ADVISORY COMMITTEE ON BANKRUPTCY RULES

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Jackson Hole, Wyoming

September 13-14, 1993

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 13-14, 1993

Jackson Lake Lodge, Wyoming

AGENDA

Introductory Items

1. Approval of minutes February 1993 meeting.

2. Report on the June 1993 meeting of the Standing Committee. [Oral presentation by Reporter; materials: "uniform texts" of Rules 8018, 9029, and 9037 and final texts of Rules 8002 and 8006 as approved at 6/93 Standing Committee meeting.]

3. Report on plans to reissue the Bankruptcy Forms Manual. [Oral report.]

Rules

4. Rule 7004 and Rule 4, FRCP; service by first class mail. Update and discussion of pending legislation on methods of service. [Materials: Reporter's memorandum dated 8/3/93; S.201; Congressional Record excerpt re: S.201; letter of Judge Keeton to Sen. Helms dated 3/10/93; section 114 of S. 540; letter of Judge Keeton to Sen. Heflin dated 3/29/93; relevant portion of testimony of Francis F. Szczebak re: S. 540 before Subcommittee on Courts and Administrative Practice, Senate Judiciary Committee 3/31/93.]

5. Rule 26, FRCP, Re: Discovery; local rule for opting out. [Materials: Reporter's memorandum dated 7/31/93; House Document 103-74.]

6. Rule 3002; update of case law and discussion of issues as framed by Judge Mannes' ad hoc subcommittee. [Materials: Reporter's memorandum dated 7/27/93 and attachments.]

7. Proposal to amend Rule 4008 to provide a deadline for filing a reaffirmation agreement. (Carried over from 2/93 meeting.) [Materials: Reporter's memorandum dated 7/27/93.]

8. Rule 8002(c); Judge Kressel's suggestion that the rule be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment. [Reporter's memorandum dated 8/5/93.]

9. Rule 1007(c); proposal to delete reference to chapter 7 in the third sentence of the rule. [Materials: Reporter's memorandum dated 8/4/93.]

10. Mr. Klee's request for discussion of "an attorney's right to obtain copies of transcripts of bankruptcy court hearings on an expedited basis." [Oral presentation by Mr. Klee.]

11. Proposals regarding amendments to Rule 9024 and Rule 7001. [Materials: Mr. Klee's letters dated 6/28/93 and 7/8/93; Reporter's letter to Mr. Klee dated 8/2/93.]

12. Proposal to amend Rule 3010 to avoid the necessity to make small distributions in chapter 11 cases. [Materials: Mr. Klee's letter dated 2/12/93.]

13. Proposal to clarify Rule 1001 regarding application of rules to "proceedings." [Presentation by Reporter.]

14. Rule 2002; proposal to amend Rule 2002(h) so that notice of the trustee's final report and account, required by Rule 2002(f)(8), would not be sent to creditors who did not file claims. [Mr. Gregorcy's letter dated 1/28/93.]

Forms

15. Report on the Supreme Court's Pioneer Investment Service Co. decision and the 1993 amendments to Official Form 9. [Materials: Reporter's memorandum dated 8/9/93.]

15a. Proposal to create a standard form of notice using plain English. [Materials: Mr. Sommer's letter dated 8/9/93, and attachments.]

16. Proposals to amend Official Form 14, Ballot. [Materials: Reporter's letter dated 8/5/93 and attached drafts.]

17. Proposal of Bankruptcy Judge Jellen to amend Official Form 5, Involuntary Petition. [Materials: Copy of Official Form 5; letter of Judge Jellen to Francis F. Szczebak dated 3/25/93; letter of Patricia S. Channon to Judge Jellen dated 4/9/93; letter of Judge Jellen to Peter G. McCabe dated 4/22/93; letter of Peter G. McCabe to Judge Jellen dated 4/29/93.]

Subcommittees

18. Report of Subcommittee on Technology.

Next Meeting

The next meeting of the Committee will be February 24-25, 1994, in Memphis, Tennessee.

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AGENDA I
Jackson Hole, Wyoming
September 13-14, 1993

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 18 - 19, 1993

Minutes

The Committee met at the Innisbrook Resort in Tarpon Springs, Florida. The following members attended the meeting:

Circuit Judge Edward Leavy, Chairman
Senior District Judge Joseph L. McGlynn, Jr.
District Judge Adrian G. Duplantier
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Ralph R. Mabey, Esquire
Herbert P. Minkel, Jr., Esquire
Henry J. Sommer, Esquire
Kenneth N. Klee, Esquire
Gerald K. Smith, Esquire
Professor Alan N. Resnick, Reporter

Two former members of the Advisory Committee also attended the meeting: Professor Lawrence P. King, and Bernard Shapiro, Esquire. The following additional persons attended the meeting:

District Judge Robert E. Keeton, Chairman, Committee on Rules of Practice and Procedure, ("Standing Committee"),
District Judge Thomas S. Ellis, III, liaison from the Standing Committee to the Advisory Committee,
Richard Heltzel, Clerk, Eastern District of California,
James Eaglin, Federal Judicial Center,
Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, ("Administrative Office"), Secretary to the Standing Committee,
John K. Rabiej, Esquire, Chief, Rules Committee Support Office, Administrative Office,
Francis F. Szczebak, Esquire, Chief, Division of Bankruptcy, Administrative Office,
Patricia S. Channon, Esquire, Deputy Assistant Chief, Division of Bankruptcy, Administrative Office, and
John E. Logan, Director, Executive Office for United States Trustees, United States Department of Justice.

Three members were absent: Circuit Judge Alice M. Batchelder, District Judge Harold L. Murphy, and Professor Charles J. Tabb. Richard Goldschmidt, Technology Enhancement Office, Office of Automation and Technology, Administrative Office, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold.**

The Chairman opened the meeting by observing that several new members had been appointed, three of whom were present, and requested that all attendees introduce themselves. (Agenda Item 1)

The Committee approved the draft minutes of the September 1992 meeting and of the March 1989 meeting. (Agenda Item 2)

Rule 7004. The Reporter informed the Advisory Committee that Senator Helms had recently introduced a bill to amend Rule 7004 of the Federal Rules of Bankruptcy Procedure. The bill would add a new subdivision (H) to the rule which would require that service on "an insured depository institution" be by "personal service on an officer of the institution." The Reporter recalled for the Committee that the major bill of 1992, which was not enacted in the rush to adjourn, also had contained a provision to amend Rule 7004. The Chairman, at the March 1992 meeting of the Committee, had requested that Professor King draft a letter opposing the amendment both on substantive grounds and procedurally, as an abrogation of the rules prescribing process. The letter, signed by Judge Keeton, was sent to the Senate Judiciary Committee.

After discussion, Judge Leavy said he would favor sending another letter opposing both the substance and the method by which Senator Helms proposed to amend the rule. Judge Keeton noted that, in addition to putting the Committee on record, a written response would supply those in Congress who support the rules process with supporting material for opposing the Helms bill. Judge Duplantier said the proposed amendment goes far beyond the problem described, but added there seemed no reason to effect service in an adversary proceeding differently than in a regular lawsuit. [Rule 4, Fed. R. Civ. P., provides for service by mail, but requires that the summons and complaint be accompanied by a notice and acknowledgment of receipt form, which must be returned for service to be effec-

tive.] Mr. Klee said a credible showing of actual consideration of the idea by the Committee would be important in defeating the amendment. Mr. Klee also stressed the urgency of the issue, as the existing bill could be tacked onto another, unrelated one and be quickly and quietly enacted. **The Chairman requested that the Reporter, in consultation with Mr. Klee, draft a letter for Judge Keeton's signature opposing this legislation on the merits, supporting the rules making process, and noting impending changes to Fed.R.Civ.P. 4 as part of the Committee's current study of the issue raised, passed unopposed.**

Mr. McCabe reported on the Judicial Electronic Date Interchange ("JEDI"), a project to prescribe standards for the electronic transmission of data between courts and parties. The JEDI standards will be useful in implementing the new Rule 9036 on electronic noticing that is scheduled to take effect August 1, 1993. Advances in electronic capabilities may lead to electronic filings in the courts and, perhaps, to electronic service. He noted that one of the features built into Rule 9036 is a requirement for acknowledgement of receipt of a notice sent electronically by the court, parallel to the option provided in Rule 4, Fed.R.Civ.P. He suggested that these developments could be mentioned in the letter to Senator Helms, as an indication that the rules already are moving in a direction that would alleviate the problem his amendment seeks to address.

Report on December 1992 Meeting of Standing Committee. The Reporter stated that the Standing Committee had approved the revisions to the Official Bankruptcy Forms as proposed by the Advisory Committee. They would be presented to the Judicial Conference in March 1993, he said, and after that become effective. Concerning the proposed amendments to Rules 8002 and 8006, he said that the language of these would track that of the Federal Rules of Appellate Procedure to which they conform with the exception that a determination of whether a motion under Rule 9024 is timely to

toll the time to appeal under Rule 8002 would be based on when the motion is filed, rather than when it is served (as in Fed.R.App.P. 4). This departure, although fully justified and not opposed by the Standing Committee, had sparked a debate about whether it is appropriate in the civil rules to measure the timeliness of post judgment motions from the date of service, Professor Resnick said. (See "Recommendation . . . .", infra.) He reported that he had made several further style changes to the text of Rules 8006 at the suggestion of the style subcommittee of the Standing Committee, and that the Standing Committee had approved a shortened publication and comment schedule for the two rules, as the amendments are conforming in nature with no controversy expected. Professor Resnick said that a public hearing has been scheduled for April 2, 1993, in Washington, D.C., but that if anyone requests to appear, the actual hearing would be handled by the Reporter and Judge Mannes, who is stationed in nearby Maryland. Professor Resnick added that any comments that come in will be resolved by mail or telephone, as no further meeting of the Advisory Committee is scheduled prior to the June 1993 meeting of the Standing Committee.

Professor Resnick also reported that an Advisory Committee on Evidence Rules had been appointed and that its membership was included in the new committee list just distributed. Lastly, he reported, the civil rules are being "styled" and will be published for comment on the proposed style changes. (Agenda Item 3)

Procedure Respecting "Style" Changes. Judge Keeton reported that the style subcommittee of the Standing Committee had found a number of ambiguities in the civil rules. He said the Advisory Committee on Civil Rules now is dealing substantively with the issues raised by the identification of the ambiguities. Judge Keeton said he wanted to reassure everyone that no style changes would be made to rules without checking with the responsible advisory committee so that it could determine whether the ambiguity involved raises a

substantive issue and deal with any substantive issue that is raised.

Proposed Amendments Requested by the Standing Committee. The Reporter referred the Committee to his memoranda dated January 13 and February 8, 1993, for the history and the texts of the proposed amendments dealing with uniform local rule numbers, technical and conforming amendments, and standing orders. The Standing Committee had requested drafts from each of the Advisory Committees and then had directed the chairs and reporters to meet and reconcile the proposed drafts to make them as uniform as possible. The January 13 memorandum shows the text that resulted from the meeting. The February 8 memorandum contains proposed Committee Notes for the amendments. The Standing Committee's style subcommittee also reviewed the drafts, and Dean Coquillette's memorandum (dated February 5) containing his recommended texts for Committee Notes shows the amendments with the style changes requested by the subcommittee.

In bankruptcy rules, the appropriate location for rules on both uniform numbering of local rules and standing orders would be Rule 9029 and 8018. In the circumstances, the Reporter said, it seemed appropriate to break the existing rule into two subdivisions, (a) and (b), and the draft would reserve subdivision (b) for the subject of standing orders. The Reporter's drafts of Rule 9029 and 8018, as contained in the Reporter's memoranda dated 1/13/93 and 2/8/93, were considered.

Rule 9029(a). Professor King and Mr. Klee said they thought line 19 of the draft rule should be amended to add that the uniform numbering system would be "for local bankruptcy rules," to prevent the bankruptcy courts from having to use a civil or criminal uniform numbering system. Judge Keeton said the Judicial Conference never prescribes anything on its own, but only what the committees propose. He said the rule is needed to give the

Judicial Conference authority to prescribe a system, but any specific system would come from the Advisory Committee responsible for the specific subject matter, through the Standing Committee. **A motion to adopt the Reporter's draft of amended Rule 9029(a) carried, unopposed.** (Agenda Item 6)

Rule 9029(b). The Reporter read the draft as changed by the Standing Committee's style subcommittee. Mr. Klee questioned the term "federal statutes" and asked if that meant one could not be sanctioned for violating case law or the Constitution, as opposed to a statute. Mr. Minkel said the draft assumes that a practitioner has access to the local rules, and that they are readily obtainable, which may not be true. **A motion to approve the draft with slight, further language changes (i.e., deleting the second "with" on line 29, and changing "federal statutes" to "federal law" wherever the former appears) carried unanimously.** (Agenda Item 6)

Rule 8018. This rule is a "mirror image" of Rule 9029, the Reporter said, except that Rule 8018 deals with local rules governing procedure in bankruptcy appeals. **A motion to approve the draft with the same changes as were made in Rule 9029, carried unanimously.** (Agenda Item 6)

Proposed Rule 9037. The Reporter read the text of his draft with the style changes. Professor King opposed including "technical" changes, because no authority is designated to decide whether a change is technical and including "technical" as a kind of change to be made without the Supreme Court or Congress opens the door to litigation over whether a particular change was technical. Mr. Klee agreed. **A motion that the Committee strongly urge Rule 9037 not be adopted carried unanimously.** Judge Mannes observed that the Standing Committee, Judicial Conference, and Supreme Court could go ahead with the proposed rule anyway and he suggested that the Committee recommend that everything after the word "typography" (on line 3) be deleted. **A motion that the Committee urge this**

suggestion as an alternative, in the event that the first suggestion is not adopted by the Standing Committee, also carried unanimously. (Agenda Item 6)

Recommendation on Amending Rules 52(b), 59(b), and 59(e) of the Federal Rules of Civil Procedure. The Reporter said the Standing Committee had asked the Advisory Committee for its recommendations concerning whether certain civil rules that now measure 10-day time periods from when a motion is "served", (or in the case of Rule 52(b), when it is "made"), should be changed to measuring from when the motion is "filed". He noted that Rule 50, Fed.R.Civ.P., uses the phrase "filed and served". He said that, as stated in his memorandum of January 13, 1993, he recommended that the Committee approve a resolution recommending that Rules 52(b), 59(b), and 59(e), (made applicable in bankruptcy by Bankruptcy Rules 7052 and 9023), be amended so that postjudgment motions must be filed not later than 10 days after the entry of judgment. **A motion was made that the Committee recommend that Rules 50, 52, and 59, Fed.R.Civ.P., be made consistent and that the 10-day time periods run from when a motion is filed.** Judge Ellis cautioned the Committee that it should concentrate on those rules that apply in bankruptcy (Rules 52 and 59) and not any which do not (Rule 50), as there may be a reason for the civil rules to use the phrase "served and filed". **The motion then was limited by consensus to Rules 52 and 59. It carried unopposed.** (Agenda Item 7)

Rule 3016(a). Professor Resnick referred the Committee to the Reporter's memorandum dated January 10, 1993, which sets forth the issues and offers three alternate solutions, one of which would be to abrogate the rule and the limits it places on the filing of competing plans. Mr. Klee observed that, although votes on a plan may not be solicited absent a court-approved disclosure statement, a plan could still be filed while the voting was in process, if the rule were abrogated. Copies of the plan could be requested and the press also might publicize its terms, thereby informing creditors

of what they might be able to get by voting "no" to the original plan. Mr. Smith recalled the history of § 1121 and said its provisions were the result of a legislative compromise; the clear intent of Congress, he said, was that the debtor's exclusive period should not be cut off prior to the times specified, but also should not be extended (and competing plans obstructed) when the period has ended. **A motion to adopt alternative (3), abrogating Rule 3016(a) and amending Rule 3017 relating to the scheduling of the disclosure statement hearing, but without the bracketed language shown in the draft, failed by a vote of three in favor to five againts (3-5).** Mr. Smith said he thinks the court should consider all plans and that § 1129(c) requires the court to do so. Mr. Klee disagreed. Both members wanted to abrogate Rule 3016(a), however. The Reporter cautioned that abrogating the rule likely would be interpreted as adoption of a position on the substantive issue of whether the court must schedule a hearing on a disclosure statement for every filed plan or can exercise discretion and thereby prevent consideration of competing plans by the creditors. He suggested as a solution that the Committee consider alternate (1), (abrogating Rule 3016(a)), but dropping the second paragraph of the draft Committee Note on the abrogation. Mr. Sommer suggested that language be added to the first paragraph stating that the Committee neither takes a position nor favors one viewpoint over the other, that abrogation of the rule does not mean the court must schedule a hearing. **A motion to adopt alternate (1), abrogating Rule 3016(a), and to include in the Committee Note a statement that the rule conflicted with the statute and that abrogation is not intended to imply that the court must schedule a hearing on every plan and disclosure statement that is filed, but rather is intended not to take a position, carried with one (1) opposed.** Judge Keeton said he thought abrogation itself "takes a position" on a substantive issue, namely, the court's authority to avoid ruling on competing plans. The Reporter drafted the following sentence to be added to the first paragraph of the Committee Note:

> The abrogation of this subdivision is not intended as an indication of any position with respect to the court's discretion in the scheduling of hearings on the approval of disclosure statements and hearings on plan confirmation when more than one plan has been filed.

Judge Ellis said he thought the Committee should take a straightforward approach and that he preferred the existing first sentence of the second paragraph of the draft Committee Note, which states that the abrogation "does not affect the court's discretion". **A motion to adopt the first paragraph plus the existing first sentence of the second paragraph of the draft Committee Note carried by a vote of six to three (6-3).** (Agenda Item 4)

Rule 4004(c). The Reporter referred the Committee to his memorandum dated 1/12/93 and described Judge Mannes' suggestion to amend this rule so that a debtor will not receive a discharge without completing all installment payments on the filing fee. **A motion to adopt the Reporter's draft amendment to add to the reasons to delay entry of a debtor's discharge the fact that the filing fee has not yet been paid in full carried unopposed.** The Reporter said he had recently received a letter suggesting a further amendment to this rule to bar entry of a discharge during the pendency of a motion to extend the time to file a complaint objecting to discharge. **A motion was made to adopt an additional amendment to this rule as follows: "(5) a motion to extend the time for filing a complaint objecting to discharge is pending".** A motion to amend the motion to restrict it to a "timely motion" died for want of a second. **The motion to adopt the amendment as drafted carried, with two (2) opposed.** (Agenda Item 5)

Rule 2015(b) and (c). The Reporter referrred the Committee to his memorandum dated 1/14/99. He said he agreed with Mr. Sommer that the rules are ambiguous with respect to the duty of a chapter 12 debtor or chapter 13 business debtor to file an inventory. **A**

motion to adopt the Reporter's draft amendments to require the chapter 12 debtor in possession and chapter 13 business debtor to file an inventory only when directed to do so by the court carried unanimously. (Agenda Item 8)

Rule 4008. The Reporter described the proposal to add a deadline for filing a reaffirmation agreement. Mr. Klee said the proposed language about chapter 11 cases filed by individuals should be deleted for two reasons: 1) corporations and partnerships also can reaffirm, and 2) the confirmation order can tie discharge to some later effective date. **A motion was made to adopt the draft amendment, and Mr. Klee proposed an amendment to the motion to delete the chapter 11 language, which amendment carried by a vote of five to two (5-2).** After further discussion about whether to amend the rule at all, **there was a motion to take up the issue at the next meeting, revisiting it from scratch, which carried by consensus. The pending motion to adopt the proposed amendment was declared moot.** (Agenda Item 9)

Recommendation Regarding Waiver of $30 Administrative Fee. The Reporter briefed the Committee on Mr. Sommer's request that the Committee recommend to the Judicial Conference that it expressly provide in the bankruptcy fee schedule for waiver of this fee based on a debtor's inability to pay. The Reporter said that, if the Committee were to approve such a recommendation, it should consider recommending that any waiver include express authority for bankruptcy judges to grant relief. He added that the Committee might also want to consider requesting that the Judicial Conference permit the fee to be paid in installments if not waived. In response to a request for a history of the fee and for procedural guidance, Mr. McCabe stated that although the Judicial Conference actually prescribed the fee, it did so in response to the appropriations process. Judge Keeton and Mr. Klee expressed concern that granting waiver authority could be an unlawful delegation by the Judicial Conference of its power to prescribe (and waive) fees.

Mr. Minkel made a motion to refer the issue to Mr. McCabe and the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"). Judge Leavy suggested tabling the matter, and Mr. McCabe observed that the issue of this fee is "not being fought on the merits." Mr. Mabey opposed tabling and stated his support for referral to the Bankruptcy Committee. He expressed concern about people who can't pay, and said he wanted assurance that someone, such as Mr. McCabe, is looking into the problem. Mr. Szczebak noted that the Bankruptcy Committee had opposed the fee entirely, as inequitable. Professor King suggested that the rule on installment payments also could be adjusted to make the debtor's burden easier, the current terms having been set when the fee was $60. **The consensus was that the matter of a waiver or authority for installment payment of the $30 administrative fee be referred to the Bankruptcy Committee.** (Agenda Item 10)

Proposals to Reduce Costs by Amending Rules 2002, 4004(g), and 6007(a). These proposals were referred by Judge Arnold, Chairman of the Budget Committee, to the Bankruptcy Committee, which referred them to the Advisory Committee. The materials transmitted included an agenda item on the subject from the January 1993 meeting of the Bankruptcy Committee. This agenda item goes through each proposal and concludes that there is no need to amend any of the rules. **The consensus of the Advisory Committee was that the Bankruptcy Committee had analyzed the issues fully and reached the proper conclusion. Accordingly, the Advisory Committee did not need to consider the proposals at this time.** Judge Duplantier said that someone should respond to Judge Arnold explaining what the Committee has done and why. (Agenda Item 11)

Rule 9002. Professor Resnick briefed the Committee about a letter from Chief Bankruptcy Judge Alexander Paskay suggesting an amendment to Rule 9002 to state that if the reference of a case or proceeding is withdrawn to the district court, papers filed after the withdrawal should be filed with the district court. Judge

Leavy questioned whether the rules or a court ought to have to say that if the case is in a certain court, papers in the case are to be filed in that court. **A motion to table the suggestion carried unopposed.** Mr. Klee said he wanted the Reporter to look into adding "proceedings" to Rule 1001 more explicitly than at present so there is no question that the Bankruptcy Rules apply whenever a bankruptcy matter is before the trial court, regardless of whether a district judge or a bankruptcy judge is presiding. (Agenda Item 12)

Rule 4003(b). The Reporter stated that Judge Edith Jones had requested that the Committee consider whether to amend Rule 4003(b) in response to the Supreme Court's holding in Taylor v. Freeland & Kronz, in which the Court held that a chapter 7 trustee could not contest the validity of a claimed exemption after the 30-day period for objecting had expired. The Committee declined to take any action to amend the rule. (Agenda Item 17)

Form 14. Ballot for Accepting or Rejecting Plan. Judge Jones had requested at the September 1992 meeting that the Committee consider whether to amend the ballot form to eliminate the language about competing plans if only one plan were being voted on. The Reporter presented a draft form with instructions added authorizing deletion of the material relating to a competing plan if there is only one plan. A motion was made to adopt the amendment drafted by the Reporter. Mr. Klee said he is dissatisfied with another part of the form that invites creditors who accept more than one plan to state their preferences among the plans. Mr. Klee said he thinks this violates § 1129 of the Code, which requires the court to consider the preferences of creditors, not just accepting creditors. Accordingly, the form should be amended to permit creditors who vote against one or more plans to express their preferences also, he said. By consensus the matter of amending the ballot form was passed to the next meeting for more complete consideration. (Agenda Item 13)

Report of Ad Hoc Subcommittee on Rule 3002. Judge Mannes said the subcommittee recommends that the Committee revisit Rule 3002 with a view toward unlinking the allowance of a claim from the timeliness of its filing. Judge Meyers said he also would like to define "timely" and "tardy". Judge Mannes distributed copies of his letter to Judge Leavy containing the recommendation and of a letter of Professor King, solicited by the subcommittee, giving Professor King's views on whether any amendment is necessary. Noting that the discussion focussed on chapter 13 cases, Mr. Klee said he is concerned about a possible "spillover" effect on tardily filed claims in chapter 11 cases. The chairman directed that the matter be placed on the agenda for the next meeting. (Agenda Item 16)

Report of Subcommittee on Local Rules. Patricia Channon presented a proposed uniform numbering system for local bankruptcy rules. The system would replace the second digit of the national rule number, which is always a zero, with another numeral (2-9) to indicate that a rule is a local rule. Mr. Shapiro said several policy issues remain, which are stated in the written report distributed to the members. Among these, he said, is what to do about local rules that do exist but should not. An example would be local rules related to former Rule 5008, Investment of Estate Funds, which was abrogated as being within the operational responsibility of the United States trustee. Yet local rules on this subject remain. (Agenda Item 15)

Report of Technology Subcommittee. Mr. Heltzel reported that preparations are going forward for three pilot courts, under the auspices of the Committee as approved at the September 1992 meeting, to test implementation of new Rule 9036, which is expected to become effective August 1, 1993. Mr. Heltzel said he would be meeting in March 1993 with representatives of Sears, Citibank, Bank of America/Security Pacific, and the IRS, and that so far these creditors are very enthusiastic. Mr. Heltzel said he would report further to the Committee before August 1, 1993. Mr. Klee said he

was concerned that under proposed Rule 9036 a private entity such as a law firm could be compelled by the court to give notice electronically. Judge Barta explained that the rule contemplates that the clerk, rather than a law firm, would be making any electronic notice transmissions and that the rule requires the court to approve any agreement to give notice in this manner.

Judge Barta reported that the Judiciary is moving ahead in the effort to establish standards for electronic transmissions involving courts, the Electronic Data Interchange (EDI) project. He said the technology subcommittee had arranged for a presentation on EDI to be given later in the meeting. Judge Barta said the subcommittee was continuing to consider proposing amendments that would authorize electronic filing of documents, permit a clerk who had converted a document to electronic form to destroy the paper original, and provide evidentiary effect for electronic data in the court's files.

Judge Barta also reported that there would be on the discussion calendar for the March 1993 session of the Judicial Conference a set of guidelines for facsimile filing with the court. The guidelines were put forward by the Committee on Court Administration and Case Management, and copies were distributed by Judge Barta. The Committee on Automation opposes the guidelines. Judge Keeton inquired whether the Committee had any comments. Judge Leavy said he is opposed to facsimile filing and believed the Committee already was on record as opposed. Professor Resnick noted that Rule 5(e), Federal Rules of Civil Procedure already permits filing of pleadings by facsimile in adversary proceedings "consistent with" any Judicial Conference guidelines. Mr. Klee said there is strong desire by the bar to use facsimile; he said he thought an appropriately high filing fee, such as $5,000 to $10,000, should enable a willing litigant to file by facsimile. Several persons said that experimentation should be allowed, even encouraged, and that some items, such as pictures, can not be

transmitted electronically at present, except by facsimile technology. Judge Keeton said he did not want others taking actions that affect the rules without consulting with the rules committees, and that these guidelines do affect rules, e.g., by permitting courts to establish a filing date based on only a partial transmission. **A motion to oppose the facsimile guidelines carried unanimously.**

Judge Leavy said the technology subcommittee should be looking at the rules from two standpoints, technology that already exists and technology that will exist soon. Mr. Minkel added that he would like the subcommittee also to familiarize itself with all that is now being done, e.g., by third party contractors in the area of claims processing, some of which may not be in conformity with the rules, and recommend whether the rules should be changed. Mr. Klee said that, despite the expressed opposition to facsimile filing, he would like the subcommittee to examine the signature issue in connection with filing by facsimile and subsequent replacement with an original. (Agenda Item 14)

Presentation on Electronic Data Interchange. Mr. Richard Goldschmidt of the Administrative Office described the Electronic Data Interchange process and the participation of the Judiciary in developing a standard to be known as the Judicial Electronic Data Interchange (JEDI). Achieving a standard for JEDI will facilitate electronic filing of documents by the courts. Mr. Goldschmidt said that experience to date has shown that it is hard to get attorneys to participate in electronic filing experiments, due in part to the expenses they incur for new software. Accordingly, it is helpful to offer incentives to participate, such as longer filing hours and access to the court's database for searching of electronically filed documents.

Mr. Goldschmidt also raised several issues that the subcommittee and the Committee will need to examine.

One issue is whether the electronic version of an official form requires approval by the Judicial Conference or could simply be considered as being in a different format. Judge Duplantier said he thought approval may be necessary. Mr. Minkel said conversion to electronic format would be like translating the forms into Chinese. "You need someone who speaks Chinese," he said, in order to know if the job has been done properly. Professor King said there were other matters also to be resolved. One is a definition of filing and what would be required to accomplish filing. A second issue is timing and timely filing, when is something filed and how the time of filing would be determined.

A second issue is how to handle the signature requirement on electronically filed documents. Judge Leavy said he thought this could be handled by an agreement with a filing law firm that says "anyone from this firm who transmits over computer is responsible under Rule 11." He added that he hoped the Committee would "not let Rule 11 slow us down" in moving toward electronic filing. Additional issues include "the creditor name problem" and whether it really is necessary to file claims with the court, since it is the trustee or the debtor in possession who is charged with examining claims. The issue over creditors' names arises because debtors identify institutional creditors, such as Sears and Citibank, by a variety of different names, spellings, and capitalizations. A human looking at a schedule or creditor list can interpret these variations more readily than a computer can. Accordingly, the developers of the computer systems would like to be able to limit the number of variations debtors could use for the names of frequently listed creditors, such as Sears. A related problem, one that arises especially in connection with accomplishing noticing through a centralized facility, is that the zip codes given for creditors on lists and schedules filed by debtors often are incorrect. Without the correct, nine-digit zip code postal rate savings can not be maximized. Although software exists that will supply the correct zip code for any address in the country,

there is no authority for the clerk to alter an address supplied by a debtor.

Mr. Minkel said it is important to see how all the electronic pieces will translate into reality, to see the products --- what the judge, the attorney for the debtor in possession, and the creditor will actually see. The Committee agreed and requested that the technology subcommittee put together a presentation on developments in electronics for a future meeting. Judge Ellis said he thinks all the advisory committees should see the presentation. Judge Leavy agreed and suggested that all the advisory committees could meet together with the Standing Committee for this purpose.

United States Trustee Program. Mr. Logan referred to the memorandum about expediting the closing of chapter 7 cases recently sent to bankruptcy judges by Judge Lloyd D. George, chairman of the Committee on Administration of the Bankruptcy System. Mr. Logan said the United States trustees can not move as decisively toward closing cases or applying the scrutiny contemplated in the Memorandum of Understanding to chapter 11 cases. The Committee discussed chapter 11 closings generally and noted the tension between the Committee's position of record, as expressed in the 1991 Committee Note and amendment to Rule 3022 --- that cases should be closed when fully administered --- and the continued reluctance of attorneys to move to close cases that might later have to be reopened. Mr. Shapiro contrasted the former practices, under which the trustee filed a statement of indebtedness listing every claim and how it was disposed of, with the whole case being audited and the trustee or debtor called to account, and today, when the cases are more complicated, checks are issued electronically, and oversight is not as feasible. Mr. Minkel noted that under the former Chapter X, the trustee needed to get the trustee's bond released and, accordingly, had an incentive to close the case.

Withdrawn Matters. A proposal by Judge Mannes to amend Rule

4004(a) and a request by Judge Barta to consider amending the subpoena form were withdrawn by their proponents.

Respectfully Submitted,

Patricia S. Channon

AGENDA II
Jackson Hole, Wyomir
September 13-14, 19

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

August 4, 1993

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

The Standing Committee has directed the publication for public comment of uniform rules on local rules, standing orders, and technical amendments. The published package will include the attached proposed amendments to Bankruptcy Rules 9029, 8018 and 9037.

I am also distributing the proposed amendments to Rules 8002 and 8006 that were approved by the Standing Committee in June and that will be before the Judicial Conference next month.

These materials are being distributed for your information. No action is required at this time.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

Rule 9029. Local Bankruptcy Rules; Procedure When There is No Controlling Law

(a) Local Bankruptcy Rules. Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement. ~~In all cases not provided~~

~~for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.~~

(b) Procedure When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished actual notice of the requirement in the particular case.

COMMITTEE NOTE

This rule is amended to require that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Subdivision (a) is also amended to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of -- or forgetting-- a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. This proscription is narrowly drawn -- covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party

if it or its attorney contumaciously or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that a party demand a jury trial within a specified time period to avoid waiver of the right to a trial by jury.

This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with federal law, with rules adopted under 28 U.S.C. § 2075, with Official Forms, and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Rule 8018. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

(a) Local Rules by Circuit Councils and District Courts. Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court~~, not inconsistent~~ consistent with, but not duplicative of, the rules of this Part VIII. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals. ~~In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner not inconsistent with these rules.~~

(b) Procedure When There is No Controlling

Law. A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the circuit council or district court. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the circuit counsel or district court unless the alleged violator has been furnished actual notice of the requirement in the particular case.

COMMITTEE NOTE

The amendments to this rule conform to the amendments to Rule 9029. See Committee Note to the amendments to Rule 9029.

Rule 9037. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

AGENDA III
Jackson Hole, Wyoming
September 13-14, 1993

ORAL PRESENTATION

AGENDA IV
Jackson Hole, Wyoming
September 13-14, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 7004 - SERVICE BY MAIL

DATE: AUGUST 3, 1993

Rule 7004 governs service of process in adversary proceedings. Pursuant to Rule 9014, Rule 7004 governs service in contested matters (motions) and, pursuant to Rule 1010, Rule 7004 also governs service of process in involuntary cases. The most significantly feature of Rule 7004 is that it allows service of process by first class mail. In bankruptcy proceedings, service by ordinary mail has been permitted since 1976 and it is my belief that the system has worked well in general. The current rule results in service that is less expensive and less time consuming than personal service.

The remainder of Rule 7004 incorporates by reference many of the subdivisions of Civil Rule 4. Numerous amendments to Rule 4, including controversial ones, have been proposed and debated during the past few years. In 1989, a package of amendments to Rule 4 was published for public comment. Because of the uncertainty regarding the timing and substance of amendments to Rule 4, Bankruptcy Rule 7004(g) was added in 1991 to "freeze" the rule as it applies in bankruptcy proceedings. By adding Rule 7004(g), the Advisory Committee was making sure that it would have adequate opportunity to decide whether, and to what extent, any future changes to Rule 4 should apply in bankruptcy.

Finally, the Supreme Court has promulgated substantial

revisions to Rule 4 in April 1993. One important change is designed to encourage use of the existing procedure by which a plaintiff may, by first-class mail, request a defendant to waive personal service. Under the amendments, if service is waived, the defendant is given 60 days to file an answer (as opposed to the 20-day answer period). In addition, the Rule 4 amendments completely restructures the rule by changing and rearranging subdivision numbers as well as making substantive changes.

The Rule 4 amendments have been forwarded to Congress together with other amendments (including controversial changes to Rule 26 on discovery and Rule 11 on sanctions). If these amendments become effective on December 1, 1993, as contemplated, it would be appropriate for the Advisory Committee on Bankruptcy Rules to carefully consider the amendments to Rule 4 with a view toward abrogating Rule 7004(g) and incorporating the parts of the revised Rule 4 that should be applicable in bankruptcy proceedings. This has been the Committee's intention since first proposing Rule 7004(g).

Another factor that could affect the timing of the Advisory Committee's review of Rule 7004 is that the Style Subcommittee of the Standing Committee is engaged presently in a project to revise all of the Civil Rules. A draft of the revised Civil Rules is scheduled to be completed by the end of December 1993. I recently discussed the project with Bryan Garner, consultant to the Standing Committee, and he indicated that it was probably unlikely, but possible, that subdivision numbers in Rule 4 may be

changed further in view of the Style Subcommittee's work.

In the ideal world, it probably would make sense to review and propose changes to Rule 7004 only after the 1993 amendments to Rule 4 become effective and we receive a draft of the Style Subcommittee's improvements to Rule 4.

Pending Legislation

However, there are two pending bills that might result in amendments to Bankruptcy Rule 7004 before we have an opportunity to carefully review it in view of the amendments to Rule 4. S.201 would require personal service (not service by first class mail) on financial institutions. S.540, a comprehensive bankruptcy bill, would amend Rule 7004 to provide for certified or registered mail service, not ordinary first class mail, on any corporation, partnership, or unincorporated association. Copies of these bills are attached.

At the February 1993 meeting of the Committee, we discussed S. 201 and the Advisory Committee decided to assist Judge Keeton in the preparation of a letter in opposition to the bill. I enclose a copy of Judge Keeton's letter regarding S. 201. Ken Klee and I had input in the drafting of Judge Keeton's letter.

After the February meeting, S. 540 was introduced. Frank Szczebak of the Administrative Office testified at a hearing on S. 540 before a subcommittee of the Senate Judiciary Committee. A copy of the relevant testimony is enclosed. As Frank pointed out, a proposal to provide for service by certified or registered mail in Civil Rule 4 was heavily criticized and was finally

rejected by Congress in 1983.

As I indicated above, in view of the possibility that Congress may take action regarding the proposed amendments to the Civil Rules, and the Style Subcommittee's project to revise the Civil Rules which could produce further changes to subdivision numbers of Rule 4, I think that a comprehensive review of Rule 7004 by the Advisory Committee should await the February 1994 meeting. However, in view of the pending legislation, the Committee may wish to accelerate consideration of Rule 7004 by having a preliminary discussion regarding the merits of continuing the availability of service by first-class mail. For that reason, consideration of Rule 7004 is on the agenda for the September meeting.

103D CONGRESS
1ST SESSION

S. 201

To amend Bankruptcy Rule 7004 to require that service of process on an insured depository institution be made by personal service on an officer of the institution.

IN THE SENATE OF THE UNITED STATES

JANUARY 26 (legislative day, JANUARY 5), 1993

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Bankruptcy Rule 7004 to require that service of process on an insured depository institution be made by personal service on an officer of the institution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SERVICE OF PROCESS IN BANKRUPTCY PROCEEDINGS ON AN INSURED DEPOSITORY INSTITUTION.

Rule 7004 of the Bankruptcy Rules is amended—

(1) in subsection (b) by striking "In addition" and inserting "Except as provided in subdivision (h), in addition"; and

(2) by adding at the end the following new subdivision:

"(h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION.—Notwithstanding any other provision of this rule or any other rule or law, service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) shall be made by personal service on an officer of the institution.".

O

By Mr. HELMS:

S. 200. A bill to amend title 18, United States Code, to establish fair competition between the private sector and the Federal Prison Industries, to the Committee on the Judiciary.

FEDERAL PRISON INDUSTRIES REFORM ACT OF 1993

Mr. HELMS. Mr. President, I am once again offering legislation to reform the Federal Prison Industries, also known as UNICOR, by amending the statute which presently allows prisons to borrow money from the U.S. Treasury and receive a preference when selling prison-made products to the Federal Government.

Mr. President, Federal Prison Industries is, in fact, a very large corporation. It is engaged in the business of making chairs, tables, desks, and other office products. It uses Federal prisoners to manufacture these items. It borrows money from the Government to finance its activities then sells the products to the Federal Government.

What originally started out as a teaching program for prisoners has now become a corporate giant.

Mr. President, Congress has created a Government-operated company which has a clear competitive edge over private companies. Because of the preference given to it by the Congress, Prison Industries can even keep the Government from giving contracts to private manufacturers.

If that weren't enough, Mr. President, prison products need not even meet the same quality standards which are required of the private sector. This is a multi-million-dollar industry making furniture that the Government must buy without adherence to the high quality expected of products purchased from the private producers.

Mr. President, we must get rid of the preference which Prison Industries receives in securing Government contracts. In other words, Federal Prison Industries receive a special Government benefit at the expense of a lot of hard working people across the country. That does not make sense.

When borrowing authority is extended, small businesses across the country could be destroyed. Prisons hold a clear advantage over any business they care to compete with because they receive preference on all Government contracts they choose to bid on. That is to say Prisons are given a right of first refusal.

Mr. President, as I said earlier this is not a small corporation. In 1990, UNICOR sales represented 25 percent of Federal office furniture purchases. In the same year total sales of prison furniture to the Government went up 14 percent while private sector sales to the Government increased only 0.7 percent.

In fiscal year 1990, metal and wood product sales of Prison Industries were $136.5 million. This would make Prison Industries the 16th largest U.S. furniture manufacturer in terms of sales.

IN addition to the competition from UNICOR, the furniture industry also faces competition from prison systems at the State level, as well as billions of dollars entering our Nation from abroad.

Mr. President, we are talking about an industry which claims a net worth over $250 million. Despite that, the Bureau of Prisons continues to add factories to its already enormous industrial plant. How many corporations can boast of a capacity like that?

Nobody is opposed to prisoner training. Certainly, Mr. President, I am not, but this corporation goes far beyond the intent of the original training program. For example, one-quarter of the furniture in this country is manufactured in North Carolina. Prison Industries is out there competing with companies which are already under assault from foreign competition. Think about it: Men and women in North Carolina, and Michigan, and South Carolina, are being put out of work by an agency of the Federal Government—the Federal Bureau of Prisons. We must not allow this to continue.

This legislation institutes four simple reforms designed to bring some fairness to our domestic industries:

It sunsets the borrowing authority in 3 years which will allow us to study the effect this measure has had on business competing with Prison Industries.

It does away with the Prison Industries contract preference so that all of our businesses may compete for Federal contracts on an equal footing.

It requires Prison Industries to comply with GSA standards. The public should know that its tax dollars buy only the best products.

It requires the President to appoint a representative of the effected industries, the people who speak for the furniture and textile companies, to sit on the board of directors. We need to make sure that Prison industries do not undercut the private sector.

Mr. President, I cannot emphasize how important these reforms are. This legislation has received the support of the U.S. Chamber of Commerce, the American Furniture Manufacturers Association, and the National Federation of Independent Business. They understand the illogic of having the Federal prison system get special treatment in the marketplace. We cannot continue to penalize the hard-working, law-abiding people of our country. I urge Senators to support this legislation.

Mr. President, I ask unanimous consent that the entire text of this legislation be printed in the RECORD at the conclusion of my remarks.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 200

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the "Federal Prison Industries Reform Act".

SEC. 2. FEDERAL PROCUREMENT STANDARDS.

Section 4124(a) of title 18, United States Code, is amended—

(1) by striking "shall" and inserting "may" in the first sentence, and

(2) by inserting after the first sentence the following: "In no event shall such a purchase involve a product which does not otherwise meet the same or equivalent quality standards which would be applied by the General Services Administrator to a comparable product if purchased from a private sector source or vendor.".

SEC. 3. BOARD OF DIRECTORS COMPOSITION.

Section 4121 of title 18, United States Code, is amended by inserting at the end thereof the following:

"Not later than 120 days after the date of enactment of this sentence, the President shall appoint one additional member of the Board of Directors of Federal Prison Industries from a list of not more than 5 persons provided by the following organizations: the Chamber of Commerce of the United States, the National Federation of Independent Business, the American Furniture Manufacturers Association, the Printing Industries of America, and the National Association of Wholesale Distributors.".

SEC. 4. EXPIRATION OF BORROWING AUTHORITY.

Section 4129(a)(1) of title 18, United States Code, is amended in the second sentence by striking "authorized" and inserting " authorized, for 3 years after the date of enactment of this amendment,".

By Mr. HELMS:

S. 201. A bill to amend bankruptcy rule 7004 to require that service of process on an insured depository institution be made by personal service on an officer of the institution; to the Committee on the Judiciary.

BANKRUPTCY PROCEEDINGS SERVICE OF PROCESS ACT 1993

Mr. HELMS. Mr. President, I am today introducing a bill to address a problem brought to my attention by one of North Carolina's foremost bankers, Mr. William L. Burns, Jr., president of Central Carolina Bank in Durham.

A few years ago, Bill Burns discussed with me the problems created for banking institutions by the provisions of the rules of bankruptcy procedure governing service of process in bankruptcy adversary proceedings. Specifically, the rules provide that service of process against a bank by an individual or company filing bankruptcy can be accomplished by simply sending a letter by first class mail to a managing agent of the bank.

This process automatically puts a bank at a disadvantage because, first, a legal document received in the large volume of regularly delivered mail received in a bank's many branches is much less likely than certified or registered mail to receive the necessary prompt attention; and second, the person at the bank to whom the letter is addressed often does not have sufficient authority to ensure a response within the time period required by the Bankruptcy Code.

While banking institutions have an interest in seeing this process made more fair, so do the American taxpayers—since they are the ones who ultimately insure most of the deposits in

these institutions. So, today, I am introducing legislation which will make this process more fair to all involved, and help ensure that justice is served in bankruptcy proceedings.

This legislation is similar to—but not identical to—a provision I proposed to members of the Judiciary Committee which was included in the bankruptcy reform bill (S. 1985). The provision amended rule 7004(b) of the bankruptcy rules to require that service of process in a bankruptcy proceeding be accomplished by certified or registered mail.

I was pleased the Judiciary Committee included this provision in their bankruptcy reform bill. And while their bill—including the Helms provision—passed the full Senate, it failed to get enacted in the rush of business accompanying the final hours of the 102d Congress.

Mr. President, shortly after the Helms provision was approved by the Judiciary Committee, that committee received a letter of opposition from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

I have since revised my proposed legislation to help meet the objections of the Committee on Rules and Practice, specifically by applying the new provision to service of process only in those instances it is made upon a federally insured depository institution. The legislation I am introducing includes these revisions.

Mr. President, this is obviously a general overview of an issue involving some very technical legal issues. Senators may wish to take a moment—or have their staffs take a moment—to review this issue in more detail by reading the following items, which, Mr. President, I ask unanimous consent to be printed in the RECORD at the conclusion of my remarks:

First, a letter dated September 26, 1991 from Mr. Richard Prentis, Jr., of the Durham, NC, law firm of Stubbs, Cole, Breedlove, Prentis & Biggs to Bill Burns outlining the problems created by the current service of process procedure and discussing proposed improvements to the procedure.

Second, the letter from Robert E. Keeton, chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to our colleague and chairman of the Senate Judiciary Committee, JOE BIDEN, outlining the advisory committee's objections to the service of process revisions including in the committee's bankruptcy reform bill.

Third, a letter from Mr. Prentis to Mr. Burns dated December 7, 1992, responding to the arguments made in the aforementioned letter from Mr. Keeton to Senator BIDEN; and,

Fourth, the text of the bankruptcy process reform legislation I am introducing today.

Mr. President, this is an issue of simple fairness: Banks—most of the deposits of which are guaranteed by the American taxpayer—should be provided a reasonable opportunity to respond to court documents when involved in a bankruptcy adversary proceeding. Under current rules of bankruptcy procedure, they often are not afforded this opportunity—which is why the legislation I introduce today is so necessary.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 201

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SERVICE OF PROCESS IN BANKRUPTCY PROCEEDINGS ON AN INSURED DEPOSITORY INSTITUTION.

Rule 7004 of the Bankruptcy Rules is amended—

(1) in subsection (b) by striking "In addition" and inserting "Except as provided in subdivision (h), in addition"; and

(2) by adding at the end the following new subdivision:

"(H) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION.—Notwithstanding any other provision of this rule or any other rule or law, service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) shall be made by personal service on an officer of the institution.".

STUBBS COLE, BREEDLOVE, PRENTIS & BIGGS,
Durham, NC, September 26, 1991

WILLIAM L. BURNS, Jr.,
President, Central Carolina Bank and Trust Co. Durham, NC.

DEAR BILL: You have asked me to articulate my concerns and opinions relating to service to process against a bank in a bankruptcy adversary proceeding. An "adversary proceeding" is simply a lawsuit with one or more plaintiffs and one or more defendants which is brought under the jurisdiction of the United States Bankruptcy Court and within the overall context of a pending bankruptcy case. Typically, the plaintiff in such an adversary proceeding will be the Trustee for the Debtor in the bankruptcy proceeding who is seeking some affirmative relief against some third party such as an attempt to recover money to be added to the assets of the bankruptcy estate.

Although the "adversary proceeding" is an expedited procedure since it is brought under the jurisdiction of the Bankruptcy Court rather than through the normal federal court system or through the state court system, the impact of such a proceeding has the same consequences as any litigation in any court.

Rule 7003 of the Rules of Bankruptcy Procedure provides that a Summons and Complaint in an adversary proceeding can be served simply by mailing by first class mail "to the attention of an officer, a managing or general agent." Thus, under this Bankruptcy Rule, the courts have permitted service of process against a bank simply by the mailing by first class mail to "managing agent" of the bank. We have been extremely concerned that such service of process for a Summons and Complaint which may seek significant affirmative relief, and which certainly requires a timely response, may not be addressed to a person of specific enough authority to insure a prompt response.

I understand that in reviewing a possible legislative revision of this liberal service of process Rule, concerns have been raised that any revision of the Rule remain consistent with the normal Rules of Civil Procedure. In response to that legislative concern, I believe the following points should be addressed.

1. The Federal Rules of Civil Procedure, which govern the filing of a Summons and Compliant in the United States District Court, also permit service upon a domestic or foreign corporation by delivery of a copy of the Summons and Compliant "to an officer, a managing or general agent . . . by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid)." However, the Federal Rules of Civil Procedure contain a "safeguard" which, in Rule 4(c)(2)(C)(ii), further provides as follows:

The mailing of the Summons and Complaint must also be accompanied by "two (2) copies of a notice and acknowledgment . . . and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be made by personal delivery by either a deputy United States Marshal or by some other individual who is not a party and who is not less than eighteen (18) years of age.

In other words, even the Federal Rules of Civil Procedure provide that if an attempt is made to serve a Summons and Complaint only by first class mail, the plaintiff must receive an acknowledgment from the defendant that the defendant has been served or the service is deemed ineffective and must be served in person by an individual or a deputy marshal.

2. It is our recommendation that the Rules of Bankruptcy Procedure be amended to at least provide for the addition of the "safeguard" provision as contained in the Federal Rules of Civil Procedure as outlined above. More importantly, we do not feel it would be burdensome upon a plaintiff in a bankruptcy adversary proceeding or the Bankruptcy Court to require that in the case of service of process upon a federally insured banking institution, the plaintiff be required to deliver the document by mail or in person to a specifically named officer of that bank rather than to an unnamed individual merely specified as "managing agent." We believe the amendment to the Rules of Bankruptcy Procedure should provide for this special consideration for banking institutions for the following reasons:

(a) Banks are inherently large institutions with multiple offices, multiple mailing addresses and with individuals in charge of those various offices of varying degrees of experience and responsibility. Service of process upon a banking institution cannot be compared and should not be the same as service of process upon the typical corporation;

(b) the very nature of banking business results in a very high volume of mail and mere service of process by first class mail to an undesignated person inherently contains a great potential of error;

(c) As a federally insured institution, there is a general taxpayer and public interest in insuring that banks are protected against unfair entry of default on filed claims and unnecessary losses.

3. Finally, we think it should be emphasized that the problems which are outlined in this letter will only increase with time. As the trend toward larger banks through merger, acquisition, and normal growth continues, the problem of service of process by mere mail delivery will become increasingly more severe. At the same time, bankruptcy filings are increasing dramatically, bankruptcy proceedings are becoming more litigious, and more theories are being developed for the assertion of claims against banks, including a growing body of law in the area of

lender liability, preferences, and violations of governmental regulations.

In summary, the filing of an adversary proceeding Summons and Complaint against a bank in a bankruptcy procedure can carry consequences as significant as the initiation of any litigation in any court against a bank. In order to insure that the bank at least has an opportunity to challenge the plaintiff's allegations and to raise appropriate defenses, the Rules of Bankruptcy Procedure should be modified so as to insure that the plaintiff in such an adversary proceeding is required to prove that, in fact, a responsible officer or agent of the bank received actual notice and knowledge of the filing of the litigation. Expansion of the Federal Rules of Bankruptcy Procedure to include the "safeguard" provision of the Federal Rules of Civil Procedure, and further expansion to require delivery of a summons and complaint to a specific officer of a federally insured banking institution would provide at least the assurance that the bank has received notice that it is a defendant in litigation.

I hope these thoughts are of assistance to you and that you will not hesitate to give me a call if I can address any other concerns or elaborate further upon the points made in this letter.

Sincerely yours,

RICHARD F. PRENTIS, Jr.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES,

Washington, DC, March 26, 1992.

Hon. JOSEPH R. BIDEN, Jr.
Chairman, Committee on the Judiciary, United States Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Senate Judiciary Committee reported out S. 1985, the National Bankruptcy Review Commission Act on March 19, 1992. Section 407 of the pending legislation would amend Bankruptcy Rule 7004(b)(3) to require that service of a complaint and summons upon a corporation in an adversary proceeding be accomplished by certified mail with a return receipt. Under the present rule, service of process in such cases can be made by any form of first class mail, without requiring a return receipt.

Rule 704, the predecessor of 7004(b)(3) of the Bankruptcy Rules of Procedure, was amended in 1976. Prior to the amendment, the rule did require service of process by first class mail with a return receipt. Experience with that procedure, however, proved unsatisfactory. Although the defendant's correct address was used, oftentimes the defendant was unavailable to the delivering postman, either to sign or refuse delivery. This created a good deal of confusion and delay in the litigation process. The rule was amended in 1976 to correct this problem and to permit service of process by first class mail.

The 1976 amendment to rule 704, now set forth as rule 7004(b)(3), has worked well. In most adversary proceedings, the corporation that is served process under rule 7004 is already part of the bankruptcy litigation. The corporation's correct address has been identified and notices of other proceedings in the bankruptcy litigation have been mailed and received by the corporation. As a result, misdirected mailings are infrequent. The change proposed in section 407 is ill-advised and could result in substantial and unnecessary cost to the debtor's estate, thereby reducing the amount available to creditors.

The proposed amendment would reinstitute a procedure that historically proved troublesome and would recreate the problems that had been corrected. In addition, the amendment conflicts with the Rules Enabling Act, 28 U.S.C. §§2071-2077, which provides a formal rule-making process that ensures that each proposed new rule or rule amendment receives wide and critical review. Under the Act, any proposed change to the rules must be published and circulated to the bench and bar, and to the public generally, for comment and suggestion. Public hearings on all proposed changes to the rules are held in most cases. Thereafter, rule changes are promulgated only after the Congress has had an opportunity to review them and has taken no action to defer or otherwise alter them following adoption by the Judicial Conference and the Supreme Court of the United States.

Section 407 of the pending legislation would in effect amend the Federal Rules of Bankruptcy Procedure outside the procedures of the Rules Enabling Act. I am aware of no reason why the normal process should be avoided in this instance. The Judicial Conference's Advisory Committee on Bankruptcy Rules is responsible to carry on a continuous study of the operation and effect of the bankruptcy rules of procedure. Although there has been no demonstrated need for a change in rule 7004(b)(3), the Advisory Committee will take the proposed change under consideration. To allow the proposed rule change to be considered in accordance with established procedures, I request that section 407 be deleted in the final version of the bill.

I appreciate your consideration of this request.

Sincerely,

ROBERT E. KEETON,
Chairman.

STUBBS, COLE, BREEDLOVE, PRENTIS & BIGGS,

Durham, NC, December 7, 1992.

Re bankruptcy rule 7004(b)(3)—proposed amendment.

W.L. BURNS, Jr.,
President, Central Carolina Bank and Trust Co., Durham, NC.

DEAR BILL: I have reviewed the letter dated March 26, 1992 from Robert E. Keeton, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to Senator Joseph R. Biden, Jr., Chairman of the Committee of the Judiciary.

The letter to Senator Biden recommends against adoption of the proposed amendment to Bankruptcy Rule 7004(b)(3) which would require service of process upon a corporation in a bankruptcy adversary proceeding to be accomplished by certified mail with a return receipt as opposed to the current version of that Rule which requires only first class mail with no return receipt in order to accomplish service of process. The letter to Senator Biden makes the following points:

1. Prior to 1976 the Bankruptcy Rules did require service by certified mail with return receipt and, according to the author of the letter, this was unsatisfactory as many defendants were "unavailable to the delivery postman . . . or refuse(d) delivery."

2. Service by first class mail is more expedient and any saving of costs of serving summons in adversary proceedings under the current Rule 7004 is a benefit to the Bankrupt estate and all creditors.

3. The adoption of the proposed amendment conflicts with the Rules Enabling Act which requires a formal rule making process to be followed before such an amendment can be adopted.

The proposed amendment to Rule 7004 provides a substantial benefit to the banking industry and our efforts must persist in obtaining an adoption of this amendment. Our initial efforts to obtain some relief for banking institutions resulted in an excellent amendment being proposed by Senator Helms which added a new paragraph (g) to Section 2 of Rule 7004 which provided as follows:

"service upon an insured depository institution, as defined in Section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1830(c), may be made by personal service on the vice president or other executive officer of such institution, notwithstanding any other provision of law."

It is my understanding that at the committee level this paragraph (g) was eliminated and as a compromise an attempt was made to render service of process more stringent upon all corporations. The letter to Senator Biden addresses this compromise proposal and the points which are addressed in that letter may have some validity as to service of process on ordinary and usual business corporations but do not have validity when applied to a federally insured banking institution.

With special emphasis upon the unique needs and burdens upon insured banking institutions I would address the points made in the letter to Senator Biden as follows:

1. In any civil litigation including a Bankruptcy adversary proceeding a delay can be incurred if service is attempted by certified mail with return receipt when the defendant is actively attempting to avoid service of process. It is not uncommon for a defendant to change address or to refuse to accept delivery of certified mail. However, this is not the case when banks are adversary proceeding defendants. Bank addresses and locations of business are well defined, highly visible, well known and virtually permanent. A rather loose requirement that the summons be delivered by certified mail return receipt required to any officer of the bank can be easily accomplished at virtually any branch office and presents no impediment, delay or additional cost to the judicial process.

2. The expediency which they are attempting to obtain by not amending Rule 7004 does not equitably balance against the extreme risk to a defendant bank. As the letter to Senator Biden states, there are frequent mailings to creditors in bankruptcy proceedings and, because banks are in the financial transaction business, banks are involved in a higher percentage of Bankruptcy proceedings than any other type of business. As a result banks receive a large volume of mail relating to bankruptcy proceedings. However, a large majority of the mail is not of a critical nature and is for informational purposes only. It is extremely misleading for a bank to receive a mailing of the extreme importance of a summons in an adversary proceeding for which substantial affirmative relief against the bank may be sought in the same mailing format as countless notices are received.

3. A very large percentage of Bankruptcy Adversary proceedings relate to attempts by a Bankruptcy Trustee or creditors to set aside or reduce the value of collateral acquired by other creditors in the Bankruptcy proceeding. Since banks are in the lending business and since most large loans are collateralized, banks constitute a large percentage of defendants in bankruptcy adversary proceedings usually with large claims at stake. Therefore, banks are at a higher risk than other potential defendants.

4. While it may be true that the proposed amendment has not been proposed and reviewed in accordance with the Rules Enabling Act, it is also true and, in my opinion, more important that the proposed amendment conforms with the already existing requirements of the Federal Rules of Civil Procedure. In fact, it is still less burdensome than those Federal Rules. Since the affirmative relief which can be sought against a

banking institution in a adversary proceeding in a bankruptcy can be just as burdensome as a law suit filed against the bank in District Court it would seem appropriate that the bank be provided the same safeguards as are provided by the Rules of Civil procedure. Moreover, there appears to be no compelling reason why the Rules for service of process under the Rules of Bankruptcy procedure should be different from the Rules for service of process under the Federal Rules of Civil Procedure.

In summary, in responding to the letter to Senator Biden the following points should be emphasized:

1. Senator Helms' proposed bill provided a specific protection contained in paragraph (g) for banking institutions. This paragraph (g) was eliminated and as a compromise an amendment was proposed making the service of process Rules upon corporations in general more stringent.

2. Concerns which may be raised regarding more restrictive service of process rules as to general corporations are not valid when raised in regard to service of process upon banking institutions. More stringent service of process rules as to banking institution do not impose a greater burden upon the bankruptcy estate and are inherently in the public interest to prevent unwarranted losses by Federally insured institutions.

3. Bankruptcy proceedings should not be "ambush" proceedings designed to "trick" some creditors from losing rights for the benefit of other creditors. If a legitimate claim exists in an adversary proceeding, it should be assured that the defendants have actual notice of the assertion of that claim and a fair opportunity to defend its position.

4. Federally insured banking institutions should be provided special relief and more stringent service of process rules should be applied. If Bankruptcy Rule 7004 is not amended to extend this protection to all corporations then it should at least be amended to extend this protection to banking institutions. It is in the public interest to avoid unwarranted losses by banks, the new proposed rule would not be burdensome upon a bankruptcy estate since banks can be easily served even under the new rule, and the banks should be afforded at least the same protection as provided by the Federal Rules of Civil procedure.

I hope that the information contained in this letter will be of assistance in building a strong case for the adoption of the proposed amendment to Bankruptcy Rule 7004(b)(3) or for adding paragraph (g) back to the proposed amendment. Of course, I would be glad to assist in any way possible.

With kind regards, I am

Sincerely yours,

RICHARD F. PRENTIS, Jr.

By Mr. KENNEDY (for himself, Mr. HATCH, Mr. METZENBAUM, Mr. SIMON, Mr. WELLSTONE, Mr. WOFFORD, Mr. DURENBERGER, and Mr. BINGAMAN):

S. 203. A bill to amend the Public Health Service Act to improve the quality of long-term care insurance through the establishment of Federal standards, and for other purposes; to the Committee on Labor and Human Resources.

LONG-TERM CARE INSURANCE STANDARDS AND ACCOUNTABILITY ACT

Mr. KENNEDY. Mr. President, I am honored to join with Senator HATCH, Senator METZENBAUM, Senator SIMON, Senator WELLSTONE, Senator WOFFORD, Senator DURENBERGER, and Senator BINGAMAN in reintroducing legislation reported by the Committee on Labor and Human Resources last summer to protect citizens who purchase long-term care insurance.

According to studies by the Brookings Institution, between 35 and 50 percent of today's senior citizens will enter a nursing home at some point in their lives. Millions more will need help with basic needs such as walking, eating, and dressing if they are to continue living independently at home or in their communities.

Long-term care is not just a crisis for the elderly—it is a crisis for their families as well. Few relatives are prepared—either financially or emotionally—to take on the heavy responsibility of providing the care that their loved ones need. Medicare does not cover such costs at all. Because of its means test, assistance from Medicaid does not become available until families have virtually exhausted their life savings.

In recent years, to fill the gap in long-term care, the private insurance industry has begun to offer policies to provide protection. The number of citizens with long-term care policies has doubled in the past 3 years, and several million policies have been sold. But this rapid growth is accompanied by serious problems.

These problems include high rates of lapsed policies, abuses by insurance agents, and substantial reductions in the value of benefits during the long time that may elapse between the purchase of a policy and when it is needed.

Too many senior citizens who purchase a policy let it lapse. A recent survey by the Health Insurance Association of America found lapse rates of 12 percent a year. In other words, if 100 senior citizens buy a long-term care policy at age 65, fewer than 2 will still have coverage at age 85, when they are most likely to need it.

In addition, agents' commissions are designed so that 70 to 80 percent of their total compensation on a policy is paid up front, at the time of the initial sale. Only 20 to 30 percent is based on policy renewals. The result is to encourage the sale of multiple policies to senior citizens, and discourage the renewal of existing policies.

Because of rising costs, policies adequate today are likely to provide only minimal protection when they are needed in the future. A nursing home stay that now costs on average of $86 a day will cost $228 20 years from now, assuming a modest inflation rate of just 5 percent a year. The most recent GAO study of States' compliance with voluntary standards for inflation protection found that 40 States were not in compliance.

In response to similar abuses in so-called Medigap policies to protect the elderly against bills not covered by Medicare, Congress passed legislation in 1990 setting basic standards for such policies.

Similar legislation is needed now to correct the abuses in private long-term care policies. The bill we are introducing today is modeled after the Medigap legislation. The key provisions will establish mandatory standards for adequate coverage; require protection against lapses; revise agents' commissions to encourage renewals and discourage multiple sales; and require training for agents in order to reduce the level of misinformation given to elderly purchasers. Agents are to be required to offer inflation protection to every consumer; however, inflation protection is not a mandatory feature of every policy, as last year's bill proposed.

Protection from abuses by the insurance industry is only a small part of the solution to the Nation's long-term care needs. Most senior citizens cannot afford adequate private long-term care insurance. According to a June 1990 study by Families USA Foundation, 84 percent of Americans age 65 to 79 could not afford the average cost of a basic long-term care insurance policy. This cost ranges from about $1,300 annually at age 65 to nearly $4,000 at age 79. Younger persons with disabilities also have great difficulty in obtaining such insurance.

For these reasons, the Nation needs a more comprehensive solution to long-term care. It is time for America to redeem the promise of Medicare and Social Security by adding a vital third component—long-term care for disabled Americans of all ages, with that assistance provided, whenever possible, in a person's own home. The task will be difficult—but we must succeed. No honorable society can deny decent care to its elderly and disabled citizens.

In the meantime, the Long-Term Care Insurance and Accountability Act that we are introducing today will provide the substantial additional protection that millions of senior citizens deserve and need. I am pleased that the Consumers Union, Families USA, the United Seniors Health Cooperative, and the National Association of Home Care have all endorsed this legislation. I urge the Congress to act quickly on this important legislation.

Mr. HATCH. Mr. President, each one of us has either had to face, or will have to face, the day that an aging parent or other loved one will stand in need of long-term care. I am certain that I speak for all of us when I say that we want our parents and loved ones to be cared for in a manner that both preserves their dignity and provides the quality care they need.

Today, many elderly Americans and their families are impoverished by the cost of long-term care. This is a sobering thought, bearing in mind that our society is rapidly aging. This is highlighted by the fact that a baby-boomer was just inaugurated as President.

Owing to the tremendous financial burden such long-term care has upon the individual, the family, and society, the financing of long-term care be-

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

M E M O R A N D U M

TO: Chairmen and Reporters for All Advisory Committees

FROM: Robert E. Keeton

DATE: March 15, 1993

Enclosed for your information is a copy of a letter I have sent to Senator Helms (with copies to Senators Biden, Hatch, Heflin, and Grassley) after consultation and drafting help from Judge Leavy, Professor Resnick, our secretarial staff, and other personnel in the Administrative Office.

Robert E. Keeton

Enclosure

cc: Dean Daniel Coquillette
Mr. Peter McCabe
Mr. John K. Rabiej
Mr. Joseph F. Spaniol, Jr.

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

March 15, 1993

Honorable Jesse A. Helms
United States Senate
Washington, D.C. 20510

Dear Senator Helms:

On January 26, 1993, when introducing S. 201, you spoke of a concern brought to your attention by Mr. Richard Prentiss, Jr. about procedures for service of process against a bank in bankruptcy adversary proceedings. S. 201 would amend Rule 7004 of the Federal Rules of Bankruptcy Procedure to require that, in a bankruptcy proceeding, service of process on an insured depository institution must be made by personal service on an officer of the institution. Under the present Rule 7004, service of process in such cases can be made on any corporation, including depository institutions, by first class mail to the attention of an officer or a managing or general agent.

This subject is on the active agenda of the Rules Committees of the Judicial Conference. I am writing to ask your support for deferring S. 201 for two reasons. First, the amendment of Bankruptcy Rule 7004 by a provision in S. 201 would be a significant departure from the procedures of the Rules Enabling Act, 28 U.S.C. §§2071-2077. Second, the proposed changes in S. 201 might be inconsistent with the propsoed changes to the service of process provisions in Rule 4 of the Federal Rules of Civil Procedure now before the Supreme Court for their consideration. Deferring Congressional action on S. 201 would allow this matter to be considered in accordance with the Rules Enabling Act process.

1. <u>Rule Making Process</u>

The Rules Enabling Act and the procedures of the Judicial Conference Rules Committees implementing the Act provide a method assuring that each proposed new rule or amendment of a rule receives wide and thorough consideration. Under the Act, any proposed change to the rules must be published and circulated to the bench and bar, and to the public generally, for comment and suggestions. Public hearings on proposed changes to the rules are held in most cases. Rule changes become effective only after Congress has had an opportunity to review them following approval by the Judicial Conference and promulgation by the Supreme Court.

It is especially important that any proposed amendment to a rule dealing with service of process not by-pass the normal process at this time. The Advisory Committee on Civil Rules has spent several years reviewing the complex and controversial subject of service of process in civil actions and, after considerable input from the bench and bar both in writing and at hearings, has proposed significant revisions to Rule 4 of the Federal Rules of Civil Procedure. Those proposals were approved by the Judicial Conference in September 1992 and are now pending before the Supreme Court. If promulgated by the Supreme Court before May 1, 1993, the amendments will be reported to Congress for its review this year. In general, the proposed revisions to Civil Rule 4 discourage the use of formal and expensive service of process and encourage a party to waive such service of process after acknowledging notice of the action. The revisions are intended to reduce the cost of litigation.

2. Substantive Problems with S. 201

At its meeting on February 18-19, 1993, the Advisory Committee on Bankruptcy Rules raised some initial concerns regarding the merits and drafting of the bill. The text of the bill would require that, in a bankruptcy proceeding, service of a summons and complaint on an insured depository institution must be made "by personal service" on an officer. However, the meaning of "personal service" is unclear. S. 201 could be construed to mean that usual methods of service, including service by first class mail, are available against a depository institution in a bankruptcy proceeding if the summons and complaint are addressed to an officer of the bank.

Alternatively, the words "personal service" could be construed to mean that a summons and complaint must be served by face-to-face personal delivery only. If so, such a requirement would be unnecessarily expensive and burdensome for debtors and trustees of insolvent estates, and would reduce the estate assets available for distribution to creditors. It is possible that under S. 201 methods of service available under state law may not be available in a bankruptcy proceeding against a bank, even though such state law methods are now available in district court cases against banks under Civil Rule 4(c)(2)(C). Provisions of Civil Rule 4 that permit service by mail on any corporation, including a bank, when properly acknowledged also might not be available in bankruptcy proceedings if S. 201 is enacted. Accordingly, if S. 201 becomes law, the requirements for service on a bank may become more stringent and expensive in a bankruptcy proceeding than they are in a district court case.

In addition, the text of S. 201 could be construed to mean that service on a bank may not be made by any form of mail, including certified or registered mail, even though the correspondence by Mr. Prentiss seems to suggest that certified or registered mail on an officer would be sufficient to satisfy the concerns that prompted introduction of the bill. In sum, the text of the bill could be construed to significantly increase the costs in bankruptcy cases at the expense of creditors, and also may be inconsistent with the purpose of the bill as expressed in the Congressional Record.

Conclusion

The Advisory Committee on Bankruptcy Rules is responsible for carrying on a continuous study of the operation and effect of the rules of bankruptcy procedure. Service on corporations, including insured depository institutions, by ordinary first class mail to the attention of an officer, or managing or general agent, has been permitted in bankruptcy cases and proceedings since 1976 and has worked well. The Advisory Committee has not received information of any instances in which a bank has been injured or disadvantaged in litigation because it was served in accordance with the present rules.

In light of your constituent's concerns, however, the Advisory Committee will review Rule 7004, which incorporates by reference several subdivisions of Civil Rule 4, promptly after action by the Supreme Court and Congress on the proposed amendments to Rule 4. In connection with its review of Bankruptcy Rule 7004, the Advisory Committee will take the substance of S. 201 under careful consideration. You can be assured that the views expressed in the letters of Richard Prentiss, Jr. that were printed on pages S708-S710 in the Congressional Record on January 26, 1993, will be considered by the Advisory Committee.

I respectfully request your support for withdrawing or deferring S. 201 in order that the problem that prompted you to introduce it may be considered fully in the Rules Committees in accordance with the Rules Enabling Act procedures.

I appreciate your consideration of this request.

Sincerely,

Robert E. Keeton

cc: Honorable Joseph R. Biden, Jr., Chairman
Committee on the Judiciary
United States Senate
Honorable Orrin G. Hatch
Honorable Howell T. Heflin
Honorable Charles E. Grassley

103D CONGRESS
1ST SESSION

S. 540

IN THE SENATE OF THE UNITED STATES

Mr. HEFLIN introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To improve the administration of the bankruptcy system, address certain commercial issues and consumer issues in bankruptcy, and establish a commission to study and make recommendations on problems with the bankruptcy system, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE IMPROVEMENT.—This Act may be cited as the "Bankruptcy Amendments Act of 1993".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

Sec. 1. Short title; table of contents.

TITLE I—IMPROVED BANKRUPTCY ADMINISTRATION

(2) the types of information that are currently available to Congress and the public regarding the number, size, and types of bankruptcy cases filed in the Federal courts;

(3) the types of additional information that the Federal judiciary believes are necessary and desirable to enhance its ability to manage the affairs of the bankruptcy system; and

(4) the projected timetable for being able to supply those additional types of information to Congress and the public in the future.

SEC. 114. SERVICE OF PROCESS.

Rule 7004(b)(3) of the Bankruptcy Rules is amended—

(1) by inserting ", by certified or registered mail," after "complaint"; and

(2) by inserting ", by certified or registered mail," after "copy".

SEC. 115. PENSION PLAN CONTRIBUTIONS.

(a) TREATMENT AS ADMINISTRATIVE EXPENSES.—Section 503(b) of title 11, United States Code, as amended by section 405, is amended—

(1) by striking "and" at the end of paragraph (6);

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

ROBERT E. KEETON
CHAIRMAN

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BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

March 29, 1993

Honorable Howell T. Heflin
United States Senate
Washington, D.C. 20510

Dear Senator Heflin:

On March 10, 1993, you introduced S. 540, the Bankruptcy Amendments Act of 1993. Section 114 of the pending legislation would amend Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure to require, in an adversary proceeding or contested matter, that service by mail of a summons and complaint on a corporation, partnership or unincorporated association be made by certified mail. Under the present rule, service of process in such cases may be made by ordinary first class mail.

This subject is on the active agenda of the Rules Committees of the Judicial Conference. I am writing to ask your support for deleting Section 114 for two reasons. First, the amendment of Bankruptcy Rule 7004(b)(3) by a provision in S. 540 would be a significant departure from the procedures of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. Second, a requirement that service must be made by certified or registered mail would be unnecessarily expensive and burdensome for debtors and trustees of insolvent estates and would reduce the estate assets available for distribution to creditors.

