

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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BANKRUPTCY RULES

January 18, 1991

Honorable Robert E. Keeton  
United States District Judge  
Room 306, John W. McCormack  
Post Office & Courthouse  
Boston, MA 02109

Dear Judge Keeton:

The purpose of this letter is to recommend that Bankruptcy Rules 5011(b) and 9027(e) be amended, on an expedited basis, as indicated in Appendix A to this letter. These amendments, which are required by the clear purpose of recent legislation, will enable bankruptcy judges to enter orders regarding certain abstention and remand motions. The Advisory Committee on Bankruptcy Rules has approved these amendments at its meeting on January 17, 1991.

The Advisory Committee recommends that the Standing Committee on Rules of Practice and Procedure approve these amendments at its meeting on February 4, 1991, without publication for public comment, so that they can be approved by the Judicial Conference and adopted by the Supreme Court as part of the comprehensive package of Bankruptcy Rules amendments that will become effective on August 1, 1991.

As you know, on December 1, 1990, the President signed the Judicial Improvements Act of 1990. Title III of the Act ("Implementation of Federal Courts Study Committee Recommendations") includes section 309 which, among other things, amends 28 USC § 1334(c)(2) and 28 USC § 1452(b).

Section 1334(c)(2), which deals with mandatory abstention regarding certain proceedings related to a bankruptcy case, has been amended as follows [new language is underlined]:

"(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action,

redesignated as Rule 9027(d) under the proposed 1991 amendments] are not amended to permit the bankruptcy court to enter orders on these motions. Currently, these rules provide that the bankruptcy judge shall make recommendations to the district court on these matters, but may not enter orders. In essence, these motions are now treated the way that non-core matters are treated under Rule 9033. The reason for limiting the bankruptcy judge's role in this manner under the present rules was the concern that it would be inappropriate for a bankruptcy judge to enter binding orders that are not reviewable by an Article III judge. By permitting appellate review by the district court, the recent legislation has removed this concern. Nonetheless, unless and until Rules 5011(b) and 9027(e) are revised to permit bankruptcy judges to enter orders on these matters, the sole purpose of the recent legislation will not be realized.

It is important to note that, technically speaking, these rules are not in direct conflict with the letter of the new legislation, although they are clearly inconsistent with its sole purpose and spirit. It is possible for the bankruptcy judge to make recommendations to the district court in accordance with the present rules, while the statutes provide that the district court's order is not appealable to the court of appeals or Supreme Court. This situation heightens the urgency for changing the rules because we can not find comfort in the belief that lawyers and courts will merely disregard Rules 5011(b) and 9027(e) on the ground that they have been overruled by the recent legislation. The only way to effectuate the clear purpose of the recent legislation is to amend these rules.

The Advisory Committee suggests, therefore, that Rules 5011(b) and 9027(e) be amended to delete the limitation on the bankruptcy judge's role and, instead, to provide that such motions are contested matters governed by Rule 9014. Bankruptcy judges will then treat such abstention and remand motions as core proceedings and will enter orders determining the motions. In addition, Rule 5011(b) should include a provision requiring service of the motion on the parties to the proceeding which is the subject of the abstention motion. Such a provision is already in Rule 9027(e).

We believe that it is important to revise Rules 5011(b) and 9027(e) without the delay that would be caused by publication for public comment. Although we always welcome public comment in connection with rules changes, we believe that the attached revisions are required in view of the recent legislation and that there could not be any controversy from the bench and bar.

I am aware of one instance of precedent for revising, without publication for public comment, a package of rules amendments after it has been approved by the Judicial Conference and prior to Supreme Court promulgation. In 1976, Chapter IX of the former Bankruptcy Act (adjustment of debts of municipalities) was amended substantially by Congress. Prior to

the statutory amendments, the rules package that had been formulated for Chapter IX cases and approved by the Standing Committee and the Judicial Conference had been sent to the Supreme Court for promulgation. After the 1976 legislation, the Reporter to the Advisory Committee on Bankruptcy Rules drafted necessary changes to the rules package and distributed them to the Advisory Committee members by mail for approval. They were then approved, without publication for public comment, by the Standing Committee and the Judicial Conference. The rules package, including the last minute revisions, was forwarded to Congress by the Supreme Court in April of 1976.

I recommend that the same procedure be followed at the present time. If the Standing Committee agrees, the attached amendments to Bankruptcy Rules 5011(b) and 9027(e) [redesignated as Rule 9027(d)] can be submitted to the Judicial Conference at its March 1991 meeting. If the Judicial Conference agrees, these amendments could then be included in the package of Bankruptcy Rule amendments currently before the Supreme Court for promulgation. They could then take effect with that package on August 1, 1991.

Respectfully submitted,

Edward Leavy  
Chairman  
Advisory Committee on  
Bankruptcy Rules

cc: Members of the Standing Committee

PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE

Rule 5011. Withdrawal and Abstention  
from Hearing a Proceeding

\* \* \* \* \*

1 (b) ABSTENTION FROM HEARING A PROCEEDING.

