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NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

February 15, 2008

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re Comments on Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Time Periods

To the Members of the Advisory Committee

I write this letter on behalf of the National Bankruptcy Conference (the "Conference") The purpose of this letter is to comment on the proposed amendments to (1) the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") dealing with time computations in bankruptcy proceedings, and (2) the Federal Rules on Civil Procedure (the "Civil Rules") dealing with time computations that apply to bankruptcy proceedings by incorporation into the Bankruptcy Rules

One of the members of the Conference is Professor Alan N Resnick of Hofstra University Professor Resnick has submitted his own comments, which are attached hereto The purpose of this letter is to advise the Advisory Committee that the Conference strongly endorses and supports Professor Resnick's Comments

Since Professor Resnick has set forth so well the position of the Conference on the Proposed Amendments, I will not repeat his Comments except to elaborate on a few, and to made an additional proposal that was not suggested by Professor Resnick.

The importance of expedition in bankruptcy matters cannot be over-emphasized As a result, lengthening the appeal period to 30 days, as has been suggested by some, or even by 4 days, as have been proposed by the Advisory Committee, would be extremely harmful to the process As Professor Resnick's Comments suggest, most important bankruptcy orders, such as those involving sales, borrowing, or the confirmation of plans or reorganization, are not effectuated until they are final. Prolonging finality will create great harm to the process, and should be considered only if there is a very good reason to do so The Conference does not believe that symmetry is a good reason to change the bankruptcy appellate practice that has been in effect for over 100 years In fact, as Professor Resnick has pointed out, the only time that it did not work well was when it was tampered with in the interests of uniformity in the late 1980s It was soon corrected, and we now have the 10-day rule for bankruptcy appeals that is both understood and working well

The Conference would also like to propose something that Professor Resnick did not suggest As Professor Resnick pointed out, even if the appeal period under Bankruptcy Rule 8002 were extended to 14 days, as is proposed, under Bankruptcy Rule 9023, which would incorporate the amended Civil Rule 59, the time to move for a new trial in a contested matter or an adversary proceeding would be extended to 30 days This incongruity would not be

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workable since finality would have to await the expiration of the 30 day period. Professor Resnick rightly suggests that the way to solve this problem is to not incorporate the change in Civil Rule 59 into Bankruptcy Rule 9023 However, what the problem pointed out by Professor Resnick also suggests is that there can be unintended consequences of the automatic incorporation of the Civil Rules into the Bankruptcy Rules, and for that matter the automatic incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules

Based on the foregoing, the Conference would recommend to the Advisory Committee that it accept Professor Resnick's Comments and not change Bankruptcy Rule 8002, as well as the companion Bankruptcy Rules 3020, 4001, 6004, 6006, 7062, 9023, and 9033, and that Bankruptcy Rule 9006 be retained as Professor Resnick suggests However, the Conference also suggests that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes are studied further by the Advisory Committee, the Bench, and the Bar to ensure that any such changes do not result in unintended consequences as would have occurred if, for example, Bankruptcy Rules 8002 and 9023 (through Civil Rule 59) were changed as proposed

The National Bankruptcy Conference appreciates the opportunity to comment on the Proposed Amendments and your consideration of the views of the National Bankruptcy Conference

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

HOFSTRA UNIVERSITY

SCHOOL OF LAW
FACULTY

January 28, 2008

Advisory Committee on Bankruptcy Rules
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Re: Comments on Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Time Periods

To the Members of the Advisory Committee:

The purpose of this letter is to comment on the proposed amendments to the Federal Rules of Bankruptcy Procedure dealing with time computations in bankruptcy proceedings. In general, I do not oppose changing time periods that are less than 30 days to 7, 14, 21, or 28 days, but I recommend that certain exceptions be made.

