07-BR-037

AMERICAN BAR ASSOCIATION

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February 15, 2008

The Honorable Laura Taylor Swain
United States District Court for
the Southern District of New York
Chair, Advisory Committee on Bankruptcy
Rules of the Judicial Conference

VIA E-MAIL
Rules_Comments@ao.uscourts.gov

Professor Jeffrey Morris
University of Dayton Law School
Reporter, Advisory Committee on Bankruptcy
Rules of the Judicial Conference

VIA E-MAIL
Rules_Comments@ao.uscourts.gov

Re: Response to Request for Comments on Proposed Change to Federal Rule of Bankruptcy Procedure 8002 Governing Time to File Notice of Appeal from Adverse Determinations of a Bankruptcy Court ("Comments")

Dear Judge Swain and Professor Morris:

On behalf of the American Bar Association ("ABA") and its more than 410,000 members, we are pleased to submit the attached Comments in response to the Request for Comments on the Time to File a Notice of Appeal in a Bankruptcy Case that was issued by the Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Advisory Committee") in November 2007. As the Chair of the ABA Business Law Section's Ad Hoc Committee on Bankruptcy Court Structure and the Insolvency Process ("Ad Hoc Committee") and as the Co-Chairs of its Task Force on Bankruptcy Rules ("Task Force"), respectively, we have been authorized to express the ABA's views on this important subject.

At the recent meeting of the ABA's House of Delegates held February 11, 2008, the attached resolution was overwhelmingly approved upon recommendation of the Ohio State Bar Association; the State Bar of Michigan; the ABA Sections of Business Law, Litigation, and Real Property, Trust & Estate Law; and the ABA General Practice, Solo & Small Firm Division. Thus, this resolution states the official policy of the ABA.

The new ABA policy supports the retention of the 10-day time limit in Rule 8002 of the Federal Rules of Bankruptcy Procedure ("FRBP 8002") for filing a notice of appeal from a judgment, order or decree in a bankruptcy case. In addition, the new ABA policy also opposes any proposed amendments to FRBP 8002 that would lengthen the time for filing a notice of appeal. A copy of the ABA's policy and a detailed background report that explains the issue and the various legal and policy reasons for opposing the change to FRBP 8002 are attached as Appendix A. Please consider these

materials to be the ABA's formal Comments to the Advisory Committee with respect to the proposed change to FRBP 8002.

The attached Comments were prepared by the ABA Business Law Section's Ad Hoc Committee and its Task Force. The Task Force is comprised of members of the ABA that practice in diverse fields of law and participate in various sections of the ABA. A list of the Task Force members is attached as Appendix B.

We appreciate your consideration of the views of the ABA on this important bankruptcy matter. If the opportunity is available, we would welcome the chance to appear and testify before the Advisory Committee with respect to the proposed rule change and the ABA's Comments. We also would be happy to respond to any additional questions or concerns that the Advisory Committee may have with respect to our Comments. If you would like more information regarding the ABA's position on this issue, you may contact the ABA's senior legislative counsel for bankruptcy law issues, Larson Frisby, at (202) 662-1098, or any of the undersigned.

Thank you for your consideration of the Comments. We are most appreciative.

Very truly yours,

William H. Schorling
Chair
Ad Hoc Committee on Bankruptcy
Court Structure and the Insolvency Process
Section of Business Law

Judith Greenstone Miller
Co-Chair
Task Force on Bankruptcy Rules
Section of Business Law

Richard M. Meth
Co-Chair
Task Force on Bankruptcy Rules
Section of Business Law

Attachments

cc: Members of the Task Force on Bankruptcy Rules (via e-mail, with attachments)

APPENDIX A

RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

FEBRUARY 11, 2008*

RESOLVED, That the American Bar Association supports the retention of the 10-day time limit in Rule 8002 of the Federal Rules of Bankruptcy Procedure for filing a notice of appeal from a judgment, order or decree in a bankruptcy case and opposes any proposed amendments to Rule 8002 that would lengthen the time for filing a notice of appeal.

*Note: The "Resolution," but not the attached background "Report," constitutes official ABA policy.

REPORT

Introduction

Subdivision (a) of Rule 8002 of the Federal Rules of Bankruptcy Procedure ["Rule 8002"] specifies a 10-day period for filing a notice of appeal from a judgment, order or decree in a bankruptcy case.[1] The Advisory Committee on Bankruptcy Rules ("Bankruptcy Rules Committee") of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has published a Request for Comment on a proposal to amend Rule 8002 to change the time for filing a notice of appeal from 10 days to 14 days. Comments must be submitted by February 15, 2008. The Request for Comment explains that this change is intended to make the bankruptcy appeal period consistent with a more general time computation principle setting deadlines as multiples of seven days. The Request for Comment also seeks comment on a proposal to amend Rule 8002 to lengthen the appeal period even further – to 30 days – in order to promote consistency between bankruptcy practice and the general civil appellate deadline in Federal Rule of Appellate Procedure 4(a)(1).

