence quoted above as follows:

> Courts, or, in the event that the noticing function has been delegated, the individual or entity providing notice, may modify this form by adding additional information and by updating changed, broken, or incorrect internet links.

The second change needed to the instructions for Official Form 309 concerns the redesignation in February 2020 of two versions of the form used in chapter 11 cases, and the addition of two new notices to be used for Chapter 11, Subchapter V cases (Official Forms 309E1, 309E2, 309F1, and 309F2). The instructions need to be updated to reflect the redesignation of Official Forms 309E, and 309F, and to add 309E2, and 309F2.

RECOMMENDATION

I recommend that the Advisory Committee:

A. change each instance of www.pacer.com to www.pacer.uscourts.gov in Official Forms 309A-I effective October 1, 2020 and that it seek approval of those changes from the Standing Committee at that Committee's next meeting; and that it

B. revise the instructions for Official Form 309 as set forth in Exhibit 1.

EXHIBIT 1

Instructions, Form 309(A-I)
October 1, 2020

NOTICE OF BANKRUPTCY CASE

General Information

Official Form 309 is used to give notice to creditors, equity security holders, and other interested parties of the filing of the bankruptcy case, the time, date, and location of the meeting of creditors, the time for filing various documents in the case, instructions for filing proofs of claim, and other information concerning the case.

Official Form 309 consists of several variations, numbered 309A through 309I, created to meet the specialized notice requirements for cases filed under chapters 7, 11, 12, and 13 of the Bankruptcy Code. The form to be used is determined by the chapter under which the bankruptcy petition was filed, the type of debtor (Individual or Joint Debtor, or Corporation or Partnership Debtor) and whether a proof of claim deadline is included. The versions of Official Form 309 are listed below:

309A (For Individuals or Joint Debtors), Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline
309B (For Individuals or Joint Debtors), Notice of Chapter 7 Bankruptcy Case –Proof of Claim Deadline Set
309C (For Corporations of Partnerships), Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline
309D (For Corporations of Partnerships), Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set
309E1 (For Individuals or Joint Debtors), Notice of Chapter 11 Bankruptcy Case
309E2 (For Individuals or Joint Debtors under Subchapter V), Notice of Chapter 11 Bankruptcy Case
309F1 (For Corporations of Partnerships), Notice of Chapter 11 Bankruptcy Case
309F2 (For Corporations of Partnerships under Subchapter V), Notice of Chapter 11 Bankruptcy Case
309G (For Individuals or Joint Debtors), Notice of Chapter 12 Bankruptcy Case
309H (For Corporations of Partnerships), Notice of Chapter 12 Bankruptcy Case
309I Notice of Chapter 13 Bankruptcy Case

Generally, the clerk will complete this form and mail (or transmit electronically) a copy to the creditors and other entities whose names and addresses appear on the mailing list or matrix filed by the debtor. Sometimes, the court delegates the noticing function to a chapter 13 trustee or, in a large chapter 11 case, to the debtor or a private notice provider.

Applicability of Rule 9009(a)

Rule 9009(a) provides that "[t]the Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration, except as otherwise provided … in the

national instructions for a particular Official Form."

Courts, or, in the event that the noticing function has been delegated, the individual or entity providing notice, may modify this form by adding additional information and by updating changed, broken, or incorrect internet links.

MEMORANDUM

TO: ADVISORY COMMITTEE ON FEDERAL RULES OF BANKRUPTCY PROCEDURE

FROM: LAURA BARTELL, ASSOCIATE REPORTER

SUBJECT: 20-BK-G – PROPOSAL TO AMEND RULE 3011 REGARDING UNCLAIMED FUNDS

DATE: SEPT. 17, 2020

As described in the memorandum date Aug. 17, 2020, the Privacy, Public Access, and Appeals Subcommittee has recommended to the Advisory Committee amendments to Rule 3011 with respect to unclaimed funds. The suggestion for the amendments came from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), 20-BK-G, and the version approved by the Subcommittee made only two changes to the language suggested by the Bankruptcy Committee. One of those changes was to remove the qualifying language "Unless the court orders otherwise" before the requirement that the clerk provide notice of funds deposited pursuant to § 347. The Subcommittee did not see any circumstances under which the court would order otherwise, and therefore thought the language unnecessary.

