JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 29, 2015

MEMORANDUM

To: The Chief Justice of the United States
Associate Justices of the Supreme Court

From: James C. Duff

RE: SUPPLEMENTAL TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States (Judicial Conference), pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for consideration of the Court a supplemental transmittal of proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 of the Federal Rules of Bankruptcy Procedure. This package, known as the "*Stern* Amendments," was previously approved by the Judicial Conference at its September 2013 session and submitted to the Court but withdrawn from consideration because of pending litigation on the Court's docket that implicated the subject matter of the *Stern* Amendments.

For reasons explained in the attached materials, the Judicial Conference now resubmits the *Stern* Amendments for the Court's consideration. This package supplements our transmittal dated October 9, 2015, of proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006, and new Rule 1012. The Judicial Conference recommends that these supplemental amendments be approved by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) a Memorandum of Action by the Executive Committee of the Judicial Conference explaining the timing of its approval of the *Stern* Amendments; (iv) the October 16, 2015, Committee on Rules of Practice and Procedure Memorandum to Chief Judge William B. Traxler, Jr., requesting expedited consideration of the *Stern* Amendments; (v) the October 14, 2015, Bankruptcy Rules Advisory Committee Memorandum regarding the *Stern* Amendments; (vi) an excerpt from the September 27, 2013, Committee on Rules of Practice and Procedure Summary of Proposed Amendments to the Federal Rules; and (vii) an excerpt from the May 8, 2013, Bankruptcy Rules Advisory Committee Report.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 7008. General Rules of Pleading

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.

Committee Note

The rule is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of

final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(b) APPLICABILITY OF RULE 12(b)-(i) F.R.CIV.P. Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court.

Committee Note

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's

subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Rule 7016. Pretrial Procedures

(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:

(1) to hear and determine the proceeding;

(2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or

(3) to take some other action.

Committee Note

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court

chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) *Where Filed; Form and Content.* A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action, the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

* * * * *

Committee Note

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Rule 9033. Proposed Findings of Fact and Conclusions of Law

(a) SERVICE. In a proceeding in which the bankruptcy court has issued proposed findings of fact and conclusions of law, the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

Committee Note

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 7008. General Rules of Pleading

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy ~~judge~~court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or non-core and, if non-core~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~court.

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* New material is underlined; matter to be omitted is lined through.

Committee Note

The rule is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

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Committee Note

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The

amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Rule 7016. Pre-~~T~~trial Procedures~~; Formulating Issues~~

(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:

(1) to hear and determine the proceeding;

(2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or

(3) to take some other action.

Committee Note

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court

chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

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(a) NOTICE OF REMOVAL.

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* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state~~ that the party does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy

to every other party to the removed claim or cause of action.

* * * * *

Committee Note

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1),~~In a proceeding in which the bankruptcy court has issued ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law, ~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

Committee Note

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

WILLIAM B. TRAXLER, JR.
CHAIRMAN, EXECUTIVE COMMITTEE

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Memorandum of Action

Executive Committee
Judicial Conference of the United States

October 20, 2015

The Executive Committee conducted a mail ballot, which concluded on October 20, 2015. All members participated.

The Executive Committee acted on the following matter:

Amendments to the Federal Rules of Bankruptcy Procedure

At its September 2013 session, the Judicial Conference approved and transmitted to the United States Supreme Court amendments to Rules 7008, 7012, 7016, 9027, and 9033 of the Federal Rules of Bankruptcy Procedure proposed by the Committee on Rules of Practice and Procedure in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). In November 2013, at the request of the Rules Committee, the Executive Committee acting on behalf of the Judicial Conference, withdrew the amendments in light of pending Supreme Court litigation implicating the amendments and recommitted the amendments to the Rules Committee for further consideration following a decision in the litigation. Following a decision in *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), the Rules Committee has determined that the proposed amendments should move forward as originally drafted. It recommended that the amendments be approved and resubmitted to the Supreme Court in sufficient time to be considered during this rulemaking cycle in order to put in place as soon as possible a process for allowing parties expressly to consent to bankruptcy-judge adjudication of claims otherwise requiring adjudication by an Article III judge. The Executive Committee agreed to act on behalf of the Judicial Conference, on an expedited basis, to approve the amendments 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.