The Bankruptcy Rules Task Force of the Ad Hoc Committee on Bankruptcy Court Structure and the Insolvency Process of the Business Law Section ("Bankruptcy Rules Task Force"), which is comprised of representatives of the co-sponsoring Sections, has reviewed the issues raised by the Request for Comment. This Report is the work of the Bankruptcy Rules Task Force.

Discussion

As the Request for Comment recognizes, the 10-day appeal period has been the governing rule since enactment of the Bankruptcy Act of 1898 -- more than 100 years ago. *See, e.g , Williams Bros. v. Savage*, 120 F. 497 (4th Cir. 1903) (enforcing 10-day appeal period in Bankr. Act 1898 § 25).

The reason for the 10-day time period is succinctly set forth in the Advisory Committee Note to Rule 8002: "The shortened time is specified in order to obtain prompt appellate review, often important to the administration of a case under the [Bankruptcy] Code." The Advisory Committee Note thus recognizes that in bankruptcy practice -- particularly chapter 11 practice -- unlike general civil practice, the courts not only adjudicate commercial disputes, but also have a significant role in supervising the conduct of on-going commercial entities that need to fund operations, settle disputes, sell assets, and the like.

Lenders, asset purchasers, entities funding settlements, contract assignees, and other parties in interest often require final and non-appealable bankruptcy court orders before they will fund or close significant transactions -- including exit financing for debtors emerging from chapter 11, other financing transactions, settlements during a case, and other major payments and asset transfers. Not infrequently, debtors are strapped for cash and time is of the essence.

The 10-day rule has worked well for over a century. The Sponsors are aware of no empirical data or study showing that it is "a potential trap for new or infrequent bankruptcy practitioners" -- a concern raised in the Request for Comment. To the contrary, with the advent of electronic dockets,

[1] Intermediate Saturdays, Sundays and holidays are not excluded from the computation of the 10-day period Pursuant to B R 9006, such intermediate days are excluded only when the period of time prescribed or allowed is less than 8 days

parties who have an interest in a particular order have the ability to be apprised of entry of the order on the day it is entered. The 10-day bankruptcy appeal rule is well known and practitioners in bankruptcy court, including commercial litigators, take the time to read the applicable Bankruptcy Rules, including the rules as to how to take an appeal, and avail themselves of the PACER system.

Given the long-standing 10-day rule -- which has worked well -- the addition of four days would only serve to create possible confusion and potential prejudice for cash-strapped debtors. *A fortiori*, a change to thirty days would be even more prejudicial.

The Bankruptcy Rules Committee notes that an argument made in favor of amending Rule 8002 is that "many practitioners" rely on principles of "equitable mootness" and the statutory mootness protections of §§ 363(m) [asset sales] and 364(e) [post-petition credit] "rather than the expiration of the deadline for commencing appeals, to ensure the finality of orders approving transactions." In the Sponsors' experience, however, parties in interest only infrequently rely on such "mootness" principles -- and for good reason.

For example, lenders often require a final, non-appealable plan confirmation order as a condition precedent to exit financing for debtors emerging from chapter 11. Such lenders rarely rely on equitable mootness because that doctrine is too uncertain. There is no statute that renders appeals from confirmation orders moot. The standards for mootness differ among circuits. In a leading Third Circuit decision, *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996), the court applied a five-factor test for equitable mootness of appeals from a plan confirmation order. Judge (now Justice) Alito, in dissent, calls "equitable mootness" a "curious doctrine" and states that he disagrees with the majority's upholding dismissal of a confirmation order appeal. In a leading Seventh Circuit case, *In re UNR Industries*, 20 F.3d 766, 769 (7th Cir. 1994), Judge Easterbrook, writing for the court, "banish[ed] 'equitable mootness' from the (local) lexicon," and ruled (upholding dismissal of an appeal) that the issue is "whether it is prudent to upset the plan of reorganization at this late date."

As for Sections 363(m) and 364(e), which deal with asset sales and post-petition credit, those sections do not bar or "moot" appeals to the extent the appellant asserts lack of good faith on the part of an asset purchaser or credit provider. And, as might be expected, there are additional judicially recognized exceptions to these statutes. *E.g., In re Swedeland*, 16 F.3d 552 (3d Cir. 1994) (appeal from order authorizing loan not moot to extent loan not fully disbursed); *In re Saybrook Mfg. Co., Inc.*, 963 F.2d 1490 (11th Cir. 1992) (appeal from cross-collateralization order not moot because such order not authorized by the Bankruptcy Code); *In re BCD Corp.*, 119 F.3d 852 (10th Cir. 1997) (appeal from sale order not moot because equitable relief available).

In sum, the current 10-day rule is long-established, well-known, serves a proper purpose, and works. It does not need to be fixed.

Dated: February 2008

Respectfully submitted,

Robert F. Ware
President, Ohio State Bar Association

APPENDIX B

THE BANKRUPTCY RULES TASK FORCE OF THE AD HOC COMMITTEE ON BANKRUPTCY COURT STRUCTURE AND THE INSOLVENCY PROCESS OF THE BUSINESS LAW SECTION OF THE AMERICAN BAR ASSOCIATION

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