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

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 6, 2023

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on Sept. 14, 2023. Four Committee members attended remotely; the rest of the Committee met in person. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to seek publication for comment of proposed amendments to Bankruptcy Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Bankruptcy Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed), and Official Form 410S1 (Notice of Mortgage Payment Change).

Part II of this report presents those action items.

The Advisory Committee also approved for publication amendments to Rules 1007(c)(4) and 5009(b), which deal with an individual debtor's demonstration that he or she has satisfied the requirement for completion of a course on personal financial management while in bankruptcy. Because the Forms Subcommittee is still considering whether to recommend any related form amendments, the Advisory Committee will wait until the June Standing Committee meeting to present these items.

Part III of this report presents six information items. The first concerns reconsideration of the proposed Rule 3002.1 sanctions provision. The second item concerns proposals to require redaction of the entire social security number from public court filings, including the last four digits of the number. The third is a proposal to eliminate the requirement that all notices given under Rule 2002 comply with the caption requirements set forth in Rule 1006. The fourth concerns proposals dealing with remote testimony in contested matters. The final two information items concern proposed amendments to Director's Form 1340 and a suggestion about contempt proceedings.

II. Action Items

Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2024. Bankruptcy Appendix A includes the rules and form that are in this group.

Action Item 1. Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed). Bankruptcy Judge Catherine Peek McEwen made a suggestion to require the reporting of a debtor's acquisition of postpetition property in the chapter 11 case of an individual or in a chapter 12 or 13 case. Judge McEwen noted that Rule 1007(h) (Interests Acquired or Arising After Petition) requires the filing of a supplemental schedule only for property covered by § 541(a)(5)—that is, property acquired within 180 days after the filing of the petition by bequest, devise, or inheritance; as a result of a property settlement with a spouse or a divorce; or as beneficiary of a life insurance policy. Not included within Rule 1007(h) are other postpetition property interests that become property of the estate under § 1115, 1207, or 1306, each of which includes property that “the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted” and “earnings from services performed by the debtor” during that period.

In some circuits there is a well-developed body of judicial estoppel law that is driven by non-disclosure in chapter 13 cases. Debtors lose the right to pursue undisclosed claims, and creditors lose the benefit of those claims. The issue often arises from the nondisclosure of personal injury and employment discrimination cases. Judge McEwen suggested that an amendment to Rule 1007(h) would help bring to the attention of debtors' counsel the importance of disclosure, since failure to do so could end up hurting their clients if they later sought to pursue such claims outside bankruptcy.

Caselaw and commentary are mixed on whether a debtor has a statutory duty, absent a request from the court, the United States Trustee, or any party in interest, to disclose property that comes into the estate by virtue of § 1115, 1207, or 1306. Without such a duty, a failure to disclose a postpetition claim does not trigger the application of judicial estoppel. In jurisdictions that have not found a statutory duty to disclose postpetition claims, the imposition of such an obligation under the rules would provide a basis for applying judicial estoppel that does not currently exist.

The differing impact of a national rule on bankruptcy courts led the Advisory Committee to conclude that the issue should continue to be left to local regulation. Attempting to strike a middle ground, the Advisory Committee approved for publication an amendment to Rule 1007(h) that would explicitly allow the court to require the debtor to file a supplemental schedule to list property or income that becomes property of the state under § 1115, 1207, or 1306.

Action Item 2. Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed). The National Bankruptcy Conference has proposed an amendment to Rule 3018(c) to authorize courts to treat as an acceptance or rejection of a plan in a chapter 9 or a chapter 11 case a statement of counsel or other representative that is part of the record in the case, including an oral statement at a confirmation hearing. Under the current rule, only an acceptance or rejection on a written ballot submitted by the deadline set by the court suffices.

The problem prompting the suggestion is the failure of the IRS and certain other federal and state agencies that participate in bankruptcy cases to submit ballots either accepting or rejecting a proposed plan, even when they have no objection to it. Courts differ on whether the failure to reject the plan may be deemed an acceptance. In jurisdictions where a ballot must be cast, the failure to vote impacts confirmation, particularly in small business cases under subchapter V of chapter 11. In that type of case, if a creditor in an impaired class by itself does not submit a ballot, the plan becomes nonconsensual even if the nonvoting creditor supports confirmation. The plan then must be confirmed under § 1191(b), which delays the discharge until completion of plan payments and requires the subchapter V trustee to serve as disbursing agent throughout the term of the plan. By contrast if the plan is confirmed as a consensual plan, the discharge occurs immediately, and the subchapter V trustee does not serve as disbursing agent for the plan. (§§ 1192, 1194.)

Although the Advisory Committee is doubtful that the proposed amendment will solve the problem of the disinclination of federal and state agencies to vote on plans, by a 12-to-1 vote it approved an amendment to Rule 3018(c) for publication, which would authorize the court to allow an acceptance (or the change or withdrawal of a rejection) to be made in a statement on the record, including an oral statement at the confirmation hearing or a stipulation, if made by an attorney for or an authorized agent of the creditor or equity security holder. The Advisory Committee concluded that it is possible that the amendment will lead to voting by government agencies, at least in some cases, and it will apply more broadly to creditors whose negotiations lead to their support of plans they previously rejected or failed to accept.