I am also writing to suggest that Section 105(f) of S. 540, which would amend 28 U.S.C. § 2075 with respect to the effective date of Bankruptcy Rule amendments, be changed to conform to the effective date for other federal rules amendments contained in 28 U.S.C. § 2074.

1. Rule Making Process.

The Rules Enabling Act and the procedures of the Judicial Conference implementing the Act provide a method to assure that each proposed new rule or amendment of a rule receives wide and thorough consideration. Under these procedures, any proposed change to the rules must be published and circulated to the bench and bar, and to the public generally, for comment and suggestions. Public hearings on proposed changes to the rules are held in most cases. Rule changes become effective only after Congress has had an opportunity to review them following approval by the Judicial Conference and promulgation by the Supreme Court.

It is especially important that any proposed amendment to a rule dealing with service of process not by-pass the normal process at this time. The Judicial Conference's Advisory Committee on Civil Rules has spent several years reviewing the complex and controversial subject of service of process in civil actions and, after considerable input from the bench and bar both in writing and at hearings, has proposed significant revisions to Rule 4 of the Federal Rules of Civil Procedure. Those proposals were approved by the Judicial Conference in September 1992 and are now pending before the Supreme Court. If promulgated by the Supreme Court before May 1, 1993, the amendments will be reported to Congress for its review this year.

The Judicial Conference's Advisory Committee on Bankruptcy Rules is responsible for carrying on a continuous study of the operation and effect of the rules of bankruptcy procedure. Service on business entities by ordinary first class mail to the attention of an officer, or a managing or general agent, has been permitted in bankruptcy cases and proceedings since 1976 and has worked well. The Advisory Committee on Bankruptcy Rules has not received information of any instances in which a corporation has been injured or disadvantaged in litigation because it was served in accordance with the present rules.

Nonetheless, the Advisory Committee will review Bankruptcy Rule 7004, which incorporates by reference several subdivisions of Civil Rule 4, promptly after action by the Supreme Court and Congress on the proposed amendments to Rule 4. Among other issues, the Advisory Committee will consider amendments to Rule 7004 that may become necessary in view of the proposed amendments to Rule 4. In connection with its review of Bankruptcy Rule 7004, the Advisory Committee will take the substance of S. 540 under careful consideration.

2. Substantive Problems with Section 114 of S. 540

As mentioned above, the Advisory Committee on Bankruptcy Rules has received no information indicating that the present method for service of process by first class mail has not worked well during the past 17 years. The proposed legislation would result in significant unnecessary expense due to the costs of certified or registered mail. In addition to increasing the costs of commencing adversary proceedings, the bill would increase the costs of making motions in bankruptcy court because Bankruptcy Rule 9014 makes Rule 7004 applicable in contested matters. This increased expense would burden insolvent estates and would reduce the assets available for distribution to creditors.

Certified or registered mail as a mechanism for service of process raises other practical concerns considered by Congress in the past. Specifically, the use of certified or registered mail in connection with service of process was considered and rejected by Congress in 1982. At that time, the Supreme Court promulgated amendments to Civil Rule 4 to provide for service by certified or registered mail of a summons and complaint, together with notice and an acknowledgement of receipt form. If the acknowledgement of receipt were signed and returned, the service would be effective. However, Congress enacted Public Law 97-227 postponing the effective date of the proposed amendments in

light of concerns that certified or registered mail would not be an appropriate way to effectuate service. Critics argued that signatures may be illegible or may not match the name of the defendant, or that it may be difficult to determine whether mail has been "unclaimed" or "refused." Congress subsequently enacted the Federal Rules of Civil Procedure Amendments Act of 1982, P.L. 97-462, amending Rule 4 to require that the summons and complaint, together with the notice and acknowledgement of receipt form, be served by ordinary first class mail instead of by certified or registered mail.

3. Effective Date of Bankruptcy Rule Amendments

S. 540 also would change the effective date of amendments to the Federal Rules of Bankruptcy Procedure. Section 105(f) of the pending bill would amend 28 U.S.C. § 2075 to provide that amendments to the bankruptcy rules shall not take effect until the expiration of 180 days after they have been reported to Congress by the Chief Justice. The effect of this amendment is that rules changes, which must be reported to Congress not later than May 1, would become effective not later than November 1 of the same year. Under the current statute, rule amendments become effective on August 1.

I suggest that section 105(f) of S. 540 be changed to provide that amendments to the Federal Rules of Bankruptcy Procedure will become effective no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law. This change would conform to the effective date for amendments to the other federal rules of procedure and evidence, as specified in 28 U.S.C. § 2074(a).

4. Conclusion

I respectfully request your support for deleting Section 114 from S. 540 so its substance may be considered fully by the Rules Committees in accordance with the Rules Enabling Act procedures, and for changing Section 105(f) of the bill to conform the effective date of amendments to the Federal Rules of Bankruptcy Procedure to that of other federal rules of procedure and evidence.

I appreciate your consideration of this request.

Sincerely,

Robert E. Keeton
Chairman

cc: Hon. Joseph R. Biden, Jr.
Hon. Orrin G. Hatch
Hon. Charles E. Grassley

PREPARED STATEMENT

OF

FRANCIS F. SZCZEBAK

CHIEF OF THE BANKRUPTCY DIVISION

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

ON

S. 540

THE BANKRUPTCY AMENDMENTS ACT OF 1993

BEFORE THE

SUBCOMMITTEE ON COURTS AND

ADMINISTRATIVE PRACTICE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

MARCH 31, 1993

The impact on the bankruptcy courts of such a scenario could be devastating. It costs the Judiciary at least $300 to process one no asset chapter 7 case from filing to disposition. (This estimate includes such items as salaries for judges and clerks, and rent for office space, equipment, postage, and automation costs.) Additionally, $45 per case is needed to pay the private panel trustee and $30 is needed to help fund the U. S. trustee system.

Thus, at least $375 in additional revenue would be needed for each "new" case caused by the availability of in forma pauperis. Although it is impossible to estimate the number of additional cases that could result from in forma pauperis, it is not unrealistic to project that the annual cost to process these additional cases would be in the tens of millions. Given the fiscal restraints facing us today and the prospects for the future, the Judiciary is quite concerned with the potential impact of in forma pauperis.

The Federal Judiciary is not on record as opposing the imposition of in forma pauperis. It is simply urging that it not be implemented until we understand its full ramifications. The issue needs careful study. The Federal Judicial Center has recently agreed to undertake such a study, but it will take at least eighteen months before it is completed.

BANKRUPTCY RULES

Section 114 of S. 540 would amend Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure to require that service by mail of a summons and complaint on a corporation, partnership, or unincorporated association be made by certified or registered mail. This requirement would apply both to an adversary proceeding and to service of the initiating motion in a contested matter. Under the present rule, service of process in these proceedings may be made by ordinary first class mail.

The concerns of the Judiciary regarding section 114 are twofold. First, amending Bankruptcy Rule 7004(b)(3) by a provision in S. 540 would be a significant departure from the procedures of the Rules Enabling Act, 28 U.S.C. § 2071-2077. Second, requiring service to be made by certified or registered mail would be unnecessarily burdensome and expensive for debtors and trustees of insolvent estates, and would reduce the assets available for distribution to creditors.

Rule Making Process

The Rules Enabling Act provides a method for ensuring that each proposed new rule or amendment of a rule receives broad-based and thorough consideration, including review by the Congress. Under these procedures, any proposed change to the rules is published and circulated to the bench and bar for comment and suggestions. Usually, public hearings are held. A rules change takes effect only after it has been approved by the Supreme Court and transmitted to the Congress.

Amending a rule by legislation, particularly in an omnibus bill such as S. 540 which covers many aspects of the bankruptcy system, undermines the provisions and the purposes of the Rules Enabling Act. More importantly, it is critical at the present moment that any proposed amendment to a rule governing service of process not bypass the normal procedure. At this time significant proposed amendments to Rule 4 of the Federal Rules of Civil Procedure, on which Bankruptcy Rule 7004 is based, are in the final stages of review.

The Advisory Committee on Civil Rules has been working on the subject of service of process in civil actions for several years. Rule 4 is complex, and the various proposed amendments generated substantial controversy. After considerable input from bench and bar, both in writing and at hearings, a final proposal for amending the rule was approved by the Judicial Conference in

September 1992. This proposal is now pending before the Supreme Court and if approved by the Court before May 1, 1993, will be reported to the Congress for its review this year.

The Advisory Committee on Bankruptcy rules is charged with carrying on a continuing study of the operation of the rules of bankruptcy procedure. Service of process on business entities by ordinary first class mail to the attention of an officer, or a managing or general agent, has been permitted in bankruptcy proceedings since 1976 and has worked smoothly. The Advisory Committee on Bankruptcy Rules frequently receives suggestions for improvements to the bankruptcy rules, but is not aware of information of widespread injuries or disadvantages to corporations that were parties in litigation on account of the corporation's being served in accordance with the existing rule.

Substantive and Practical Considerations

Section 114 of the proposed legislation would result in significant added expense due to the costs of certified or registered mail. Moreover, as the addressee of the certified or registered mail can choose to refuse delivery, a plaintiff unwilling to risk potential refusal may reasonably feel compelled to employ a process server to effect personal service, at even greater expense. For a debtor or trustee undertaking litigation against multiple parties, this could be a heavy burden.

In addition to increasing the costs of initiating adversary proceedings, S. 540 would increase the costs of making motions in bankruptcy court, because Bankruptcy Rule 9014 requires service as prescribed in Rule 7004 in any contested matter. Contested matters brought by motion in bankruptcy cases generally outnumber adversary proceedings. If service on an opposing party by ordinary first class mail no longer were available, the added and unnecessary expense to the estate would diminish the estate and reduce the amount available to pay creditors.

Refusal of delivery and other practical problems associated with service of process by certified or registered mail, have been considered by the Congress in the past. Specifically, an amendment proposed in 1982 to Rule 4, Fed. R. Civ. P., would have provided for service of a summons and complaint in a civil action by certified or registered mail combined with a notice and acknowledgment of receipt form. Critics argued, in addition to the delay caused by refusal, signatures often are illegible or may not match the name of the defendant and that it may be difficult to determine whether mail has been refused or simply unclaimed. Congress subsequently enacted the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, which retained the notice and acknowledgment of receipt form, but rejected delivery of the documents by certified or registered mail in favor of delivery by ordinary first class mail.

At the request of the Chairman of the Judicial Conference Committee on Rules of Practice and Procedure, I respectfully suggest that section 114 should be deleted from S. 540 so that its substance may be considered fully by the rules committees in accordance with the procedures of the Rules Enabling Act.

BANKRUPTCY APPELLATE PANELS

The second area concerns the establishment of bankruptcy appellate panels. Section 105(c) of the bill would require a judicial council to establish a bankruptcy appellate service unless the council finds that there are either insufficient judicial resources available within the circuit or that the establishment of the service would result in undue delay or increased costs to the parties.

The Judicial Conference believes that, given the unique composition of the circuits, that each circuit should have the flexibility to assess its own particular circumstances and that the imposition of bankruptcy appellate panels should not be mandatory. While the present legislation does provide two

grounds to be considered when the council is determining the feasibility of creating a bankruptcy appellate panel, the Judicial Conference believes that the judicial council should have greater discretion in this matter.

In contrast, in response to legislation introduced in the last Congress language proposed by the Judicial Conference required each judicial council to create a bankruptcy appellate panel or joint bankruptcy appellate panel if it found that it had sufficient judicial resources and that its creation would result in an enhancement in the administration of justice. The judicial councils were also specifically required to review the feasibility of establishing a joint panel with another circuit. The Judicial Conference version also permitted the bankruptcy appellate panel of the circuit to consist of more than three bankruptcy judges. This would permit the establishment of a panel of bankruptcy judges from which panels of three could be drawn.

Finally, under present law the judicial councils of two or more circuits may create a joint bankruptcy appellate panel only if the Judicial Conference so approves. The Conference believes its approval is unnecessary, in this situation, and drafted its provision to permit the creation of joint panels without obtaining Judicial Conference approval.

Conclusion

The growth in bankruptcy case filings has been sustained and unprecedented-approaching a level of nearly one million petitions in 1992. The bankruptcy court system has strained under this crushing burden, but has managed to administer its caseload and provide the relief envisioned by the Congress. While the number of filings may have begun to stabilize, the size and complexity of many cases continues to increase. As you examine the need for possible changes to the bankruptcy court system, let me express

AGENDA V
Jackson Hole, Wyoming
September 13-14, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: AMENDMENTS TO CIVIL RULE 26 (DISCOVERY)

DATE: JULY 31, 1993

The Supreme Court has promulgated a package of amendments to the Federal Rules of Civil Procedure that will become effective on December 1, 1993, unless Congress passes legislation to defer or block part or all of the changes. I asked John Rabiej to circulate with the agenda materials copies of the Civil Rule amendments for your information (House Document 103-74). Several proposed amendments, including Rule 26 on discovery and Rule 11 on sanctions, are controversial and have been the subject of hearings in the Senate and the House. There is a possibility that Congress may take action to defer the effectiveness of at least one subdivision of Rule 26, and perhaps other amendments as well. I understand that, on June 14th, John Rabiej circulated to you copies of the testimony of Judges Keeton, Pointer, and Schwarzer submitted to the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee in connection with the proposed amendments to the Civil Rules.

If these amendments become effective on December 1, the Advisory Committee should carefully consider all of the amendments to those rules that are made applicable in bankruptcy cases pursuant to the Bankruptcy Rules. I intend to prepare a memorandum for the Spring meeting dealing with these amendments and identifying the applicable Civil and Bankruptcy Rules.

However, there is one proposed amendment, the most controversial one, that I want to bring to your attention as soon as possible (in any event, before the December 1 effective date). I am referring to proposed Rule 26(a)(1), (a)(2), (a)(3), and (a)(4), which create a new requirement for mandatory early pre-discovery disclosures. A clean copy of the rule as amended can be found on page 28, and a copy showing the changes can be found on page 203 of the House document. Justice Scalia, joined by Justice Thomas and Justice Souter, has written a dissent from the Court's order promulgating the amendments to Rule 26 (see page 104 of the House document). Judge Pointer's testimony discusses in detail the nature of the controversy. Although there is a possibility that these amendments will be deferred by Congress, we must assume for now that the amendments will become effective in December.

The so-called "automatic mandatory early disclosure" requirement contained in Rule 26(a)(1)-(4) are explained in the Committee Note to the rule (beginning on page 224 of the House document). The matters that must be disclosed early in the case will have to be communicated within 10 days after a meeting of the parties that will have to be held at least 14 days before the Rule 16 pre-trial scheduling conference.

In addition, an amendment to Rule 26(f) will require parties to meet in person to plan for discovery at least 14 days before the Rule 16 pre-trial conference.

It is important to note that Bankruptcy Rule 7026 and 7016

make F.R.C.P. 26 and 16 applicable in adversary proceedings. Bankruptcy Rule 9014 does not make Rule 16 applicable in contested matters (motions), but does provide that Rule 7026 is applicable in contested matters "unless the court otherwise directs." It is also interesting to note that the proposed amendments to Rule 26(a)(1) expressly provide that the mandatory disclosure requirement is applicable "except to the extent otherwise stipulated or directed by order or local rule...." and that the mandatory discovery meeting under Rule 26(f) is applicable "except in actions exempted by local rule or when otherwise ordered." Accordingly, it appears that bankruptcy courts, by order or local rule, may opt out of the new mandatory disclosure and mandatory meeting provisions.

In reviewing the proposed amendments to the Civil Rules, I became concerned that bankruptcy courts may not be aware of the necessity of taking some action, by order or local rule, to prevent the automatic mandatory disclosure and mandatory meeting requirements from becoming effective in contested matters and adversary proceedings. I am especially concerned that, in the absence of court action, the mandatory disclosure requirements and mandatory meeting of the parties will be applicable in contested matters.

Given the expedited nature of contested matters, I do not think that it makes sense for the proposed amendments to Rule 26(a)(1)-(4) and Rule 26(f) to be applicable in contested matters. I also think that the Committee should consider whether

these amendments should be applicable in adversary proceedings.

Unfortunately, we do not have the luxury of time regarding these amendments. It would take about three years for Bankruptcy Rules to be amended to deal with the applicability of Rule 26 to adversary proceedings and contested matters. In the interim, some action by bankruptcy courts (orders or local rules) should be encouraged to make sure that these amendments do not inadvertently become effective in bankruptcy proceedings.

I indicated my concern to Peter McCabe and he suggested that we put this matter on the agenda for the September meeting. He also suggested that I draft a model local rule for consideration by bankruptcy courts. Attached is my attempt as such a draft. In addition to providing that Rule 26(a)(1)-(4) and (f) shall not be applicable in contested matters [and adversary proceedings?], I found it necessary to include the text of portions of the current Rule 26 on expert witnesses (presently Rule 26(b)(4)) and discovery conferences (presently Rule 26(f)) so as to avoid a gap that would otherwise be caused by the pending amendments to Rule 26. In so doing, I did not attempt to modify any current provisions on these matters, but am only trying to keep the status quo.

MODEL RULE ON THE APPLICATION OF RULE 26 F.R.Civ.P.

Effective December 1, 1993, Rule 26 shall be applicable in adversary proceedings and, unless the court otherwise directs, in contested matters, except that:

(a) Mandatory Disclosure Rule Not Applicable. Rule 26(a)(1), (a)(2), (a)(3), and (a)(4) shall not be applicable in contested matters [and adversary proceedings].

(b) Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under Rule 26(b)(1) F.R.Civ.P. and acquired or developed in anticipation of litigation or for trial, may be obtained in contested matters [and adversary proceedings] only as follows: (i) a party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion; (ii) upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26(b)(4)(C) F.R.Civ.P., concerning fees and expenses as the court may deem appropriate, and; (iii) any means provided in Rule 26(b)(4).

(c) Discovery Conference. Rule 26(f) F.R.Civ.P. shall not be applicable in contested matters [and adversary proceedings] unless the court, in a particular case, otherwise directs.

At any time after commencement of a contested matter [or an adversary proceeding], the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. [In an adversary proceeding] the court shall do so upon motion by the attorney for any party if the motion includes: (i) a statement of the issues as they then appear, (ii) a proposed plan and schedule of discovery, (iii) any limitations proposed to be placed on discovery, (iv) any other proposed orders with respect to discovery, and (v) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of

the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. Any order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference under Rule 16.

AGENDA VI
Jackson Hole, Wyoming
September 13-14, 1993

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

July 29, 1993

MEMORANDUM TO MEMBERS OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBJECT: Agenda material on Bankruptcy Rule 3002 for September 13-14, 1993, Meeting in Jackson Hole

On behalf of Professor Resnick, I am forwarding to you the attached material on Bankruptcy Rule 3002. Additional agenda material will be distributed to you at a later date.

John K. Rabiej

Attachments

cc: Honorable Robert E. Keeton
Honorable Alicemarie H. Stotler
Honorable Thomas S. Ellis, III

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

July 27, 1993

John K. Rabiej
Chief, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544

RE: Bankruptcy Rule 3002

Dear John:

I request that you circulate to the Advisory Committee on Bankruptcy Rules copies of the following enclosed documents as soon as possible. This is a package that relates to the Committee's review of Bankruptcy Rule 3002 which is on the agenda for the September meeting in Jackson Hole. It is important for the members to have at least one month to consider these materials in advance of the meeting.

1. My memorandum to the Advisory Committee dated July 27, 1993.

2. Letter from Judge Paul Mannes to Judge Edward Leavy dated February 11, 1993.

3. Letter from Prof. Lawrence P. King to Judge Mannes dated February 5, 1993.

4. My memoranda to the Advisory Committee dated December 10, 1990, June 10, 1991, and August 25, 1992.

5. Extracts from minutes of meetings held in December 1990, June 1991, March 1992, and September 1992.

6. The following judicial decisions: In re Hausladen, U.S. v. Cardinal Mine Supply, Inc., In re Rago, In re Cole, and In

re Duarte, In re Bailey, In re Stoecker.

In addition to the above mentioned cased, please enclose in the package copies of the following two cases that were printed from WestLaw and delivered to you this week by Pat Channon: In re Zimmerman. 1993 WL 248793 (Bankr. W.D. Mich), and In re Johnson, 1993 WL 255955 (Bankr. N.D. Ill.).

As always, I thank you for your assistance.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 3002 REVISITED (AGAIN)

DATE: JULY 27, 1993

At the suggestion of the ad hoc subcommittee of bankruptcy judges of the Advisory Committee on Bankruptcy Rules, Bankruptcy Rule 3002 will be on the agenda for the September meeting in Jackson Hole. Judge Mannes, on behalf of the subcommittee, explains the focus and limits of our revisit in his letter to Judge Leavy dated February 11, 1993 (copy enclosed). In his letter, Judge Mannes suggests that the Committee members receive a package consisting of copies of several decisions, three memoranda prepared by the Reporter in advance of prior meetings, and extracts of minutes from three meetings held in 1990, 1991 and 1992. Attached to Judge Mannes' letter is a letter from Prof. Lawrence P. King, dated February 5, 1993, in which he expresses his opposition to any amendments to Rule 3002. For your convenience, I enclose with this memorandum a copy of Judge Mannes' letter, Prof. King's letter, and copies of all the materials that are to be circulated at Judge Mannes' request.

In addition to distributing Judge Mannes' letter and the enclosed materials, I thought that it would be useful to prepare a memorandum to inform the newer members, and to refresh the recollection of the rest of the Committee, with respect to the Committee's prior actions regarding Rule 3002. Hopefully, this

memorandum will make it easier for you to refer to the relevant portions of the enclosed materials and to avoid the necessity of reading portions that are irrelevant to our agenda (it would probably be most efficient for you to first read the "Background" section of this memorandum, then Judge Mannes' letter, then Prof. King's letter, and then the remainder of this memorandum before referring to the enclosed documents). I also want to inform the Committee with respect to more recent case law that has developed since the date of Judge Mannes' letter and, as usual, to add my own thoughts regarding the issues that we will discuss. At the same time, however, I am not unmindful of the substantial volume of the enclosed materials and I will try to make this as brief as possible.

Background

Rule 3002 deals with the filing of proofs of claim. The Advisory Committee has spent a considerable amount of time analyzing and debating the merits and deficiencies of Rule 3002 since 1990, when a newly formed subcommittee of the Advisory Committee, chaired by Ralph Mabey, solicited comments from the bench and bar regarding possible amendments to the rules to improve the administration of chapter 13 cases. Several comments were received regarding the filing of proofs of claim under Rule 3002. In my 12/10/90 memorandum to the subcommittee (copy enclosed), I summarized the suggestions discussed at the subcommittee's 12/6/90 meeting.

In its final report, the Chapter 13 Subcommittee recommended

that Rule 3002 be amended to expressly provide that (1) secured creditors must file proofs of claim for their claims to be allowed, and (2) a proof of claim may be filed late in a chapter 13 case if the failure to file was due to excusable neglect. At the request of the full Committee, I prepared a memorandum dated June 10, 1992 (copy enclosed) on the question of whether it would be inconsistent with the Code to require the filing of a proof of claim by a secured creditor as a condition to allowance of the claim. I concluded that such a requirement would not be inconsistent with the Code and the Committee thereafter voted to ask the Standing Committee to publish for public comment proposed amendments to Rule 3002(a) and (c) that would implement the two recommendations of the Chapter 13 Subcommittee. A copy of the proposed amendments is on pages 1-2 of the enclosed 8/25/92 memorandum.

The proposed amendments to Rule 3002 were published for comment in 1991 and became very controversial (both within and outside the committee). At its February 28, 1992, meeting, the Committee considered the public comment, debated the merits of the proposed amendments again, and voted by a 5-4 margin to go forward with the proposal to amend Rule 3002(a) to require secured creditors to file claims for them to be allowed. The proposal to amend Rule 3002(c) to permit late filed claims based on excusable neglect was tabled and the reporter was asked to draft new language to limit the amendment to unscheduled creditors.

In view of the close vote, and concerns by several members of the Committee and the Reporter that further study was warranted, only one month later, at the March 26, 1992 meeting, the Committee approved my recommendation that the proposed amendments be withdrawn with the understanding that we would again focus on Rule 3002 at the following meeting.

At the request of the Committee, I prepared a memorandum dated August 25, 1992, in advance of the September meeting, to assist the Committee in again considering Rule 3002. This time, however, I also focused the Committee's attention on what I perceived as additional deficiencies in the rule that are unrelated to secured creditors. In essence, I suggested that the rule is inconsistent with § 726 of the Code to the extent that Rule 3002 prevents a tardily filed claim from being "allowed" without making appropriate exceptions consistent with § 726. I refer you to paragraph (3) on pages 7-11 of my 8/25/92 memorandum for an explanation of my suggestion that Rule 3002 be amended to cure this deficiency.

At the September 1992 meeting, the Committee considered my 8/25/92 memorandum and voted to make no changes to Rule 3002. Although the Committee asked the Reporter to consider possible amendments to Rule 3021 to permit chapter 13 trustees to make distributions to secured creditors where no claim had been filed "if it can be done consistent with the Code," the Committee decided that Rule 3002 should not be amended in any respect. Finally, I and the Committee thought that the subject of Rule

3002 was off our agenda for at least the near future.

Soon after our September meeting, the Bankruptcy Court for the District of Minnesota, sitting "en banc", rendered its decision in In re Hausladen, 146 BR 557 (Bankr. D. Minn. 1992), holding that Rule 3002 is inconsistent with the Bankruptcy Code in that it requires disallowance of late filed claims in chapter 13 cases. In essence, the court held that, since lateness is not one of the eight grounds for disallowance of claims listed in Code § 502(b), a tardily filed claim may be allowed in chapter 13 cases despite Rule 3002. Although it is my usual practice to refrain from asking the Committee to reconsider any recommendation that was previously rejected, I informed Judge Leavy of the Hausladen decision and, in response, Judge Leavy appointed an ad hoc subcommittee consisting of the three bankruptcy judges who serve on the Committee to consider whether, and to what extent, the Advisory Committee should revisit Rule 3002 in view of that decision.

The ad hoc committee recommends that the Advisory Committee consider three matters listed on the first page of Judge Mannes' letter (the subcommittee recommends that we do not revisit the issue of requiring claims to be filed on behalf of secured creditors). I will discuss each of the subcommittee's three points separately.

Point 1: "Departing from the language in Rule 3002(a) that a claim must be filed to be allowed, substituting language to the effect that the filing of a proof of claim is required to share in proceeds distributed by the trustee."

This suggestion is apparently a direct response to the Hausladen decision. If the rule is changed so that it does not say that an untimely filed claim may not be "allowed", it could be argued that it will no longer be inconsistent with § 502 of the Code.

The following information and comments should be considered by the Committee with respect to this point:

(a) To the extent that this change is a reaction to the Hausladen decision, it is important to note that other courts are divided on whether they agree with that decision. Decisions agreeing with Hausladen include In re Babbin, 1993 Bankr. Lexis 875 (Bankr. Colo., June 14, 1993) ("[t]his court concurs with and adopts the reasoning of the Hausladen court."); In re Judkins, 151 BR 553 (Bankr. Colo. 1993) ("[Hausladen] correctly points out that a claim cannot be disallowed because it is untimely"); In re Rago, 149 BR 882 (Bankr. N.D.Ill. 1992) (chapter 7 case). However, Hausladen has been expressly rejected in the following cases: In re Zimmerman, 1993 WL 248793 (Bankr. W.D. Mich., July 1, 1993) (another "en banc" decision; "Hausladen was wrongly decided"); In re Johnson, 1993 WL 255955 (Bankr. N.D. Ill., June 1, 1993) ("The Court respectfully declines to follow the Hausladen reasoning for several reasons."); In re Bailey, 151 BR 28 (Bankr. N.D.N.Y. 1993) ("[T]his Court finds the rationale

underlying the Hausladen decision unpersuasive."); In re Stoecker, 151 BR 989 (Bankr. N.D. Ill. 1992) (chapter 7 case; "Thus, the Court declines to follow Hausladen."). For your convenience, I enclose copies of the decisions rejecting Hausladen.

Although I have recommended in my 8/25/92 memorandum that Rule 3002 should be changed to expressly provide that, as an exception to the general rule that untimely claims are not allowable, tardily filed claims may be allowed to the extent that tardily filed claims are entitled to a distribution pursuant to § 726, I personally think that Hausladen is wrong and goes too far in holding that tardily filed claims may be allowed beyond the requirements of § 726.

Given the split of authority among bankruptcy courts (including two bankruptcy courts sitting "en banc") , all decided recently without the benefit of any appellate decisions, one alternative the Committee may wish to consider is to wait until the case law develops further to see whether Hausladen will become the prevailing view. If Hausladen is overruled or becomes a minority position, an amendment suggested by Point 1 of Judge Mannes' letter would not be necessary. It is also possible that any proposed amendment to Rule 3002 at this time in response to Hausladen could influence other courts on this issue during the next three years (the time it would take for any proposed amendment to become effective).

If the subcommittee's suggested change is made, the

Committee will have to give some thought to an appropriate committee note. Would the note discuss Hausladen and the split authority? What is the reason for the change if the Committee is not taking a position on the correctness of that decision?

(b) The change suggested in Judge Mannes' letter will make Rule 3002 more consistent with Rule 3003(c)(2) ("any creditor who fails to [file a timely proof of claim in a chapter 11 case] shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution"). Rule 3003 does not mention allowance or disallowance of a claim. Similar language could be used in Rule 3002.

(c) When the Committee considered proposed changes to Rule 3002 in the past, it found a substantial risk that any amendment might cause other problems (either anticipated or unanticipated) that made the suggested changes "not worth it." I am concerned that the change suggested by the subcommittee in response to Hausladen presents the same risks. In particular, I am concerned that the proposed change could cause the following problems:

(1) The Chapter 12 and 13 Discharge. The change could affect the scope of the discharge in a chapter 13 case. Section 1328(a) provides for a "discharge of all debts provided for by the plan or disallowed under section 502 ..." Section 1228(a) has similar language applicable in chapter 12 cases. Suppose that Rule 3002 is amended to provide that a late claim shall not share in a distribution (without affecting "allowance" of the claim), and a chapter

13 plan is filed that provides that the debtor shall pay to the trustee $100 each month which shall be distributed to holders of "claims filed within the time provided in Rule 3002(c)." If a creditor files a late claim, the creditor will not receive a distribution. However, the late claim also will not be discharged because the debt is not provided for in the plan and is not disallowed. Therefore, the rule should, if legally possible, continue to provide for disallowance of the late claim, instead of merely providing for no distribution. It is interesting to note that the language of Rule 3003(c)(2) does not present the same discharge problem in chapter 11 cases because the discharge of debts under § 1141(d) is not limited to debts provided for in the plan or disallowed.

(2) Standing to Raise Issues. By changing the rule to limit the effect of tardiness in filing a claim to the prohibition of sharing in a distribution, a tardy creditor may be given standing to raise certain issues that presently the creditor could not raise. For example, under § 1229 and § 1329, the holder of "an allowed unsecured claim" has standing to request post-confirmation plan modification. If the rule is changed as suggested, would the tardy claimant have standing to seek an increase in plan payments (even though the rule would prohibit a distribution to the creditor)? Similarly, the holder of an "allowed" unsecured claim has standing under § 1325(b) to require that the

debtor devote all disposable income to fund a chapter 13 plan. Would that include a late filed claimant if Rule 3002 is amended as Point 1 suggests? These questions must be carefully considered.

(d) If a change in Rule 3002(a) is desirable to avoid the Hausladen problem, there are other alternatives that should be considered that may avoid the discharge and standing problems discussed above. In particular, the rule could provide that a late proof of claim is "ineffective", "null and void", or "shall not be treated as a filed claim." By using such language, the "ineffective" proof of claim will prevent the claim from being "allowed" because a proof of claim must be filed under § 501 for it to be allowable under § 502(a). Of course, such an amendment might be striken by a court following the Hausladen reasoning as inappropriately mandating the disallowance of a claim merely because it was not timely filed.

Another alternative that should be considered, if any amendments are made at this time, is to leave Rule 3002(a) as is except to provide an exception for tardily filed claims that are entitled to a distribution under § 726. I think that it is a reasonable position to take: i,e., a late filed claim may not be allowed except that a tardily filed claim may be allowed to the extent that the creditor is entitled to a distribution under § 726. This approach is the one that I suggested last year (see pages 7-13 of my 8/25/92 memorandum).

(e) If the suggested change is made to Rule 3002(a), other rules would have to be amended to conform. Rule 3009 and Rule 3021 would have to be amended by inserting language such as "except as provided in Rule 3002(a). . . "

Point 2: "Dealing with equitable concerns and due process issues, as to unnoticed and unknowing creditors, caused by the interaction of Rule 3002(c) with Code §§ 726(a) and 1328(a)."

This point raises questions regarding creditors who file late claims only because they are unscheduled or have not received notice of the case. The Committee should consider the following:

(a) This is not a significant issue regarding non-priority claims in chapter 7 because of § 726(a)(2)(C) which permits a creditor with a tardily filed claim to share with other creditors in such situations.

(b) The question regarding the rights of unscheduled and unnoticed creditors in chapter 13 cases has been addressed by the courts. Several courts have held that such a creditor must, as a matter of due process, have the right to file a late claim notwithstanding Rule 3002. See U.S v. Cardinal Mine Supply, Inc., 916 F2d 1087 (6th Cir. 1990) ("Due process and equitable concerns require that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be permitted to file tardily when the creditor does so promptly after learning of the bankruptcy."); In re Cole, 146 BR 837 (D.Colo. 1992) ("[A] creditor who has received no notice in a Chapter 13 case should

be entitled to file a late proof of claim, notwithstanding the provisions of Bankruptcy Rule 3002(c) and 9006(b)."); In re Duarte, 146 BR 948 (Bankr. W.D.Tex. 1992) ("Where a creditor's basic entitlement to due process under the Constitution has been abridged, the rule [3002] of course cannot be enforced."). The Committee should consider whether the protection of such creditors in chapter 13 cases should be left to the courts as a matter of due process, or, alternatively, Rule 3002 should be amended to expressly provide this protection.

(c) Another aspect of this problem relates to § 507 priority claimants who are entitled to priority in distribution under Code § 726(a)(1). If a priority claimant, such as the IRS, fails to file a timely claim because it has not been scheduled or noticed, does due process require that the creditor continue to have priority in distribution? Or, does the priority creditor lose priority status and share with general creditors under § 726(a)(2)(C)? Courts are divided on this issue. The Court of Appeals for the Sixth Circuit has held that the IRS does not lose priority rights where failure to timely file is due to lack of notice. See Cardinal Mine; In re Century Boat Co., 986 F2d 154 (6th Cir. 1993) ("[A] priority creditor who fails to receive notice of the bankruptcy and consequently files an untimely proof of claim is not bared from receiving priority distribution as a matter of law."). Accord, In re Cole, 146 BR 837 (D.Colo. 1992). However, the Bankruptcy Appellate Panel in the Ninth Circuit recently rejected Cardinal Mine and held that a late filed IRS

priority claim shares with other unsecured non-priority creditors under § 726(a)(2)(C), whether or not it received adequate notice. In re Mantz, 151 BR 928 (9th Cir. BAP, 1993).

This split of authority raises the question of whether Rule 3002 should attempt to resolve the issue relating to priority status under § 726(a)(1) for late filed claims. I personally believe that Rule 3002 should not do so because the case law focuses on statutory interpretation of an ambiguous Code provision that is best left to the courts. If Rule 3002 is amended, I suggest that it indicate that the bar date does not deprive a creditor of distribution rights to the extent that a tardily filed claim is entitled to distribution under § 726, leaving to the courts the task of deciding the appropriate priority under § 726.

Point 3: "Dealing with problems of a Chapter 13 trustee who, after making distribution under a confirmed plan, encounters a hotchpot-like situation of having to recover funds from non-priority creditors or otherwise recover funds from creditors to provide equality of distribution."

The Hausladen decision may present problems in many cases in which a confirmed chapter 13 plan provides for payment to all "allowed" claims. If tardily filed claims are allowable in chapter 13 despite Rule 3002, even claims filed post-confirmation may be entitled to share in distributions.

Section 726(a)(2)(C) permits tardily filed claims to receive distributions in chapter 7 cases as if they are timely filed, but only if "proof of such claim is filed in time to permit payment

of such claim." Perhaps this same concept could be included in any amendments to Rule 3002 dealing with late filing of claims by unscheduled and unnoticed creditors in chapter 13 cases. If it is too late to receive distributions because the chapter 13 trustee has already made distributions under the plan, the chapter 13 trustee should have no obligation to recover funds.

Working Draft of Amendments.

To assist in focusing the discussion of Rule 3002, I have prepared the attached draft of amendments that deal with the three points raised in Judge Mannes' letter.

DRAFT FOR DISCUSSION PURPOSES

Rule 3002. Filing Proof of Claim

(a) Necessity for Filing. ~~An unsecured~~ A creditor ~~or an equity security holder~~ must file a proof of claim ~~or interest~~ in accordance with this rule for ~~the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.~~ the creditor to receive a distribution with respect to an unsecured claim, unless (1) a proof of claim is filed in accordance with Rule 3004 or 3005 or is deemed filed pursuant to Rule 1019(3); (2) a proof of claim is deemed filed pursuant to § 1111(a) of the Code or is filed in accordance with Rule 3003; or (3) the creditor is entitled to a distribution pursuant to § 726 as the holder of an allowed unsecured claim for which a proof of claim has been tardily filed. An equity security holder must file a proof of interest in accordance with this rule for the interest to be allowed except as provided in Rule 3003.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

* * * *

~~(6) In a chapter 7 liquidation case, if a surplus~~

~~remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed.~~

(6) In a chapter 12 or chapter 13 case, the court may extend the time for a creditor to file a proof of claim if the creditor did not have notice or actual knowledge of the case in time for filing of a proof of claim within the time herein above prescribed, and the proof of claim is filed in time to permit distribution to the creditor.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
451 HUNGERFORD DRIVE
ROCKVILLE, MARYLAND 20850

PAUL MANNES
JUDGE

(301) 443-7010

February 11, 1993

Honorable Edward Leavy
Judge, United States Court of Appeals
for the Ninth Circuit
216 Pioneer Courthouse
555 S. W. Yamhill Street
Portland, Oregon 97204-1396

Dear Judge Leavy:

In response to your request, your ad hoc committee of bankruptcy judges who are members of the Rules Committee recommends that revisitation of Rule 3002 be included in the next meeting's agenda.

We suggest that the Committee consider the following on a preliminary basis:

1. Departing from the language in Rule 3002(a) that a claim must be filed to be allowed, substituting language to the effect that the filing of a proof of claim is required to share in proceeds distributed by the trustee.

2. Dealing with equitable concerns and due process issues, as to unnoticed and unknowing creditors, caused by the interaction of Rule 3002(c) with Code §§ 726(a) and 1328(a).

3. Dealing with problems of a Chapter 13 trustee who, after making distribution under a confirmed plan, encounters a hotchpot-like situation of having to recover funds from non-priority creditors or otherwise recover funds from creditors to provide equality of distribution.

We do not propose that the Committee revisit the issue of requiring claims to be filed on behalf of secured creditors or that there be a modification of Rule 9006(b) to allow enlargement of time based upon excusable neglect.

To aid this initial discussion, we suggest that the Committee consider U.S. v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (CA6 1990), and In re Rago, B.C. N.D. Illinois 1992, Bankr.

Lexis 1855, that deal with the issue of subordination of priority creditors, as well as In re Hausladen, 146 B.R. 557, (BC D. Minn. en banc 1992) that deals with the nullification of the bar date of Rule 3002(c), the case of In re Cole, 146 B.R. 837, that deals with a lack of notice in Chapter 13 cases and underscores the excusable neglect/due process distinction, and the case of In re Duarte, 146 B.R. 958 (BC W.D. Tex. 1992) that gives effect to an untimely proof of claim on constitutional grounds, when the creditor has no notice in time to file a timely proof of claim. We suggest that the package also include Professor Resnick's communications of December 10, 1990, June 10, 1991, and August 25, 1992, together with extracts of minutes of previous meetings held December 1990, June 1991, and March and September 1992.

Judge Meyers points out, picking up on Professor Resnick's memorandum of August 25, 1992, that if "timeliness" is not a requirement for "allowance," several of the problems that have befuddled us are apparently eliminated. He points to the following:

1. § 363(k) - This section appears to limit the right of a lienholder to bid at a sale to those whose lien secures an "allowed claim." If a trustee decides to dispose of property after the 90 days have run, the lienholder could still file a tardy, but still "allowed" claim, at a later time so that use of the "bid-in" right granted by § 363(k) can be exercised.

2. § 506(c) - This section allows a trustee to recover costs incurred in preserving or disposal of property secured by an "allowed secured" claim. Such expenses may not be incurred until after the time to file timely claims has expired. If timeliness is not part of "allowability," then the trustee can file a claim and thereby turn it into an "allowed" claim at any time.

3. § 722 - Under this provision, an individual debtor can redeem tangible personal property by paying the amount of the "allowed secured claim." If the court grants an extension to exercise this right pursuant to 11 U.S.C. § 521(2)(B), then by the time the debtor gets around to exercising this right, no timely claim may have been filed on the secured claim. Judge Kressel's interpretation would mean that the debtor could file a tardy, but allowable, claim for the lienholder so as to be able to use this redemption provision.

4. § 726(a)(2)(C) and § 726(a)(3) - These provisions provide for payment on "allowed" but tardily filed claims. The interpretation under consideration renders these provisions understandable.

5. § 1305 - This section deals with postpetition claims in Chapter 13 cases. It appears to provide for "allowed" postpetition claims without regard to the time when they are filed.

This project may cause us to study other rules that deal with filing timely proofs of claim, such as Rules 3004 and 3005. We believe that there are some obvious questions and some less than obvious ones that will surface upon scrutiny. One obvious concern deals with § 723(a), in which Judge Meyers wonders how will a trustee ever know how much to seek from a general partner under § 723 to cover a deficiency? He points out this may be the classic "chicken and egg" problem.

The various statutory construction concerns are manageable. The greatest difficulty will be caused by the fact that the rule in question has been in effect for nearly ten years and tens of thousands of plans have been formulated with reference to the rule. A great number of plans deal with payments on "allowed claims" and do not contain any distinction in the treatment of untimely filed claims. If Hausladen were implemented universally, the Chapter 13 trustees would have an intolerable burden in attempting to reconstruct distributions in pending cases in order to determine how to provide equality of distribution to holders of tardily filed claims. The trustees may be held personally liable to such claimants if payments are not made.

In preparing this memorandum we consulted with Professor Lawrence P. King, who had opposed the prior proposed changes to Rule 3002. He does not support changes to Rule 3002 at this time and he has authorized the inclusion of his letter of February 5, 1993, with this report.

Sincerely,

Paul Mannes

PAUL MANNES

cc: Honorable James W. Meyers
Honorable James J. Barta

Enclosure

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Lawrence P. King
Charles Seligson Professor of Law

FEB 0 9 93

February 5, 1993

Honorable Paul Mannes
U.S. Bankruptcy Judge
U.S. Bankruptcy Court
451 Hungerford Drive
Rockville, Maryland 20850

Dear Judge Mannes:

This is in response to your letter of February 3, 1993. Prior to its receipt, I had read In re Hausladen, 146 B.R. 557 and also noted in the same volume, In re Duarte, 146 B.R. 958. Accordingly, there are these two cases which read and apply Rule 3002(a) and (c) quite differently. In itself, this is a reason I would think it unnecessary at this time to consider rule changes. It seems to me that it would be better to get some learning from appellate courts before making "legislative" changes. Having expressed that personal viewpoint, I will attempt to respond to the matters presented in your letter.

1. (a) The opinion of the court, in Hausladen, starts out correctly by noting that section 501 leaves to the rules the fixing of the time for filing claims. After that the "en banc" opinion departs from the Code and rules by (1) failing to recognize that section 501(b) speaks of a "timely" filed proof of claim, as does section 501(c), and section 726(a)(2)(A), (B), (C), (3) speaks of "timely" and "tardily" filed claims; (2) in addition, these portions of section 726 speak of "allowed" claims that are either timely or tardily filed; (3) allowance of claims in section 502(a) depends first on a claim being "filed under section 501 of this title"; and, (4) section 1325(a)(4) should make section 726(a)(2), (3) applicable in chapter 13 cases.

By leaving the time for filing claims to the rules, section 501 perforce has to be read with Rule 3002. Rule 3002 provides that a proof of claim must be filed within a certain time. If it is not, the claim is not filed under section 501 and does not reach the specific disallowance provisions in section 502(b). It just comes within (or

without) section 502(a), i.e., if not timely, it is not filed (and, of course, not deemed allowed).

Section 726(a)(2)(C) provides an exception that was not contained in the former Act. The rules, of course, cannot change this exception. Accordingly, the only portion of Rule 3002 that would apply in the section 726(a)(2)(C) situation is that which states that a proof of claim must be filed. The time is not relevant, only the filing because, even under the Code's exception, filing is presupposed.

Section 1325(a)(4) requires the chapter 13 plan to give creditors at least as much as they would receive in a chapter 7 liquidation. I take this to incorporate the provisions of section 726 which, in effect, states what creditors will receive in a chapter 7 liquidation. Under section 726 a late claim may or may not be entitled to distribution along with timely filed claims. If the late claim is not within the exception and would not so participate in a chapter 7 case, depending on the assets of the debtor available for distribution, the creditor would, more likely than not, receive nothing in the chapter 7 case. Thus, in the chapter 13 case that creditor should also receive nothing. And the reverse should also apply; if the creditor is within the exception and would participate, it should participate under the chapter 13 plan.

It seems to me that the statutory scheme as implemented by the rules reads and works well. It is difficult to perceive an amendment that would clarify rather than confuse.

(b) In Hausladen the court states:

> . . . Read together, Rules 3002(a) and 3002(c) do not explicitly say but imply that filing with in [sic] the prescribed period is a prerequisite to allowance.... Under the Bankruptcy Act, late claims were explicitly disallowed [citing Section 57n]. . . . The old Bankruptcy Rule implemented this time bar. However, a time bar does not expressly exist under the Code or Rules. (Emphasis added.)

But Rule 3002 (a) does explicitly contain a time bar: it provides:

> An unsecured creditor . . . must file a proof of claim . . . in accordance with this rule . . . for the claim . . . to be allowed.

The former Rule 302(a) provided:

> In order for his claim to be allowed, every creditor . . . must file a proof of claim in accordance with this rule . . . .

Both rules contain the same basic proposition that allowance depends on timely filing; thus a time bar existed then and exists now in the two Rules. Accordingly, again, it seems to me that the present Rule does not require "clarification."

2. On the due process issue, would it not be better to leave the development to the courts on a case by case basis? Section 726(a)(2)(C) basically covers the elements that would go into its applicability and protective nature; I would doubt that it is necessary to attempt some procedural implementation of the Code provision.

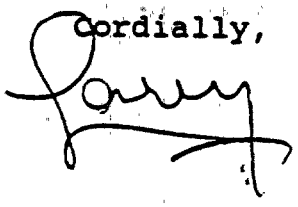
As to you Point 3, firstly, section 726(a)(2)(C)(ii) only permits payment if the late claim is filed in time to permit payment to it. If there has been distribution, I would assume it is too late and the chapter 13 trustee would not have to seek disgorgement or even to revise future payments. Protection of the creditor who did not receive proper notice comes from the fact that the claim is rendered nondischargeable. That is where due process comes it, I would believe. The chapter 7 or chapter 13 discharge cannot operate in violation of the due process concept; obviously and otherwise, inter alia, a debtor would have an improper incentive to leave some creditors off the list or schedules.

I think I agree with Point 4. If it means not to mess with excusable neglect, I would agree. It would not be excusable neglect to try to define excusable neglect or to work it into the bar date for filing claims.

I hope that this is of some help to the ad hoc committee. Not only is your errand an important one but it is comforting to note that it is one that is placed in the hands of such capable judges.

Best personal regards.

Cordially,



cc: Honorable James J. Barta
Honorable James W. Meyers

TO: SUBCOMMITTEE ON CHAPTER 13

FROM: ALAN N. RESNICK, REPORTER

RE: SUMMARY OF DECEMBER 6TH MEETING AND FRAMEWORK FOR FURTHER ACTION

DATE: DECEMBER 10, 1990

When I returned home from the December 6th meeting in Raleigh, I thought that it may be useful to put in writing my recollections of the meeting, and to try to develop a useful framework for further subcommittee activity.

At this point, I believe that it would be helpful to divide all the suggestions received by the subcommittee into the following four categories:

(A) Suggestions discussed in Raleigh that should be considered further;

(B) Suggestions to be considered, but which were not discussed at the meeting;

(C) Suggestions that should be adopted without the need for further discussion; and

(D) Suggestions that should not be considered further.

Although this document may be influenced by my own views, I tried to be as objective as possible and to incorporate the views of the group as best as I could recall them. I also want to emphasize that this was prepared from my notes and recollection of the discussion, but without the benefit of a transcript or minutes of the meeting. However, I am confident that you will correct any of my faulty recollections. I realize that the subcommittee may disagree with my placement of some of these issues in particular categories. Indeed, this document is offered only as a rough framework for further subcommittee action. If any of you do not agree with any part of this memorandum, please feel free to raise this either before or at the next meeting.

Hopefully, by eliminating categories (C) and (D) from further discussion, the subcommittee could focus on the remaining issues only. The subcommittee also may wish to ask the full Advisory Committee for direction on the items in categories (A) and (B).

I also want to make a recommendation regarding Part B of this memorandum. I RECOMMEND THAT ITEMS I, II, III, IV, AND V OF PART B BE REJECTED AND MOVED TO CATEGORY D.

It was suggested that the Chapter 13 Subcommittee should meet again after the next Advisory Committee meeting. Perhaps many of the remaining issues could be resolved by the subcommittee at that meeting. The Advisory Committee meeting will be held on Thursday and Friday, January 17 and 18. I will be available to meet with the Chapter 13 Subcommittee on Saturday, January 19th. If you wish to meet before the Advisory Committee meeting, since I must be in San Diego for another subcommittee meeting on January 15th, I could be available for a meeting of the Chapter 13 Subcommittee on Wednesday, January 16th. Alternatively (or in addition), perhaps a telephone conference could be arranged at a convenient time for all members of the subcommittee to discuss or vote on some of the suggestions in Part A or B, or on my recommendation regarding the rejection of most of the items in Part B.

PART A
SUGGESTED CHANGES DISCUSSED AT THE MEETING THAT SHOULD BE CONSIDERED FURTHER

I. SHOULD THE TIME PERIODS IN THE RULES BE AMENDED TO ACCOMMODATE THOSE DISTRICTS WHICH DESIRE TO HOLD THE §341 MEETING AND CONFIRMATION HEARINGS ON THE SAME DAY?

If there is any clear conclusion to be reached from the meeting on December 6th, it is that there is no uniformity in the timing of confirmation hearings. Some districts hold the confirmation hearings on the same day as the §341 meeting (although if there is an objection to confirmation, the hearing is usually adjourned); some hold the confirmation hearing after the §341 meeting date, but prior to the bar date for filing proofs of claim; and some wait until after the bar date to hold the confirmation hearing. In at least one district, no confirmation hearing is held unless there is an objection.

A fundamental question for the Advisory Committee is whether the rules should strive for uniformity. If so, it should focus on which of the above is most desirable and modify the rules to impose it on all districts. Alternatively, the rules could be designed to permit local variations.

If the Committee decides to accommodate those who wish to hold the confirmation hearing and § 341 meeting on the same day, the rules must be amended. Under the current rules, if the petition is filed on Day 1, the plan must be filed by Day 15 (Rule 3015), and then 25-days notice of the confirmation hearing must be given together with the plan or plan summary (Rule 2002(b)) before the hearing can be held. Since, as a practical matter, the clerk cannot get the notice out until at least Day 16, the hearing must be held not earlier than Day 41. Rule 2003(a) requires that the § 341 meeting be held by Day 40. Therefore, the rules will have to be changed in one of the following ways in order to permit the § 341 meeting and the confirmation hearing to be held on the same day:

(1) Shorten the requirement in Rule 2002(b) for notice of the confirmation hearing from 25 days to 20 days, or

(2) Amend Rule 2003(a) to provide that the § 341 meeting may he held not later than 45 days (instead of 40 days) after the commencement of the case. [It has also been suggested that the deadline should be extended to 60 days so that creditors will better prepare and participate at the meeting, but this is not necessary for scheduling the two events on the same day]

Both of these alternatives will give the clerk a window of

five days in which to send out the required notices of the § 341 meeting and confirmation hearing.

Those who suggest holding the § 341 meeting and confirmation hearing on the same day do so because it saves the debtor (and counsel) a trip to court. In certain districts with large geographic areas, it is difficult for a debtor to miss another day of work and travel to court (sometimes hundreds of miles). In response to this, it was pointed out that the debtor's presence at the confirmation hearing is not required. Another reason expressed for holding these events on the same day is that it expedites the case, especially when there is no objection to confirmation. However, this expediting of the case may have little value if the trustee does not make any distributions to creditors until after the bar date (90 days after the § 341 meeting) anyway (although in at least one district, the money collected by the trustee is distributed after confirmation and prior to the bar date).

It was pointed out that in districts which confirm the plan very early (when the § 341 meeting is held) there is probably fewer motions for relief from the stay (by secured creditors), but more motions to modify the plan when priority and secured creditors file timely proofs of claim after confirmation. In districts that wait until after the bar date to confirm the plan, there is probably more stay litigation, but fewer motions to modify the plan. Therefore, it should be assumed that the volume of litigation and judicial time spent on a case will not vary by amending the rules in this regard.

Another fact that was learned at the December 6th meeting is that in some districts the § 341 meeting is very productive. Secured creditors attend and negotiate valuation and other matters. After the meeting at which the parties have hammered out there differences, the court confirms the plan without objection. In many other districts, the § 341 meeting is virtually meaningless - creditors do not attend and there is only a few minutes for the meeting. Will this change if the parties are told that the confirmation hearing will be held on the same day? Is it too early in the case for institutional creditors to "get their act together" to participate?

If the Subcommittee agrees that the rules should be changed to permit the § 341 meeting and confirmation hearing on the same day, I think it would be better to extend the time for holding the § 341 meeting by 5 days (to 45 days) so that it will not cut down on the rights of creditors' to the current 25-days notice of the hearing. I would not recommend extending the meeting more than that. The date set for the § 341 meeting is used to trigger other time limits (time to object to discharge, for § 707(b) dismissal motions, for filing proofs of claim, etc.) and it may be confusing to the bar to start changing these deadlines

unnecessarily. I also doubt that § 341 meetings will be more meaningful if held on the 60th day of the case. Also, the United States trustee sets the § 341 meeting date (not the court) and, as we discussed in Raleigh, an under-staffed U.S. trustee may use this change to automatically delay holding the meetings.

II. SHOULD THE RULES BE CHANGED TO CLARIFY THAT SECURED CREDITORS MUST FILE PROOFS OF CLAIM WITHIN THE BAR DATE IN ORDER TO HAVE "ALLOWED CLAIMS"?

The following ambiguity that causes confusion among secured creditors and which discourages the filing of secured creditors has been pointed out:

(1) Sections 501(a), 502(a), and 506 of the Code and Rule 3001(d) make it clear that secured creditors may file proofs of claim, and that if they do not, there claims will not be "allowed." Section 506(d) provides that if the secured claim is not "allowed" only because of the failure to file a proof of claim, the lien survives. Nonetheless, there is a difference between an "allowed" secured claim (which requires filing of a proof of claim), and one that is not allowed but whose lien survives. This difference could be important for the confirmation standards under § 1325(a)(5) and for distribution purposes under a confirmed plan.

(2) Rule 3002(a), however, gives the impression that only unsecured creditors must file a proof of claim in order to have the claim allowed. Does the secured creditor also have to file a proof of claim to have the claim "allowed"?

(3) Since Rule 3002(a) applies to unsecureds only, does that mean that Rule 3002(c) also applies to unsecureds only? If a secured creditor files a proof of claim 2 years after the plan is confirmed, is it a timely proof of claim so that it could move to modify the plan and share in distributions? Case law indicates that the secured creditor is subject to the 90-day bar date and must have an allowed claim in order to receive a distribution under a confirmed plan. See In re Johnson, 95 BR 197 (Bankr. D. Colo. 1989); In re Rogers, 57 BR 170 (Bankr. E.D. Tenn. 1986) (footnote 1 says that "to the extent Rule 3002(a) appears to say that allowance of a secured claim . . . does not require the filing of a proof of claim, it is inconsistent with the statutes and is ineffective"). However, experience in some districts indicates that secured creditors do not know this and late proofs of claim are common. These courts often accept such late filed proofs of claim and modify confirmed plans accordingly because there is no objection. It would be preferable if secureds were clearly informed that they must file by the bar date in order to have an allowed claim.

At first, it had been suggested that the rules require secured creditors to file claims, but that was dismissed because of the effect of § 506(d). See In re Thomas, 883 F2d 991 (11th Cir. 1989) (failure to file proof of claim did not affect secured creditor's lien). After considerable discussion, it was suggested that the ambiguity now confusing secured creditors as to the necessity for filing proofs of claim within the bar date in order to have an "allowed" claim could be avoided by striking the word "unsecured" in the first sentence of Rule 3002(a). The Committee Note could explain that this is to clear up any confusion regarding the application of the bar date to secured creditors, but that failure to file a timely proof of claim will not mean that the lien is lost (referring to § 506(d)).

III. SHOULD RULE 3004 BE AMENDED (1) TO CONFORM TO THE CODE AND (2) TO GIVE A SECURED CREDITOR AN OPPORTUNITY TO FILE A SUPERSEDING CLAIM REPLACING ONE FILED BY THE DEBTOR AFTER THE BAR DATE?

Two problems were pointed out regarding Rule 3004:

(1) Rule 3004 is ambiguous. Does it mean that the debtor may file the claim after the § 341 meeting but prior to the bar date (90 days after the § 341 meeting)? Or, does it mean that the debtor must wait until after the bar date to file it. The last sentence of the rule and the Committee Note to the 1987 change indicates that the debtor may file prior to the bar date. By permitting the debtor to file a claim on behalf of a creditor prior to the bar date, it seems to violate § 501(c) which provides: "If the creditor does not timely file a proof of such creditor's claim, the debtor of the trustee may file a proof of such claim."

It seems that Rule 3004 should be amended to allow the debtor or trustee to file only after the bar date.

(2) If the bar date passes, and the debtor files a proof of claim for an unsecured creditor, there is no reason to permit the creditor to file a superseding claim. In essence, that creditor is time barred and should not be resurrected except to the extent that the debtor wishes to do so.

However, it has been suggested that the rule should be different for secured creditors. Suppose that a secured creditor decides to refrain from filing a proof of claim and to have its lien "ride through" under § 506(d). Of course, there is nothing wrong with the creditor doing this. Then, after the bar date, the debtor files a claim on its behalf, but understates the value of the collateral or the amount of the debt. It was suggested that the secured creditor in that event, "dragged into the case",

should have an opportunity to "correct the record" by filing a superseding claim. This could be accomplished by amending the last sentence of Rule 3004 to permit secured creditors only to file a superceding claim. Unsecureds should have no right to file any superseding claim if they miss the bar date.

IV. SHOULD THE RULES PERMIT A LATE SCHEDULED CREDITOR TO FILE AN OTHERWISE LATE PROOF OF CLAIM IN CHAPTER 13 CASES?

Suppose that the debtor fails to schedule an unsecured creditor and the creditor first learns of the case after the bar date for filing proofs of claim? If the case is in chapter 7, the creditor is not discharged (§ 523(a)(3)). But if the case is in chapter 13, the debt could be discharged (§ 1328) unless the court basis a decision on lack of due process, etc.

It has been suggested that in chapter 13 cases only (since § 523(a)(3) does not apply), fairness dictates that the late scheduled creditor be given a brief opportunity to file a late claim and participate in distributions under the plan. Apparently, some courts permit the late filed claim to be allowed because usually nobody objects to the allowance.

Two alternatives have been discussed for dealing with this problem:

(a) Amend Rule 3002(c) to add another subdivision that provides that a creditor who did not have notice or actual knowledge of the case in time for filing a timely proof of claim may file a proof of claim within a certain period [30 days?] after receiving such notice or actual knowledge of the case [this concept is borrowed from § 726(a)(2)(C)]; or

(b) Amend Rule 9006(b)(3) to delete reference to Rule 3002(c). This will allow courts to apply the "excusable neglect" standard to permit the late filing of claims. It was assumed that the courts will use the "excusable neglect" doctrine to permit the late filing of claims when the creditor is added to the schedules late.

V. SHOULD RULES 3018, 3019, AND 3020 BE AMENDED SO THAT THEY DO NOT APPLY TO CHAPTER 13, AND A NEW RULE ADDED TO DEAL WITH THE CONFIRMATION PROCESS AND MODIFICATION OF PLANS IN CHAPTER 13 CASES?

It was suggested that Rules 3018-3020 do not work well in chapter 13 cases, and that a new rule should be added to deal with chapter 13 cases. This presents several questions regarding

the content of such a new rule:

(1) Should confirmation hearings be held only if there is an objection to confirmation? I doubt whether that could be permitted in view of the mandate for a hearing in § 1324 (although the view has been expressed that the language in § 1324 is a "similar phrase" to "after notice and a hearing" so that a hearing is not required under § 102). It is interesting to note that the phrase "after notice and a hearing" is now used in Rule 3020(b)(2) [Query: should that be changed?].

(2) If a hearing is held, does the court have to make findings regarding the requirements for confirmation (§ 1325) in the absence of an objection? It appears that some courts do not require any evidence, and that confirmation is merely a "rubber stamp" when no party objects. However, Rule 3002(b)(2) seems to imply that the court need not hear evidence only on the good faith issue, but must hear it on the other requirements for confirmation under § 1325. It has been suggested that the second sentence of Rule 3020(b)(2) be deleted (at least for chapter 13 cases) so that courts may confirm plans automatically in the absence of an objection. Does this defeat the purpose of requiring confirmation hearings in all cases, even in the absence of an objection?

(3) Should the rules be specific on how a secured creditor "accepts" a plan (see § 1325(a)(5)(A)? Should there be an Official Form? It was pointed out that secured creditors use different methods of signifying acceptance, including adding acceptance language on a proof of claim form, accepting the plan orally at the confirmation hearing, etc. This does not seem to be a significant problem in practice.

VI. SHOULD A RULE BE ADDED ON POST-CONFIRMATION MODIFICATION OF CHAPTER 13 PLANS?

There is no rule covering post-confirmation modification. The Code provides for this in § 1329. It has been suggested that the rules require service of a proposed modification on creditors at least 10 days prior to the time for objecting to it. However, only those parties adversely affected by the modification should get notice. Section 1329(a) says that a party may request modification, and Rule 9013 says that a request for an order is by motion. Therefore, a motion must be made to modify the plan. Section 1329(b)(2) says that the plan is modified only "after notice and a hearing." This means that notice must be given to parties in interest affected by the proposed modification.

I question whether there is a need for a new rule dealing with this.

VII. SHOULD SUPPLEMENTAL SCHEDULES BE REQUIRED IN CHAPTER 13 CASES TO COMPEL DEBTORS TO REPORT ASSETS ACQUIRED POST-PETITION (INCLUDING POST-CONFIRMATION) AND TO REPORT CHANGES IN CURRENT INCOME AND EXPENSES.

Rule 1007(h) requires supplemental schedules if a debtor acquires assets that become part of the estate under § 541(a)(5). It has been suggested that, since post-petition acquired property becomes property of the estate in chapter 13 cases (§ 1306), debtors should be required to file supplemental schedules whenever any property is acquired during the case (including after confirmation and during the 3 or 5 year payment period). Also, changes in income and expenses should be reported. The purpose of this suggestion is so that creditors will know when they should request modification of the plan under § 1329.

It appears that such a change would have to have some limitations so that a debtor would not have to file daily, weekly, or even monthly amended schedules to reflect day-to-day changes in assets and income. Is this opening up a door that could cause administrative problems, costs, paper, etc.?

VIII. SHOULD RULE 4007(d) BE AMENDED TO PROVIDE A UNIFORM BAR DATE FOR § 523(c) NONDISCHARGEABILITY COMPLAINTS WHEN THE DEBTOR REQUESTS A HARDSHIP DISCHARGE UNDER § 1328(b)?

Rule 4007(d) now requires the court to fix a bar date and for creditors to receive 30 days notice of the bar date. This should give creditors ample opportunity to object. Is there any reason to add to this?

PART B
SUGGESTIONS TO BE CONSIDERED
BUT WHICH WERE NOT DISCUSSED AT THE MEETING

I. SHOULD THE RULES PROVIDE A BAR DATE FOR FILING POST-PETITION CLAIMS THAT MAY BE FILED PURSUANT TO § 1305?

It has been suggested by Judge Lundin and Judge Drake that the rules provide that postpetition claims filed under § 1305 must be filed not later than 45 days after they arise. At present there is no such deadline.

I question the necessity for such a rule. It would probably invite litigation regarding the date when a claim "arises." This brings back memories of the high volume of litigation over when a claim was "incurred" for purposes of applying the old 45-day rule in connection with the "ordinary course of business" exception to preferences under § 547(c)(2) that was deleted in 1984. Also, why would it be desirable to prompt the post-petition creditor to file early. The creditor has the option of filing, and if it decides to file to participate under the plan, it is only hurting itself by delaying. Is this a real problem? I favor rejection of this suggestion.

II. SHOULD THE RULES PERMIT THE CHAPTER 13 TRUSTEE TO FIX THE VALUE OF COLLATERAL AT THE § 341 MEETING (OR THEREAFTER WHEN A CLAIM IS FILED LATE), SUBJECT TO COURT REVIEW UPON OBJECTION?

It has been suggested by Judge Drake that, since the trustee is neutral, this may be a good way to value collateral. He says that debtors who file claims on behalf of the creditor will undervalue the collateral, while secured creditors will overvalue the collateral. However, under the present rules there is no prohibition that prevents the Chapter 13 trustee from mediating such disputes to avoid litigation. I also question the desirability of giving any presumptive weight to a determination by the trustee. Therefore, I question whether such a change is necessary or desirable.

III. SHOULD THE RULES REQUIRE NOTICE TO ALL CREDITORS WHEN A DEBTOR "AUTOMATICALLY" DISMISSES THE PETITION UNDER § 1307(B)?

The debtor has the absolute right to dismiss a chapter 13 case. However, Judge Small has cited in his letter cases in which courts have taken steps to prevent abuse by debtors who "automatically" dismiss the case. Judge Small suggests that the rules require that all creditors receive notice of such dismissals so that they can ask the court to take whatever steps are appropriate if there is an abuse.

I question the desirability of requiring notice to all creditors when there is such an automatic dismissal. This appears to me to be expensive and cumbersome overkill to catch the rare abuse. Who will pay for the notice? If there is an abuse, I assume that it could be brought to the court's attention later after creditors receive notice of the dismissal under Rule 2002(f)(2), and that the court could impose costs or another appropriate remedy at that time?

IV. SHOULD THE RULES REQUIRE THE CHAPTER 13 TRUSTEE TO TAKE SOME ACTION (REPORT, MOTION, ETC.) BY A CERTAIN TIME REGARDING OBJECTIONS TO CLAIMS? SHOULD THERE BE A TIME LIMIT FOR OBJECTING TO CLAIMS?

Judge Clark suggested that such a requirement be added to the rules to impose an affirmative cutoff date for objecting to claims so that the trustee can begin cutting checks to creditors without having to adjust latter when objections to claims are filed. Would such a deadline have to apply to all parties in interest since they also may object to claims (§ 502(a))? Therefore, I question whether a duty on the trustee to take affirmative action regarding objections to claims by a certain date would be effective given the possibility of others filing objections later.

If there is a problem caused by a Chapter 13 trustees' delay in objecting to claims, it seems to me that this may be an administrative matter to be handled by the United States trustee's office in its role as supervisor of trustees.

V. SHOULD RULE 2016 BE AMENDED TO STREAMLINE THE PROCEDURES FOR COMPENSATING PROFESSIONALS IN CHAPTER 13 CASES?

Judge Clark suggested that the rules should streamline the procedure for compensating professionals, such as by requiring disclosure of fees in the schedules and review by the trustee at the § 341 meeting. I question the necessity for this. The Statement of Financial Affairs already requires the debtor to disclose this information, Rule 2016(b) requires professionals to disclose their fees, and the trustee may take whatever action is deemed appropriate. If there is a problem, perhaps this is a matter for the United States trustee who is supposed to monitor attorneys' fees.

VI. SHOULD RULE 2002(h) BE AMENDED TO INCLUDE CHAPTER 13 SO THAT NOTICES WILL NOT HAVE TO BE SENT TO CREDITORS WHO DID NOT FILE TIMELY PROOFS OF CLAIM?

Mr. Dunn suggested that this rule, which applies only in chapter 7 cases, also apply to chapter 13 cases.

VII. SHOULD THE RULES (RULE 3012?) BE AMENDED TO CLARIFY NOTICE REQUIREMENTS WHEN THE COURT DETERMINES VALUATION OF COLLATERAL IN CONNECTION WITH A CONFIRMATION HEARING - A RESPONSE TO RECENT CASES IN THE ELEVENTH CIRCUIT.

In re Calvert, 907 F.2d 1069 (11th Cir. 1990), and In re White, 908 F.2d 691 (11th Cir. 1990), have raised questions regarding the type of notice that is required before a court may value collateral at a hearing in connection with confirmation of a chapter 13 plan. Should Rule 3012 be amended to provide that collateral could be valued at a confirmation hearing if the secured creditor receives notice that such a valuation may be determined. This would implement § 506(a) which provides that valuation may be determined in connection with a hearing on confirmation of a plan.

PART C
AMENDMENTS THAT SHOULD BE PROPOSED WITHOUT THE NEED FOR FURTHER DISCUSSION

I. AMEND RULE 1017(d) TO PROVIDE THAT "THE DATE OF THE FILING OF THE NOTICE OF CONVERSION SHALL BE DEEMED THE DATE OF THE ENTRY OF THE ORDER OF CONVERSION FOR THE PURPOSE OF APPLYING RULE 1019."

This is a technical amendment that should be made so that the filing of a notice of conversion pursuant to § 1307(a) will trigger those provisions in Rule 1019 that are triggered by the entry of an order of conversion. See current Rule 1019(6).

II. ADD A SENTENCE TO RULE 3015(b) TO PROVIDE THAT A PLAN MUST BE FILED WITHIN 15 DAYS AFTER A CASE IS CONVERTED TO CHAPTER 13.

There is currently no time limit for filing chapter 13 plans in cases that were converted from chapter 7. This will provide such a time limit.

PART D
SUGGESTIONS THAT SHOULD NOT BE CONSIDERED FURTHER

I. SHOULD THE TIME FOR FILING CLAIMS UNDER RULES 3002, 3004, AND 3005 BE CHANGED?

Except as provided above with regard to late scheduled claims and Rule 3004, there seemed to be no reason for shortening the time for filing claims. The current period (90 days after the date set for the § 341 meeting) seems to work well.

II. THE RULES SHOULD REQUIRE THE FILING OF SECURED CLAIMS.

In view of § 506(d), this proposed change is inappropriate.

III. THE RULES SHOULD REQUIRE THAT PROOFS OF SECURED AND PRIORITY CLAIMS BE SERVED ON THE DEBTOR.

This was discussed at the meeting and had little support. The debtor's attorney could review these claims at the courthouse and the service requirement would be difficult to enforce. Clearly, failing to serve the debtor would not cause the claim to be "unfiled" if it was filed with the clerk.

IV. THE RULES SHOULD PROVIDE A PROCEDURE FOR OBTAINING A CHAPTER 13 DISCHARGE, SUCH AS REQUIRING NOTIFICATION TO THE COURT OF THE COMPLETION OF PAYMENTS.

If the debtor is entitled to a discharge upon completion of the payments, a request is made for a discharge. The problem pointed out by Henry Sommer is that debtors sometimes do not know when the plan payments have been completed and the debtor sometimes continues to make payments after the plan is fully executed. I do not know how the rules could deal with this other than to require the trustee to stop collecting payments at that time. Perhaps this is for the U.S. Trustee to deal with as the supervisor of trustees.

V. THE RULES SHOULD PROVIDE A UNIFORM DEADLINE FOR OBJECTING TO CONFIRMATION OF A CHAPTER 13 PLAN (PERHAPS 10 DAYS PRIOR TO THE CONFIRMATION HEARING).

The rules now require that the court set a bar date for objections to confirmation (Rule 3020(b)(1)) and that this deadline be in a 25-day notice to creditors under Rule 2002(b). If objections must be filed 10 days prior to (instead of at) the confirmation hearing, it would not make sense to hold the

confirmation hearing on the same day as the § 341 meeting because creditors should be able to use the § 341 meeting to gather the information needed to formulate their objections.

VI. THE RULES SHOULD REQUIRE DISCLOSURE OF ENTITIES ASSISTING PRO SE DEBTORS AND THE FEES PAID TO SUCH ENTITIES.

This issue was discussed and rejected by the Advisory Committee and is not unique to chapter 13 cases.

VII. A RULE ON CONVERSION FROM CHAPTER 7 TO CHAPTER 13, AND FROM CHAPTER 11 TO CHAPTER 13, SHOULD BE ADDED, INCLUDING A PROVISION REQUIRING THE FILING OF SUPPLEMENTAL SCHEDULES AND SETTING FORTH A 15-DAY DEADLINE FOR FILING A PLAN.

As mentioned above, the rules should provide that the chapter 13 plan must be filed within 15 days after conversion. However, there is no need for additional provisions. Rule 1007(c) already provides that the chapter 7 schedules shall be deemed filed in a superseding case unless the court directs otherwise. Also, since conversion from chapter 11 to chapter 13 is rare and no problems have been identified, there is no necessity for a new rule on that.

VIII. RULE 1006 SHOULD BE AMENDED TO PERMIT THE FILING FEE TO BE PAID WITH THE FIRST DISTRIBUTION UNDER THE PLAN, EVEN IF THAT OCCURS MORE THAN 180 DAYS AFTER THE PETITION IS FILED.

This could present problems regarding the trustee's right to a fee based on such a distribution, as well as other problems. My recollection is that this did not receive much support at the meeting.