Rule 8002 and the Time to Appeal

I oppose the proposed change to Rule 8002, which provides a 10-day time period for filing a notice of appeal, for the following reasons:

(1) *The Need for Speed in Resolving Bankruptcy Proceedings.* Creditors, debtors, employees, and other parties involved in bankruptcy cases benefit from moving those cases along expeditiously and without unnecessary delay. Any delay in the bankruptcy process could have an adverse impact on maximizing the value of property and distributions to creditors, as well as on the likelihood of success of a corporate reorganization. That is why a 10-day appeal period has been part of the bankruptcy system for more than a century, dating back to section 39c of the Bankruptcy Act of 1898. Though it could be argued that going to 14 days, instead of 10, will not delay matters too long, even adding four days to the appeal time would unnecessarily delay closings of asset sales, the effective dates of plans, and other transactions that are conditioned on the nonappealability of an order authorizing the transaction.[1]

[1]Some may argue that finality of orders is not important because of sections 363(m) and 364(e) of the Code, as well as the equitable mootness doctrine, which protect parties who rely on certain orders despite the possibility of an appeal. But those sections go just so far. For example, *In re Saybrook Mfg Co*, 963 F. 2d 1490)(11th Cir. 1992), the court of appeals held that 364(e) and mootness did not apply to protect a lender from reversal on appeal of a financing order that contained a cross-collateralization provision because section 364 did not expressly provide for such provisions. Indeed, many provisions in DIP financing orders are not expressly provided for in

My opposition to changing the 10-day appeal time is, of course, even stronger in the context of a suggestion to change the time to 30 days.

(2) *Ten Days is Ample Time to Decide Whether to File an Appeal.* There is no need for a party to have more than 10 days to decide whether to file an appeal. I have never heard any lawyer complain that a decision on whether to appeal cannot be made within 10 days after entry of the order or judgment. And if further time is needed, Rule 8002 allows a party to request an extension of time up to an additional 20 days. I doubt that there are many requests for extensions filed because, in virtually all cases, 10 days is sufficient time to make that decision – especially in view of advances in electronic filing and docketing, which enable lawyers to learn of the entry of orders earlier than ever before. Four extra days is not needed, and, clearly, tripling the time in which to file a notice of appeal from 10 to 30 days would only allow parties to delay the filing of the appeal until the last day, even though the decision could have been made easily within 10 days. That delay would require creditors, the debtor, and other parties to wait almost 3 more weeks unnecessarily – and perhaps put the progress of the case on hold --before they know whether an order is final and nonappealable.

(3) *Bankruptcy Proceedings Differ from Other Federal Cases Because of the Additional Level of Appeal.* The bankruptcy system differs from traditional litigation in district court because bankruptcy proceedings have an extra level of appellate review (except in the very rare situation when an appeal is taken directly to the court of appeals). In district court litigation, a losing party has one appeal as of right to the court of appeals and a possible appeal to the Supreme Court. In bankruptcy, an appeal goes from the bankruptcy court to the district court or BAP, and then as of right to the court of appeals (with a 30-day time to file a notice of appeal) before the right to petition for certiorari in the Supreme Court. Ironically, in the system in which expeditious decision-making is important, parties have the greatest opportunity to delay in the appellate process because of the extra level of appeal. It is important, therefore, not to extend the 10-day appeal time at all, even by four more days. And if the appeal time under Rule 8002 is expanded to 30 days, that would allow parties to delay the decision on whether to appeal for 30 days at one

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section 364 (such as roll-ups, stay relief, protection from attack on prepetition liens, etc.). Courts also have held that section 363(m) does not apply if notice of the sale was improper. See *In re Moberg Trucking*, 112 BR 362 (9th Cir. BAP 1990) Therefore, prudent buyers of substantial assets or postpetition lenders often will wait for a final, nonappealable order before closing a sale or loan transaction And equitable mootness with respect to confirmation orders is also limited to those situations where the appellate court is unable to provide an effective remedy. Also, sections 363(m) and 364(e) rely on a finding of good faith, and even those who act in good faith may want to avoid even a slim possibility of having to litigate that issue if an appeal is taken, thereby preferring to have a nonappealable order before closing. It is not surprising that many asset sales and confirmation orders provide that a final non-appealable order is required before closing or going effective Any increase in the 10-day appeal time will cause a delay in the consummation of these types of transactions.

level and another 30 days at the next. That is simply too much time in one case to be spent waiting for parties to decide whether to appeal a decision.