2 ~~Unless a district judge orders otherwise, a~~ A  
3 motion for abstention pursuant to 28 U.S.C. §  
4 1334(c) shall be governed by Rule 9014 and shall be  
5 served on the parties to the proceeding. ~~heard by~~  
6 ~~the bankruptcy judge, who shall file a report and~~  
7 ~~recommendation for disposition of the motion. The~~  
8 ~~clerk shall serve forthwith a copy of the report~~  
9 ~~and recommendation on the parties to the~~  
10 ~~proceeding. Within 10 days of being served with a~~  
11 ~~copy of the report and recommendation a party may~~  
12 ~~serve and file with the clerk objections prepared~~  
13 ~~in the manner provided in Rule 9033(f). Review of~~  
14 ~~the report and recommendation by the district court~~  
15 ~~shall be governed by Rule 9033.~~

\* \* \* \* \*

COMMITTEE NOTE

~~The words "with the clerk in subdivision (b) are~~  
~~deleted as unnecessary. See Rules 5005(a) and 9001(3).~~

Subdivision (b) is amended to delete the restriction that limits the role of the bankruptcy court to the filing of a report and recommendation for disposition of a motion for abstention under 28 U.S.C. § 1334(c)(2). This amendment is consistent with § 309(b) of the Judicial Improvements Act of 1990 which amended § 1334(c)(2) so that it allows an appeal to the district court of a bankruptcy court's order determining an abstention motion. This subdivision is also amended to clarify that the motion is a contested matter governed by Rule 9014 and that it must be served on all parties to the proceeding which is the subject of the motion.

[NOTE: THE ABOVE IS THE COMMITTEE NOTE THAT ACCOMPANIED THE PROPOSED AMENDMENT TO RULE 5011 THAT WAS APPROVED BY THE JUDICIAL CONFERENCE IN SEPTEMBER 1990, SHOWING THE CHANGES RECOMMENDED BY THE ADVISORY COMMITTEE AT THIS TIME]

Pule 9027. Removal

\* \* \* \* \*

1        ~~(e)~~ (d) REMAND. A motion for remand of the  
 2        removed claim or cause of action shall be governed  
 3        by Rule 9014 ~~filed with the clerk and served on the~~  
 4        parties to the removed claim or cause of action.  
 5        ~~Unless the district court orders otherwise, a~~  
 6        ~~motion for remand shall be heard by the bankruptcy~~  
 7        ~~judge, who shall file a report and recommendation~~  
 8        ~~for disposition of the motion. The clerk shall~~  
 9        ~~serve forthwith a copy of the report and~~  
 10        ~~recommendation on the parties. Within 10 days of~~

11 ~~being served with a copy of the report and~~  
12 ~~recommendation, a party may serve and file with the~~  
13 ~~clerk objections prepared in the manner provided in~~  
14 ~~Rule 9033(b). Review by the district court of the~~  
15 ~~report and recommendation shall be governed by Rule~~  
16 ~~9033.~~

## COMMITTEE NOTE

The abrogation of subdivision (b) is consistent with the repeal of 28 U.S.C. § 1446(d). The changes substituting the notice of removal for the application for removal conform to the 1988 amendments to 28 U.S.C. § 1446.

Rules 7008(a) and 7012(b) were amended in 1987 to require parties to allege in pleadings whether a proceeding is core or non-core and, if non-core, whether the parties consent to the entry of final orders or judgment by the bankruptcy judge. Subdivision (a)(1) is amended and subdivision (f)(3) is added to require parties to a removed claim or cause of action to make the same allegations. The party filing the notice of removal must include the allegation in the notice, and the other parties who have filed pleadings must respond to the allegation in a separate statement filed within 10 days after removal. However, if a party to the removed claim or cause of action has not filed a pleading prior to removal, there is no need to file a separate statement under subdivision (f)(3) because the allegation must be included in the responsive pleading filed pursuant to Rule 7012(b).

Subdivision (e), redesignated as subdivision (d), is amended to delete the restriction that limits the role of the bankruptcy court to the filing of a report and recommendation for disposition of a motion for remand under 28 U.S.C. § 1452(b). This amendment is consistent with § 309(c) of the Judicial Improvements Act of 1990, which amended § 1452(b) so that it allows an appeal to

the district court of a bankruptcy court's order determining a motion for remand. This subdivision is also amended to clarify that the motion is a contested matter governed by Rule 9014. The words "filed with the clerk" ~~in subdivision (e), redesignated as subdivision (d),~~ are deleted as unnecessary. See Rules 5005(a) and 9001(3).

[NOTE: THE ABOVE IS THE COMMITTEE NOTE THAT ACCOMPANIED THE PROPOSED AMENDMENT TO RULE 9027 THAT WAS APPROVED BY THE JUDICIAL CONFERENCE IN SEPTEMBER 1990, SHOWING THE CHANGES RECOMMENDED BY THE ADVISORY COMMITTEE AT THIS TIME]