Memorandum

To: Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure

From: Alan N. Resnick
Benjamin Weintraub Professor of Bankruptcy Law
Hofstra University School of Law
alan.n.resnick@hofstra.edu

Date: March 21, 2012

Re: Suggested Amendment to Bankruptcy Rule 8013

I understand that the Advisory Committee on Bankruptcy Rules, at its meeting on March 29-30, 2012, will be considering possible amendments to the Federal Rules of Bankruptcy Procedure to deal with procedural issues raised by Stern v. Marshall, including possible amendments to Rules 7008, 7012, 9027, and 9033.

The purpose of this memorandum is to suggest that the Advisory Committee also consider amending Rule 8013. In particular, I suggest that the Advisory Committee consider the following amendment:

Rule 8013. Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact; Treatment of Judgment, Order, or Decree as Proposed Findings and Conclusions

(a) Disposition; Weight Accorded Findings of Fact. On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

(b) Treatment as Proposed Findings and Conclusions. If the appeal is to the district court and the district court determines that the bankruptcy judge did not have the power consistent with Article III of the Constitution to enter the judgment, order, or decree, the district court may treat the judgment, order, or decree as proposed findings of fact and conclusions of law. In that event, Rule 9033(b), (c), and (d) shall apply, except that the district court shall set a time for serving and filing written objections under Rule 9033(b). Any party may elect to have its appellate brief treated as objections or responses to the proposed findings and conclusions.

The reasons for this proposal are as follows:

1) If a bankruptcy court enters a final order or judgment that it did not have the power to enter, in most situations it would be more efficient for the district court to treat the order

or judgment as proposed findings of fact and conclusions of law than to remand the proceeding to the bankruptcy court for the submission of proposed findings and conclusions. The above proposal would give the district court the discretion to do so.

2) A number of district courts have been so treating judgments that should not have been entered by the bankruptcy court. Indeed, in *Stern v. Marshall* itself, the district court treated the bankruptcy court's judgment as proposed findings and conclusions and the Supreme Court did not criticize such procedure. Thus, the proposed amendment to Rule 8013 will not be a drastic change in procedures used now in some districts, but will clarify for courts and practitioners that it is acceptable for district courts to treat such judgments as proposed findings and conclusions without the need to remand the proceeding.

3) At least three district courts (Southern District of New York, District of Delaware, and Middle District of Florida) have revised their standing referral orders to clarify that the district court may treat such judgments as proposed findings and conclusions. By having a national rule to that effect, it would eliminate the need for district courts to amend their referral orders and would promote uniformity.

4) The suggested amendment to Rule 8013 would clarify that Rule 9033(a), (b), and (c) apply in such situations, and would provide that the district court shall set a deadline for parties to serve and file objections and responses to the proposed findings and conclusions. This is important because parties should have the right to either elect to let their appellate briefs stand as their objections or responses or to file new objections and responses. Since the standard of review applicable when the district court is sitting as an appellate court differs from the standard applicable when the district court uses a *de novo* review standard, parties should have the opportunity to file new objections and responses when the district court treats a judgment as proposed findings and conclusions. In those situations in which the only issues before the district court are legal issues, instead of factual issues, parties are likely to rely on their appellate briefs.

I thank the Advisory Committee for considering this proposal.