IX. RULE 3015(b) SHOULD BE CHANGED SO THAT CHAPTER 13 PLANS MUST BE FILED WITHIN 10 DAYS AFTER THE COMMENCEMENT OF THE CASE (INSTEAD OF 15 DAYS).

This suggestion was made so that the notice of the confirmation hearing could be sent out 5 days earlier, thus permitting the confirmation hearing to be held on the same day as the § 341 meeting. As discussed above, there are two other ways to accomplish this goal. Shortening the time for filing plans will probably result in more debtors not meeting the deadline.

X. RULE 4001(a) SHOULD BE AMENDED TO REQUIRE SERVICE OF A MOTION FOR RELIEF FROM THE CO-DEBTOR STAY ON THE CO-DEBTOR.

This is not necessary in view of Rule 4001(a) which requires the filing of a motion in accordance with Rule 9014. Rule 9014 requires that "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." It appears, therefore, that the co-debtor (the party against whom relief is sought) is already entitled to notice.

XI. RULE 5005 SHOULD BE AMENDED TO PERMIT THE FILING OF PROOFS OF CLAIM WITH THE CHAPTER 13 TRUSTEE INSTEAD OF THE CLERK.

This change would cause problems regarding the integrity of the filing system. The Chapter 13 trustee is not the kind of judicial officer who should be accepting papers for "filing." There is no way to control the hours the office is open, the personnel in the office, etc.

I recall that Judge Howard agreed that it would not be appropriate to make the Chapter 13 trustee's office the filing office, but suggested that the desirability of the Chapter 13 trustee having possession of the proofs of claim so as to examine them for validity should be subject to further consideration. I suggest that, once it is decided that the claims should be filed with the clerk, the problem of Chapter 13 trustees obtaining possession is an internal administrative matter to be left to the United States trustee and the court. I suggest that it is not a matter for the Bankruptcy Rules.

XII. ALL RULES APPLICABLE TO CHAPTER 13 CASES SHOULD BE IN ONE PLACE.

XIII. RULE 7004(b)(4) SHOULD BE AMENDED TO ASSURE THAT THE PROPER OFFICER RECEIVE ACTUAL NOTICE OF AN ADVERSARY PROCEEDING.

This is not unique to chapter 13 and, therefore, is beyond the scope of this subcommittee. If you do not buy that cop-out, I suggest that the rule is now sufficient because it requires that it be sent to an officer, or to a general or managing agent.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENT TO RULE 3002(a)

DATE: JUNE 10, 1991

At the meeting of the Advisory Committee in January, 1991, the Committee tentatively approved the following amendment to Rule 3002(a):

> (a) NECESSITY FOR FILING. ~~An unsecured~~ A creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

The purpose of the amendment is to provide (or clarify) that a secured creditor must file a proof of claim for the claim to be "allowed," and that the time period for filing a proof of claim in Rule 3002(c) is applicable to secured creditors.

I was asked to prepare a memorandum on whether requiring a secured creditor to file a proof of claim conflicts with the Bankruptcy Code. My conclusion is that it would be inconsistent with the Code to require a secured creditor to file a proof of claim in order to maintain its lien, but that it is not inconsistent with the Code to require the filing of a proof of claim as a condition to the "allowance" of a secured claim. Since the only effect of the proposed amendment to Rule 3002(a) is to make the filing of a proof of claim a condition to the allowance of the claim, I believe that the proposed amendment does not conflict with the Code.

I. REQUIRING A SECURED CREDITOR TO FILE A PROOF OF CLAIM IN ORDER TO KEEP ITS LIEN WOULD VIOLATE THE BANKRUPTCY CODE

Section 506(d) of the Code, as amended in 1984, provides as follows:

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless -
>
> (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of claim of such claim under section 501 of this title.

Accordingly, under §506(d)(2), the secured creditor's lien remains valid notwithstanding the fact that a proof of claim had not been filed. The legislative history to the 1984 amendments confirms that the change was intended "to make clear that the failure of the secured creditor to file a proof of claim is not a basis for avoiding the lien of the secured creditor." S.Rep. No. 65, 98th Cong., 1st Sess. 798 (1983). This conclusion is also supported by judicial authority. See, e.g., Matter of Tarnow, 749 F.2d 464 (7th Cir. 1984). Therefore, it would be inappropriate for the Bankruptcy Rules to require the filing of a proof of claim as a condition to keeping the lien.

It should be emphasized, however, that the proposed amendment to Rule 3002(a) does not invalidate the lien if the secured creditor fails to file the proof of claim. All that the Rule does is to require the filing of a proof of claim as a condition to the "allowance" of the claim.

II. REQUIRING A SECURED CREDITOR TO FILE A CLAIM IN ORDER TO HAVE THE CLAIM "ALLOWED" IS NOT IN CONFLICT WITH THE BANKRUPTCY CODE.

Section 501 of the Code makes it clear that a "creditor" (which includes secured creditor) may file a proof of claim, and § 502(a) provides that a "claim" (which would include a secured claim), "proof of which is filed under section 501," is deemed allowed. Therefore, under the Code a secured creditor may file a proof of claim and, if one is filed, the claim may be allowed. Other sections of the Code also confirm that Congress recognized the difference between a secured claim that is allowed and one that is not allowed. For example, § 1325(a)(5) provides for certain treatment as a requirement for confirmation of a chapter 13 plan "with respect to an allowed secured claim provided for by the plan. . . " See also, e.g., §§ 1111(b)(1)(A), 1111(b)(2) for other Code sections that refer to the concept of an allowed secured claim.

Although the filing of a proof of claim is never mandatory, a literal application of sections 501 and 502 leads to the conclusion that the only way that a secured claim (or any other claim) may be "allowed" is by the filing of a proof of claim (except for the "deemed filed" concept in § 1111(a)). It is consistent with these Code provisions for the Rules to provide that a creditor (including a secured creditor) in a chapter 7, 12, or 13 case may have an allowed claim only if a proof of claim is filed.

There is also judicial authority for the position that a

secured creditor must file a proof of claim in order to have an allowed claim. See, e.g., In re Rogers, 57 BR 170, 172 n.1 (Bankr. E.D. Tenn. 1986) ("To the extent Rule 3002(a) appears to say that allowance of a secured claim. . . does not require the filing of a proof of claim, it is inconsistent with the statutes and is ineffective."); In re Johnson, 95 BR 197 (Bankr. D. Colo. 1989) (secured creditor is subject to 90-day bar date for filing a proof of claim and must have an allowed claim in order to receive a distribution under a confirmed plan).

The Bankruptcy Code also recognizes that there is a difference between the allowance of a secured claim and the continuation of the secured creditor's lien. Otherwise, section 506(d)(2) would not make sense. In essence, that section says that the lien is not void solely because the claim is not allowed because the creditor failed to file a proof of claim.

Therefore, the plain language of the Code and the judicial authority lead to the conclusions that (1) a secured creditor must file a proof of claim in order to have an "allowed" claim (§§ 501, 502), and (2) there is a difference between the Code's treatment of an allowed secured claim and one that is not allowed (§§ 1111(b), 1325(a)(5), etc.), and (3) the validity of the lien will continue despite the fact that the claim is not allowed due to the failure to file a proof of claim (§ 506(d)). These conclusion are not inconsistent with each other. Also, the proposed amendment to Rule 3002(a) does not conflict with any of these conclusions.

III. THE PROPOSED AMENDMENT TO RULE 3002(a) DOES NOT ADDRESS OR AFFECT SUBSTANTIVE LAW ISSUES REGARDING THE RIGHTS OF A SECURED CREDITOR WHO DOES NOT FILE A PROOF OF CLAIM.

I do not mean to suggest that the above analysis is helpful, or even makes sense, when attempting to determine the rights of a secured creditor who has a valid lien, but not an allowed claim due to the failure to file a proof of claim, in a chapter 13 case.

There appears to be confusion regarding the effect of confirmation of a plan on the rights of a secured creditor who did not file a proof of claim. See generally, Lundin, CHAPTER 13 BANKRUPTCY, Vol. 2, §§ 6.10-6.12, 7.24 (1990) ("The effects of confirmation on creditors' prepetition liens could not be more confusing."). For example, suppose that a chapter 13 plan provides that a particular secured creditor is to receive a small distribution (less than the value of the collateral), but the secured creditor decides not to file a proof of claim or to object to confirmation. Does confirmation of the plan bind the secured creditor? May the secured creditor rely on § 506(d) to preserve the lien and permit foreclosure when the full amount of the debt is not paid? Does § 1327(c), which provides that the debtor's property vests in the debtor upon confirmation "free and clear of any claim or interest of any creditor provided for by the plan," deprive the secured creditor of its lien regardless of § 506(d)?

There is case law dealing with the question of whether a confirmed plan binds a secured creditor who does not have an

allowed claim due to the failure to file a proof of claim. For example, the Court of Appeals in In re Thomas, 883 F.2d 991 (11th Cir. 1989) (Chief District Judge Malcolm J. Howard sitting by designation), held that a secured creditor's lien was not invalidated by a confirmed plan that provided for payment in full of "allowed secured claims" despite the fact that the creditor did not file a proof of claim. In essence, the court recognized the creditor's right to have the lien "ride through" the bankruptcy case without filing a proof of claim and, subsequent to confirmation, move for relief from the stay to foreclose on its lien. See also In re Harris, 64 BR 717 (Bankr. D. Conn. 1986) (lien of creditor who did not file proof of claim was not invalidated by confirmed plan and could be enforced after obtaining relief from the stay). Compare L.King, 5 COLLIER ON BANKRUPTCY, ¶ 1327.01 ("[A] secured creditor may be provided for in a plan, even if it does not file a claim. Therefore, a secured creditor ignores a chapter 13 case at its peril. Because all parties are entitled to rely on the res judicata effect of a chapter 13 confirmation order, a confirmed chapter 13 plan is binding on all creditors.").

In any event, I think that these issues that focus on the post-confirmation rights of a secured creditor who does not file a proof of claim, and therefore has the lien ride through under § 506(d), are substantive law questions requiring the interpretation of the Bankruptcy Code. I believe that the Rules should not take a position on them. It is my opinion that the

proposed amendment to Rule 3002(a) does not address or affect the substantive issues regarding the rights of such a secured creditor, but only clarifies that the secured creditor must file a proof of claim if it wants to give its claim the status of being an "allowed" secured claim.

IV. REQUIRING A SECURED CREDITOR TO FILE A PROOF OF CLAIM IN CHAPTER 7, 12, AND 13 CASES AS A CONDITION TO THE ALLOWANCE OF THE SECURED CLAIM IS CONSISTENT WITH THE BANKRUPTCY RULE APPLICABLE TO CHAPTER 11 CASES.

The proposed amendment to Bankruptcy Rule 3002(a) would make it consistent with Rule 3003(c) which applies in chapter 11 cases. Rule 3003(c)(2) provides:

> (2) WHO MUST FILE. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purpose of voting and distribution.

This rule refers to "any" creditor and, accordingly, it applies to secured as well as unsecured creditors. Apparently, Rule 3003(c)(2) is consistent with Code § 1126(a) which provides that only "the holder of a claim or interest allowed under section 502 of this title may accept or reject a plan." Therefore, although a secured creditor may refrain from filing a proof of claim and have the lien continue pursuant to § 506(d), the Code and Rules recognize that the failure to file the claim in a chapter 11 case could nonetheless have an adverse impact on the secured creditor's right to participate in the case.

The proposed amendment to Rule 3002(a), which makes the filing of a proof of claim a condition to having an allowed secured claim in a chapter 7, 12 or 13 case, appears to be consistent with Rule 3003(c)(2), which makes the filing of a proof of claim a condition to voting and distribution in chapter 11 case (unless the claim is deemed filed under § 1111(a)).

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 3002

DATE: AUGUST 25, 1992

Background

In 1991, the Subcommittee on Chapter 13 recommended to the Advisory Committee on Bankruptcy Rules that Rule 3002 be amended to (1) require a secured creditor to file a proof of claim for the claim to be allowed, and (2) give the court discretion to permit a late proof of claim to be filed in a chapter 13 case based on excusable neglect. More particularly, the following amendments to Rule 3002(a) and (c) were suggested by the Chapter 13 Subcommittee:

Rule 3002. Filing Proof of Claim or Interest

(a) Necessity for Filing. ~~An unsecured~~ A creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

* * * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

* * * *

(7) In a chapter 13 individual's debt adjustment case, on motion by a creditor who has not filed a proof of claim within the time herein above prescribed, the court for cause shown may extend the time for filing a proof of claim by the creditor where the failure to file a timely proof was the result of excusable neglect.

* * * * * *

COMMITTEE NOTE

Subdivision (a) is amended to include secured creditors. A secured claim may not be allowed unless a proof of claim is filed. The amendment also clarifies that the time limits for filing proofs of claim set forth in subdivision (c) apply to both secured and unsecured claims. Notwithstanding this amendment, however, a lien is not void merely because the secured claim is not an allowed secured claim due only to the failure to file a proof of claim. See § 506(d) of the Code.

Subdivision (c) is amended to provide that in a chapter 13 case the court may extend the time for filing a proof of claim for a creditor who has failed to file a timely proof due to excusable neglect. This revision is designed to give the court discretion to treat as timely filed an otherwise late proof of claim that is filed by a creditor who has not been listed or scheduled and who had no knowledge of the case in time to file a timely proof of claim.

Before voting on the suggested changes, the Advisory Committee asked the Reporter for a memorandum on the question of whether it would be inconsistent with the Bankruptcy Code for the Rules to require a secured creditor to file a proof of claim for the claim to be allowed. I concluded in my memorandum of June 10, 1991, that such a filing requirement would not be inconsistent with the Code. For your convenience, I enclose a copy of my June 10, 1991 memorandum. After considering my memorandum, the Advisory Committee voted to recommend to the Standing Committee that the suggested amendment be published for public comment.

At the meeting on February 28, 1992, following the public comment period, the Advisory Committee again considered the proposed amendments to Rule 3002(a) (filing of secured claims)

and voted by a 5-4 margin to go forward with it. For your information and convenience, I am enclosing a summary of the public comment that was received from the bench and bar regarding the proposed amendment to Rule 3002(a). I am also enclosing copies of letters that we received from the Justice Department and from Judge Grant expressing opposition to the proposed amendment.

The Committee also voted at the February meeting to table the proposed amendment to Rule 3002(c) (allowing late filing of claims based on excusable neglect) and asked the Reporter to draft new language to limit the amendment to unscheduled creditors.

After the February meeting, I became less confident in the wisdom of the proposed changes to Rule 3002. Although I still believe that requiring secured creditors to file proofs of claims as a condition to the allowance of their claims is consistent with the Code for the reasons stated in my June 10 memorandum, I have shared other concerns raised by several members of the Committee regarding the effect of the amendment on redemption rights under § 722 and the interplay with § 726. I also became concerned that other problems relating to the Rule were not being addressed, such as the effect of missing the bar date for secured claims on a trustee's right to recover expenses incurred in preserving the collateral from property "securing an allowed secured claim" under § 506(c). In addition, concerns on the part of Committee members regarding the propriety of requiring a

secured claim to be filed continued to be expressed.

In view of these concerns and the closeness of the vote (5-4) at the February meeting, I recommended at the meeting on March 26, 1992, that the Advisory Committee withdraw the proposed amendments to Rule 3002(a) and (c) for further study. The Advisory Committee voted (7 to 3) to withdraw the amendments, with the understanding that the Reporter will reconsider the proposed changes and report back to the Committee with further suggestions.

The purpose of this memorandum is to assist the Committee in revisiting Rule 3002, to set forth my thoughts on this subject, and to serve as a focus for the discussion. I realize that the complexity of these issues probably will require further thought and discussion after the meeting in Santa Fe.

Discussion

Upon further consideration of Rule 3002 and certain sections of the Code, I raise the following questions for consideration by the Committee at the September 1992 meeting:

(1) Should Rule 3002(a) be amended to require the filing of a proof of claim for a secured claim to be allowed? As discussed in my memorandum, I think that the present rule is inconsistent with §§ 501, 502, and 506(d), as well as existing case law that has held that, despite Rule 3002(a), a secured claim must be filed to be allowed.

I am undecided on whether a bar date should apply to secured creditors. It could be argued that a bar date is needed because § 501 permits a trustee, debtor, or codebtor to file a claim on behalf of a creditor only if the creditor does not file a timely claim. Therefore, a bar date may be needed to trigger the debtor's right to file a proof of claim on behalf of the secured creditor, which may be important in a chapter 13 case. On the other hand, Rule 3004 itself could be construed to provide the "timeliness" requirement in that it provides that the debtor or trustee may file a claim on behalf of a creditor only after the § 341 meeting. Therefore, a claim not filed by the § 341 meeting is not "timely" within the meaning of § 501(c). Accordingly, a bar date for secured creditors in Rule 3002 may not be needed to trigger the right of a debtor to file the claim.

(2) Should Rule 3004 be amended to delete the bar date for debtors and trustees to file secured claims?

At the March 1992 meeting, the Committee discussed a potential problem that would exist if (a) the Rules create a bar date for filing a secured claim, (b) a secured creditor misses the bar date in a chapter 7 case, (c) the debtor misses the 30-day bar date in Rule 3004, and (d) the debtor wants to redeem the collateral. Since the only way to redeem is to pay the amount of the "allowed" secured claim, the debtor may not be able to redeem if the claim could no longer become allowed because of the bar date. However, I think that this problem could be solved by

amending 3004 to remove a bar date for the debtor or trustee who wants to file a proof of claim on behalf of a secured creditor. The 30-day bar date for filing a proof of claim under Rule 3004 was added in 1987 to clarify that the trustee or debtor may file a claim after the bar date for creditors set forth in Rule 3002.

Requiring secured creditors to file proofs of claim, even if there is a bar date, should have little or no impact on chapter 7 cases. If a secured creditor misses a bar date, the claim may not be allowed, but the lien continues in accordance with § 506(d). If the trustee abandons the collateral, or if the property is sold subject to the lien, the secured creditor may still pursue its rights against the property. If the trustee sells the property "free and clear" of the lien under § 363(f), the lienor is entitled to adequate protection of its interest. See § 363(e). If the debtor wants to redeem the collateral under § 722, the debtor may file a secured claim on behalf of the creditor for the purpose of determining the allowed amount of the claim. If, pursuant to § 506(c), the trustee wants to recover from collateral expenses of preserving or selling it, the trustee may file the claim under Rule 3004 for the purpose of having the secured claim allowed.

In chapter 12 and chapter 13 cases, the consequences of the amendment are also not that significant. If a plan does not provide for the secured claim, the debtor wishes to treat the secured creditor "outside the plan", and the secured creditor does not want to participate in the case, a proof of claim need

not be filed by anyone and the lien will remain valid. However, the suggested change to Rule 3002 will clarify that the creditor may not object to confirmation of the plan under §1325(a)(5) based on the plan's failure to provide payments to the secured creditor.

In sum, I do not think that the suggested changes will have a significant effect on cases, which raises the question: "Are we fixing something that is not broken?" The reason to make these changes is to make the Rules consistent with the Code and those cases that have held that a secured creditor must file a proof of claim to have an allowed claim.

(3) Should Rule 3002(a) be amended to permit a late filed claim to be allowed to the extent that the creditor with a tardily filed claim is entitled to payment under § 726 of the Code?

I think that Rule 3002 is inconsistent with § 726(a)(2)(C) and (a)(3), and perhaps (a)(4) and (a)(5). For your convenience, I enclose a copy of § 726.

Rule 3002(a) requires that an unsecured claim be filed "in accordance with this rule" to be "allowed." Rule 3002(c) sets forth the time for filing a proof of claim in a case under chapter 7, 12 or 13. Therefore, a plain reading of Rule 3002 indicates that an unsecured claim that is not filed within the time limit may not be allowed. In addition, Rule 3009 provides that, in a chapter 7 case, "Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed. . . ."

Rule 3021, applicable in chapter 12 and 13 cases, similarly provides that "distribution shall be made to creditors whose claims have been allowed." When read together, these rules lead to the conclusion that an unsecured creditor who misses a bar date may not receive any distribution in a chapter 7, chapter 12, or chapter 13 case.

In contrast, § 726 of the Code recognizes that a "tardily filed" claim may be "allowed," at least in certain circumstances. In particular, § 726(a)(2)(C) recognizes that a creditor without notice or knowledge of the case in time to file a timely claim (for the sake of brevity, I will refer to such a creditor as an "unscheduled creditor") may have an "allowed" claim that is "tardily filed," and that the creditor may share in a chapter 7 estate equally with timely filed claims. How can a tardily filed claim be an allowed claim? Apparently, Congress intended that "timeliness" is not a requirement for "allowance." Otherwise, § 726(a)(2)(C) would not make sense because it would be impossible for the tardily filed claim to ever be "allowed."

Similarly, § 726(a)(3) provides that, after other allowed claims are paid in full, there shall be a distribution "in payment of any allowed unsecured claim proof of which is tardily filed . . . ." [emphasis added]. Apparently, Rule 3002(c)(6), which gives the court the discretion to extend the bar date if there is a surplus after all other allowed claims have been paid, was designed to implement § 726(a)(3). However, I question whether it is consistent with § 726(a)(3) for the court to have

to approve the filing of the proof of claim. Why doesn't a creditor have an absolute right to file a tardy claim against a surplus under § 726(a)(3)?

Section 726(a)(4) raises other questions regarding the right of a creditor with a claim for punitive damages to receive a distribution from a chapter 7 surplus if the bar date is missed. Here the statute may be ambiguous, but it appears to me that a claim, whether or not filed in time, may receive a distribution under § 726(a)(4). Notice that § 726(a)(2) and (3) distinguish between timely filed and tardily filed claims, but § 726(a)(4) provides for "payment of any allowed claim" for a fine, penalty, etc. This conclusion is consistent with Rule 3002(c)(6) which appears to give the court the discretion to permit any creditor to file a late claim, including a punitive damage claim, against a chapter 7 surplus.

An illustration of the inconsistency between the Rule 3002 and § 726 may be helpful. Suppose that a debtor files a chapter 7 petition and has unsecured debts of $10,000 and non-exempt unencumbered assets worth $ 9,000. The unsecured claims include an $8,000 timely filed claim and a $2,000 claim filed after the bar date. How will the estate be distributed under the Rules? A literal reading of Rule 3002 leads to the conclusion that, after the $8,000 timely claim is paid, the tardily filed claim may be paid the remaining $1,000 only if the court exercises its discretion (the court "may") to grant a motion to extend the time to file a claim under Rule 3002(c)(6). Under the Rules, it would

not make any difference whether the claim was properly scheduled or whether the creditor had notice of the case prior to the bar date. In any event, under Rule 3002(c)(6) the tardily filed claim, whether or not scheduled, would not receive more than the $1,000 surplus (a recovery of 50%).

A different result would occur under § 726 of the Code. If the tardily filed claim was unscheduled, under § 726(a)(2)(C) the creditor would have the right to receive payment on a pro rata basis with the $8,000 timely claim, thus giving the tardy creditor a 90% recovery. If the tardily filed claim was properly scheduled, the creditor would receive the $1,000 surplus (50% recovery) under § 726(a)(3). In any event, the debtor would not receive any surplus under the Code and the tardy creditor would not have to make any motion to extend the bar date.

I am not suggesting that this has created any real problems in the administration of estates. However, if Rule 3002 is going to be amended, the Committee may wish to correct this inconsistency.

If this amendment is made, I do not think that it will be necessary to amend the rule further to give the court discretion to permit an unscheduled creditor to file a late proof of claim in a chapter 13 case, as was recommended by the Advisory Committee at the February 1992 meeting. Under § 1325(a)(4) of the Code, a plan may not be confirmed unless the holder of an allowed unsecured claim will receive in value at least as much as the creditor would receive if the estate were liquidated under

chapter 7. If an unscheduled unsecured creditor did not have notice or knowledge of a chapter 13 case in time to file a timely proof of claim, but tardily files a proof of claim so that the creditor would have had the right to share in a chapter 7 estate under § 726(a)(2)(C), the creditor would have the right to object to confirmation of the chapter 13 plan if it does not provide for "liquidation value" treatment of the claim.

Possible Amendments to be Considered for Discussion.

I think that the following amendments to Rule 3002 and 3004 take into consideration the concerns mentioned above, and I offer them for the sake of our discussion at the next meeting.

Rule 3002. Filing Proof of Claim or Interest

(a) Necessity for Filing. ~~An unsecured~~ A creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as ~~provided in Rules 1019(3), 3003, 3004 and 3005.~~ follows:

(1) A claim or interest may be allowed if a proof of claim or interest is timely filed pursuant to Rules 1019(4), 3003, 3004, and 3005.

(2) An unsecured claim, proof of which is tardily filed, may be allowed for the purpose of distribution pursuant to § 726(a)(2)(C), §726(a)(3), §726(a)(4), and §726(a)(5) of the Code.

[(3) A tardily filed secured claim may be allowed]

* * * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

* * * *

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in~~

~~full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed.~~

COMMITTEE NOTE

Subdivision (a) is amended to include secured creditors. A secured claim may not be allowed unless a proof of claim is filed. Notwithstanding this amendment, however, a lien is not void merely because the secured claim is not an allowed secured claim due only to the failure to file a proof of claim. See § 506(d) of the Code.

Section 726(a) of the Code recognizes that, in certain circumstances, a creditor may have an allowed claim despite the fact that it is tardily filed. For example, under § 726(a)(2)(C), an unsecured creditor with an allowed claim who did not have notice or actual knowledge of the case in time to file a timely claim, and who tardily files a proof of claim, may receive a distribution in a chapter 7 case equal to the distributions paid to unsecured creditors with timely filed claims. Subdivision (a) of this rule is amended to recognize the rights of creditors whose claims are tardily filed to have allowed claims to the extent that they are entitled to receive distributions pursuant to §§ 726(a)(2)(C), (a)(3), (a)(4), or (a)(5).

Subdivision (c) is amended to delete paragraph (6). The addition of subdivision (a)(2) renders subdivision (c)(6) unnecessary.

Rule 3004. Filing of Claims by Debtor or Trustee

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor. If the claim is unsecured, a proof of claim may not be filed pursuant to this rule more than ~~within~~ 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. If the claim is secured, a proof of claim may be filed pursuant to this rule at any time after the meeting of creditors called pursuant to § 341(a) and before the case is closed. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.

COMMITTEE NOTE

This rule is amended to permit the debtor or trustee to file a proof of claim on behalf of a secured creditor at any time during the case.

For example, if a chapter 7 trustee incurs expenses in preserving collateral 60 days after the bar date for filing claims under Rule 3002, and the expenses benefit a secured creditor, the trustee may file a proof of claim on behalf of the secured creditor so that the secured claim may be allowed for the purpose of recovering expenses from the property under § 506(c) of the Code.

This amendment also protects the debtor's right to redeem collateral under § 722 of the Code by paying the amount of the allowed secured claim. The secured claim may be allowed despite the creditor's failure to file a timely proof of claim and the debtor's failure to file a proof of claim on behalf of the creditor within 30 days after the bar date.

FROM MINUTES OF CHAPTER 13 SUBCOMMITTEE MEETING - December '90

objection to confirmation, he stated, confirmation hearing is continued.

Judge Mannes moved to extend the time for § 341 meetings to 60 days in chapter 13 cases. The straw vote was 5-1 in favor of the motion. The straw vote on shortening the Rule 2002(b) notice to 20 days was 6-0 in favor of shortening the time. There was no agreement on whether the § 341 meeting and confirmation should be held on the same day.

Claims Bar Date

The Subcommittee considered whether the time for filing claims under Rules 3002, 3004, and 3005 should be changed. The Reporter noted that extending the time for the § 341 meeting would extend the time for filing claims because the claims bar date is 90 days after the first date set for the meeting of creditors.

Judge Clark indicated that a secured claim filed after confirmation causes problems if it is not provided for in the plan. Ideally, he stated, secured claims should be filed before the § 341 meeting. The Reporter stated that the greatest negative reaction to the published proposed changes in the Bankruptcy Rules was the early claims bar date in chapter 12 cases. Mr. Sommer and Mr. Deutsch stated that some creditors can not meet the present 90-day bar date.

Judge Howard moved to leave the bar date at 90 days. The straw vote was 7-0 in favor of the motion.

Late-Noticed Creditors

The Subcommittee considered whether additional time should be provided for filing claims under Rule 3002(c) in the event that a creditor is added by an amendment to the schedules. This would prevent a late-noticed creditor from being barred from participating in the distribution by the original bar date. Judge Lundin indicated that the proposed change would create an open-ended bar date for "amended-on" creditors, in contrast to the existing claims bar dates which are final in all chapters (except for the incompetent and certain tax claims).

Judge Lundin stated that a late claim could change a 70% plan to a 5% plan. The Chairman and Judge Lundin suggested that late claims be permitted only if other creditors are allowed to object to the late claim or if the time for objecting to confirmation is reopened. The Subcommittee discussed whether, in chapter 13 cases, Rule 3002(c) should be removed from the prohibition against enlargement of time in Rule 9006(b)(3), and whether the standard of § 726(a)(2)(C) or excusable neglect should be followed.

Judge Mannes moved to delete Rule 3002(c) from the Rule 9006(b)(3) prohibition in chapter 13 cases. The straw vote was 5-2 in favor of the motion. The Reporter requested a straw vote on permitting a chapter 13 creditor with no actual notice or knowledge of the case to file a late claim and participate in the distribution if it is not too late to receive a distribution. The straw vote was 4-2 in favor of the proposal. Mr. Sommer stated that he would support the change if it was limited to unscheduled creditors who do not get actual notice of the case.

Secured Claims

The Subcommittee discussed whether the Rules should be amended to require secured creditors to file proofs of claim.

Judge Lundin stated that the use of the word "unsecured" in Rule 3002(a) is misleading. Although liens survive the bankruptcy, secured creditors probably must file in order to receive distributions under the plan. Judge Lundin indicated that deleting the word "unsecured" would avoid the ambiguity and ease the chapter 13 trustee's job by requiring secured creditors to file proof of their claim and its secured status. Judge Small stated that it is worth changing the rule to educate secured creditors.

The Chairman moved to eliminate the word "unsecured" from Rule 3002(a) so that both secured and unsecured creditors must file proofs of claim. The straw vote was 7-0 in favor of the change.

Rule 3004

The Subcommittee considered whether Rule 3004 should be amended to allow a debtor or trustee to file a proof of claim only after the expiration of the time for the creditor to file under Rules 3002 and 3003? The Subcommittee discussed whether the rule should permit a creditor to substitute its own proof of claim for one filed by the debtor or trustee after the bar date or whether the creditor may amend the debtor or trustee's proof of claim. The Subcommittee also considered whether the last sentence of Rule 3004 should be deleted.

Mr. Sommer stated that he believed that the Rules permit a debtor or creditor to file a proof of claim on behalf of a creditor before the claims bar date. The other participants were not so sure. Judge Lundin stated that there were no reported cases allowing a creditor to amend a claim filed on the creditor's behalf by the debtor or the trustee. He indicated that a secured creditor could contest the valuation of its security even if the debtor's claim is allowed because the § 506 valuation is a separate issue.

The Reporter stated that giving a creditor 30 days to substitute its own proof of claim raises the finality issue again because it creates another 30-day period to file a claim. Judge Clark stated that a secured creditor has a right to file a proof of claim within the original 90-day period, but if the creditor chooses to sit on its rights and does not file, that is the creditor's decision. A secured creditor can always seek valuation of its security, the judge added.

There was no straw vote on the first question. The straw vote was 3-3 on permitting creditors to file superceding claims after the bar date. After further discussion, the straw vote was 4-2 to permit at least secured creditors to file superceding claims for 30 days. Two persons indicated that they would permit all creditors to file superceding claims during the 30-day period.

Service of Proof of Claim

The Subcommittee discussed whether the Rules should require that proofs of claim for priority and secured claims be served on the debtor. Mr. Sommer indicated that the debtor needs to know what priority and secured claims have been filed to form a plan. The group generally favored the idea but only one person voted in favor of the change in the straw vote. Three persons abstained.

Chapter 13 Discharge

The Subcommittee considered whether the Rules should provide a procedure for obtaining a chapter 13 discharge (such as notifying the court when the debtor has completed payments under the plan). The Chairman requested that the Reporter raise the issue with the Executive Office for United States Trustees.

Objections to Confirmation

The Subcommittee considered whether the Rules should provide an uniform deadline for objections to confirmation (perhaps 10 days prior to the confirmation hearing). The deadline is now set by the court and must be set forth in the notice of the confirmation hearing pursuant to Rule 2002(b). It was indicated that an uniform date would be inconsistent with accommodating flexibility and local variances in chapter 13 scheduling and procedures, such as holding the section 341 meeting and confirmation on the same day.

Typing Services

The Subcommittee considered whether the Rules should require the disclosure of any entity assisting pro se debtors and the frees paid to that entity. It was indicated that abuses by

from MINUTES OF JUNE '91 MEETING

Rule 2003(a)

The Subcommittee recommended that Rule 2003(a) be amended to extend by ten days the time for holding the meeting of creditors in chapter 13 cases in order to permit more flexibility in scheduling the meeting. Mr. Mabey explained that some of the districts with a large number of chapter 13 filings prefer to schedule the meeting of creditors and consensual confirmation hearings on the same day. He stated that this is difficult to do in compliance with the current rules because the debtor has 15 days to file a plan and creditors must be given 25 days' notice of the confirmation hearing, along with a copy of the plan or a summary of it.

Professor King expressed concern that the proposal would create a third time period for meetings of creditors: one in chapter 7 and chapter 11 cases, one in chapter 12 cases, and one in chapter 13 cases. He moved to create uniform 50-day periods in chapters 7, 11, and 13. Mr. Mabey noted that extending the time for the meeting would also extend the time for filing claims and objections to discharge. The Reporter stated that uniformity would not necessarily justify the delay in chapter 7 cases, which are more numerous than chapter 13 cases. Professor King's motion was rejected by a vote of 4-6.

A motion to adopt the Subcommittee's draft amendment to Rule 2003(a) carried on a vote of 7-1.

The Reporter asked whether the bracketed language in the Subcommittee's proposed Committee Note would be viewed as endorsing the practice of holding the meeting of creditors and confirmation hearing on the same day. Judge Mannes moved to delete the bracketed language. The vote was 8-3 for the motion.

Rule 3002

The Subcommittee recommended that Rule 3002 be amended to clarify that secured creditors must file proofs of claims before the bar date in order to have "allowed claims" and to provide that a creditor may file a late claim in a chapter 13 case if the delay was the result of excusable neglect.

At the Committee's meeting in January, 1991, the Reporter had been asked to prepare a memorandum on whether requiring a secured creditor to file a proof of claim would conflict with the Bankruptcy Code. He concluded that it would be inconsistent with the Code to require a secured creditor to file in order to retain its lien, but that it is not inconsistent with the Code to require a secured creditor to do so as a condition to the "allowance" of the claim.

Professor King stated that the 1983 rules included this provision but that it was dropped as the result of criticism that the Code does not require that secured claims be filed. He indicated that he was not sure that it was worth stirring up the dispute again because the lien survives the bankruptcy regardless of whether the claim is filed.

Professor King moved to disapprove the proposed amendment to Rule 3002(a). He withdrew the motion at the suggestion of Judge Howard, who stated that the proposed amendment would clarify that a secured creditor has to file a proof of claim. The Reporter stated that the current rule contributes to the misimpression that only unsecured creditors have to file in order to have allowed claims.

Mr. Mabey moved to adopt the draft amendment to Rule 3002(a) and the motion carried by a vote of 9-2.

Mr. Mabey moved to adopt the Subcommittee's proposed amendment to Rule 3002(c), which would allow the court to extend the time for filing a proof of claim for a creditor whose delay was due to excusable neglect. Mabey stated that the Bankruptcy Code provides for late claims in chapter 7 and should do the same in chapter 13.

Judge Meyers asked what effect the change would have in a case in which the chapter 13 trustee had begun distributions to creditors. Mr. Mabey said the amendment would merely permit an extension. The court could consider the status of distributions in ruling on an extension. Professor King stated that the amendment would change the whole body of law on the hard and fast time for filing claims. **The Committee voted 8-1 for the motion.**

Rules 3004, 3005

The Subcommittee recommended amending Rule 3004 to allow a secured creditor to file, after the bar date, a superseding claim replacing one filed by the debtor or trustee. The Subcommittee also recommended amending Rule 3005 to give a secured creditor an opportunity to file, after the bar date, a superseding claim replacing one filed by a codebtor.

The Reporter stated that the draft does not affect the court's discretion to allow a creditor to amend a proof of claim filed by the debtor. Judge Jones indicated that the proposed change is not limited to chapter 13 cases. She requested that consideration of the proposal be deferred until Friday to allow more time for its consideration. **The Committee agreed.**

After the lunch recess, Mr. Mabey withdrew the proposed changes to Rule 3004 and 3005 in light of the ruling by the Court of Appeals for the Fifth Circuit in United States v. Kolstad, 928

FROM MINUTES OF MARCH '92 MEETING

Rule 3002

At its last meeting, the Committee approved an amendment to Rule 3002(a) which provided that, with certain exceptions, both secured and unsecured creditors must file timely proofs of claim in order to have allowed claims. Given the closeness of the 5-4 vote; Professor King's view that the amendment is inconsistent with the Bankruptcy Code; questions about the interplay between the amendment and various sections of the Code, including sections 722 and 726; and the debtor's right to file a claim for a creditor who does not file in a timely manner; the Reporter suggested that the amendment be withdrawn for further study. The Reporter stated that the problems might be resolved in a future amendment by unlinking the allowance of a claim and its timeliness.

The Reporter suggested that the Committee also might withdraw the amendment to Rule 3002(c)(7). He stated that the amendment, which was tabled at the last meeting, would no longer be needed if the amendment to Rule 3002(a) is withdrawn. The original amendment authorized the court to extend the filing period for a chapter 13 creditor who has not filed a timely claim due to excusable neglect. At its last meeting, the Committee had voted to restrict the scope of the amendment to unscheduled creditors who did not have notice of the case in time to file a timely proof of claim.

Judge Howard moved to reconsider and withdraw the amendment to Rule 3002(a). The Chair stated that a motion to reconsider a previous vote by the Committee should be made by a member who voted with the majority. Mr. Sommer stated that he voted with the majority and moved to withdraw the amendments to both Rule 3002(a) and Rule 3002(c)(7). Mr. Mabey stated that the issues raised by the Reporter are substantial but do not argue for leaving the current rule as it is. The Reporter stated that he intended to come back to the Committee with a memorandum and possible changes in the rule. He indicated that any new amendment would be published for public comment and, if approved by the Committee, included in a future package of amendments.

The motion to reconsider and withdraw both amendments passed on a vote of 7-3.

Rule 9029

The Reporter discussed his memorandum of February 6, 1992, which concerned two requests by the Standing Committee. The Standing Committee requested that this Committee propose an amendment to Rule 9029 which would require the uniform numbering of local rules and prohibit local rules which merely repeat provisions of the national rules. Similar changes were requested in the civil, criminal, and appellate rules.

FROM DRAFT MINUTES OF SEPT. '92 MEETING

rules and to prohibit local rules which merely repeat national rules. According to the Reporter, the Standing Committee has received the proposed amendments and has asked that the reporters for the four advisory committees attempt to develop uniform language before the Standing Committee's December meeting.

Style Committee

Judge Barta reported that the Style Subcommittee of this Committee met on March 27, 1992, to consider, on behalf of the Committee, suggested changes in the proposed amendments to the Bankruptcy Rules published in August, 1991. The changes were suggested by the Style Subcommittee of the Standing Committee. Judge Barta's subcommittee reviewed the changes line by line, agreed to several, and suggested that the others appeared to be substantive. The subcommittee also reviewed and responded to a second set of suggested stylistic changes.

Judge Barta stated that most of these changes also were substantive. The Reporter stated that Standing Committee accepted the recommendations of Judge Barta's subcommittee. Judge Barta thanked the Style Subcommittee for its thought-provoking suggestions and Professor King, Professor Resnick, Mr. Minkel, Ms. Channon, and Joseph F. Spaniol for their work in reviewing the suggested changes.

Filing Secured Claims

The Reporter recalled the Committee's consideration of proposed amendments to Rule 3002 at several recent meetings, beginning with the amendments proposed by the Chapter 13 Subcommittee. The Committee voted at its March, 1992, meeting to withdraw the proposed amendments to Rules 3002(a) and 3002(c) for further study. The Reporter reviewed his memoranda dated August 25, 1992, and June 10, 1991, in which he discussed whether the present rule, which does not require secured claims to be filed, is inconsistent with sections 501, 502, and 506(d) of the Code. Although the Reporter concluded that such a requirement would not be inconsistent with the Code, requiring secured claims to be filed could cause other problems. The imposition of a filing requirement and a bar date could result in a windfall for the debtor, who can redeem under section 722 for the allowed amount of the claim. (If a bar date were prescribed and no proof of claim were filed, the claim could not be allowed in any amount.) Furthermore, the Reporter stated that section 726 of the Code, unlike Rule 3002, does not equate the timeliness of a claim with its allowance.

The chairman asked why a secured creditor should not be deemed to have filed a claim for the amount of the scheduled

debt. The Reporter responded that, although the Code deems scheduled claims to be filed in chapter 11 cases, there are doubts about whether it would be consistent with the Code, especially section 502, to extend the concept to chapter 12 or chapter 13 cases. Judge Mannes and Mr. Sommer stated that, based on Rule 3021, most chapter 13 trustees only pay those creditors who have filed claims. Deeming secured claims to be filed would give secured creditors more of an incentive to come into the case. Mr. Minkel stated that forcing a creditor to file a proof of claim would also force the creditor to subject itself to the court's jurisdiction under the Granfinanciera decision.

Professor King suggested amending Rule 3021 rather than Rule 3002. He stated that the problem with Rule 3002 really is the use of the word "allowed" in sections 506(b) and 722, and that changing Rule 3002 could lead some courts to rule that the lien of a non-filing secured creditor would not ride through the bankruptcy case, despite the provisions of section 506(d). Mr. Mabey and the Reporter stated that the addition of section 506(d) to the Code in 1984 should make it clear that the lien survives.

The Reporter suggested that the Committee had three alternatives (1) doing nothing, (2) amending Rule 3021 to permit the trustee to make distributions to secured creditors who don't file claims or amending Rule 3004 to delete the bar date for the trustee or debtor to file a claim on behalf of a secured creditor, or (3) amending Rule 3002 to delete the word "unsecured" and make it consistent with the Code and the case law. Mr. Mabey stated that there are two problems: (1) the practical problem that chapter 13 trustees can not pay secured creditors who do not file and (2) the legal problem that the present Rule 3002 does not appear to be consistent with the Code.

Professor King moved not to make any amendment to Rules 3002 and 3004 and to direct the Reporter to consider a change to Rule 3021 to take care of distributions to secured creditors in chapter 13 if that can be done consistent with the Code. Mr. Shapiro seconded the motion. Mr. Dixon said the problems with amending Rule 3002 arise when the change is applied to cases under chapters 7 and 11. He suggested amending the rule, but limiting it to chapter 13 cases. Mr. Mabey stated that amending Rule 3021 to solve the problem with chapter 13 distributions would conceptually offend the Code in the minds of judges who believe that the Code requires secured claims to be filed in order to be allowed. Judge Mannes stated that removing the bar date from Rule 3004 could cause a problem if a secured claim is filed close to the end of payments under a chapter 13 plan.

The motion carried with four dissenting votes.

Excusable Neglect

When the proposed amendment to Rule 3002(c)(6) was withdrawn at the Committee's meeting in March, 1992, the Reporter was directed to study the matter further. The Reporter stated that the amendment, which would authorize the court to extend the filing period for a chapter 13 creditor who has not filed a timely claim due to excusable neglect, was not needed in light of the provisions of section 726(a)(2), (a)(3), and, possibly, (a)(4) and (a)(5). He indicated that both the proposed rule and present rule 3002(c)(6) conflicted with a creditor's right to file a tardy claim under certain circumstances by giving the court discretion to approve the late filing.

As a point of order, Judge Howard questioned why the Committee was continuing to discuss Rule 3002 when Professor King's motion, which passed, provided that the Committee would not amend Rule 3002. The Chair stated that the motion was proposed and passed in the context of the discussion of subsection 3002(a). Professor King moved that Rule 3002 not be changed. Judge Howard stated that the motion was out of order and unnecessary in light of the identical, earlier motion. Professor King withdrew the motion.

Citing the conflict described by the Reporter between Rule 3002(c) and section 726, Mr. Mabey dissented from concluding the discussion. The Reporter stated that the mischief with the rule is the misconception that once the bar date has passed, unsecured creditors can not file claims in chapter 7 and chapter 13 cases. There being no motion, the Chair moved to the next agenda item.

Bankruptcy Notices

In continuing the discussion of adequate notice which he began at the March meeting, Mr. Sommer stated that many chapter 13 debtors are effectively pro se after confirmation of their plans. He added that an even larger group of creditors are pro se. These pro se parties may lose valuable property rights because they do not have adequate information and do not understand what is happening in a case.

Mr. Sommer stated that he is preparing a list of matters which are particularly important to pro se debtors and creditors, including motions to dismiss or convert a case, objections to claims, relief from stay motions, motions to modify a chapter 13 plan, motions for a chapter 13 hardship discharge, and dischargeability complaints. He described the "plain language" notices used in some state courts and indicated that the new bankruptcy notices could be either generic notice of the need to respond or refer to the specific type of relief sought. Notices

APPENDIX A—Continued

Seller	Partnership	Location	Transaction Date	State of Completion as of Date of Bankruptcy	Options/Liquidated Damages
MexTex	Reverse Assocs., Ltd.	Vernon, TX	11/26/85	Not completed, 11/1/86 (post-petition) established as grand opening date in construction documents	$200,000
LSP & Co.	Rosepoint Assocs., Ltd.	Portales, NM	11/22/85	Not completed; 11/1/86 (post-petition) established as grand opening date in construction documents	$ 25,000

In re Gary HAUSLADEN and Kristi Hausladen, Debtors.

In re Jeffrey TIEDENS and Amy Tiedens, Debtors.

In re Virgil M. FLYNN, Debtor.

In re Robert M. BEAUTO, Debtor.

In re Harold M. MICHAUD and Jacqueline M. Michaud, Debtors.

Bankruptcy Nos. 4-91-6571, 4-91-6398, 3-91-6802, 3-90-4460 and 3-91-1964.

United States Bankruptcy Court, D. Minnesota.

Sept. 24, 1992.

Chapter 13 trustee objected to claims of several creditors. The Bankruptcy Court, Robert J. Kressel, Chief Judge, held that claim filed in Chapter 13 case after 90-day deadline for filing claim should not for that reason be disallowed.

Objection overruled.

1. Bankruptcy ⇐2021

When Bankruptcy Code language expresses Congress' intent with precision, reference to legislative history and to pre-code practice is not necessary.

2. Bankruptcy ⇐2897

Claim filed in Chapter 13 case after 90-day deadline for filing claims should not for that reason be disallowed. Fed.Rules Bankr.Proc.Rule 3002(c), 11 U.S.C.A.

3. Bankruptcy ⇐3787

Chapter 13 plan may treat tardily filed claims differently than timely filed claims. Bankr.Code, 11 U.S.C.A. § 1322(b)(10).

Stephen J. Creasey, Minneapolis, Minn., for trustee.

Richard L. Kelso, Crystal, Minn., for debtors Jeffrey and Amy Tiedens.

Thomas E. Hoffman, Norwest Corp., Minneapolis, Minn., for Norwest Bank.

Linda Jeanne Jungers, Minneapolis, Minn., for Minneapolis Collection Bureau and Reliance Recoveries.

John P. Gustaphson, Roseville, Minn., for John's Hillcrest Pharmacy.

Before KRESSEL, Chief Judge, O'BRIEN, KISHEL, and DREHER, Bankruptcy Judges.

ORDER ALLOWING CLAIMS

ROBERT J. KRESSEL, Chief Judge.

These Chapter 13 cases came on for hearing on objections by the trustee to several claims. Because the trustee's objections raise the identical issue[1] in each

1. While the dispositive issue is the same, three cases contain factual differences. In *Beauto* and *Flynn* the late filing creditors did not receive notice of the Chapter 13 case or the deadline for filing timely claims.

In *Tiedens*, the late filed claim was filed by the debtor. This late filing raises the issue of whether an extension could have been granted under Rule 9006 of the Federal Rules of Bankruptcy Procedure for excusable neglect. The debtors have not yet made such a motion.

Because we are allowing all claims, these issues are moot and need not be addressed.

case and because of the importance of the issue, the court is deciding the objections en banc. See Local Rule 109. This court has jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and Local Rule 201. These are core proceedings under 28 U.S.C. § 157(b)(2)(B).

FACTS

The debtors all filed petitions under Chapter 13. Meetings of creditors were scheduled pursuant to 11 U.S.C. § 341 and Rule 2003 of the Federal Rules of Bankruptcy Procedure. Pursuant to Rule 3002 of the Federal Rules of Bankruptcy Procedure, timely filed claims were to be filed by creditors within 90 days after the meeting of creditors. Pursuant to Rule 3004 of the Federal Rules of Bankruptcy Procedure, the debtors have an additional 30 days to file a proof of claim on behalf of a creditor who fails to do so. After the 90-day period had run, Norwest Bank Minnesota, N.A., Minneapolis Collection, Reliance Recoveries and John's Hillcrest Pharmacy filed proofs of claim. After both the 90-day period and the additional 30-day period had run, proofs of claim were filed on behalf of North Memorial Medical Center and Student Loan Servicing Center by the Tiedens. The trustee objected to allowance of all claims on the basis of their late filing.

ISSUE

The issue before us is whether a claim filed in a Chapter 13 case after the 90-day deadline set by Rule 3002(c) of the Federal Rules of Bankruptcy Procedure should be disallowed?

DISCUSSION

[1] The resolution of this question requires an examination of several provisions of the Bankruptcy Code and Rules. Although "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation," *Connecticut Nat'l Bank v. Germain*, — U.S. —, —, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992), the examination commences with the language of the statutes itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588 (1990) ("the fundamental canon [of] statutory interpretation begins with the language of the statute itself."); *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). "The sole function of the court is to enforce [the statute] according to its terms." *Id.* 489 U.S. at 241, 109 S.Ct. at 1030 (citing *Caminetti v. U.S.*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917)). Defining the terms of the statute, we must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Germain*, — U.S. at —, 112 S.Ct. at 1149. When the language before the court expresses Congress' intent with precision, as it does here, reference to legislative history and to pre-Code practice is not necessary. *Ron Pair Enter., Inc.*, 489 U.S. at 241, 109 S.Ct. at 1030.[2]

Section 501 is our starting point. Simply, section 501 tells us who can file a claim; it does not set out the time limits for filing. Legislative history tells us that

2. Our method of statutory interpretation, the "plain language" doctrine, is widely accepted and applied by a majority of the current Supreme Court. *See, e.g., Patterson v. Shumate*, — U.S. —, — 112 S.Ct. 2242, 2248-51, 119 L.Ed.2d 519 (1992); *Connecticut Nat'l Bank v. Germain*, — U.S. —, —, 112 S.Ct. 1146, 1149-50, 117 L.Ed.2d 391 (1992); *U.S. v. Nordic Village, Inc.*, — U.S. —, —, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992); *Union Bank v. Wolas*, — U.S. —, — 112 S.Ct. 527, 530, 116 L.Ed.2d 514 (1991); *Board of Governors v. Mcorp Financial, Inc.*, — U.S. —, —, 112 S.Ct. 459, 465-66, 116 L.Ed.2d 358 (1991). Although the "plain meaning" doctrine is not always followed,

> [it is] regrettable that we have a legal culture in which [legislative history and policy] arguments have to be addressed ... with respect to a statute utterly devoid of [ambiguity].
>
> *Union Bank*, — U.S. at —, 112 S.Ct. at 534 (Scalia, J., concurring).
>
> ... [T]he phenomenon [of looking outside the "plain meaning" of words in the statute] calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men."
>
> *Patterson*, — U.S. at —, 112 S.Ct. at 2250-51 (Scalia, J., concurring).

"[t]he Rules of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, *which will determine whether claims are timely or tardily filed.*" H.R.Rep. No. 595, 95th Cong., 1st Sess., 351 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 61 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5847, 6307 (emphasis added). Rule 3002 of the Federal Rules of Bankruptcy Procedure addresses these issues:

> **(a) Necessity for Filing.** An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed,....
>
> **(c)**[3] **Time for Filing.** In a chapter 7 liquidation or chapter 13 individuals debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, ...

Fed.R.Bankr.P. 3002. Read together, Rules 3002(a) and 3002(c) do not explicitly say but imply that filing with in the prescribed period is a prerequisite to allowance. This erroneous reading arose when the drafters of the new Rule 3002 hastefully copied the substance of *old* Rule 302 without paying any attention to the major change in the underlying statute. Under the Bankruptcy Act, late claims were explicitly disallowed. Section 57(n) of the Act provided that ... "[c]laims which are not filed within six months after the first date set for the first meeting of creditors *shall not be allowed* ..." 11 U.S.C. § 93(n) (repealed Oct. 1, 1979) (emphasis added). The old Bankruptcy Rule implemented this time bar.[4] However, a time bar does not expressly exist under the Code or Rules.

All of this has been compounded by attorneys, judges and commentators who have carried forward the old Act habit of referring to the date set for filing claims as the "bar date." Under Section 57(n) of the Act it was a bar date; however under Section 502 of the Code it is not. Continued mischaracterization of the time period has led to reliance on the words themselves without actually understanding them or what the statute actually says.

The language of the official bankruptcy forms further aggravates the problem and confusion. These forms provide that:

> claims which are not filed within ninety days following the above date set for the meeting of creditors will not be allowed, *except as otherwise provided by law.*

Again, reading this clause without actually understanding its significance leads one to believe that tardily filed claims are not allowed. However, the law does in fact "otherwise provide" that tardily filed claims are allowed.

Focusing on the operative language, we find that allowance of claims is specifically governed by Section 502 of the Code. Section 502, in relevant part, provides:

> **Allowance of claims or interests.**
>
> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, *unless* a party in interest ... objects.
>
> (b) ... if such objection to a claim is made, the court, after notice and a hearing ... ***shall allow such claim*** ... *except* to the extent that—

11 U.S.C. § 502 (emphasis added). Section 502 then sets out eight specific grounds for disallowing claims. Tardy or late filing is not one of them. The statute says what the statute means: "the court ... *shall allow* ... claim[s] ... except...." 11 U.S.C. § 502(b) (emphasis added). The words are clear; "lateness is not a ground for disallowance under section 502 of the Code." *In re Horner*, 1991 WL 353297 (Bankr.N.D.Ill. Sept. 21, 1991) (dicta); J. Keith M. Lundin, *Chapter 13 Bankruptcy*, § 7.24 at 7–59 (Sept. 1992 galley proof). In fact, in the face of an objection based on

3. Consistent with the statute, Local Rule 502 provides:

> [t]he last day to timely file a proof of claim is fixed at 90 days after the date set for the meeting of creditors.

Local Rule 502 does not address the allowance, disallowance or treatment of claims.

4. The Advisory Committee Note to Rule 13-302(e)(2) explains that the language "of subdivision (e) is adopted from § 57(n) of the Act and retains the time limits on the filing of claims established by the statutory provisions."

lateness, the statute explicitly requires us to allow the claim.

[2] When Congress speaks as clearly as it has done here, the plain meaning of the legislation is conclusive, except in those "rare cases" in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. *Ron Pair Enter., Inc.*, 489 U.S. at 242–43, 109 S.Ct. at 1031 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). Here, however, the exception does not apply. Allowance of tardily filed claims clearly does not contravene the intent of the framers of the Code. Indeed, allowing tardily filed claims does not conflict with any other section of the Code, the legislative history of section 502 or for that matter with any important state or federal interest.[5] The trustee has failed to articulate any argument or policy reason why Congress would have intended to disallow late filed claims. The language being clear and in conformity with the intent of Congress, the plain meaning is conclusive; tardily filed claims are allowed.

In fact, while not directly applicable in a Chapter 13 case, § 726 supports our conclusion that tardily filed claims should be allowed. Among the priorities of distribution in section 726(a) are allowed unsecured claims which are "timely filed" and those which are "tardily filed." Thus, absent some other basis of disallowance, tardily filed claims are allowed and entitled to distribution if there is enough money. While we recognize that section 726 applies only to Chapter 7 cases, it is a clear illustration of the principal: while treatment of a claim may be dependent on its timeliness, allowance is not.

Given the clarity of the statutory text, the trustee's burden of persuading us that Congress intended tardily filed claims to be disallowed is exceptionally heavy. *Union Bank*, — U.S. at —, 112 S.Ct. at 530 (citing *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241–42, 109 S.Ct. 1026, 1030–31, 103 L.Ed.2d 290 (1989)). The trustee, reading section 502 and Rule 3002 together, argues that tardily filed claims should not be allowed. Essentially, the trustee asserts that Rule 3002 complements section 502 by not allowing late filed claims. However, the trustee's reading ignores the obvious; section 502 and Rule 3002 are not complementary but independent. Considering the independent functions of each provision, the trustee's reading is simply incorrect.

Fundamentally, treatment or classification of claims is different from allowance. A creditor who files a claim is seeking payment under the debtor's plan. Section 502 identifies what claims are entitled to treatment under the plan. Once claims are allowed under section 502 they may then be classified by the plan for treatment under the plan. To this end, Rule 3002 plays an important role. Rule 3002 expressly provides the criteria for determining whether a claim is timely or tardy, a distinction which is explicitly significant in a chapter 7 case and which provides a basis for differing treatment in a chapter 13 plan.

[3] The rights of tardily filing claim holders in Chapter 13 cases are not defined by the Code but rather are controlled by the Chapter 13 plan. *See* 11 U.S.C. § 1322(b)(10). The plan may treat these claims in several different ways. The plan may provide that tardily filed claims be paid after timely filed claims are paid in full or for no payment at all. The plan may provide identical treatment for all allowed unsecured claims, regardless of timeliness or for payment at a different percentage than timely filed claims.

What is to be gleaned from this exercise is that treatment or classification of a claim is distinct from allowance under the Code. We need not choose between giving effect

5. As we discussed above, allowing late filed claims under Code section 502 may arguably conflict with Rule 3002 of the Federal Rules of Bankruptcy Procedure. However, we interpret the rule is such a way as the to eliminate the inconsistency. Even if they were inconsistent, it is the rule that must fall, not the statute. *See U.S. v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1089 (6th Cir.1990). *See also In re Klein*, 110 B.R. 862, 870 (Bankr.N.D.Ill.1990); *In re Grabill Corp.*, 113 B.R. 966, 974 (Bankr.N.D.Ill. 1990). *See* 28 U.S.C. § 2075.

on the one hand to § 502 and on the other to Rule 3002. Independent application gives effect to the express language of both Code section 502 and Rule 3002 avoiding any unnecessary conflict or contradiction between the two. *See U.S. v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1089 (6th Cir.1990) (discussing the conflict between § 726 and Rule 9006 the court stated: "We cannot have a statute that specifically allows payment of tardily filed claims and rules that prohibit their filing. Accordingly, to the extent that Rule 9006 contradicts the statute, it cannot stand.") *See also In re Klein*, 110 B.R. 862, 870 (Bankr.N.D.Ill.1990); *In re Grabill Corp.*, 113 B.R. 966, 974 (Bankr.N.D.Ill.1990). *See* 28 U.S.C. § 2075 (Congress intended Code supremacy when it stated: "[Bankruptcy] rules shall not abridge, enlarge, or modify any substantive right").

The trustee, going beyond the language of the statutes, asserts that operation of section 502 and Rule 3002 is governed by pre-Code practice. As support, the trustee cites a series of cases that, to some, is the "weight of authority."[6] Specifically, the trustee cites *In re Glow*, 111 B.R. 209 (Bankr.N.D.Ind.1990) for the proposition that a claim, tardily filed, in a Chapter 13 case, is not allowable. *Id.* at 217. The *Glow* court primarily rests on *Wilkens v. Simon Bros., Inc. (In re Wilkens)*, 731 F.2d 462 (7th Cir.1984). Reliance on *Wilkens*, however, is misplaced.[7]

The *Wilkens* court found that Rule 13-302(e)(2) of the Rules of Bankruptcy Procedure under the Bankruptcy Act of 1898 controlled its decision.[8] The Advisory Committee Note to Rule 13-302(e)(2) explains that the language "of subdivision (e) is adopted from § 57(n) of the Act and retains the time limits on the filing of claims established by the statutory provisions." Section 57(n) of the Act provided that ... "[c]laims which are not filed within six months after the first date set for the first meeting of creditors shall *not* be allowed ..." 11 U.S.C. § 93(n) (repealed Oct. 1, 1979) (emphasis added). Section 502 of the Code, on the other hand, does not, by its express terms, exclude late claims. Indeed, the drafters, aware of Section 57(n) and Rule 13-302(e)(2) of Bankruptcy Act of 1898, chose not to include late filed claims as grounds for disallowing claims. Pre-Code practice is hardly relevant where, as here, the Code specifically changes the practice. *See, e.g., U.S. v. Ron Pair Enter., Inc.*, 489 U.S. at 241, 109 S.Ct. at 1030.

The *Glow* court also places heavy reliance on *In re Chirillo*, 84 B.R. 120 (Bankr. N.D.Ill.1988). The *Chirillo* court held that a creditor's claim, filed late, in a Chapter 13 case, is not allowed. The *Chirillo* court found that

> [c]ase law supports this construction [of the Rules and Code]. Former Bankruptcy Rule 302(e) contained the same type of bar date as present Rule 3002(e); the only difference is that the former rule

6. Included in the "weight of authority" is *In re Davis*, 936 F.2d 771 (4th Cir.1991); *Wilkens v. Simon Bros., Inc.*, 731 F.2d 462 (7th Cir.1984); *In re Pigott*, 684 F.2d 239 (3d Cir.1982); *In re Street*, 55 B.R. 763 (Bankr. 9th Cir.1985); *In re Smartt Const. Co.*, 138 B.R. 269 (D.Colo.1992); *Richards v. U.S. (In re Richards)*, 50 B.R. 339 (E.D.Wash.1989); *In re Tomlan*, 102 B.R. 790 (E.D.Wash.1989); *In re Richards*, 50 B.R. 339 (E.D.Tenn.1985); *In re Weissman*, 126 B.R. 889 (Bankr.N.D.Ill.1991); *In re Wells*, 125 B.R. 297 (Bankr.D.Colo.1991); *In re Harper*, 138 B.R. 229 (Bankr.N.D.Ill.1991); *In re Scott*, 119 B.R. 818 (Bankr.M.D.Ala.1990); *In re Glow*, 111 B.R. 209 (Bankr.N.D.Ind.1990); *In re Woodhouse*, 119 B.R. 819 (Bankr.M.D.Ala.1990); *In re Chirillo*, 84 B.R. 120 (Bankr.N.D.Ill.1988); *In re Int'l Resorts, Inc.*, 74 B.R. 428 (Bankr.N.D.Ala.1987); *In re Stern*, 70 B.R. 472 (Bankr.E.D.Pa.1987); *In re Matthews*, 75 B.R. 379 (Bankr.E.D.Mo.1987); *In re Goodwin*, 58 B.R. 75 (Bankr.D.Me.1986); *In re Kennedy*, 40 B.R. 558 (Bankr.N.D.Ill.1984).

7. Beyond misapplying *Wilkens*, the *Glow* decision is without reason. After quoting the *Wilkens* decision at great length, the *Glow* court, in summary fashion, states:

> [a]lthough the *Wilkens* case was decided under Rule 13-302(e)(2), the predecessor to the present Bankr.R., this Court concludes that the holding in *Wilkens* is still applicable under the present Bankruptcy Rules.

Conclusory statements of law, to us, are less than persuasive. We are similarly unimpressed with lack of specificity other courts have used in discussing this issue.

8. The debtor's Chapter 13 case was filed in early 1981, long before the promulgation of the new Rules which took effect on August 1, 1983. Therefore, the old Rules were applicable.

allowed six months from the first meeting of creditors instead of 90 days.

In re Glow, 111 B.R. at 216 (quoting *In re Chirillo*, 84 B.R. at 122). We do not agree that timing is the only difference. Code section 502 is anything but analogous to section 57(n) under the Act. Again, section 57(n) specifically provided that ... "[c]laims which are not filed within six months after the first date set for the first meeting of creditors shall *not* be allowed ..." 11 U.S.C. § 93(n) (repealed Oct. 1, 1979) (emphasis added). Section 502, on the other hand does not exclude late claims. Once again, reliance on the Bankruptcy Act and its Rules is misplaced. Therefore, we respectfully disagree with both the *Chirillo* and *Glow* courts and all courts that follow them.

THEREFORE, IT IS ORDERED: The trustee's objections to the claims are overruled and:

1. claim number 7, filed in case number 4-91-6398 by North Memorial Medical Center, is allowed in the amount of $410.21;
2. claim number 8, filed in case number 4-91-6398 by Student Loan Servicing Center, is allowed in the amount of $1,800.00;
3. claim number 18, filed in case number 4-91-6571 by Norwest Bank Minnesota, N.A., is allowed in the amount of $5,164.40;
4. claim number 14, filed in case number 3-91-6802 by Minneapolis Collection Bureau, is allowed in the amount of $767.67;
5. claim number 7, filed in case number 3-90-4460 by Reliance Recoveries, is allowed in the amount of $442.68; and
6. claim number 14, filed in case number 3-91-1964 by John's Hillcrest Pharmacy, is allowed in the amount of $1,755.28.

In re H. Russell PACE, dba Seward's Folly, Debtor.

H. Russell PACE, John E. Havelock and John R. Strachan, Appellants,

v.

Kenneth W. BATTLEY, Trustee, Appellee.

BAP No. AK-91-2105-AsJV.
Bankruptcy No. 3-86-00572-HAR.
Adv. No. 3-86-00572-001.

United States Bankruptcy Appellate Panel, Ninth Circuit.

Argued and Submitted June 23, 1992.

Decided Sept. 10, 1992.

Chapter 7 trustee brought adversary proceeding to recover proceeds of settlement of legal malpractice action against debtor's former attorneys. The United States Bankruptcy Court for the District of Alaska, Donald MacDonald IV, J., 132 B.R. 644, found for trustee, and debtor appealed. The Bankruptcy Appellate Panel, Ashland, J., held that trustee's abandonment of promissory note executed in connection with sale of liquor licenses did not constitute abandonment of legal malpractice claim against debtor's former attorneys for failure to file Uniform Commercial Code (UCC) financing statement to perfect debtor's interest in liquor licenses.

Affirmed.

1. Bankruptcy ⇐3132, 3137

Abandonment of estate property during case requires notice, hearing, and court order authorizing abandonment. Bankr. Code, 11 U.S.C.A. § 544(a, b); Fed.Rules Bankr.Proc.Rule 6007, 11 U.S.C.A.

2. Bankruptcy ⇐3133

Abandonment of estate property by operation of law once case is closed requires that property to be abandoned must have been properly scheduled. Bankr.Code, 11 U.S.C.A. §§ 521(*l*), 554(c).

UNITED STATES of America, Plaintiff-Appellant,

v.

CARDINAL MINE SUPPLY, INC., Defendant-Appellee.

No. 89-6475.

United States Court of Appeals, Sixth Circuit.

Argued July 30, 1990.

Decided Oct. 22, 1990.

Internal Revenue Service (IRS) sought payment of priority tax claim. The United States District Court for the Eastern District of Kentucky, Karl S Forester, J., affirmed bankruptcy court's determination that tax claim was subordinated to claims of general unsecured creditors On appeal, the Court of Appeals, Kennedy, Circuit Judge, held that priority federal tax claim, filed late because IRS was not notified and had no knowledge of debtor's bankruptcy case or of bar date, was not subordinated to nonpriority unsecured claims.

Reversed and remanded

1. Constitutional Law ⇐252

United States is not "person" entitled to due process under Fifth Amendment. U.S.C.A. Const.Amend 5.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐306(4)

Failure of Bankruptcy Rules to provide relief to creditors who received no notice of bankruptcy and had no knowledge of it cannot deprive those creditors of their substantive right not to have their property rights taken away without notice.

3. Bankruptcy ⇐2125

Bankruptcy courts are courts of equity and can provide remedy when there is substantive right.

4. Bankruptcy ⇐2967

Priority federal tax claim, filed late because Internal Revenue Service (IRS) was not notified and had no knowledge of debtor's bankruptcy case or of bar date, was not subordinated to nonpriority unsecured claims. Bankr.Code, 11 U.S.C.A. §§ 507, 726(a)(2)(C); Bankruptcy Rule 3002(c), 11 U.S.C.A.

Louis DeFalaise, U.S. Atty., David Middleton, Asst U.S. Atty, Lexington, Ky., Robert K. Coulter, U.S Dept. of Justice, Tax Div., Washington, D.C., Gary R Allen, Acting Chief, Gary D. Gray, Joel A. Rabinovitz (argued), U.S. Dept. of Justice, Appellate Section Tax Div., Washington, D.C., for plaintiff-appellant

Louis DeFalaise, U.S Atty., David Middleton, Asst. U.S. Atty., Robert K Coulter, U.S. Dept of Justice, Tax Div., Washington, D.C., for plaintiff.

Randy G Clark, Pikeville, Ky., for defendant-appellee.

Before KENNEDY, BOGGS, and SUHRHEINRICH, Circuit Judges

KENNEDY, Circuit Judge.

The United States appeals the decision of the Bankruptcy Court affirmed by the District Court that both general unsecured creditors who filed timely claims and those who did not file timely claims because they received no notice of the bankruptcy are to be paid ahead of priority claimants who also filed late claims because they received no notice and had no knowledge of the bankruptcy Because we do not believe that the Bankruptcy Code (11 U.S.C.) directs this result, we shall REVERSE.

On October 25, 1983, debtor, Cardinal Mine Supply, Inc., filed a petition for relief under Chapter 7 of the Bankruptcy Code A notice mailed to creditors on November 25, 1983 set December 19, 1983 as the date of the meeting of creditors pursuant to 11 U.S.C. § 341(a), and set 90 days from December 19, 1983 as the time within which claims must be filed in order to be allowed, except as otherwise provided by law

The IRS was not listed as a creditor in the case and did not receive notice of the meeting The IRS learned of the bankrupt-

[51]

cy on September 27, 1985. On October 7, 1985, the IRS filed its claim as a priority claim in the amount of $18,892.35. The claim is primarily for employment taxes for the second and third quarters of 1983 as reported on returns delinquently filed by the debtor.

The United States Bankruptcy Court for the Eastern District of Kentucky determined that the fact that the IRS did not receive notice of the corporate debtor's bankruptcy case in time to permit timely filing of a proof of claim does not affect the result dictated by applicable provisions of the Bankruptcy Rules. It held that the Rules do not permit it to enlarge the time to file this tardy claim.

The Bankruptcy Court stated that Bankruptcy Rule 3002 requires that in a Chapter 7 liquidation case, an unsecured creditor, such as the IRS in this case, must file a claim within 90 days after the first date set for the meeting of creditors called pursuant to section 341 of the Bankruptcy Code in order for the claim to be allowed. The court noted that Bankruptcy Rule 3002(c)(1) permits a governmental entity to obtain an extension of time to file a proof of claim but only for cause shown on motion made before expiration of the 90 day period for filing claims; the court further noted that no such motion was filed in this case. The court also noted that Bankruptcy Rule 9006(b)(3) permits the court to enlarge the time for filing a proof of claim only under the conditions stated in Rule 3002(c) and that none of these conditions applies to the facts of this case. Finally, the Bankruptcy Court noted that although 11 U.S.C. § 726(a)(2)(C) authorizes *pari passu* distribution on a tardily filed unsecured claim if the creditor did not have notice or actual knowledge of the case in time to file a timely proof of claim, this provision excludes unsecured claims entitled to priority in distribution under 11 U.S.C. § 507, such as the claim of the IRS in this case. Thus the court sustained the trustee's objection to the tardily filed claim of the IRS and found that the order of distribution on the claim is that provided for by 11 U.S.C. § 726(a)(3), that is after the distribution on non-priority unsecured claims.

The IRS appealed, and the District Court affirmed the decision of the Bankruptcy Court. The District Court stated that "[s]ection 726(a)(2)(C) of Title 11 allows distribution for a late general unsecured claim if the creditor did not have notice or actual knowledge of the case in time for filing a proof of claim. However, this provision specifically excludes unsecured claims entitled to priority, such as the IRS' claim here." We do not agree that the Bankruptcy Code requires that exclusion.

Section 501(a) of the Bankruptcy Code provides that a creditor may file a proof of claim. 11 U.S.C. § 501(a). The Code requires that appropriate notice be given (11 U.S.C. § 342) but does not specify what notice shall be given to creditors or when it shall be given. That was left to the Bankruptcy Rules. Bankruptcy Rule 3002(c) provides that a proof of claim in a Chapter 7 or 13 case shall be filed within 90 days after the first date set for the meetings of creditors.[1] Rule 9006 provides that the court may enlarge the time under Rule 3002(c) only to the extent and under the conditions stated by that rule. It is clear that the IRS did not file its claim within the time period permitted by Rule 3002(c). The IRS argues, however, that a federal tax claim, filed late because the IRS was not notified and had no knowledge of the debtor's bankruptcy case or of the bar date, may not be subordinated to non-priority unsecured claims.

Section 507 sets forth the types of claims that are to be given priority treatment, and sets forth the order that the priority is to take. 11 U.S.C. § 507. There is no question that the employment taxes claimed by the IRS would receive priority under section 507 had a claim for them been timely filed, for such a claim would fall within the

1. This section enumerates a number of exceptions to the 90 day filing requirement, none of which is applicable to the present case.

[52]

sixth priority group set forth in that section. *See* 11 U.S.C. § 507(a)(6)(D).[2]

Distribution of property of the estate is controlled by 11 U.S.C. § 726, which provides in part:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed—
>
> (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title,
>
> (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—
>
> (A) timely filed under section 501(a) of this title,
>
> (B) timely filed under section 501(b) or 501(c) of this title, or
>
> (C) tardily filed under section 501(a) of this title, if—
>
> (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title, and
>
> (ii) proof of such claim is filed in time to permit payment of such claim,
>
> (3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;
>
> (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages . . .
>
> . . . .
>
> (b) Payments on claims of a kind specified in paragraph (1), (2), (3), (4), (5), or (6) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in a particular paragraph . . .

