

January 29, 2021

Honorable Dennis Dow
United States Bankruptcy Court
Charles Evans Whittaker U.S. Courthouse
400 East Ninth Street, Room 6562
Kansas City, MO 64106

Dear Judge Dow:

We are forty-five professors who specialize in bankruptcy law and are writing to suggest an amendment to the Federal Rules of Bankruptcy Procedure. We suggest that the rules allow a turnover action under section 542 to be brought by motion rather than through an adversary proceeding. This cover letter explains the reasons for our suggestion and how it would operate. After our signatures is an appendix with draft language for such a rule change.

In *City of Chicago v. Fulton*, No. 19-357 (U.S., Jan. 14, 2021), the United States Supreme Court ruled that retention of possession of estate property does not violate the stay of section 362(a)(3). In so doing, the Court declined to construe section 362(a)(3) to give the same functional relief that section 542 already authorizes. But under the current rules, a demand for turnover under section 542 requires an adversary proceeding with its necessary expense and delay. As Justice Sotomayor put it in her concurrence, “the trouble is . . . that turnover proceedings can be quite slow,” citing statistics that the mean time for a turnover proceeding is over 100 days.

The facts in *Fulton* illustrate how these procedural complications have serious consequences for consumers who have turned to the bankruptcy system to get back on their feet. In that case, the City of Chicago had impounded the cars of the four chapter 13 debtors in the consolidated appeal as security for unpaid parking and traffic tickets. The debtors needed access to the cars for access to employment, schooling, health care, and all the other necessities of modern life. In Justice Sotomayor’s words, “One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy plan payments.” She invited rule drafters and policymakers to address “the gap left by the Court’s ruling.” This letter asks the rules committee to act on that invitation.¹

Although the pressing policy issues in consumer chapter 13s highlighted by *Fulton* are the impetus for the proposal, we suggest an expansion beyond chapter 13 to allow turnover actions by motion in all circumstances. Where there is no dispute, there is no reason a party holding estate property should be able to hide behind an adversary proceeding to delay doing the party’s statutory duty that sections 521(a)(4), 542, or 543 require. Under the Bankruptcy Act of 1898, a court could order turnover as a summary proceeding where there was no substantial dispute that a party held estate property. The court simply used its injunctive powers to exercise in rem jurisdiction over the estate and order return of estate property. A plenary proceeding was instead appropriate when there were substantial issues about ownership that drew into question whether the item was within the court’s in rem jurisdiction.² The abstract jurisdictional distinctions also contained very practical

¹ The American Bankruptcy Institute’s Commission on Consumer Bankruptcy recommended a statutory amendment to section 542 to create a special turnover action for consumer debtors. The Commission further recommended that this section be added to the exception in FRBP 7001(1) so that it could be done by motion. See FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY § 2.01 (2019).

² See generally Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEV. J. 11, 77-87 (2016).

distinctions regarding the appropriate procedure for summary versus plenary matters. The Bankruptcy Code and the new rules adopted contemporaneously abandoned the summary-plenary distinction. In doing so, however, we lost the practical distinctions about how turnover operates in the world, as *Fulton* illustrates.³

The centerpiece of our proposal is an amendment to FRBP 7001(1), adding section 542 to the list of exceptions for proceedings to recover money or property that do not require an adversary proceeding. Our amendment also adds to this exception the debtor's duty under section 521(a)(4) to surrender estate property and books and records to the trustee as well as recovery of property from a custodian under section 543. The amendment eliminates as surplusage the textual language about proceedings to compel a debtor to turn over property.

We then propose a new FRBP 6012 that creates a new procedure for turnover actions under section 542(a).⁴ Similar to a movant seeking permission to use cash collateral under FRBP 4001(b), a movant under our proposal would have to state the property in question, its value, others' interests in the property, the amount of their claims, and the nature of any proffered adequate protection. In a consumer case like *Fulton*, the proffered adequate protection might be proof of insurance or periodic payments of money under a plan. In making this motion, the movant would act subject to the usual FRBP 9011 duties and other professional ethical duties to state things in good faith to the best of the movant's knowledge. The rule then requires a response within seven days from the party against whom relief is sought. The response must contain the respondent's own estimate of the property's value and the amount of its claim. The respondent must also state with particularity any adequate protection demanded. The proposed rule only sets out procedural requirements. The ultimate burdens of proof would be governed by section 363(p).

The parties' pleadings that the new rule requires should help clarify whether there is any dispute about turnover of the estate property. At a hearing, which must be held within 10 days in a chapter 13 or 21 days in all other cases, the court could order turnover or order further proceedings including discovery or evidentiary hearings. As Justice Sotomayor noted, even a short delay can be a long time when a person's livelihood is at stake. For this reason, the proposed rule allows for ex parte relief to prevent irreparable harm to a chapter 13 debtor's chance of reorganization. The ex parte relief proceeding is modeled after that allowed for creditors seeking ex parte stay relief under FRBP 4001(a)(2).

The scope of the suggested rule is expressly limited to section 542(a) proceedings. All other turnover motions would be governed by the general FRBP 9014 provisions for contested matters. In an appropriate case, that includes the power for the court to direct the application of Part VII rules for adversary proceedings. *See* FRBP 9014(c).