William B. Traxler, Jr.

Committee: Paul J. Barbadoro
James C. Duff
Merrick B. Garland
Federico A. Moreno
William Jay Riley

10/22/2015

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

JEFFREY S. SUTTON
CHAIR

REBECCA WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
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SANDRA S. IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 16, 2015

The Honorable William B. Traxler, Jr.
Chief Judge
United States Court of Appeals
C.F. Haynsworth Federal Building and
United States Courthouse
300 East Washington Street, Room 222
Greenville, South Carolina 29601

Dear Chief Judge Traxler:

I write with a request. In 2013, the Executive Committee of the Judicial Conference withdrew from the Supreme Court's consideration a set of Amendments to the Bankruptcy Rules (the "*Stern* Amendments") that the Judicial Conference previously had approved and forwarded to the Court for approval. The reason for the withdrawal, as the attached memoranda from me and Judge Ikuta explain in more detail, was pending litigation at the Court that implicated the legal and constitutional premises of the *Stern* Amendments. The Supreme Court recently removed the legal cloud hanging over the *Stern* Amendments when it held that the Constitution permits a bankruptcy judge to adjudicate claims otherwise requiring Article III adjudication if the parties consent to determination by a bankruptcy judge. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

That development leaves us with a choice. Namely, should we resubmit the *Stern* Amendments immediately to the Court to be considered during this rulemaking cycle or should we wait for the next rulemaking cycle? The choice affects whether the Amendments, if approved, go into effect on December 1, 2016 or December 1, 2017. The Bankruptcy Rules Committee and the Standing Committee recently each unanimously re-approved the *Stern* Amendments and unanimously agreed that we should resubmit them to the Court during this rulemaking cycle—in order to put in place as soon as possible a process for allowing parties expressly to consent to bankruptcy-judge adjudication if they wish. We now urge the Executive Committee to do the same on behalf of the Judicial Conference. Waiting until the March 2016 Judicial Conference to re-approve the Amendments, we fear, will not give the Supreme Court time to consider the package during this rulemaking cycle. On top of that, the Conference

previously approved the precise Amendments in 2013, and the Executive Committee previously authorized their withdrawal in 2013. It is my understanding that, if we re-submit the *Stern* Amendments by early November, the Supreme Court should be able to consider them during this rulemaking cycle.

Please let me know if you have any questions about this request, and thank you in advance for considering it.

Sincerely,

/s/

Jeffrey S. Sutton

JSS:jmf
Attachments

cc: James C. Duff
Jeffrey P. Minear
The Honorable Sandra S. Ikuta

MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: October 14, 2015

RE: Submission to the Supreme Court of Previously Approved *Stern* Amendments

I. Introduction

The purpose of this memorandum is to recommend that a set of Bankruptcy Rules amendments ("the *Stern* amendments"), which were previously approved by the Standing Committee and the Judicial Conference, be sent forward to the Supreme Court.

The memorandum provides background information about the *Stern* amendments, which the Committee originally proposed in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), as well as providing information about the Court's subsequent decision in *Wellness International Network v. Sharif*, which held that the Constitution permits a bankruptcy judge to adjudicate claims otherwise requiring Article III adjudication if the parties knowingly and voluntarily consent (expressly or implicitly) to determination by the bankruptcy judge. 135 S. Ct. 1932 (2015). The memorandum also explains why the Committee recommends that the *Stern* amendments be submitted to the Supreme Court now rather than as part of the 2016 submission of amendments (which will take effect on December 1, 2017).

II. The *Stern* Amendments

In *Stern v. Marshall*, the Supreme Court held that the bankruptcy court lacked authority under Article III to hear and enter a final judgment on a state-law counterclaim by the estate against a creditor who had filed a claim against the estate. Such adjudication is expressly authorized by 28 U.S.C. § 157(b)(2), which classifies it as a core proceeding. Nevertheless, the Court concluded that the exercise of that authority in this case by the non-Article III bankruptcy judge was constitutionally impermissible because the proceeding did not fall within the "public rights" exception to Article III and the bankruptcy judge was not acting as a mere adjunct of the Article III courts. The Court further concluded that the objecting creditor had not consented to the bankruptcy court's adjudication of the counterclaim.

