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02-BK-C



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To: "Rules_Support@ao.uscourts.gov"
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cc:

Subject: Proposed Amendment to Bankruptcy Rule 8001

02/25/2002 02:34 PM

In the last several months I have been involved in a number of bankruptcy appeals where the appellant has not taken all the necessary steps to perfect the appeal and the district court has had to deal with the appeal on an incomplete record. I have been successful in having the appeals dismissed, but valuable time, mine and the district court's, has been needlessly spent on these efforts. The present rules do not make provision for appeals that have not been perfected to be dismissed prior to transmittal to the district court. In the attachment to this e-mail I propose an amendment to the rules that would address this problem.

The suggested rule change is mine alone and should not be attributed to the Department of Justice or the U.S. Trustee Program.

I would appreciate if it you would pass this along to Peter McCabe, who I understand deals with amendments to the bankruptcy rules.

Thanks.

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AmendmenttoR8001

AMENDMENT TO BANKRUPTCY RULE 8001
NEW SUBSECTION (d)

(d) *Involuntary Dismissal Before Docketing.* If an appeal has not been docketed and the appellant has not promptly taken whatever action is necessary to enable the clerk to assemble and transmit the record as provided by Rule 8006, the appeal may be dismissed by the bankruptcy judge on the court's own motion or on the motion of the appellee.

Comment

The amendment facilitates the administration of unperfected appeals. It is not uncommon for a party aggrieved by an adverse ruling to file a notice of appeal, but not take all of the necessary steps to perfect the appeal. The party may fail to file the designation of items to be included in the record on appeal or fail to order the necessary transcripts of hearings. Under the present rule the appellee has no authority to move to dismiss the appeal and the clerk is left with a nettlesome dilemma. If the clerk does nothing, the unperfected appeal languishes on the docket, inhibiting the expeditious closing of the case. On the other hand, if the clerk transmits the appeal to the district court or bankruptcy appellate panel, that court will receive an incomplete record and will not be able to properly determine the appeal, absent taking procedural steps to complete the record. That is not a sound use of judicial resources for an appellate court. The amendment resolves the clerk's dilemma by authorizing the bankruptcy judge or appellee to move to dismiss an unperfected appeal and, thus, both expedites case closure and conserves judicial resources.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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April 11, 2002


Richard Craig Friedman
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227 West Monroe Street, Suite 3350
Chicago, Illinois 60606-5025

Dear Mr. Friedman:

Thank you for your e-mail of February 25, 2002, suggesting an amendment to Bankruptcy Rule 8001. A copy of your letter has been sent to the chair and reporter of the Advisory Committee on Bankruptcy Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe

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December 31, 2002

Richard Craig Friedman
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227 West Monroe Street, Suite 3350
Chicago, Illinois 60606-5025

Re: Your Proposed Amendment to Bankruptcy Rule 8001 (Docket Number 02-BK-C)

Dear Mr. Friedman:

Thank you again for your e-mail of February 25, 2002, suggesting an amendment to Bankruptcy Rule 8001. At its October 10-11, 2002, meeting, the Advisory Committee on Bankruptcy Rules discussed your proposal. After some discussion, the Committee referred your proposal to its Subcommittee on Privacy, Public Access, and Appeals for further study.

For your information, I am attaching an excerpt of the draft minutes of the committee's meeting. You may track future committee action on your proposal at the Judiciary's Federal Rulemaking web site at <http://www.uscourts.gov/rules/newrules7.html>.

Thank you again for your suggestion. We appreciate your interest in the federal rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

Attachment

cc: Honorable A. Thomas Small
Professor Jeffrey W. Morris

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of October 10-11, 2002
Hyannis, Massachusetts

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Norman C. Roettger, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. Circuit Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure (Standing Committee), Professor Daniel Coquillette, reporter of the Standing Committee, and District Judge Thomas W. Thrash, Jr., liaison to the Standing Committee, attended. Bankruptcy Judge A. Jay Cristol, a former member of the Committee, attended. Bankruptcy Judge Wesley W. Steen attended the first day of the meeting as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

The following additional persons attended all or part of the meeting: Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Principal Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); Patricia S. Ketchum and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; Robert Niemic, Research Division, Federal Judicial Center (FJC); and Ned Diver, law clerk to Judge Scirica.

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

extensions of time. Judge Walker said cases generally are closed shortly after discharge and, therefore, perhaps, the agreements should be filed before discharge. Judge Klein stated that the Court of Appeals for the Ninth Circuit has held, In re Staffer, 306 F.3d 967 (9th Cir. 2002), that closing a bankruptcy case is not jurisdictional and that the bankruptcy court can still entertain a dischargeability action. He added that a case doesn't have to be reopened to file a paper. After discussion, the Committee decided to delete the language of the existing rule that sets deadlines for notices of a discharge and reaffirmation hearing, and to substitute a rule that simply establishes a deadline for filing a reaffirmation agreement with the court. The filing of a reaffirmation agreement will enable the court to determine whether a discharge hearing is necessary, and the court can then schedule the hearing in the most efficient manner. The Committee concluded that getting reaffirmation agreements filed is the most important objective, and leaving discretion to the courts to notice and schedule the hearings permits the courts to set their own calendars in the most efficient manner.