Action Item 3. Official Form 410S1 (Notice of Mortgage Payment Change). After publication in 2021 of proposed amendments to Rule 3002.1 and implementing forms, the National

Consumer Law Center (“NCLC”) filed a comment suggesting an amendment to existing Form 410S1. The amendment would reflect the proposed provisions in the amendments to Rule 3002.1(b) regarding payment changes in home equity lines of credit (“HELOCs”). The NCLC suggested changes to the form to include disclosure of the one-time next payment that includes the reconciliation amount under Rule 3002.1(b)(3)(C) and a separate disclosure of the new payment amount without reconciliation under Rule 3002.1(b)(3)(D). The Advisory Committee treated the comment as a suggestion.

The current Form 410S1 has three parts plus a signature box – Part 1: Escrow Account Payment Adjustment; Part 2: Mortgage Payment Adjustment; and Part 3: Other Payment Change. The Advisory Committee recommends for publication amendments modifying the form by creating a new Part 3 for the Annual HELOC Notice. Existing Part 3 would become Part 4. At the top of the form, the following direction would be added under “New total payment”: “For HELOC payment amounts, see Part 3.”

Because the process for amending official forms is one year shorter than the period for amending rules, the amendment to Official Form 410S1 could be published for comment in 2024 and, if approved, go into effect at the same time as the proposed amendments to Rule 3002.1, which were published for comment in 2023.

III. Information Items

Information Item 1. Reconsideration of the Proposed Sanctions Provision in Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor’s Principal Residence). At the June meeting, the Standing Committee approved for republication amendments to Bankruptcy Rule 3002.1 with one deletion. In subdivision (h), the proposed amendments would have expressly authorized courts to award “in appropriate circumstances, noncompensatory sanctions.” The impetus for the inclusion of the amendment was the Second Circuit’s 2-1 decision in *PHH Mortg. Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2021), in which the court held that “[p]unitive sanctions do not fall within the ‘appropriate relief’ authorized by Rule 3002.1.” Several bankruptcy courts have disagreed with the Second Circuit and, following the *Gravel* dissent, have concluded that the existing rule does authorize the award of punitive damages. After lengthy discussions, Judge Connelly suggested that the Advisory Committee should further consider the sanctions provision and withdrew that amendment and the related portion of the Committee Note. The Standing Committee approved the remainder of Rule 3002.1 for republication.

After reconsideration at the fall meeting, the Advisory Committee decided to keep the issue on its agenda but to wait and see how the case law develops, rather than seeking to reintroduce an additional sanction provision to subdivision (h).

Information Item 2. Suggestion to Remove Redacted Social Security Numbers from Filed Documents. Senator Ron Wyden of Oregon sent a letter to The Chief Justice of the United States in August 2022, in which he suggested that federal court filings should be “scrubbed of personal information before they are publicly available.” Portions of his letter, suggesting that the

rules committees reconsider a proposal to redact the entire social security number (“SSN”) from court filings, have been filed as a suggestion with each of the advisory committees.

To a limited extent, the requirement that social security numbers be included on bankruptcy documents, either in whole or in redacted form, is set forth in the Bankruptcy Code. Section 342(c)(1) provides that notices required to be given by a debtor to a creditor must contain the last 4 digits of the taxpayer identification number of the debtor. Section 110 requires disclosure of the complete social security number of a bankruptcy petition preparer (“BPP”) on documents, such as the petition and schedules, prepared by the BPP. Changing those requirements must be left to Congress.

As to other situations in which the debtor’s SSN (or a truncated version) is used on bankruptcy filings, the Advisory Committee has been informed that the Committee on Court Administration and Case Management of the Judicial Conference of the United States has requested the Federal Judicial Center (“FJC”) to design and conduct studies regarding the inclusion of sensitive personal information in court filings and in social security and immigration opinions. Those studies will update the 2015 FJC privacy study and gather information about compliance with privacy rules and the extent of unredacted SSNs in court filings.

Although that study will not (and could not) address the extent to which SSNs that are disclosed in publicly-filed documents lead to identity fraud, the Advisory Committee thinks that the FJC privacy study may be useful in determining the extent to which disclosure of SSNs actually occurs and whether those disclosures are made in the bankruptcy forms themselves or in documents that are attached to the forms by debtors, creditors, and their attorneys. The Advisory Committee also wants to determine whether creditors actually need the last four numbers of the redacted SSN on all court filings where that partial redaction is currently required by rule, but not by statute. The Advisory Committee further wants to consider whether there are benefits to the debtor if some bankruptcy filings, such as the discharge form, include the truncated SSN. The Advisory Committee will be continuing to gather information to inform a recommendation on the suggestion at a future meeting.