In 2011 the Committee began considering whether the Bankruptcy Rules needed to be amended in response to *Stern*. Existing Rules 7008 (General Rules of Pleading) and 7012 (Defenses and Objections) require parties to adversary proceedings to state in the complaint and the responsive pleading whether the proceeding is core or non-core and, if non-core, whether the pleader consents to entry of final judgment by the bankruptcy judge.[1] Rule 7012(b) further states that in "non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

The Committee concluded that *Stern* had created an ambiguity concerning the meaning of the terms core and non-core. The case demonstrated that a proceeding might be designated core by the statute but be beyond the constitutional authority of a bankruptcy court to hear and determine, at least without the parties' consent. Thus it would be constitutionally non-core. The Committee therefore decided to propose amendments to Bankruptcy Rules 7008(a) and 7012(b) that would eliminate the distinction between core and non-core proceedings and would require parties in all proceedings to state in their pleadings whether they do or do not consent to entry of a final judgment or order by the bankruptcy judge. A similar amendment was proposed to Rule 9027(a) and (e) (Removal). The sentence in Rule 7012(b) prohibiting a bankruptcy court from entering a final order or judgment in a non-core proceeding without the express consent of the parties was proposed to be deleted. The Committee also proposed amendments to Rule 7016 (Pre-Trial Procedures), which would direct the bankruptcy court to determine the authority it would exercise in a proceeding—whether it would hear and determine it, hear and issue proposed findings of fact and conclusions of law, or take some other action. The final revision included in the *Stern* amendments was to Rule 9033 (Proposed Findings of Fact and Conclusions of Law), which would omit the rule's limitation to non-core proceedings. These amendments, which are attached to this memorandum, were published for public comment in August 2012.

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[1] Rule 7008(a) provides in part: "In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge." Rule 7012(b) provides in part: "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge."

The *Stern* amendments were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013. Later in the fall of 2013, the Judicial Conference withdrew the amendments from the Supreme Court due to the Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). That case presented the issue, among others, of whether Article III permits a bankruptcy court, with the express or implied consent of the parties, to enter a final judgment on a *Stern* claim. Because the proposed *Stern* amendments rely on the validity of consent, it was determined that the Court should not be asked to approve them while that issue was pending before it.

The Supreme Court decided *Arkison* in June 2014 without reaching the consent issue.[2] But a few weeks later, the Court granted *certiorari* in *Wellness*, which also presented the issue of the constitutional validity of party consent to the adjudication by a bankruptcy judge of a *Stern* claim. As a result, the *Stern* amendments remained on hold awaiting a decision in *Wellness*.

III. The Supreme Court Upholds Consent in *Wellness*

In ruling on the constitutional validity of consent in *Wellness*, the Court looked to its decision in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), for guidance. There the Court held that Article III's "guarantee of an impartial and independent federal adjudication" serves two functions: (1) protection of the personal rights of litigants and (2) maintenance of the separation of powers of the branches of the federal government. *Id.* at 848. *Schor* held that, as a personal right, the protection is freely waivable. *Id.* But, as the Court explained in *Wellness*, *Schor* also held that "'[t]o the extent that this structural principle is implicated in a given case'—but only to that extent—'the parties cannot by consent cure the constitutional difficulty.'" 135 S. Ct. at 1943.

Wellness therefore examined "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threate[n] the institutional integrity of the Judicial Branch.'" *Id.* at 1944. It concluded that there was no such threat, based on its examination of the degree of control Article III courts exercise over bankruptcy judges and the absence of evidence that Congress sought to "aggrandize itself or humble the Judiciary." *Id.* at 1945. As a result, the Court held that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent." *Id.* at 1949.