At its March 2002 meeting, the Committee discussed the possibility of a survey of the bankruptcy courts regarding the extent of any problems with the late filing of reaffirmation agreements. Mr. Niemic asked whether the Committee still was interested in a such survey. Chairman Small stated that, if there is a problem, the courts will tell the Committee about it during the comment period on the proposed amendments. Professor Resnick moved to revise the proposed amendment to allow a reaffirmation agreement to be filed not later than 30 days after entry of the discharge, to specify that the court may extend the deadline for cause, to state in the Committee Note that the court has broad discretion to extend the time, and to approve the amendments and the Committee Note, as revised, for publication. The proposed amendment would no longer require the court to hold the hearing within a stated time. **The motion carried without objection.**

Proposed Amendments to Rules 2002 and 3017. Mr. Shaffer had suggested that Rules 2002 and 3017 be amended to establish a shorter notice period for the time to file objections to a disclosure statement than for the time for the hearing to consider approval of the statement. The changes were intended to prevent unnecessary delays at the hearing due to objections that are filed at the hearing. Mr. Shaffer stated that, after reading the Reporter's memorandum on the proposal, he is not sure that the amendments are needed. **The consensus was to take no action.**

Proposed Amendment to Rule 8001. Mr. Richard Friedman, an attorney in the Office of the United States Trustee in Chicago, had suggested that Rule 8001 be amended to address the problem of unperfected appeals. Mr. Friedman noted that in many instances he has faced the situation in which the appellant failed to designate the record under Rule 8006, requiring that he file a motion to dismiss in the district court, wasting time for both the appellee and the appellate court. He suggested that Rule 8001 be amended to allow the bankruptcy court to dismiss the appeal if it has not been docketed in the appellate court and the appellant has failed to take whatever action is necessary to enable the clerk to assemble and transmit the record as provided under Rule 8006.

Professor Morris stated that there is a jurisdictional difficulty with the proposed amendment because, once the notice of appeal is filed, jurisdiction over the appeal is with the appellate court. The Committee members discussed how the situation is handled in different courts. In some courts, the bankruptcy clerk notifies the clerk of the appellate court that the record has not been completed. In others, the bankruptcy clerk transmits the incomplete record or a local rule authorizes the bankruptcy court to dismiss the unperfected appeal. The Committee discussed various approaches, including a model local rule on unperfected appeals, guidance for the clerks and chief judges, a rules amendment providing for the transmission of the incomplete record if the appeal is not perfected in a timely fashion, an amendment providing for the bankruptcy clerk to transmit notice of the filing of the notice of appeal to the appellate court as is provided in Appellate Rule 3(d), and a review of Part VIII rules generally. **The Committee agreed with Chairman Small's suggestion that the matter be referred to the Subcommittee on Appeals.**

Proposed Amendment to Rule 3004. Mr. Frank and Judge Walker each had noted problems with Rule 3004. The rule provides that the trustee or debtor may file a proof of claim on behalf of a creditor if the creditor does not file a proof of claim on or before the first date set for the meeting of creditors. Although the deadline in Rule 3004 for filing such a claim is 30 days after expiration of the time for filing claims pursuant to Rules 3002(c) or 3003(c), the rule provides for a creditor to file a superseding claim "pursuant to Rule 3002 or Rule 3003(c)." Thus, the Reporter stated, the creditor has an earlier deadline for filing a superseding claim than the debtor or trustee has for filing the original claim on behalf of the creditor. The Reporter stated that, by allowing the debtor or trustee to file a proof of claim on behalf of a creditor before the creditor's deadline for filing, Rule 3004 gives the debtor and trustee more power than the statute does. 11 U.S.C. § 501(c) requires that they wait until the creditor's claim would be untimely. Furthermore, the 1983 Committee Note to Rule 3002 and the 1987 Committee Note to Rule 3004 are inaccurate as a result of subsequent changes in the Bankruptcy Code and Rules. The Reporter stated that there is no mechanism for amending or revising a Committee Note in the absence of an amendment to the rule in question.

Several committee members discussed the extent of a creditor's right to amend a proof of claim filed by the debtor or trustee, as delineated by the Court of Appeals for the Fifth Circuit, In re Kolstad, 928 F.2d 171 (5th Cir. 1991), *cert. denied*, 502 U.S. 491 (1991), and contrasted the right to amend with filing a superseding claim or objecting to the claim filed by the debtor or the trustee. The Reporter offered an amendment to Rule 3004 which would permit the debtor or trustee to file a proof of claim for the creditor within 30 days after the expiration of the time for filing pursuant to Rule 3002(c) or 3003(c), whichever is applicable, and would delete the provision for the creditor to file a superseding claim. The proposed Committee Note stated that the rule leaves to the courts the issue of whether to permit subsequent amendment of such claims filed by the debtor or trustee. Judge Steen suggested that the amended rule state that the clerk shall give notice of the claim, rather than mailing notice. Judge Klein said that the Committee Note should state why the provision for superseding claims was deleted. **The Committee**

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April 22, 2003

Richard C. Friedman
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Dear Mr. Friedman:

The Advisory Committee on Bankruptcy Rules at its meeting on April 3 - 4 considered your proposal to amend the Bankruptcy Rules to deal with unperfected appeals. The Committee adopted the recommendation of its Subcommittee on Appeals to defer action on your request pending a more thorough review of Part VIII of the Bankruptcy Rules.

The procedure for dismissing unperfected appeals varies greatly throughout the country, but fortunately most courts have developed local practices that deal with the issue effectively.

The Committee very much appreciates your recommendation, and it will be considered in connection with a broader review of Part VIII in the future.

Very truly yours,



A. Thomas Small

ATS:lw

cc: Prof. Jeffrey W. Morris
Pat Ketchum
Peter G. McCabe

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