Information Item 3. Eliminate Requirement that All Notices Given under Rule 2002 Comply with Caption Requirements in Rule 1005. A suggestion was made by the Clerk of Court for the Bankruptcy Court for the District of Minnesota, which was joined by clerks of court for eight other bankruptcy courts in the Eighth Circuit. They suggested that Rule 2002(n) (restyled Rule 2002(o)) be amended to eliminate the requirement that the caption of every notice given under Rule 2002 comply with Rule 1005.¹ The Bankruptcy Clerks Advisory Group submitted a second suggestion supporting the first one.

The clerks of court stated that the caption requirements “are substantial and can add a significant amount of length, and therefore cost, to a Rule 2002 notice,” and they noted that

¹ Rule 1005 requires the caption to include the following information about the debtor: name, employer identification number, last four digits of the SSN or individual debtor’s taxpayer identification number, any other federal taxpayer-identification number, and all other names used within eight years before the filing of the petition.

bankruptcy courts in the Eighth Circuit routinely provide the Rule 1005 caption only on the Notice of Bankruptcy Case (Official Forms 309A-I) and thereafter use the shorter caption.

The same concern about the length of the caption was expressed at the time the rule was amended in 1991. The Advisory Committee at its meeting of March 15-16, 1990, unanimously declined to provide for Rule 2002 notices to use the short caption rather than the Rule 1005 caption, agreeing with the reporter that “some creditors rely on the social security number to identify the debtors.”

No empirical research was done at that time, and if creditors have no need for the full caption after the notice of the meeting of creditors, the suggestion might have merit. A consumer debtors’ attorney on the Advisory Committee offered to create a survey (with the help of the FJC) to canvas some creditor groups to try to ascertain whether they need the full caption on all Rule 2002 notices. After the Advisory Committee receives the results of that survey, it will consider the suggestion further.

Information Item 4. Remote Testimony in Contested Matters. The National Bankruptcy Conference submitted proposals to amend Rules 9014 and 9017 and to create a new Rule 7043 addressing a court’s decision to allow remote testimony in contested matters in bankruptcy cases.

The suggestion proposes to eliminate the incorporation by reference in Rule 9017 of Fed. R. Civ. P. 43 (which generally requires witnesses’ testimony to be taken in open court unless the court permits remote testimony “for good cause in compelling circumstances and with appropriate safeguards”). Instead, new Rule 7043 would make Civil Rule 43 applicable in adversary proceedings. Rule 9014, dealing with contested matters (commonly motions, confirmation hearings, and objections to proofs of claim), would be amended in two respects. First, it would make Civil Rule 43(d) (dealing with interpreters) applicable to contested matters and insert language identical to Civil Rule 43(c) (dealing with evidence on a motion). Second, it would delete the language requiring that testimony in a contested matter be taken in the same manner as testimony in an adversary proceeding and instead insert language that requires a court to find cause² and appropriate safeguards without requiring it to find “compelling circumstances” to permit remote testimony in a non-trial proceeding.

At the request of Judge Bates, the Advisory Committee agreed to defer consideration of the amendments until its spring meeting to permit coordination with the Committee on Court Administration and Case Management, a subcommittee of which is looking more broadly at the issue of remote access to court proceedings.

Information Item 5. Consideration of Proposed Amendments to Director’s Form 1340. The Unclaimed Funds Expert Panel of the Financial Managers Working Group submitted a suggestion for amendments to Form 1340 (a Director’s Form by which an applicant may seek payment of unclaimed funds) and to the instructions accompanying that form. The concern

² The use of “cause” rather than “good cause” conforms to the usage of that term throughout the restyled Bankruptcy Rules. It is not intended to be a substantive change.

expressed by the Expert Panel was that fraudulent applications may be filed by persons who assert that they are a successor claim holder when in fact they are not. The proposed amendments would, among other things, require notice to be given to the owner of record and all other prior owners of the claim when the claim has been transferred, assigned, purchased, obtained by merger or acquisition, or another means of succession.

Acting on the recommendations of the Forms Subcommittee and some additional suggestions of Professor Cathie Struve, the Advisory Committee approved several changes to the form and accompanying instructions. Because this is a Director's Form and its use is permissive under Rule 9009, the Advisory Committee's role was to review the suggestions and to make recommendations for proposed changes to the Administrative Office. It has done so.

Information Item 6. Consideration of Suggestion Regarding Contempt Proceedings.

An attorney submitted a suggestion to the Advisory Committee "for reforming judicial rules governing contempt proceedings." With respect to the bankruptcy courts, he proposed that § 105 of the Bankruptcy Code be amended to expressly authorize those courts to issue orders for civil and criminal contempt. If that change were made, he suggested, Bankruptcy Rule 9020 should be amended to make his suggested civil and criminal rules on contempt applicable in bankruptcy cases.

Because the Advisory Committee is not the proper venue for proposals to amend the Bankruptcy Code, and all the proposed rule amendments are dependent on a statutory change to the Code, the Advisory Committee decided to take no further action on the suggestion.