In Part III of the opinion, the Court examined the nature of the consent required. It concluded that neither the Constitution nor 28 U.S.C. § 157(c)(2) requires the parties to give their express consent to bankruptcy court adjudication. But whether such consent is express or implied, the Court stated, it must be knowing and voluntary. Thus the "key inquiry" in determining whether there is implied consent, said the Court, "is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared

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[2] *Arkison* did, however, confirm that *Stern* claims could be treated as non-core under 28 U.S.C. § 157(c), as the rule amendments had assumed. *See* 134 S. Ct. at 2174 ("Accordingly, because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.").

to try the case' before the non-Article III adjudicator." *Id.* at 1948. The Court emphasized that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" *Id.*

Although the Court rejected the debtor's argument that consent to bankruptcy court adjudication must be express, it noted that Bankruptcy Rules 7008 and 7012 require parties to state in their pleadings whether or not they consent to bankruptcy court adjudication of non-core proceedings. The Court said that it is a "good practice" for courts to seek such express statements and that "[s]tatutes or judicial rules may require express consent where the Constitution does not." *Id.* at 1948 n.13.[3]

IV. The Committee's Analysis and Conclusion

At its fall meeting on October 1, the Committee voted unanimously to proceed with the *Stern* amendments as originally drafted and approved, rather than propose a set of rule amendments that would take a different approach to expressing party consent to bankruptcy court adjudication. As discussed above, the pending amendments are based on the constitutional validity of party consent to non-Article III adjudication of *Stern* and non-core claims, which *Wellness* upholds. They provide for express consent in the parties' pleadings. If all the parties to a proceeding consent to bankruptcy court adjudication, no court would have to determine whether the proceeding is one that the bankruptcy court could have heard and determined in the absence of consent. On the other hand, if all of the parties do not consent in their pleadings, the bankruptcy court would determine whether the proceeding is constitutionally and statutorily core—in which case it could enter a final judgment—or a *Stern* or non-core proceeding—in which case it could do no more than submit proposed findings of fact and conclusions of law to the district court.

Members of the Committee recognized that requiring express consent goes beyond the constitutional minimum announced in *Wellness* and that an express consent approach could result in more non-core and *Stern* claims being adjudicated in the district court. That is because parties who might decline to give express consent (if it is required) might otherwise be deemed to have implicitly consented to bankruptcy court adjudication of non-core and *Stern* claims under an implied consent approach. The express consent approach has the advantage, however, of clarity. A court can examine pleadings to determine if the parties in fact consented, thereby eliminating a more uncertain, retrospective determination of whether one or more parties voluntarily and knowingly gave implied consent. Furthermore, it is a procedure that the Court in *Wellness* declared to be a good practice even if implied consent otherwise suffices. *See id.* at

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[3] Justice Alito, in a separate opinion, concurred with the majority opinion in part and concurred in the judgment. 135 S. Ct. at 1949. He agreed that Article III permits a bankruptcy judge to adjudicate a *Stern* claim with the consent of the parties, but he thought that the majority should not have addressed implied consent. Instead, he concluded that "respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below." *Id.* *Stern* claims, he wrote, are not "exempt from ordinary principles of appellate procedure." *Id.* Although the majority opinion did not discuss forfeiture, the Court did remand for the Seventh Circuit to decide "whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below." *Id.*

1948 n.13 (explaining that express statements of consent "ensure irrefutably that any waiver of the right to consent to Article III adjudication is knowing and voluntary and . . . limit subsequent litigation over the consent issue").

In deciding to recommend that the *Stern* amendments be resubmitted to the Supreme Court, the Committee considered but rejected two alternative approaches that had been suggested to the Committee. The first alternative was to adopt a procedure similar to the one used to obtain parties' consent to a magistrate judge's adjudication of civil actions. Under this approach, the parties would receive notice of their opportunity to consent to adjudication by a bankruptcy judge (instead of a district judge), but would also be reminded that the parties "are free to withhold consent without adverse substantive consequences." Fed. R. Civ. P. 73(b)(2). The Committee concluded that it would be difficult to implement this more conservative approach in the current bankruptcy context. District courts by standing orders have referred all bankruptcy cases and proceedings to the bankruptcy courts as an initial matter, and bankruptcy judges have authority to adjudicate proceedings that are constitutionally and statutorily core without party consent. Because the Supreme Court has not yet provided clear guidance regarding which claims are core and which are non-core *Stern* claims,[4] there is a great deal of uncertainty regarding when parties would have a right to withhold consent to bankruptcy court adjudication.