In placing the IRS claim in section 726(a)(3), the Bankruptcy Court reasoned that although 11 U.S.C. § 726(a)(2)(C) authorizes *pari passa* distribution on a tardily filed nonpriority unsecured claim where the creditor did not have notice or actual knowledge of the bankruptcy to file a timely proof of claim, section 726(a)(2)(C) specifically excludes unsecured claims entitled to priority in distribution under section 507.

We note that although the Bankruptcy Court said that the Rules did not allow it to permit the IRS's claim to be tardily filed, the court in fact treated the claim as filed and allowed in holding that it was entitled to distribution after payment of all the unsecured claims. Certainly section 726(a)(3) contemplates that some tardily filed claims can and will be filed and allowed. We cannot have a statute that specifically allows payment of tardily filed claims and rules that prohibit their filing. Accordingly, to the extent that Rule 9006 contradicts the statute, it cannot stand.

[1] Due process and equitable concerns require that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be permitted to file tardily when the creditor does so promptly after learning of the bankruptcy. Although the United States appropriately concedes that it has no right to due process,[3] construing the Bankruptcy Rules and section 726(a)(2)(C) to exclude the IRS's claim in the present case would cause *all* section 507 priority claims, including those of private parties, to be excluded from the

2. This subsection provides that priority shall be given

> [To] allowed unsecured claims of governmental units, to the extent that such claims are for—
>
> (D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition.

11 U.S.C. § 507(a)(6)(D).

3. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S.Ct. 803, 815-16, 15 L.Ed.2d 769 (1966) (holding that a state is not a person entitled to due process under the fifth amendment).

[53]

tardily filed claims provision of section 726, thereby implicating due process rights. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950) (stating that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of ... property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case").

In a case involving a tax lien under the old Bankruptcy Act, the United States Supreme Court determined that notice and an opportunity to be heard were necessary before a party could be deprived of property. *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953). *City of New York* involved the reorganization of a railroad under section 77 of the old Bankruptcy Act. The district court ordered that all claims be filed by a certain date, after which unfiled claims would be denied participation. The debtor was ordered to mail notices to the creditors who had already appeared in court. The only notice given to other creditors appeared in two once-a-week publications in five daily newspapers. New York City was never notified of the order setting the bar date and therefore never filed its claims.

The Court noted that section 77(c)(8) of the Bankruptcy Act required judges to cause reasonable notice of the bar date to be given, and that section 77(c)(4) of the act also required judges to cause a list of known creditors to be filed. The Court held that notice by newspaper publication was not reasonable notice when the creditor was known to the debtor, and that the bar date notice should have been mailed to New York City. The Court stated, "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *City of New York*, 344 U.S. at 297, 73 S.Ct. at 301.

[54]

City of New York was not decided upon due process grounds, for the city of New York, like the IRS in the present case, does not have a constitutional right to due process. *City of New York* involved a statutory mandate that notice be given, and section 342 of the Bankruptcy Code provides a similar mandate. This section provides: "There shall be given such notice as is appropriate of an order for relief in a case under this title." 11 U.S.C. § 342. The legislative history of this provision notes that "[d]ue process will certainly require notice to all creditors ... State and Federal governmental representatives responsible for collecting taxes will also receive notice." S.Rep. No. 989, 95th Cong., 2d Sess. 42 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5828, *reprinted in* Collier on Bankruptcy, App. vol. 3 (15th ed. 1990). Further, at least one court has found that "[t]he language in *City of New York* clearly is not grounded in goals unique to the former bankruptcy act." *Spring Valley Farms, Inc. v. Crow*, 863 F.2d 832, 835 (11th Cir.1989). The Court's reasoning in *City of New York* is equally applicable to the case before this Court, and thus the basic principle of justice that notice and an opportunity to be heard are necessary before a party's claim is barred applies to the present case as well. Further, were this a priority claim for wages, the Bankruptcy Court's construction of the statute would result in a due process violation. As the Supreme Court stated "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).

Several Chapter 11 cases have found that a party's right to due process was violated because the party did not receive notice of the bankruptcy. *See, e.g., Spring Valley Farms*, 863 F.2d at 834 ("Considerable support exists for plaintiffs' assertion that due process prevents Section 1141 from being read to extinguish their claims when no

notice of the bar date for filing a proof of claim has been sent in compliance with Bankruptcy Rule 2002(a)(8)." [4]); *Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1386 (10th Cir.1987) ("Notice must be given to 'all creditors' under Rule 2002(a) of the time set for filing proofs of claim. The term 'all creditors' has no qualifications or limitations. This notice must also be given to satisfy due process requirements.") (citation omitted), *cert. dismissed*, 488 U.S. 881, 109 S.Ct. 201, 102 L.Ed.2d 171 (1988). *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir.1984) ("A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. We will not require Olson to subject its claim to a confirmed reorganization plan that it had no opportunity to dispute.") (footnote omitted). *See also In re Remington Rand Corp.*, 836 F.2d 825 (3d Cir.1988) (holding in a chapter 11 case that government is entitled to file a late proof of claim where debtor failed to notify government of claims bar date). *Merrill Lynch, Pierce, Fenner & Smith v. Dodd*, 82 B.R. 924, 928 (N.D.Ill.1987) ("Nonetheless, implicit in the strict time requirements of the bankruptcy rules is the assumption that a creditor has received notice of the bankruptcy petition. The basic principles of due process—notice and the opportunity to be heard—require no less. Indeed, courts which have faced a situation similar to the instant dispute have found that the debtor must demonstrate that notice has been provided before the Rules' time limits may be enforced.") (citing *In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir.1985)). *In re Wm. B. Wilson Mfg. Co.*, 59 B.R. 535, 538–39 (Bankr.W.D.Tex.1986). *But see In re International Resorts, Inc.*, 74 B.R. 428 (Bankr.N.D.Ala.1987) (denying creditor's late filed claim where creditor did not receive notice of first meeting of creditors and information concerning filing proofs of claim).

[2, 3] The failure of the Bankruptcy Rules to provide relief to creditors who receive no notice of a bankruptcy and have no knowledge of it cannot deprive those creditors of their substantive right not to have their property rights taken away without notice. Bankruptcy courts are courts of equity and can provide a remedy when there is a substantive right. *See Pepper v. Litton*, 308 U.S. 295, 303–04, 60 S.Ct. 238, 243–44, 84 L.Ed. 281 (1939).

[4] The language of section 726 does not itself bar tardily filed priority claims. Subsection (a)(1) merely provides that the order of distribution of priority claims will be the order specified in section 507. This subsection makes no distinction between tardily filed and timely filed priority claims or between tardily filed claims where the priority creditor had notice or had no notice. Subsection (a)(2)(C) makes such a distinction between tardily filed claims where the creditor had notice or knowledge and those where the creditor had no notice or knowledge. There are valid reasons for permitting all tardily filed priority claims to be paid whether or not the creditor had notice. Wages, contributions to employee benefit plans, claims of persons who have deposited grain in a grain elevator up to $2,000, rent or security deposits up to $900, are all claims which deserve very special consideration. Those considerations apply whether the claim is tardily filed or not. Congress has chosen to place certain taxes in the privileged category. Congress has expressed itself that these claims are to be paid first. Since their priority is set in the statute, it is reasonable that that priority is more important than whether they were tardily filed either because they had received no notice of the bankruptcy or for some other reason.

The Bankruptcy Court read section 726(a)(2) to exclude priority claims from payment if filed late although it clearly permits non-priority without-notice late-filed claims to be paid. However, section 726(a)(2) excludes subsection (a)(1) priority claims because they will have already been paid if the statutory order of distribution is followed and it excludes subsection (3) and subsection (4) claims since they are to come after all subsection (2) claims are paid

4. Rule 2002(a) applies only in chapter 9, 11 and 13 cases.

Thus, subsection 726(a)(2) does not except the claims of subsections (a)(1), (3) and (4) because it wishes to distinguish between classes of tardily filed claims, but rather to maintain the order of payment of claims specified therein. Note that tardily filed unsecured creditor claims, even where there is no lack of notice, are paid *before* subsections (3) and (4) claims.

Further, a finding that basic principles of justice require notice and an opportunity to be heard is consistent with the legislative history of section 726 claims. The House and Senate Reports regarding section 726(a)(2)(C) state, "Second, distribution is to general unsecured creditors. This class excludes priority creditors...." H.R.Rep. No. 595, 95th Cong., 1st Sess. 383 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 97 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5883, 6339, *reprinted in* Collier on Bankruptcy, App. Vols. 2 and 3 (19th ed. 1990). Both reports go on to state that "[t]hough it is in the interest of the estate to encourage timely filing, when tardy filing is not the result of a failure to act by the creditor, the normal subordination penalty should not apply." *Id.* It would be inconsistent with such reasoning to exclude section 507 claims that are untimely filed from section 726. Not only is there no apparent rationale for excluding such claims, it is also unlikely that the legislature would have intentionally excluded such claims without discussing the reason for doing so. Where, as here, the reason for late filing of a priority claim is the failure to give the creditor notice, it should be treated the same as timely filed priority claims entitled to distribution under section 726(a).

Principles of equity require that notice and an opportunity to be heard must be provided before a party can be deprived of a right such as the IRS's property interest in the present case. The Bankruptcy Code contemplates the filing of late claims. The legislative history does not indicate that section 726(a)(2)(C) should be construed as the Bankruptcy Court and District Court construed the provision. For these reasons, we find that the District Court erred in affirming the decision of the Bankruptcy Court.

Accordingly, we REVERSE the decision of the District Court and REMAND the case to the Bankruptcy Court according priority to the claim of the IRS.

[56]

In re: Michael A. Rago, Debtor.

No. 90 B 2284
UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1992 Bankr. LEXIS 1855; Bankr. L. Rep. (CCH) P75,085

November 23, 1992, Decided

COUNSEL: [*1] Mayer Y. Silber, Attorney for IRS, Special Assistant, United States Attorney, 200 West Adams Street, Suite 2300, Chicago, Illinois 60606.

M. Scott Michel, United States Trustee, Room A-1335, 175 West Jackson Blvd., Chicago, Illinois 60604. Allan J. DeMars, Trustee, 100 West Monroe St., Suite 1701, Chicago, IL 60603-1901.

JUDGES: Wedoff

OPINIONBY: EUGENE R. WEDOFF

OPINION: MEMORANDUM OF DECISION

This Chapter 7 case is before the court on the motion of the United States of America to allow a claim of the Internal Revenue Service as timely filed. The trustee has responded in opposition to the motion, and both parties have briefed the matter. For the reasons stated below, the motion is denied, but the trustee is instructed that the late filing of the IRS's claim does not deprive the claim of its priority under 11 U.S.C. @ 726(a)(1). n1

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n1 To reduce complexity, this opinion sometimes refers to the filing of "claims," rather than the technically accurate "proofs of claim." Thus, "timely filed claim" replaces the more cumbersome "claim for which proof was timely filed.

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[*2]

Findings of Fact

The relevant facts are undisputed. The debtor began this case as a voluntary case under Chapter 11 of the Bankruptcy Code (Title 11, U.S.C., the "Code"), but converted it to one under Chapter 7 of the Code. Notice was given to all scheduled

creditors of this conversion, and of the date set for a meeting of creditors pursuant to Section 341(a) of the Code. The initial notice also informed creditors that there appeared to he insufficient assets in the estate to pay a dividend. However, on January 7, 1991, a notice of possible dividend was issued to the creditors: this second notice informed the creditors that the last date for filing claims was April 8, 1991. The IRS did not receive either of the notices to creditors, because it was not listed as a creditor in the debtor's schedules. The failure of the debtor to list the IRS was, in turn, due to the debtor's lack of knowledge that the IRS had any claim against him. It was not until May 20, 1991, that the IRS began the audit of the debtor's 1988 tax liability that ultimately resulted in claims for unpaid taxes.

On January 2, 1992, the debtor filed a proof of claim on behalf of the IRS, stating the amount as "$ [*3] 5,000 Estimated (to be liquidated)." On January 31, 1992, the IRS filed its own proof of claim, in the amount of $ 18,836 for 1988 individual income taxes, $ 2,427.32 for interest on the taxes, and $ 942 for penalties on the taxes. The IRS asserted that the taxes and interest were unsecured priority claims under Section 507(a)(7) of the Code, and that the penalties were an unsecured general claim.

The trustee has not objected to the IRS claim, but the debtor has done so, by way of a "Complaint to Determine Liability for Taxes," filed on May 22, 1992. This claim objection remains pending. On July 28, 1992, the trustee gave notice that he intended to commence distribution of the estate to claimants who had filed timely proofs of claim. The IRS responded with the present motion, and the trustee has withheld distribution pending the court's ruling.

Jurisdiction

This court has jurisdiction over the pending motion pursuant to 28 U.S.C. @ 1334(a) and (b), 28 U.S.C. @ 157(a) and (b)(1), and Rule 2.33 of the General Rules of the United States District Court for the Northern District of Illinois. This matter is a core proceeding [*4] pursuant to 28 U.S.C. @ 157(b)(2)(A), (B), and (O).

Conclusions of Law

The pending motion of United States seeks a declaration from the court that the IRS's claim in this matter was timely filed. However, the ultimate relief sought by the motion is a determination that the IRS claim should not be barred from payment. In ruling on the motion, it is necessary to consider three issues: the timeliness of the claim, its potential to be allowed, and its relative priority.

Timeliness. The IRS claim was not timely filed, and this court cannot grant the IRS a retroactive extension of the time to file. This is plain from the applicable rules. Fed.R.Bankr.P. 3002(c) requires creditors to file proofs of claim against the estate within 90 days after the date set for the meeting of creditors, unless one of six exceptions applies. In the present case, the only applicable exception is the fifth, which governs cases in which "notice of insufficient assets to pay a dividend was given . . . and subsequently the trustee notifies the court that payment of a dividend appears possible." In such circumstances, the rule directs the clerk to notify creditors (1) of the possibility [*5] of a dividend, and (2) "that they may file proofs of claim within 90 days after the mailing of the notice." Such a notice was mailed to creditors in this case on January 7, 1991, properly setting April 8, 1991 as the last date for filing proofs of claims. Another exception, the first, allows a court to extend the period for the United States to file a claim, but only on motion made "before the expiration of such period." Fed.R.Bankr.P. 3002(c)(1). The United States did not make such a motion. Finally, Fed.R.Bankr.P. 9006(b)(3) provides that the time limits of Rule 3002(c) may be enlarged by the court "only to the extent and under the conditions stated" in the rule. Thus, the court has no discretion to deem the claim of the IRS in this case timely filed. In re Coastal Alaska Lines, Inc., 920 F.2d 1428, 1431-33 (9th Cir. 1990); In re Global Precious Metals, Inc., 143 Bankr. 204, 205 (Bankr.N.D.Ill.1992); In re Chirillo, 84 Bankr. 120, 121-122 (Bankr.N.D.Ill.1988).

In arguing that the court does possess discretion to retroactively extend claim filing deadlines, the United States relies primarily [*6] on In re Unroe, 937 F.2d 346 (7th Cir.1991). This reliance is misplaced. Unroe did not involve a late filed original claim, but rather an amendment to a timely filed claim. The Seventh Circuit held in Unroe only that a bankruptcy court might use its discretion to allow the amended claim to relate back to the timely filed one, even if such relation back would not have been allowed under Fed.R.Civ.P. 15(c). "We leave for another case the question whether a judge in equity could permit an entirely new claim filed out of time." 937 F.2d at 350. Thus, Unroe had no occasion to consider the impact of Rule 9006(b)(3) in limiting the discretion of the court.

Allowance. However, the fact that the IRS's claim is irretrievably untimely does not resolve the question of whether that claim is entitled to payment from the estate. In re Unroe, 937 F.2d 346 (7th Cir.1991), like many decisions, including the opinion of this court in In re Chirillo, 84 Bankr. 120, 122 (Bankr.N.D.Ill.1988), assumes that a late filed claim is disallowed. n2 This assumption is mistaken. [*7] As pointed out by both the trustee in this case and the bankruptcy judges of Minnesota, in In re Hausladen, 1992 Bankr. LEXIS 1529, 1992 WL 246584 (Bankr.D.Minn. 1992), disallowance of claims is governed by Section 502 of the Code. Section 502(a) provides

that a claim is deemed allowed unless an objection is made, and Section 502(b) states that if an objection is made, the court shall allow the claim except to the extent that it fits into eight specific categories, none of which includes untimeliness in filing proof of the claim. Furthermore, as discussed below, Section 726(a)(3) of the Code makes specific provision for payment of an "allowed unsecured claim proof of which is tardily filed." See In re Coastal Alaska Lines, Inc., 920 F.2d 1428, 1430 (9th Cir. 1990)(late filed claim accorded Section 726(a)(3) priority). It is plain, then, that the untimeliness of the filing of a proof of claim does not in itself cause disallowance of the claim. Rule 3002, which governs the timeliness of creditor claims in Chapter 7, states in section (a) that "an unsecured creditor . . . must file a proof of claim . . . in accordance with [*8] this rule for the claim . . . to be allowed." This rule, insofar as it purports to require disallowance of late filed creditor claims, contravenes Sections 502 and 726 of the Code, and thus cannot be enforced. See Hausladen, 1992 Bankr. LEXIS 1529 at *10 n.5; 1992 WL 246584 at *5 n.5, and the cases cited therein. To the extent that the IRS claim is not disallowed on the basis of the debtor's objection (made pursuant to Section 502(b)(1)), the IRS has an allowed claim. 11 U.S.C. § 502(a).

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n2 Among the other decisions that equate untimeliness with disallowance are In re Davis, 936 F.2d 771, 772-73 (4th Cir. 1991); In re Johnson, 901 F.2d 513, 522 (6th Cir. 1990); In re Tomlan, 907 F.2d 114 (9th Cir. 1990) affirming and adopting the decision of the district court reported at 102 Bankr. 790 (E.D.Wash. 1989); and In re Mayville Feed & Grain, Inc., 123 Bankr. 245, 247 (Bankr.E.D.Mich.1991) citing 3 Collier on Bankruptcy, P 502.02[1] (15th ed. 1990).

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Priority. Because the IRS claim may be allowed, it is necessary to determine its potential priority, in order that the trustee can determine to what extent to distribute assets of the estate. This presents a difficult question of the interpretation of Section 726(a) of the Code, which governs priority of distribution in Chapter 7 cases. n3 In re Virtual Network Services Corp., 98 Bankr. 343, 344-45 (N.D.Ill.1989), aff'd, 902 F.2d 1246 (7th Cir. 1990) (limiting application of Section 726 to cases under Chapter 7). Section 726(a) determines priority based on two factors. The first factor is the nature of the claim. The highest priority of distribution is accorded by Section 726(a)(1) to the "priority" claims designated by Section 507 of the Code, among which are the tax liabilities that make up the bulk of the IRS claim in this case. Next, are "general"

unsecured claims--that is, claims which are not accorded special priority by Section 507. n4 General unsecured claims are dealt with by subsections (a)(2) and (a)(3) of Section 726. Finally, Section 726(a)(4) accords the [*10] lowest claim priority to noncompensatory fines, penalties, forfeitures, and damage awards, including the relatively small penalty that is part of the IRS claim here. n5

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n3 11 U.S.C. @ 726, "Distribution of property of the estate," provides in pertinent part as follows:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed--

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1),(3), or (4) of this subsection, proof of which is--

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if--

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim . . . . [*11]

n4 Use of the term "general" to refer to a claim in bankruptcy that has no special priority is common. See, e.g., In

re Richard, 141 Bankr. 751 (W.D.Okla. 1992) ("Richards maintains that his income tax claim does not qualify as a @ 507(a)(7)(A) priority claim, and should only be allowed as a general unsecured claim."). This distinction between "general" and "priority" was also in common use prior to enactment of the Bankruptcy Code. See, e.g., Home Indemnity Co. v. F. H. Donovan Painting Co., 325 F.2d 870, 872 (8th Cir. 1963) ("Surety filed a claim in the bankruptcy court for a total of $ 90,141.68; $ 17,974 was allowed as a wage priority claim, and $ 64,611.43 was allowed as a general unsecured claim.").

n5 Section 726(a) goes on to provide lower priorities for the payment of postpetition interest on claims in the first four categories and for payment of any surplus to the debtor.

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In addition to distinguishing claims by their nature, Section 726 also defines priority of [*12] distribution according to a second factor: the timeliness of claim filing. Section 726(a)(2) accords the higher priority to two classes of claims: (a) claims that are filed on time, regardless of whether the claim is filed by the creditor holding the claim or by another party on behalf of the creditor and (b) claims filed by creditors who did not receive notice or have knowledge of the bankruptcy in time for timely filing, but who nevertheless filed their claims in time to permit payment--a class of claims that can be called "effective late filings." Section 726(a)(3) accords a lower priority to what can be called "ineffective late filings"--late claims filed by creditors who did have timely notice or knowledge of the bankruptcy, as well as by creditors who lacked timely notice or knowledge, but did not file their claims in time to permit payment. n6

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n6 "Effective" and "ineffective," in this context are thus used to distinguish the two categories of late filed claims: (1) late claims that are paid as though they were timely filed ("effective") and (2) late claims that are paid at a lower priority than timely filed claims ("ineffective"). "Effective" does not mean "allowed." As discussed above, late filed claims, whether "effective" or "ineffective." cannot be disallowed because of their untimeliness.

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[*13]

The question raised by the present case is the whether the timeliness priorities set out in subsections (a)(2) and (a)(3) apply to Section 507 priority claims. There is an

argument--advanced here by the trustee--that they do. Section 726(a)(3) accords third priority of distribution to "any allowed unsecured claim" that (1) is filed by a creditor (hence the reference to Section 501(a)), (2) is filed late, and (3) does not fall within the "effective late filing" provisions of subsection (a)(2)(C). Nothing in the express language of Section 726(a)(3) limits its application to general claims. Thus, it can be read as applying to all claims, priority as well as general. In re Kragness, 82 Bankr. 553, 556-57 (Bankr.D.Or.1988); Robert E. Ginsberg, Bankruptcy @ 10.05[c](2d ed. 1989)("[A] late-filed unsecured claim that is otherwise entitled to priority . . . is placed behind timely-filed general unsecured claims."). n7

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n7 The trustee's position, though not his argument, is also supported by In re Pacific Atlantic Trading Co., 1992 U.S.Dist. LEXIS 15099 (N.D.Cal.1992). The reasoning of Pacific Atlantic Trading Co. can be summarized as follows: (1) in order to be deemed allowed under Section 502(a) of the Code, a claim must be "filed under section 501"; (2) an untimely filed claim is not "filed under section 501," and so cannot be allowed under Section 502; (3) an untimely filed tax claim is not entitled to priority under Section 507(a)(7), because that subsection applies only to "allowed" unsecured claims; and so (4) an untimely filed tax claim, stripped of its priority, should be paid as an untimely filed general claim, under Section 726(a)(3). 1992 U.S. Dist. LEXIS 15099 at *5-*8. This reasoning is not persuasive. First, the language of Section 501 does not require timely filing of claims. Second, as pointed out above, Section 726(a)(3) makes express provision for the payment of any "allowed unsecured claim proof of which is tardily filed." Thus, late filing cannot be grounds for disallowance of a claim. Third, if late filing were grounds for disallowance, a late filed tax claim could not be paid pursuant to Section 726(a)(3), because, as the language quoted above indicates, that subsection is applicable only to "allowed" unsecured claims.

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[*14]

Actually, the trustee's reading of the statute would place only "ineffectively" late filed priority claims behind timely-filed general claims. Under the trustee's reading, Section 726(a)(1) does not apply to late filed priority claims, and thus such claims cannot be deemed "specified" in that subsection. Accordingly, late filed priority claims would not be excluded from subsection (a)(2), and priority claims that were effectively late filed would be paid, together with timely filed general claims, under subsection (a)(2)(C). Kragness appears so to hold. 82 Bankr. at 557. n8 In the present case, the IRS claims was effectively late filed. The IRS was never notified of

the bankruptcy, and had no knowledge of the case, until after it commenced its audit--more than a month after the time for filing claims had elapsed. Thus, even under the trustee's reading of Section 726(a), the IRS would be at least entitled to share pro rata with general unsecured creditors.

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n8 The trustee's reading would therefore lead to the following treatment of claims under Section 726:

First, under Section 726(a)(1), timely filed priority claims would be given first priority of distribution, ahead of all general claims, but all late filed priority claims would be excluded from this subsection.

Second, under Section 726(a)(2), effectively late filed priority claims would share pro rata with timely filed general claims, and effectively late filed general claims.

Third, under Section 726(a)(3), ineffectively late filed priority claims would be paid pro rata with ineffectively late filed general claims.

Fourth, under Section 726(a)(4), noncompensatory fines and penalties would receive the lowest claim priority.

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[*15]

However, the trustee's reading presents several difficulties. First, it produces an anomalous result. Under Section 726(a)(2), an effectively late filed general claim receives exactly the same treatment as a timely filed general claim. Yet under the trustee's interpretation, an effectively late filed priority claim is penalized, losing its (a)(1) status to share with timely filed general claims in subsection (a)(2). There is no apparent policy justification for this disparate treatment.

Second, and more significantly, the trustee's reading contradicts the language of Section 726(a)(1), which provides first priority of distribution to priority claims ("claims of the kind specified in . . . section 507") without any limitation to priority claims that are timely filed. Thus, the language of subsection (a)(1), on its face, directs payment of all priority claims, timely as well as untimely filed. Several recent cases have so interpreted the statute. United States v. Cardinal Mine Co., 916 F.2d 1087, 1091-92 (6th Cir. 1990); In re Horner, 1991 WL 353297 (Bankr.N.D.Cal. Sept. 21, 1991); In re MacLochlan, 134 Bankr. 2, 3-4 (Bankr.N.D.Ohio 1991). [*16] The Cardinal Mine reading of Section 726 results in a straightforward scheme of priorities. n9

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n9 This reading would lead to the following treatment of claims under Section 726:

First, under Section 726(a)(1), all priority claims, regardless of time of filing, would be given first priority of distribution, ahead of all general claims.

Second, under Section 726(a)(2), general claims in the category of "effective late filings" would share pro rata with timely filed general claims.

Third, under Section 726(a)(3), only general claims in the category of "ineffective late filings" would be given third priority.

Fourth, under Section 726(a)(4), noncompensatory fines and penalties would be paid.

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Third, the trustee's reading of subsection (a)(2) and (a)(3) is strained. This reading interprets subsection (a)(3) as including all late filed allowed claims that [*17] are not within the "effectively" late filed category of subsection (a)(2)(C), i.e., ineffectively late filed claims of all sorts. Yet subsections (a)(2) and (a)(3) are more reasonably read as a unit, with the exclusions of (a)(2) also applying to (a)(3). Thus, since priority claims (specified in subsection (a)(1)) are expressly excluded from subsection (a)(2), they should be read as being excluded from subsection (a)(3) as well. Indeed, in connection with subsection (a)(4) claims, this interpretation is required to avoid an absurd result. The claims accorded (a)(4) priority--noncompensatory fines and penalties--are, like priority claims, expressly excluded from subsection (a)(2). However, also like priority claims, subsection (a)(4) claims are not expressly excluded from subsection (a)(3). Unless subsection (a)(3) is understood as incorporating the exclusions of subsection (a)(2), a late filed claim for a noncompensatory penalty would be accorded (a)(3) priority: it would fit under the trustee's reading of subsection (a)(3) as an allowed unsecured claim that (1) is filed by a creditor, (2) is filed late, and (3) does not fall within the "effective late filing" provisions of subsection [*18] (a)(2)(C). The result of such a reading is that a late filed claim for a noncompensatory penalty would receive a higher priority of distribution, under subsection(a)(3), than would a timely filed claim of the same nature, under subsection (a)(4).

Finally, to the extent that the language of Section 726 is ambiguous, reference to legislative history is appropriate.

Toibb v. Radloff, 111 S.Ct. 2197, 2200 (1991). The legislative history of Section 726 contradicts the trustee's reading of the statute and supports the reading of Cardinal Mine. Both the House and Senate reports accompanying the legislation that became the Code contain identical language describing Section 726:

First, property is distributed among priority claimants, as determined by section 507, and in the order prescribed by section 507. Second, distribution is to general unsecured creditors. This class excludes priority creditors and the two classes of subordinated creditors specified below. The provision is written to permit distribution to creditors that tardily file claims if their tardiness was [*19] due to lack of notice or knowledge of the case. Though it is in the interest of the estate to encourage timely filing, when tardy filing is not the result of a failure to act by the creditor, the normal subordination penalty should not apply. Third distribution is to general unsecured creditors who tardily file. Fourth distribution is to holders of fine, penalty, forfeiture, or multiple, punitive, or exemplary damage claims. These claims are disallowed entirely under present law. They are simply subordinated here.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 383 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 97 (1978). This commentary indicates that Section 726(a)(1) was intended to apply to all Section 507 claims: timeliness of filing a proof of claim is not discussed in connection with Section 726(a)(1). On the other hand, Sections 726(a)(2) and (3), which do deal with untimeliness, are each said to apply only to "general unsecured creditors," not priority claimants under Section 507, who are said to be "excluded" from 726(a)(2).

This is not to say that the Cardinal Mine reading of Section 726(a) [*20] is itself without difficulty. By requiring payment of all priority claims first, regardless of their timeliness, this reading imposes no penalty on holders of priority claims who have timely notice of the bankruptcy but negligently or even deliberately fail to file their claims within the deadlines imposed by the bankruptcy rules. To sanction such disregard of the rules contradicts a firmly established policy of encouraging finality in the administration of claims. In re Evanston Motor Co., 26 Bankr. 998, 1005 (N.D.Ill.1983), aff'd, 735 F.2d 1029 (7th Cir. 1984) ("Trustees, creditors, and even bankruptcy judges are entitled to some measure of finality in bankruptcy proceedings."); In re Johnson, 84 Bankr. 492, 494 (Bankr.N.D.Ohio 1988), aff'd, 901 F.2d 513 (6th Cir. 1990) ("The bar date for filing proofs of claim is to provide the debtor and its creditors with finality."). n10 Furthermore, this reading would appear to direct first priority payment even to claims filed after a distribution of the estate's assets. As the court in Kragness observed:

There is a [*21] practical necessity for finality in filing and paying priority claims. Without construing Section 726(a)(1) to require timeliness as a condition to priority in payment, a priority claim filed at any time prior to termination of the case would have to be satisfied before any other timely non-priority claim is paid. If any claim had been paid before the tardy priority claim was actually filed, recipients of disbursed funds would have to return sufficient funds, pro rata, to satisfy the tardy priority claim That situation would be unworkable.

82 Bankr. at 556.

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n10 Under the Bankruptcy Act of 1898, a policy of finality was an expressed part of the statutory scheme, with a claims filing deadline set forth in Section 57(n) of the Act. 11 U.S.C. @ 93(n)(repealed Oct. 1, 1979). The courts generally interpreted this filing deadline as an absolute bar. Hoos & Co. v. Dynamics Corp. of America, 570 F.2d 433, 439 (2d Cir. 1978)("[The] clear Congressional intent to require filing of valid proofs of claim with the time limits that it has set is sufficient to preclude us from finding exceptions to these rules in the supposed interest of equity."); In re Pigott, 684 F.2d 239, 242 (3d Cir. 1982)("The law is settled in the Third Circuit that @ 57(n) . . . is to be strictly construed); Wilkens v. Simon Brothers, Inc., 731 F.2d 462, 464 (7th Cir. 1984)(per curiam)(collecting cases holding that the claims filing period under the Act operated as a statute of limitations).

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[*22]

Undoubtedly, Section 726 could have been better drafted. n11 However, the difficulties in the Cardinal Mine reading are not insurmountable. All of the priorities set forth in Section 726(a) are subject to an express exception: property of the estate is to be distributed as set forth in Section 726(a) "except as provided in section 510 of this title." Section 510, in turn, sets forth grounds for subordination. Subsections (a) and (b) deal, respectively, with subordination agreements and subordination of claims involving securities of the debtor. Subsection (c), however, has a wider scope, providing in paragraph (c)(1) that "after notice and a hearing, the court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part or another allowed claim. . . ." In In re Virtual Network Services Corp., 902 F.2d 1246 (7th Cir. 1990), the Court of Appeals employed Section 510(c)(1) to affirm a determination by the district court that a claim for tax penalties owing to the IRS should be subordinated to the claims

of general unsecured creditors in a Chapter 11 liquidation. After [*23] a careful analysis of the statute and its legislative history, the Court concluded (1) that "Congress intended the courts to 'develop' the 'principles of equitable subordination,"' (2) that these principles are "broader than the doctrine which developed prior to @ 510(c)(1)'s enactment," and (3) that "equitable subordination no longer requires, in all circumstances, some inequitable conduct on the part of the creditor." 902 F.2d at 1249-50. The basis for the equitable subordination in Virtual Network was a determination that a tax penalty, in the context of a liquidation, served no deterrent purpose, and penalized the creditors of taxpayer's estate rather than the taxpayer.

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n11 The best way of dealing with late filed priority claims would be to distinguish in the statute between "effective" and "ineffective" late filings, in a manner parallel to the treatment accorded general unsecured claims by Sections 726(a)(2) and (a)(3). The statute would then provide as follows:

First, under Section 726(a)(1), all timely filed priority claims, and all "effectively late filed" priority claims would be given first priority of distribution, ahead of all general claims.

Second, under Section 726(a)(2), all timely filed general claims and all effectively late filed general claims would be paid, before any ineffectively late filed claims.

Third, under Section 726(a)(3), "ineffective late filings" for both priority and general claims would be given third priority.

Fourth, under Section 726(a)(4), noncompensatory fines and penalties would be paid.

This scheme allows effectively late filed claims to be paid the same as timely filed claims, regardless whether the claim is general or priority; it imposes a penalty on holders of both priority and general claims who file late despite adequate notice of the bankruptcy, and it would not require undoing of distributions to satisfy late claims. Unfortunately, the statutory language is not reasonably susceptible to this interpretation.

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[*24]

This understanding of the equitable subordination provision of Section 510 makes the section applicable to the situation of late filed priority claims. Where, despite adequate notice or

knowledge of the bankruptcy, a priority creditor fails to file a timely proof of claim, it may be equitable to subordinate the creditor's claim to claims that were timely filed. Since general considerations of fairness will support subordination even without inequitable conduct on the part of the creditor, an unexcused delay by the creditor in filing a proof of claim certainly provides a basis to subordinate. Moreover, based on general considerations of fairness, it may be equitable to subordinate a late filed priority claim even where the creditor lacked adequate notice or knowledge, if a distribution has already taken place and an undoing of the distribution would be excessively burdensome. n12 In either situation, the notice and hearing provision of Section 510(c) will assure that the priority creditor can present the arguments against subordination to the court. Equitable subordination, then, under Section 510(c)(1), eliminates difficulties that might otherwise result from the Cardinal Mine [*25] reading of Section 726(a).

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n12 Another factor that might argue in favor of equitable subordination in this context would be the potential for the creditor's collecting any unpaid claim amounts from the debtor's postpetition earnings, pursuant to the nondischargeability provisions of Section 523(a)(1) and (a)(3).

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The debtor's claim. With the interpretation of Section 726(a) established, one final matter needs to be addressed: the status of the debtor's claim filed on behalf of the IRS. This claim, like the subsequent IRS claim, was filed late. n13 However, as with the IRS claim, the late filing does not deprive the claim of its priority status under Section 726(a)(1). Just as application of Section 726(a)(1) is not limited to timely filed priority claims, so is its application not limited to priority claims filed by creditors. Fed.R.Bankr.P. 3004 provides that a proof of claim filed by a debtor shall be superseded by "[a] proof of claim filed by a creditor pursuant to Rule 3002." However, Rule 3002 includes the [*26] timeliness requirements that were not met by the IRS claim. Although the provision of Rule 3002 that purports to disallow untimely claims is in conflict with the Bankruptcy Code, there is no conflict with the Code in denying supersession to untimely filed claims. n14 Thus there is no supersession here. Both the debtor's and the IRS's claim therefore stand as allowed in this case, and, since they arise out of the same debt, it would be appropriate either for the debtor to withdraw his proof of claim or for the trustee to object to it.

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n13 Fed.R.Bankr.P. 3004 provides that "if a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to @ 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c)." As noted above, the deadline for creditors to file claims in this case, pursuant to Rule 3002(c), was April 8, 1991, so that June 8, 1991 would have been the last date for a debtor's filing under Rule 3004. The debtor's claim on behalf of the IRS was filed on January 2, 1992. Courts may have the power to extend the deadline for filing claims by non-creditors, since Fed.R.Bankr.P. 9006(b) does not prohibit enlargement of time for filing claims under Rules 3004 and 3005. However, no such request was made by the debtor in the present case. [*27]

n14 Moreover, allowing an untimely filed creditor claim to supersede a claim timely filed by the debtor would have inequitable consequences: a general claim timely filed by the debtor would be entitled to priority under Section 726(a)(2), whereas an untimely creditor claim might only be entitled to Section 726(a)(3) priority.

- -End Footnotes- -

Conclusion

For the reasons stated above, the motion of the United States to Allow Claim as Timely Filed is denied, but the trustee is given no authorization to distribute assets of the estate until resolution of the debtor's objection to the IRS claim at issue. To the extent the claim is allowed, it is entitled to payment pursuant to Section 726(a)(1) and (a)(4). An order will be entered in conformity with this opinion.

Dated: November 23, 1992

Eugene R. Wedoff
Bankruptcy Judge

ORDER

This case coming to be heard on the motion of the United States of America to allow a claim of the Internal Revenue Service as timely filed, the court having considered the arguments of the parties and otherwise being fully advised in the matter,

IT IS HEREBY ORDERED, for the [*28] reasons set forth in the accompanying Memorandum of Decision, that the motion is denied, but that the untimeliness of the filing of proof of the IRS claim does not deprive that claim of priority under 11 U.S.C. @ 726(a)(1).

Dated: November 23, 1992

Eugene R. Wedoff
Bankruptcy Judge

73301." The October 10, 1990 bar date for filing claims passed without the IRS or the debtors filing a proof of claim for the delinquent taxes. On May 27, 1992, the IRS filed a claim for $2,024.68 in back taxes for the 1988 and 1989 tax years,[1] and shortly thereafter the government moved for permission to allow the claim. The debtors concurred in the motion. In an order dated July 14, 1992, the court denied the government's motion, reasoning that "[t]he Court has not been conferred any authority to extend the time period for filing proofs of claim by the creditor," (R. Doc. 22 at 2), relying in part on my decision in *National Bank of Canada v. Chadderdon (In re Smartt Construction Co.)*, 138 B.R. 269 (D.Colo.1992).

II *Legal Analysis.*

A *Can the Bar Date be Extended When the Creditor Had No Notice?*

[1] The central question in this case is whether a creditor who has not received notice of a Chapter 13 bankruptcy case or the deadline for filing proofs of claim must be permitted to file a late proof of claim. There is conflicting authority on this issue. In my opinion, however, the better reasoned cases hold that the notice requirements of the Code and Rules, due process and fundamental fairness all require the allowance of late proofs of claim in these circumstances.

The Bankruptcy Code does not specify the time limit within which a creditor must file a proof of claim. *See United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1088 (6th Cir.1990); 11 U.S.C. § 501. Instead, those limits are set forth in the Bankruptcy Rules. Bankruptcy Rule 3002(c) requires a proof of claim in a Chapter 13 case to be filed "within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code." In addition, the rule lists six exceptions for which the 90-day period does not apply, none of which are relevant to this case. *See* Bankr.R. 3002(c)(1)-(6). If a creditor fails to file a claim within the time specified in Bankruptcy Rule 3002(c), the Bankruptcy Rules further permit the debtor or the trustee to file a claim "in the name of the creditor, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c)." Bankr.R. 3004.

If neither the creditor nor the debtor has timely filed a proof of claim, and the creditor later seeks permission to do so, the bankruptcy court must look to Bankruptcy Rule 9006(b) to determine whether it may grant the creditor's request. This rule grants the bankruptcy court discretion to extend time periods set forth in the rules if the request for extension is made before the period expires, or if the failure to act within the specified period was the result of "excusable neglect." Bankr.R. 9006(b). The rule has two exceptions, however. The first absolutely prohibits extensions of time with respect to several rules, none of which are involved here. Second, enlargement is permitted in connection with Bankruptcy Rule 3002(c) and other specified rules "only to the extent and under the conditions stated in those rules." Bankr.R. 9006(b)(3). Thus, "[a] majority of courts agree that the bar date for Chapter 7 and Chapter 13 proofs of claim cannot be extended for excusable neglect," since it is not one of the exceptions listed in Rule 3002(c). *In re Smartt Constr. Co.*, 138 B.R. at 271.

The bankruptcy court below relied on this principal to deny the government's motion to allow its late-filed claim. In doing so, it dismissed the government's reliance on another case nearly identical on its facts, *In re Johnson*, 95 B.R. 197 (Bankr. D.Colo.1989). The court rejected *In re Johnson* as persuasive authority because it was handed down before my decision in *In re Smartt Construction Co.*, apparently reasoning that the former was abrogated by the latter. (*See* R. Doc. 22 at 2 n. 1.) That conclusion is flawed.

In *In re Smartt Construction Co.*, the debtor company and its principal officer filed separate Chapter 7 bankruptcy pro-

1. The government states that claim consisted of a priority claim of $1,871.89 and an unsecured general claim of $152.99, though these figures reflect a claim in the combined amount of $2024.88, not $2024.68.

ceedings. *See* 138 B.R at 270. The Resolution Trust Corporation (RTC), as receiver of a savings institution which was a creditor in both cases, filed a timely proof of claim only in the officer's case but failed to do so in the corporation's case. The RTC argued that its failure was excusable neglect because, while it had received the appropriate notice triggering the time period in the officer's case, it did not receive the notice in the corporate case despite adequate internal mail-handling procedures. The bankruptcy court agreed and granted the RTC's motion for approval of the late claim. *See id.* at 270–71.

On appeal, I reversed, holding that the provision of Bankruptcy Rule 9006(b)(1) permitting extensions of time for excusable neglect was inapplicable to a request for an extension of time to file a proof of claim under Rule 3002(c). *Id.* at 271. In a footnote, however, I indicated one situation in which this inflexible rule would not apply, explaining:

> This was not a situation in which the creditor had no notice of the bankruptcy proceedings or where there had been no attempt to serve notice of the bar date. In such circumstances, failure to extend the bar date could result in denial of due process. *See In re Harbor Tank Storage Co.*, 385 F.2d 111, 114 (3d Cir.1967). Here, it is undisputed that Otero, and its successor the RTC, had notice of SCC's bankruptcy and that the NOPD was mailed to all creditors, including Otero.

Id. at 272, n. 6.

In contrast, in *In re Johnson*, despite earlier contact by a local IRS revenue officer, several notices in the debtors' bankruptcy case were mailed to the IRS at "Ogden, Utah 84201." In addition, the Chapter 13 Trustee's notice of bankruptcy filing, which established the date of the first meeting of creditors and the bar date for filing proofs of claim, was never mailed to the IRS. *See* 95 B.R. at 198. Ruling on the debtors' objection to the IRS' late proof of claim, the bankruptcy court acknowledged that Rule 9006(b)(3) prevented the court from allowing the untimely filing of a proof of claim where the creditor alleges excusable neglect. *See id.* at 202 & n. 13. Nevertheless, the court held that "under truly extraordinary, compelling circumstances" a late filed claim could be allowed. *Id.* at 202. The *Johnson* court concluded that "[l]ack of timely and meaningful notices, i.e., due process, fulfills the requisite stated above that upon a showing of extraordinary and compelling reasons, the period of time might be extended within which a creditor may file a proof of claim." *Id.* at 203.

[2] I don't find the decisions in *In re Smartt Construction* and *In re Johnson* to be in conflict; the facts of the two cases are different. In *Smartt Construction*, the notices of possible dividend, triggering the claims filing period, were properly addressed and mailed to the RTC in both related bankruptcy cases, but for unknown reasons the RTC did not receive one of the notices. The debtor complied with the notice requirements of the Code and Rules, the error, if any, occurred after the notices were mailed. In contrast, in *Johnson* the debtors sent notices to the IRS at a general address. The *Johnson* court ruled that this notice was "simply not sufficient in a pending bankruptcy case, particularly where taxes are at issue and in dispute." 95 B.R. at 203 n. 15. The question in *Johnson* was whether the debtors complied with the notice requirements under the Code and Rules, not whether the creditor's failure to act on the notice was excusable neglect. This holding squares with *Smartt Construction*'s recognition that due process requires the creditor be permitted to file a late proof of claim when it has not been given adequate notice of the bankruptcy proceedings through no fault of its own. In this sense, "adequate" means sufficient to satisfy the requirements of due process or fundamental fairness.

Courts have permitted the IRS and other creditors to file a late proof claim in similar circumstances. For example, in *United States v. Cardinal Mine Supply, Inc.*, the court held that "[d]ue process and equitable concerns require that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be per-

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mitted to file tardily when the creditor does so promptly after learning of the bankruptcy." 916 F.2d at 1089. The court's holding in *Cardinal Mine* concerned the priority of the IRS' tardy claim in a Chapter 7 distribution. The IRS was not listed as a creditor in the case and did not receive notice of the first meeting of creditors. Although the court recognized that the government is not a person entitled to due process under the Fifth Amendment, *id.* at 1089, it held that "basic principles of justice" and the notice requirements of the Code required that the IRS' late-filed claim be allowed and not subordinated to non-priority unsecured claims, *id.* at 1092.

Other courts likewise have permitted a creditor without adequate notice of the bankruptcy proceedings to file a late proof of claim in similar circumstances. *See, e.g., Kilbarr v. General Servs. Admin. (In re Remington Rand Corp.)*, 836 F.2d 825 (3d Cir.1988); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984); *In re Harbor Tank Storage Co.*, 385 F.2d 111 (3d Cir.1967); *cf. In re Dewey Beach Enter., Inc.*, 110 B.R. 681, 684 (Bankr.D.Del.1990) (recognizing that creditor with no notice of bar date may be constitutionally entitled to file late proof of claim). The bankruptcy court below rejected the Tenth Circuit's decision in *Reliable Electric* and related cases because they involved Chapter 11 reorganizations (or the Bankruptcy Act equivalent) for which the rules for extensions of time for filing proofs of claim are different. *See, e.g.* Bankr.R. 3003, 9006(b) (permitting creditor to file late proof of claim for excusable neglect). The rationale supporting the allowance of the late proofs of claim in those cases, however, was not excusable neglect, but due process. Other courts have reaffirmed this view in the Chapter 13 setting. *See, e.g., Smith v. Martinez (In re Martinez)*, 51 B.R. 944, 947 (Bankr.D.Colo. 1985) (noting applicability of *Reliable Electric* and *Harbor Tank Storage* in Chapter 13 cases); *In re Barnett*, 42 B.R. 254 (Bankr.S.D.N.Y.1984); *cf. In re Hausladen*, 146 B.R. 357 (Bankr.D.Minn.1992) (tardily-filed Chapter 13 claim not precluded by section 501 or Bankr.R. 3002).

In contrast, the court in *In re Global Precious Metals, Inc.*, 143 B.R. 204 (Bankr. N.D.Ill.1992), discounted the analysis of the *Cardinal Mine* and related cases. Contrary to the assumption in *Cardinal Mine* that the creditor is deprived of property if not permitted to file a late proof of claim, the *Global Precious Metals* court noted three sections of the Code which protect the creditor. (1) section 726(a)(2)(C), which allows the creditor to participate in a Chapter 7 distribution despite a late filed claim if it did not have notice of the proceedings; (2) section 523(a)(3), which exempts from discharge claims not listed or scheduled, and (3) section 501(c), which authorizes the trustee or the debtor to file a proof of claim on behalf of the creditor who does not timely file. *See id.* at 206.

While the court's analysis in *Global Precious Metals* is helpful in connection with a case proceeding under Chapter 7, it is not persuasive in the Chapter 13 context. First, section 726(a)(2)(C) is not applicable in a Chapter 13 case, and there is no similar treatment giving recognition to tardily-filed claims in Chapter 13. Likewise, assuming a Chapter 13 debtor receives a discharge under section 1328(a) of the Code, which grants the debtor a discharge after all payments under the plan have been made, certain provisions of section 523 excepting debts from discharge do not apply. Section 523 pertains only to discharges under section 1328(b), which grants the debtor a discharge in hardship and good-faith cases.[2] For example, section 523(a)(1) exempting priority claims from discharge would not apply, nor would a creditor whose debt was neither scheduled nor listed be protected by section 523(a)(3). *But see In re Glou*, 111 B.R. 209, 217 (Bankr. N.D.Ind.1990) (noting that creditor without notice of bankruptcy proceedings protected from deprivation of due process by section

2. Section 1328(a) of the Code, however, makes applicable to discharges granted thereunder the exceptions contained in subsections (5), (8) and (9) of section 523. *See* 11 U.S.C. § 1328(a)(2). These exceptions are not relevant here.

523(a)(3) if discharge granted under section 1328(b)).

[3, 4] Finally, a debtor contemplating a successful completion of plan payments under Chapter 13 has little incentive to file a proof of claim on behalf of a creditor under section 501. The purpose of section 501 is to protect the debtor if the creditor's claim is *nondischargeable*, so that it may provide for payment of the claim in full or in part under the plan, rather than having to repay the entire debt after the case is closed. *See In re Johnson*, 95 B.R. at 199 n. 4. As explained in *Daniel v. United States (In re Daniel)*, this section is permissive, not mandatory:

> Section 501(c), which allows the debtor or the trustee to file a proof of a creditor's claim when the creditor does not file a timely proof of claim, is permissive only. There is nothing in the statutory scheme to suggest that debtors must file claims for creditors in order for the debts to be discharged under the liberal discharge provisions of § 1328(a).

107 B.R. 798, 803 (Bankr.N.D.Ga.1989). More important, although Chapter 13 requires the plan to provide for payment in full of all priority claims, "only priority claims actually filed must be paid. If a plan provides for payment of a priority claim and that claim is not paid only because it was never filed by the holder of the claim, the claim is dischargeable under section 1328(a)." 5 *Collier on Bankruptcy* ¶ 1322.03 at 1322–7 (L. King 15th ed. 1992); *see also Ledlin v. United States (In re Tomlan)*, 102 B.R. 790, 795–97 (E.D.Wash. 1989), *aff'd*, 907 F.2d 114 (9th Cir.1990); *In re Ryan*, 78 B.R. 175, 178 (Bankr. E.D.Tenn.1987). Consequently, a debtor gains little benefit by filing a proof of claim to protect a creditor whose interest will ultimately be discharged. For this reason, section 501 gives scant protection to a creditor who fails to file a proof of claim because it was deprived of notice.

In light of the different posture of Chapter 13 cases, affirmance of the bankruptcy court's ruling could result in dangerous precedent. Debtors would not be encouraged to give proper notice to creditors, thwarting their ability to file timely proofs of claim. Since a proof of claim must be filed in order for a claim to be allowed, these creditors would not be entitled to payments under the plan and their claims would be discharged after consummation of the plan under section 1328(a). Unlike cases under other Code chapters, no back door provisions under Chapter 13 otherwise allow the creditor with no notice to participate in distributions. For these reasons, a creditor who has received no notice in a Chapter 13 case should be entitled to file a late proof of claim, notwithstanding the provisions of Bankruptcy Rules 3002(c) and 9006(b).

B. *Was the Notice Defective?*

[5] A second issue in this appeal is whether the notice provided to the IRS, mailed to one of its service centers, was effective. The Bankruptcy Rules provide little guidance. Rule 2002(j) is the only rule that speaks of notice to the United States. The provisions of that rule concern only Chapter 11 cases, commodity broker cases, and cases involving a debt to the United States other than for taxes. Nothing in the rule requires notice to be given to the IRS in every Chapter 13 case as in Chapter 11 cases, *see* Bankr.R. 2002(j)(3), or specifies generally where or to whom the notice must be sent. "Since the Bankruptcy Rules ... do not contain any provision dealing with where to send notice to the IRS in a Chapter 13 case, the Court's inquiry is limited to whether the specific notice given in this case was fair and reasonable under the circumstances." *In re Daniel*, 107 B.R. at 801.

The two cases most closely on point on this issue are *In re Johnson* and *In re Daniel*. In *Johnson*, as in this case, notices were sent to the IRS at a general address. As noted above, the bankruptcy court found that this notice was simply not reasonable under the circumstances. The court's conclusion was "derived from rather obvious deficiencies such as Debtors failure to mail their Amended Plan, Motion to Confirm (Amended) Plan, and Notice of Hearing ... to the IRS at (a) a specific,

appropriate IRS office address, preferably to the attention of (i) a designated department or (ii) an authorized Revenue Officer's attention, or (b) in accordance with local Court requirements"[3] 95 B.R. at 203. In addition, the court reasoned that because notice to the government is often subject to specific requirements, debtors should pay special attention to "insure timely and meaningful notice to government agencies, as well as other creditors." *Id.*

In contrast, in *Daniel*, the bankruptcy court held that notice to the IRS was sufficient. There the debtors sent bankruptcy notices to the IRS at the address provided on a collection notice they received from the agency before filing for bankruptcy. The IRS argued that the notices should have been sent to its district director, as required in Chapter 11 cases, and not to its collection office, which had no authority to file a proof of claim. The court rejected the IRS' contention that the notices required of debtors in Chapter 11 proceedings applied in a Chapter 13 proceeding. 107 B.R. at 800. It held that notice to the IRS at the collection office indicated on earlier correspondence was sufficient under the circumstances and that the debtors "cannot be charged with knowing the intricacies of the organization." *Id.* at 801.

Here, there is nothing in the record to indicate why the debtors sent their notices to the IRS at its service center or whether they had knowledge of a more appropriate address. Likewise, the government does not explain why the debtors' use of the service center address is unreasonable or why the center could not have forwarded the notices to the appropriate office. *See In re Daniel*, 107 B.R. at 801. In fairness, however, the parties did not have the opportunity to create a record on this issue, since the bankruptcy court held that it had no discretion to consider a late-filed claim, even for lack of notice.

Consequently, because of the meager record, I cannot determine whether the IRS had effective notice in this case. If I follow the rationale of *In re Johnson*, notice sent to a general IRS address, standing alone, is unreasonable. On the other hand, if the only address the debtors had when they filed their case was that of the regional service center and the IRS could have forwarded the notice to the correct division, under the reasoning of *In re Daniel*, this notice may have been "fair and reasonable under the circumstances." *See id.*

III *Conclusion*

In my opinion, contrary to the bankruptcy court's view, the strict limits on extensions of time for filing proofs of claim do not apply to a situation where the creditor has had no effective notice of the proceedings or the bar date. Thus, I cannot affirm on this ground. Accordingly, I REVERSE and REMAND for a rehearing and a determination by the bankruptcy court whether the notice to the IRS was fair and reasonable under the circumstances.

In re Joe Earl COOPER and Janice Lee Cooper, Debtors.

Bankruptcy No. 89-B-10175-A.

United States Bankruptcy Court, D. Colorado.

Oct. 22, 1992.

After debtors' Chapter 7 petition was converted to Chapter 13, creditor moved to dismiss. The Bankruptcy Court granted the motion. On remand, 139 B.R. 736, the Bankruptcy Court, Sidney B. Brooks, J., held that debtors' delay, nondisclosure, and bad faith justified sanction of dismissal

3. The court further indicated that the clerk of the bankruptcy court in this district had issued special instructions regarding proper mailing of notices to the IRS and the Colorado Department of Revenue, and that those instructions were at one time provided to practitioners. *See* 95 B.R. at 199.

the clerk will schedule new pretrial conferences for the remaining issues.

In re Jose & Cynthia DUARTE, Debtors.

Bankruptcy No. 91–50420–C.

United States Bankruptcy Court,
W.D. Texas,
San Antonio Division

Oct. 11, 1992.

Creditor filed motion for extension of time to file claim in Chapter 13 case. The Bankruptcy Court, Leif M. Clark, J., held that creditor was absolutely barred from filing late claim in Chapter 13 case, since creditor did not satisfy any of the six exceptions contained in Bankruptcy Rule

Motion denied.

1. Bankruptcy ⇐2900(1)

Bankruptcy Rule on time limits for filing proof of claim in Chapter 13 case is absolute bar to late claims, unless one of the six exceptions contained within Rule is met, or denial of due process can be demonstrated. Fed.Rules Bankr.Proc.Rule 3002(c), 11 U.S.C.A.; U.S.C.A. Const. Amends. 5, 14.

2. Bankruptcy ⇐2900(1)

Bankruptcy Rule allowing court to enlarge time for taking action is not available to relieve creditor from time limitations for filing claim in Chapter 13 case. Fed.Rules Bankr.Proc.Rules 3002(c), 9006(b)(3), 11 U.S.C.A.

3. Bankruptcy ⇐2900(1)

If debtor fails to file claim for creditor within time provided by Bankruptcy Rule, debtor may request extension after the fact, if debtor can establish cause and demonstrate excusable neglect. Fed.Rules Bankr.Proc.Rules 3004, 9006(b)(1), 11 U.S.C.A.

4. Bankruptcy ⇐2900(1)

Only debtor has standing to bring motion for extension of time for debtor to file claim for creditor. Fed.Rules Bankr.Proc. Rules 3004, 9006(b)(1), 11 U.S.C.A.

5. Bankruptcy ⇐2363

Public policy favors bankruptcy debtor's fresh start.

6. Bankruptcy ⇐2896

Debtor or trustee may file claim for any creditor who has not itself filed claim by time of first meeting of creditors, but debtor or trustee must do so within 120 days of that date, up to 30 days after deadline for creditor to file claim. Fed. Rules Bankr.Proc.Rules 3002(c), 3004, 11 U.S.C.A.

7. Bankruptcy ⇐2891

If creditor files proof of claim within time provided in Bankruptcy Rule, creditor's claim will supersede claim filed by debtor or trustee on behalf of creditor. Fed.Rules Bankr.Proc.Rules 3002(c), 3004, 11 U.S.C.A.

8. Bankruptcy ⇐2900(1)

Debtors have heavy burden to meet in order to establish cause and excusable neglect for filing claim for creditor after deadline imposed by Bankruptcy Rule. Fed.Rules Bankr.Proc.Rules 3004, 9006(b)(1), 11 U.S.C.A.

9. Bankruptcy ⇐2900(1)

Debtor's mere inattention to process for filing proofs of claim for creditors is not "excusable neglect," and merely listing creditor's claim in schedules is not "cause," for filing claim for creditor after deadline imposed by Bankruptcy Rule. Fed.Rules Bankr.Proc.Rules 3004, 9006(b)(1), 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

10. Bankruptcy ⇐2900(1)

"Excusable neglect standard" is unavailable to allow creditors to file untimely proofs of claim in Chapter 13 cases. Fed.Rules Bankr.Proc.R
U.S.C.A.

11. Bankruptcy ⇐

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John A. Ruttan,
debtors.

David A. Ayon,
creditor

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Rules Bankr.Proc.Rules 3002, 9006(b)(1), 11 U.S.C.A.

11. Bankruptcy ⇐2125

Bankruptcy Court cannot exercise its equitable powers in derogation of specific authority to the contrary.

John A. Ruttan, San Antonio, Tex., for debtors

David A. Ayon, San Antonio, Tex., for creditor

DECISION AND ORDER ON MOTION TO ALLOW FOR EXTENSION OF TIME TO FILE CLAIM

LEIF M. CLARK, Bankruptcy Judge.

CAME ON for hearing the Motion of creditor Adolph's Furniture to Allow for Extension of Time to File Claim in the above-referenced case. Upon consideration thereof the court finds that the motion should be denied.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 11 U.S.C. § 501(c). This matter is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A).

BACKGROUND

Jose and Cynthia Duarte ("Debtors") filed for relief under Chapter 13 of the Bankruptcy Code on February 4, 1991. Adolph's Furniture ("Adolph's") is a creditor of the estate. Adolph's claim was originally scheduled by the debtors; however, due to "confusion by the employee handling [the] matter," Adolph's did not file a proof of claim in the case in a timely manner.

Adolph's filed the instant motion to allow for extension of time on June 5, 1992, alleging that the failure to timely file the proof of claim resulted from the failure of an employee document relating to the Notice of Bankruptcy.[1] Adolph's argues that creditors will not be prejudiced by an extension of time, because the debt was included in debtor's schedules. The debtor agrees, for the same reasons. The trustee has taken no position on the issue.

ANALYSIS

[1] Section 501 of the Bankruptcy Code provides in pertinent part that:

> (a) A creditor or an indenture trustee may file a proof of claim . . .
>
> . . . . . .
>
> (c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

11 U.S.C. § 501 (1992). The time limits for filing a proof of claim are set by the bankruptcy rules which implement Section 501. *See* Fed.R.Bankr.P., Rule 3002 (proof of claim in cases under Chapters 7 and 13); Rule 3003 (proof of claim in cases under Chapters 9 and 11), Rule 3004 (proof of claim filed by Debtor or trustee); Rule 3005 (proof of claim filed by guarantor or codebtor). In a Chapter 13 case, an unsecured creditor must file a proof of claim within ninety (90) days after the first date set for the meeting of creditors. Rule 3002(c), Fed.R.Bankr.P. (1992). Subsection (c) also defines the limited circumstances under which the court may extend the time within which to file a proof of claim. The United States, a state, or a subdivision may obtain an extension, if they request the extension before the expiration of the time period. Rule 3002(c)(1). An extension may also be granted to infants and incompetents (or their representatives). Rule 3002(c)(2). A creditor who, as a result of a judgment, is determined not to be a secured creditor may file a claim as an unsecured creditor within thirty days after that judgment. Rule 3002(c)(3). Claims arising from the rejection of executory contracts may be filed outside the 90 day time frame, as the rejection may itself not occur within

1. Similar motions were filed in a number of other cases, evidently shortly after Adolph's hired a law firm to help it with collections in bankruptcy cases. The decision in this case controls the disposition of Adolph's motions in the other cases.

that time frame Rule 3002(c)(4).[2] If a creditor does not come within one of these listed exceptions in Rule 3002(c), the court has no authority to extend the time within which to file a proof of claim. *See In re Glow*, 111 B.R 209, 214 (Bankr.N.D.Ind. 1990), *see also In re Shelton*, 116 B.R. 453, 455 (Bankr.D Md.1990); *In re Bowers*, 104 B.R 362, 363 (Bankr.D.Colo.1989); *In re Wilt*, 84 B.R 480, 481-82 (Bankr.N.D.Ohio 1988) None of the six exceptions established by Rule 3002(c) apply to Adolph's situation here The instant motion is not a motion filed by the United States; Adolph's is not an incompetent person or an infant; the claim at issue did not result from an entry of judgment determining Adolph's not to have a security interest, the claim does not arise from a rejected executory contract, and this is not a chapter 7 case. Rule 3002(c) on its face forecloses Adolph's motion.

[2] Adolph's argues that the court can extend the time for filing its claim under Rule 9006(b) That rule indeed permits the court to extend deadlines, for cause shown It even permits relief from a deadline after the fact if the failure to act was the result of excusable neglect. However,

> The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 2003(a) and (d), 7052, 9023, and 9024.

Fed.R.Bankr.P., Rule 9006(b)(2). Furthermore,

> The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), *3002(c)*, 4003(b), 4004(a), 4007(c), 8002, and 9033, *only to the extent and under the conditions stated in those rules.*

Fed.R.Bank.P. 9006(b)(3) (emphasis added). Thus, Rule 9006(b) is expressly not available to relieve Adolph's from the limitations specified in Rule 3002(c) *Glow*, 111 B.R. at 214, *Shelton*, 116 B.R. at 455; *Bowers*, 104 B.R. at 363

[3, 4] All is not lost for Adolph's, however, provided it has the cooperation of the debtor or the chapter 13 trustee. Rule 3004 permits a debtor or trustee to file a proof of claim on behalf of a creditor up to thirty (30) days after the expiration of the time provided for a creditor to do so in Rules 3002. Rule 3004, interestingly, is not one of the rules listed under the "enlargement not permitted" or "enlargement limited" exceptions to Rule 9006(b) *See* Rule 9006(b)(2), (3). Thus, if a *debtor* fails to file a claim for a creditor within the time provided by Rule 3004, the debtor may request an extension after the fact, if the debtor can establish cause and demonstrate excusable neglect. Rule 9006(b)(1) Obviously, only the *debtor* has standing to bring such a motion, however.

Adolphs argues that the excusable neglect standard of Rule 9006(b)(1) should be available to creditors as well, especially in the case of claims which have originally been scheduled by the debtor anyway Obviously, the court is not free to accept Adolphs' invitation, for the rule expressly prohibits it Fed.R.Bankr.P. 9006(b)(3), *see also In re Stern*, 70 B.R. 472, 475 (Bankr E.D.Pa.1987).

Moreover, there is a principled reason for the disparate treatment of Rule 3002(c) and Rule 3004 in Rule 9006(b) Both chapter 7 and chapter 13 are structured to foster prompt resolution of claims and equally prompt satisfaction of those claims.[3] The excusable neglect standard tends to undermine the prompt and efficient administration of such cases, especially because both chapters are essentially distributional in nature. Once distribution has begun, it is difficult to alter the *pro rata* allocation [4]

2. There are two more exceptions, but they apply only to chapter 7 cases Rule 3002(c)(5), (6).

3. Chapter 9 and 11, by contrast, are not distributional but reorganizational. Thus, a different rule, Rule 3003, spells out the slightly different procedure appropriate for claims filing under those chapters Rule 9006(b) does apply to late filed claims by creditors in chapter 9 and 11 cases.

4. This is easy to see in Chapter 7 cases, where the trustee makes a single distribution of remaining assets pursuant to a court-approved final report, which spells out the precise amount each creditor is to receive on account of its claim A chapter 13 trustee does essentially the same thing, but does so over time, out of a fund set up at confirmation, but funded over the life of the plan out of the debtor's earnings It

In addition to the administrative problems which late claims create for the distributional chapters of the Bankruptcy Code, late claims also upset the legitimate expectations of other creditors, who are entitled to rely on having to share the limited assets of the estate only with those who have timely participated in the process. Rule 3002(c), with its strict deadlines and narrow exceptions, fosters these two goals of prompt administration and even-handed treatment of creditors, and gives finality to the distributional process. It sets out a statute of limitations upon which both trustees who administer cases and creditors looking for distribution from those cases may rely.

[5–7] Yet late claims *can* be filed by *debtors* out of time upon a showing of excusable neglect. Rules 3004, 9006(b), Fed.R.Bankr.P. (1991). This is so because, just as public policy permits late filings by infants and incompetents, or by a governmental entity, so also does public policy favor a debtor's fresh start. That fresh start can be jeopardized by a creditor's failing to file a proof of claim. Thus, the Advisory Committee notes to Rule 3004 observe that

> [i]t is the policy of the Code that debtors' estates should be administered for the benefit of creditors without regard to the dischargeability of their claims. After their estates have been closed, however, discharged debtors may find themselves saddled with liabilities, particularly for taxes, which remain unpaid because of the failure of creditors holding nondischargeable claims to file proofs of claim and receive distributions thereon. The result is that the debtor is deprived of an important benefit of the Code without any fault or omission on the debtor's part and without any objective of the Code being served thereby.

Section 501(c) of the Code authorizes a debtor or trustee to file a proof of claim for any holder of a claim. Although all claims may not be nondischargeable, it may be difficult to determine, in particular, whether tax claims survive discharge. [citations omitted] To eliminate the necessity of the resolution of this troublesome issue, the option accorded the debtor by the Code does not depend on the nondischargeability of the claim. No serious administrative problems and no unfairness to creditors seemed to develop from adoption of Rule 303, the forerunner to § 501(c). The authority to file is conditioned on the creditor's failure to file the proof of claim on or before the first date set for the meeting of creditors, which is the date a claim must ordinarily be filed in order to be voted in a chapter 7 case.[5]

Advisory Committee note, Rule 3004, Fed.R.Bankr.P. (1992). Thus, the debtor or the trustee may file a claim for any creditor who has not itself filed a claim by the time of the first meeting of creditors, but the debtor or trustee must do so within 120 days of that date (up to 30 days after the 3002(c) deadline). *See* Advisory Committee note to 1987 amendments, Rule 3004, Fed.R.Bankr.P. (1992). If the creditor files a proof of claim within the time provided in Rule 3002(c), the creditor's claim will supersede the debtor's or trustee's. By this scheme, then, the debtor or the trustee in a chapter 13 case can always be assured of having a claim on file for taxes, for example, even if the IRS has failed to file soon enough to be included in the debtor's chapter 13 plan.

[8, 9] Rule 3004 has its roots in equity (i.e., to spare a debtor from being ". . . deprived of an important benefit of the Code without any fault or omission on the debtor's part . . ."). It is itself an exception to the general policy which underlies Rule 3002—prompt and even administra

is important to recognize, as did the drafters of the Rules, that Chapter 13 is essentially distributional in character, not reorganizational. In practice, Chapter 13 trustees administer hundreds or even thousands of cases per month, usually computerizing their operation. Like a claim, cause almost as much administrative confusion in chapter 13 cases as they would in chapter 7 cases.

5. *See* 11 U.S.C. § 702(b) (permitting creditors with "allowed claims" to choose their own trustee at the first meeting of creditors).

tion of the estate for the benefit of creditors who have been diligent in protecting their rights. We should not, therefore, be too surprised that another rule of equity, Rule 9006(b), which permits relief from deadlines for cause upon a showing of excusable neglect, can be applied to the "deadline" set by Rule 3004 for debtors and trustees.[6]

The same logic does not apply to the ability of creditors to file late claims. A hard and fast deadline for creditor's claims has its roots not in equity but in the necessity for prompt and efficient administration of the case, untimely creditor claims simply undermine the distribution process. As it is, Rule 3002(c) *does* contain a few equitable exceptions, but an "exception" permitting late claims for "excusable neglect" would quickly swallow the rule, imposing an administrative cost on chapter 7 and chapter 13 cases directly contrary to the goal of "just, speedy and inexpensive determination of cases" and their "expeditious and efficient administration," said to be the chief purpose of the bankruptcy laws. Rule 1001, Fed.R.Bankr.P. (1992); *see also Katchen v Landy*, 382 U.S. 323, 328, 86 S.Ct. 467, 472, 15 L.Ed.2d 391 (1966); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346–47, 22 L.Ed. 636 (1874); *Ex parte Christy*, 44 U.S. (3 How.) 292, 312–14, 11 L.Ed. 603 (1845). The general authority in Rule 9006(b) granted courts to exercise their equitable powers to relieve parties from deadlines cannot be extended to Rule 3002(c), because limited exceptions are already specified within the body of the rule; permitting the general rule to apply would contradict the specific language within the specific rule. Observed the Advisory Committee:

> Many rules which establish a time for doing an act also contain a specific authorization and standard for granting an extension of time and, in some cases, limit the length of an extension. In some instances it would be inconsistent with the objective of the rule and sound administration of the case to permit extension under Rule 9006(b)(1) ...

Advisory Committee Note, Rule 9006, Fed R.Bankr.P. (1992); *see also In re Stern*, 70 B.R. 472, 475 (Bankr.E.D.Pa.1987) (permitting the "excusable neglect" standard of Rule 9006(b) to be used to relieve a creditor from the strict deadlines of Rule 3002(c) would destroy the objective of finality which Congress obviously intended to promote).

[10, 11] Given that the plain language of the Rule specifically prohibits a creditor from filing a claim after the deadline imposed under Rule 3002 unless one of the six exceptions is met, there is simply no basis for an extension of the excusable neglect standard to claims filed by creditors under Rule 3002; a bankruptcy court cannot exercise its equitable powers in derogation of specific authority to the contrary.[7]

Several courts have allowed a creditor to file a late proof of claim under circumstances outside the six exceptions listed in Rule 3002(c) where the creditor fails to receive notice of the pending bankruptcy case. *See United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087 (6th Cir.1990); *In re Yoder Company*, 758 F.2d 1114 (6th Cir.1985); *In re Barnett*, 42 B.R. 254

6. Debtors especially are cautioned to bear in mind that they will have a heavy burden to meet in order to establish cause and excusable neglect in order to file a claim for a creditor after the deadline imposed by Rule 3004. The debtor has 30 days beyond the claims deadline set by Rule 3002(c) to file a claim for a creditor, but the debtor need not wait until that deadline has passed. Debtors are permitted to file claims for creditors the day after the first meeting of creditors, if the creditor has not itself already filed. Debtors should also have every incentive to file a claim for a nonfiling creditor early rather than late, as the principle goal is to incorporate the creditor's claim in the plan and to then discharge that claim upon completion of that plan. Debtors would therefore, as a matter of course, be expected to review the claims register to see whether the creditor had filed, and to do so early in the process so that the debtor's plan could accommodate the claim *In re Davis*, 936 F.2d 771, 774 (4th Cir.1991); *see also* 11 U.S.C. § 1327. Mere inattention to this process is not "excusable neglect," and merely listing the creditor's claim in the schedules is not "cause." *See Davis, supra.*

7. *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977).

(Bkrtcy.S.D.N.Y.1984) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); *In re Moskowitz*, 35 B.R. 750 (S.D.N.Y. 1983). Where a creditor's basic entitlement to due process under the Constitution has been abridged, the rule of course cannot be enforced. U.S. Const., Amend. V; *City of New York v. New York, New Haven, & Hartford R.R.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953).[8] In the instant case, however, Adolph's has admitted receiving notice of the bankruptcy filings; the motion states that an employee misplaced the notices. Therefore, *City of New York* and its progeny are inapposite and cannot support Adolph's motion.

CONCLUSION

Bankruptcy Rule 3002(c) is an absolute bar to late claims by creditors in chapter 13 cases, unless one of the six exceptions contained within the Rule is met (or unless a denial of constitutional due process can be demonstrated). None of the six exceptions have been satisfied in the instant case; accordingly, the motion for extension of time must be DENIED as a matter of law. So ORDERED.

8. Said the Supreme Court,

> The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed right

City of New York, 344 U.S. at 297, 73 S.Ct. at 301. The Sixth Circuit added in *Cardinal Mine Supply* that

> [t]he failure of the Bankruptcy Rules to provide relief to creditors who receive no notice of a bankruptcy and have no knowledge of it cannot deprive those creditors of their substantive right not to have their property rights taken away without notice.