Subsequent to the Subcommittee meeting, Bridget Healy and Scott Myers discussed the recommendation with Dana Elliot, one of the staff attorneys supporting the Bankruptcy Committee, and David Levine, Chief of the Judicial Policy Division. They provided some background on why the Bankruptcy Committee wanted the "unless the court orders otherwise" clause. It was suggested by the clerk of the court whose court hosts the unclaimed funds locator that some courts do not post information on unclaimed funds that are subject to a sealing order for some reason. An example was claimants with unclaimed funds in a church diocese case. (We seemed to have anticipated that concern in part and attempted to address it by eliminating the word "publish" from the language suggested by the Bankruptcy Committee.) A second category are unclaimed funds from very old cases (apparently there are some over 50 years old), and lack of good information about the underlying claims. There may be other reasons to give a court discretion in the rule as well, but those were the examples that prompted the Bankruptcy Committee to include court discretion language in the suggestion.

If the Advisory Committee wishes to modify the proposed amendments to reflect this concern, the language of the revised Rule 3011(b) would read as follows:

(b) Unless the court orders otherwise, the clerk must provide searchable access on the court's website to the funds deposited pursuant to § 347(a).

Advisory Committee Note

Rule 3011 is amended to require the clerk to provide searchable access (as by providing a link to the U.S. Bankruptcy Unclaimed Funds Locator) on the court's website to unclaimed funds deposited pursuant to § 347(a). The court may order otherwise for any reason, including, for example, if such access risks disclosing the identity of claimants whose privacy should be protected, or if the information about the unclaimed funds is so old as to be unreliable.

Civil Rule 87. Procedure in Emergency.

(a) RULES EMERGENCY. The Judicial Conference of the United States may declare a rules emergency when extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARATION OF [RULES] EMERGENCY.
A declaration [of a judicial emergency]:
(1) must designate the court or courts affected by the emergency;
(2) may authorize only one or more of the Emergency Rules provided by Rule 87(c) to take the place of the same rule [for the period set by Rule 87(b)(3), (4), and (5)];
(3) must be limited to a stated period of no more than 90 days;
(4) may be renewed for successive stated periods of no more than 90 days [each]; and
(5) may be modified or terminated before the end of the stated period.

(c) EMERGENCY RULES.
(1) Emergency Rule 4(e)(2)(B): leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or, if ordered by the court, sending a copy of each to [that place] [the individual's dwelling or usual place of abode] by registered or certified mail or other reliable means that require a signed receipt.

(2) Emergency Rule 4(h)(1)(B): by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process or, if ordered by the court, by mailing them by registered or certified mail or other reliable means that require a signed receipt, and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant;

(3) Emergency Rule 4(j)(2)(a): delivering a copy of the summons and of the complaint to its chief executive officer or, if ordered by the court, sending them to the chief executive officer by registered or certified mail or other reliable means that require a signed receipt;

(4) Emergency Rule 6(b)(2): A court may apply Rule 6(b)(1) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and

(e), and 60(b). The order extending time has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under those rules.

~~(5) Emergency Rule 43(a): At trial, the witnesses' testimony must be taken in open court or, with appropriate safeguards, by remote means that permit reasonable public access unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise~~.

~~(6) Emergency Rule 77(b): Every trial on the merits must be conducted in open court in person or by remote means that permit reasonable public access and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.~~

(d) EFFECT OF TERMINATION. A proceeding not authorized by a rule but authorized and commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice.

Rule 62. Rules Emergency.

(a) Conditions for a rules emergency. A rules emergency may be declared when:

(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and

(2) no feasible alternative measures would eliminate the impairment within a reasonable time.

(b) Declaration of a Rules Emergency.

(1) *Authority to Declare.* The Judicial Conference of the United States may declare a rules emergency upon finding that the conditions in (a) are met [in one or more courts].

(2) *Contents*. Each declaration must identify:

(A) the court or courts affected;

(B) any restrictions in addition to those in (c) and (d) on the authority to modify the rules; and

(C) a date, no later than 90 days from the date of the declaration, on which it will terminate.

