

Hon. Erik P. Kimball
United States Bankruptcy Judge
Southern District of Florida
October 13, 2011

Proposed Amendments to
Federal Rules of Bankruptcy Procedure 7008(a) and 7012(b)
Proposed changes are shown in red with underline and strikeout.

Rule 7008. General Rules of Pleading

(a) Applicability of Rule 8 F.R.Civ.P.

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core without regard to whether the proceeding is alleged to be core or non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

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(b) Applicability of Rule 12(b)-(i) F.R.Civ.P.

Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. Without regard to whether the proceeding is alleged to be core or non-core, if the responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non core proceedings and in other

proceedings where the bankruptcy court has determined that the bankruptcy court may not enter final orders or judgments absent consent of the parties, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties. In non core proceedings and in proceedings where the bankruptcy court has determined that the bankruptcy court may not enter final orders or judgments absent consent of the parties, and in which not all necessary parties have consented, the bankruptcy court shall submit proposed findings of fact and conclusions of law to the district court consistent with 28 U.S.C. § 157(c) and Rule 9033.

Explanatory Comments

The proposed amendments to Fed. R. Bankr. P. 7008(a) and 7012(b) are intended to modify certain pleading requirements to address the recent ruling of the Supreme Court in *Stern v. Marshall*, No. 10-179, 564 U.S. ___, 2011 WL 2472792 (June 23, 2011). The revisions are intended to clarify that litigants must indicate whether they consent to entry of final orders and judgments by the bankruptcy court not only in matters alleged to be “non-core,” but also in matters defined as “core” in 28 U.S.C. § 157(b) that must be treated as “non-core” matters as a result of the *Stern* decision, and also for personal injury tort and wrongful death matters covered by 28 U.S.C. § 157(b)(5).

Rule 7008(a) presently requires that each complaint, counterclaim, cross-claim, or third-party complaint contain a statement that the proceeding is core or non-core and, if the proceeding is alleged to be non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge. Likewise, Rule 7012(b) presently requires that each responsive pleading admit or deny an allegation that the proceeding is core or non-core and, if the response is that the proceeding is non-core, include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. Thus, Rules 7008(a) and 7012(b) currently require an expression of a party’s consent or lack of consent to entry of final orders and judgments by the bankruptcy court only when the party has alleged the matter is non-core.

The existing versions of these rules are potentially inadequate in several ways.

First, under the Supreme Court’s decision in *Stern*, there are matters that are defined as core under 28 U.S.C. § 157(b) that must be treated as non-core matters. Consequently, requiring an expression of consent or non-consent only in matters specifically alleged to be non-core is not sufficient to cover all matters where consent may be required for the bankruptcy court to enter final orders and judgments. The revised language would require each party to an adversary proceeding to express its consent or lack of consent to the entry of final orders and judgments by the bankruptcy court without regard to whether any party has alleged that the matter is non-core. This will require each party to address consent in non-core matters, and also in matters such as the alleged section 157(b)(5) personal injury tort claim and the section 157(b)(2)(C) counterclaim addressed in *Stern*.

The holding in *Stern* is narrow. The Supreme Court focused its ruling on counterclaims deemed core under 28 U.S.C. § 157(b)(2)(C), and held that the bankruptcy court may not enter final orders and judgments on counterclaims unless they stem from the bankruptcy itself or will necessarily be determined in the claims allowance process. In spite of the limited scope of the holding, it is possible that the courts will apply the analysis in *Stern* to other matters defined as core in 28 U.S.C. § 157(b). The proposed revisions are intended to encompass any matter that the courts may later determine must be treated as non-core.

Second, as the Supreme Court made clear in *Stern*, although 28 U.S.C. § 157(b)(5) provides that personal injury tort and wrongful death matters must be “tried” in the district court, litigants may consent to the bankruptcy court entering final orders and judgments in such matters. The current versions of Rules 7008(a) and 7012(b) do not require the parties to express their consent or non-consent to the bankruptcy court entering final rulings on personal injury tort and wrongful death claims. The proposed revisions are intended to be broad enough to address consent to final rulings by the bankruptcy court on personal injury tort and wrongful death matters.

Third, existing Rule 7012(b) does not explicitly provide the appropriate procedure for addressing matters defined as core in 28 U.S.C. § 157(b) but that, consistent with the holding in *Stern*, are not subject to entry of final orders or judgments in the bankruptcy court absent consent of the parties. The current version of Rule 7012(b) states that in non-core proceedings final orders and judgments may not be entered on the bankruptcy judge's order except with the express consent of the parties. The existing rule applies only to those matters determined to be non-core. Under *Stern*, there are certain claims that are labeled core under 28 U.S.C. § 157(b) but that must be treated as non-core. The present text of Rule 7012(b) does not explicitly

address how the bankruptcy court should address such claims. The proposed revision requires that the bankruptcy court determine whether the proceeding may be the subject of entry of final orders and judgments in the bankruptcy court. It is appropriate that the bankruptcy court make this determination, just as the bankruptcy court must determine whether a matter is core or non-core pursuant to 28 U.S.C. § 157(b)(3). Under the proposed revision, if the determination is that the bankruptcy court may not enter final orders and judgments in the matter, and the parties have not consented, as with non-core matters the bankruptcy court may hear the matter but must submit proposed findings of fact and conclusions of law to the district court. The revision references 28 U.S.C. § 157(c) and Rule 9033, which provide further guidance on the procedure for submission of proposed findings and conclusions and the rights of the parties. By referencing section 157(c) and Rule 9033, the revision makes it clear that these procedures apply even if the proceeding is technically labeled core under 28 U.S.C. § 157(b). (It may be appropriate for the Committee to consider parallel amendments to Rule 9033.)

Lastly, the proposed revision to Rule 7012(b) strikes the word “express” from the phrase addressing the consent of the parties. 28 U.S.C. § 157(c)(2), the statutory basis for this rule and for Rule 9033, does not explicitly require “express” consent, nor does the case law addressing the issue of consent in this context. In *Stern* the Supreme Court addressed consent in two different contexts under 28 U.S.C. § 157, and in neither case did the court limit the concept of consent to any form of “express” consent. The inclusion of this word in existing Rule 7012(b) appears inconsistent with the applicable statutory and decisional law.