U.S. v. Cardinal Mine Supply, Inc., 916 F.2d at 1091. It is worth adding that both of these cases involved taxing authorities, which are not protected by the Constitution's Due Process clause. The courts found support for their rulings in statutory due process (which *does* extend to governmental entities) and "basic principle[s] of justice."

In re HARBOUR LIGHTS MARINA, INC., Debtor.

E. Hanlin BAVELY, Trustee, Plaintiff,

v.

Raymond G. WANDSTRAT, et al., Defendants.

Bankruptcy No. 1-91-06086.
Adv. No. 1-91-0231.

United States Bankruptcy Court, S.D. Ohio, W.D.

Oct. 30, 1992

Chapter 7 trustee filed adversary proceeding to contest validity and/or amounts of liens asserted by creditors. Trustee and creditors filed motions for summary judgment. The Bankruptcy Court, Burton Perlman, Chief Judge, held that (1) one creditor had security interest in contents of barge that had been converted into floating restaurant, but not in barge itself; (2) gangplanks did not constitute "equipment" subject to security interest; (3) barge constituted "vessel" under Federal Maritime Lien Act; and (4) creditor was not entitled to maritime lien against barge, where barge was not used in maritime venture at time of repairs for which creditor lent money.

So ordered.

1. Secured Transactions ⇐41

Under Ohio law, creditor could assert security interest in contents of barge that had been converted into floating restaurant, even though creditor lacked a duly signed and executed security agreement, where evidence of intent of debtor's presi-

leaving Debtors with $15,452.21 of equity in the Property, which is fully exempt under N.Y. CPLR § 5206(a). *See In re Dore*, 124 B.R. at 96 (available exemption is lesser of 1) equity or 2) maximum potential value of exemption claimed).

Because judicial liens are avoidable under Code § 522(f)(1) only to the extent to which they impair an available exemption, the Court must determine whether Debtors' equity exemption in their homestead is impaired by the Bank's liens. To make such a determination, the Court must:

> [S]ubtract the allowed amount of the judicial lien[s] from the equity determined to exist ... If after subtracting the lien from such equity there remains a property interest which is greater in value than the available exemption, no impairment exists. If the deduction leaves equity which is less than the available exemption, impairment arises to the extent of the deficiency. If no equity remains, impairment of the available exemption is complete.

Id. (quoting *In re Galvan*, 110 B.R. at 450). In the present case, the Bank's liens total $10,825.31. If this amount were subtracted from Debtors' equity of $15,452.21, Debtors' equity would be $4,626.90. Debtors' available exemption in the amount of $15,452.21 is thus impaired by the entirety of the Bank's $10,825.31 of aggregate liens.

Therefore, based upon the foregoing, each of the Bank's four judgment liens is hereby avoided pursuant to Code § 522(f)(1).

IT IS SO ORDERED.

In re Jonathan L. BAILEY, Sr., Individually and as an Officer of Leigh Exteriors, Inc. and Mary Jo Bailey, Debtors.

Bankruptcy No. 92-00202.

United States Bankruptcy Court, N.D. New York.

Feb. 12, 1993.

Chapter 13 trustee moved to expunge proof of claim dated four days before claims bar date but received by clerk and filed one day after claims bar date. The Bankruptcy Court, Stephen D. Gerling, J., held that claim had to be expunged.

Motion granted.

1. Bankruptcy ⇐2897

Time limit for filing proofs of claim is strictly construed as statute of limitations barring late claims. Fed.Rules Bankr. Proc.Rule 3002(c), 11 U.S.C.A.

2. Bankruptcy ⇐2900(1)

Courts are without discretion or equitable power to enlarge period for filing of proofs of claim; absent defective notice of bar date, time for filing proofs of claim may not be enlarged except as provided in enumerated exceptions to rule. Fed.Rules Bankr.Proc.Rules 3002(c), 9006(b)(3), 11 U.S.C.A.

3. Bankruptcy ⇐2897

Creditor's proof of claim in Chapter 13 case, which was dated four days before claims bar date but received and filed by clerk one day after claims bar date, had to be expunged as untimely. Fed.Rules Bankr.Proc.Rule 3002(c), 11 U.S.C.A.

4. Bankruptcy ⇐2897

Filing of proof of claim within prescribed period is condition precedent to allowance. Fed.Rules Bankr.Proc.Rule 3002(a, c), 11 U.S.C.A.

5. Bankruptcy ⇐2897

In Chapter 7 liquidation, tardily filed claims of creditors with notice or actual knowledge of bankruptcy case will be paid

only after all other claims ahead of it in priority have been paid in full. Fed.Rules Bankr.Proc.Rule 3002(c), (c)(6), 11 U.S.C.A.

6. Bankruptcy ⇐2129

Bankruptcy rules have force of law; however, in event of actual conflict between provisions of Bankruptcy Code and rules, the Code prevails. 28 U.S.C.A. § 2075.

7. Bankruptcy ⇐2900(1)

Excusable neglect based on external factor over which creditor lacked control is inapplicable to justify failure to file timely proof of claim. Fed.Rules Bankr.Proc. Rules 3002(c), 9006(b), (b)(3), 11 U.S.C.A.

Mark W. Swimelar, Syracuse, NY, Chapter 13 Trustee.

Bodow Law Firm, P.C., Syracuse, NY, for debtors; Irwin Mallin, of counsel.

William B. Rosbrook, Syracuse, NY, for Erie Materials.

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

STEPHEN D. GERLING, Bankruptcy Judge.

The within contested matter is before the Court by way of a motion filed on September 22, 1992, by Mark W. Swimelar, Chapter 13 Trustee ("Trustee"), to expunge Erie Materials, Inc.'s ("Erie") claim against the estate in the amount of $27,482.99.

Oral argument was heard at the Court's regular motion term held in Syracuse, New York, on November 10, 1992. Thereafter, the parties were provided an opportunity to submit memoranda of law. The matter was submitted for decision on December 1, 1992.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), 157(b)(1), (b)(2)(A) and (B).

FACTS

On January, 23, 1992 Jonathan and Mary Jo Bailey ("Debtors") filed a joint petition under Chapter 13 of the Bankruptcy Code ("Code") (11 U.S.C. §§ 101–1330). Debtors' Chapter 13 Plan was confirmed by Order of the Court dated September 1, 1992.

Debtors' Schedule F, filed with their joint petition, listed Erie as a creditor holding an unsecured non-priority claim in the amount of $30,800.00. On February 14, 1992, notice of the Code § 341 meeting of creditors was mailed to all creditors listed in Debtors' petition. The notice set June 8, 1992 as the last day for the filing of claims in Debtors' Chapter 13 case. Erie's proof of claim, dated June 4, 1992, was received by the Clerk of the Court ("Clerk") on June 9, 1992, and was filed on the same day.

Erie's address is listed on Schedule F as: Erie Materials, 500 Factory Avenue, Syracuse, N.Y. 13208. This address also appears on page one of the mailing matrix which was filed with Debtors' petition. Debtors' file contains what appears to be a form letter from Erie, dated November 22, 1991, upon which is hand written Debtors' case number and the date February 24, 1992. The letter states that Erie's correct address is: Erie Materials, P.O. Box 476, Syracuse, N.Y. 13211. Attached to the letter is what appears to be a photocopy of the envelope that the notice to creditors was mailed in. The copy depicts a label which is affixed to the envelope directing the addressee to "Notify Sender of New Address: Erie Materials, P.O. Box 476, Syracuse, N.Y. 13211–0476." It appears that the mailing matrix was updated by the Clerk accordingly, as the 500 Factory Avenue address on page one has been crossed-out and replaced by a label, affixed to page three, which bears the P.O. Box 476 address.

The Trustee has commenced making payments to creditors under Debtors' Plan.

ARGUMENTS

Trustee contends that pursuant to Rule 3002(c) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), the date set in the notice to creditors as the last date

for the filing of proofs of claim in a Chapter 13 case constitutes a statute of limitations barring the filing of late claims. Since Erie's proof of claim was filed after such date had passed in this case, Trustee contends that it must be expunged.

Relying on the decision and rationale of the United States Bankruptcy Court for the District of Minnesota, sitting *en banc*, in *In re Hausladen*, 146 B.R. 557 (Bankr. D.Minn.1992), Erie contends that the date set in the notice to creditors is not a statute of limitations barring the late filing of claims. Rather, Erie asserts that such date delineates classification and treatment of such claims under a debtor's Chapter 13 plan. Thus, Erie contends that its claim, mailed before the date set in the notice, yet not received by the Clerk and filed until one day after the date had passed, may not be disallowed on the basis of being tardily filed, and must therefore be treated under Debtors' confirmed Plan.

DISCUSSION

[1] It is well settled in this Circuit that Fed.R.Bankr.P. 3002(c) is strictly construed as a statute of limitations barring the late filing of proofs of claim. *In re Nohle*, 93 B.R. 13, 15 (Bankr.N.D.N.Y.1988) (citations omitted); *In re Roberts*, 98 B.R. 664, 665–66 (Bankr.D.Vt.1989); *accord*, *In re Duarte*, 146 B.R. 958 (Bankr.W.D.Tex. 1992); *cf. In re Benedict*, 65 B.R. 95 (Bankr.N.D.N.Y.1986) (the filing of an objection to the confirmation of debtor's Chapter 13 plan within the time set for the filing proofs of claim was sufficient notice of the creditor's claim so that submission of a formal proof of claim after the bar date acted as an amendment thereto).

[2] Absent defective notice of the bar date, *In re Dodd*, 82 B.R. 924 (N.D.Ill.1987) (holding that a creditor who did not receive notice of the bankruptcy was entitled to file its late claim); *accord*, *In re Barnett*, 42 B.R. 254 (Bankr.S.D.N.Y.1984), the time limit imposed by Fed.R.Bankr.P. 3002(c) may not be enlarged except as provided by one of the six exceptions recognized by that Rule. *See* Fed.R.Bankr.P. 9006(b)(3); *In re Duarte*, *supra*, 146 B.R. at 960; *In re Wilson*, 90 B.R. 491, 493 (Bankr. N.D.Ala.1988). None of those exceptions are applicable here. As the Rule controls, courts are without discretion or equitable power to enlarge the period for the filing of proofs of claim even where the refusal to grant such an extension might seem harsh under the circumstances. *See In re Nohle*, *supra*, 93 B.R. at 16 (proof of claim filed one day late must be expunged); *cf. Hoos & Co. v. Dynamics Corp. of America*, 570 F.2d 433, 439 (2d Cir.1978) (Chapter XI case under the Bankruptcy Act in which the Second Circuit stated that "[the] clear Congressional intent to require filing of valid proofs of claim within the time limits that it has set up is sufficient to preclude us from finding exceptions to these rules in the supposed interest of equity.").

[3] In the matter *sub judice*, it has not been disputed that Erie received the notice to creditors in time to timely file its proof of claim. Erie was listed in Debtors' Schedules, was included in the mailing matrix and was included among the creditors to whom notice was mailed on February 14, 1992. Pursuant to Fed.R.Bankr.P. 3002(c) the 90–day period to file proofs of claims runs from the date set in the notice to creditors for the Code § 341 meeting. *See generally In re Little*, 74 B.R. 625, 627 (Bankr.N.D.N.Y.1987). Here, that date was set for March 9, 1992, and the last day for filing claims was set for June 8, 1992. Even assuming, arguendo, that Erie received the notice later than other creditors due to having changed its address, and assuming further that the handwritten date on its change of address letter to the Clerk, February 24, 1992, was also the date on which it received the notice, Erie still would have had 105 days from that date in which to timely file its proof of claim by June 8, 1992. Thus, proper notice and due process concerns are not in issue here.

This background notwithstanding, Erie contends that under a rule of law recently adopted by the Bankruptcy Court for the District of Minnesota in *In re Hausladen*, *supra*, 146 B.R. 557, its proof of claim should be allowed for purposes of treat-

ment under Debtors' confirmed Chapter 13 Plan. Thus, the issue to be determined here is whether *Hausladen* marks a recognizable change of law in this seemingly well settled area that should be adopted by this Court. For the reasons stated below, this Court finds the rationale underlying the *Hausladen* decision unpersuasive. Consequently, Erie's proof of claim, which was filed after the bar date, must be expunged.

Hausladen holds that claims, proof of which are filed after the date set in the notice to creditors pursuant to Fed.R.Bankr.P. 3002(c), are claims against the estate which, even in the face of an objection based on timeliness *must* be allowed, *id.* at 559–60, for purposes of classification and treatment under a Chapter 13 debtor's plan. *Id.* at 560. In reaching this conclusion, the *Hausladen* court reasons, in part, that late filed claims must be allowed because lateness is not a ground for disallowance under Code § 502(b).[1] *Id.* at 559–60. Further, that because of the fundamental difference between the allowance of claims on the one hand, and their classification and treatment under a plan on the other, Code § 502(b) and Fed.R.Bankr.P. 3002(c) operate independently of one another in order to provide for proofs of claim that are filed out of time. *See Id.* at 560–61.

This Court finds that Code § 502(b) and Fed.R.Bankr.P. 3002(c) are not independent of, or in conflict with, one another and were intended to operate together in the expeditious administration of Chapter 13 cases where the time frames have purposefully been abbreviated. In the first instance, Code § 501 permits a creditor to file a proof of claim but does not provide a mechanism by which this task may be accomplished. The legislative history to Code § 501 clarifies that it was Congress' intention that procedural guidelines, including when it would be permissible or impermissible for creditors to file proofs of claim, would govern a creditor's exercise of the permission granted in Code § 501. *In re Wilson, supra,* 90 B.R. at 494. The House and Senate reports provide:

> This subsection is permissive only, and does not require filing of a proof of claim by any creditor. It permits filing where some purpose would be served. . . . The Rules of Bankruptcy Procedure and practice under the law will guide creditors as to when filing is necessary and when it may be dispensed with. In general, however, unless a claim is listed in a chapter 9 or chapter 11 case and allowed as a result of the list, *a proof of claim will be a prerequisite to the allowance for unsecured claims.* * * * The Rules of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, which will determine whether claims are timely or tardily filed.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 351 (1977), *reprinted in,* 1978 U.S.Code Cong. & Admin.News 5963, 6307; S.Rep.No. 989, 95th Cong., 2d Sess. 61, *reprinted in,* 1978 U.S.Code Cong. & Admin.News 5787, 5847, (emphasis added).

[4] Thus, Fed.R.Bankr.P. 3002(a) provides that an unsecured creditor must file a proof of claim *"in accordance with this rule for the claim . . . to be allowed . . ."*[2] *Id.* (emphasis added). The Rule is subject to certain exceptions, none of which are relevant here. Fed.R.Bankr.P. 3002(c) pro-

1. Two other recent decisions cite *Hausladen* approvingly for this proposition. These are: *In re Rago,* 149 B.R. 882 (Bankr.N.D.Ill.1992) (available on WESTLAW at 1992 WL 410281) and *In re Corporacion De Servicios Medico-Hospitalarios De Fajardo, Inc.,* 149 B.R. 746 (Bankr.D.Puerto Rico 1993) (available on WESTLAW at 1993 WL 6453). Both of these decisions, however, deal with cases under Chapter 7, which as discussed *infra,* involve different concerns than those addressed in Chapter 13. In dictum, the *Rago* court implies that this reasoning might also be applicable to cases under Chapter 13. *See In re Rago, supra,* 149 B.R. at 884.

2. The Bankruptcy Court for the District of Minnesota observes that "[r]ead together, Rules 3002(a) and 3002(c) do not explicitly say but imply that filing with in [sic] the prescribed period is a prerequisite to allowance." *In re Hausladen, supra,* 146 B.R. at 559. With all due respect to that observation the plain reading of Fed.R.Bankr.P. 3002(a) requires this Court to reach the conclusion that that Rule emphatically requires the filing of a proof of claim within the period prescribed under Fed.R.Bankr.P. 3002(c) as a condition precedent to allowance

vides that "a proof of claim *shall* be filed within 90 days after the first date set for the meeting of creditors called pursuant to [Code] § 341...." Use of the term "shall" indicates that in order to participate in a Chapter 13 distribution a creditor must file a proof of claim within the time limit set out in the Rule. *In re Nohle, supra*, 93 B.R. at 14.

Code § 502(a) provides that a claim, proof of which is filed under Code § 501, will be deemed allowed unless a party in interest objects. The basis upon which such a party may object are provided in Code § 502(b). Untimeliness in filing is not one of them. However, reading these Code sections together with Fed.R.Bankr.P. 3002(a) and (c) this Court concludes that in order for an unsecured creditor's claim to meet the threshold requirement for allowance under Code § 502(a), a proof of claim must be filed under Code § 501 which comports with Fed.R.Bankr.P. 3002(a) and (c). Failure to meet these simple requirements will result in the claim being disallowed, or more appropriately expunged.[3] *Cf. In re Wilson, supra*, 90 B.R. 491 (impliedly holding that a Chapter 13 creditor's tardy proof of claim was a complete nullity thereby validating the clerk's refusal to accept such proof of claim for filing after the bar date had passed). Since Erie's proof of claim did not conform with the time limit prescribed by Rule 3002(c) and the Court is without discretion to extend the period, *see In re King*, 90 B.R. 155, 158 (Bankr. E.D.N.C.1988) (citing *Maressa v. A.H. Robbins Co., Inc.*, 839 F.2d 220, 221 (4th Cir.), *cert. denied, A.H. Robbins Co., Inc. v. Maressa*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 53 (1988)); *see also* Fed.R.Bankr.P. 9006(b)(3), its claim must be expunged.

The *Hausladen* court finds that the current practice of disallowing late filed claims resulted from improperly carrying over pre-code law into present practice. *Hausladen, supra*, 146 B.R. at 559. That court observes that under the Bankruptcy Act, late claims were explicitly disallowed: "[s]ection § 57(n) of the Act provided that ... '[c]laims which are not filed within six months after the first date set for the first meeting of creditors *shall not be allowed* ...'" *Hausladen, supra*, 146 B.R. at 559 (emphasis in original) (citing 11 U.S.C. § 93(n)) (repealed Oct. 1, 1979). Former Bankruptcy Rule 13-302(e)(2) implemented this time bar by adopting the time limits on the filing of claims established by § 57(n) of the Act. *Hausladen, supra*, 146 B.R. at 561 (citing the Advisory Committee Note to Rule 13-302(e)(2)). The legislative history to the Bankruptcy Reform Act reveals, however, that in revising and modernizing the bankruptcy law "nearly all procedural matters [formerly incorporated in the provisions of the Act] have been removed and left to the Rules of Bankruptcy Procedure.... H.R.Rep. No. 595, 95th Cong., 1st Sess. 449 (1977), *reprinted in*, 1978 U.S.Code Cong. & Admin.News 5963, 6405. Thus, the fact that former § 57(n) of the Bankruptcy Act explicitly disallowed late claims while Code § 502(b) does not, fails to establish an abandonment of the Congressional "bar date" concept in light of the language of Fed.R.Bankr.P. 3002(a).

[5] Further, *Hausladen's* analogy to the treatment of untimely proofs of claim under Code § 726(a) is not applicable in these proceedings since that provision admittedly only applies in a liquidation case under Chapter 7 and implicates concerns different than those addressed under Chapter 13. Under Code § 726(a)(2)(C)(i) and (ii), the tardily filed claims of creditors without notice or actual knowledge of the bankruptcy case, whose claims are filed in time to permit payment, are grouped with other allowed unsecured non-priority claims, *see* Code § 726(a)(2), for payment ahead of other tardily filed claims where the creditor had notice but simply missed the bar date. *See* Code § 726(a)(3). Thus, in a Chapter 7 liquidation, tardily filed claims in the latter category will be paid only after all other claims ahead of it in

3. In *In re Nohle, supra*, 93 B.R. 13, this Court explained that since untimeliness is not one of the categories by which a claim can be disallowed under § 502(b), the act of excluding such a claim is more appropriately referred to as expungement. *See Id.* at 16 n. 3 (citations omitted).

priority have been paid in full. *See also* Fed.R.Bankr.P. 3002(c)(6). In direct contrast to Code § 726(a), however, there is no Chapter 13 corollary. Aside from there being a lack of notice, the only basis upon which tardily filed claims might be classified for purposes of treatment under a Chapter 13 plan are those provided in Fed. R.Bankr.P. 3002(c), none of which apply here. Moreover, if a court were to allow such claims for payment under a confirmed Chapter 13 plan, then the pro rata dividend payable to those creditors who did timely file their proofs of claim would be unfairly reduced.[4]

[6] The *Hausladen* court also states that its interpretation eliminates any inconsistency that might exist between Code § 502 and Fed.R.Bankr.P. 3002. *Hausladen, supra*, 146 B.R. at 560 n. 5. While its interpretation might have relevance in a case under Chapter 7, *see* Discussion *supra*, the result reached by that court renders the time constraint of Fed.R.Bankr.P. 3002(c) meaningless in the Chapter 13 context where there are no substantive provisions for late filed claims. The rules of statutory construction provide that where possible "statutes are to be given such effect that no clause, sentence, or word is rendered superfluous, contradictory, or insignificant." *In re OTC Net Inc.*, 34 B.R. 658, 661 (Bankr.D.Colo.1983) (citing *E.E.O.C. v. Continental Oil Co.*, 548 F.2d 884 (10th Cir.1977)). Although not a statute, the Rules were promulgated by the Supreme Court pursuant to authority granted by Congress under 28 U.S.C. § 2075, and have the force of law. *In re Brooks Fashion Stores, Inc.*, 124 B.R. 436, 440 (Bankr.S.D.N.Y.1991). This Court harmonizes Code § 502 with Fed.R.Bankr.P. 3002 thereby avoiding any supposed conflict while at the same time effectuating the terms of both.

This Court also disagrees with the finding in *Hausladen* that "allowing tardily filed claims does not conflict with any other section of the Code, the legislative history of section 502 or for that matter with any important state or federal interest." *In re Hausladen, supra*, 146 B.R. at 560 (footnote omitted). On the contrary, the Rules complement the Code and provide the procedural framework for its application.[5] This Court has previously found that Fed. R.Bankr.P. 3002(c) functions as a claims bar to " 'provide the debtor and its creditors with finality' and to 'insure the swift distribution of the bankruptcy estate' ". *In re Nohle, supra*, 93 B.R. at 15 (quoting *In re Johnson*, 84 B.R. 492, 494 (Bankr. N.D.Ohio 1988), *aff'd*, 901 F.2d 513 (6th Cir.1990) and *In re Good News Publishers, Inc.*, 33 B.R. 125, 126 (M.D.Tenn.1983), other citations omitted). As stated by the Bankruptcy Court in *In re Duarte, supra*, 146 B.R. 958, "Rule 3002(c), with its strict deadlines and narrow exceptions, fosters [the] goals of prompt administration and even-handed treatment of creditors, and gives finality to the distributional process. It sets out a statute of limitations upon which both trustees who administer cases and creditors looking for distribution ... may rely." *Id.* at 961. In the instant case, allowing Erie's untimely proof of claim would unduly burden the administration of the estate since the Trustee has already commenced distribution under Debtors' operating Chapter 13 Plan. Moreover, if Erie's claim were allowed, other unsecured creditors whose claims were timely filed would be prejudiced in that they would receive less than their pro rata distribution as set forth under the Plan.

[7] Additionally, Counsel for Erie contends that in mailing the proof of claim before the bar date had passed, it was his intent to timely file the proof of claim, but that due to a delay in the delivery of the

4. Even the *Hausladen* court acknowledges that a Chapter 13 plan could adversely affect a tardily filed claim to the extent of providing for a 0% distribution. *See In re Hausladen, supra*, 146 B.R. at 560. As a practical matter, however, requiring that tardy claims be allowed for purposes of such 0% treatment seems superfluous.

5. The Court acknowledges that in the event of an actual conflict between the provisions of the Code and those of the Rules, the Code prevails. *See* 28 U.S.C. § 2075; *In re (Phillip G.) Roberts*, 68 B.R. 1004, 1006 (Bankr.E.D.Mich.1987).

United States mail he failed to do so. Presumably, Erie contends that since the delay was the result of an external factor over which it lacked control, its claim should be allowed on the basis of excusable neglect. This argument, however, does not save Erie's claim as the excusable neglect provision under Fed.R.Bankr.P. 9006(b) does not apply to the time limit prescribed by Fed. R.Bankr.R. 3002(c).[6] *See* Fed.R.Bankr.P. 9006(b)(3).[7] While not raised by Erie, the Court also notes the inapplicability of Fed. Bankr.R. 9006(f) which provides an additional three days "after service by mail" to the filing of proofs of claims. *In re Nohle, supra*, 93 B.R. at 15 n. 2 (citations omitted); *In re Roberts, supra*, 98 B.R. at 669.

Based on the foregoing, Trustee's motion to expunge Erie's claim on the basis of untimely filing under Fed.R.Bankr.P. 3002(c) is granted.

IT IS SO ORDERED.

In re MELGAR ENTERPRISES, INC., Debtor.

Bankruptcy No. 191-18688-260.

United States Bankruptcy Court, E.D. New York.

Feb. 22, 1993.

Chapter 11 debtor sought to determine value of creditor's secured claim in debtor's undeveloped real estate. The Bankruptcy Court, Conrad B. Duberstein, Chief Judge, held that debtor's real estate would be valued by reference to comparable sales of vacant land in the area.

Claim determined.

1. Bankruptcy ⇐2852

Valuation of collateral, for purpose of fixing extent of creditor's secured claim, is to be determined on case-by-case basis. Bankr.Code, 11 U.S.C.A. § 506(a).

2. Bankruptcy ⇐2852

Where prospects for reorganization appear good, collateral should be valued at fair market or going concern value, for purposes of fixing extent of creditor's secured claim; however, if prospects for successful reorganization appear dim, disposition value is more appropriate. Bankr. Code, 11 U.S.C.A. § 506(a).

3. Bankruptcy ⇐2852

Valuation of property, for purpose of determining amount of secured claim under Chapter 11 plan, should be determined in close proximity to effective date of claim. Bankr.Code, 11 U.S.C.A. § 506(a).

4. Bankruptcy ⇐2852

Property should be valued according to its highest and best use, for purpose of establishing extent of creditor's secured claim. Bankr.Code, 11 U.S.C.A. § 506(a).

5. Bankruptcy ⇐2852

Three appraisal techniques available to determine fair market value of undeveloped property, for purpose of determining extent of creditor's secured claim, are market or sales comparison approach, which is based upon evidence of comparable sales, cost or land development approach, in which actual costs of construction are reduced for depreciation, and capitalization of income approach, which capitalizes net future income that property is capable of producing; fourth, less favored approach is

6. While not directly on point, the Court notes that the United States Supreme Court has recently accepted on certiorari *In re Pioneer Inv. Services Co.*, 943 F.2d 673 (6th Cir.1991) (a Chapter 11 case), *cert. granted*, — U.S. —, 112 S.Ct. 2963, 119 L.Ed.2d 585 (1992), which concerns the issue of what constitutes excusable neglect under Fed.R.Bankr.P. 9006(b) in the filing of a proof of claim.

7. That enlargement of the time to file proofs of claim under Fed.R.Bankr.P. 9006(b) is limited only to those situations provided in Fed. R.Bankr.P. 3002(c) is further indication that the time limit prescribed by the latter is to function as a statute of limitations barring the filing of late claims.

In re William J. STOECKER, Debtor.

Bankruptcy No. 89 B 02873.

United States Bankruptcy Court, N.D. Illinois, E.D.

Nov. 25, 1992.

Memorandum Opinion Feb. 23, 1993.

Chapter 7 trustee objected to Illinois Department of Revenue's tax claim that had been filed after expiration of bar date for filing claims. The Bankruptcy Court, John H. Squires, J., held that: (1) department's late-filed claim could not be allowed, and (2) department did not establish debtor's failure to make tax payments was willful as required under Illinois law. On department's motion for reconsideration, the Bankruptcy Court held that the rule concerning time for filing claims does not patently conflict with either the statute on disallowing contested claims or the distribution scheme of the Bankruptcy Code.

Objection sustained; motion for reconsideration overruled.

1. Bankruptcy ⇐2897.1, 2900(1)

Bankruptcy rule allowing court to extend time for filing proofs of claim is strictly construed as a statute of limitations; purpose of claims bar date is to provide debtor and its creditors with finality and to insure swift distribution of bankruptcy estate. Fed.Rules Bankr.Proc.Rule 3002(c), 11 U.S.C.A.

2. Bankruptcy ⇐2903

Decision to allow amendment to proof of creditor's claim in bankruptcy proceeding is within sound discretion of court.

3. Bankruptcy ⇐2903

Amendments to creditor's timely filed claims have to be liberally allowed in bankruptcy proceedings to modify information or correct omissions in original claim.

4. Bankruptcy ⇐2903

Amendments to creditor's proof of claim will be permitted if original claim provided notice to court of existence and nature and amount of claim and notice that it was creditor's intent to hold the bankruptcy estate liable.

5. Bankruptcy ⇐2903

Amendment to creditor's claim in bankruptcy proceeding must be closely scrutinized to ensure that amendment is genuine rather than an assertion of entirely new claim.

6. Bankruptcy ⇐2897.1

Court may, in its discretion, allow late filed proof of claim; factors that must be considered include, inter alia, whether parties or creditors relied on initial claim, whether they had reason to know subsequent proof of claim would follow, and whether other creditors would receive windfall to which they were not entitled on the merits.

7. Bankruptcy ⇐2897.1, 2901.1

State department of revenue's tax claim against Chapter 7 debtor was filed after expiration of claims bar date and thus could not be allowed where department never asked for extension of time to file claim before the expiration date, and the late-filed claim did not arise out of any of the same transactions set forth in department's timely claims and thus could not be considered a proper amendment to any timely claim. Fed.Rules Bankr.Proc.Rules 3002(c)(1), 9006(b)(3), 11 U.S.C.A., Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

8. Bankruptcy ⇐2903

State department of revenue was not entitled to amend its timely filed claims to add another claim, filed after expiration of bar date for filing claims, even though Chapter 7 debtor may have been on notice of department's intent to assert claims for tax liabilities; although debtor may have had clear indication of department's intent, this was not effective notice to all other parties in interest. Fed.Rules Bankr.Proc.Rule 7015, 11 U.S.C.A.

9. Bankruptcy ⇐2897.1

Bankruptcy court declined to allow state department of revenue's late-filed tax claim against Chapter 13 debtor under the

court's equitable power and exercise of discretion, even though department's actions, for purposes of assessment under state tax laws, may have been timely and within applicable statute of limitations, where department offered no compelling reason for failure to request extension of bar date, and department was a scheduled creditor and had filed timely four other tax claims. Fed.Rules Bankr.Proc.Rules 3002(c), 9006(b)(3), 11 U.S.C.A.

10. Bankruptcy ⇐2055

Bankruptcy court was authorized to examine asserted tax liability of nondebtor corporation where determining Chapter 7 debtor's tax liability as responsible officer of the nondebtor corporation was dependent on whether nondebtor actually owed the tax, and, having been denied a discharge, the debtor had personal stake in outcome of nondebtor's tax liability. Bankr.Code, 11 U.S.C.A. § 505(a)(1).

11. Taxation ⇐1342

Under the Illinois Retailers' Occupation Tax Act, evidence that state department of revenue sent notice of assessment to Chapter 7 debtor as the statutorily responsible corporate officer, and that debtor failed to respond or to pay, was not equivalent of a conscious or intentional failure of debtor to pay taxes; thus, department failed to meet its burden of proving debtor's willful failure to pay. Ill.Rev.Stat. 1991, ch. 120, ¶ 452½.

12. Federal Civil Procedure ⇐2331, 2350.1, 2653, 2655

Motions made under rule on new trials and amendment of judgments serve to correct manifest errors of law or fact, or to consider import of newly discovered evidence. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

13. Federal Civil Procedure ⇐2641

Function of motion made under rule on altering or amending a judgment is not to serve as vehicle to relitigate old matters, present case under new legal theory, or to give moving party another "bite at the apple" by permitting the arguing of issues and procedures that could and should have been raised prior to judgment. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

14. Bankruptcy ⇐2897.1

Text and legislative history of bankruptcy statute which provides for disallowance of contested claim if the same is unenforceable against debtor for any reason other than because it is contingent or unmatured do not conflict with or preclude resort to statute of limitations created by bankruptcy rule on time for filing proof of claim. Bankr.Code, 11 U.S.C.A. § 502(b)(1); Fed.Rules Bankr.Proc.Rule 3002(c), 11 U.S.C.A.

15. Federal Civil Procedure ⇐37

Rules promulgated pursuant to the federal Rules Enabling Act have force of law pursuant to that authority granted by Congress. 28 U.S.C.A. § 2075.

16. Bankruptcy ⇐2129

Bankruptcy court is bound to follow, without exceptions, the rules promulgated by the United States Supreme Court unless a rule is inconsistent with the Rules Enabling Act, in which case the Bankruptcy Code controls over inconsistent procedural rules. 28 U.S.C.A. § 2075.

17. Federal Civil Procedure ⇐35

Rules promulgated pursuant to the federal Rules Enabling Act are entitled to presumption that they were promulgated within proper authority of the United States Supreme Court and do not affect substantive rights. 28 U.S.C.A. § 2075.

18. Bankruptcy ⇐2897.1

Bankruptcy rule on time for filing proofs of claim does not patently conflict with distribution scheme even though distribution scheme does not refer to dividend distributions of late-filed priority claims that are effectively subordinated; creditor could appear years after receiving timely notice of the bankruptcy, and if his claim was a priority claim, it would be protected. Bankr.Code, 11 U.S.C.A. § 726; Fed.Rules Bankr.Proc.Rule 3002(c), 11 U.S.C.A.

19. Taxation ⇐1342

State department of revenue had burden of proof under Illinois' Retailers' Occupation Tax Act to show failure of Chapter 7

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department of revenue had bur- of under Illinois' Retailers' Occu- Act to show failure of Chapter 7 debtor, as responsible corporate officer, to pay tax was a voluntary, conscious, and intentional failure to pay. Ill.Rev.Stat. 1991, ch. 120, ¶ 452½.

James D. Newbold, Asst. Atty. Gen., Illinois Dept. of Revenue, Chicago, IL, for Illinois Dept. of Revenue.

Thomas Raleigh, Raleigh & Helms, Chicago, IL, Trustee.

Robert Radasevich, Neal, Gerber & Eisenberg, Chicago, IL, for the trustee.

M. Scott Michel, Chicago, IL, U.S. Trustee.

MEMORANDUM OPINION

JOHN H. SQUIRES, Bankruptcy Judge.

This matter comes before the Court on the objection of Thomas E. Raleigh, Chapter 7 trustee (the "Trustee") for the estate of William J. Stoecker (the "Debtor"), to a proof of claim, as subsequently amended, filed by the Illinois Department of Revenue (the "Department"). For the reasons set forth herein, the Court having considered all the pleadings and evidence adduced at trial by way of testimony and exhibits, sustains the objection and disallows the subject proof of claim.

I. *JURISDICTION AND PROCEDURE*

The Court has jurisdiction to entertain this objection to claim pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(B).

II. *FACTS AND BACKGROUND*

On February 21, 1989, an involuntary petition under Chapter 11 was filed against the Debtor. Thereafter, on March 20, 1989, the Trustee was appointed Chapter 11 trustee of the estate for cause. On February 26, 1990, the case was converted to Chapter 7. The Trustee remained as the Chapter 7 trustee. Many more of the facts, background and history of this case are contained in earlier Opinions. *See In re Stoecker*, 118 B.R. 596, 598-599 (Bankr. N.D.Ill.1990); *In re Stoecker*, 114 B.R. 965, 967-968 (Bankr.N.D.Ill.1990); *In re Stoecker*, 103 B.R. 182, 184-185 (Bankr.N.D.Ill. 1989). Additional background information concerning the related corporate cases is contained in other Opinions of the Court. *See In re Grabill Corp.*, 110 B.R. 356, 358 (Bankr.N.D.Ill.1990); *In re Grabill Corp.*, 103 B.R. 996, 997-998 (Bankr.N.D.Ill.1989).

Upon conversion of the case from Chapter 11 to Chapter 7, the Court by Order dated March 5, 1990, set the 11 U.S.C. § 341 meeting of creditors for March 28, 1990, as required by Federal Rule of Bankruptcy Procedure 2003(a). That Order provided that all proofs of claim were to be filed within ninety days after the section 341 meeting of creditors, on or before June 26, 1990, pursuant to Bankruptcy Rule 3002(c). On November 28, 1990, pursuant to an agreed order, the Debtor's discharge was denied under 11 U.S.C. § 727 in settlement of various filed objections to discharge.

Prior to conversion, the Department filed three proofs of claim on July 25, 1989, when the case was still in its Chapter 11 phase. The first two claims are for withholding tax and Retailers' Occupation/Use Tax (Ill.Rev.Stat. ch. 120, para. 440 *et seq.* and para. 439.1 *et seq.*) owed by the Debtor as responsible officer of The Cook's Cupboard. The amounts of these claims are $12,667.00 and $1,330.21. (Department Exhibit No. 16). The third claim for $222.03 is asserted against the Debtor as responsible officer of Eagle Line, Inc. for Retailers' Occupation/Use Tax. (Department Exhibit No. 16) Thereafter, on November 17, 1989, the Department filed an amended proof of claim, asserting additional taxes owed by the Debtor as responsible officer for The Cook's Cupboard in the amount of $14,630.00. (Answer of Department to Objection to Claim, Exhibit D). The amount of the Department's timely filed proofs of claim totals $14,852.03. No other objections thereto have been filed, thus those claims were deemed allowed under 11 U.S.C. § 502(a) and Bankruptcy Rule 3001(f), although the claims for $1,330.21

and $14,630.00 have been withdrawn by the Department. (Department Exhibit No. 18).

On January 21, 1992, approximately a year and a half after the claims bar date, the Department filed the subject contested proof of claim (Trustee's Objection to Proof of Claim, Exhibit B) which represents Retailers' Occupation/Use Tax allegedly owed by the Debtor as responsible officer for Chandler Enterprises, Inc. ("Chandler"). *See* Ill.Rev.Stat. ch. 120, para. 452½ (1991). The basis of the claim (subsequently amended to reflect a reduction per an amended claim dated September 8, 1992) arises from Chandler's purchase of an aircraft in 1988. Chandler was an Illinois Corporation, incorporated on January 24, 1985. (Department Exhibit Nos. 19 and 20). The Debtor was president and sole director, but not the sole officer, of Chandler from 1985 to 1990. *Id.* Chandler was involuntarily dissolved by the Illinois Secretary of State on June 1, 1990. (Department Exhibit No. 20, p. 5).

According to the records of the Federal Aviation Administration, Chandler purchased a Dassault Falcon 50 aircraft from Prewitt Leasing, Inc. on September 30, 1988. (Department Exhibit No. 7). The preceding link in the chain of title also showed on that same date, Jack Prewitt & Associates, Inc. sold the aircraft to Prewitt Leasing, Inc., prior to Prewitt Leasing, Inc.'s sale of the aircraft to Chandler. (Department Exhibit No. 6). The aircraft was previously sold to Jack Prewitt & Associates, Inc. on June 1, 1988, by Opex Aviation, Inc. (Department Exhibit Nos. 5 and 5A). The aircraft was subsequently leased by Chandler to Grabill Corporation for the period of September 30, 1988 through December 30, 1988, at a basic monthly rental of $172,752.25. (Department Exhibit No. 8, p. 00000002332).

Neither Chandler nor Prewitt Leasing, Inc. paid any sales/use tax, withholding tax or income tax on Chandler's purchase of the aircraft. John Anderson, counsel for Chandler and Grabill, issued an opinion concluding that under Illinois law, there was no sale or use tax properly assessable or payable as a result of the purchase of the aircraft by Chandler or the lease of the aircraft by Chandler to Grabill. (Trustee Exhibit No. 3). Such legal opinion was supported by the vice-president of Prewitt Leasing, Inc. who signed a "Certificate Re Occasional Seller Exemption from Illinois Sales and Use Tax" on September 30, 1988. (Trustee Exhibit No. 4).

On March 7, 1990 and June 7, 1990, weeks before the claims bar date, the Department sent Chandler two letters demanding payment of the claimed tax due. (Trustee Exhibit Nos. 3 and 4). Subsequently, on September 7, 1990, a Notice of Penalty Liability was issued against Chandler. (Department Exhibit No. 10). Almost one year later, on August 15, 1991, a Notice of Penalty Liability was issued against the Debtor. (Department Exhibit No. 1). On September 25, 1991, the Department sent the Debtor a demand for full payment of the tax liability claimed. (Department Exhibit No. 13). The Trustee subsequently objected to allowance of this late filed claim pursuant to Bankruptcy Rule 3007. On July 30, 1992 and August 27, 1992, the Court held the trial on this matter. Thereafter, the matter was taken under advisement after submission of post-trial briefs.

III. *ARGUMENTS OF THE PARTIES*

The Trustee has objected to the late filed claim of the Department on two grounds: (1) the claim was filed after the bar date fixed by Bankruptcy Rule 3002(c), and hence is untimely; and (2) the claim against the Debtor as responsible officer of Chandler is invalid as the underlying purchase of the aircraft by Chandler was an "occasional sale" exempt from sales/use tax.

The Department does not deny that its claim filed on January 21, 1992 is untimely. Instead, the Department contends that the claim should be treated as an amendment to the earlier filed proofs of claim pursuant to Federal Rule of Civil Procedure 15. In the alternative, the Department requests the Court utilize its equitable powers to allow the claim though late filed. The Department explains that it failed to file a timely claim against the Debtor as respon-

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sible officer of Chandler because Chandler never registered with the Department for any type of tax, and never filed a tax return with the Department during its corporate existence. By the time the Department discovered that Chandler was engaged in taxable activities and that the Debtor was a responsible officer of Chandler, the claims bar date had passed. The Department maintains, however, that by previously filing responsible officer tax claims, it has clearly evidenced its intention of claiming any and all responsible officer liability against the Debtor and his bankruptcy estate.

The Department contends its efforts to file a timely claim were impeded as a result of Chandler's conduct and omissions. It alleges that Chandler acted improperly in failing to register with the Department or file tax returns regarding its purchase and lease of the aircraft. Moreover, the Department contends that Chandler attempted to conceal the taxability of the transaction by having title to the aircraft transferred from Jack Prewitt & Associates, Inc., a retail seller of aircraft, to Prewitt Leasing, Inc., a purported lessor of aircraft, so that it could claim the "occasional sale" exemption.

The Trustee contends that the sale of the aircraft to Chandler was an "occasional sale" of property at retail, exempt from sales/use tax. The Trustee argues that Anderson's opinion letter properly concluded that the transaction was exempt from taxes. The Department disagrees with this contention and claims that in order to create a sale that was ostensibly exempt from tax, Jack Prewitt & Associates, Inc. sold the aircraft to Prewitt Leasing, Inc. who in turn acted as a nominal "straw man" and immediately thereafter sold it to Chandler. The Department contends the true seller was Jack Prewitt & Associates, Inc., and that the sale was not an "occasional sale" exempt from tax.

IV. *APPLICABLE STANDARDS*

[1] Pursuant to Federal Rule of Bankruptcy Procedure 3002(c), a creditor in a Chapter 7 case is required to file a proof of claim within ninety days after the date first set for the meeting of creditors called under 11 U.S.C. § 341. There are several specific instances where the time for filing proofs of claim may be extended in a Chapter 7 case, none of which are applicable here. *See* Fed.R.Bankr.P. 3002(c). Thus, Bankruptcy Rule 3002(c)(1) requires that a claimant, like the Department, must first move for an extension within the permitted ninety days, which it did not do. The Court's authority to extend the time for filing proofs of claim is also severely limited by Bankruptcy Rule 9006. Pursuant to Bankruptcy Rule 9006(b)(3), the Court is allowed to extend the time for creditor/claimants taking action under Bankruptcy Rule 3002 only "to the extent and under the conditions stated in [the rule]." Fed.R.Bankr.P. 9006(b)(3). Thus, "Bankr.R. 3002(c) is strictly construed as a statute of limitations since the purpose of such a claims bar date is 'to provide the debtor and its creditors with finality' and to 'insure the swift distribution of the bankruptcy estate.'" *In re Robert Stone Cut Off Equipment, Inc.*, 98 B.R. 158, 160 (Bankr.N.D.N.Y.1989) (quoting *In re Johnson*, 84 B.R. 492, 494 (Bankr.N.D.Ohio 1988) and *In re Good News Publishers, Inc.*, 33 B.R. 125, 126 (M.D.Tenn.1983)). *See also In re Chirillo*, 84 B.R. 120, 121–122 nn. 2–3 (Bankr.N.D.Ill.1988) (collecting cases).

Bankruptcy Rule 3002(c) can operate in conjunction with Federal Rule of Bankruptcy Procedure 7015 which incorporates by reference Federal Rule of Civil Procedure 15. Rule 15(c) provides in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . .

Fed.R.Civ.P. 15(c). Bankruptcy Rule 7015 provides that "Rule 15 FR Civ P applies in adversary proceedings." Fed.R.Bank.P. 7015. While normally an objection to a

claim is not a formal adversary proceeding, Bankruptcy Rule 9014 allows courts at any stage of a contested motion or other matter, to extend Bankruptcy Rule 7015, among other rules, to contested matters which includes the Trustee's objection to the Department's claim. *See In re Unroe*, 937 F.2d 346, 349 (7th Cir.1991). No such order or direction was made in this matter pursuant to Bankruptcy Rule 9014.

[2–5] The decision to allow an amendment to a proof of claim is within the sound discretion of the Court. *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir.1992); *Unroe*, 937 F.2d at 350; *In re Candy Braz, Inc.*, 98 B.R. 375, 380 (Bankr.N.D.Ill.1988). Amendments to timely filed claims are liberally allowed to modify information or correct omissions in the original claim. *In re Calisoff*, 94 B.R. 1002, 1003 (Bankr.N.D.Ill. 1988). Amendments to proofs of claim are also permitted if "the original claim provided notice to the court of the existence, nature and amount of the claim and that it was the creditors' intent to hold the estate liable." *In re International Horizons, Inc.*, 751 F.2d 1213, 1217 (11th Cir.1985). Amendments to claims are closely scrutinized to ensure that the amendment is genuine rather than an assertion of an entirely new claim. *Candy Braz*, 98 B.R. at 380; *In re AM International, Inc.*, 67 B.R. 79, 81 (N.D.Ill.1986). "[T]o be within the scope of a permissible amendment, the second claim should not only be of the same nature as the first but also reasonably within the amount to which the first claim provided notice." *Id.* at 82.

"[B]ankruptcy courts are not required to permit late amendments which are primarily used as a back-door route to secure bar-date extensions. Were the rule otherwise, a party could effectively help itself to automatic extensions of the bar date without seeking leave of the court." *Stavriotis*, 977 F.2d at 1206. While leave to amend should generally be granted, courts have found it inappropriate in some circumstances. *See Amendola v. Bayer*, 907 F.2d 760, 764 (7th Cir.1990) (denial of leave to file amended claim affirmed where party was aware of the facts underlying the claim prior to the filing deadline and presented no excuse for failing to raise the claim earlier; opposing party would be unduly prejudiced; and delay would impair the public interest in prompt resolution of disputes). "[U]nlike a chapter 11 proceeding, the court reviewing a chapter 7 or chapter 13 proof of claim has no discretion to allow an untimely filed claim on the grounds of excusable neglect." *In re Couzens Warehouse & Distributors, Inc.*, 1991 WL 233314 at *1, 1991 Bankr. LEXIS 1591 at *2 (Bankr.N.D.Ill. Oct. 17, 1991); *In re Smartt Constr. Co.*, 138 B.R. 269, 271 (D.Colo.1992) ("A majority of courts agree that the bar date for Chapter 7 and Chapter 13 proofs of claim cannot be extended for excusable neglect.").

[6] The Court's authority to allow the late filed claim of the Department is not absolutely limited by statute or rule. Another potential basis for allowing the claim is the Court's equitable powers. This authority was recently discussed by the Seventh Circuit Court of Appeals in *Unroe*, 937 F.2d 346, which noted, "[e]quitable jurisdiction to permit amendments out-of-time does not conflict with, but rather fulfills, the statutory backdrop for bankruptcy proceedings. The bankruptcy court below therefore properly considered equitable matters outside the scope of the test of Fed.R.Civ.P. 15(c) in deciding to permit the late-filed claim as an 'amendment.'" *Id.* at 349–350. The *Unroe* court expressly stated, however, that late filed claims disrupt orderly discharge and should generally be barred. *Id.* at 351.

In *Unroe*, the court permitted the late filing of a claim for income taxes which had been scheduled at a higher amount in the debtor's Chapter 13 plan. The debtor included in her plan of confirmation $15,000.00 for taxes owed for the years 1982 and 1983. The IRS filed a timely proof of claim for 1982 taxes, but failed to file a claim for 1983 taxes until after the claims bar date. The sum total for both 1982 and 1983 taxes sought by the IRS in its untimely amendment, however, was $10,914.21, approximately $4,000.00 less that the $15,000.00 the debtor listed as tax liabilities. The court found that neither the debtor nor

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the creditors were prejudiced by the allowance of the late filed claim for the 1983 taxes. The court stated, however, that "[t]he result may have been different had the late claim been unscheduled or exceeded the amount in the plan, in which cases the prejudice to the debtor and other creditors would have been more severe." 937 F.2d at 351.

In holding that the bankruptcy courts' equitable powers included the authorization of late filed claims, *Unroe* noted that such an exercise of equity must include identification of factors related to the debtor's notice of a pending claim or excusable neglect by the creditor. *Id.* at 350 n. 5. The holding in *Unroe*, however, did not extend to an entirely new claim filed after the bar date. Specifically, the court noted, "[w]e leave for another case the question whether a judge in equity could permit an entirely new claim filed out of time." *Id.* at 350.

Another contrary approach has been taken by the United States Bankruptcy Court for the District of Minnesota, sitting *en banc* in *In re Hausladen*, 146 B.R. 557 (Bankr.D.Minn.1992). There the court principally focused on the absence of an exception under section 502 for late claims as a basis for disallowance. *Hausladen* involved late filed Chapter 13 claims subject to the same bar date period prescribed by Bankruptcy Rule 3002(c). There, the court noted that Rule 3002 does not explicitly state that timely filing is a prerequisite to allowance and that section 502(b) does not specify tardiness in filing as one of the eight statutorily enumerated grounds for disallowing claims. In discussing various ways a tardily-filed claim may be treated under a Chapter 13 plan, the court aptly noted that treatment or classification of claims is different from their allowance. 11 U.S.C. § 726, however, provides for distribution of property of the estate and that timely filed claims enjoy priority in distribution over tardily-filed claims. *Compare* 11 U.S.C. § 726(a)(2) with (a)(3). In most Chapter 7 cases, like this one, a claim holder's "rung" on the priority "ladder" created under section 726 is crucial because the estate assets are limited. There are usually insufficient assets to pay all claimants in full, and section 726(b) mandates pro rata distribution among all claimants at each level, or rung of the priority ladder, with an absolute priority cutoff. All allowed claimants at a particular level or rung of the ladder must be paid in full before any estate funds can be distributed to holders of claims at the next lower rung. Thus, the race among claimants is to reach the highest rung on the claims ladder.

Hausladen is premised upon the proposition that the time limits of Rule 3002(c) cannot be imposed on the exceptions to allowance provided in the statutory language of section 502(b). The rule, however, setting a limitations period does not necessarily conflict with the statute because the latter is silent on tardily-filed claims. Section 502(b)(1) does state an exception of claims unenforceable "against the debtor ... under any ... applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). Such exception logically includes the applicable law of the claims bar date established by Bankruptcy Rule 3002(c), promulgated by the Supreme Court of the United States pursuant to the congressional authority granted it by the Rules Enabling Act. *See* 28 U.S.C. § 2075. Thereby, Congress has at least tacitly allowed the Supreme Court to prescribe the applicable statute of limitations contained in Bankruptcy Rule 3002. As a general proposition, statutes of limitation are to be strictly construed. *See In re Friedman*, 15 B.R. 493, 494 (Bankr.N.D.Ill.1981). This principle is appropriately applied in light of the text of Bankruptcy Rule 9006(b). Accordingly, the Court will follow the rationale behind *Chirillo*, as tempered by *Unroe* and *Stavriotis* which are binding precedents in this circuit, while *Hausladen* is not. Thus, the Court declines to follow *Hausladen*.

The Department alternatively relies on the equitable factors enumerated in *In re Miss Glamour Coat Co.*, 80-2 U.S.T.C. ¶ 9737 (S.D.N.Y.1980). *Unroe* recognized the applicability of these factors. 937 F.2d at 350-351. Pursuant to *Miss Glamour Coat*, a court may, in its discretion, allow a

late filed proof of claim. The factors that must be considered include the following:

(1) whether the parties or creditors relied on the Department's initial claim, or whether they had reason to know subsequent proof of claim would follow pending the completion of the audit;

(2) whether other creditors would receive a windfall to which they are not entitled on the merits by the court not allowing this amendment to the Department's proof of claim;

(3) whether the Department intentionally or negligently delayed in filing its amended claim;

(4) the justification, if any, for the failure to request a timely extension of the bar date; and

(5) any other general equitable considerations.

Id. at 85, 434–435.

V. *DISCUSSION*

A. Whether the Department's Claim Should be Deemed or Allowed as Timely Filed

[7] The Trustee alleges that because the Department's proof of claim was filed after the bar date, and because the Department never asked for an extension of time to file its proof of claim before the expiration of the bar date as required by Bankruptcy Rules 3002(c)(1) and 9006(b)(3), the claim must be disallowed as untimely. The Court agrees and hereby finds that the Department's claim was admittedly tardily-filed. The Department could have timely moved for an extension of time within the ninety day period as contemplated by Bankruptcy Rule 3002(c)(1). It failed to so move, and hence pursuant to Bankruptcy Rules 3002(c) and 9006(b)(3) the Court will not allow the claim as timely filed.

Moreover, viewed under Rule 15(c), the Court finds that the late filed claim did not arise out of any of the same transactions or occurrences set forth in the four timely claims filed by the Department before the bar date. None of those claims concerned taxes owed by Chandler or the Debtor as a responsible officer of that entity. The Department's purported amendment arises out of a tax imposed against an entirely different entity than any referenced in its timely filed claims. Additionally, the Court finds that the instant late filed claim is for an amount greatly exceeding the aggregate of all its timely filed claims. Thus, the Court concludes that the subject proof of claim is not a proper amendment to any of the earlier filed proofs of claim, but rather an entirely new claim. *See e.g., Am International*, 67 B.R. at 82 (a claim for approximately $11,000.00 does not give parties notice of a claim of over $2,000,000.00, even though the creditors had notice that the amount of taxes had not yet been determined).

[8] Furthermore, the Department contends that by timely filing claims against the Debtor as a responsible officer of The Cook's Cupboard and Eagle Line, Inc., it demonstrated an intent to assert claims against the Debtor and the estate for any liability the Debtor has as a responsible officer for any type of trust fund tax for which it could make a personal claim against him. The Court finds this argument unpersuasive. Taken to its logical conclusion, this argument purports to put the estate, and all its other creditors, on sufficient notice of any and all taxes due and owing by the Debtor from any corporation of which the Debtor was a responsible officer. While the filing of the previous claims against the Debtor as responsible officer of those other corporations may be a clear indication of the Department's intent to hold the Debtor responsible for taxes in those corporations, the Court is not willing to extend this argument as effective notice to all other parties in interest concerning any and all other corporations of which the Debtor may potentially be held to be a responsible officer for sales or use taxes in unspecified amounts. Accordingly, the Court hereby declines to allow the Department to amend its earlier proofs of claim pursuant to Bankruptcy Rule 7015.

[9] In addition, the Court declines to allow the late filed claim under its equitable power and exercise of discretion as set

forth in *Unroe* and *Stavriotis*. The Court respectfully distinguishes the result reached here with that in the *Unroe* and *Stavriotis* decisions. First, neither *Unroe* nor *Stavriotis* made reference to Bankruptcy Rule 9006(b)(3), which allows extensions of time only and to the extent provided in Bankruptcy Rule 3002(c). The Court views such omission to reference the mandatory limits of Rule 9006(b)(3) as a major limitation in the appropriate application of those decisions. Moreover, in *Unroe* the debtor scheduled the IRS for a larger amount than the actual amount finally claimed, in contrast to the facts of this matter where the Debtor, at all times, asserted his Fifth Amendment privilege against self-incrimination, and never filed schedules of assets or liabilities. Thus, the Trustee and the interested creditors were left to their own resources to ferret out the Debtor's liabilities, including the instant contested claim which only surfaced of record over a year after the claims bar date had run.

Next, in applying the *Glamour Coat* balancing test, which *Unroe* adopted, the Court concludes that the equities weigh in favor of disallowance of the subject claim. No evidence in the record offers any compelling explanation for the Department's failure to request an extension of the bar date. The Department was a scheduled creditor, received notice of the claims bar date, and timely filed four proofs of claim. The Department filed the late claim one and a half years after the bar date. Moreover, the Court finds that the Department did not exercise due diligence in filing its claim. Pursuant to the testimony of Mark Russell, a revenue auditor for the Department, the investigation of the September 1988 aircraft transfer did not begin until February or March 1990, months prior to the claims bar date. The evidence adduced at trial indicated that the Department was well aware of the pendency of this case. Russell further testified that he was aware in July 1990 that the Debtor was the president of Chandler. The Department, however, did not send out a Notice of Penalty Liability to the Debtor until August 15, 1991. It subsequently waited until January 21, 1992 to file the subject proof of claim. The Court concludes that these belated actions do not constitute due diligence

Although the Department's actions for purposes of assessment under the Retailers' Occupation/Use Tax Acts may be timely and within the applicable statute of limitations, that is insufficient on these facts to establish the requisite diligence for timely filed bankruptcy proofs of claim as required under Bankruptcy Rules 3002(c) and 9006(b)(3). The Court similarly rejects the Department's arguments that employees of one of its units were unaware of what other employees in its other units were doing. This is a classic bureaucratic excuse that the right hand was unaware of what the left hand was doing or had done. The applicable Bankruptcy Rules do not provide for such an exception. Bankruptcy Rule 3002(c)(1) merely contemplates a timely motion for an extension of time which could have been requested, but was not sought. The Department is the claimant, however, not its various units or employees, and as an entity and claimant is held to the requirements of the Bankruptcy Rules.

In addition, nothing in the record indicates that the Trustee or other interested parties were on notice that there would be any additional claims for taxes due and owing by Chandler, a corporation which was not mentioned in any of the Department's timely filed proofs of claim. Furthermore, no creditor will receive a windfall if the subject contested claim is disallowed. The Trustee has estimated that the unsecured creditors in the estate will receive approximately a twenty percent dividend distribution.

The Department claims the timely filed proofs of claim covered the taxable period of July, 1986 through July, 1989, and the amended claim at issue is for the period of September, 1988. The Department further argues that its efforts to timely file a claim were impeded because Chandler attempted to conceal the taxability of the transaction by having title to the airplane transferred from the retailer, Jack Prewitt & Associates, Inc. to Prewitt Leasing, Inc. so that it

could claim the "occasional sale" exemption. The Department claims that it did not file a timely claim with regard to the aircraft purchase because Chandler never registered with the Department for any type of tax and never filed a tax return with the Department during its corporate existence. Russell, however, admitted that a corporation is not required to register or to file a tax return if it has no income and has not engaged in a taxable transaction. The Department counters that Chandler was seeking to evade payment of the tax. The Court finds this argument misplaced. The Department cannot assert Chandler's acts or omissions as a compelling defense for its own inaction under the facts of this matter in light of the history of the Department's timely prior actions in connection with its other claims in this case. In the pleadings, the Department sets forth the proposition and cites supporting cases that concealment of a cause of action suspends the running of applicable statutes of limitations. Although the Department is contending that the Debtor and Chandler fraudulently concealed the taxability of the subject transaction, no evidence of fraud or conspiracy was presented supporting this conclusion. Therefore, the Court will not further address this argument and rejects same.

Upon balancing the equities, the Court finds that the equities really favor the other unsecured creditors whose allowed claims were timely filed and whose dividends should not be diluted through allowance of the subject contested claim. After all, the Department has other potential sources of recovery for its assessed unpaid taxes, namely Chandler and its assets, if any, other potentially responsible officers of Chandler and their assets, and the Debtor and his assets as a result of the denial of his discharge.

B. The Underlying Claim Against the Debtor as Responsible Officer of Chandler

Concerning the Trustee's second defense attacking the merits of the Debtor's liability for the Department's claim, the Court must first address the Department's contention that this Court lacks jurisdiction to determine the tax liability of a non-debtor entity such as Chandler. For this proposition, the Department cites several cases *See In re Brandt-Airflex Corp.*, 843 F.2d 90 (2d Cir.1988); *United States v. Huckabee Auto Co.*, 783 F.2d 1546 (11th Cir.1986); *In re Success Tool & Mfg. Co.*, 62 B.R. 221 (N.D.Ill.1986). These cases are distinguishable from the case at bar. In the cited cases, the debtors sought to have the court shift a tax liability to a non-debtor. That is not the situation in this matter. Thus, the Court declines to follow this inapposite line of authority.

Pursuant to 11 U.S.C. § 505(a)(1), the Court is authorized to "determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction." Several courts have held that the bankruptcy court may apply section 505(a) to determine the tax liability of parties other than the debtor. *See In re Wolverine Radio Co.*, 930 F.2d 1132 (6th Cir.1991), *cert. denied*, — U.S. ——, 112 S.Ct. 1605, 118 L.Ed.2d 317 (1992) (bankruptcy courts have jurisdiction over disputes involving unemployment compensation tax liability incurred by debtors, but same may include tax disputes concerning non-debtors when that dispute affects the debtors and when exercise of that jurisdiction is necessary to rehabilitate the debtor or to administer its estate effectively); *In re Goldblatt Bros., Inc.*, 106 B.R. 522 (Bankr.N.D.Ill.1989) (court held that determination of whether creditors' committee was responsible for paying taxes on interest earned on money held in an account established pursuant to the Chapter 11 plan was a core proceeding); *In re John Renton Young, Ltd.*, 87 B.R. 635 (Bankr.D.Nev. 1988) (court had jurisdiction to determine debtor's motion for injunctive relief from a one-hundred percent penalty tax assessment against the non-debtor obligor based on his relationship with the debtor as its president and only shareholder); *In re Jon*

Co., 30 B.R. 831 (D.Colo.1983) (court determined the 26 U.S.C. § 6672 tax liability of the debtor's employees); *In re H & R Ice Co.*, 24 B.R. 28 (Bankr.W.D.Mo.1982) (same); *In re Major Dynamics, Inc.*, 14 B.R. 969 (Bankr.S.D.Cal.1981) (court stayed IRS audits, assessments and collections directed at the creditors of the estate). In *Major Dynamics*, the court acknowledged that the legislative history of section 505 focuses on tax obligations of the debtor or the debtor's estate. It held, however, that the "any tax" language used in section 505(a)(1) must control and "that the Bankruptcy Court has jurisdiction to determine disputes between third party creditors and the IRS in an appropriate case." 14 B.R. at 972. The court opined that an "appropriate case" included "tax disputes of third parties other than the debtor *provided, however,* that the IRS activity to be enjoined directly affected the debtor or the estate, and that the exercise of such jurisdiction was necessary to the rehabilitation of the debtor or the orderly and efficient administration of the debtor's case." *Id.* (emphasis in original).

[10] In the instant matter, the parties ask the Court to determine the Debtor's liability as responsible officer of a non-debtor corporation. The Debtor's liability, in part, depends on whether Chandler actually owes the tax. The determination of the tax assessed against Chandler directly affects the Debtor, who was denied a discharge, and the potential dividend distribution from the estate. Moreover, the determination of this issue is necessary for the orderly and efficient administration of the estate. *See Major Dynamics*, 14 B.R. at 972. Having been denied a discharge, the Debtor has a personal stake in the outcome of Chandler's (and his) tax liability. *See Jon Co.*, 30 B.R. at 833–834. Thus, under the plain language used in section 505(a)(1), the Court can examine the asserted tax liability of Chandler. *See e.g., Wolverine Radio*, 930 F.2d at 1140–1143. Moreover, under 11 U.S.C. § 558, the Trustee may assert any defense available to the Debtor for the benefit of the estate including defenses personal to the Debtor. Thus, even though the Debtor may not have protested the notice of assessment sent by the Department to him, the Trustee may still assert substantive defenses to the claim as argued here. *See* 11 U.S.C. § 558.

The Department asserts and has assessed personal liability on the Debtor as a corporate officer of Chandler pursuant to Section 13½ of the Retailers' Occupation Tax Act, which provides in pertinent part:

> Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed ... and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon ...

Ill.Rev.Stat. ch. 120, para. 452½ (1991).

The Illinois Supreme Court has held that the willful failure to pay requirement is satisfied with a showing of "voluntary, conscious and intentional failure" to make the tax payments. *Department of Revenue v. Heartland Invest., Inc.*, 106 Ill.2d 19, 30, 86 Ill.Dec. 912, 476 N.E.2d 413 (1985) (quoting *Department of Revenue v. Joseph Bublick & Sons, Inc.*, 68 Ill.2d 568, 577, 12 Ill.Dec. 265, 369 N.E.2d 1279 (1977)); *Department of Revenue v. Corrosion Systems, Inc.*, 185 Ill.App.3d 580, 583–584, 133 Ill.Dec. 647, 649, 650, 541 N.E.2d 858, 860, 861 (4th Dist.1989). Moreover, "in a civil action, wilful conduct does not require bad purpose or intent to defraud the government." *Heartland Invest.*, 106 Ill.2d at 30, 86 Ill.Dec. 912, 476 N.E.2d 413. The *Bublick* court further found that the determination of willful failure "is an issue of fact to be determined by the trier of the fact on the basis of the circumstances and evidence adduced in the particular case." *Bublick*, 68 Ill.2d at 577, 12 Ill.Dec. 265, 369 N.E.2d 1279.

The Retailers' Occupation Tax Act further establishes the procedure for creating

and assessing the liability against a corporate officer:

> The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. Proof of such determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or any legal proceeding and shall be prima facie proof of the correctness of the penalty due, as shown thereon.

Ill.Rev.Stat. ch. 120, para. 452½.

The Department established prima facie proof of the correctness of the penalty by introducing a copy of the Notice of Penalty Liability issued against the Debtor. (Department Exhibit No. 1). At trial, the Trustee presented evidence to the contrary, namely the opinion testimony of John Anderson which concluded the sale was not taxable, as well as the supporting certificate of occasional seller exemption executed on behalf of Prewitt Leasing, Inc.. As a result of this evidence, the ultimate burden of proof and persuasion shifted back to the Department. *See generally, People ex rel. Dept. of Revenue v. National Liquors Empire, Inc.*, 157 Ill.App.3d 434, 439, 109 Ill. Dec. 627, 630–631, 510 N.E.2d 495, 498–499 (4th Dist.1987). The Department's assessment notice to the Debtor and the prima facie effect of para. 452½ without more evidence are insufficient. Even proof that Chandler may be liable for the tax is not ipso facto sufficient to show the Debtor liable as a responsible officer.

[11] The Court finds that the Department has failed to meet its burden and establish that the Debtor willfully failed to pay the tax assessed against Chandler for the sale of the aircraft. On the required element of corporate control, it is uncontested that the Debtor was president and sole director of Chandler. Although by no means certain, the Court can reasonably infer that the Debtor, as such officer and director, was in control of Chandler. No compelling evidence, however, was presented on the issue of whether the Debtor's failure to pay the claimed tax was voluntary, conscious and intentional. John Anderson testified that Lawrence Pluhar acted as the Debtor's chief financial officer, and thus is putatively another potential responsible Chandler officer against whom the Department could proceed. Chandler's annual corporate report for 1988 showed two other officers who may be additional potentially responsible officers. (Department Exhibit No. 19, p. 3). There was no evidence presented of the Debtor's voluntary, conscious and intentional failure to pay the tax. Evidence that the Department sent the notice of assessment to the Debtor, and he has not paid same or responded to the Department's demands, is not the equivalent of a conscious or intentional failure on his part.

As a matter of law, the automatic stay under 11 U.S.C. § 362(a) was effective from the time the petition was filed in February, 1989, over two years prior to the Department's August 15, 1991 issuance of its Notice of Penalty Liability to the Debtor. That his pre-petition property which passed to the Trustee as property of the bankruptcy estate under 11 U.S.C. § 541 was not available to satisfy this contested claim, does not serve as the equivalent of adequate proof of the Debtor's voluntary, conscious and intentional failure to pay.

In addition, in *Corrosion Systems*, the corporate officer against whom the Department sought to impose responsible party liability, signed the corporation's tax reports and checks accompanying same. 185 Ill.App.3d at 583–584, 133 Ill.Dec. at 650, 541 N.E.2d at 861. The court there concluded, however, that "the officer had relied on his accountant, and there was no evidence 'that the defendant consciously, voluntarily, intentionally, knowingly or recklessly failed to make the appropriate retailers' occupation tax payments.'" *Id.* (quoting *Department of Revenue v. Mar-*

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ion Sopko, Inc., 84 Ill.App.3d 953, 955, 40 Ill.Dec. 487, 489, 406 N.E.2d 188, 190 (2d Dist.1980)). Based upon the evidence that the Debtor has merely failed to respond to the Department's notice, the Court is unable to conclude that the Debtor's failure to pay the tax was willful or voluntary, conscious and intentional.

VI. *CONCLUSION*

For the reasons set forth herein, the Court hereby sustains the Trustee's objection to the allowance of the Department's subject proof of claim, as amended.

This Opinion serves as findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

MEMORANDUM OPINION

This matter comes before the Court on the motion for reconsideration filed by the Illinois Department of Revenue (the "Department") of the Court's Memorandum Opinion and Order dated November 25, 1992, and the response in opposition filed by Thomas E. Raleigh, Chapter 7 Trustee (the "Trustee"). For the reasons set forth herein, the Court hereby denies the motion.

I. *JURISDICTION AND PROCEDURE*

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(B).

II. *APPLICABLE STANDARDS*

"Motions to reconsider" are not formally designated by either the Federal Rules of Bankruptcy Procedure or Federal Rules of Civil Procedure, except as provided in 11 U.S.C. § 502(j) and Bankruptcy Rule 3008 which allow reconsideration of orders allowing or disallowing claims against the estate. Section 502(j) provides in relevant part that "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." 11 U.S.C. § 502(j). Bankruptcy Rule 3008, in turn, provides that "[a] party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order." Fed.R.Bankr.P. 3008. Reconsideration of both allowed and disallowed claims may be made at any time before the case is closed. *In re Resources Reclamation Corp.*, 34 B.R. 771, 773 (Bankr.9th Cir.1983). The Court should weigh the extent and reasonableness of any delay, prejudice to the debtor and other creditors, effect on efficient administration, and the moving creditor's good faith. *Id.* Rule 3008 has been held permissive and does not require that a party file a motion to reconsider before appealing. *Walsh Trucking Co. v. Insurance Co. of North America*, 838 F.2d 698 (3rd Cir.1988).

The Seventh Circuit Court of Appeals has instructed courts to treat all substantive post-judgment motions filed within ten days of judgment under Rule 59. *Charles v. Daley*, 799 F.2d 343 (7th Cir.1986). Motions made thereafter are considered under the provisions of Rule 60 of the Federal Rules of Civil Procedure, as adopted by Bankruptcy Rule 9024. Because the motion at bar was filed and served on December 4, 1992, within ten days of the judgment, the procedural standards and authorities construing section 502(j) and Rules 59, 3008 and 9023 control.

[12, 13] Motions made under Rule 59 serve to correct manifest errors of law or fact, or to consider the import of newly discovered evidence. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557 (7th Cir.1985); *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656 (N.D.Ill.1982), *aff'd.* 736 F.2d 388 (7th Cir.1984); *F/H Industries, Inc. v. National Union Fire Ins. Co.*, 116 F.R.D. 224, 226 (N.D.Ill.1987). The function of a motion made pursuant to Rule 59(e) is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory. *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir.1986); *Evans, Inc. v. Tiffany & Co.*, 416 F.Supp.

224, 244 (N.D.Ill.1976); *In re BNT Terminals, Inc.*, 125 B.R. 963, 976–977 (Bankr. N.D.Ill.1990). The purpose of a motion to alter or amend "is not to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." *BNT Terminals*, 125 B.R. at 977. "A motion brought under Rule 59(e) is not a procedural folly to be filed by a losing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants." *Id.*

III. *THE DEPARTMENT'S ARGUMENTS*

The Department makes several arguments in its motion. First, it contends that Bankruptcy Rule 3002(c) conflicts with 11 U.S.C. § 726(a)(2) and (a)(3), the statutory provision governing payments of claims, because it specifically contemplates allowance of late-filed claims by providing for their payment. Second, the Department argues that pre-petition unsecured priority claims that would be so classified under 11 U.S.C. § 507(a)(7), even if late-filed, such as the claim at bar, are entitled to payment and distribution along with timely filed pre-petition unsecured claims under section 726(a)(1). This is so, the Department maintains, because the text of section 726(a)(1) makes no reference to effectively subordinated dividend distributions of late-filed priority claim; section 726(a)(2) is explicitly inapplicable to priority claims by its text; and the provisions of section 726(a)(3) likewise do not specifically exclude claims that would otherwise be accorded administrative priority under section 507. Only claims of general unsecured creditors who file late claims receive distribution under section 726(a)(3).

Next, the Department urges the Court to follow the recent opinion of Judge Wedoff in *In re Rago*, 149 B.R. 882 (Bankr.N.D.Ill. 1992) which followed *In re Hausladen*, 146 B.R. 557 (Bankr.D.Minn.1992). *Hausladen* held that late filing of a claim is not grounds for its disallowance under section 502(b). *Rago*, in turn, held that priority claims, even though late filed, are entitled to distribution under section 726(a)(1). The Department concludes that these two opinions are recent significant changes in extant case law concerning contested late claims allowance and payment, and the Court should follow these decisions by holding Bankruptcy Rule 3002(c) invalid as in conflict with sections 502(b) and 726. The Department concludes that because section 726(a)(2)(C) and (a)(3) provide for payment of late-filed claims, they conflict with and override the provisions of Bankruptcy Rule 3002(c), notwithstanding the Seventh Circuit cases which do not address the perceived conflict, but assume the validity of the Rule. The Department contends that in the Chapter 7 context, there is no legal dispute that late claims are allowed. The real issue is classification for distribution purposes.