(4) *Experience Demonstrates That The Appeal Period Should Not Be Changed Lightly And That Such Change Could Have Serious Consequences.* The time to appeal should not be changed lightly, as was demonstrated in the late 1980s. Bankruptcy Rule 8002(a) always had a 10-day appeal period, but "10 days" did not always mean 10 calendar days. Before 1987, Rule 9006(a), provided that any period that was less than 7 days would mean business days so that the 10-day appeal period was 10 calendar days. That has always worked well. However, the Civil Rules were amended in 1984 to provide that weekends and holidays do not count if the time period is less than 11 days (previously, such days would not count only if the time period was less than 7 days). For the sole purpose of uniformity, at the urging of the Standing Rules Committee, Rule 9006(a) was amended in 1987 to conform to the "less than 11 days" rule. For the first time, that meant that the 10-day appeal period was not 10 calendar days -- it would usually mean 14 calendar days (because of 2 intervening weekends), and sometimes more if there was a holiday. The change to Rule 9006(a) was published for comment, but most practitioners are unaware of Rules changes until a time after they become effective and publishers include them in law books. As a result, transactions, such as asset sales, intended to close only when the relevant order became nonappealable would close too early. When I became reporter to the Advisory Committee, my first meeting was in January 1988, and the committee was faced with an outcry about the change in the appeal time due to the 1987 amendment of Rule 9006(a). The consensus of the Advisory Committee was that changing the way to calculate the 10-day appeal period was a serious mistake. The Advisory Committee recommended to the Standing Rules Committee that that Rule 9006 be changed back to where it was before 1987. The Standing Committee agreed to change Rule 9006(a) on an expedited basis (without waiting the usual 3 years to change a rule) so that, in 1989, the 10-day period for filing a notice of appeal became, once again, 10 calendar days. The problem that we had in 1987 was a result of the lack of education of the bar, but no matter how well it is publicized, if the rules are changed so that the appeal period becomes 14 days, for a significant period of time, some lawyers will be closing transactions and going effective on plans on the 11th day without realizing that the order had not yet become nonappealable.[2] Thus, changing the time to appeal to either 14 or 30 days will create a trap for the unwary bankruptcy practitioner that is greater than any trap that may now

[2] I have no doubt that many bankruptcy practitioners are not yet aware of the December 1, 2007 changes to the rules on financing motions, cash collateral motions, omnibus claims objections, etc., and that they are just now getting into the law books Many lawyers will not learn about them for a substantial period of time.

exist, if at all, for non-bankruptcy practitioners who delve into bankruptcy cases without knowing about the 10-day appeal period.[3]

(5) *Changing the Appeal Time to Thirty Days Will Not Achieve Uniformity With Other Federal Rules.* As discussed above, there are good reasons for keeping the 10-day time to appeal. The only suggested reason for changing that time to 30 days is to have uniformity for the time to appeal in federal cases. But changing the bankruptcy appeal time to 30 days would not achieve uniformity at all. F.R.A.P. 4 provides that the appeal time in a criminal case is 10 days (the proposed amendments would make it 14 days). That means that there is no uniformity in the federal system now regarding the time to appeal, and there will be no uniformity later, even if the bankruptcy appeal time is increased to 30 days. It makes no sense to change the 10-day bankruptcy appeal time merely to achieve uniformity if uniformity will not be achieved regardless of whether the bankruptcy appeal time is changed.

Rule 9023 and Civil Rule 59

I recommend that Rule 9023 be amended so that the time to move for a new trial or to amend a judgment will not be longer than the time to file a notice of appeal.