The proposal also has a few other conforming amendments. The new rule itself allows the court to order adequate protection, where appropriate of course, as part of the turnover relief. And it will make it clear, early on, whether turnover relief is appropriate, eliminating the procedural hurdle of requiring an adversary proceeding. We think this will lead to more settlements in turnover matters. To avoid any doubt that parties could enter into an agreement that simultaneously deals with both turnover and adequate protection, our proposal adds turnover agreements to the list of agreements that can be approved under FRBP 4001(d).

³ See generally Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who Is "Exercising Control" Over What?*, 33 BANKR. L. LETTER No. 9, at 1, 8-9 (Sept. 2013).

⁴ Because our suggestion is a procedure to recover estate property, Part VI likely is the most appropriate location. It also could be a new subdivision in FRBP 4001.

Because turnover arguably is relief authorizing the use, sale, or lease of estate property, subdivision (g) of our proposed rule expressly excludes turnover from the 14-day stay of FRBP 4001(a)(3) and 6004(h). For similar reasons, our proposal amends FRBP 6003(b) to except turnover from the prohibition of interim and final relief in the first 21 days of a case on a motion to use, sell, or lease estate property. One might argue that turnover relief technically is not a motion to use, sell, or lease, but we have proposed these amendments to eliminate any doubt.

We appreciate the committee's consideration of our suggestion. We believe our proposal will streamline the process generally for all bankruptcy filers, but in light of *Fulton* it is of critical importance to restore the ability of consumers to use the bankruptcy process to regain access to transportation. Justice Sotomayor's call for action should not go unanswered.

Sincerely,

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APPENDIX

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

....

(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT.

(1) *Motion; Service.*

(A) *Motion.* A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:

- (i) an agreement to provide adequate protection;
- (ii) an agreement to prohibit or condition the use, sale, or lease of property;
- (iii) an agreement to modify or terminate the stay provided for in §362;
- (iv) an agreement to use cash collateral; ~~or~~

(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property-; or

(vi) an agreement to deliver or account for property or recorded information under §521(a)(4), §542 or §543 of the Code.

....

(4) *Agreement in Settlement of Motion.* The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule or Rule 6012 or §521(a)(4), §542 or §543 of the Code was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.

Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following:

....

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001 or Rule 6012 or §521(a)(4), §542 or §543 of the Code; or

....

Rule 6012. Turnover of Property

(a) MOTION. A motion to enforce an entity's obligation to deliver and account for property under §542(a) of the Code must be made in accordance with Rule 9014.

(b) CONTENTS. The motion shall state:

(1) the property the entity must deliver or for which it must account,

(2) the value of the property,

(3) the name of each entity with an interest in the property and the nature of that interest,

(4) for any entity whose interest is a lien, the amount of the entity's claim, and

(5) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the property.

(c) SERVICE. The movant shall serve the motion on:

(1) any entity with an interest in the property;

(2) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and

(3) any other entity the court directs.

(d) RESPONSE. Within seven days after service of the motion, any entity against whom relief is sought must file and serve a response that states:

(1) the nature of the entity's interest in the property,

(2) the value of the property,

(3) if the interest is a lien, the amount of the entity's claim, and

(4) whether the entity requests the court to order adequate protection under §363(e). Any such request must state with particularity the adequate protection the entity requests including, if applicable, the amount of any cash payments or the amount or type of insurance protecting the interest of the entity.

(e) HEARING.

(1) Timing.

(A) For a motion brought by a debtor in a case under chapter 13, the court must hold a hearing within 10 days after service of the motion.

(B) In all other cases, the court must hold a hearing within 21 days after service of the motion.

(2) Action. At the hearing, the court may enter any appropriate orders including:

(A) ordering the entity to deliver or account for the property;

(B) ordering the debtor or trustee to provide adequate protection to the entity; or

(C) directing further hearings, briefing, pleadings, discovery, or other proceedings consistent with Rule 9014.

(f) EX PARTE RELIEF. Relief may be granted to a debtor in a case under chapter 13 without prior notice only if (A) the motion is verified, (B) it clearly appears from specific facts shown by affidavit

or by the verified motion that in the absence of relief the debtor will suffer immediate and irreparable harm to the debtor's prospects for effective reorganization before the adverse party or the attorney for the adverse party can be heard in opposition, and (C) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief without prior notice shall immediately give oral notice thereof to the adverse party and forthwith mail or otherwise transmit to the adverse party a copy of the order granting relief. On two days notice to the debtor or on shorter notice as the court may prescribe, the adverse party may appear and move for reconsideration of the relief granted or to prohibit or condition the use, sale, or lease of property. In that event, the court shall proceed expeditiously to hear and determine the motion.

(g) NO STAY OF TURNOVER ORDER. Notwithstanding Rule 4001(a)(3) and Rule 6004(h), an order entered under this rule or §521(a)(4), §542 or §543 of the Code is effective immediately, unless the court orders otherwise.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to ~~compel the debtor to deliver property to the trustee, or a proceeding under~~ §521(a)(4), §542, §543, §554(b), or §725 of the Code, or Rule 2017, or Rule 6002;

....