The other approach rejected by the Committee was a procedure similar to the rule preserving the right to a jury trial. Under Rule 38 of the Federal Rules of Civil Procedure, "[a] party waives a jury trial unless its demand is properly served and filed." Under this approach, a party's initial pleading would have to include a demand for adjudication before a district judge; otherwise the party would waive that right, and a bankruptcy judge would be authorized to hear the proceeding and enter a final judgment. Some members of the Committee questioned whether such a procedure would satisfy the Court's standard in *Wellness* for implied consent. Quoting from *Roell v. Withrow*, 538 U.S. 580, 590 n.5 (2003), *Wellness* said that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" 135 S. Ct. at 1948. Moreover, *Wellness* itself indicated the Court's preference for express consent, stating that "it is a good practice for courts to seek express statements of consent or nonconsent" in order to "limit subsequent litigation over the consent issue." *Id.* at 1948 n.13. Other members were opposed to the affirmative-demand approach for the practical reason that the previously approved amendments could be promulgated sooner than a new set of proposed rules that would have to be published for public comment, and it was thought that bankruptcy judges wanted clarifying amendments as soon as possible.

V. The Committee's Recommendation

The Committee recommends that the Standing Committee ask the Judicial Conference to submit the *Stern* amendments to the Supreme Court this fall (which would be slightly after the

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[4] Because the Court in *Wellness* did not decide whether the claim in question was a *Stern* claim, it provided no further guidance about the scope of *Stern* or how to determine whether a claim listed as core under 28 U.S.C. § 157(b)(2) is beyond the bankruptcy court's authority to adjudicate without the consent of the parties. 135 S. Ct. at 1942 n.7 (noting that the opinion "does not address, and expresses no view on, . . . [whether] the Seventh Circuit erred in concluding the claim in count V of [the] complaint was a *Stern* claim").

submission of the amendments that the Judicial Conference approved in September). By submitting these *Stern* amendments to the Supreme Court now, rather than in the next cycle of submissions to the Court, the *Stern* amendments could take effect as early as December 2016, rather than a year later. The Committee believes it is important to provide needed clarity to the bankruptcy community as soon as possible regarding how bankruptcy courts can proceed on a consent basis to adjudicate *Stern* claims.

Attachment

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

September 27, 2013

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

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BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: Jeffrey S. Sutton

SUBJECT: Summary of Proposed Amendments to the Federal Rules

This memorandum summarizes the amendments to the Federal Rules of Practice and Procedure that will take effect on December 1, 2014, if (1) the Supreme Court adopts the proposed amendments and transmits them to Congress no later than May 1, 2014, and (2) Congress does not reject or defer the proposed amendments. Part I addresses the amendments of significant interest, including the arguments made for and against the amendments and the Rules Committees' reasons for proceeding with them. Part II addresses the proposals that generated little or no interest during the public comment period. A more comprehensive explanation of the Committees' deliberations with respect to each amendment was submitted to the Judicial Conference of the United States and is attached to this memorandum. In the last rulemaking cycle, the Standing Committee delivered the proposed amendments to the Court in January 2013. In delivering the amendments earlier to the Court this year, we hope to give the Court more time to consider them and, if the Court wishes, to resolve its work on the amendments earlier in the Term.

I. Proposed Amendments of Significant Interest

A. Federal Rules of Bankruptcy Procedure

1. Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033

a. Brief Description

The proposed amendments to Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 respond to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Consistent with the United States Code, 28 U.S.C. § 157, the current Bankruptcy Rules distinguish between core and non-core bankruptcy proceedings

and contemplate that a bankruptcy judge has more limited authority to resolve non-core proceedings. *Stern* held that a bankruptcy judge lacked authority under Article III of the Constitution to enter a final judgment in a proceeding that qualified as "core" under the Code, thus establishing that a proceeding could be "core" as a statutory matter but "non-core" (and thus non-permissible) as a constitutional matter. In response to *Stern*, the amendments propose three key changes: (1) they remove the distinction between "core" and "non-core" proceedings in the Bankruptcy Rules, namely in Rules 7008, 7012, 9027, and 9033; (2) they require parties to state at the outset whether they consent to entry of final orders or judgment by a bankruptcy judge in all adversary proceedings, not just in "non-core" proceedings as the current rules provide; and (3) they direct bankruptcy courts under Rule 7016 to decide the proper treatment of all proceedings, including whether to handle the proceeding at all, whether to entertain the proceeding and offer proposed findings of fact and conclusions of law, or whether to take some other action.