(3) *Effect of a Declaration.* If the Judicial Conference of the United States declares a rules emergency, during its pendency an affected court may use any authority under (c) and (d) that is consistent with that declaration.

(4) *Additional Declarations.* The Judicial Conference of the United States may issue additional declarations if emergency conditions change or persist.

(5) *Early termination.* The Judicial Conference of the United States may terminate a declaration for one or more courts before its stated termination date upon finding that a rules emergency no longer affects those courts.

(c) Authority to Depart from These Rules After a Declaration.

(1) *Signing or Consenting for a Defendant.* If these rules require a defendant's signature, written consent, or written waiver, defense counsel may sign for the defendant if emergency conditions limit a defendant's ability to sign, and –after an opportunity to consult with counsel—the defendant consents. If the defendant's consent is not given on the record, defense counsel must file an affidavit attesting to the defendant's consent.

(2) *Issuance of Summons*. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, unless the government can show good cause to issue an arrest warrant, the court may issue a summons [in the interests of justice/when necessary to avoid a danger to public health or safety].

(3) *Bench Trial*. If a defendant waives a jury trial in writing, the court may approve the waiver and conduct a bench trial without government consent if, after providing an opportunity for the parties [and any victim] to be heard, the court decides that a bench trial would be in the interests of justice.

(4) *Alternate jurors*. The court may impanel more than 6 alternate jurors.

(5) *Correcting or Reducing a Sentence*. Notwithstanding Rule 45(b)(2), if emergency conditions provide good cause for extending the time to take action under Rule 35, that time may be extended as reasonably necessary.

(d) Authority to Use Video Teleconferencing and Teleconferencing After a Declaration.

(1) *Video teleconferencing for certain proceedings other than felony pleas and sentencings*. A court may use video teleconferencing for a

* preliminary hearing under Rule 5.1,
* waiver of indictment Rule 7
* conflict hearing under Rule 44(c)(2), or
* revocation proceeding under Rule 32.1, if

(A) the defendant consents, after consultation with counsel, and

(B) the court finds that

(i) the procedures will provide an adequate opportunity for confidential consultation between defendant and defense counsel [before and during the proceeding], and

(ii) circumstances relating to public health or safety or affecting physical access to the court preclude holding the proceeding in person and will not permit the proceeding to be held in person within a reasonable time.

(2) *Video teleconferencing for felony pleas and sentencings.* The court may use video teleconferencing for a felony proceeding under Rule 11 and or 32 if

(A) The Chief Judge of the district finds that circumstances relating to public health or safety or affecting physical access to the court preclude holding felony pleas and sentencings in person;

(B) the defendant requests that the proceeding be conducted by video teleconferencing;

(C) the court finds that

(i) the defendant had an [adequate] opportunity to consult with counsel before requesting video teleconferencing;

(ii) the procedures will provide an adequate opportunity for confidential consultation between defendant and defense counsel [before and during the proceeding]; and

(iii) the proceeding in that particular case cannot be further delayed without serious harm to the interests of justice.

(3*) Teleconferencing.* A court may use teleconferencing

[(A) for proceedings under Rules 5, 10, 40, or misdemeanor proceedings described in 43(b)(2), upon a finding by the Chief Judge of a District [or …] that videoconferencing [capacity/technology] cannot be provided for these proceedings within a reasonable time.]

(B) for proceedings under Rule 11 or 32, if

(i) video teleconferencing is authorized under (d)(2), and

(ii) the court finds that [adequate] video teleconferencing [capacity/technology] cannot be provided for the proceeding within a reasonable time.

(C) for proceedings listed in (d)(1), if

(i) videoconferencing is authorized under (d)(1) and

(ii) the court finds that [adequate] videoconferencing [capacity/technology] cannot be provided for the proceeding within a reasonable time.

(e) Effect of Termination. Terminating a declaration for a court ends that court's authority under (c) and (d) to depart from these rules. But if a particular proceeding is already underway and compliance with these rules for the rest of the proceeding would be infeasible or work an injustice, it may be completed as if the declaration had not terminated.