

From: Kenneth N. Klee
Sent: Friday, March 13, 2015 3:15 PM
To: Mayer, Thomas Moers
Subject: Rules Flaw

Tom,

There is an ambiguity in newly amended Rule 8018 that arises when an appellant files a stay motion (or other pre-merits brief motion) on the appellate docket. Rule 8018 requires the appellant to file its opening brief "within 30 days after the docketing of notice that the record has been transmitted or is available electronically." Ordinarily, transmission of the record from the bankruptcy court to the district court does not occur until the parties have designated and counter-designated the record in the ordinary course. However, when a preliminary motion is filed in the appellate court, the bankruptcy clerk is required to transmit a preliminary record (per Rule 8010(c)). The problem is that Rule 8018 does not make clear that the "record" to which it refers is the complete record, as opposed to any preliminary record that may be transmitted.

For example, in an appeal in which I'm currently involved, an emergency stay motion was filed in the district court on the same day the appeal was docketed. The bankruptcy court clerk transmitted a preliminary record consisting solely of the notice of appeal and the orders on appeal. Three days later, the district court entered a notice on the docket entitled "Notice of docketing bankruptcy record on appeal..." Although it seems absurd for this to trigger the 30-day clock under Rule 8018 (given that the parties had not yet designated the record below), that is arguably what the plain language of Rule 8018 provides. Given the harm that would befall us if we blew the briefing deadline, we assumed, out of an abundance of caution, that the 30-day clock began ticking on the date of the notice.

This ambiguity could be resolved by clarifying that "the record" referred to in Rule 8018 is "the complete record" or perhaps "the record, as designated pursuant to Rule 8009(a)."

Ken