22-BK-F

Giuseppe A. Ippolito[1]
31 E. 11th St.
Chattanooga, TN 37402
(423) 752-5104
giuseppe_ippolito@tneb.uscourts.gov
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H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

RE: Proposed Amendment to Federal Bankruptcy Rule 7012(b)

Dear Secretary Byron:

I write briefly to propose an amendment to Bankruptcy Rule 7012(b) that would complement the 2016 amendments to Bankruptcy Rules 7008, 7012, and 7016. The 2016 amendments were made in response to a line of cases from the Supreme Court of the United States that established 1) that Bankruptcy Judges lack jurisdiction to enter final judgments against non-creditors to a bankruptcy estate; but 2) that those non-creditors can consent to entry of final judgment. *See generally Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015); *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25 (2014); *Stern v. Marshall*, 564 U.S. 462 (2011). Together, the 2016 amendments help Bankruptcy Judges clarify the scope of their jurisdiction in adversary proceedings that involve non-creditors. The amendments to Bankruptcy Rules 7008 and 7012 require the parties to state whether they consent to the entry of final orders or judgment by the bankruptcy court. The amendment to Bankruptcy Rule 7016 allows Bankruptcy Judges to review the parties' positions on consent and to set the course for the pretrial phase of the adversary proceeding.

[1]I am a law clerk in the federal judiciary. Any opinions expressed in this letter are entirely my own.

While the 2016 amendments have helped to clarify the issue of consent at the pleading phase and at the pretrial phase, they do not address one phase that falls in between—dispositive motions filed in lieu of an answer under Civil Rule 12(b), made applicable to adversary proceedings by Bankruptcy Rule 7012(b). The granting of a pre-answer dispositive motion can constitute a final order or judgment, depending on the circumstances. *See, e.g., Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 585 B.R. 850, 853 (B.A.P. 6th Cir. 2018) ("An order granting a motion to dismiss for lack of standing is a final order.") (citation omitted). Clarifying the consent of the parties thus is equally important for early dispositive motions. Bankruptcy Rule 7012(b), however, currently does not cover pre-answer dispositive motions; it requires a statement of consent only for responsive pleadings, and dispositive motions are not pleadings. *See, e.g., Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 574 (6th Cir. 2008); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 242 (2d Cir. 2007). As a result, Bankruptcy Judges currently must resort to three other ways to clarify the issue of consent with a pre-answer dispositive motion:

1) Create a local rule for their respective districts that would require a statement of consent for pre-answer dispositive motions and that would assume consent in the absence of any statement. Some districts currently have local rules in place that assume consent in the absence of any statement for adversary complaints and answers. *See, e.g.*, Bankr. E.D. Wis. L.R. 7008, 7012.

2) Issue an individual order upon the filing of a pre-answer dispositive motion.

3) Infer consent from the record, which might not be well developed when a dispositive motion is filed in lieu of an answer. *See, e.g., Ariston Props., LLC v. Messer (In re FKF 3,*

LLC), 501 B.R. 491, 500 (S.D.N.Y. 2013) (no implied consent after one appearance to oppose default judgment).

The above three options always would be available, but an amendment to Bankruptcy Rule 7012(b) would harmonize the treatment of pre-answer dispositive motions with the treatment under the Bankruptcy Rules of adversary complaints, answers, and pretrial scheduling.

The easiest way to fit pre-answer dispositive motions into the letter and the spirit of the 2016 amendments is to make the following change to Bankruptcy Rule 7012(b). I have quoted Bankruptcy Rule 7012(b) below in full; my proposed amendment is highlighted in red boldface:

> Rule 12(b)–(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading**, or a motion under Rule 12(b)–(h),** shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court.

Bankruptcy Rule 7012(b) incorporates Civil Rule 12(b)–(i), and my amendment would cover every motion that can be filed through that incorporation. Motions for judgment on the pleadings under Civil Rule 12(c) occur after "the pleadings are closed," meaning that statements about consent should be in the record by the time those motions are filed, but there is no harm in including them here. There similarly would be no harm in including motions under Civil Rule 12(e), which have been considered non-dispositive but have not been adjudicated with much frequency. *See, e.g., Remole v. Trans Union, LLC*, No. 3:21-CV-00623-DJH-CHL, 2022 U.S. Dist. LEXIS 224, at *1 n.1 (W.D. Ky. Dec. 28, 2021) (concluding that Civil Rule 12(e) motions are non-dispositive but noting "a paucity of case law on the subject nationwide"). Including motions under Civil Rule 12(f) would be important because those motions also are not adjudicated frequently,

and courts that have adjudicated them are not unanimous. *See, e.g., Herrerra v. Mich. Dep't of Corr.*, No. 5:10-CV-11215, 2011 U.S. Dist. LEXIS 98567, at *2 n.1 (E.D. Mich. July 22, 2011) (collecting cases).

Thank you for taking the time to consider my proposal, and do not hesitate to contact me if you wish to discuss it with me further.

Cordially,

Giuseppe Ippolito

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