



Fw: Proposed Rule Change
Richard Schmidt (Bankr Judge)

12-BK-E

to:

Rules_Support

03/05/2012 05:42 PM

Hide Details

From: Richard Schmidt/TXSB/05/USCOURTS(Bankr Judge)

To: Rules_Support@ao.uscourts.gov

1 Attachment



Proposed Changes to Bankruptcy Rules DAL02 599625 2.DOC

Attached is a suggested Rules Change to provide for consent after *Stern*.

Richard S. Schmidt

----- Forwarded by Richard Schmidt/TXSB/05/USCOURTS on 03/05/2012 04:39 PM -----

From: "Eugene R. Wedoff" <erwedoff@mac.com>

To: Richard_Schmidt@txs.uscourts.gov

Date: 03/05/2012 04:37 PM

Subject: Re: Proposed Rule Change

Thanks very much, Richard. If you haven't already submitted this to the rules committee, the easiest way to do so is by email to Rules_Support@ao.uscourts.gov
This will be a big help in our discussions at the end of the month.

Gene

Eugene R. Wedoff
United States Bankruptcy Court
Northern District of Illinois
219 S. Dearborn St.
Room 748
Chicago, IL 60604-1702
voice: 312-435-5644
fax: 312-408-5114
eugene_wedoff@ilnb.uscourts.gov

On Mar 5, 2012, at 4:15 PM, Richard_Schmidt@txs.uscourts.gov wrote:

Gene

Attached is a draft of a Proposed Rule Change provides that parties must plead whether they consent to a Bankruptcy Judge entering a Final Order. Failure to so plead constitutes consent. It also provides that in any proceeding in which a Bankruptcy Judge believes he/she could not enter a Final Order, the Judge issues a Report and Recommendation to the District Court.

(See attached file: Proposed Changes to Bankruptcy Rules DAL02 599625 2.DOC)

Richard S. Schmidt<Proposed Changes to Bankruptcy Rules DAL02 599625 2.DOC>

Proposed Rule Amendments

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 setting forth the basis of referral of the proceeding under section 157(a) of title 28~~that the proceeding is core or non-core and, if non-core, and~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

(b) ATTORNEY'S FEES. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third- party complaint, answer, or reply as may be appropriate.

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

(a) WHEN PRESENTED. If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross- claim shall serve an answer thereto within 21 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 21 days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross- claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 14 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 14 days after the service of a more definite statement.

(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. If the response is that the proceeding is non-core, it 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 final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.~~

(c) CONSTITUTIONALITY CHALLENGES. Any party alleging that the bankruptcy judge cannot enter a final order or judgment based on Article III of the United States Constitution in a particular proceeding referred to the bankruptcy judge under section 157 of title 28 shall include such challenge in the answer required to be filed under subsection (a). If the answer under

subjection (a) does not contain such challenge, the party will be deemed have consented to the bankruptcy judge's authority to enter final orders and judgments in the particular proceeding.

Rule 9014. Contested Matters

(a) MOTION. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise or as required by Rule 9014(f).

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(d) TESTIMONY OF WITNESSES. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding

(e) ATTENDANCE OF WITNESSES. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

(f) DEADLINE TO RAISE CONSTITUTIONAL AUTHORITY CHALLENGE. Unless the court orders otherwise, any party alleging that the bankruptcy judge cannot enter a final order or judgment based on Article III of the United States Constitution in a particular contested matter shall file a responsive pleading containing such challenge the earlier of (1) the deadline for filing a responsive pleading by local rule or (2) 21 days of service of the motion. If a response is not timely filed containing such challenge, all parties served with the motion will be deemed have consented to the bankruptcy judge's authority to enter final orders and judgments in the contested matter.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) *Where Filed; Form and Content.* A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove ~~and~~; contain a statement setting forth the basis of referral under section 157(a) of title 28~~that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, and~~ that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge. The notice, and shall be accompanied by a copy of all process and pleadings.

(2) *Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code.* If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) *Time for filing; civil action initiated after commencement of the case under the Code.* If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) NOTICE. Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(c) FILING IN NON-BANKRUPTCY COURT. Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(d) REMAND. A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(e) PROCEDURE AFTER REMOVAL.

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the

notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) Any party alleging that the bankruptcy judge cannot enter a final order or judgment based on Article III of the United States Constitution in who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action. If the statement required by this paragraph is not timely filed, the party will be deemed to have consented to the bankruptcy judge's authority to enter final orders and judgments in the particular removed claim or cause of action.

(f) PROCESS AFTER REMOVAL. If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(g) APPLICABILITY OF PART VII. The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 21 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 21 days following the service of summons on such initial pleading, or within seven days following the filing of the notice of removal, whichever period is longest.

(h) RECORD SUPPLIED. When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(i) ATTACHMENT OR SEQUESTRATION; SECURITIES. When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final

judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.

Rule 9033. Review of Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. In ~~non-core~~ proceedings heard pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

(b) OBJECTIONS: TIME FOR FILING. Within 14 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 14 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.

(c) EXTENSION OF TIME. The bankruptcy judge may for cause extend the time for filing objections by any party for a period not to exceed 21 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing objections must be made before the time for filing objections has expired, except that a request made no more than 21 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.

(d) STANDARD OF REVIEW. The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

(e) CHALLENGES TO REFERRAL. If the bankruptcy judge determines that it cannot enter a final order or judgment consistent with Article III of the United States Constitution in a particular proceeding referred to the bankruptcy judge under section 157 of title 28 and the bankruptcy judge hears the proceeding, Rule 9033(a), (b), and (c) of the Federal Rules of Bankruptcy Procedure shall apply.