Civil Rule 59 now provides that a motion for a new trial, or a motion to amend a judgment, may be filed within 10 days after entry of the judgment, and that the court on its own motion may order a new trial within that same 10 day period. Civil Rule 59 is applicable in bankruptcy cases by reason of Bankruptcy Rule 9023. The 10-day periods in Civil Rule 59 work well with the 10-day appeal time in Bankruptcy Rule 8002. The effect of these rules is that an order or judgment will become non-appealable, and not subject to a motion for a new trial, 10 days after the entry thereof. Parties could find comfort in knowing that the order authorizing a transaction has become "final" and that the closing of the transaction may take place on the 11th day after entry of the order.

However, the proposed amendments to the Civil Rules recently published for comment include a revision to Civil Rule 59 that would change the current 10-day periods to 30-day periods. If that change is made, by reason of Bankruptcy Rule 9023, it will become applicable in bankruptcy proceedings. Of course, if the appeal time under Rule 8002 remains at 10 days, it would not make sense to permit a party, who is time barred from filing a notice of appeal, to file a motion for a new trial or to amend the judgment for a 30-day time period. That would, in effect, eliminate the early finality that parties are looking for before closing transactions and moving a bankruptcy case along. If the time to appeal under Rule 8002(a) is changed to 14 days, then I recommend that Rule 9023 be amended to provide that the time periods in that rule be 14 days when applicable

[3] In this regard, I do not believe that there is any real trap for nonbankruptcy lawyers who find themselves litigating in bankruptcy court. It is difficult for me to imagine a lawyer representing a client in an adversary proceeding or contested matter in bankruptcy court, learning the intricacies of bankruptcy practice under the Bankruptcy Rules, but not learning the time to appeal to the district court or BAP by the time a judgment is entered in the proceeding.

in bankruptcy proceedings. In any event, the time to move for a new trial or to amend the judgment should not be longer than the time to file a notice of appeal.

Other Bankruptcy Rules That Stay Certain Orders (Rules 3020, 4001, 6004, and 6006) Should Conform to the Time to Appeal Under Rule 8002(a)

I suggest that the time periods in Bankruptcy Rules 3020(e), 4001(a)(3), 6004(g), and 6006(d), conform to the time to appeal under Rule 8002(a).

The above-listed rules now provide for a stay of certain orders (chapter 11 confirmation orders, relief from stay orders, sale orders, and orders authorizing the assignment of an executory contract) for a 10-day period so as to give parties an opportunity to obtain a stay pending appeal. The proposed amendments would change the 10-day period to a 14-day period in each of these rules. If the time to appeal in Rule 8002(a) remains at 10 days, I suggest that the 10-day periods in these rules not be amended. It would not make sense to stay an order for 14 days for the purpose of allowing a party to obtain a stay pending appeal if the an appeal is time-barred because of the expiration of the 10-day appeal time. However, if the time to appeal under Rule 8002 is amended to 14 days, as proposed, then the proposed amendments to Rules 3020, 4001, 6004, and 6006 changing those time periods to 14 days would be appropriate.

Rule 7062 Should Conform to the Appeal Period Under Rule 8002(a)

Rule 7062 makes Civil Rule 62 applicable in adversary proceedings. Civil Rule 62 now contains a 10-day stay of judgments so that parties have an opportunity to obtain a stay pending appeal before it is implemented, which works well together with the 10-day appeal period in bankruptcy. For the reasons discussed above, a stay of judgments should not exceed the time for filing a notice of appeal.

The proposed amendments to Civil Rule 62 would change the 10-day stay to a 14-day stay. Therefore, if the time to appeal under Bankruptcy Rule 8002 remains at 10 days, I suggest that Bankruptcy Rule 7062 be amended to provide that Civil Rule 62 is applicable in adversary proceedings, but that the stay of judgments shall be for 10 days, not 14. Of course, if the time to appeal under Rule 8002(a) is changed to 14 days, an amendment to Rule 7062 would not be necessary.