Lastly, concerning the merits of the underlying claim, the Department argues it established and proved a prima facie case, notwithstanding the Trustee's evidence and objections thereto, citing as supporting authority two Illinois Appellate Court decisions: *Quincy Trading Post, Inc. v. Department of Revenue*, 12 Ill.App.3d 725, 298 N.E.2d 789 (4th Dist.1973) and *Department of Revenue v. Corrosion Systems, Inc.*, 185 Ill.App.3d 580, 133 Ill.Dec. 647, 541 N.E.2d 858 (4th Dist.1989). The Court notes that it discussed and applied *Corrosion Systems* in its prior Opinion. Under this argument, the Department asserts that because the Trustee did not show that the Debtor was not a responsible officer, and there were no similar opinion letters of counsel on the non-taxable nature of the subject transaction issued to the purchasing corporation or its officers, or that the Debtor ever relied on the legal opinion that was given to the lender on the transaction, the Department's evidence is sufficient to support allowance of the underlying claim on its merits. The Department concludes that the Trustee had the burden of proving that the Debtor's failure to pay the claimed tax was not willful, rather than on it to show that the Debtor's failure to pay was willful.

bution under section 726(a)(1). The ent concludes that these two opin- recent significant changes in ex- e law concerning contested late llowance and payment, and the hould follow these decisions by Bankruptcy Rule 3002(c) invalid as ct with sections 502(b) and 726. partment concludes that because 726(a)(2)(C) and (a)(3) provide for of late-filed claims, they conflict d override the provisions of Bank- Rule 3002(c), notwithstanding the Circuit cases which do not address eived conflict, but assume the va- the Rule. The Department con- it in the Chapter 7 context, there is dispute that late claims are al- The real issue is classification for on purposes.

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B. The Trustee's Arguments

The Trustee counters with numerous arguments in opposition to the Department's motion. First, the Trustee notes that the motion does not show that the Court made any manifest error of fact or law, nor is the Department proffering any newly discovered evidence. Second, the Trustee counters that the Department's motion raises a new argument under *Rago*—that a tardily-filed proof of claim cannot serve as a basis for disallowance of a claim—which was not urged at the time of trial, and is not properly advanced under Rule 59. Third, the Trustee points out that the Court in its Opinion had considered the *Hausladen* view and rejected same for reasons stated therein. Fourth, the Trustee asserts that notwithstanding *Hausladen*, the analysis contained in *Rago* is flawed, and has effectively been rejected in *In re Unroe*, 937 F.2d 346 (7th Cir.1991) and *In re Stavriotis*, 977 F.2d 1202 (7th Cir.1992). As additional authority the Trustee cites *Wilkens v. Simon Bros., Inc.*, 731 F.2d 462 (7th Cir.1984) (per curiam) in which the Seventh Circuit noted that both the text of the Bankruptcy Code and the Bankruptcy Rules must be considered in determining whether a claim is to be disallowed. *Wilkens* looked to the Rules then in effect under the prior Bankruptcy Act in holding that a Chapter 13 claim was required to be filed no later than six months after the initial creditors' meeting.

The Trustee thus urges the Court to adhere to its view that the text of section 502(b)(1) effectively provides for disallowance of late claims as "unenforceable" under "applicable law" which the Court found included the time limits of Bankruptcy Rule 3002(c). Next, the Trustee contends that the *Rago* analysis would not be applicable here under the facts of this matter because the Department's subject claim was asserted to be an amendment to previously timely claims, rather than a new claim, merely tardily-filed, unlike the claimant in *Rago* which had no notice of the case or its claim prior to the expiration of the claims bar date. Hence, the Trustee maintains that the Department cannot now, on its motion for reconsideration, argue that the subject tardily-filed proof of claim constitutes an entirely new claim, rather than an amended claim previously argued.

The Trustee further asserts that properly applied principles of statutory construction compel relegation of the Department's tardily-filed claim to payment and classification under section 726(a)(3) and (a)(4). On this point, the Trustee argues that section 726(a)(3) is for unsecured claims which are tardily-filed, and are not of a type specified in section 726(a)(2)(C), such as the Department's claim at bar, except the portion thereof which is a claimed penalty which would be more properly classified under section 726(a)(4). Consequently, the Trustee concludes tardily-filed unsecured claims, whether entitled to priority treatment under section 507 or not, do not require treatment and payment under 726(a)(1). The text of the various subsections comprising section 726 which contains enumerations of specific exclusions from various subparagraphs, is indicative that section 726(a)(3) should apply to all cases involving late claim payments not specifically excluded

An additional point argued by the Trustee is that by extending the result reached in *Rago* to this case, havoc is wreaked on dividend payments. Affording late priority claims with an equal treatment to timely-filed allowed claims, notwithstanding established claims bar dates, forces objecting debtors, trustees and other interested parties to thereafter institute subordination actions against tardily-filed claims pursuant to 11 U.S.C. § 510. In this regard, the Trustee argues that if the Court follows the *Rago* result, then principles of equitable subordination should be applied here to equitably subordinate payment of any part of the Department's claim it favorably reconsidered because here, unlike the tax claimant in *Rago*, the Department knew of this case and filed several timely claims. Lastly, on the merits on the underlying claim, the Trustee contends that the motion merely challenges the Court's factual finding that there was no supporting evidence showing that the Debtor willfully failed to pay the claimed tax assessed. Such a chal-

lenge to the Court's factual findings cannot be appropriately made on a motion for reconsideration.

V. *DISCUSSION*

One crucial point to emphasize is that the process of bankruptcy claim allowance or disallowance pursuant to the provisions of section 502(b) and Bankruptcy Rules 3007 and 3008 is a separate and distinct aspect of estate administration from the related process of payment. Allowed claims are paid through distributions from the bankruptcy estate, as defined in section 541, made by the Trustee pursuant to section 704 and Bankruptcy Rule 3009, through the provisions of, and in the priorities established under, section 726. Frequently, these two separate, but related, steps of claim allowance and claim payment practically occur in close proximity. The real issue here, however, involves the disallowance of the Department's claim under section 502(b)(1) and Bankruptcy Rule 3002(c), not any claim classification issues for distribution purposes under section 726 as the parties unnecessarily argue for the first time in this motion. Only claims allowed under sections 501, 502, 503 and 507, and not disallowed under section 502(b), receive distributions under the priorities established in section 726. Because the Department's claim was disallowed both as untimely and on the merits, section 726 classification issues are irrelevant and immaterial to the claim disallowance issues.

[14] For purposes of this contested matter, one ultimate issue is whether the Court's prior ruling disallowing the Department's claim pursuant to Bankruptcy Rule 3002(c) violates section 502(b)(1) of the Code, and secondly whether the Court's ruling disallowing the Department's claim on the merits was in error. After carefully considering and reconsidering the arguments, and with all due respect to the learned decisions in *Hausladen* and *Rago*, the Court disagrees with those conclusions that Bankruptcy Rule 3002(c) conflicts with section 502(b)(1). Neither opinion discusses or focuses on the operative language in section 502(b)(1). As previously stated in the Court's Opinion, the plain meaning of section 502(b)(1) provides for disallowance of a contested claim, if same is unenforceable against the Debtor for *any* reason other than because it is contingent or unmatured. This reading of section 502 and the end result is supported by its sparse legislative history. *See* H.R.Rep. 595, 95th Cong. 1st Sess. 352 (1977); S.Rep. 989, 95th Cong.2d Sess. 62 (1977) U.S.Code Cong. & Admin.News pp. 5787, 5848, 6308. There is no limit either in the text of section 502(b)(1) or its legislative gloss which precludes resort to the statute of limitation created by Rule 3002(c) as appropriate applicable law.

[15–17] In the Rules Enabling Act, 28 U.S.C. § 2075, Congress empowered the Supreme Court of the United States to prescribe rules for the practice and procedure in cases under Title 11. Section 2075 expressly provides that such rules shall not abridge, enlarge or modify any substantive right. Accordingly, it has been held that the rule making power of the Supreme Court is limited and to be exercised consistently with the substantive provisions of Title 11. *In re Itel Corp.*, 17 B.R. 942 (Bankr.9th Cir.1982). Rules promulgated pursuant to section 2075 have the force of law pursuant to that authority granted by Congress. *In re Brooks Fashion Stores, Inc.*, 124 B.R. 436, 440 (Bankr.S.D.N.Y. 1991). The bankruptcy court is bound to follow, without exceptions, the rules promulgated by the United States Supreme Court unless a rule is inconsistent with the statute, in which case the Bankruptcy Code controls over inconsistent procedural rules. *In re Wilferth*, 57 B.R. 693, 694 (Bankr. D.N.M.1986). Rules are entitled to a presumption that they were promulgated within the proper authority of the Supreme Court and do not affect substantive rights. *In re Neese*, 87 B.R. 609, 611 (9th Cir.BAP 1988). A party contending that a court rule violates substantive rights bears a heavy burden of proof. *Neese*, 87 B.R. at 611; *In re Management Data Services, Inc.*, 43 B.R. 962, 966 (Bankr.W.D.Wash. 1984). The Court concludes that the operative text of section 502(b)(1) can be harmo-

t's Opinion, the plain meaning of 02(b)(1) provides for disallowance ested claim, if same is unenforceast the Debtor for *any* reason othecause it is contingent or unmais reading of section 502 and the is supported by its sparse legistory. *See* H.R.Rep. 595, 95th Sess. 352 (1977); S.Rep. 989, 95th Sess. 62 (1977) U.S.Code Cong. & ws pp. 5787, 5848, 6308. There is either in the text of section r its legislative gloss which preort to the statute of limitation Rule 3002(c) as appropriate aw.

In the Rules Enabling Act, 28 2075, Congress empowered the Court of the United States to rules for the practice and proceses under Title 11. Section 2075 provides that such rules shall not large or modify any substantive cordingly, it has been held that making power of the Supreme mited and to be exercised consisn the substantive provisions of *In re Itel Corp.*, 17 B.R. 942 Cir.1982). Rules promulgated o section 2075 have the force of nt to that authority granted by *In re Brooks Fashion Stores*, B.R. 436, 440 (Bankr.S.D.N.Y. e bankruptcy court is bound to hout exceptions, the rules proby the United States Supreme ss a rule is inconsistent with the which case the Bankruptcy Code er inconsistent procedural rules. *erth*, 57 B.R. 693, 694 (Bankr. 6). Rules are entitled to a prehat they were promulgated with per authority of the Supreme do not affect substantive rights. *e*, 87 B.R. 609, 611 (9th Cir.BAP party contending that a court es substantive rights bears a len of proof. *Neese*, 87 B.R. at *e Management Data Services*, .R. 962, 966 (Bankr.W.D.Wash e Court concludes that the operaf section 502(b)(1) can be harmoniously construed and applied through the statute of limitations provided by Bankruptcy Rule 3002(c).

[18] The Court rejects the Department's argument that Bankruptcy Rule 3002(c) patently conflicts with the distribution scheme of section 726. In bankruptcy estates where there is sufficient money or other liquidated assets to pay allowed priority claims that have been filed under section 726(a)(1), then after all claims at that distribution level under section 726 have been paid in full, to the extent there are additional estate funds on hand to pay claims that fall under section 726(a)(2), those proceeds are distributed pro rata to claim holders falling in that class. If there are sufficient funds on hand to fully pay all claimants in that class of claims, the excess is then distributed down to the section 726(a)(3) level of tardily-filed claims. Although infrequent, occasionally there are bankruptcy estates in which there are sufficient funds to pay all claims timely and tardily-filed leaving an excess to cover payment of penalty, fines or punitive damage claims under section 726(a)(4). If those claims are all paid in full, then distribution of post-petition interest is paid to allowed claim holders under section 726(a)(1)–(4) pursuant to section 726(a)(5). Thereafter, any surplus of the estate is to be paid to the debtor pursuant to section 726(a)(6). In such cases, there is no need for a trustee to object to late claims because there is enough to pay all claims.

In the vast majority of Chapter 7 estates, however, like the case at bar, there are insufficient assets to pay all allowed claims that are timely filed whether priority under section 726(a)(1), or unsecured under section 726(a)(2)(A). It is precisely in cases such as this, where there are not enough assets to pay all claim holders, that the impact of Bankruptcy Rule 3002(c) becomes important. It is not logical to extend the first priority in distribution under section 726(a)(1) to tardily-filed claims because section 726(a)(2)(A) and (B) provides that timely-filed allowed claims take priority over tardily-filed allowed claims under section 726(a)(2)(C) and (a)(3). Moreover, the Department's classification argument only impacts on allowed claims. This matter, however, focuses on its claim disallowed under 502(b)(1), rather than the distribution classification scheme under section 726. Therefore, it is unnecessary, for proper determination of this matter, to categorize the Department's claim under section 726, had it not been disallowed, nor address the equitable subordination arguments newly raised by the Trustee. The Court need not reach such subordination and classification issues discussed in *Rago*. Only allowed claims are entitled to receive distributions from the estate. Thus, the principal focus and discussion in *Rago* concerning section 726 is inapposite and not controlling in this matter.

The result reached here is also in accord with *United States v. Vecchio*, 147 B.R. 303 (E.D.N.Y.1992). There the bankruptcy court disallowed two claims of the Internal Revenue Service which were filed late. Similar to the tax claimant in *Rago*, the IRS in *Vecchio* argued that it should be entitled to section 726(a)(1) treatment. The district court on appeal held that the IRS's late claims should be relegated to section 726(a)(3) status, and same extends to all tardy claims, both priority and non-priority. *Id.* at 306. *Vecchio* cited with approval *In re Global Precious Metals, Inc.*, 143 B.R. 204 (Bankr.N.D.Ill.1992), which found that a creditor without notice is protected by section 726(a)(2), but otherwise the ninety-day filing requirement of Bankruptcy Rule 3002(c) applies. *Vecchio* noted that judicial efficiency, certainty and finality with respect to bankruptcy proceedings would be severely hampered if creditors with priority claims were able to assert them at any time, regardless of having received timely notice of the bankruptcy proceeding. 147 B.R. at 307. The contrary view espoused in *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087 (6th Cir.1990), urged by the Department, is rejected. The *Vecchio* court concluded that a broad reading of *Cardinal Mine* does not subsume the Bankruptcy Rule 3002(c)(1) ninety-day deadline with regard to federal tax claims; it makes the Rule inapplicable, wherever a priority claim is allegedly asserted. 147

B.R. at 307. A creditor could appear years after receiving timely notice of the bankruptcy, and if his claim was a priority claim, it would be protected. That result is inequitable especially under the facts of this matter. The controlling law and equities of the case militate in favor of the Trustee's position, and against that taken by the Department.

[19] On the merits of the underlying claim and the objection thereto, there was no evidence furnished at trial that the Debtor's failure to pay the subject claim was willful. Contrary to the Department's arguments, the Department had the burden of proof to show the Debtor's failure to pay the subject claim was willful, rather than the Trustee, as the objector, having the burden to show that the Debtor's failure to pay was not willful. No evidence was adduced by the Department to show that the Debtor's failure to pay the claimed tax was a voluntary, conscious and intentional failure as required by the controlling holding in *Department of Revenue v. Heartland Invest., Inc.*, 106 Ill.2d 19, 30, 86 Ill.Dec. 912, 476 N.E.2d 413 (1985). The other case cited by the Department, *Quincy Trading Post*, did not involve assessment of a tax liability against a responsible corporate officer under 35 ILCS 120/13½, and is therefore inapposite and not on point.

A recent opinion of the Seventh Circuit dealing with contested bankruptcy claims provides instructive dicta: "[e]nforcing the Bankruptcy Rules according to their terms cannot be an abuse of discretion." *In re Danielson*, 981 F.2d 296, 299 (7th Cir.1992). Although *Danielson* did not decide the issues raised here, it expressly references Bankruptcy Rule 3002(c), noting that the Seventh Circuit regularly holds that sloth, ignorance or other negligence does not qualify as excusable negligence warranting enlargement of time under Bankruptcy Rule 9006(b)(1). *Id.* at 298. *Danielson* cites *Unroe* with approval and *Taylor v. Freeland & Kronz*, — U.S. —, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), which noted that courts have no standby power to excuse violations of statutes and rules. In addition, in *Holstein v. Brill*, 987 F.2d 1268 (7th Cir.1993), the court, in discussing amendments to claims, noted: "[l]eave to amend should be freely granted ... but passing milestones in the litigation make amendment less appropriate. One milestone of particular significance in bankruptcy is the bar date." *Id.* 987 F.2d at 1270.

VI. *CONCLUSION*

For the foregoing reasons, the Court hereby denies the Department's motion for reconsideration.

This Opinion serves as findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

In re Robert Christian WALKER.

Rose COOPER, as administratrix of the Estate of Edward Cooper, Deceased, Plaintiff,

v.

Robert C. WALKER, and Walter Dickinson, trustee, Defendants.

Bankruptcy No. 92–50411S.
CMS No. 93–209.

United States Bankruptcy Court, E.D. Arkansas, Pine Bluff Division.

Feb. 25, 1993.

Administratrix of deceased's estate moved for partial lift of automatic stay to proceed with wrongful death action in state court against Chapter 7 debtor who was a child incarcerated for murder. The Bankruptcy Court, Mary D. Scott, held that after trustee had abandoned interest, if any, in debtor's parent's home insurance policy, the automatic stay was no longer in effect as to that property, thus there was no

--- B.R. ----
(Cite as: 1993 WL 248793 (W.D.Mich.))
In re Raymond M. ZIMMERMAN, Debtor.
In re Larry D. & Shirley J. NEUMAN, Debtors.
Bankrtupcy Nos. SG91-88620, SG92-01892
United States Bankruptcy Court,
W.D. Michigan, S.D.
July 1, 1993.
DeGroot, Keller & Vincent, (James M. Keller, argued and briefed) Grand Rapids, MI, for debtors Raymond M. Zimmerman and Larry D. and Shirley J. Neuman.
Department of the Atty. Gen., (James D. Clarke, argued and briefed), Lansing, MI, for the Michigan Dept. of Treasury, Revenue Div.
Office of the U.S. Atty. (Tanya M. Marcum, and Terry L. Zabel, argued and briefed), Grand Rapids, MI, for the U.S. I.R.S.
Brett N. Rodgers (argued and briefed) Grand Rapids, MI, for chapter 13 standing trustee Raymond B. Johnson.
Paul F. Davidoff, P.C. (Paul F. Davidoff, briefed) Kalamazoo, MI, for amicus curiae chapter 13 trustee Joseph A. Chrystler.
Alexander C. Lipsey (argued), Kalamazoo, MI, for amicus curiae chapter 13 standing trustee Joseph A. Chrystler.

Before LAURENCE E. HOWARD, Chief Judge; JAMES D. GREGG, and JO ANN C. STEVENSON, Bankruptcy Judges.
EN BANC OPINION REGARDING THE ALLOWANCE OF LATE CLAIMS IN CHAPTER 13
PROCEEDINGS

JO ANN C. STEVENSON, Bankruptcy Judge.
I. Introduction.
*1 This court has taken the unusual measure of sitting en banc to decide an unusual issue: whether late claims must be allowed in chapter 13 cases. This question gained attention as the result of another en banc decision, In re Hausladen, 146 B.R. 557 (Bankr.D.Minn.1992). That court made a facially appealing argument that lateness is not a basis for disallowance under 11 U.S.C. s 502(b). However, this panel rejects the interpretation of s 502 espoused by the Hausladen court, concluding that the issue is not so much one of claim disallowance under the substantive provisions of s 502 as it is of procedure.
II. Factual Background.
This is a contest of legal theories; the facts of the cases are straightforward. In Zimmerman, the debtor commenced his chapter 13 proceeding on December 13, 1991. His plan of reorganization was confirmed on April 6, 1992. The state of Michigan was scheduled as a creditor, but failed to file a claim before the May 10, 1992 bar date. A late claim was filed by the Michigan Department of Treasury (the "Department") on October 1, 1992 in the amount of $2,315.51 for withholding and single business tax liabilities to which the debtor objected. [FN1] The only argument advanced by the Department of Treasury in support of

allowing its claim is that this court should adopt the reasoning set forth in Hausladen.

The Neuman chapter 13 case was filed on March 26, 1992 and the plan confirmed on June 22, 1992. The bar date for claims was set as August 16, 1992. On December 29, 1992 the Internal Revenue Service (the "Service") filed a claim in the amount of $42,536.97. This claim was based upon a civil penalty assessed against debtor Larry Neuman as a responsible person for the failure of Star- Con, Inc. (a corporation in which he was an officer) to pay employment taxes. As in Neuman, the debtors objected to allowance of the claim on the basis of lateness. The Service raised Hausladen in defense of the claim, but it also asserted that certain fact issues exist as to whether the notice it received of the bankruptcy was sufficient to apprise it of the debtor's relationship to Star-Con, Inc. [FN2] At hearing counsel for the Service attempted to make an offer of proof as to this and other fact issues, but was not allowed to do so on the basis that such an offer was premature. Counsel was informed that if this court declined to adopt Hausladen the Service would have an opportunity to address the factual peculiarities of its case at a later date outside the en banc setting.

III. Jurisdiction.

Jurisdiction exists in this matter under 28 U.S.C. s 1334(b). Because this is a claim allowance matter, it is a core proceeding under 28 U.S.C. s 157(b)(2)(B).

IV. Hausladen.

In Hausladen the Minnesota en banc decision addressed the exact issue which now confronts this court: "[W]hether a claimed filed in a Chapter 13 case after the 90-day deadline set by Rule 3002(c) of the Federal Rules of Bankruptcy Procedure should be disallowed?" Hausladen, 146 B.R. at 558. That panel concluded that a claim filed after the 90-day deadline would not be disallowed. Instead, the court posited that the timeliness of a claim relates only to the claim's priority. These conclusions were derived from the Minnesota bankruptcy court's interpretation of s 502 of the Code. Section 502, "Allowance of claims or interest," states: *2 (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects. (b) [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim ... and shall allow such claim ... except to the extent that--[the section continues by enumerating eight exceptions]. 11 U.S.C. s 502. The Minnesota court focused closely upon the use of the word "except" used in s 502(b). The court stated that the eight enumerated items following the phrase "except to the extent that" are the only reasons a claim may be disallowed under the Code. Because lateness is not an enumerated ground, the court concluded that a claim may not be disallowed for that reason. Hausladen, 146 B.R. at 559.

The Minnesota court read FED.R.BANKR.P. 3002 to be consistent with its interpretation of s 502. Hausladen, 146 B.R. at 560, n. 5. Rule 3002 states: (a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim

or interest in accordance with this rule for the claim or interest to be allowed.... (c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to s 341(a) of the Code.... The court stated that Rule 3002 does not explicitly require filing within the 90-day period for the claim to be allowed, although the court recognized that such an interpretation is implied by the rule. Therefore, it concluded, reading the rule to require filing within the 90-day period is erroneous: This erroneous reading arose when the drafters of the new Rule 3002 hastefully copied the substance of old Rule 302 without paying any attention to the major change in the underlying statute. Under the Bankruptcy Act, late claims were explicitly disallowed. Section 57(n) of the Act provided that ... "[c]laims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed ...." 11 U.S.C. s 93(n) (repealed Oct. 1, 1979) (emphasis added). The old Bankruptcy Rule implemented this time bar. However, a time bar does not expressly exist under the Code or Rules. Hausladen, 146 B.R. at 559 (emphasis in original; footnote omitted).
The Minnesota court stated that the 90-day filing deadline established by Rule 3002 relates to the classification of claims as timely or tardy. This classification determines the priority of a claim. In support of its position the court pointed to s 726 of the Code which provides for the payment of tardily filed claims in a chapter 7 case. While acknowledging that no equivalent section of the Code exists in chapter 13, the court stated instead that the chapter 13 plan controls the treatment of tardily filed claims. Id. at 560. Although the court cited to no section of chapter 13 for this conclusion, it determined that its construction was supported by the unambiguous language of the statute. "When Congress speaks as clearly as it has done here, the plain meaning of the legislation is conclusive ... " Id. at 558 (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242-43, 109 S.Ct. 1026, 1031 (1989)) In such cases, reference to "legislative history and to pre-Code practice is not necessary." Id. at 558 (citing Ron Pair, 489 U.S. at 241, 109 S.Ct. at 1030).
*3 The reasoning of Hausladen parallels the reasoning of two cases decided after the Code was enacted but before the current Federal Rules of Bankruptcy Procedure were promulgated. See In re Corbett, 27 B.R. 442 (Bankr.W.D.Mo.1983), rev'd, 68 B.R. 480 (W.D.Mo.1984); In re Collins, 33 B.R. 203 (Bankr.E.D.N.C.1983); but see In re Pennetta, 19 B.R. 974 (Bankr.D.Colo.1982); In re Foster, 11 B.R. 476 (Bankr.S.D.Cal.1981); In re Walter, 10 B.C.D. 791 (Bankr.S.D.N.Y.1982) (late claims disallowed under old rule 13-302). During this transitional period, s 405 of the Reform Act of 1978 provided that the rules in effect when the Code became effective would continue to the extent the old rules were no inconsistent with the Code. These cases held that old Rule 13-302, which did not allow late claims, was inconsistent with s 502 of the Code. The Bankruptcy Court for the Western

District of Missouri allowed late claimed but stated that "[t]he Court recognizes the violence done to the plain language of the statute and rules but concludes that the policy of payment to creditors implicit in Chapter 13 cases is of overriding importance." Corbett, 27 B.R. at 444.
Courts ruling on the late filing of claims in chapter 13 cases in the wake of Hausladen have split on whether that case is correctly decided. Only two cases to date have been decided on similar facts. General Motors Acceptance Corp. v. Judkins (In re Judkins), 151 B.R. 553 (Bankr.D.Colo.1993), follows Hausladen, while In re Bailey, 151 B.R 28 (Bankr.N.D.N.Y.1993) takes the opposite view. Other cases not involving the factual scenario now before the court have also cited Hausladen favorably. Two such cases decided in the context of late claims filed by the IRS in chapter 7 cases are Lastra v. Blood Services Program of the American Red Cross (In re Corporation de Servicios Medico-Hospitalarios de Fajardo, Inc.), 149 B.R. 746 (Bankr.D.P.R.1993), and In re Rago, 149 B.R. 882 (Bankr.N.D.Ill.1992). In re Stoecker, 151 B.R. 989 (Bankr.N.D.Ill.1993) also involved a late claim filed by the IRS in a chapter 7 case but declined to follow Hausladen's reasoning. Other courts have cited Hausladen in passing but have failed to reach the Hausladen issue because of defects in the notice given to the creditor. See Internal Revenue Service v. Barton (In re Barton), 151 B.R. 110 (Bankr.W.D.Mich.1993); Internal Revenue Service v. Cole (In re Cole), 146 B.R. 837 (D.C.Colo.1992). Because the Hausladen interpretation of s 502 has been critically analyzed by several other courts, much of the ground work for our decision has already been laid. Upon review of these cases, and, more importantly, the statute and legislative history, we respectfully conclude that Hausladen was wrongly decided. While we concur generally with the analysis set forth in the well-reasoned Bailey opinion, we find the Hausladen rationale flawed in two particular areas: its harmonization of s 502 and FED.R.BANKR.P. 3002, and its failure to grasp the semantic problem of describing a time-barred claims as "disallowed."
V. The Interrelation of ss 501, 502 and FED.R.BANKR.P. 3002.
*4 Section 502 states that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects." 11 U.S.C. s 502(a) (emphasis added). According to the Code, a prerequisite to being "deemed allowed" under s 502 is filing under s 501. Section 501, "Filing of proof of claims or interest," creates the substantive right to file a claim and identifies the parties holding that right. The merits of a claim will be analyzed under s 502 only if the claim meets s 501's requirements.
One procedural requirement s 501 contemplates is a time limit in which to file claims. Section 501(b) states that "[i]f a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor ... may file a proof of such claim." Section 502(c) states that "[i]f a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim." Thus, s 501 allows a creditor a specific period in which to file a

claim and allows an entry that is liable to the creditor, or the debtor, or the trustee an additional period in which to file the claim if the creditor does not file within its contemplated period. Section 501 is explicitly silent as to the time limits in which to file and the penalty, if any, for not filing within the given time period. This void is filed by FED.R.BANKR.P. 3002, which specifies the time frame for claim filing and requires that claims be filed in accordance with its provisions. Hausladen and the instant cases turn upon the proper interpretation of this rule.

Federal court rules are promulgated under the authority of an enabling statute. The enabling statute for the federal rules of bankruptcy procedure gives the United States Supreme Court the power to promulgate rules which do "not bridge, enlarge, or modify any substantive right." 28 U.S.C. s 2701. Often, the Supreme Court will appoint an advisory committee to draft the rules. These rules are presented to Congress for passive acceptance and take effect if Congress does not strike a rule within a set time period after presentment. Id. A similar procedure exists for the federal rules of civil procedure. See 28 U.S.C. s 2072. Court rules are strongly presumed to be within the guidelines of their enabling statute because they are drafted by the judges who must rule on their validity. Hanna v. Plumer, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144 (1965). Moreover, the rules are presumed to reflect Congress's intent because Congress acquiesces to their acceptance. Sibbach v. Wilson & Co., 312 U.S. 1, 14-15, 61 S.Ct. 422, 427 (1941).

More fundamentally, because of the rigorous adoption process there is a strong presumption that the rules correctly reflect the dichotomy between substantive law and procedural law. This distinction has historically proved troublesome because procedural rules often have substantive outcomes. For example, a failure to timely file an answer in a civil case may result in a default. While the default is procedurally mandated, the outcome of a default judgment against the defendant is most definitely substantive. The federal courts have wrestled with this conundrum since the enactment of the Federal Rules of Civil Procedure in 1938 and the Supreme Court's decision that same year of Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). When the Supreme Court decided the Hanna case it intended to put to rest the practice of invalidating procedural rules where they overlapped into matters that were arguably substantive, except in the most compelling cases: *5 When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions. Hanna, 380 U.S. at 471, 85 S.Ct. at 1144. More recently the Court reaffirmed this holding in Burlington N. Railroad v. Woods, 480 U.S. 1, 6, 107 S.Ct. 967, 970 (1987): [T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial

Conference, and the Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, see 28 U.S.C. s 2072, give the Rules presumptive validity under both the constitutional and statutory constraints.
While Erie and its progeny generally dealt with the conflict between federal procedure and state law, the same principles apply where a court is called upon to consider the validity of a federal rule of bankruptcy procedure. This is so because of 28 U.S.C. s 2071's directive that the rules not alter or abridge substantive rights, thus according rights acquired under federal statute the same status as the state law rights considered in Erie. As stated in 19 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE s 4509 at 147 (1982): By virtue of this process, the Rules, once they have become effective, carry a presumptive validity: any possible intrusions upon substantive rights presumably have been thoroughly considered; whatever balancing is required between procedural objectives and substantive policy concerns, it may be assumed, already has been done.
The relationship between s 502 and FED.R.BANKR.P. 3002 evidences this substantive/procedural balancing. The enumerated grounds for denying allowance of a claim under s 502(b) are addressed to what has typically been considered substantive matters. By contrast, FED.R.BANKR.P. 3002 concerns itself with the procedure which must be followed in filing a claim. It is concerned with the time and place of filing but is silent as to the substantive aspects of the claim. This complementary interpretation of s 502 and FED.R.BANKR.P. 3002 is mandated by the presumption that the drafters of the rules did not intend to nor did they make substantive law when FED.R.BANKR.P. 3002 was enacted.
It is upon this point that Hausladen commits its first error. In order to reach the conclusion that it did, the Hausladen court had to deal with the language of FED.R.BANKR.P. 3002, which quite clearly poses a time bar against the late filing of claims. It could do this by either invalidating the rule or reading the time bar out of the rule. It chose to do the latter, concluding that FED.R.BANKR.P. 3002 was "hastefully" drawn from the text of the former Rule 302, and therefore contained language which permitted to a timeliness requirement in s 57 of the Bankruptcy Act, which found no counterpart in the Code. This conclusion ignores the legislative history, which clearly establishes an intent to place substantive considerations in the Code and procedural considerations in the Rules.
*6 The legislative history of s 501 explicitly recognized that the task of setting time limits would fall to the Bankruptcy Rules and further envisioned those time limitations as constituting a bar to the filing of late claims: [FN3] The Rules of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, which will determine whether claims are timely or tardily filed. The [former] Rules governing time limits for filing proofs of claims will continue to apply under section 405(d) of the bill. These provide a six- month bar date for the filing of claims. H.R.REP. NO. 595, 95th Cong., 1st Sess. 351 (1977); S.REP. NO. 989, 95th Cong., 2d Sess. 61 (1978)

(emphasis added). As the foregoing passage demonstrates, Congress envisioned the procedural aspects of claims filing being governed by the Bankruptcy Rules, not the Code.

Despite the clear language of both the legislative history and FED.R.BANKR.P. 3002, the Hausladen court attempted to harmonize the rule and s 502 by stating that a bar date was not stated but was merely implied by the rule. From this it concluded that "a time bar does not expressly exist under the Code or Rules." Hausladen, 146 B.R. at 559. This is true only under the most strained reading of the rule, which states only claims filed in accordance with the rule (i.e. timely claims) may be allowed. We agree with the Bailey court, which in reference to this interpretation of FED.R.BANKR.P. 3002, stated: With all due respect to that observation the plain reading of FED.R.BANKR.P. 3002(a) requires this Court to reach the conclusion that that Rule emphatically requires the filing of a proof of claim within the period prescribed under FED.R.BANKR.P. 3002(c) as a condition precedent to allowance. Bailey, 151 B.R. at 31, fn. 2. While FED.R.BANKR.P. 3002 does not explicitly state that late claims are barred, it does not make timely filing a prerequisite to allowance. Hausladen's attempt to ignore this aspect of the rule flies in the face of the rule's presumptive validity.

VI. The Semantics of s 502 and FED.R.BANKR.P. 3002.

The second error which the Hausladen court made resulted from an unfortunate double meaning which bankruptcy courts and practitioners commonly attach to the term "disallowed." Although that term appears nowhere in s 502, it is common to describe a claim that falls within s 502(b)'s enumerated exceptions as being "disallowed." Likewise, that term has been used with respect to claims that cannot be allowed because they are not filed "in accordance with" FED.R.BANKR.P 3002. However, the process of claims allowance involves several steps, and "disallowance" under these two provisions describes different events. The first step in the process is filing a claim. The substantive rights of various parties to file claims are found in s 501; the procedure for doing so is located in FED.R.BANKR.P. 3002. Once filing is accomplished, the substance of the claim is considered under s 502. A claim may not be allowed because of defects at any of these steps. Hausladen, however, collapses the process into a single step: *7 Section 502 ... sets out eight specific grounds for disallowing claims. Tardy or late filing is not one of them. The statute says what the statute means: "the court ... shall allow ... claim[s] ... except ... " 11 U.S.C. s 502(b) (emphasis added). The words are clear; "lateness is not a ground for disallowance under section 502 of the Code." In re Horner, 1991 WL 353297 (Bankr.N.D.Ill. Sept. 21, 1991) (dicta); J. Keith M. Lundin, Chapter 13 Bankruptcy, s 7.24 at 7-59 (Sept.1992 galley proof). Hausladen, 146 B.R. at 559. This statement is accurate to the extent it describes the decision-making process under the specific provisions of s 502. But, like an answer to a complaint, whether a claim is eligible to be considered under s 502 at all depends upon its proper and timely filing. The use of the term "disallow" in the context of both the procedural test in

FED.R.BANKR.P. 3002 and the substantive test in s 502 glosses over this fact.

Another term frequently employed with regard to late claims is the word "bar." This is perhaps more accurate when referring to late claims, as the effect of FED.R.BANKR.P. 3002 is to prevent the claim from moving forward in the process toward treatment under s 502. [FN4] Hausladen, however, rejects this term: All of this has been compounded by attorneys, judges and commentators who have carried forward the old Act habit of referring to the date set for filing claims as the "bar date." Under Section 57(n) of the Act it was a bar date; however under Section 502 of the Code it is not. Continued mischaracterization of the time period has led to reliance on the words themselves without actually understanding them or what the statute actually says. Id. Ironically, the confusion to which Hausladen alludes is the result not of the use of the term "bar date" to refer to the treatment of late claims under FED.R.BANKR.P. 3002, but rather the overbroad use of the term "disallow." Hausladen implicitly presumes that barring a claim as untimely, and thus preventing it from ever being "deemed allowed" under s 502(b), is the equivalent of "disallowing" the claim under s 502(b). This presumption is supported neither by statute nor court rule. While neither the statute nor rule contains the term "bar date," the same is true of the word "disallow." Both terms are used by practitioners and courts as a shorthand to describe what happens under these various provisions. [FN5] By using the term "bar" in the FED.R.BANKR.P. 3002 context and the term "disallow" in the s 502 context, the confusion which led in Hausladen to the blurring of a rule of procedure with the substantive provisions of s 502 can be avoided. This court adopts this practice.

VII. Policy Considerations.

Our holding that FED.R.BANKR.P. 3002(c) imposes a bar date against late claims is based upon the plain language of the statute. However, an examination of the underlying policies of FED.R.BANKR.P. 3002 will show that this Court's interpretation of the statutory language and court rule is completely in harmony with the legislative intent, satisfying Ron Pair's requirement that the plain language of the statute be applied unless it is blatantly at odds with statutory intent.

*8 Policy considerations strongly support the necessity of a bar date in bankruptcy reorganizations. As stated by the court in In re Nohle, 93 B.R. 13, 15 (Bankr.N.D.N.Y.1988): Bankr.R. 3002(c) is strictly construed as a statute of limitations since the purpose of such a claims bar date is "to provide the debtor and its creditors with finality" and to "insure the swift distribution of the bankruptcy estate." See In re Johnson, 84 B.R. 492, 494 (Bankr.N.D.Oh.1988) [other citations omitted]. Although Nohle was decided in the chapter 12 context, the policy is equally applicable in chapter 13. A bar date is necessary so that a reorganization plan may more easily be formulated. Furthermore, a plan can only be administered after all claims against the estate have been filed. In chapter 13 cases, once the claims have been filed, the parties can determine with certainty the dividend percentage to be paid to holders of

allowed unsecured claims. In some cases, application of the 11 U.S.C. s 1325 confirmation standards would be impossible if the calculations were subject to change due to the filing of late claims. Calculations involving plan distributions would be extremely difficult even if late claims were paid less that other claims because the late claims would still be taking something away from the timely filed claims. The debtor and all timely filing creditors benefit from the claims bar date because the case can be administered much more efficiently. On the other hand, no injustice results by barring late claims of unsecured creditors who have timely notice of the bar date. [FN6]

VIII. Conclusion.

The only defense raised by the Department to the debtor's objection in the Zimmerman case was Hausladen. Accordingly, under 27 U.S.C. s 157(b)(1) the court may enter a final order as to this case. Having not been persuaded by the reasoning in that case, the debtor's objection is sustained, and an appropriate order will enter. In the Neuman case, the Hausladen defense was raised concomitantly with other factual defenses. Accordingly, no order will enter the Neuman case at this time. Instead, the court will schedule an additional evidentiary hearing on the debtors' objection to the Service's claim. For the purposes of that hearing, this opinion will control as to the legal issues raised in the en banc hearing.

JAMES D. GREGG, Bankruptcy Judge, concurring.

I agree with the en banc decision. The Bankruptcy Code and Rules must be harmonized unless it is impossible to do so. "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme...." United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371, 108 S.Ct. 626, 630 (1988) (citations omitted). Section 506(d) of the Bankruptcy Code refers both to sections 501 and 502. [FN1] Congress made a distinction between a claim being "disallowed" pursuant to section 502 and "not ... allowed" pursuant to section 501. Further, in section 506(d)(2), Congress stated a claim may not be an allowed claim "due only to the failure of any entity to file a proof of such claim under section 501 of this title." Hausladen fails to give appropriate analytical weight to section 501 and totally ignores section 506(d). Reading all Code sections together mandates that an untimely claim (as procedurally defined in the Bankruptcy Rules) shall not be allowed; such a claim is "barred".

*9 The Supreme Court has also recently addressed untimely filed claims in a case involving the "excusable neglect" exception. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, --- U.S. ----, 113 S.Ct. 1489 (1993). In Pioneer Investment, the Court held a late filed proof of claim in a chapter 11 case may be allowed under certain circumstances by reason of "excusable neglect" under Bankruptcy Rule 9006(b)(1). Id. at ----, 113 S.Ct. at 1492. In its discussion, albeit dicta, the Court noted that the "excusable neglect" exception is restricted by the Bankruptcy Rules. "Subsections (b)(2) and (b)(3) of [Bankruptcy]

Rule 9006 enumerate those time requirements excluded from the operation of the 'excusable neglect' standard. One of the time requirements listed as excepted in Rule 9006(b)(3) is that governing the filings of proofs of claim in Chapter 7 cases. Such filings are governed exclusively by Rule 3002(c)." Id. at ----, 113 S.Ct. at 1495 n. 4 (emphasis supplied). Bankruptcy Rule 3002 is not limited to chapter 7 cases. It governs chapter 12 and chapter 13 as well. Therefore, filing of chapter 13 claims is also "governed exclusively by Rule 3002(c)." The Supreme Court has sent a strong signal that the Bankruptcy Rule-imposed claims filing deadline, or "bar date", must be enforced. Following Hausladen renders section 501 of the Bankruptcy Code and Bankruptcy Rule 3002 meaningless. I decline to do so.

FN1. Counsel for the Department stated that it was not the Department's practice to file late claims on the theory that the filing of a claim might operate as a waiver of the right of the Department to pursue claims for trust fund taxes (for example, unpaid withholding taxes for which the taxpayer was a responsible person) after the chapter 13 has been completed. As a consequence of its non-filing policy, other taxes for which no claim has been filed are normally written off. The claim filed in Zimmerman was submitted in derogation of this policy.

FN2. This relationship apparently became clear only when the Service attempted to levy upon the debtors' bank account to satisfy the Star-Con, Inc. liability.

FN3. The court is aware that legislative history may be resorted to only when a statute is ambiguous. See Ron Pair, 489 U.S. at 242-43. It is this court's position that ss 501 and 502, when read in conjunction with FED.R.BANKR.P. 3002, are not ambiguous. However, to the extent that the bar date is read out of FED.R.BANKR.P. 3002, as was done by the Hausladen court, the statute becomes ambiguous, as s 501 contemplates consequences for late filing but fails to identify those consequences. This court therefore does not rely upon the legislative history for its interpretation of the statute and rules, which are clear on their face; however, we do rely upon the legislative history in our critque of Hausladen.

FN4. The Bailey court's entry in this verbiage derby is the word "expunge." 151 B.R. at 32. With due respect, we do not find this term entirely satisfactory, either. "Expunge" carries with it the connotation that the claim will be removed from the court record, which is not accurate. The late filed claim will remain on the docket; it is merely ineffective as a claim because it cannot move forward toward allowance under s 502.

FN5. The Supreme Court has referred to the timely claims allowance deadline as the "bar date" in the chapter 11 context. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, --- U.S. ----, ----, 113 S.Ct. 1489, 1492 (1993).

FN6. This result does not effect unsecured creditors who do not have notice of the bar date. The Sixth Circuit has stated that the claims of unsecured creditors who do not have notice of the bar date could not be disallowed because disallowance would result in an unconstitutional taking of their property. IRS v. Century Boat Co. (In re Century Boat Co.), 986 F.2d 154 (6th Cir.1993); United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1091 (6th Cir.1990); see also Barton, supra.

FN1. Section 506(d) of the Bankruptcy Code states: To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless-- (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.
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--- B.R. ----
(Cite as: 1993 WL 255955 (Bankr.N.D.Ill.))
IN RE: Joseph Johnson and Bobbie J. Hill-Johnson, Debtors.
No. 91-B-16374.
United States Bankruptcy Court,
N.D. Illinois.
June 1, 1993.

SONDERBY
MEMORANDUM DECISION
*1 This matter comes before the Court on the Trustee's objection to the unsecured claim of American Ambassador Casualty Company. The Court sustains the Trustee's objection and disallows American Ambassador Casualty Company's claim because it was not timely filed.
JURISDICTION
The Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. Section 157(b)(2)(A), (B) and (O).
BACKGROUND
Sometime in June 1989, Joseph Johnson was involved in an automobile accident with Denise Cohn. At the time of the accident, Ms. Cohn was insured by American Ambassador Casualty Company ("Ambassador"). Ambassador became subrogated to the rights of Ms. Cohn and asserted a claim against Mr. Johnson. In September 1989, Mr. Johnson responded to a letter from Ambassador and acknowledged the accident but denied liability.
Two years later, on August 1, 1991, Mr. Johnson and his wife ("Debtors") filed a joint petition under Chapter 13 of the Bankruptcy Code. In their schedule of debts, the Debtors listed Ms. Cohn as an unsecured creditor in the amount of $3,375. Ms. Cohn, however, never filed a proof of claim. The Court confirmed a plan which provided for 25 % payment of the allowed unsecured claims.
Ambassador obtained a judgment against Mr. Johnson in the amount of $3,128 on June 29, 1992. Upon attempting to garnish Mr. Johnson's wages, Ambassador learned of the bankruptcy. On October 2, 1992, Ambassador filed a proof of claim for $3,128. The Trustee objected to the claim as untimely. Ambassador argues it never received notice of the underlying bankruptcy until September 25, 1992 and to disallow its claim would be inequitable and unfair.
DISCUSSION
The issue is whether a creditor's untimely or tardily filed proof of claim should be allowed in a Chapter 13 case. When a proof of claim may be filed and whether a filed proof of claim will be deemed allowed are two distinct issues governed by separate provisions of the Code. Section 501 [FN1] governs the filing of proofs of claim and Section 502 [FN2] governs the allowance of those filed claims. Although Sections 501 and 502 are distinct and independent, these two sections work conjunctively with the

Federal Rules of Bankruptcy Procedure to define the claims "allowed" and thus subject to payment from the estate.
When a debtor files a petition under Title 11 an estate is created against which a universe of claims pend. Section 501 narrows this universe of claims by providing who may file a proof of claim and Section 502 provides the mechanism for allowing those filed claims. The interaction between these two sections is expressed in the text of Section 502 which provides "that a claim or interest, proof of which filed under Section 501 of this title, is deemed allowed." 11 U.S.C. s 502(a) (emphasis added) The literal language of Section 502 substantively allows a claim but only to the extent that it is filed in compliance with Section 501. This matter involves the filing of a proof of claim, and thus is governed by Section 501.
*2 Although Section 501 establishes who may file a proof of claim, it fails to enumerate time limitations or procedures for filing proofs of claim. According to the legislative history, the Rules of Bankruptcy Procedure are to address those issues. See H.R. Rep No. 595, 95th Cong., 1st Sess., 351 (1977), U.S.Code Cong. & Admin. News 1978, pp. 5787, 5847, 6307 (rules of bankruptcy procedure are to guide creditors as to when filing would be necessary.). The applicable rule is Federal Rule of Bankruptcy Procedure 3002 which provides in pertinent part: (a) Necessity for Filing. An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.
* * *
(c) Time for Filing. In a chapter 7 liquidation or a chapter 13 individual debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to Section 341(a) of the Code,.... Fed.R.Bankr.P. 3002(a) and (c). The text of the Rule requires the filing of a proof of claim within the prescribed period as a prerequisite to allowance. Thus, Rule 3002 gives effect to Section 501 as a procedural limitation to filing. It is this procedural limitation which narrows the universe of claims to an identifiable set of claims recognized by Section 502 as "allowed" against the estate.
Interpreting Rule 3002 as a time bar is consistent with the Seventh Circuit's reasoning as set forth in In re Danielson, 981 F.2d 296 (7th Cir.1992). In Danielson, the Seventh Circuit considered Rule 3004 which contains a 30 day requirement for the filing of proofs of claim by the debtor or trustee on behalf of creditors. That Rule provides in relevant part: If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to Section 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable.... Fed.R.Bankr.P 3004. The Danielson court construed Rule 3004 as establishing a time bar for filing such proofs of claim by interpreting the permissive term "may" as giving the

debtor or trustee the option of filing a proof of claim; however, the Court concluded that a debtor or trustee wanting to file a proof of claim on behalf of a creditor "must" do so within the time specified. Id. at 298.

Like Rule 3004, Rule 3002 establishes a time period for filing proofs of claim under Section 501. The rules differ in that the time period established in Rule 3002 applies only to a creditor while the time period established in Rule 3004 applies to filings made by a debtor or trustee on behalf of a creditor. Another difference is in the language used. Notably, Rule 3002 is much less lenient in prescribing the applicable time period within which a creditor must file a proof of claim by expressly providing that any such proof of claim "shall be filed within 90 days ... " Fed.R.Bankr.P. 3002(c). Rule 3004, on the other hand, uses more permissive language in defining the applicable time period within which a debtor or trustee must file by expressly providing that any such proof of claim "may" be filed within 30 days. Fed.R.Bankr.P. 3004. Because the Danielson court construed Rule 3004 as establishing a time bar and because the language of Rule 3002 is less permissive, the Court feels compelled to interpret Rule 3002 similarly. [FN3]

*3 Recently, a Minnesota bankruptcy court addressed the issue of tardily filed proofs of claim in a Chapter 13 context and held untimeliness was not a basis for disallowing such claims. In re Hausladen, 146 B. R. 557 (Bankr.D. Minn.1992). The Hausladen court's reasoning has engendered similar holdings from courts addressing the issue in a Chapter 13 and Chapter 7 context. See, e.g., In re Judkins, 151 B.R. 298 (Bankr.D. Colo.1993) (recognizing that Rule 3002(c) is not a bar to allowing claims in a Chapter 13 case); In re Rago, 149 B.R. 882 (Bankr.N.D. 111.1992) (recognizing that Rule 3002(c) is not a bar to allowing claims in a Chapter 7 case).

Beginning with the Bankruptcy Act and ending with Section 726, the Hausladen court carefully links several arguments to support its conclusion that untimely or tardily filed proofs of claim should be allowed in a Chapter 13 case. The Hausladen court's reasoning, however, is premised upon a single misconception--that Rule 3002's time bar conflicts with the provisions of Section 502 in a Chapter 13 context. The Court respectfully declines to follow the Hausladen reasoning for several reasons.

The Hausladen court's reasoning is that under the Bankruptcy Act, untimely or tardily filed proofs of claim were expressly not allowed pursuant to Section 57(n) which provided "claims which are not filed within six months after the first date set for the first meeting of the creditors shall not be allowed ... " 11 U.S.C. Section 93(n) (repealed Oct. 1, 1979) (emphasis added). [FN4] Like the statute, the Act's applicable rules of procedure also expressly required the timely filing of proofs of claim for allowance. [FN5] Under the present Code, however, Section 502 governs the disallowance (a) Manner of Filing.--In order for his claim to be allowed, every creditor, including the United States, any state, or any subdivision thereof, must file a proof of claim in accordance with this rule .... of claims and contains no similar provision "not allowing" untimely or tardily filed proofs

of claim. Yet, Rule 3002 contains an express time period within which proofs of claim must be filed which is similar to the former Rule 13-302. The Hausladen court maintains that the drafters of Fed.R.Bankr.P. 3002 hastily copied the substance of the old Act Rule 13-302 while ignoring a major change in the underlying statute, specifically the omission of language that untimely filed claims "shall not be allowed." Hausladen, 146 B.R. at 559. According to the Hausladen court, therefore, the current practice of disallowing late filed claims is the direct result of carrying over pre-code law into present practice which was not Congress' express intent. The Hausladen court misinterprets the interplay of the Code provisions and Rules of Bankruptcy Procedure.

Namely, Congress, in revising and modernizing the bankruptcy law, removed and left to the Rules of Bankruptcy Procedure nearly all procedural matters formerly incorporated in the Act. H.R.Rep. No. 595, 95th Cong., 1st See. 449 (1977), reprinted in 1978 U.S.Code Cong. & Admin.News 5963, 6405. Thus, Rule 3002(c) eliminates the need for Code language specifically excluding untimely or tardily filed proofs of claim. Consequently, the difference between Section 57(n) of the Bankruptcy Act and Code Section 502(b), by itself, lends no support for the Hausladen court's conclusion that Congress abandoned the "bar date" concept. It is this misunderstanding of Rule 3002's purpose that leads the Hausladen court to conclude that a conflict exists between Rule 3002 and Section 502.

*4 The Hausladen court stated that a claim is deemed allowed unless an objection is made, and if an objection is made, the court shall allow the claim except to the extent that the objection fits into one of eight specific categories, none of which includes untimeliness. 146 B.R. at 559. According to the Hausladen court, bankruptcy courts incorrectly disallow untimely or tardily filed claims which, as noted, is not a reason for disallowance. [FN6] Thus, the Hausladen court concludes that disallowing a filed proof of claim because of untimeliness conflicts with the express provisions of Section 502(b) for disallowing claims.

The Hausladen court perceives a conflict where none exists by confusing a proof of claim not allowed pursuant to Section 501 and a claim disallowed pursuant to Section 502. Completely overlooked by the Hausladen court is the fact that Rule 3002 gives effect to Section 501 by creating a procedural bar to filing. As noted above, Congress intended the rules of procedure to establish the time for filing a proof of claim under Section 501. The Hausladen court's failure to recognize Section 501 as a procedural limitation for filing proofs of claim and Section 502 as a substantive limitation for allowing timely filed claims severely undermines the allowance of untimely or tardily filed claims in a Chapter 13 context. [FN7]

The Hausladen court makes one final effort to resurrect a perceived conflict between the Code provisions and the Rules of Procedure by pointing to Section 726. Hausladen, 146 B.R. at 560. That section governs the distribution of property in Chapter 7 and expressly provides for the payment of tardily filed

claims. Because not allowing untimely or tardily filed claims in a Chapter 7 conflicts with the express provisions of Section 726, the Hausladen court contends that Section 726 illustrates that the timeliness of a claim is relevant only for purposes of treatment, not allowance. Consequently, the Hausladen court concludes that courts should allow untimely or tardily filed claims, and then look to the Chapter 13 plan to determine the treatment of such claims. Although the Hausladen court's observation may have some merit in a Chapter 7 context, [FN8] it falls far short of recognizing a similar conflict in a Chapter 13 context because Chapter 13 plans do not incorporate the distribution scheme recognized in liquidations.

The distribution scheme in liquidations is to ensure all parties have an opportunity to collect from limited assets. A plan of reorganization in Chapter 13 cases is the voluntary payment by debtors of obligations over a period of time from current and future assets. See In re Casper, 1993 WL 131943 (Bankr.N.D. Ill.1993). The dissimilarity between the Chapters is further demonstrated by the discharge provisions. Unlike a discharge in Chapter 7, a discharge under Chapter 13 is much narrower in scope by discharging only those claims provided for in the plan or disallowed pursuant to Section 502. 11 U.S.C. s 1328(a). Thus, Chapter 13 places a heavy burden upon a debtor to account and provide for the treatment of his or her creditors' claims under a plan of reorganization--a treatment which is automatically provided for in liquidations pursuant to Section 726. Because of the dissimilarities between reorganizations and liquidations, including their respective goals, this Court sees no reason to impart a purported conflict between the Rules and Section 726 into Chapter 13 reorganizations.

*5 Based on the foregoing, the Court finds the Hausladen court's reasoning unpersuasive. In this case, Ambassador's right to collect its judgment has not been prejudiced because the Court will not allow Ambassador's tardily filed claim. This claim will not be discharged because Ambassador's claim was neither provided for by the plan nor disallowed pursuant to Section 502. See 11 U.S.C. s 1328(a). If a debtor intends in all honesty to pay his or her creditors then that debtor bears some responsibility for ensuring that those claims are filed.

The plain language of the Code provisions and Rules of Bankruptcy Procedure as well as the Seventh Circuit case law requires this Court to not allow untimely or tardily filed claims in a Chapter 13 context. Consequently, Ambassador's tardily filed claim is not allowed.

CONCLUSION

The Court will sustain the Trustee's objection to Ambassador's tardily filed claim. Ambassador's claim is not allowed and the Trustee is to make no payment to this creditor based on that claim.

FN1. Section 501 provides: (a) A creditor or an indenture trustee, may file a proof of claim. An equity security holder may file a proof of interest. (b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable

to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim. (c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim. (d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition. 11 U.S.C. s 501.

FN2. Section 502 provides in pertinent part: A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects. 11 U.S.C. s 502(a).

FN3. The Court also notes that prior to the Danielson decision, the Seventh Circuit had previously recognized that a creditor must file a proof of claim within 90 days for said claim to be timely in In re Unroe, 937 F.2d 346 (7th Cir.1991). Although not specifically addressing the issue of whether a claim was disallowed for untimeliness, the Court of Appeals noted that late-filed proofs of claim disrupt the orderly discharge of debts, and thus should generally be barred. Id. at 351. The Danielson and Unroe decisions treat untimely filed proofs of claim as not allowed and absent a clear directive from the Court of Appeals to the contrary, so will this Court.

FN4. 11 U.S.C. s 93 is the formerly official citation to the session law commonly referred to as Section s 7.

FN5. Rule 13-302 provided in pertinent part: (e) Time for Filing.... (2) Unsecured Claims. Unsecured claims, whether or not listed in the Chapter XIII Statement, must be filed within 6 months after the first date set for the first meeting of creditors in the Chapter XIII case.... R.Bankr.P. 13-302(a) and (e)(2) (repealed).

FN6. This Court notes that numerous courts have treated and continue to treat Rule 3002 as a time bar, and thus do not allow untimely filed claims. See, e.g., In re Bailey, 151 B.R. 28 (Bankr.S.D. N.Y.1993) (rule 3002 operates as a bar date); In re Duarte, 146 B.R. 948 (Bankr.W.D. Tex.1992) (rule 3002(c) operates as a statute of limitations); In re Glow, 111 B.R. 209 (Bankr.N.D. Ind.1990) (tardily filed claim in a Chapter 13 case is not allowable); see In re Hausladen, 146 B.R. 557, 561 n.6 (Bankr.D. Minn.1992) for compilation of cases construing 3002 as a time bar; see also In Re William J. Stoecker, p B.R.p 1993 WL 66025 (Bankr.N.D. Ill.1993) (an untimely filed proof of claim in a Chapter 7 case disallowed pursuant to Section 502(b)(1) by giving Rule 3002(c) effect as a statute of limitation).

FN7. Applying the Hausladen reasoning in this Circuit would discriminate among untimely filed claims depending on the party

filing such claim. According to Hausladen, a creditor's untimely or tardily filed claim should be allowed. As previously explained, the Seventh Circuit in the Danielson decision held that the time limits of Fed.R.Bankr.P. 3004 require a debtor or trustee to file a proof of claim within the time prescribed. Thus, if this Court were to apply the Hausladen reaso ning in light of the Danielson decision only those proofs of claim filed by creditors could be filed after the claims bar date and those filed by the debtor or trustee could not. There is no justification for such differing treatment in a Chapter 13.

FN8. The Rago court expanded upon the Hausladen court's observation and held that disallowing tardily filed claims in a Chapter 7 case creates a conflict between the Code and Rules. In re Rago, 149 B.R. 882 (Bankr.N.D. 111.1992). The Stoecker court, however, declined to follow the Rago reasoning in a similar Chapter 7 context. In re Stoecker, p B.R. p 1993 WL 66025 (Bankr.N.D. Ill.1993).
END OF DOCUMENT

AGENDA VII
Jackson Hole, Wyoming
September 13-14, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 4008

DATE: July 27, 1993

Bankruptcy Rule 4008 governs discharge and reaffirmation hearings. It provides as follows:

Rule 4008. Discharge and Reaffirmation Hearing

> Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as prescribed in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

Henry Sommer has suggested that Rule 4008 be amended to add a deadline for filing reaffirmation agreements. In particular, Henry has written the following:

> "Under current rule 4008, any discharge hearing must be held within 30 days following the entry of an order granting or denying a discharge, and on not less than 10 days notice to the debtor and the trustee. Section 524(d) requires the court to have a discharge hearing in any case where the debtor intends to reaffirm a debt. However, there is no way for the court to know whether the debtor intends to reaffirm a debt until the reaffirmation agreement is filed with the court, and there is no requirement that the reaffirmation agreement be filed with the court prior to the discharge. Therefore, situations could arise where the reaffirmation agreement was filed more than 20 days after the discharge order and there would be no way for the court to comply with the rule about scheduling a discharge hearing. To remedy this problem, there should be a deadline for filing any reaffirmation agreement with the court and sufficient time so that the court can send notice of and hold the discharge hearing within the time required by the rules."

I agree with Henry that Rule 4008 should be amended to

provide a time limit for filing reaffirmation agreements so that the court will know to schedule a hearing within the 30-day time period provided in the existing rule.

In looking at this problem, it occurred to me that the current rule also may give the erroneous impression that discharge hearings are always discretionary. I therefore think that the Advisory Committee should consider further amendments to make it clear that (1) hearings under § 524(d) are not required unless the debtor desires to reaffirm a debt, (2) if the debtor enters into a reaffirmation agreement (whether or not court approval of the agreement is required under § 524(c)(6)), a hearing is required, and (3) if court approval is needed under § 524(c)(6), a motion for approval must be filed at or before the hearing.

In view of the above, I prepared a draft of proposed amendments to Rule 4008 for the Committee's consideration at the February 1993 meeting. After discussing this matter, members of the Committee at first voted to delete language that referred to chapter 11 cases involving individual debtors because (1) corporations and partnerships also can reaffirm, and (2) the confirmation order can tie discharge to some later effective date. After further discussion as to whether any amendments should be made, the Committee voted to revisit this rule at the September 1993 meeting.

Since the last meeting, I again considered Rule 4008 and I still believe that some amendment is needed for the reasons

expressed by Henry Sommer. Regarding the language referring to chapter 11 cases, I think that it makes sense to track the statute (§ 524(c) and (d)) by listing the applicable discharge sections of the Code instead of referring to confirmation of a chapter 11 plan (in case the confirmation order and the discharge is effective on different dates, which is a rare event). I also think that it is best to limit the rule to individual debtors because only individual cases are governed by § 524(d). That is, there are no discharge or reaffirmation hearings involving corporate or partnership debtors even if they wish to reaffirm a debt under § 524(c).

I have amended the draft that was considered at the last meeting to (1) add appropriate references to discharge sections of the Code, (2) delete references to confirmation of a chapter 11 plan, (3) clarify that only individual debtors (regardless of the chapter) may be the subject of a hearing under § 524(d). The Committee Note clarifies that the rule only applies to individual debtors, but that corporations or partnerships also may reaffirm debts.

A question that the Committee may wish to consider is whether the time limit for filing a reaffirmation agreement should apply in corporate or partnership cases in which there can be no reaffirmation hearing under § 524(c). Does it make sense to impose a time limit so that there will be finality -- instead of allowing a reaffirmation agreement executed before the discharge to be filed months or even years after the chapter 11

or chapter 12 discharge? Such reaffirmation agreements are probably very rare anyway.

I attach a new draft for consideration by the Committee at the September meeting. This draft only applies to individual debtors and imposes no time limit for filing reaffirmation agreements in chapter 11 or chapter 12 cases involving corporations or partnerships.

Rule 4008. Discharge Hearing and Reaffirmation ~~Hearing~~ Agreements by an Individual Debtor

(a) Discharge Hearing. Not more than 30 days following the entry of an order granting or denying a discharge under § 727, 1141, 1228, or 1328 of the Code ~~or confirming a plan in a chapter 11 reorganization case~~ in a case concerning an individual debtor, and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as prescribed in § 524(d) of the Code. ~~A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.~~

(b) Reaffirmation Agreement by Individual Debtor. In a case concerning an individual debtor, any reaffirmation agreement made in accordance with § 524(c) shall be filed not more than 10 days after the entry of an order granting a discharge under § 727, 1141, 1228, or 1328 of the Code. If a reaffirmation agreement is timely filed in a case concerning an individual debtor, the court shall hold a hearing as prescribed in § 524(d) and subdivision (a) of this rule. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

COMMITTEE NOTE

This rule is amended to clarify that, although a hearing under § 524(d) of the Code usually is discretionary, a hearing is required if a discharge has been granted, the debtor is an individual, and the debtor desires to make a reaffirmation agreement in accordance with § 524(c).

This amendment also establishes a 10-day time limit for filing a reaffirmation agreement in cases concerning an individual debtor so that the court will have sufficient time to schedule and hold a hearing within the 30-day period provided in subdivision (a) of this rule. If court approval of the reaffirmation agreement is required under § 524(c)(6), a motion for such approval shall be filed before or at the hearing.

Although a debtor that is a corporation or partnership may reaffirm a debt pursuant to § 524(c) in a chapter 11 or chapter 12 case, the time limits set forth in this rule does not apply to the filing of reaffirmation agreements in such cases because they do not require a hearing under § 524(d).

AGENDA VIII
Jackosn Hole, Wyoming
September 13-14, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 8002(c)

DATE: August 5, 1993

At the June meeting of the Standing Committee, proposed amendments to Bankruptcy Rule 8002(b) were approved and forwarded to the Judicial Conference. A copy of the proposed amendments is attached.

As recommended by the Advisory Committee, the amended rule will provide that a motion to modify a judgment under Rule 9024 (Civil Rule 60) will toll the time for filing a notice of appeal only if the motion is filed (instead of served) within 10 days after the entry of the judgment. Consistent with the proposed amendment to Rule 8002(b), the Standing Committee also approved changes to the relevant Civil Rules (50, 52 and 59) to require that such post-judgment motions be filed within 10-days after entry of the judgment.

During the public comment period on Rule 8002(b), Chief Bankruptcy Judge Robert J. Kressel (Minnesota) suggested that similar amendments should be made to Rule 8002(c) to clarify that a request for an extension of the time to appeal must be filed within the applicable time periods. I agree.

I suggest that the Advisory Committee recommend the following amendments to Rule 8002(c):

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be ~~made~~ filed before the time for filing a notice of appeal has expired, except that a request ~~made~~ filed no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

AGENDA IX
Jackson Hole, Wyoming
September 13-14, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 1007(c)

DATE: August 4, 1993

Bankruptcy Rule 1007(c) governs the time for filing schedules and statements. The third sentence provides that: "Schedules and statements previously filed in a pending chapter 7 case shall be deemed filed in a superseding case unless the court directs otherwise."

Judge Paul Mannes has suggested that the above sentence in Bankruptcy Rule 1007(c) be amended to delete the reference to "chapter 7." I agree. As a result of the 1991 amendments to the Official Forms, there now is only one form for the schedules and one form for the statement of financial affairs applicable to all debtors and all cases. The old Chapter 13 Statement has been abrogated. Therefore, it makes sense for the rule to provide that schedules and statements previously filed in any type of case shall be deemed filed in a superseding case, unless the court directs otherwise.

I recommend that the rule be amended as follows:

Rule 1007. Lists, Schedules and Statements; Time Limits

* * *

(c) TIME LIMITS. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied

by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements previously filed in a pending ~~chapter 7~~ case shall be deemed filed in a superseding case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

COMMITTEE NOTE

Subdivision (c) is amended to provide that schedules and statements filed in a pending case shall be deemed filed in a superseding case, whether or not the pending case is a chapter 7 case.

AGENDA X
Jackson Hole, Wyoming
September 13-14, 1993

ORAL PRESENTATION

AGENDA XI
Jackson Hole, Wyoming
September 13-14, 1993

HERMAN L. GLATT
RICHARD M. NEITER
ROBERT A. GREENFIELD
CHARLES D. AXELROD
THEODORE B. STOLMAN
ISAAC M. PACHULSKI
KENNETH N. KLEE
ALAN PEDLAR
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STEPHAN M. RAY
MICHAEL A. MORRIS
JEFFREY C. KRAUSE
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WRITER'S DIRECT NUMBER

(213) 251-5165

June 28, 1993

The Honorable Edward Leavy
Chairman
The Advisory Committee on
Bankruptcy Rules
216 Pioneer Courthouse
Portland, OR 97204

Re: **Amendments to the Bankruptcy Rules**

Dear Chairman Leavy:

During a recent review of the Bankruptcy Rules, I noted two rules that could be improved. First, Rule 9024, which deals with relief from a judgment or order by incorporating Federal Rule of Civil Procedure 60, contains a carve out with respect to complaints to revoke orders confirming plans. Unfortunately, the carve out only applies to revocation, not to modification or alteration of an order confirming a plan. Based on the Supreme Court's recent interpretation of the excusable neglect standard, I believe it is important for the Bankruptcy Rules to clarify that revocation is the only appropriate remedy to deal with relief from an order confirming a plan. See Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 113 S. Ct. 1489 (1993). Currently, Bankruptcy Rule 9024 creates an ambiguity by incorporating Fed. R. Civ. P. 60 generally while only carving out complaints to revoke orders confirming a plan. In my view, Rule 9024 should apply to an order confirming a plan only to the extent provided in 11 U.S.C. § 1144.

My second suggestion deals with Rule 7001 as it applies in the context of a plan of reorganization. Specifically, except with respect to subordination in Rule 7001(8), Bankruptcy Rule 7001 requires a complaint to be filed to commence an adversary proceeding. In 1985 the Ninth Circuit held, quite properly, that based on the requirements of Rule 7001(1), a plan of reorganization could not avoid a preferential transfer without the filing of a separate complaint. In re Commercial W. Fin. Corp., 761 F.2d 1329 (9th Cir. 1985). As presently drafted, Rule 7001 could be interpreted to preclude a plan of reorganization

from issuing an injunction, selling jointly owned property pursuant to section 363(h), or determining the validity, priority, or extent of a lien. While the propriety of the matter is not free from doubt when the injunction precludes suits against third parties, several plans of reorganization presently provide for injunctions or other equitable relief. In none of these instances is a separate complaint filed. See, e.g., Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989); MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89 (2d Cir.), cert. denied, 488 U.S. 868 (1988). Of course, if the Rule is amended, the comment to the rule should be clear that the amendment to permit the issuance of an injunction under a plan without the filing of a complaint is procedural only and does not indicate a substantive view whether such an injunction is authorized. See American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989). Similar amendments should be considered with respect to lien modifications and sales of jointly owned property.

If time permits, I would like to discuss these proposed amendments to the Bankruptcy Rules at our September meeting. If not, I request that these suggestions be considered as soon as practicable thereafter.

Best regards.

Very truly yours,

Kenneth N. Klee

KNK:amg

cc: Professor Alan Resnick
Members of the Advisory Committee
on Bankruptcy Rules

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WRITER'S DIRECT NUMBER
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July 8, 1993

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: **Advisory Committee on Bankruptcy Rules**

Dear John:

At the request of Chairman Leavy per the enclosed correspondence, I am enclosing suggested improvements to Bankruptcy Rules 7001 and 9024.

Please cause the enclosed suggested improvements to be copied and distributed to members of the Rules Committee so that they may read them prior to the September meeting of the Committee. You may want to clarify that I have provided two alternatives for improvements to Rule 9024 as either or both suggestions may be appropriate.

Very truly yours,

Kenneth N. Klee

KNK/gmr
Enclosures

cc: The Honorable Edward Leavy

V37:0037
RAB.RULE

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

June 30, 1993

Mr. Kenneth N. Klee
Stutman, Treister & Glatt
3699 Wilshire Blvd., Suite 900
Los Angeles, CA 90010

Dear Ken:

Thank you for your letter of June 28, 1993, concerning your suggested improvements to Rules 9024 and 7001. These proposed amendments will be placed on the agenda for our September meeting. If you have the time, I would appreciate your putting together specific language to amend each rule so that we can focus our discussions.

Sincerely,

Edward Leavy

EL/jg

Rule 7001

SCOPE OF RULES OF PART VII

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, except when such sale is provided in a chapter 9, 11, 12, or 13 plan, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, except when such injunction or other equitable relief is provided in, or in an order confirming, a chapter 9, 11, 12, or 13 plan, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.
Amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991.

Cross References

Adversarial nature of proceeding -

Avoidance of indemnifying lien or transfer to surety, see rule 6010.
Commenced by complaint objecting to discharge, see rule 4004.
Commenced by complaint to obtain determination of debt's dischargeability, see rule 4007.
Joinder of objection to claim with demand for relief, see rule 3007.
Liability of sureties on bond or stipulation or other undertaking, see rule 9025.
Applicability of rules of this part to removed claim or cause of action, see rule 9027.
Contested matters, applicability of and notice to parties of applicability of rules of this part, see rule 9014.
Effect of amendment of Federal Rules of Civil Procedure, see rule 9032.
Meanings of words in Federal Rules of Civil Procedure when applicable, see rule 9002.

Rule 9024

RELIEF FROM JUDGMENT OR ORDER

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330, and (4) a motion for relief from an order confirming a chapter 9, 11, 12, or 13 plan may not have the effect of modifying such a plan in violation of §§ 942, 1127(b), 1229, or 1329, as the case may be.

Amended Apr. 30, 1991, eff. Aug. 1, 1991.

Cross References

Enlargement of time for motion for relief from judgment or order not permitted, see rule 9006.
Motions; form and service, see rule 9013.
Reconsideration of allowance or disallowance of claims, see rule 3008.
Reopening cases, see rule 5010.
Revocation of discharges under individual debt adjustment plan, see § 1328 of this title.
Setting aside judgment by default, see rule 7055.

Advisory Committee Note

Motions to reopen cases are governed by Rule 5010. Reconsideration of orders allowing and disallowing claims is governed by Rule 3008. For the purpose of this rule all orders of the bankruptcy court are subject to Rule 60 F.R.Civ.P.

Pursuant to § 727(e) of the Code a complaint to revoke a discharge must be filed within one year of the entry of the discharge or, when certain grounds of revocation are asserted, the later of one year after the entry of the discharge or the date the case is closed. Under § 1144 and § 1330 of the Code a party must file a complaint to revoke an order confirming a chapter 11 or 13 plan within 180 days of its entry. Clauses (2) and (3) of this rule make it clear that the time periods established by §§ 727(e), 1144 and 1330 of the Code may not be circumvented by the invocation of F.R.Civ.P. 60(b).