b. Arguments in Favor

• Responds to *Stern v. Marshall* by removing the distinction between "core" and "non-core" proceedings and by requiring all pleadings to contain a statement as to whether the pleader consents to the entry of a final judgment by the bankruptcy court.

c. Objections/Comments

The Advisory Committee received eight comments, largely supportive of the proposed amendments, that raised five issues:

• whether to retain the terms "core" and "non-core";

• whether references to the "bankruptcy court" in the proposed amendments should revert to the "bankruptcy judge," the term currently used;

• whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

• whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

• whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

d. The Advisory Committee's Reasoning

Stern recognized the possibility that a "core" proceeding under the United States Code may lie beyond the constitutional power of a bankruptcy judge. The amendments seek to alleviate potential administrative confusion by eliminating the terms "core" and "non-core" from Rules 7008, 7012, 9027, and 9033, and by requiring a statement regarding consent in all proceedings.

In rejecting the first three concerns raised during the public comment period, the Committee reasoned that: (1) retaining the distinction between core and non-core pleadings was no longer useful and potentially confusing, because the status of a matter as "core" under 28 U.S.C. § 157 does not necessarily establish the bankruptcy court's authority to adjudicate the matter; (2) the term "bankruptcy court" is more useful than "bankruptcy judge," because it eliminates the possibility that a party's consent might be understood to apply only to adjudication by a particular bankruptcy judge; and (3) a rule providing for treatment of a bankruptcy judge's final order issued without authority as proposed findings of fact and conclusions of law would require extensive rule amendments to deal with the deadlines and the scope of objections to proposed findings and conclusions. The Committee concluded that the last two issues raised useful ideas for future rulemaking but did not warrant changes to the proposed amendments. The Advisory Committee and the Standing Committee unanimously supported the amendments.

e. *Arkison*

On June 24, 2013, the Court granted review in *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200, adding a wrinkle to the Court's deliberations over the consent portion of the rules package. At issue in *Arkison* (among other things) is whether Article III permits bankruptcy courts to resolve a proceeding based on the express or implied consent of the parties. At the earliest, the Court will hear oral argument in the case in January 2014. To the extent the Court wishes to review the rules package earlier in the Term than it has in years past, it may wish to give preliminary approval (or disapproval) to the rest of the package while making its final decision on this amendment contingent on the *Arkison* ruling. If the Court later authorizes consent-based bankruptcy court decisions in *Arkison* before May 1, 2014, and if the Court otherwise agrees with the merits of this proposal, *Arkison* will not stand in the way of approving this part of the package during this rulemaking cycle. On the other hand, if the Court rejects consent-based bankruptcy court decisions in *Arkison* or is unable to decide *Arkison* before May 1, it may wish to send this part of the package back to the Advisory Committee or to hold onto this part of the package until potential approval in May 2015 along with the next package.

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

MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Federal Rules of Bankruptcy Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 2 and 3, 2013, in New York, New York, at the United States Bankruptcy Court. The draft minutes of that meeting accompany this report as Appendix C. The Committee's actions fall into three categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2012. Forty-six comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee conference calls, at a meeting of the Forms Modernization Project, and in Committee discussions at the New York meeting. (The comments are summarized below, along with a discussion of the changes that the Committee made in response.) The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of most of the published items: the revision of the Part VIII rules and amendments to ten other rules and five official forms. Because the Committee

made significant changes after publication to one set of published forms—the means test forms—it requests that those forms be republished.

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Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2012 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

* * * * *

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2012. **The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be approved and forwarded to the Judicial Conference. It recommends that the amended forms take effect on December 1, 2013.** The text of the amended rules and forms is set out in Appendix A.

Action Item 1. Rules 7008, 7012, 7016, 9027, and 9033 would be amended in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would need to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find the comments to raise new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, had not been considered previously. The Advisory Committee nevertheless concluded that the comments raising those issues, although presenting possible suggestions for future rulemaking, did not require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments. The comments are set out in more detail in Appendix A.

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