Rule 9033 Should Conform to the Appeal Period Under Rule 8002(a)

Rule 9033(b) imposes a 10-day time period for filing an objection to proposed findings of fact and conclusions of law in a non-core proceeding. That period conforms to the 10-day appeal period and is intended to give finality to such proposed findings and conclusions. Rule 9003(c), similar to Rule 8002(c), provides for the extension of time to file an objection for up to an additional 20 days. Again, it was intended to conform to the time limits for filing an appeal.

The proposed amendment to Rule 9033 would change the 10-day time period to 14 days. If the time to appeal under Rule 8002(a) remains unchanged at 10 days, then the time to file an objection under Rule 9033 should remain at 10 days. These time periods should be the same.

Rule 9006(a) Should Provide that Intermediate Weekends and Holidays Not Be Counted in Computing Time for Short Time Periods (Less Than 7 Days)

The proposed amendments to Rule 9006 would delete the provision that says that intermediate weekends and holidays do not count for time periods of less than 8 days. Assuming that, in general, the proposed 7-14-21-28 day time periods are adopted, it is still important to exclude intermediate weekends and holidays from time periods that are less than 7 days.

The scope of Rule 9006 is not limited to time periods in the Rules. Rule 9006 also applies to time periods in local rules, court orders, and, most significantly, in statutes. For example, section 704(b)(1)(B) of the Code requires the court to provide to all creditors, not later than 5 days after receiving it, a copy of the United States trustee's statement as to whether the a consumer debtor's case is presumed to be an abuse of chapter 7. That is a short time period that, under current Rule 9006(a), is always expanded because it does not include intervening weekends and holidays. If 9006 is amended as proposed, 5 days will mean 5 calendar days. If the clerk receives the U.S. trustee's statement on a Thursday, it will have to send it to all creditors by Tuesday, even if Monday is a legal holiday (under the current Rule, clerks would have until the following Thursday or, if Monday is a holiday, until the following Friday). Other short time periods are contained in the Bankruptcy Code, such as the 5-day periods in sections 109(h)(3)(A)(ii), 322(a), 332(a), 342(e), 521(e)(3), 749(b), and 764(b). There are also state statutes with time periods that could be applicable in bankruptcy cases and the proposed amendments to Rule 9006 could have an impact on the computation of those periods. One effect of the proposed amendments to Rule 9006 is, as a practical matter, the shortening of some state and federal statutory time periods.

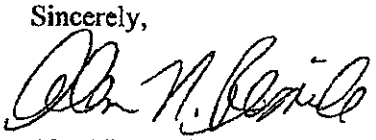
In order to avoid the effect of shortening applicable state and federal statutory time periods inadvertently, Rule 9006 should provide that intervening weekends and holidays are not to be counted when computing time periods of less than 7 days.

In sum, though I have no objection in general to changing time periods that are less than 30 days to 7, 14, 21, or 28 day time periods, certain exceptions should be made. In particular, I recommend keeping unchanged the 10-day time for filing a notice of appeal (Rule 8002), as well as 10-day rules designed to provide an opportunity to obtain a stay pending appeal (Rules 3020, 4001, 6004, and 6006), and the 10-day rule on objections to proposed findings of fact and conclusions of law in non-core proceedings (Rule 9033). I also recommend amending Rule 7062 to maintain the 10-day stay of judgments in adversary proceedings, and Rule 9023 to maintain the 10-day period for requesting a new trial or amendment to a judgment. Finally, Rule 9006 should provide

that intermediate weekends and holidays do not count in computing time periods of less than 7 days.

I greatly appreciate your consideration of my comments.

Sincerely,



Alan N. Resnick
Benjamin Weintraub Professor of
Bankruptcy Law

cc: Honorable Laura Taylor Swain
Prof. Jeffrey W. Morris

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

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