Advisory Committee Notes to 1991 Amendments

Clause (3) is amended to include a reference to § 1230 of the Code which contains time limitations relating to revocation of confirmation of a chapter 12 plan. The time periods prescribed by § 1230 may not be circumvented by the invocation of F.R.Civ.P. 60(b).

RD.UND
V37:0037

Rule 9024

RELIEF FROM JUDGMENT OR ORDER

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330, and (4) a motion for relief from an order confirming a chapter 9, 11, 12, or 13 plan may only be filed within 180 days after the date of entry of such order.

Amended Apr. 30, 1991, eff. Aug. 1, 1991.

Cross References

Enlargement of time for motion for relief from judgment or order not permitted, see rule 9006.
Motions; form and service, see rule 9013.
Reconsideration of allowance or disallowance of claims, see rule 3008.
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Setting aside judgment by default, see rule 7055.

Advisory Committee Note

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Advisory Committee Notes to 1991 Amendments

Clause (3) is amended to include a reference to § 1230 of the Code which contains time limitations relating to revocation of confirmation of a chapter 12 plan. The time periods prescribed by § 1230 may not be circumvented by the invocation of F.R.Civ.P. 60(b).

BL.UND
V37:0037

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

August 2, 1993

Kenneth N. Klee, Esq.
Stutman, Treister & Glatt
3699 Wilshire Boulevard
Suite 900
Los Angeles, CA 90010-2739

Re: Bankruptcy Rules 7001 and 9024

Dear Ken:

I have considered your suggestions regarding Rules 7001 and 9024 contained in your letter to Judge Leavy dated June 28th and your letter to John Rabiej dated July 8th. Here are my reactions.

Rule 7001

With respect to your proposal to amend Rule 7001, I have the following comments:

(a) I agree that Rule 7001, in view of the Commercial W. Fin. Corp. decision, could be interpreted to mean that an injunction or other equitable relief could not be obtained merely by including it in a plan, which is unfortunate. This could be cured by amending Rule 7001(7) by adding the phrase "except when such injunction or equitable relief is provided in a chapter 9, 11, 12, or 13 plan." I also agree that the committee note should state that this amendment is procedural only and is intended to avoid the necessity of commencing an adversary proceeding only when an injunction or other equitable relief may be provided in a plan consistent with due process and the Bankruptcy Code.

(b) I question whether it is necessary or appropriate to add that such equitable relief may be obtained merely by including it in an order confirming a plan. Your suggestion seems to support

the notion that an injunction should be obtainable without providing for it in a plan and without commencing an adversary proceeding. I do not share that view. If an injunction is being sought as part of the reorganization, the plan itself should provide for it so that creditors and others affected by it could vote on it. For example, the plan could say that "upon confirmation of this plan, creditors shall not ...", or "shall be enjoined from ...." Or, the plan could say that "the confirmation order shall provide that creditors shall be enjoined from ...." I realize that it may be common for a plan to contain an injunction and for the confirmation order to repeat it, which practice could be continued even if Rule 7001(7) is amended as suggested in my paragraph (a) above.

(c) I do not agree with your suggestion that a similar change should be made to Rule 7001(3). The published draft of the original rules promulgated to implement the Bankruptcy Reform Act of 1978 did not require an adversary proceeding to effectuate a sale of both the debtor and nondebtor's interests in jointly held property under § 363(h), but the final version that became effective in 1983 does contain such a requirement in Rule 7001(3). Since a nondebtor (usually a spouse as co-owner of a home) loses his or her possession and ownership of the property, the Advisory Committee was persuaded during the public comment period in 1982 that the nondebtor should have the procedural protection of being served with a summons and complaint before such drastic relief is granted. I believe that such protection should be continued. It is important to note that the co-owner who is ousted from possession of property under § 363(h) is often not a creditor and does not even receive a disclosure statement, plan, or ballot. To adversely affect the property interests of a person who is not a debtor and not a creditor, the maximum procedural protection should be mandated. Merely inserting a clause in a plan should not be sufficient. The thought of permitting this remedy in a plan is especially troublesome in cases where the proponent of the plan is not the debtor, but is a creditor.

Rule 9024

I have the following reactions to your suggestions regarding Rule 9024:

(a) Rule 9024 incorporates Civil Rule 60, but provides three exceptions that are based only on time limitations imposed by the Bankruptcy Code. I would construe Rule 9024 and Rule 60 to mean that relief from, or modification of, any order or judgment must be consistent with the Bankruptcy Code or any other applicable statute or substantive law. For example, I do not think that a court may modify any order if the effect of it is to relieve the debtor of the obligation to pay nondischargeable alimony. An order denying a motion to reject a collective

bargaining agreement could not be modified under Rule 60 if the effect of the modification would relieve the debtor from honoring a collective bargaining agreement without satisfying the requirements of § 1113. Similarly, I do not think that an amendment to Rule 9024 is needed to conclude that a court may not modify a confirmation order if to do so would have the effect of revoking confirmation inconsistent with § 1144, or would have the effect of modifying the plan inconsistent with the requirements for modification set forth in § 1127(b).

I therefore think that it is not necessary to amend Rule 9024 as you suggest in the first of your two drafts of proposed amendments to Rule 9024 attached to your letter of July 8th, in which you suggest that the following be added to the rule: "(4) a motion for relief from an order confirming a chapter 9, 11, 12, or 13 plan may not have the effect of modifying such a plan in violation of §§ 948, 1127(b), 1229, or 1329, as the case may be." I also fear the possible negative inference of such an amendment (could Rule 60 modifications of orders have an effect that violates other Code sections?). I think it is best to continue to list as exceptions in Rule 9024 only time limitations provided by the Code.

(b) The amendment suggested in your second draft would add the following to Rule 9024: "(4) a motion for relief from an order confirming a chapter 9, 11, 12, or 13 plan may only be filed within 180 days after the date of the entry of such order." This is apparently an attempt to conform the time limit for any Rule 60 motion regarding a confirmation order to the time limit for seeking revocation of confirmation under § 1144. If a Rule 60 motion is made regarding a confirmation order that does not have the effect of revoking confirmation in violation of the Code, such as to correct a typographical error so that the order is consistent with the plan, I see no reason to limit the time for making the motion. On the other hand, if the motion is a disguised attempt to revoke confirmation in violation of § 1144, the court should permit it only if all the requirements of § 1144 are met (not just the time limit). Of course, Rule 60 is always discretionary with the court ("the court may ....").

(c) In your June 28th letter, you said: "In my view, Rule 9024 should apply to an order confirming a plan only to the extent provided in 11 U.S.C. § 1144." I do not agree. Section 1144 only governs revocation of a confirmation order and provides for revocation only for fraud. There may be a situation in which a confirmation order could be modified without it constituting revocation. Why should a court be prohibited from correcting clerical errors in a confirmation order, or from granting other Rule 60 relief if to do so is not inconsistent with § 1144 or any other section of the Code?

I would welcome an opportunity to discuss these matters with you by telephone. Please call me at 212-820-8528. In addition to these proposals, I also would like to discuss your suggestion regarding Rule 3010 (contained in your letter of February 12th) and your suggestion regarding an attorney's right to obtain transcripts of bankruptcy court hearings on an expedited basis. As always, I look forward to hearing from you.

Best personal regards.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee
on Bankruptcy Rules

AGENDA XII
Jackson Hole, Wyoming
September 13-14, 1993

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RICHARD M. NEITER
ROBERT A. GREENFIELD
CHARLES D. AXELROD
THEODORE B STOLMAN
ISAAC M. PACHULSKI
KENNETH N. KLEE
ALAN PEDLAR
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GEORGE C. WEBSTER II
STEPHAN M. RAY
MICHAEL A. MORRIS
JEFFREY C. KRAUSE
BRUCE BENNETT
MICHAEL H. GOLDSTEIN
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FRANK A. MEROLA
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February 12, 1993

Professor Alan Reznick
Hofstra University - School of Law
Hempstead, NY 11550

Re: Bankruptcy Rules

Dear Alan:

Since I last corresponded with the Rules Committee, I have had occasion to focus on the necessity for a rule pertaining to minimum distributions in chapter 11 cases. As you know, Bankruptcy Rule 3010 sets forth rules with respect to small dividends and payments in chapter 7, 12, and 13 cases. These are useful rules because they preclude the distribution of minimum amounts of money by trustees and disbursing agents. The absence of a similar rule for chapter 11 cases implies that small amounts must be distributed to holders of claims.

I believe it would be beneficial for the Rules Committee to consider the adoption of a new Bankruptcy Rule 3010(c) pertaining to chapter 11 cases which would specify that no payment in an amount less than $25.00 shall be distributed by the trustee or debtor-in-possession to any holder of a claim or interest unless authorized by local rule or order of the Court.

I would be interested to your reaction with respect to this proposal.

I look forward to seeing you in Florida.

Very truly yours,

KENNETH N. KLEE

KNK:amg

AGENDA XIII
Jackson Hole, Wyoming
September 13-14, 1993

ORAL PRESENTATION

AGENDA XIV
Jackson Hole, Wyoming
September 13-14, 1993

United States Bankruptcy Court
District of Utah
Frank E. Moss United States Courthouse
Room 348
350 South Main Street
Salt Lake City, Utah 84101

William C. Stillgebauer
Clerk of Court

TELEPHONE
(801) 524-6565
(801) 524-5157

January 28, 1993

Peter G. McCabe, Secretary
Committee on Rules of
Practice and Procedure
Administrative Office of
The United States Courts
Washington, D.C. 20544

Dear Mr. McCabe,

This letter is to propose a possible alteration to Federal Rules of Bankruptcy Procedure 2002(h). At present, the subdivision encompasses all notices that are mentioned in 2002(a) except for clause (4). It is this clerk's suggestion that the notice mentioned in Rule 2002(f)(8) also be included in subdivision (h). Logically, the trustee's summary will be of interest/consequence to only those creditors who have previously filed a claim. It is felt that by not receiving the notice no harm befalls those creditors who did not file a claim.

Thank you.

Very truly yours,

Glenn M. Gregorcy
Chief Deputy Clerk

AGENDA XV
Jackson Hole, Wyoming
September 13-14, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PIONEER INVESTMENT DECISION AND THE 1993 AMENDMENTS TO OFFICIAL FORM 9

DATE: AUGUST 9, 1993

Bankruptcy Rule 3003(c)(3) provides that in a chapter 11 case "[t]he court shall fix and for cause may extend the time within which proofs of claim or interest may be filed." Rule 9006(b)(1) permits the court to extend time limits after the relevant period expires "where the failure to act was the result of excusable neglect." Therefore, if a creditor misses a bar date for filing proofs of claim, the court may permit the late filing if the failure to timely file was due to "excusable neglect."

On March 24, 1993, the Supreme Court, in a 5-4 decision, construed and applied the "excusable neglect" standard in Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489 (1993), to uphold a Court of Appeals decision permitting the late filing of proofs of claim. For your convenience, a copy of the decision is enclosed. The Supreme Court has adopted a flexible standard based on a balancing of several factors, as it indicates on page 1498 of the opinion:

> "[W]e conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the

> reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

This standard will make it very difficult to predict how courts will decide "excusable neglect" cases. Each case will be decided on the particular facts and circumstances.

One factor that the Supreme Court, as well as the Court of Appeals, found significant was the form of the notice of the deadline for filing claims, which was unusual in that it was included in a "Notice of Meeting of Creditors." A copy of the notice used in the Pioneer case is enclosed. The form did not conform to the official form in effect at that time for the notice of the meeting of creditors (Official Form 16). In addition to the announcement of the meeting of creditors, the form contained the following:

> "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. Sec. 1111 & Bankruptcy rule 3003. Bar date is August 3, 1989."

The Supreme Court characterized the view of the Court of Appeals with respect to the notice in the following way on page 1494 of its opinion:

> "The Court of Appeals also found 'it significant that the notice containing the bar date was incorporated in a document entitled 'Notice for Meeting of Creditors.'... 'Such a designation,' the court explained, 'would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims.' ... Indeed, based on a comparison between the notice in this case and the model notice set out in Official Bankruptcy Form 16, the court concluded that the notice given respondents contained a 'dramatic ambiguity,' which could well have confused '[e]ven persons experienced in bankruptcy."

Later in the opinion (page 1499-1500), the Supreme Court wrote:

> "We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases. As the Court of Appeals noted, ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance.... We agree with the court that the 'peculiar and inconspicuous placement of the bar date in the notice regarding a creditors['] meeting,' without any indication of the significance of the bar date, left a 'dramatic ambiguity' in the notification.... This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable.' In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondent's counsel was, under all the circumstances, 'excusable.'"

The New Official Forms

The official forms were revised in 1991. Forms 9E and 9F are entitled "Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates." As adopted in 1991, the text of the notice has a paragraph entitled "Proof of Claim" that explains the need for filing a proof of claim and also states that: "If the court sets a deadline for filing a proof of claim, you will be notified."

After the 1991 Official Forms became effective, it came to the Committee's attention that a number of courts, either by standing order or local rule, were routinely setting the deadline for filing claims in chapter 11 cases as soon as the petition was

filed, and that the new official forms did not accommodate the sending of notice of the claims bar date together with the notice of the meeting of creditors. The Administrative Office received inquiries from clerks asking about the proper way to add the bar date to the official form or the propriety of using a different form.

To accommodate those districts that routinely set bar dates early in the case, the Advisory Committee recommended new alternative Official Forms 9E(Alt.) and 9F(Alt.). Copies of the new Forms 9E and 9F are enclosed. These forms were promulgated by the Judicial Conference on March 16, 1993, at which time they became effective. It is interesting to note that the alternate forms were approved and became effective only 8 days before the Supreme Court decided the Pioneer case.

Given the flexibility of the standards adopted by the Court for deciding "excusable neglect" issues, it is impossible to predict how courts will resolve particular cases. However, because the Supreme Court emphasized that the form of the notice of the bar date was a significant factor in its decision that there was "excusable neglect" in Pioneer, I thought that the Committee should focus on Forms 9E(Alt.) and 9F(Alt.) to determine whether it is satisfied that they do not suffer from the inadequacies of the notice in Pioneer. I understand that, since the new forms have become effective, several clerks have asked the Administrative Office whether the new forms are adequate in view of Pioneer.

You will notice that these forms differ from the form of notice used in Pioneer in several respects:

(1) The heading of the new form ("Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates)" clearly indicates that the form includes "Fixing of Dates." In contrast, the Supreme Court emphasized that the notice in Pioneer was headed "Notice of Meeting of Creditors."

(2) The new form has a box labeled "FILING CLAIMS" that runs the entire width of the page, about one-third down from the top of the page. As explained in the Committee Note to the form, if the notice is used to communicate a bar date, the box labeled "FILING CLAIMS" will state: "Deadline for filing a claim: (date)." I do not think that the placement of this notice is inconspicuous. Stating that the date is a "deadline for filing claims" is clearer than stating "Bar date is August 3, 1989" as was done in Pioneer.

(3) The text of the new form contains the following paragraph:

> "PROOF OF CLAIM: Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy

court. Proof of claim forms are available in the clerk's office of any bankruptcy court."

This paragraph does not mention the deadline for filing claims. However, the box in the top part of the page does indicate the "Deadline for filing claims: (date)." Please note that the Supreme Court expressed concern that "ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance." [emphasis added]. Does the use of the word "deadline" for filing claims meet this concern of the Court? Does it adequately explain the significance of the date (better than "bar date is ___")?

(4) It is also significant (perhaps the most significant point) that, at the time of Pioneer, there was no official form in effect that included the notice of the claims bar date with the notice of the meeting of creditors. Instead, the clerk in that case used a home-made non-official notice. As the Court indicated, the form used in Pioneer "was outside the ordinary course in bankruptcy cases." In contrast, there are now official forms -- Form 9E(Alt.) and Form 9F(Alt.) -- that were adopted by the Judicial Conference for the sole purpose of combining the claims deadline with the notice of the meeting of creditors. Considering the adoption of the form by the Judicial Conference, and the practice in several districts of setting a claims deadline at the start of the case, it may be difficult for a court to find that use of these new official forms is "outside the ordinary course in bankruptcy cases."

Based on the above discussion, I think that the new forms

are better than the form used in Pioneer. As I indicated above, it is impossible to predict how a court will decide an "excusable neglect" issue in a particular case. However, I think that courts are likely to find that the new forms give adequate notice of the deadline for filing claims, especially when viewed by an attorney.

My primary purpose in writing this memorandum is to determine whether the Committee is satisfied with the new forms in light of Pioneer. If so, then no action need be taken at this time. If the Committee is satisfied that the new forms give adequate notice of the claims deadline, but decides that further improvements are warranted nonetheless in view of Pioneer, it could discuss such changes at the meeting. For example, one possible amendment is to add language to the third sentence of the paragraph labeled "Proofs of Claim" so that it reads as follows: "Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim before the deadline for filing proofs of claim indicated above." In addition, the heading of the box could be "Deadline for Filing Proofs of Claim", instead of "Filing Claims." The language to be inserted in the box could state "Deadline for filing proofs of claim: ___" instead of "Deadline for filing claims: ___" (this change could be made without changing the form at all because this instruction is only in the Committee Note).

Of course, I do not mean to limit the options available to the Committee to deal with the problems raised by Pioneer, including the more extreme measure of amending Rule 9006(b)(3) and Rule 3003(c) to prohibit the court from extending the bar date based on excusable neglect (as is the rule in chapter 7, chapter 12, and chapter 13 cases -- See Rule 9006(b)(3) and Rule 3002(c)).

with the United States in this case are, in my view, plainly sufficient to subject petitioners to suit in this country on a claim arising out of its nonimmune commercial activity relating to respondent. If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry; for as Justice WHITE explains, *ante*, at 1482, n. 2, 1483, when a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace. I would therefore affirm the judgment of the Court of Appeals.[4]

PIONEER INVESTMENT SERVICES COMPANY, Petitioner

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP et al.

No. 91–1695.

Argued Nov. 30, 1992.

Decided March 24, 1993.

Creditors of Chapter 11 debtor sought extension of bar date for filing late proofs of claim, alleging excusable neglect. The Bankruptcy Court denied the motion and the United States District Court for the Eastern District of Tennessee, Robert Leon Jordan, J., affirmed. The Court of Appeals for the Sixth Circuit, 943 F.2d 673, reversed and remanded. On certiorari review, the Supreme Court, Justice White, held that rule authorizing bankruptcy court to accept late filings where failure to act is result of "excusable neglect," contemplates that courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond party's control.

Affirmed.

Justice O'Connor dissented and filed opinion in which Scalia, Souter and Thomas, Justices, joined.

1. Statutes ⇐212.6

Courts properly assume, absent sufficient indication to the contrary, that Congress intends words in its enactments to carry their ordinary, contemporary, common meaning.

2. Bankruptcy ⇐2900(1)

Rule authorizing bankruptcy court to accept late filings where failure to act is result of "excusable neglect," contemplates that courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond party's control. Fed.Rules Bankr.Proc. Rule 9006(b)(1), 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⇐2900(1)

Determination of whether neglect is "excusable," warranting allowing of late filing of claim, is at bottom an equitable

more narrow requirements of "specific" jurisdiction), I am inclined to agree with the view expressed by Judge Higginbotham in his separate opinion in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 204–205 (1984) (concurring in part and dissenting in part), that the first clause of § 1605(a)(2), interpreted in light of the relevant legislative history and the second and third clauses of the provision, does authorize "general" jurisdiction over foreign entities that engage in substantial commercial activities in the United States.

4. My affirmance would extend to respondents' failure to warn claims. I am therefore in agreement with Justice KENNEDY's analysis of that aspect of the case.

one, taking account of all relevant circumstances surrounding party's omission; these include danger of prejudice to debtor, length of delay and its potential impact on judicial proceedings, reason for delay, including whether it was within reasonable control of movant, and whether movant acted in good faith. Fed.Rules Bankr.Proc. Rule 9006(b)(1), 11 U.S.C.A.

4. Attorney and Client ⇐77

Clients are held accountable for acts and omissions of their attorneys.

5. Bankruptcy ⇐2900(1)

In determining whether creditors' failure to file proofs of claim prior to bar date was excusable, proper focus is upon whether neglect of creditors and their counsel was excusable. Fed.Rules Bankr.Proc. Rule 9006(b)(1), 11 U.S.C.A.

6. Bankruptcy ⇐2897

Claims bar date in bankruptcy case should be prominently announced and accompanied by explanation of its significance.

7. Bankruptcy ⇐2900(1, 2)

Creditors' failure to timely file proof of claim was result of excusable neglect, warranting allowance of late claim, though upheaval in counsel's law practice at time of bar date was irrelevant, creditors acted in good faith, debtor was not prejudiced by delay, and notice of bar date was deficient. Fed.Rules Bankr.Proc.Rule 9006(b)(1), 11 U.S.C.A.

Syllabus *

As unsecured creditors of petitioner—a company seeking relief under Chapter 11 of the Bankruptcy Code—respondents were required to file proofs of claim with the Bankruptcy Court before the deadline, or bar date, established by that court. An August 3, 1989, bar date was included in a "Notice for Meeting of Creditors" received from the court by Mark Berlin, an official for respondents. Respondents' attorney was provided with a complete copy of the case file and, when asked, assertedly assured Berlin that no bar date had been set. On August 29, 1989, respondents asked the court to accept their proofs under Bankruptcy Rule 9006(b)(1), which allows a court to permit late filings where the movant's failure to comply with the deadline "was the result of excusable neglect." The court refused, holding that a party may claim excusable neglect only if the failure to timely perform was due to circumstances beyond its reasonable control. The District Court remanded the case, ordering the Bankruptcy Court to evaluate respondents' conduct under a more liberal standard. The Bankruptcy Court applied that standard and again denied the motion, finding that several factors—the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, and whether the creditor acted in good faith—favored respondents, but that the delay was within their control and that they should be penalized for their counsel's mistake. The District Court affirmed, but the Court of Appeals reversed. It found that the Bankruptcy Court had inappropriately penalized respondents for their counsel's error, since Berlin had asked the attorney about the impending deadlines and since the peculiar and inconspicuous placement of the bar date in a notice for a creditors' meeting without any indication of the date's significance left a dramatic ambiguity in the notification that would have confused even a person experienced in bankruptcy.

Held:

1. An attorney's inadvertent failure to file a proof of claim by the bar date can constitute "excusable neglect" within the meaning of Rule 9006(b)(1). Pp. 1494–1499.

(a) Contrary to petitioner's suggestion, Congress plainly contemplated that the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control. This flexible understanding comports with the ordinary meaning of "neglect." It also accords with the underlying policies of Chapter 11 and the bankruptcy rules, which entrust broad equitable powers to the courts in order to ensure the success of a debtor's reorganization. In addition, this view is confirmed by the history of the present bankruptcy rules and is strongly supported by the fact that the phrase "excusable neglect," as used in several of the Federal Rules of Civil Procedure, is understood to be a somewhat "elastic concept." Pp. 1494–1498.

(b) The determination of what sorts of neglect will be considered "excusable" is an equitable one, taking account of all relevant circumstances. These include the first four factors applied in the instant case. However, the Court of Appeals erred in not attributing to respondents the fault of their counsel. Clients may be held accountable for their attorney's acts and omissions. See, *e.g., Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734. Thus, in determining whether respondents' failure to timely file was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable. Pp. 1498–1499.

2. The neglect of respondents' counsel was, under all the circumstances, excusable. As the Court of Appeals found, the lack of any prejudice to the debtor or to the interest of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim. As for the culpability of respondents' counsel, it is significant that the notice of the bar date in this case was outside the ordinary course in bankruptcy cases. Normally, such a notice would be prominently announced and accompanied by an explanation of its significance, not inconspicuously placed in a notice regarding a creditors' meeting. P. 1499.

943 F.2d 673 (CA6 1991), affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA, SOUTER, and THOMAS, JJ., joined.

Craig J. Donaldson, Morristown, NJ, for petitioner.

John A. Lucas, Knoxville, TN, for respondents.

Justice WHITE delivered the opinion of the Court.

Rule 3003(c) of the Federal Rules of Bankruptcy Procedure sets out the requirements for filing proofs of claim in Chapter 9 Municipality and Chapter 11 Reorganization cases.[1] Rule 3003(c)(3) provides that the "court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules. Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier

1. Bankruptcy Rule 3003(c), in relevant part, provides:

"(c) Filing Proof of Claim.

"(1) *Who May File.* Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

"(2) *Who Must File.* Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

"(3) *Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4)."

deadline "was the result of excusable neglect." [2] In this case, we are called upon to decide whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute "excusable neglect" within the meaning of the rule. Finding that it can, we affirm.

I

On April 12, 1989, petitioner filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Tennessee. The petition sought relief under Chapter 11 of the Bankruptcy Code. Petitioner also filed a list of its 20 largest unsecured creditors, including all but one of respondents here. The following month, after obtaining extensions of time from the Bankruptcy Court, petitioner filed a statement of financial affairs and schedules of its assets and liabilities. The schedules, as amended, listed all of the respondents except Ft. Oglethorpe Associates Limited Partnership as creditors holding contingent, unliquidated, or disputed claims; the Ft. Oglethorpe partnership was not listed at all. Under § 1111 of the Bankruptcy Code, 11 U.S.C. § 1111(a), and Bankruptcy Rule 3003(c)(2), all such creditors are required to file a proof of claim with the bankruptcy court before the deadline, or "bar date," established by the court.

On April 13, 1989, the day after petitioner filed its Chapter 11 petition, the Bankruptcy Court mailed a "Notice for Meeting of Creditors" to petitioner's creditors. Along with the announcement of a May 5 meeting was the following passage:

> "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. Sec. 1111 & Bankruptcy rule 3003. Bar date is August 3, 1989." App. 29a.

The notice was received and read by Mark A. Berlin, president of the corporate general partners of each of the respondents. Berlin duly attended the creditors' meeting on May 5. The following month, respondents retained an experienced bankruptcy attorney, Marc Richards, to represent them in the proceedings. Berlin stated in an affidavit that he provided Richards with a complete copy of the case file, including a copy of the court's April 13, 1989, notice to creditors. Berlin also asserted that he inquired of Richards whether there was a deadline for filing claims and that Richards assured him that no bar date had been set and that there was no urgency in filing proofs of claim. *Id.*, at 121a. Richards and Berlin both attended a subsequent meeting of creditors on June 16, 1989.

Respondents failed to file any proofs of claim by the August 3, 1989, bar date. On August 23, 1989, respondents filed their proofs, along with a motion that the court permit the late filing under Rule 9006(b)(1). In particular, respondents' counsel explained that the bar date, of which he was unaware, came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm on July 31, 1989. *Id.*, at 56a. Because of this disruption, counsel did not have access to

2. Bankruptcy Rule 9006(b) provides:

"(b) Enlargement.

"(1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

"(2) *Enlargement Not Permitted.* The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 2003(a) and (d), 7052, 9023, and 9024.

"(3) *Enlargement Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules."

his copy of the case file in this matter until mid-August. *Ibid.*

The Bankruptcy Court refused the late filing. Following precedent from the Court of Appeals for the Eleventh Circuit, the court held that a party may claim "excusable neglect" only if its " 'failure to timely perform a duty was due to circumstances which were beyond [its] reasonable control.' " *Id.*, at 124a (quoting *In re South Atlantic Financial Corp.*, 767 F.2d 814, 817 (CA11 1985), cert. denied *sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986)). Finding that respondents had received notice of the bar date and could have complied, the court ruled that they could not claim "excusable neglect."

On appeal, the District Court affirmed in part and reversed in part. The court found "respectable authority for the narrow reading of 'excusable neglect' " adopted by the Bankruptcy Court, but concluded that the Court of Appeals for the Sixth Circuit would follow "a more liberal approach." App. 157a. Embracing a test announced by the Court of Appeals for the Ninth Circuit, the District Court remanded with instructions that the Bankruptcy Court evaluate respondents' conduct against several factors, including: " 'the "(1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect." ' " *Id.*, at 158a–159a (quoting *In re Dix*, 95 B.R. 134, 138 (CA9 Bkrptcy. Appellate Panel 1988) (in turn quoting *In re Magouirk*, 693 F.2d 948, 951 (CA9 1982))). The District Court also suggested that the Bankruptcy Court consider whether the failure to comply with the bar date "resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel." App. 159a.

On remand, the Bankruptcy Court applied the so-called *Dix* factors and again denied respondents' motion. Specifically, the Bankruptcy Court found (1) that petitioner would not be prejudiced by the late filings; (2) that the 20-day delay in filing the proofs of claim would have no adverse impact on efficient court administration; (3) that the reason for the delay was not outside respondents' control; (4) that respondents and their counsel acted in good faith; and (5) that, in light of Berlin's business sophistication and his actual knowledge of the bar date, it would not be improper to penalize respondents for the neglect of their counsel. *Id.*, at 168a–172a. The court also found that respondents' counsel was negligent in missing the bar date and, "[t]o a degree," indifferent to it. *Id.*, at 172a. In weighing these considerations, the Bankruptcy Court "attache[d] considerable importance to *Dix* factors 3 and 5," and concluded that a ruling in respondents' favor, notwithstanding their actual notice of the bar date, "would render nugatory the fixing of the claims' bar date in this case." *Id.*, at 173a. The District Court affirmed the ruling.

The Court of Appeals for the Sixth Circuit reversed. The Court of Appeals agreed with the District Court that "excusable neglect" was not limited to cases where the failure to act was due to circumstances beyond the movant's control. The Court of Appeals also agreed with the District Court that the five "*Dix* factors" were helpful, although not necessarily exhaustive, guides. *In re Pioneer Investment Services Co.*, 943 F.2d 673, 677 (1991). The court found, however, that the Bankruptcy Court had misapplied the fifth *Dix* factor to this case. Because Berlin had inquired of counsel whether there were any impending filing deadlines and been told that none existed, the Court of Appeals ruled that the Bankruptcy Court had "inappropriately penalized the [respondents] for the errors of their counsel." *Ibid.*

The Court of Appeals also found "it significant that the notice containing the bar date was incorporated in a document entitled 'Notice for Meeting of Creditors.'" *Id.*, at 678. "Such a designation," the court explained, "would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims." *Ibid.* Indeed, based on a comparison between the notice in this case and the model notice set out in Official Bankruptcy Form 16, the court concluded that the notice given respondents contained a "dramatic ambiguity," which could well have confused "[e]ven persons experienced in bankruptcy." *Ibid.* Having determined that the fifth *Dix* factor favored respondents rather than petitioner, the Court of Appeals found that the record demonstrated "excusable neglect."

Because of the conflict in the courts of appeals over the meaning of "excusable neglect," [3] we granted certiorari, 504 U.S. ——, 112 S.Ct. 2963, 119 L.Ed.2d 585 (1992), and now affirm.

II

A

There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. In between lie cases where a party may *choose* to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence. Petitioner contends that the Bankruptcy Court was correct when it first interpreted Rule 9006(b)(1) to require a showing that the movant's failure to comply with the court's deadline was caused by circumstances beyond its reasonable control. Petitioner suggests that exacting enforcement of filing deadlines is essential to the Bankruptcy Code's goals of certainty and finality in resolving disputed claims. Under petitioner's view, any showing of fault on the part of the late filer would defeat a claim of "excusable neglect."

[1, 2] We think that petitioner's interpretation is not consonant with either the language of the rule or the evident purposes underlying it. First, the rule grants a reprieve to out-of-time filings that were delayed by "neglect." The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through care-*

3. The Courts of Appeals for the Fourth, Seventh, Eighth, and Eleventh Circuits have taken a narrow view of "excusable neglect" under Rule 9006(b)(1), requiring a showing that the delay was caused by circumstances beyond the movant's control. See *In re Davis*, 936 F.2d 771, 774 (CA4 1991); *In re Danielson*, 981 F.2d 296, 298 (CA7 1992); *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310, 1314–1315 (CA8 1987); *In re Analytical Systems, Inc.*, 933 F.2d 939, 942 (CA11 1991). The Court of Appeals for the Tenth Circuit, by contrast, has applied a more flexible analysis similar to that employed by the Court of Appeals in the present case. *In re Centric Corp.*, 901 F.2d 1514, 1517–1518, cert. denied *sub nom. Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp.*, 498 U.S. 852, 111 S.Ct. 145, 112 L.Ed.2d 112 (1990). The Courts of Appeals similarly have divided in their interpretations of "excusable neglect" as found in Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Some courts have required a showing that the movant's failure to meet the deadline was beyond its control, see, *e.g.*, *650 Park Ave. Corp. v. McRae*, 836 F.2d 764, 767 (CA2 1988); *Pratt v. McCarthy*, 850 F.2d 590, 592 (CA9 1988), while others have adopted a more flexible approach similar to that employed by the Court of Appeals in this case, see, *e.g.*, *Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916 (CA3 1987), cert. denied *sub nom. Consolidated Freightways Corp. v. Secretary of Transp. of Pennsylvania*, 484 U.S. 1032, 108 S.Ct. 762, 98 L.Ed.2d 775 (1988); *Lorenzen v. Employees Retirement Plan of Sperry-Hutchinson Co.*, 896 F.2d 228, 232–233 (CA7 1990).

lessness." Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Contrary to petitioner's suggestion, this flexible understanding of "excusable neglect" accords with the policies underlying Chapter 11 and the bankruptcy rules. The "excusable neglect" standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases.[4] The rules' differentiation between Chapter 7 and Chapter 11 filings corresponds with the differing policies of the two chapters. Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. See *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 2312–2313, 76 L.Ed.2d 515 (1983). In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527–528, 104 S.Ct. 1188, 1197, 79 L.Ed.2d 482 (1984). This context suggests that Rule 9006's allowance for late filings due to "excusable neglect" entails a correspondingly equitable inquiry.

The history of the present bankruptcy rules confirms this view. Rule 9006(b) is derived from Rule 906(b) of the former bankruptcy rules, which governed bankruptcy proceedings under the former Bankruptcy Act. Like Rule 9006(b)(1), former Rule 906(b) permitted courts to accept late filings "where the failure to act was the result of excusable neglect." The forerunner of Rule 3003(c), which now establishes the requirements for filing claims in Chapter 11 cases, was former Rule 10–401(b), which established the filing requirements for proofs of claim in reorganization cases under Chapter X of the former Act, Chapter 11's predecessor. The Advisory Committee Notes accompanying that former rule make clear that courts were entrusted with the authority under Rules 10–401(b) and 906(b) to accept tardy filings "in accordance with the equities of the situation":

> "If the court has fixed a bar date for the filing of proofs of claim, it may still enlarge that time within the provisions of Bankruptcy Rule 906(b) which is made applicable in this subdivision. This policy is in accord with Chapter X generally which is to preserve rather than to forfeit rights. In § 102 it rejects the notion expressed in § 57n of the Act that claims must be filed within a six-month period

4. The time-computation and -extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006 enumerate those time requirements excluded from the operation of the "excusable neglect" standard. One of the time requirements listed as excepted in Rule 9006(b)(3) is that governing the filing of proofs of claim in Chapter 7 cases. Such filings are governed exclusively by Rule 3002(c). See Rule 9006(b)(3); *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428, 1432 (CA9 1990). By contrast, Rule 9006(b) does not make a similar exception for Rule 3003(c), which, as noted earlier, establishes the time requirements for proofs of claim in Chapter 11 cases. Consequently, Rule 9006(b)(1) must be construed to govern the permissibility of late filings in Chapter 11 bankruptcies. See Advisory Committee Note accompanying Rule 9006(b)(1).

to participate in any distribution. Section 224(4) of Chapter X of the Act permits distribution to certain creditors even if they fail to file claims and § 204 fixes a minimum period of 5 years before distribution rights under a plan may be forfeited. This approach was intentional as expressed in Senate Report 1916 (75th Cong., 3d Sess., April 20, 1938):

> "'Sections 204 and 205 insure participation in the benefits of the reorganization to those who, through inadvertence or otherwise, have failed to file their claims or otherwise evidence their interests during the pendency of the proceedings.'
>
> "This attitude is carried forward in the rules, first by dispensing with the need to file proofs of claims and stock interests in most instances and, secondly, by permitting enlargement of the fixed bar date in a particular case with leave of court and for cause shown in accordance with the equities of the situation." Advisory Committee Note accompanying Rule 10–401(b), reprinted in 13A J. Moore & L. King, Collier on Bankruptcy, ¶ 10–401.01, p. 10–401–4 (14th ed. 1977).

This history supports our conclusion that the enlargement of prescribed time periods under the "excusable neglect" standard of Rule 9006(b)(1) is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer.

Our view that the phrase "excusable neglect" found in Bankruptcy Rule 9006(b)(1) is not limited as petitioner would have it is also strongly supported by the Federal Rules of Civil Procedure, which use that phrase in several places. Indeed, Rule 9006(b)(1) was patterned after Rule 6(b) of those rules.[5] Under Rule 6(b), where the specified period for the performance of an act has elapsed, a District Court may enlarge the period and permit the tardy act where the omission is the "result of excusable neglect."[6] As with Rule 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the courts of appeals have generally recognized that "excusable neglect" may extend to inadvertent delays.[7] Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept"[8] and is not limited strictly to omissions caused by circumstances beyond the control of the movant.[9]

5. See Advisory Committee Note accompanying Rule 9006(b).

6. Federal Rule of Civil Procedure 6(b) provides: "(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

7. See, *e.g., United States v. Borromeo,* 945 F.2d 750, 753–754 (CA4 1991); *Hill v. Marshall,* No. 86–3987, 1988 WL 117163, at *2, 1988 U.S.App. LEXIS 14742, *4 (CA6, Nov. 4, 1988); *Dominic v. Hess Oil V.I. Corp.,* 841 F.2d 513, 517 (CA3 1988); *Sony Corp. v. Elm State Electronics, Inc.,* 800 F.2d 317, 319 (CA2 1986); *United States ex rel. Robinson v. Bar Assn. of District of Columbia,* 89 U.S.App.D.C. 185, 186, 190 F.2d 664, 665 (1951). But see *Hewlett–Packard Co. v. Olympus Corp.,* 931 F.2d 1551, 1552–1553 (CA Fed. 1991).

8. 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, p. 479 (2d ed. 1987).

9. The Courts of Appeals generally have given a similar interpretation to "excusable neglect" in the context of Rule 45(b) of the Rules of Criminal Procedure, which, like Rule 9006(b), was modeled after Rule 6(b). See, *e.g., United States v. Roberts,* 978 F.2d 17, 21–24 (CA1 1992); *Warren v. United States,* 123 U.S.App.D.C. 160, 163, 358 F.2d 527, 530 (1965); *Calland v. United States,* 323 F.2d 405, 407–408 (CA7 1963).

The "excusable neglect" standard for allowing late filings is also used elsewhere in the Federal Rules of Civil Procedure. When a party should have asserted a counterclaim but did not, Rule 13(f) permits the counterclaim to be set up by amendment where the omission is due to "oversight, inadvertence, or excusable neglect, or when justice requires." In the context of such a provision, it is difficult indeed to imagine that "excusable neglect" was intended to be limited as petitioner insists it should be.[10]

The same is true of Rule 60(b)(1), which permits courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect," but only on motion made within one year of the judgment. Rule 60(b)(6) goes further, however, and empowers the court to reopen a judgment even after one year has passed for "any other reason justifying relief from the operation of the judgment." These provisions are mutually exclusive, and thus a party who failed to take timely action due to "excusable neglect" may not seek relief more than a year after the judgment by resorting to subsection (6). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, and n. 11, 108 S.Ct. 2194, 2205 n. 11, 100 L.Ed.2d 855 (1988). To justify relief under subsection (6), a party must show "extraordinary circumstances" suggesting that the party is faultless in the delay. See *ibid.*; *Ackerman v. United States*, 340 U.S. 193, 197–200, 71 S.Ct. 209, 211–213, 95 L.Ed. 207 (1950); *Klapprott v. United States*, 335 U.S. 601, 613–614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable. In *Klapprott*, for example, the petitioner had been effectively prevented from taking a timely appeal of a judgment by incarceration, ill health, and other factors beyond his reasonable control. Four years after a default judgment had been entered against him, he sought to reopen the matter under Rule 60(b) and was permitted to do so. As explained by Justice Black:

> "It is contended that the one-year limitation [of subsection (1)] bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one-year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend ... due to inadvertence, indifference, or careless disregard of consequences." 335 U.S., at 613, 69 S.Ct., at 389.

Justice Frankfurter, although dissenting on other grounds, agreed that Klapprott's allegations of *inability* to comply with earlier deadlines took his case outside the scope of "excusable neglect" "because 'neglect' in the context of its subject matter carries the idea of negligence and not merely of non-action." *Id.*, at 630, 69 S.Ct., at 398.

Thus, at least for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. Because of the language and structure of Rule 60(b), a party's fail-

10. In assessing what constitutes "excusable neglect" under Rule 13(f), the lower courts have looked, *inter alia*, to the good faith of the claimant, the extent of the delay, and the danger of prejudice to the opposing party. See, *e.g.*, *New York Petroleum Corp. v. Ashland Oil, Inc.*, 757 F.2d 288, 291 (Temp.Ct.Emergency App.1985); *Gaines v. Farese*, No. 87-5567, 1990 WL 153937, *3, 1990 U.S.App. LEXIS 18086, *9 (CA6, Oct. 11, 1990); *Barrett v. United States Banknote Corp.*, 1992-2 Trade Cases ¶ 69,956, p. ——, 1992 WL 232055 (SDNY 1992); *Technographics, Inc. v. Mercer Corp.*, 142 F.R.D. 429, 430 (MD Pa. 1992). Federal Rule of Bankruptcy Procedure 7013 contains a similar allowance for late counterclaims brought by a trustee or debtor in possession.

ure to file on time for reasons beyond his or her control is not considered to constitute "neglect." See *Klapprott, supra.*[11] This latter result, however, would not obtain under Bankruptcy Rule 9006(b)(1). Had respondents here been prevented from complying with the bar date by an act of God or some other circumstance beyond their control, the Bankruptcy Court plainly would have been permitted to find "excusable neglect." At the same time, reading Rule 9006(b)(1) inflexibly to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word "neglect" and would be at odds with the accepted meaning of that word in analogous contexts.[12]

B

[3] This leaves, of course, the Rule's requirement that the party's neglect of the bar date be "excusable." It is this requirement that we believe will deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1). With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.[13] These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. See 943 F.2d, at 677.[14]

11. A similar, but even more explicit, dichotomy can be found in a former rule of the Circuit Court of Appeals for the Second Circuit governing the late filing of appeals. That rule permitted late filings " 'upon a showing . . . (a) that the delay has been due to cause beyond the control of the moving party or (b) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect . . . .' " Rule 15(2), U.S.C.C.A., Second Circuit, quoted in *Pyramid Motor Corp. v. Ispass*, 330 U.S. 695, 703, n. 10, 67 S.Ct. 954, 958, n. 10, 91 L.Ed. 1184 (1947). Although the meaning given "excusable neglect" for purposes of this rule obviously is not controlling for purposes of Rule 9006(b)(1), it does suggest that the meaning of "excusable neglect" urged by petitioner is far from natural.

12. See also *United States v. Boyle*, 469 U.S. 241, 245, n. 3, 105 S.Ct. 687, 690, n. 3, 83 L.Ed.2d 622 (1985) ("neglect" as used in statute governing late filing of tax returns "impl[ies] carelessness").

13. The dissent discerns in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), an indication that the factors relevant to this inquiry extend no further than the movant's culpability and the reason for the delay, see *post*, at 1501. We cannot agree. *Lujan* held that a district court did not abuse its discretion in declining to permit a late filing under Rule 6(b) of the Civil Rules on grounds of excusable neglect. 497 U.S., at 897–898, 110 S.Ct., at 3193. The Court did not, however, define "excusable neglect" or even decide whether that standard could have been met on the facts of that case.

14. The dissent would permit judges to take account of the full range of equitable considerations only if they have first made a threshold determination that the movant is "sufficiently blameless" in the delay, see *post*, at 1501. The dissent believes that this formulation of the Rule's requirements would bring needed clarity to the Rule's application and save judicial resources. See *post*, at 1504–1505. But narrowing the range of factors to be considered in making the "excusable neglect" determination will not eliminate disputes over how the remaining factors should be applied in any given case. For purposes of the present case at least, the dissent appears willing to draw a line between ordinary negligence and partial "indifference" to deadlines, see *ibid.*, but parties with valuable interests at stake will no doubt find this distinction susceptible of litigation. The only reliable means of eliminating the "indeterminacy" the dissent finds so troubling would be to adopt a bright-line rule of the sort embraced by some Courts of Appeals, erecting a rigid barrier against late filings attributable in any degree to the movant's negligence. As we have suggested, however, such a construction is irreconcilable with our cases assigning a more flexible meaning to "excusable *neglect*." Faced with a choice between our own precedent and Black's Law Dictionary, we adhere to the former.

There is one aspect of the Court of Appeals' analysis, however, with which we disagree. The Court of Appeals suggested that it would be inappropriate to penalize respondents for the omissions of their attorney, reasoning that "the ultimate responsibility of filing the ... proof[s] of clai[m] rested with [respondents'] counsel." *Ibid.* The court also appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonably could to comply with the court-ordered bar date. In this, the court erred.

[4, 5] In other contexts, we have held that clients must be held accountable for the acts and omissions of their attorneys. In *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), we held that a client may be made to suffer the consequence of dismissal of its lawsuit because of its attorney's failure to attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Id.*, at 633, 82 S.Ct., at 1390. To the contrary, the Court wrote:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.*, at 633–634, 82 S.Ct., at 1390 (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)).

This principle also underlay our decision in *United States v. Boyle*, 469 U.S. 241, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985), that a client could be penalized for counsel's tardy filing of a tax return. This principle applies with equal force here and requires that respondents be held accountable for the acts and omissions of their chosen counsel. Consequently, in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable.

III

[6, 7] Although the Court of Appeals in this case erred in not attributing to respondents the fault of their counsel, we conclude that its result was correct nonetheless. First, petitioner does not challenge the findings made below concerning the respondents' good faith and the absence of any danger of prejudice to the debtor or of disruption to efficient judicial administration posed by the late filings. Nor would we be inclined in any event to unsettle factual findings entered by a Bankruptcy Court and affirmed by both the District Court and Court of Appeals. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572 (1987). Indeed, in this case, the Bankruptcy Court took judicial notice of the fact that the debtor's second amended plan of reorganization, offered after this litigation was well underway, takes account of respondents' claims. App. 168a–169a. As the Court of Appeals found, the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date. We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases. As the Court of Appeals noted, ordinarily the bar date in a bankruptcy case should be prominently announced and

accompanied by an explanation of its significance. See 943 F.2d, at 678. We agree with the court that the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors['] meeting," without any indication of the significance of the bar date, left a "dramatic ambiguity" in the notification. *Ibid.*[15] This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, "excusable."

For these reasons, the judgment of the Court of Appeals is

Affirmed.

Justice O'CONNOR, with whom Justice SCALIA, Justice SOUTER and Justice THOMAS join, dissenting.

Today the Court replaces the straightforward analysis commended by the language of Bankruptcy Rule 9006(b)(1) with a balancing test. Because the Court's approach is inconsistent with the Rule's plain language and unduly complicates the task of courts called upon to apply it, I respectfully dissent.

I

Bankruptcy Rule 9006(b)(1) provides that, if a party moves for permission to act after having missed a deadline, the court "may at any time in its discretion ... permit the act to be done where the failure to act was the result of excusable neglect." This language establishes two requirements that must be met before untimely action will be permitted. First, no relief is available unless the failure to comply with the deadline "was the result of excusable neglect." Bkrtcy.Rule 9006(b)(1). Second, the court may withhold relief if it believes forbearance inappropriate; the statute does not *require* the court to forgive every omission caused by excusable neglect, but states that the court "*may*" grant relief "in its discretion." *Ibid.* (emphasis added). Thus, the court must at the threshold determine its authority to allow untimely action by asking whether the failure to meet the deadline resulted from excusable neglect; if the answer is yes, *then* the court should consider the equities and decide whether to excuse the error.

Instead of following the plain meaning of the statute and examining this case in these two steps, the Court employs a multifactor balancing test covering numerous equitable considerations, including (and perhaps not limited to) "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, ... and whether the movant acted in good faith." *Ante*, at 1498. But Rule 9006(b) does not simply command courts to permit late filing whenever it would be "equitable" in light of all the circumstances. Rather, it establishes that the courts may exercise their discretion in accord with the equities *only* if the failure to meet the deadline resulted from excusable neglect in the first place.

15. Indeed, one commentator has warned expressly of the deficiency in the method of notification employed by the Bankruptcy Court here: "Prior to the adoption of the present bankruptcy rules some bankruptcy courts placed a time to close the receipt of claims in chapter 11 in the notice sent to the listed creditors for the first meeting of creditors. This practice should be strongly discouraged. It conflicts with some of the factual circumstances giving rise to a claim in chapter 11 and can ambush unwitting creditors. Since creditors are notorious for failing to read all of the boilerplate language in the xeroxed form distributed as the notice of the first meeting of creditors, counsel for creditors will be wise to double check and ask for a prompt receipt of the notice from the client or examine the notice on file in the particular bankruptcy case." R. Aaron, Bankruptcy Law Fundamentals § 8.02[7], p. 8–21 (rev. ed. 1991).

Whether the failure resulted from excusable neglect depends on the nature of the omission itself, both in terms of cause and culpability. Consequently, until the reason for the omission is determined to be sufficiently blameless, the consequences of the failure, such as the effect on the parties or the impact on the judicial system, are not relevant. *In re Vertientes, Ltd.*, 845 F.2d 57, 60 (CA3 1988) ("The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason"); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (CA11 1985) (The focus of the Rule is on the omission and the reasons therefor rather than on the effect on others), cert. denied, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986); see also *Maressa v. A.H. Robins Co.*, 839 F.2d 220, 221 (CA4 1988) (no exception to claim filing deadlines based on general equitable principles).

Although the Court pays lip service to the existence of a threshold determination regarding excusable neglect, see *ante*, at 1492 ("Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect' "), it holds that the threshold question is "at bottom an equitable one." *Ante*, at 1498. Our case law is to the contrary.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), we applied the virtually identical language of Federal Rule of Civil Procedure 6(b). Under that Rule, as under this one, a court may not permit untimely filing unless it "find[s] as a substantive matter . . . that the failure to file on time 'was the result of excusable neglect.' " 497 U.S., at 897, 110 S.Ct., at 2733. Characterizing that "obstacle" as "the greatest of all," *ibid.*, we examined the reasons for the movant's failure to make a timely filing. Nowhere in our discussion did we mention the equities or the consequences of the movant's failure to file. Instead, we concentrated exclusively on the asserted cause of the failure and the movant's culpability. See *ibid.*

The Court concedes that Federal Rule of Civil Procedure 6(b) and Bankruptcy Rule 9006(b) have virtually identical language; indeed, it even relies on the former to support its interpretation of the latter. *Ante*, at 1496–1497. Yet the majority provides no reason why we should depart from the analysis we so recently employed in *Lujan*, except to say it reads that case differently. See *ante*, at 1498, n. 13. While it is true that we did not "define" the phrase "excusable neglect" in *Lujan*, *ante*, at 1498, n. 13, there is no denying that we applied that phrase to the facts before us: There is simply no other explanation for the opinion's discussion of whether the movant had overcome that "greatest" of "substantive obstacle[s]," 497 U.S., at 897, 110 S.Ct., at 2733. But even if *Lujan* might be read differently, the majority offers no affirmative reason to believe that the equities *should* bear on whether neglect is "excusable." Instead it states:

> "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Ante*, at 1498.

In my view, Congress *has* provided "guideposts" as to how courts should determine whether "neglect will be considered 'excusable.' " The majority simply fails to follow them. First is the remaining language of Rule 9006(b)(1) itself, a good portion of which the majority fails to consult. The Rule, read in its entirety, establishes that the excusable neglect determination requires inquiry into causation rather than consequences. Unless "the *failure* to act was *the result*" of the excusable neglect, relief is unavailable. "It is clear from this language that the focus of [the Rule] is on the movant's actions and the reasons for those actions, not on the effect that an extension might have on the other

parties' positions." *In re South Atlantic Financial Corp.*, 767 F.2d, at 819. Moreover, Rule 9006(b)(1) indicates that the court must determine whether the neglect was "excusable" as of the moment it occurred rather than in light of facts known when untimely action is proposed. The Rule authorizes relief in cases where the failure *"was"* the result of excusable neglect, not as to incidents where the neglect *is* excusable in light of current knowledge.

The majority also overlooks a second and dispositive guidepost—the accepted dictionary definition of "excusable neglect." That definition does not incorporate the results or consequences of a failure to take appropriate and timely action; to the contrary, it turns on the cause or reasons for the failure and the culpability involved. According to Black's Law Dictionary 566 (6th ed. 1990), "excusable neglect" is:

> "[A] failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party. As used in rule (*e.g.* Fed.R.Civil P. 6(b)) authorizing court to permit an act to be done after expiration of the time within which under the rules such act was required to be done, where failure to act was the result of 'excusable neglect', quoted phrase is ordinarily understood to be the act of a reasonably prudent person under the same circumstances."

Cf. 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, pp. 480, 482 (2d ed. 1987) ("Excusable neglect [in Fed. Rule Civ.Proc. 6(b)] seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance. . . . Absent a showing along these lines, relief will be denied"). Of course, we are not bound to accept Black's Law Dictionary as the authoritative expositor of American law. But if Congress had intended to depart from the accepted meaning of excusable neglect—supplementing its exclusive focus on the *reason* for the error with an emphasis on its *effect*—surely it would have so indicated.

In any event, it is quite unnatural to read the term "excusable neglect" to mean a variety of neglect that, in light of subsequent events and all the equities, turns out to be excusable. Not only does such an interpretation suffer from circularity—excusable neglect becomes the neglect that the court in its equitable discretion chooses to excuse—but it also renders critical language in the Rule superfluous. After all, the majority's interpretation would be no different if Rule 9006(b) afforded courts discretion to give relief in cases of "neglect" rather than "excusable neglect." The term "neglect" would describe the acceptable level of culpability, see *ante*, at 1494–1498, and the equities still would move the court's discretionary decision on whether it in fact would excuse the error once "neglect" was shown. The Court's interpretation thus reads the word "excusable" right out of the Rule. In my view, Congress included the word "excusable" to convey the notion that some types of neglect—at a minimum, the highly culpable and the willful—cannot be forgiven, regardless of the consequences.

The Court does recognize one guidepost. It states that the requirement of "excusable neglect" should be construed so as to "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Ante*, at 1498. But rather than concentrating on the types of culpable neglect that ought to be deterred, the majority immediately shifts its focus to considerations such as the *effect* of the failure to take timely action, including prejudice to the debtor and the effect on judicial proceedings. *Ante*, at 1499. If the goal of requiring neglect to be "excusable" is to deter culpable noncompliance, the consequences of such noncompliance should be

irrelevant. To hold otherwise not only undermines deterrence but excuses the inexcusable.

II

The Court's approach also undermines the interests the Bankruptcy Rules seek to promote. Because the majority's balancing test is indeterminate, its results frequently will be called into question. Reasonable minds often differ greatly on what the equities require. This case is a prime example. Applying much the same test the Court applies today, two courts below held that respondent's neglect was inexcusable. Then the Court of Appeals substituted its view and held otherwise. Today the Court evens the score at two to two. We ought not unnecessarily introduce so much uncertainty into a routine matter like an "excusable neglect" determination. Nor should we unhesitatingly endorse an approach that invites litigants to seek redetermination of their procedural disputes from four different courts.

Direct application of Rule 9006(b)(1)'s plain language to this case, in contrast, is straightforward. First, we must examine the failure to act itself and ask if it resulted from excusable neglect. If it did, then the lower court may, in its discretion, permit untimely action in accord with the equities. But if the failure did not result from excusable neglect, there is no reason to consider the effects of the failure.

That, of course, brings us to the question to which the majority devotes the bulk of its discussion: whether mere negligence can qualify as excusable neglect. *Ante*, at 1494–1498. As the majority points out, *ante*, at 1494, the Courts of Appeals have disagreed on this matter. Some require the omission to result from circumstances beyond counsel's reasonable control. See, *e.g.*, *In re South Atlantic Financial Corp.*, 767 F.2d, at 819, and cases cited *ante*, at 1494, n. 3. Others hold that negligence may constitute excusable neglect but distinguish among different types of negligence. Cf. *Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916, 919 (CA3 1987) ("Excusable neglect" inquiry entails a "qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence") (Fed.Rule App.Proc. 4(a)), cert. denied *sub nom.*, *Consolidated Freightways Corp. of Delaware v. Secretary of Transp. of Pennsylvania*, 484 U.S. 1032, 108 S.Ct. 762, 98 L.Ed.2d 775 (1988). In my view, we need not resolve that dispute in this case. Once we properly clarify the factors that are *relevant* to the excusable neglect determination, the Bankruptcy Court's findings compel the conclusion that respondent's neglect was inexcusable under any standard.

The Bankruptcy Court expressly found that respondent's former counsel's failure to file a timely proof of claim resulted from negligence and, to some degree, an attitude of "indifference" toward the deadline. App. 172a. In addition, the court noted that the client, a sophisticated business person and an active participant in the bankruptcy proceedings, had received actual notice of, and was aware of, the deadline. *Id.*, at 171a. Thus, this is not a case of a clerical or other minor error yielding an untoward result despite counsel's best efforts; it is a case in which counsel simply failed to look after his business properly, even if that failure was not the result of bad faith.

The Court of Appeals held the neglect excusable nonetheless for two reasons. First, it thought it inequitable to saddle the client with the mistakes of its attorney. The Court today properly rejects that rationale. *Ante*, at 1499. The second reason offered by the Court of Appeals was that the notice containing the deadline was incorporated in a document entitled "Notice for Meeting of Creditors." That designation, the court explained, was not enough to put those without extensive bankruptcy experience on notice that the "bar date" at the end of the notice was the final date for filing proofs of claims. *In re Pioneer In-*

vestment Services Co., 943 F.2d 673, 678 (CA6 1991). In addition, the court noted that use of the term "bar date" to designate the deadline for filing a proof of claim was "dramatic[ally] ambigu[ous]" since there are many bar dates in bankruptcy, not all of them for the filing of proofs of claims. *Ibid.* The Court today signals its agreement. *Ante*, at 1499, and n. 13. The majority and the Court of Appeals may be correct that the form of notice was unorthodox; they also may be correct in asserting that, if the inadequacy of notice caused respondent to miss the deadline, respondent's failure was the result of "excusable neglect." But they are not correct in asserting that respondent's former lawyer overlooked the deadline "as a result of" the unorthodox form of notice. The Bankruptcy Court made no such finding. Nor did it find that the notice's ambiguity somehow led counsel astray. On the contrary, the Bankruptcy Court found that both counsel and client had actual notice of the deadline and that the cause of their failure to file on time was indifference and negligence. App. 172a.

To be sure, we would not be obligated to accept those findings if they were not supported by the record. But they are supported by the record. Indeed, in a commendable display of candor, respondent's former counsel admitted that the "foul-up" was "particularly" his own. *Id.*, at 72a. Accord, *id.*, at 112a ("[T]he foul-up I can't lay to the clients' shoes because it really is probably mine"). There is no indication that he blamed his error on petitioner's form of notice. Rather, he appealed to the Bankruptcy Court's sense of fairness, arguing that it would be inequitable to penalize his client so greatly where the "delay was occasioned not by [the client], but by its counsel." *Id.*, at 73a. Accord, *id.*, at 102(a) ("[U]nder all the circumstances, we think it would be unfair and inequitable to visit the sins of the lawyer on the client"); *id.*, at 112a (Although the foul-up was respondent's attorney's, given "the lack of prejudice [and] the totality of all the circumstances, [it would be] inherently inequitable to visit the sins on the client for this situation").

Perhaps it would have been desirable for the Bankruptcy Court to make a specific factual finding on whether the unorthodox form of notice actually caused respondent's former counsel to miss the deadline. Given that respondent's lawyer offered no reason why he overlooked the bar date, it is not inconceivable that the notice's unorthodoxy led him astray. *Id.*, at 57a (no recollection of seeing the order setting the deadline); *id.*, at 103a (same). But if there is uncertainty, the answer is to remand to the Bankruptcy Court for appropriate factual findings. Based on the current state of the record and the findings the Bankruptcy Court did make, I cannot accept the majority's finding that counsel's failure in fact resulted from the inadequacy of notice.

Respondent's former counsel's error may represent a relatively unaggravated instance of negligence. He did not miss deadlines repeatedly despite clear warnings. Nor did he act in bad faith. But respondent, its former lawyer, the Court of Appeals, and the majority today, have all failed to produce a reasonable explanation for this rather major error. More important still, the Bankruptcy Court *did* explain the error. It found that respondent's failure to meet the deadline resulted at least in part from counsel's "indifference." The majority offers no reason for ignoring that finding. Even accepting the conclusion that excusable neglect may cover some instances of negligence, indifference falls outside the range of the "excusable." Because the failure to act in this case did not result from excusable neglect, there is no occasion to consider whether the Bankruptcy Court properly exercised its discretion in light of the equities; respondent was ineligible for relief in any event.

The Court's only response is that, even if one focuses exclusively on the nature of the error and why it occurred, the parties can still litigate the Rule's application. *Ante*, at 1498, n. 14. But that objection

can be made to any approach; courts always must apply law to facts. The point is that following the plain language of Rule 9006(b)(1) renders the law's application both easier and more certain. A determination that a party missed the filing deadline on account of "indifference" or some other reason is not as "susceptible of litigation," *ibid.*, as the result of multifactor balancing. The determination is factual and, as such, may be overturned on review only if clearly erroneous. In fact, no one—neither the parties nor any of the many courts that have reviewed this case—has suggested that there was clear error here. Rather, in this case, as in most others like it, the Bankruptcy Court's findings are more than adequately supported by the record.

Indeed, the majority succeeds in circumventing the finding of "indifference" only by ignoring it, concentrating instead on other considerations in the multifactor test. The Court's technique will no doubt prove instructive to anyone appealing an excusable neglect determination in the future, for it highlights the indeterminacy of the test: A simple shift in focus from one factor to another—here, from cause to effects—shifts the balance and the result. The approach required by the Rule itself, in contrast, precludes that slippery tactic. At the threshold, there is but one question on which to focus: the reason the deadline was missed. Contrary to the Court's assertion, *ibid.*, that singular focus does not require us to hold today that all incidents of negligence are inexcusable. We need hold only that *indifference* is inexcusable. That, I would have thought, goes without saying.

III

When courts depart from the language of a congressional command, they often create unintended difficulties in the process. This case, I fear, may prove no exception. The majority's single-step, multifactor, equitable balancing approach to "excusable neglect" is contrary to the language of Rule 9006(b) and inconsistent with sensible notions of judicial economy. Its indeterminacy not only renders consistent application unlikely but also invites unproductive recourse to appeal. Such consequences are especially unfortunate in the Rules of *Bankruptcy* Procedure. An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see. Congress established in Rule 9006(b) the inquiry that should be made when courts contemplate permitting untimely action. Under the approach commended by that Rule, respondent is barred from filing an untimely proof of claim because its omission resulted from a neglect that, on this record, was simply inexcusable; the equities, no matter how compelling, cannot propel respondent over that hurdle. I therefore respectfully dissent.

CITY OF CINCINNATI, Petitioner,

v.

DISCOVERY NETWORK, INC., et al.

No. 91-1200.

Argued Nov. 9, 1992.

Decided March 24, 1993.

Commercial publishers brought civil rights action, requesting declaratory and injunctive relief against enforcement of city ordinance prohibiting distribution of "commercial handbills" on public property, used as basis of ordering removal of news racks. The United States District Court for the Southern District of Ohio, S. Arthur Spiegel, J., entered judgment preventing enforcement of ordinance, and City appealed. The Court of Appeals for the Sixth Circuit, 946 F.2d 464, affirmed. Certiorari

U.S. Bankruptcy Court for the Eastern District of TN
Courtroom, 15th Floor, Plaza Tower, Knoxville, Tennessee

In Re a Petition for Relief under Chapter 11 of Title 11, U.S. Code, filed by or against the below-named Debtor(s) on April 12, 1989:

DEBTOR : **PIONEER INVESTMENT SERVICES COMPANY of POST OFFICE BOX** 90444, KNOXVILLE, TN 37990, aka/dba PREMIERE RESTAURANT INVESTMENT COMPANY, ID:62-1217172 CASE NO. **89-01058RS -11A**

You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 USC Sec 1111 & Bankruptcy rule 3003.
Bar date is August 3, 1989.

NOTICE FOR MEETING OF CREDITORS

ATTY FOR DEBTOR: Craig J. Donaldson, 1200 One Commerce Pl., Nashville, TN 37239 Phone:615/259-3560 and John S. Hicks

ITEM NO. 1 - §341(a) MEETING DATE: May 5, 1989 at 1:30 P.M. in Meeting Room, Suite 610, Plaza Tower, Knoxville, Tennessee

ITEM NO. 2 - FILING DEADLINE FOR §523(c)/§727 COMPLAINTS: Not applicable.

A meeting of creditors pursuant to 11 U.S.C. §341(a) shall be held at the time and place specified in ITEM NO 1 above at which time creditors may examine the debtor and file claims.

The debtor [and joint debtor, if any] and attorney for debtors(s) shall be in attendance at the §341(a) meeting. A partnership shall appear by a general partner, a corporation by its president or other executive officer.

Failure of the debtor or his attorney to appear at the §341(a) meeting or to timely file schedules and statement of affairs may result in dismissal.

Upon filing of the petition, certain acts and proceedings against the debtor and the estate are stayed as provided in 11 U.S.C. §362(a).

Dated: April 13, 1989

RICHARD STAIR, JR, U.S. BANKRUPTCY JUDGE

FORM B9E (Alt) 07/93	United States Bankruptcy Court _____ District of _____ Case Number:	NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES (Individual or Joint Debtor Case)	
In re (Name of Debtor)		Address of Debtor Date Filed or Converted	Soc. Sec/Tax ID Nos.
Addressee:		Address of the Clerk of the Bankruptcy Court	
Name and Address of Attorney for Debtor Telephone Number		Name and Address of Trustee Telephone Number	
This is a converted case originally filed under chapter _____ on _____		_____ (date)	

FILING CLAIMS

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

DISCHARGE of DEBTS

_____ Is the Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts.

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection . An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor may seek a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive a discharge under §1141(d)(3)(C) of the Bankruptcy Code, timely action must taken in the bankrupcy court in accordance with Bankruptcy Rule 4004(a). If a creditor believes that a debt owed to the creditor is not dischargeable under § 523(a)(2), (4), or (6) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above in the box labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ _____

Clerk of the Bankruptcy Court — Date

FORM B9F (Alt) 11/92	United States Bankruptcy Court _____ District of _____ Case Number:	NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS, AND FIXING OF DATES (Corporation/Partnership Case)	
In re (Name of Debtor)		Address of Debtor Date Filed or Converted	Soc. Sec/Tax ID Nos.
Addressee:		Address of the Clerk of the Bankruptcy Court	
☐ Corporation		☐ Partnership	
Name and Address of Attorney for Debtor	Telephone Number	Name and Address of Trustee	Telephone Number
This is a converted case originally filed under chapter _____ on _____ (date)			

FILING CLAIMS

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS

COMMENCEMENT OF CASE. A petition for reorganization under chapter 11 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions or repossessions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review § 362 of the Bankruptcy Code and may wish to seek legal advice. If the debtor is a partnership, remedies otherwise available against general partners are not necessarily affected by the filing of this partnership case. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor's representative, as specified in Bankruptcy Rule 9001(5) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may examine the debtor and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to the creditors.

PROOF OF CLAIM. Schedules of creditors have been or will be filed pursuant to Bankruptcy Rule 1007. Any creditor holding a scheduled claim which is not listed as disputed, contingent, or unliquidated as to amount may, but is not required to, file a proof of claim in this case. Creditors whose claims are not scheduled or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim. A creditor who desires to rely on the schedule of creditors has the responsibility for determining that the claim is listed accurately. The place to file a proof of claim, either in person or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court.

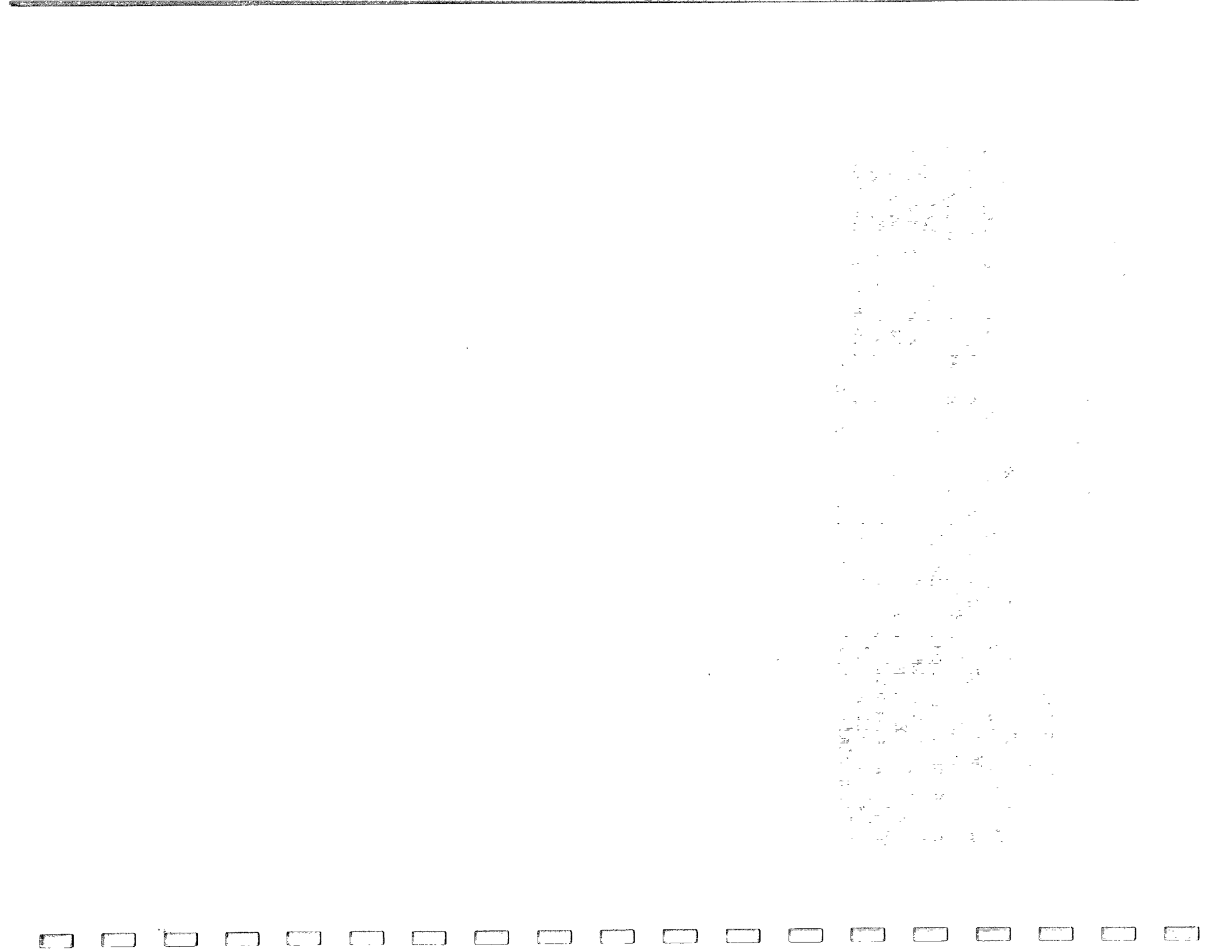
PURPOSE OF CHAPTER 11 FILING. Chapter 11 of the Bankruptcy Code enables a debtor to reorganize pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. Creditors will be given notice concerning any plan, or in the event the case is dismissed or converted to another chapter of the Bankruptcy Code. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

For the Court: _____ Clerk of the Bankruptcy Court

_____ Date

COMMITTEE NOTE

The title page of the form has been amended to conform to the headings used on Forms 9A - 9I. Alternate versions of Form 9E and Form 9F have been added for the convenience of districts that routinely set a deadline for filing claims in a chapter 11 case. When a creditor receives the alternate form in a case, the box labeled "Filing Claims" will contain information about the bar date as follows: "Deadline for filing a claim: __(date)__." If no deadline is set in a particular case, either the court will use Form 9E or Form 9F, as appropriate, or the alternate form will be used with the following sentence appearing in the box labeled "Filing Claims": "When the court sets a deadline for filing claims, creditors will be notified."



AGENDA XV(a)
Jackson Hole, Wyoming
September 13-14, 1993

COMMUNITY LEGAL SERVICES, INC.

LAW CENTER NORTHEAST
3207 KENSINGTON AVENUE
PHILADELPHIA, PA 19134-1917
215-427-4850
FAX 215-427-4895

August 9, 1993

The Honorable Edward Leavy
United States Circuit Judge
216 Pioneer Courthouse
555 S.W. Yamhill Street
Portland, Oregon 97204-1396

Dear Judge Leavy:

As you know, I have for some time been concerned about the lack of intelligible notices to parties in bankruptcy cases. Especially in a system where many people, both debtors and creditors, proceed pro se, I think it terribly important that the courts make reasonable efforts to ensure that parties do not lose important rights through misunderstanding or confusion.

This issue first arose in connection with our consideration of the rule for modifying a chapter 13 plan, under which a debtor's plan might be drastically altered and made infeasible if the debtor does not respond to a modification motion. However, the problem cuts across many other issues in bankruptcy cases. These include motions for relief from the automatic stay, motions to dismiss or convert a case, objections to claims, objections to exemptions, and motions to avoid creditors' liens. In many proceedings, if a party does not respond in writing to a particular motion or objection, the court grants the relief automatically.

I believe that the way to resolve this problem is to promulgate a form or forms of notice that will clearly tell parties their rights and duties in plain English. In fact, there has been a definite trend toward doing this in both the state and federal courts. For example, some states have included clear notices with summonses or complaints initiating actions. I have attached court rules setting forth such notices from New York and Pennsylvania. Similarly, the federal district courts have been slowly moving toward telling parties and nonparties more about their rights. See, e.g., the notice required by Fed.R.Civ.P. 4(c)(2)(C)(ii) and the new subpoena form, which are also attached hereto.

At present the local bankruptcy courts have dealt with this problem to varying degrees. Some have taken no steps to provide notice of what a responding party must do to oppose a motion or objection. Often, this means that the responding party receives a document with an unsigned order granting the relief requested as its first page. In my experience, this leads to confusion, with many people thinking the relief has already been granted. In such cases, parties are given no clue as to deadlines for a response or that a failure to file a response may mean relief by default.

Other districts are more sensitive to the problem and have promulgated a variety of notices to be included with motions and objections. Some of these districts have different notices for different types of proceedings (e.g., the Central District of California), some have notices only for one or two types of proceedings, and some have notices for all motions. There is a wide range in the extent to which these notices are clear and understandable to a lay person. (See, e.g. the notice from the Northern District of Iowa, which speaks of filing a "resistance" to an objection to exemptions; and the notice from the Eastern District of North Carolina, which includes such "legalese" terms and phrases as "herewith", "above captioned case", "hereby", "respond or otherwise plead", and "relief".) Still other districts, e.g., the District of Maryland, merely include in their rules a description of the notice information that should be included in a motion.

Some of the better examples are those from the Southern District of Texas and the Western District of Pennsylvania. Even these, however, leave considerable room for improvement. I have drafted and attached (as the last page to the attachments) to this letter a proposed form which our committee could use as a starting point if we decide to draft a national form of notice.

I feel that our committee could perform a real service and greatly enhance the fairness of bankruptcy proceedings by promulgating a form or forms of notice that would be clear and understandable by all. Few would argue that it is not in everyone's interest to have all parties be aware of their rights and how to protect them.

Furthermore, promulgating uniform notice forms would create minimal burdens in the short run and relieve parties and the clerks' offices of substantial burdens in the long run. I have no doubt that a great deal of the clerks' time is spent instructing pro se parties about how to respond to various proceedings.

I would appreciate it if this matter could be put on our agenda for the September meeting and if this letter and the attached materials could be distributed to all committee members. Thank you for your consideration.

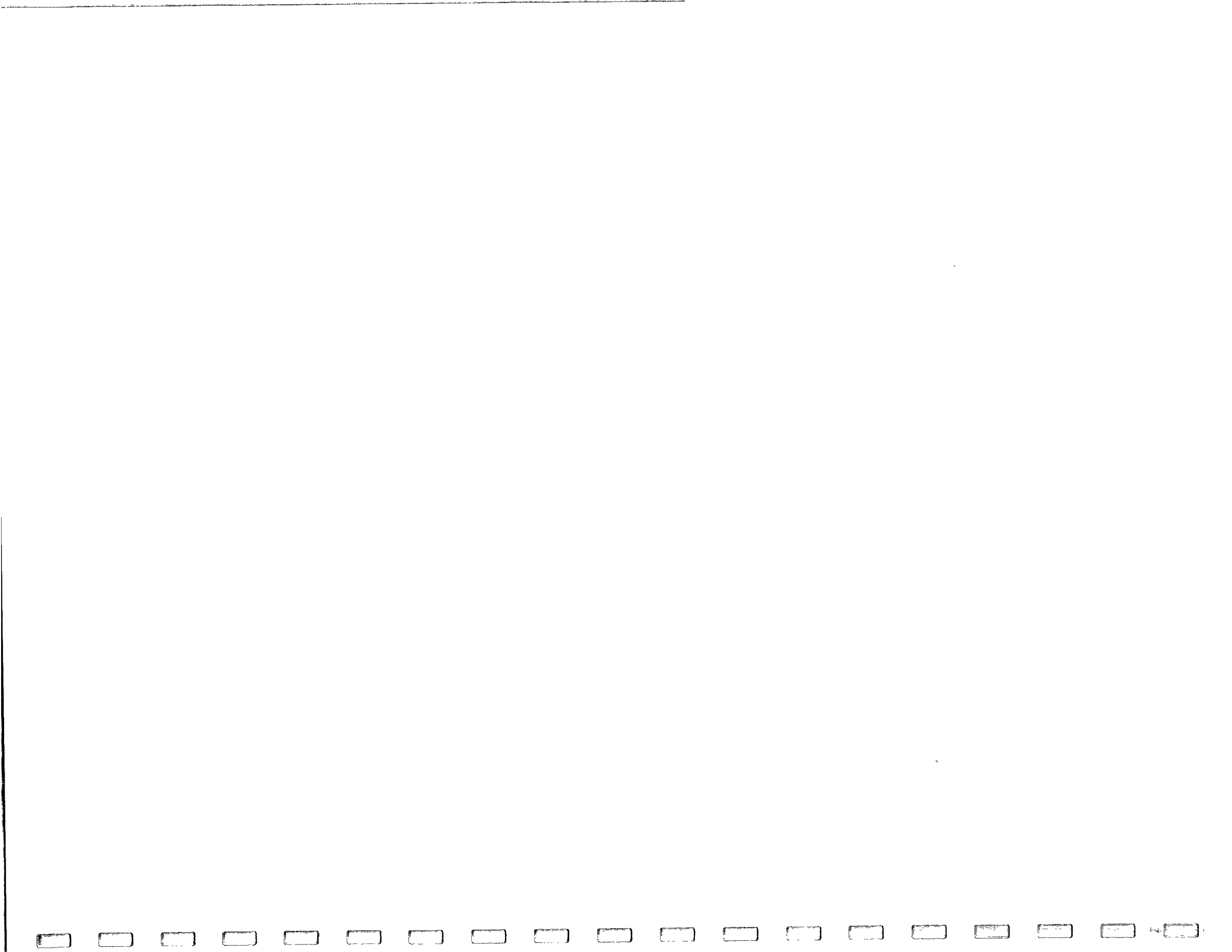
Respectfully yours,

Henry J. Sommer

HJS:jmp

cc: Professor Alan N. Resnick
Patricia S. Channon, Esquire

Enclosures



Pennsylvania

(c) Criminal actions and proceedings shall be captioned as follows: "Court of Common Pleas of ..... County—Criminal", and shall be filed with the clerk of courts, as provided by Section 15 of the Schedule to Article V of the Constitution.

(d) Proceedings heretofore within the jurisdiction of the Juvenile Court shall be captioned as follows: "Court of Common Pleas of ..... County—Juvenile", and shall be filed with the clerk of courts, as provided by Section 15 of the Schedule to Article V of the Constitution.

(e) Local rules may require that the caption contain further identification of the nature of the action or proceeding.

(f) No action or proceeding may be dismissed by reason of an erroneous caption or docketing, but the court on motion of any party or on its own motion may correct the caption or direct appropriate docketing.

(g) Actions and proceedings in Multi-County Judicial Districts shall be captioned as follows: "Court of Common Pleas of the ..... Judicial District, County Branch ....."

Effective February 8, 1969.

RULE 1018.1 NOTICE TO DEFEND. FORM

(a) Every complaint filed by a plaintiff and every complaint filed by a defendant against an additional defendant shall begin with a notice to defend in substantially the form set forth in subdivision (b). No other notice to plead to a complaint shall be required.

(b)

[CAPTION]

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

(NAME)

(ADDRESS)

(TELEPHONE NUMBER)

Note

The above notice does not change any of the rules relating to the pleading of objections and defenses.

This rule applies to all complaints including those where service is by publication. For the mandatory content of the publication in such cases see Rule 1009(f).

When a defendant is a nonresident served outside the United States, Rules 2081(a), 2131.2(a), 2157.2(a) and 2182(a) provide a sixty-day period for pleading.

(c) Each court shall by local rule designate the officer, organization, agency or person to be named in the notice from whom legal help can be obtained.

(d) A court may by local rule require the notice to be repeated in one or more designated languages other than English.

Adopted Jan. 23, 1975, effective July 1, 1975. Amended July 1, 1975, effective Aug. 1, 1975; May 15, 1979, effective June 11, 1979.

Explanatory Comment—1975

New Rule 1018.1 "Notice to Defend", adopted January 23, 1975 and effective July 1, 1975, and the related amendments to the other Rules, had their origin in a request from the Attorney General for amendment to Pennsylvania's historic "Notice to Plead" rule which required the notice to be "endorsed" upon a complaint to which a responsive answer is required.

The Attorney General suggested that the legalistic and uniformative nature of the "Notice to Plead" was inadequate in the case of "uneducated, uninformed and unsophisticated defendants" and raised due process problems, particularly in the case of Spanish-speaking minority groups who had little, if any, knowledge of the English language. He cited Lau v. Nichols, 94 S.Ct. 786, 414 U.S. 563, 39 L.Ed.2d 1 (1974) in which the Supreme Court held that bilingual education must, by the terms of the statute, be provided under federally assisted public education programs where a substantial number of students were involved who could not understand or read English. United States District Court decisions have also required bilingual election notices under the Voting Rights Act. However, these decisions did not rest upon due process concepts but upon statutory construction of the Federal legislation and regulations thereunder.

The Attorney General also suggested that, with the extension of legal aid services to practically every county of the Commonwealth under federally financed programs,

COMPLAINT (pursuant to CPLR 3219 and NYCCCA 1004) is annexed to the summons, the following form of summons is to be used:

Civil Court of the City of New York
County of .....

Index No. .....

Plaintiff, against- Defendant.	SUMMONS Plaintiff's Residence Address: The basis of the venue designated is:

To the above named defendant:

YOU ARE HEREBY SUMMONED and required to submit to plaintiff's attorney your answering papers on this motion within the time provided in the notice of motion annexed hereto. In the case of your failure to submit answering papers summary judgment will be taken against you by default for the relief demanded in the notice of motion.

Dated, the ..... day of ....., 19...

.....
Attorney(s) for Plaintiff
Post Office Address
Telephone Number

(f) In any action arising from a consumer credit transaction, if the form of summons provided for in subdivision (e) of this section is used:

(1) the summons shall have prominently displayed at the top thereof the words "CONSUMER CREDIT TRANSACTION" and the following additional legend or caveat printed in not less than 12-point bold upper case type:

"IMPORTANT!! YOU ARE BEING SUED!!
THIS IS A COURT PAPER A SUMMONS

DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY!! PART OF YOUR PAY CAN BE TAKEN FROM YOU (GARNISHEED). IF YOU DO NOT BRING THIS TO COURT, OR SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN'T PAY FOR YOUR OWN LAWYER BRING THESE PAPERS TO THIS COURT RIGHT AWAY. THE CLERK (PERSONAL APPEARANCE) WILL HELP YOU!!"

(2) where a purchaser, borrower or debtor is a defendant, the summons shall have set forth beneath the designation of the basis of venue the county of residence of a defendant, if one resides within the state, and the county where the consumer credit transaction took place, if it is within the State.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Luz Santiago, et al.

v.

Penn Credit Corporation
Dale Marshall
Norman Johnson

CIVIL ACTION NO. 93-1134

NOTICE OF ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT

NOTICE

TO: Penn Credit Corporation
(Name)
208 North Street
(Street)
Harrisburg, PA 17108
(City and State)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expense incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice of Acknowledgment of Receipt of Summons and Complaint was mailed on 3/29/, 1993

Henry J. Sommer

3/29/93
(Date of Signature)

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at _____
(insert address)

_____
(Signature)

_____
(Relationship to Entity/Authority to Receive Service of Process)

_____
(Date of Signature)

Civ. 652(12/3/84) ⊕

United States District Court

DISTRICT OF

V.

SUBPOENA IN A CIVIL CASE

CASE NUMBER:

TO:

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

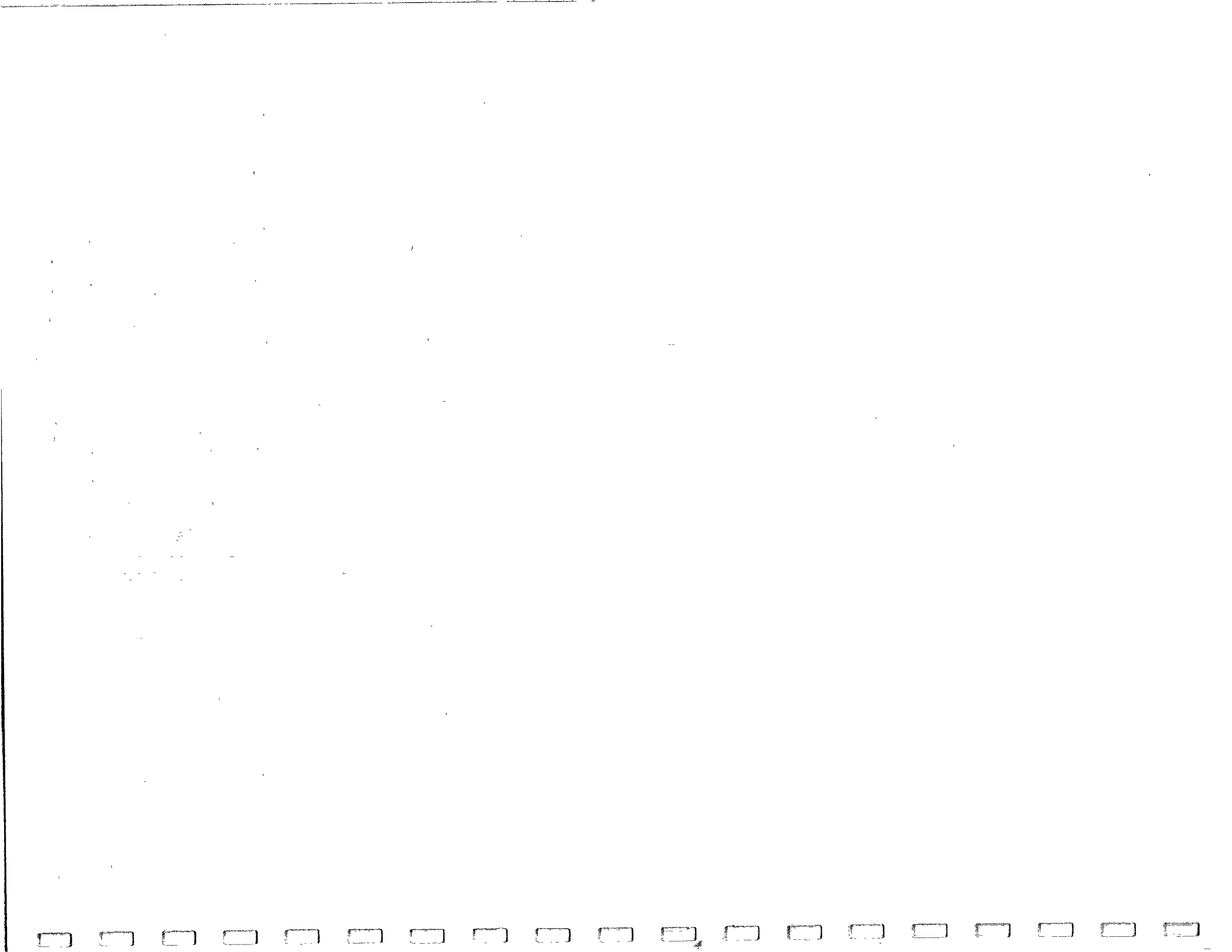
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.



(Name of Attorney)
(Name of Firm)
(Address)
(Telephone)
(Fax)

(Attorney for _____)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re

_____

Debtor(s).

Case No.

NOTICE OF MOTION FOR RELIEF FROM STAY

Notice is hereby given that _____ (creditor) has moved for relief from stay pursuant to 11 U.S.C. § 362(d) upon property described as: _____.

The basis for relief from stay is _____.

The original motion was filed _____, 19__ with the Clerk of the U.S. Bankruptcy Court, Old Federal Building, 605 W. 4th Avenue, Suite 138, Anchorage, Alaska 99501-2296.

You have until _____, 199__ (fifteen days from the date of mailing or personal service of this notice) within which to file written objections to the motion. SHOULD YOU FAIL TO FILE AN OBJECTION THE COURT MAY GRANT THE MOTION FOR RELIEF FROM STAY WITHOUT AN ACTUAL HEARING AND WITHOUT FURTHER NOTICE.

If objections are filed, a hearing must be held by _____, 199__ (within thirty days of the date of filing of the motion) or relief from stay will occur automatically under 11 U.S.C. § 362(e). ALTHOUGH ANY PARTY MAY REQUEST A HEARING ON AN OBJECTION TO A MOTION FOR RELIEF FROM STAY, THE PARTY DESIRING THE STAY TO REMAIN IN EFFECT MUST REQUEST A HEARING AND BE CERTAIN THAT A HEARING IS SCHEDULED WITHIN THIRTY (30) DAYS OF THE MOTION. Objections and calendar requests shall be sent to the Clerk of the Bankruptcy Court with copies to creditor's counsel at the addresses set forth above.

DATED this ____ day of _____, 19—.

(Name of Attorney Firm)

By _____
Attorneys for Creditor

(Name of Attorney)
(Name of Firm)
(Address)
(Telephone)
(Fax)

(Attorney for _____)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re)
)
_____)
) Case No.
Debtor(s).)
_____)

NOTICE OF MOTION FOR RELIEF FROM STAY (CODEBTOR STAY §§ 1201 and 1301)

Notice is hereby given that _____ (creditor) has moved for relief from the codebtor stay pursuant to 11 U.S.C. §§ 1201 or 1301 upon an obligation described as: _____.

The basis for relief from stay is _____.

The original motion was filed _____, 19__ with the Clerk of the U.S. Bankruptcy Court, Old Federal Building, 605 W. 4th Avenue, Suite 138, Anchorage, Alaska 99501-2296.

You have until _____, 199__ (fifteen days from the date of mailing or personal service of this notice) within which to file written objections to the motion. SHOULD YOU FAIL TO FILE AN OBJECTION THE COURT MAY GRANT THE MOTION FOR RELIEF FROM STAY WITHOUT AN ACTUAL HEARING AND WITHOUT FURTHER NOTICE.

If objections are filed, a hearing must be held by _____, 199__ (within twenty days of the date of filing of the motion) or relief from stay will occur automatically under 11 U.S.C. §§ 1201 or 1301. ALTHOUGH ANY PARTY MAY REQUEST A HEARING ON AN OBJECTION TO A MOTION FOR RELIEF FROM STAY, THE PARTY DESIRING THE STAY TO REMAIN IN EFFECT MUST REQUEST A HEARING AND BE CERTAIN THAT A HEARING IS SCHEDULED WITHIN TWENTY (20) DAYS OF THE MOTION. Objections and calendar requests shall be sent to the Clerk of the Bankruptcy Court with copies to creditor's counsel at the addresses set forth above.

DATED this ——— day of ————, 19—.

(Name of Attorney Firm)

By _____
Attorneys for Creditor

(Name of Attorney)
(Name of Firm)
(Address)
(Telephone)
(Fax)

(Attorney for _____)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re)
)
_____)
) Case No.
Debtor(s).)
_____)

NOTICE OF OBJECTION TO CLAIM AND NOTICE OF HEARING THEREON

To: _____

Please take notice that the undersigned hereby objects to the allowance of Claim No. _____ filed by the above-named claimant on the _____ day of _____, 199__ for the following reasons: _____

Please further take notice that a hearing will be held on the _____ day of _____*, 199__ at _____

for the purpose of determining the above-noted objection.

DATED:

(Name of Attorney Firm)
By _____
Attorneys for _____

* Not less than 30 days after mailing the notice of hearing

(Name of Attorney)
(Name of Firm)
(Address)
(Telephone)
(Fax)

(Attorney for _____)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In the Matter of:)
)
)
)
) Case No.
)
)
_____ Debtor(s).)

NOTICE OF APPLICATION FOR ORDER OF DISMISSAL OR CONVERSION OF CASE

Notice is hereby given that the undersigned has made application to the above entitled court for an order CONVERTING the above entitled case from a case under Chapter _____ to a case under Chapter _____ or DISMISSING the above entitled case. The application is based upon the following:

_____
_____
_____
_____

Further take notice that if you object to the DISMISSAL/CONVERSION of this case that you must object in writing on or before the _____* day of _____, 19__ by filing your written objection with the Office of the Clerk of the above entitled Court at the Old Federal Building, 605 W. 4th Avenue, Suite 138, Anchorage, Alaska 99501-2296 and serve a copy on the undersigned on or before said date.

SHOULD YOU FAIL TO SO OBJECT OR HAVING OBJECTED FAIL TO TIMELY REQUEST A HEARING, PLEASE BE ADVISED THAT THE CASE MAY BE DISMISSED OR CONVERTED WITHOUT FURTHER NOTICE TO YOU.

The application for Order of DISMISSAL/CONVERSION of Case may be inspected at the office of the Clerk at the Old Federal Building, 605 W. 4th Avenue, Suite 138, Anchorage, Alaska or at the office of the undersigned.

DATED:

(Name of Attorney Firm)

By _____
Attorneys for _____

* Unless otherwise ordered, not less than 20 days after the mailing of the notice.

(A) Form. A motion for relief from the automatic stay shall be captioned as a contested matter which discloses the names of the movant and the respondents and filed by the Clerk in the administrative file.

(B) Service.

(1) The motion, a proposed form of order and the notice required by subsection D shall be promptly served by movant upon:

(a) the debtor;
(b) the debtor's counsel; and
(c) the trustee.

(2) The notice only required by subsection D shall be promptly served by movant upon:

(a) any other party known to movant to claim an interest in property or the rents, issues, profits or proceeds thereof which are the subject of the motion;
(b) in a Chapter 11 case, the twenty largest unsecured creditors listed by debtor and counsel for any committee appointed under the Code; and
(c) any other person or entity required by law or the Court.

(C) Movant's Supporting Documents. Each such motion shall be supported by legible copies of:

(1) all documents which movant asserts establish a valid, perfected security interest; and

(2) all documents which movant contends support an assertion of a lack of adequate protection or equity in property, including appraisals or summaries thereof, currently in movant's possession or control upon which it intends to rely at final hearing.

(D) Notice of Motion. Contemporaneously with the motion, movant will serve and file a form of notice providing the details of the motion and that if no objection is served on movant and filed within fifteen days of service, the motion may be granted.

(E) Entry of Order. If an objection is not timely filed and served, the proposed form of order may be lodged and served with a certification of service and of no objection, which certification may not be made until expiration of five days after the last day for objection. If the Court determines that the movant filed improperly or in bad faith a certification of no objection, the movant may be subject to sanctions.

(F) Objection. Objection to relief from stay shall be supported by specific facts and, if respondent is alleging the existence of adequate protection, legible copies of all appraisals or summaries thereof, currently in the objector's possession or control upon which it intends to rely at final hearing.

(G) Procedure Upon Objection. If a timely objection is filed and served, movant will lodge and serve a proposed order setting final hearing reflecting the parties' stipulation as to:

(1) the length of time required for final hearing; and

(2) whether the final hearing will be conducted as an evidentiary hearing or as oral argument based on a stipulated briefing schedule. If no stipulation can be reached, the movant's estimation of the time required and the nature of the final hearing will be adopted unless the Court otherwise orders.

same shall have expired, may be subject to the sanctions listed in Local Bankruptcy Rule 106.

(d) Service by Mail: Applicability of Bank.Rule 9006(f). Unless otherwise specified, the times prescribed by this Local Bankruptcy Rule assume and allow for service by mail. Therefore the parties may not avail themselves of the additional time provided by Bank.Rule 9006(f) in situations wherein the specific time limits set forth in the Local Bankruptcy Rules apply.

(e) Filing, Time for Hearing and Content of Papers Filed. Unless otherwise provided by rule or order of the Court, no oral motions will be recognized except during trial. Every motion shall be accompanied by written notice of motion, specifying the time and place of hearing.

(f) Time for Service and Response. Any motion and notice thereof shall be served upon the adverse party, except for a motion under Local Bankruptcy Rule 111(3), and filed with the Clerk not later than twenty-one days before the day designated in the motion as the hearing date, unless the Court, for good cause, prescribes a shorter time. All motions shall be placed by the Courtroom Deputy upon the calendar for hearing at the time and on the day set forth in the notice thereof. There shall be served and filed with the motion and as a part thereof: (1) copies of all photographs and documentary evidence which the moving party intends to submit in support of the motion, in addition to the declarations required or permitted by Bank.Rule 9006(d); and (2) a brief, but complete, written statement of all reasons in support thereof, together with a memorandum of the points and authorities upon which the moving party will rely.

Unless warranted by special circumstances of the motion, or otherwise ordered by the Court, points and authorities are not usually required for applications to retain or compensate professionals.

The moving papers shall advise the opposing party that Local Bankruptcy Rule 111(1)(g) requires a formal response at least eleven days before the hearing.

(g) Response to Motions. Unless the Court orders otherwise, each interested party responding to the motion shall, not later than 11 days prior to the hearing date, serve upon the adverse party, and file with the Clerk either: (i) a brief, but complete written statement of all reasons in opposition thereto or in support or joinder thereof and answering memorandum of points and authorities, declarations and copies of all photographs and documentary evidence on which the responding party intends to rely; or (ii) a written statement that the motion will not be opposed. If the hearing is set for Santa Barbara, a courtesy copy of the response should also be mailed to the Judge's chambers in Santa Barbara. The Santa Barbara courtesy copy does *not* have to be a court-conformed copy.

(h) Reply Papers. The moving party (or the opposing party in instances where a joinder has been filed) may, at least two Court days before the scheduled hearing, elect to serve and file a reply memorandum with declarations or other evidence attached. Service of reply papers on opposing parties shall be made by personal service or by overnight mail delivery service. A courtesy copy should be delivered directly to the Judge's law clerk. If the hearing is set for Santa Barbara, the Judge's courtesy copy should be delivered directly to the chambers in Santa Barbara. The Santa Barbara courtesy copy does not have to be a court-conformed copy. Unless the Court finds good cause, repiy papers not filed or served as provided above will not be considered.

(i) Extension of Time Due to Continuance of Hearing Date. Unless the order for continuance shall specify otherwise, the entry of an order continuing

Form 300. Notice of Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362.

Attorney or Party Name, Address and Telephone Number	FOR COURT USE ONLY
Attorney for	
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor	
Movant(s), vs. Respondent(s)	CHAPTER ____ CASE NUMBER REFERENCE NUMBER

NOTICE OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362

1. TO THE DEBTOR, DEBTOR'S ATTORNEY AND OTHER INTERESTED PARTIES:

2. NOTICE IS HEREBY GIVEN that on the following date and time and in the indicated courtroom, Movant in the above-captioned matter will move this Court for an Order granting relief from the automatic stay on the grounds set forth in the attached Motion for Relief from the Automatic Stay.

3. Hearing Date: Time: Courtroom: Floor:

☐ 312 North Spring Street, Los Angeles
☐ 201 North Figueroa Street, Los Angeles
☐ 699 North Arrowhead Avenue, San Bernardino
☐ 300 North Los Angeles Street, Los Angeles
☐ 34 Civic Center Plaza, Santa Ana
☐ 222 East Carrillo Street, Santa Barbara

4. Deadline for Opposition Papers:

a. ☐ This motion is being heard on regular notice pursuant to Local Bankruptcy Rule 112. If you wish to oppose this Motion, you must file a written response with the Bankruptcy Court and serve a copy of it upon the Movant or Movant's attorney at the address set forth above no less than five (5) court days prior to the above hearing date. If you fail to file a written response to this Motion within such time period, the Court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.

b. ☐ This motion is being heard on shortened notice pursuant to Local Bankruptcy Rule 113(2). Oral or written response may be made at the hearing.

JACK L. WAGNER
Clerk of the Bankruptcy Court

Dated:

By: _____
Deputy Clerk

In re (SHORT TITLE) Debtor.	CHAPTER ___ CASE NUMBER:

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF _____

I am employed in the above County, State of California. I am over the age of 18 and not a party to the within action. My business address is as follows:

On _____, I served the foregoing document described as: ORDER ON MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (REAL PROPERTY) on the interested parties at their last known address in this action by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail at _____, California, addressed as follows:

☐ Addressees continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated:

_____ _____
Type Name *Signature*

Form 320. Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 (Unlawful Detainer).

Attorney or Party Name, Address and Telephone Number Attorney for	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re. Debtor.	
Movant(s), vs. Respondent(s)	CHAPTER ____ CASE NUMBER REFERENCE NUMBER DATE: TIME: CTRM:

MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (UNLAWFUL DETAINER)

1. Movant in the above-captioned matter moves this Court for an Order granting relief from the automatic stay on the grounds set forth below:

2. a. A Petition under Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on:

   b. *(Optional)* Prior Filing Information: Debtor has previously filed a Bankruptcy Petition on *(specify date)*: *If known:* The prior case was dismissed on *(specify date)*:

   c. ☐ See Attached Page for additional Prior Filing Information

3. Movant alleges the following in support of its Motion:

   a. Debtor occupies the premises commonly known as *(specify street address)*:

   b. Debtor occupies the premises ☐ on a month-to-month tenancy ☐ on a hold-over tenancy ☐ pursuant to a lease in default ☐ on a tenancy at will ☐ after a foreclosure sale ☐ pursuant to a terminated lease

   c. Debtor has failed to pay the monthly rent of $_____ since *(specify date)*:

(Continued on Next Page)

In re (SHORT TITLE) Debtor.	CHAPTER ___ CASE NUMBER:

3. d. Procedural status in state court *(fill in all applicable data for completed steps)*

(i) ☐ On *(specify date)*: _____, Movant served a Notice to Pay Rent or Quit on the Debtor;

(ii) ☐ On *(specify date)*: _____, Movant filed a Complaint for Unlawful Detainer in State Cou

(iii) ☐ Trial was held on *(specify date)*: _____.

(iv) ☐ A Judgment was entered on said Complaint by the State Court on *(specify date)*: _____

4. *(Optional)* Movant alleges that Debtor filed this bankruptcy case in bad faith based upon the following:

a. ☐ The Debtor filed what is commonly referred to as a "face sheet" filing of only a few pages consisting of the Petition an few other documents. No Schedules or Statement of Affairs (or Chapter 13 Statement or Plan, if appropria accompanied the Petition.

b. ☐ The landlord and/or the landlord's attorney was the only creditor listed on the master mailing matrix.

c. ☐ Movant is informed and believes that the Debtor filed the Petition herein for the sole purpose of attempting to obstruc state court unlawful detainer proceeding and without intending to seek a fresh start as provided under the Bankrup Code. Debtor's use of the bankruptcy system for such purpose is an abuse of such system.

5. Movant attaches the following supporting evidence pursuant to Local Bankruptcy Rule 112(3)(a):

a. ☐ Declarations under penalty of perjury which include any material to which the declarant would be allowed, under Fede Rules of Evidence, to testify if called as a witness at the hearing.

b. ☐ Copy of State Court Unlawful Detainer Judgment.

c. ☐ *(Optional)* Memorandum of the points and authorities upon which the movant will rely.

d. ☐ Other evidence *(specify)*: ☐ See Attached Page

6. Total number of attached pages of supporting documentation: _____

WHEREFORE, Movant prays that this Court issue an Order (a copy of the form of which is submitted herewith and has been serve granting the following:

☐ Relief from the automatic stay, or alternatively, for adequate protection

☐ Prospective relief and findings under Bankruptcy Code § 109(g)

☐ Attorney's fees and/or sanctions as requested in the supporting Declaration(s) and Order

Dated:

Respectfully submitted,

_____

Firm Name

By: _____

Name: _____

Attorney for Movant

Form 420. Notice of Motion and Motion To Avoid Lien Under 11 U.S.C. § 522(f) (Real Property).

Attorney or Party Name, Address and Telephone Number Attorney for	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor.	CHAPTER ____ CASE NUMBER (No Hearing Required)

NOTICE OF MOTION AND MOTION TO AVOID LIEN UNDER 11 U.S.C. § 522(f) (REAL PROPERTY)

1. TO THE CREDITOR, CREDITOR'S ATTORNEY AND OTHER INTERESTED PARTIES:

2. NOTICE IS HEREBY GIVEN that the Debtor hereby moves this Court for an Order, without a hearing, avoiding a lien on the grounds set forth below

3 **Deadline for Opposition Papers:**
Pursuant to Local Bankruptcy Rule 111(7)(a), any party objecting to Debtor's Motion may file and serve a written objection and request a hearing on this Motion. If you fail to file a written response within twenty (20) days of the date of service of this Notice, the Court may treat such failure as a waiver of your right to oppose this Motion and may grant the requested relief.

4. **Type of Case:**

   a. ☐ A Voluntary Petition under Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on:

   b. ☐ An Involuntary Petition under Chapter ☐ 7 ☐ 11 was filed on:

      ☐ An Order of Relief under Chapter ☐ 7 ☐ 11 was entered on:

   c. ☐ An Order of Conversion to Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on:

   d. ☐ Other

5. **Procedural Status:**

   a. ☐ Name of Trustee Appointed *(if any)*:

   b. ☐ Name of Attorney of Record for Trustee *(if any)*:

(Continued on Next Page)

Motion to Avoid Lien (Real Property) - Page Two (2)

In re (SHORT TITLE) Debtor	CHAPTER ___ CASE NUMBER:

6. Debtor claims an exemption in the subject real property under:

a. ☐ California Code of Civil Procedure § _____ (Homestead): Exemption amount claimed on Schedules: $_____
b. ☐ California Code of Civil Procedure § _____ Exemption amount claimed on Schedules: $_____
c. ☐ Other Statute *(specify)*:

7. Debtor's entitlement to an exemption is impaired by judicial lien, the details of which are as follows:

a. Date of Entry of Judgment *(specify)*:
b. Case Name *(specify)*:
c. Docket Number *(specify)*:
d. Date of Recordation of Lien *(specify)*:
e. Recorder's Instrument Number or Map/Book/Page *(specify)*:

8. The street address of the property claimed to be exempt is *(specify)*:

9. Debtor alleges that the fair market value of the property claimed exempt is: $ _____.

10. The subject property is encumbered with the following liens *(list in order of priority and place an "X" as to the lien to be avoided by this Motion)*:

Name of Lien Holder	"X"	Date Lien Recorded	Original Lien Amt	Current Lien Amt	Date of Current Lien Amt
			$	$	
			$	$	
			$	$	
			$	$	
			$	$	
			$	$	

11. Debtor attaches copies of the following documents in support of the motion (as appropriate):

a. ☐ Schedule B-4 listing all exemptions claimed by Debtor(s)
b. ☐ Appraisal of the property
c. ☐ Documents showing current balance due as to the liens specified in Paragraph 10 above
d. ☐ Recorded Abstract of Judgment
e. ☐ Recorded Declaration of Homestead (Homestead Exemption)
f. ☐ Declaration(s)
g. ☐ Other *(specify)*:

(Continued on Next Page)

In re (SHORT TITLE) Debtor.	CHAPTER ____ CASE NUMBER

12. Total number of attached pages of supporting documentation: _____

13. Debtor declares under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this motion was executed on the following date at _____, California.

WHEREFORE, Debtor prays that this Court issue an Order (a copy of the form of which is submitted herewith and has been served) avoiding the creditor's lien.

Dated:

_____
Debtor's Signature

Dated:

_____
Law Firm Name

By: _____

Name: _____
Attorney for Debtor

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF _____

I am employed in the above County, State of California. I am over the age of 18 and not a party to the within action. My business address is as follows:

On _____, I served the foregoing document described as: NOTICE OF MOTION AND MOTION TO AVOID LIEN UNDER 11 U.S.C. § 522(f) (REAL PROPERTY) on the lienholder whose lien is sought to be avoided, the lienholder's attorney (if known), on the Chapter ____ Trustee and the United States Trustee at their last known addresses by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail at _____, California, addressed as follows:

☐ Addresses continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated:

_____ _____
Type Name *Signature*

CSD 1181 [08/01/91]

Name, Address, Telephone No. & I.D. No.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
940 Front Street, Room 5-N-26, San Diego, California 92189-0020

In Re

Tax I.D. #:

Social Security #:

Debtor.

BANKRUPTCY NO.

NOTICE OF MOTION AND HEARING

TO THE DEBTOR, ALL CREDITORS AND OTHER PARTIES IN INTEREST:

YOU ARE HEREBY NOTIFIED that on ———, 19—, at ———.m., in Department ——— of the United States Bankruptcy Rule located at 940 Front Street, Fifth Floor, San Diego, California 92189-0020, there will be a hearing regarding the Motion of ———, for [check the appropriate box]:

[ ] Dismissal of a chapter 7, 11 or 12 case;

[ ] Conversion of a chapter 7, 11 or 12 case by a party other than the debtor;

[ ] Modification of a chapter 11, 12 or 13 plan;

[ ] Approval of disclosure statement in chapter 11 case;

[ ] Approval of plan of reorganization in chapter 11 case;

[ ] Allowance of [interim] compensation or reimbursement of expenses of professionals as follows [include information required by Federal Rule of Bankruptcy Procedure 2002(c)(2)]:

[ ] Appointment of a trustee in a chapter 11 case; or

[ ] Other [specify the nature of the matter]:

If not required to be attached, a set of the moving papers will be provided, upon request, by the undersigned or may be inspected at the office of the Clerk.

Any opposition or other response to the motion must be served upon the undersigned and the original and one copy of such papers with proof of service must be filed with the Clerk of the U.S. Bankruptcy Court at 940 Front St., Rm. 5-N-26, San Diego, California 92189-0020, NOT LATER THAN FOURTEEN (14)[1] DAYS BEFORE THE HEARING DATE.

DATED:

[Attorney for] Moving Party

CSD 1181

[1] If you were served by mail, you have three (3) additional days to take the above-stated actions.

CERTIFICATE OF SERVICE

I, the undersigned whose address appears below, certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on ——— day of ———, 19—, I served a true copy of the within NOTICE OF MOTION AND HEARING by [describe here mode of service]

on the following persons [set forth name and address of each person served] and as checked below:

[ ] In Chpt. 7, 11, & 12 cases:
UNITED STATES TRUSTEE
Department of Justice
101 West Broadway, Suite 440
San Diego, CA 92101

[ ] In Chpt. 13 cases numbered 90-08445 or lower:
HARRY W. HEID, TRUSTEE
Post Office Box 671
San Diego, CA 92112

[ ] In Chpt. 13 cases numbered 90-08446 or higher:
DAVID L. SKELTON
Post Office Box 12188
San Diego, CA 92112

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____
(Date)

_____
(Typed Name and Signature)

_____
(Address)

_____
(City, State, ZIP Code)

CSD 1181

CSD 1182 [08/01/91]

Name, Address, Telephone No. & I.D. No.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
940 Front Street, Room 5-N-26, San Diego, California 92189-0020

In Re

Tax I.D. #:

Social Security #: Debtor.

BANKRUPTCY NO.

NOTICE OF MOTION FOR ————

TO:

You are herewith served with the attached Motion by _____

_____

for:

and any accompanying declarations.

If you object to the Court granting the relief requested in the Motion:

1. **YOU ARE REQUIRED** to obtain a hearing date and time from the appropriate Courtroom Deputy for the judge assigned to this bankruptcy case. *If a Chapter 7, 11, or 12 case*, determine which deputy to call by looking at the Bankruptcy Case No. in the above caption of this notice. If the case number is followed by the letter(s):

— M —	call (619) 557-6019	—	DEPARTMENT ONE
— LM —	call (619) 557-6594	—	DEPARTMENT TWO
— H —	call (619) 557-6018	—	DEPARTMENT THREE
— B —	call (619) 557-5157	—	DEPARTMENT FOUR

For ALL Chapter 13 cases, call (619) 557-5955.

2. **WITHIN TWENTY-EIGHT (28)[1] DAYS FROM THE DATE OF SERVICE OF THE MOTION,** you are further required to serve a copy of your DECLARATION IN OPPOSITION TO MOTION and separate REQUEST AND NOTICE OF HEARING [Local Form CSD 1184[2]] upon the undersigned moving party, together with any opposing papers. The opposing declaration shall be signed and

CSD 1182 [Continued on Page 2]

[1] If you were served by mail, you have three (3) additional days to take the above-stated actions.

[2] You may obtain Local Form CSD 1184 from the office of the Clerk of the U.S. Bankruptcy Court.

verified in the manner prescribed by Federal Rule of Bankruptcy Procedure 9011, and the declaration shall:

a. identify the interest of the opposing party; and

b. state, with particularity, the grounds for the opposition.

3. **YOU MUST** file the original and one copy of the Declaration and Request and Notice of Hearing with proof of service with the Clerk of the U.S. Bankruptcy Court at 940 Front Street, Room 5-N-26, San Diego, California 92189-0020, no later than the next business day following the date of service.

IF YOU FAIL TO SERVE YOUR "DECLARATION IN OPPOSITION TO INTENDED ACTION" AND "REQUEST AND NOTICE OF HEARING" within the 28-day[1] period provided by this notice, NO HEARING SHALL TAKE PLACE, you shall lose your opportunity for hearing, and the debtor or trustee may proceed to take the intended action.

DATED:

_____
Attorney for Moving Party

CERTIFICATE OF SERVICE

I, the undersigned whose address appears below, certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on _____ day of _____, 19—, I served a true copy of the within NOTICE OF MOTION by [describe here mode of service]

on the following persons [set forth name and address of each person served] and as checked below:

[ ] In Chpt. 7, 11, & 12 cases:
UNITED STATES TRUSTEE
Department of Justice
101 West Broadway, Suite 440
San Diego, CA 92101

[ ] In Chpt. 13 cases numbered 90-08445 or lower:
HARRY W. HEID, TRUSTEE
Post Office Box 671
San Diego, CA 92112

[ ] In Chpt. 13 cases numbered 90-08446 or higher:
DAVID L. SKELTON
Post Office Box 12188
San Diego, CA 92112

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____
(Date)

_____
(Typed Name and Signature)

_____
(Address)

_____
(City, State, ZIP Code)

CSD 1182

CERTIFICATE OF SERVICE

I, the undersigned whose address appears below, certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on _____ day of _____, 19—, I served a true copy of the within REQUEST AND NOTICE OF HEARING and the following pleadings [describe]

by [describe here mode of service]

on the following persons [set forth name and address of each person served] and as checked below:

[ ] In Chpt. 7, 11, & 12 cases:
UNITED STATES TRUSTEE
Department of Justice
101 West Broadway, Suite 440
San Diego, CA 92101

[ ] In Chpt. 13 cases numbered 90-06445 or lower:
HARRY W. HEID, TRUSTEE
Post Office Box 671
San Diego, CA 92112

[ ] In Chpt. 13 cases numbered 90-06446 or higher:
DAVID L. SKELTON
Post Office Box 12188
San Diego, CA 92112

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____
(Date)

_____
(Typed Name and Signature)

_____
(Address)

_____
(City, State, ZIP Code)

CSD 1184

CSD 1185 [08/01/91]

Name, Address, Telephone No. & I.D. No.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA 940 Front Street, Room 5-N-26, San Diego, California 92189-0020	
In Re Debtor.	BANKRUPTCY NO.
Moving Party	RS NO.
Respondent(s)	

NOTICE OF FILING OF A MOTION FOR RELIEF FROM AUTOMATIC STAY

TO THE ABOVE NAMED RESPONDENT(S)[1]:

YOU ARE HEREBY NOTIFIED that a Motion for Relief from the Automatic Stay provided by § 362 of the Bankruptcy Code has been filed. If you object to the Court granting relief from the automatic stay as requested in the Motion, **YOU MUST, WITHIN 11[2] DAYS FOLLOWING THE DATE OF SERVICE OF THIS NOTICE OF MOTION ON YOU:**

1. Obtain a hearing date and time from the appropriate Courtroom Deputy for the judge assigned to this bankruptcy case. *If a Chapter 7, 11, or 12 case,* determine which deputy to call by looking at the Bankruptcy Case No. in the above caption of this notice. If the case number contains the letter(s):

— M —	call (619) 557-6019	— DEPARTMENT ONE
— LM —	call (619) 557-6594	— DEPARTMENT TWO
— H —	call (619) 557-6018	— DEPARTMENT THREE
— B —	call (619) 557-5157	— DEPARTMENT FOUR

For ALL Chapter 13 cases, call (619) 557-5955.

[1] Bankruptcy Local Rule 4001-2, printed on the reverse side, governs service of this notice.

[2] If you were served by mail, you have three (3) additional days to take the above-stated actions. Instructions for the Respondent and the date of service of this notice indicated in the Certificate of Service are printed on the reverse side.

2. File with the undersigned Clerk of the Bankruptcy Court, at the address shown above, the original and one copy of:

(a) a "DECLARATION IN OPPOSITION TO THE MOTION"[2]; and

(b) a separate "REQUEST AND NOTICE OF HEARING ON MOTION," using Form CSD 1186 of this Court (this form must be obtained from the Office of the undersigned Clerk);

3. Serve a copy of both documents on the [Attorney for the] Moving Party named in the upper left hand corner.

4. Serve a copy of both documents on each of the additional parties as required by Bankruptcy Local Rule 4001-3.

IF YOU FAIL TO FILE WITH THE CLERK AND SERVE ON THE MOVING PARTY YOUR REQUEST FOR HEARING AND THE DECLARATION IN OPPOSITION TO MOTION WITHIN THE 11-DAY[2] PERIOD PROVIDED BY THIS MOTION, THE COURT MAY GRANT THE MOVING PARTY RELIEF FROM THE AUTOMATIC STAY WITHOUT FURTHER NOTICE TO YOU OR A HEARING.

Dated: Barry K. Lander, Clerk

By: _____, Deputy Clerk

ALL PLEADINGS RELATED TO THIS PARTICULAR RS ACTION MUST CONTAIN THE ABOVE CAPTION

CSD 1185 (RECEIPT NO. ————) [Continued on Page 2]

1. ALL PLEADINGS RELATED TO THIS PARTICULAR RS ACTION MUST CONTAIN THE ABOVE CAPTION.
2. INSTRUCTIONS TO RESPONDENT: If you file a "Declaration in Opposition to the Motion," it must be signed by the respondent under oath; and
   (1) identify the interest of the Respondent in the property;
   (2) state with particularity the grounds for the opposition; and
   (3) if respondent is the debtor or the trustee, state the provable value of the property specified in the Motion and the amount of equity which would be realized by the debtor after deduction of all encumbrances.
3. INSTRUCTIONS TO MOVING PARTY: Bankruptcy Local Rule 4001-2 provides that: "(a) A motion for stay relief shall:
   "(1) name, as respondents, the debtor, the trustee, and other entities entitled to receive notice of default or notice of sale under applicable non-bankruptcy law governing foreclosure of real or personal property which is the subject of the motion, or the agents for such parties;
   "(2) state with particularity the relief or order sought, and the grounds for such relief or order;
   "(3) state the status of any pending foreclosure or repossession;
   "(4) if the basis of the motion is lack of equity or adequate protection, and value is relevant, state by declaration the provable value of the subject property and the amount of any known encumbrances. The declaration shall also contain a statement as to the competency of the declarant and the foundation for any opinion therein; and
   "(5) if the motion is brought for cause, state by declaration or other verified pleading the specific facts that constitute such cause.
   "(b) Failure to set forth the information required by this rule may be grounds for denial of the relief requested.
   "(c) The moving party shall serve the motion, together with Local Form CSD 1185 (Note: new form number), NOTICE OF FILING OF A MOTION FOR RELIEF FROM AUTOMATIC STAY, as set forth in Appendix C, on the parties named in Bankruptcy Local Rule 4001-2(a)(1) above. In a chapter 11 or 12 case, a copy of the motion shall also be served on the United States Trustee.
   "(d) The proof of service shall be filed with the clerk no later than the next business day following the date of service."

==========

[The below Certification of Service must accompany the Notice of Motion printed on the reverse and any motion for entry of a default order pursuant to Bankruptcy Local Rule 4001-6.]

CERTIFICATE OF SERVICE

I, the undersigned whose address appears below, certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on ——— [DATE OF SERVICE[3]], I served a true copy of the within NOTICE OF FILING OF A MOTION FOR RELIEF FROM AUTOMATIC STAY, together with a copy of the Motion for Relief from Stay and [describe any other papers]:

by [describe mode of service]:

[3] This DATE OF SERVICE commences the time period for responding to Motion.

INSTRUCTIONS TO MOVANT

By way of example, if the movant *mails* the notice on the first day of the month, the Court action date is 18 days later, on the 19th day of the month. Since the hearing request date must not be less than 11 days from the date of service, plus three days for mailing, objections may be filed through the 15th day of the month. The Court action date is thus not less than four days following the hearing request date.

Attach *Certificate of Service* to this notice when filing with the Court. The Certificate of Service, however, need not be mailed to all parties receiving notice.

Failure to follow these and other procedural instructions required by Local Rule 23 may result in the denial of your application.

Suggested Form L. Notice of Hearing, Preliminary Hearing, or Entry of Order.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:

Debtors.

Applicant,

vs.

Respondent.

Bankruptcy Case No. _____

NOTICE OF HEARING, PRELIMINARY HEARING, OR ENTRY OF ORDER

YOU ARE HEREBY NOTIFIED that a ———, a copy of which is attached hereto, has been filed with this Court.

If you desire to oppose this MOTION you are REQUIRED TO FILE WITH THIS COURT AND SERVE upon ———, attorney, whose address is ———, a written RESPONSE TO THE MOTION on or before ———. IF YOU FAIL TO DO SO, AN ORDER GRANTING THE MOTION WILL BE ENTERED.

YOU ARE HEREBY NOTIFIED that in the event you do timely file and serve a RESPONSE TO THE MOTION, a HEARING ON THE MOTION (or that a PRELIMINARY HEARING ON THE MOTION) has been set for ——— at ——— o'clock —.m., in Courtroom ———, ———.

Bradford L. Bolton, Clerk

_____
Date of Issuance

By ———
Deputy Clerk
U.S. Bankruptcy Court
1845 Sherman Street, Fourth Floor
Denver, Colorado 80203

2. All motions for continuance are expected to be filed as promptly as possible after a party or counsel learns of a conflict or other event necessitating the motion for continuance.

3. A motion for continuance shall not be granted by the mere agreement of counsel.

4. The person requesting the continuance shall have the responsibility of contacting all opposing counsel for purposes of advising opposing counsel of the fact that a motion for continuance is to be filed and for purposes of ascertaining whether opposing counsel will consent to the motion for continuance.

5. All motions for continuance shall be in writing and shall set out with specificity the grounds which necessitate the continuance. In addition, counsel shall make a professional statement that all opposing counsel have been contacted about the continuance, or, that opposing counsel could not be consulted about the continuance and what efforts were made to reach opposing counsel, and whether any opposing counsel are resisting the motion for continuance.

6. In the case of resisted motions for continuance, the movant shall contact the court's scheduling clerk to determine a time when a hearing may be held on the motion for continuance (which hearing will normally be a telephonic hearing). Motions for continuance shall be served upon all opposing counsel or parties, if pro se, and shall contain in the motion for continuance a notice as to the date and time of the hearing and an indication as to whether the hearing will be telephonic or an in court hearing. If the hearing is to be a telephonic hearing, it shall be the responsibility of the movant to determine from the court whose responsibility it is to set up the telephonic hearing.

7. If a motion for continuance (whether resisted or unresisted) is filed within 10 days of the hearing date, counsel shall not only file a written motion but shall also telephonically advise the court's scheduling clerk that the motion is being filed.

8. This rule will be strictly enforced. Any motion for continuance which is filed and is not in compliance with this rule will be summarily denied.

Local Rule 23. Motions for Relief from Stay.

A. Entry of Agreed Orders. Agreed orders for relief may be entered without hearing under the following circumstances. The motion must be presented with an agreed order (or with signature(s) indicating no objection). The debtor(s) or debtor(s) attorney, trustee, (and, in a Chapter 11 case, the attorney for the unsecured creditors' committee, or if none, the chairperson of the Unsecured Creditors' Committee and U. S. trustee) must sign the order stating their agreement or lack of opposition. Such orders must be limited to relief from the stay and shall not recognize the validity of any lien, title to any property or the validity or amount of any indebtedness for any purpose except relief from the stay. All other motions must follow the procedure set forth below, including all such motions in Chapter 11 cases if there is not an unsecured creditors' committee willing to waive objection.

B. Contents of the Motion for Relief Without an Agreed Order.

1. The motion shall contain a short and plain statement of the alleged facts that are grounds for relief; mere statement of the statutory grounds for relief is insufficient.

2. If "cause" other than lack of adequate protection is alleged, the motion must explain the "cause".

3. If lack of equity is an issue, the motion must state the movant's estimation of value.

4. If the motion seeks relief from the stay to proceed to foreclose on a security agreement or mortgage affecting property of the estate, copies of the following must be attached to the motion:

a. All notes or other obligations secured by the property.

b. All security documents involved (including evidence of perfection).

c. If the security documents are particularly voluminous they may be omitted from the motion provided there is a statement in the motion to that effect and the documents are exchanged with counsel prior to the hearing pursuant to Local Rule 12.

d. Attachment of the documents to the motion shall be considered compliance with Local Rule 12 regarding exchanging of the exhibits if the movant gives notice in the motion or by way of separate document that the movant is relying upon the attachment of the documents as compliance with Local Rule 12. Failure to timely object to the introduction of the attachments into evidence shall result in their admissibility pursuant to Local Rule 12.

5. The motion must include a notice that any party opposing the motion must timely file and serve an answer at least 5 days prior to the date set for the preliminary hearing on relief from stay.

C. Answer Required. The court may refuse to hear an objection to a motion for relief from the stay or may grant the motion by default at hearing unless an answer or other objection is filed and is served on the movant at least 5 days before the date set for hearing. An answer or objection must contain the following:

1. If valuation of property is an issue, the answer must state the estimation of value asserted by the respondent. Local Rule 24 regarding valuation hearings shall be applicable to the valuation dispute at the final hearing on relief from stay.

2. If the party intends to dispute the existence, validity, signature, effect, or any other aspect of the notes or security documents required by these rules to be attached to the motion for relief from the stay, those objections must be stated with specificity.

3. If the party proposes to offer adequate protection, it must state with specificity the adequate protection that it offers to provide; if periodic payments are proposed, the specific amounts and intervals (if applicable) must be stated or a formula must be set forth to determine the amount of the payments; if substitute liens are proposed, a description of the proposed collateral must be set forth as well as valuation allegations (such as those described above). If other indubitable equivalents are involved, the allegations must be equally specific.

D. Service of Pleadings in § 362 Motions.

1. The following entities must receive service:

a. Chapter 7 cases—The debtor(s), debtor(s) attorney, trustee, and U. S. trustee.

b. Chapter 11 cases—The debtor(s), debtor(s) attorney, trustee (if any), the 10 largest unsecured creditors (or the unsecured creditors' committee and its

attorney if such a committee has been designated by the U. S. trustee) and U. S. trustee.

c. Chapter 12 cases—The debtor(s), debtor(s) attorney, trustee, and U. S. trustee.

d. Chapter 13 cases—The debtor(s), debtor(s) attorney, trustee, and the U. S. trustee.

2. Attention is directed to Local Bankruptcy Rule 9.D. which deals with the effect upon the time limits of § 362(e) of a failure to properly serve a motion for relief from stay.

E. Relief from Stay by Default. Any default order granting the motion for relief from stay for failure to file a timely answer will not be granted prior to the date set for the preliminary hearing. The preliminary hearing will not go forward and to the extent the preliminary hearing may be set as a telephonic hearing no telephonic notice will be given to opposing counsel that the default has been entered.

F. Procedure for Motions Timely Controverted.

1. If the motion is timely and properly answered by the opposing party, the initial hearing will in most cases be a telephonic preliminary hearing. At the preliminary hearing the following matters will be considered:

a. Estimation of the length of the final hearing.

b. A determination if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing.

c. The method to be used to value collateral if valuation is in dispute.

d. Setting a date for the final hearing.

e. The entering of such other orders as may be appropriate.

2. Notice of the final hearing and other matters which may result from the preliminary hearing will only be given to movant and those parties who timely filed answers to movant's motion.

Local Rule 24. Valuation Hearings.

The following procedure shall be applicable to all valuation hearings held in the bankruptcy court. This includes valuation hearings for purposes of determining allowed secured claims pursuant to § 506 of the Bankruptcy Code.

1. The parties to the valuation dispute shall each file their appraisal(s) with the bankruptcy court, and serve a copy of the appraisal upon other parties to the dispute, trustee, if any, and U. S. trustee, at least 7 days prior to the valuation hearing. There shall be attached to each appraisal the following affidavits:

a) An affidavit signed by the appraiser, attorney for the party offering the appraisal or some other knowledgeable person which sets forth the qualifications of the appraiser, recites the appraiser has appraised the property and the value is as set forth in the appraisal. To the extent the appraiser sets forth his qualifications in the written appraisal, it will not be necessary to duplicate that information in the affidavit. The affidavit may also set forth any other or further information which either party feels is of value to the court in ruling upon the valuation issue.

b) A separate affidavit signed by the attorney for the party offering the appraisal which certifies to the court that the party has made every reasonable attempt to meet with the opposing counsel and resolve any differences over

7. All upper case (capital letters).

8. THE CLERK WILL NOT ACCEPT AN ORIGINAL PETITION FOR FILING WITHOUT A PROPERLY PREPARED MATRIX ACCOMPANYING THE PETITION.

ORDERED June 2, 1992

Iowa Department of Revenue & Finance
Accounts Receivable Unit
Hoover State Office Building
Des Moines IA 50319

Jewelry Arcade
124 First Avenue NE
Cedar Rapids IA 52401

Montgomery Ward
Crossroads Shopping Center
Waterloo IA 50701

Sears Roebuck
Merle Hay Plaza
Des Moines IA 50309

Small Business Administration
373 Collins Road NE
Cedar Rapids IA 52402

Zales Jewelry
Crossroads Shopping Center
Waterloo IA 50701

Office of the U. S. Trustee
675 The Center, Box 47
425 Second Street SE
Cedar Rapids IA 52401

U.S. Attorney (SBA)
950 The Center
425 Second Street SE
Cedar Rapids IA 52401

Administrative Order 113. Objection to Exemptions.

IT IS ORDERED that effective October 1, 1992, the following procedure shall govern objections to exemptions filed by any party in interest.

1. The party filing the objection to exemption shall serve a copy of the objection, together with a notice of the debtor's right to file a resistance to the objection, upon the debtor(s), debtor's attorney, trustee (if the trustee is not the objector) and U.S. Trustee, and promptly thereafter file a certificate of service. The notice shall advise the debtor that he or she will have 20 days in which to file a resistance with the Clerk of the Bankruptcy Court and to make appropriate service of the resistance. The notice shall also advise that if a timely resistance is not filed, an order will enter sustaining the objection to exemptions.

2. Upon the expiration of the time for filing a resistance to the objection to exemptions, the objecting party shall have the responsibility to do one of the following:

a. If the debtor has not filed a timely resistance to the objection the objector shall submit a proposed order sustaining the objection to exemptions. A submission of such an order shall constitute a certification by the objector or his/her attorney that the objector has not been served with a timely filed resistance and that it is now appropriate for the Court to enter an order sustaining the objection to exemptions.

b. If a timely resistance to the objection has been filed, the objector has the responsibility to so advise the Clerk's Office and to request that the matter be set for hearing.

DONE AND ORDERED this 17th day of September, 1992.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:

(complete)

Debtor(s).

CHAPTER *(complete)*
BANKRUPTCY NO.

(complete)

NOTICE of Objection to Exemptions

by: *(complete)*
(name of objector)

TO: *(complete)*

NOTICE IS HEREBY GIVEN that the trustee/creditor *(complete)* has filed an objection to exemptions.

NOTICE IS FURTHER GIVEN that resistance to the objection, if any, shall be filed with the Clerk of Bankruptcy Court, P. O. Box 74890, Cedar Rapids IA 52407, with a copy to Attorney for Objector, Trustee, and U. S. Trustee, addresses below, within 20 days from the date of this Notice.

NOTICE IS FURTHER GIVEN that if resistance is filed it will be set for hearing. If no resistance is filed, an order will enter sustaining the objection to exemptions.

The undersigned certifies a copy of this Notice was mailed to the parties named this date.

DATED *(complete)*

Note: ***(Filing attorney is the one who signs this notice)***

(filing attorney signature & PIN #)

ATTORNEY FOR DEBTOR
(complete name and address)

ATTORNEY FOR MOVANT
Name: *(complete)*
Address: *(complete)*
Phone #: *(complete)*

U. S. Trustee
Suite 675—The Center
425 2nd St. S.E.
Cedar Rapids IA 52401

Trustee:
(complete, if the objector is not the trustee)

[The text continues on the next printed page.]

lot, or for the property as a whole if sold in bulk, together with an affidavit to the effect that the auctioneer has not been paid, and will not pay, directly or indirectly, anything for employing or for aiding to employ the auctioneer to make such sale, and that no payments have been made, or will be made by the auctioneer, in connection with such sale, except those set forth in detail in said bill or statement.

(e) Reports of Sale. All bankruptcy trustees, debtors-in-possession, and Chapter 12 or 13 debtors who have conducted a sale of property of the estate for which notice is required shall promptly upon the settlement or closing of the sale, file a Report of Sale, containing at least the following data and documents unless it is impracticable: gross sale price; administrative expenses paid or sought (itemized); commissions or fees owed or paid to brokers, realtors, or other agents; settlement sheets, if any; and, if not clearly reflected in the foregoing, a full accounting of the gross sale proceeds, indicating the location and custody of all proceeds not previously approved for disbursement. The documents described in subdivision (e) of this Rule shall be included in the report of a public sale.

Rule 17. Compensation of Debtor in Chapter 11.

(a) Unless otherwise ordered by the Court, the rate of compensation paid to an individual debtor, to members of a partnership, or to an officer or director of a corporation after the filing of the petition shall not exceed the rate of compensation paid to those persons ninety (90) days prior to the filing of the petition.

(b) Within twenty (20) days after the date of filing of the petition, the debtor shall file a statement containing the following information:

(1) the name of the debtor, if an individual, or the members of the partnership, or the officers and directors of the corporation, and any other insiders, specifying the position and duties of each;

(2) the rate of compensation paid to each ninety (90) days prior to and at the time of the filing of the petition; and

(3) the rate of compensation of each as of the time the statement is filed.

Rule 18. Chapter 11 Tally.

The tally of ballots in Chapter 11 cases shall be filed with the Clerk no later than the third business day prior to the confirmation hearing. It shall substantially conform to the format prescribed by the Court and available from the Clerk.

Rule 19. Notices: Technical Requirements.

(a) Measuring Period. Except where the Bankruptcy Rules specifically require a different time, all notices prepared by the debtor, creditors, official committees, or any other party in interest to be transmitted to other parties in interest shall give the recipient of the notice not less than twenty (20) days from the date of completion of service to file an objection to the action contemplated to be taken in the notice, unless otherwise ordered by the Court.

(b) Content. In addition to the information required to be given with respect to specific kinds of notice, all notices shall contain sufficient information to enable a party in interest to make a reasonably well-informed decision as to whether to object to the action proposed in the notice. The notice shall advise parties in interest as to where they must file objections and by when; that the action may be authorized without further order or notice if no objections are filed; that the Court may conduct a hearing or determine the matter without a hearing, in its discretion, regardless of whether any objections are filed; that objections must contain a complete specifica-

tion of the factual and legal grounds upon which they are based; that parties in interest with questions may contact the party giving notice or its attorney. No notice given shall compel an objecting party to attend a court hearing in support of the objection. The address and the telephone number of the party to be contacted must appear on the face of the notice.

(c) Objections. If an objection is filed, the objecting party shall set forth in its objection or in an accompanying memorandum of fact and law such authority upon which it relies for its objection and shall certify the mailing of the objection and, if applicable, memorandum to the opposing party or parties and their counsel. Within ten (10) days of the date indicated on the certificate of service, the noticing party may file a responsive memorandum. Parties may append affidavits and verified documents to their memoranda.

(d) Sale Notices. Notices of private sale must include:

(1) the appraised value of the asset being sold if an appraisal has been performed, the date of the appraisal, and the name and address of the appraiser;

(2) if no appraisal has been performed, the scheduled value of the asset proposed to be sold;

(3) the purchaser's identity;

(4) the relationship, if any, between the purchaser and any party in interest; and

(5) all consideration paid and to be paid by the purchaser and the terms of payment.

(e) Disclosure of Sale Charges. Unless included in the notice of sale, the following may not be paid from a bankruptcy estate in connection with the sale of estate property:

(1) points, loan origination fees, loan enabling fees, or other charges to enable the buyer to obtain financing for the purchase of property of the estate; and

(2) documentary stamps, transfer taxes, or recording fees.

(f) Sales Authorized. Sales shall be deemed automatically authorized upon expiration of the notice period if no written objections have been filed with the Clerk. Any party in interest may request a certification by the Clerk that no objections to the notice have been filed, for which a certification fee shall be charged.

(g) Transmission of Notices. A party transmitting a notice shall obtain a duplicate label matrix from the Clerk. A trustee, debtor, or committee's reasonable expenses of transmitting notices (postage, stationery, reproducing charges) shall be allowable as administrative expense claims, upon application therefor. Where a party transmits a notice, the party shall enter the date of the completion of service conspicuously on the face of the notice. Certification of such transmission shall be filed with the Clerk, within five (5) days after completion, indicating the parties noticed, and the date and manner of transmitting such notice.

(1) Limitation of Notice—Chapter 7. Unless otherwise directed by the Court, in Chapter 7 cases all notices subject to Federal Rule of Bankruptcy Procedure 2002(h) may be transmitted only to creditors whose claims have been filed and to those creditors, if any, still permitted to file claims.

(2) Limitation of Notice—Chapter 11. Subject to any specific or administrative order entered by the Court governing notice requirements in a designated Chapter 11 case, where official committees are appointed and creditors exceed thirty (30) in number, notices of proposed use, sale or lease of property, approval

(2) In contested matters, a motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be filed within thirty (30) days from the date indicated on the certificate of service on the pleading initiating the contested matter.

(b) Core and Non-Core Matters.

(1) Ruling That Action Is Core or Non-Core. Prior to trial a party may move for a ruling that an adversary proceeding is core or non-core. The Court shall ordinarily allow adverse parties fourteen (14) days from the service of the motion to file responses. The filing of such a motion shall not postpone any time periods unless so stipulated by the parties or ordered by the Court. At any time before the conclusion of a hearing on the merits, all parties to a proceeding may file a consent to the entry of a final order by the Court under 28 U.S.C. § 157(c)(2).

(2) Record and Issues on Objections to Proposed Findings of Fact or Conclusions of Law. When a party has objected to proposed findings or conclusions pursuant to Federal Rule of Bankruptcy Procedure 9033(b), for the purpose of preparing the record and identifying the issues for the District Court, the parties shall follow the procedures set forth in Federal Rule of Bankruptcy Procedure 8006 by treating the objection(s) as an appeal. The bankruptcy judge may order the designated extract supplemented.

Rule 41. Motions Practice.

(a) Requirement of Written Motion. All motions must be in writing and filed with the Court, unless made during a hearing or trial. If time does not permit the filing of a written motion, the Court may, in its discretion, waive this requirement.

(b) Procedure for Motions Other Than Motions for Relief from Stay and To Avoid Lien.

(1) All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought. Supplementing Local Rule 3 as to moving parties, responding parties shall file with the Court at the time of filing a response a proposed order which shall set forth the requested disposition.

(2) Copies of all motions must be served upon all adverse parties, their counsel, and all persons as required by Federal Rule of Bankruptcy Procedure 9013 and in the manner required by Federal Rule of Bankruptcy Procedure 9014 if a contested matter. There shall be filed with each motion a brief memorandum of fact and law entitling the movant to the relief claimed or a statement that no memorandum shall be filed and that the movant shall rely solely upon the motion filed.

(3) Parties may file with or append to their motion and memorandum or to their responsive pleading and opposing memorandum such supporting affidavits or documents as would establish the elements of entitlement to the relief sought or the denial thereof.

(4) Any responsive pleading and memorandum in opposition to the motion shall be filed within fourteen (14) days from the date of service of said motion.

(5) Except as otherwise provided in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, or except as otherwise ordered by the Court, all motions may be decided on the pleadings and memoranda filed. Where the motion has been decided on the pleadings, the Clerk will notify parties of the decision.

(6) In Chapter 11 cases, motions to assume or reject an executory contract or unexpired lease, in addition to the other parties to the contract or lease, shall be served on the U.S. Trustee, on all committees or their counsel, if any, or the ten (10) largest unsecured creditors from debtor's list filed pursuant to Federal Rule of Bankruptcy Procedure 1007(d) if there is no unsecured creditors' committee, on those requesting notice under Federal Rule of Bankruptcy Procedure 2002(i), and on secured creditors.

(c) Procedure for Motions Seeking Relief From Stay.

(1) Issuance and Service of Order Directing Course of Proceedings.

(A) In all 11 U.S.C. § 362(d) motion proceedings, all motion papers shall bear a certification of service on all necessary parties in accordance with Federal Rules of Bankruptcy Procedure 7004 and 4001(a)(1). The Court or the Clerk shall thereupon issue an order directing course of proceeding and notice of hearing. That order and notice shall be served by the moving party or their counsel on all respondents, their counsel, and the entities specified in Federal Rule of Bankruptcy Procedure 4001(a)(1).

(B) Within five (5) days after completion of service of the order and notice, the moving party or counsel for the moving party shall certify service to the Court.

(2) Responses to Motions for Relief from Stay.

(A) The response or objection required by the order directing the course of proceedings shall, unless otherwise ordered by the Court, include a detailed response to each paragraph of the motion in conformity with Federal Rules of Civil Procedure 8(b) and (d) and also shall set forth all defenses to said motion.

(B) No response need be filed by the Chapter 12 trustee or the Chapter 13 trustee, and such trustee, if named as a respondent in the motion, shall be deemed dismissed from the matter without the necessity of requesting such dismissal.

(d) Proceedings Upon Motion To Avoid Lien Under 11 U.S.C. § 522(f).

(1) Issuance and Service of Order Directing course of Proceedings.

(A) Upon the filing of a motion proceeding under 11 U.S.C. § 522(f), the Court by the Clerk shall thereupon issue an order directing course of proceeding that shall state the date upon which the motion was filed. Within eight (8) days of the date of this order, the moving party shall serve a copy of this order, together with the motion, on the respondent(s), counsel for respondent(s), and the trustee, if applicable, in the manner provided by Federal Rule of Bankruptcy Procedure 7004.

(B) Within five (5) days after completion of service of the order and motion, the moving party or counsel for the moving party shall certify service with the Court.

(2) Responses to Motions To Avoid Lien.

(A) Any responsive pleading or objection pursuant to the order directing course of proceeding must be filed with the Court within thirty (30) days after the date of the order directing course of proceeding, and it must be served on the movant and counsel for the movant. If a responsive pleading is

Form 1. Notice of Motion and Certificate of Service.

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:

CASE NO.:
SS NO.
ID NO.
CHAPTER:

DEBTOR(S)

NOTICE OF MOTION
AND
CERTIFICATE OF SERVICE

TO: THE DEBTOR(S), ATTORNEY FOR THE DEBTOR(S), TRUSTEE AND OTHER PARTIES IN INTEREST

NOTICE IS HEREBY GIVEN of the Motion to (nature of motion) filed simultaneously herewith by (moving party) in the above captioned case; and

FURTHER NOTICE IS HEREBY GIVEN that if you fail to respond or otherwise plead or request a hearing in writing within ——— days from the date of this notice, the relief requested in the motion may be granted without further hearing or notice; and

FURTHER NOTICE IS HEREBY GIVEN that if a response and a request for a hearing is filed by the debtor(s), trustee, or other parties in interest named herein in writing within the time indicated, a hearing will be conducted on the motion and response thereto at a date, time and place to be later set by this Court and all interested parties will be notified accordingly.

DATE OF NOTICE: (must be same date of service)

_____
(Movant's Name and Address)

CERTIFICATION OF SERVICE

I, _____, of _____ certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the ____ day of _____, 19__, I served copies of the foregoing motion and notice of motion on [include address(es)]

by (describe here the mode of service)

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
Date Signature

have no force or effect in law other than certification of the contents of the Bankruptcy Clerk's records regarding notice and lack of filed objections.

Rule 4:0.8. Motion Procedure.

(a) Submission of Motions.

(1) Motions, in general, shall be submitted and determined upon the motion papers referred to hereinafter. The movant or party opposing the motion may request a hearing on matters required by Bankruptcy Rule or statute to be heard.

(2) The moving party shall serve and file with the motion a brief written statement of reasons in support of the motion and a list of the authorities on which movant relies. If the motion requires the consideration of facts not appearing of record, movant shall also serve and file copies of all photographs and documentary evidence which movant intends to present in support of the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.

(3) No motion or response thereto, including written argument and cited authorities, shall exceed twenty (20) pages in length, exclusive of appendices, unless the party has first sought and obtained leave of Court.

(4) The motion filed with the Court shall be accompanied by:

(A) a proof of service indicating the date and manner of service and the parties served; and

(B) a notice to all persons entitled to notice, that the respondent has ten (10) days, or such other time as fixed by Bankruptcy Rule or statute or as the Court may order, after service to file and serve a response or a request for a hearing and that if a response or request is not timely filed with the Court and served upon movant, the Court may grant the relief requested in the motion without a hearing.

(5) Each party opposing the motion shall serve and file a brief written statement of reasons in opposition to the motion and a list of the authorities on which respondent relies. If the motion requires the consideration of facts not appearing of record, respondent shall also serve and file copies of all documentary evidence and photographs which respondent intends to submit in opposition to the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.

(6) If a response is not timely filed with the Court and served upon movant, the movant may submit a proposed order to the Court.

(7) Motions pursuant to 11 U.S.C. § 362(d).

(A) A motion for relief from the stay shall be served on the debtor, the debtor's counsel, the trustee, the trustee's counsel if appointed, any official committees and their counsel if appointed, and, if applicable, upon any other parties asserting an interest in the property.

(B) If applicable, the motion shall state the names and purported interests of all parties known, or discoverable upon reasonable investigation, who claim an interest in the property in question, and shall identify the property, and state the amount of the outstanding indebtedness and the fair market value of the property. The motion shall be accompanied by a legible and complete copy of all relevant loan and security agreements and evidence

issue notice of the hearing on the motion to the appropriate parties as provided in LBR 5.0(a).

(c) The motion for relief from stay shall be accompanied by a statement that any responsive filing or memorandum shall be filed within twenty (20) days from the date of service of motion unless otherwise provided for by the court, and that a failure to file a response and accompanying memorandum on a timely basis may be cause for the court to grant the motion as filed without further notice.

(d) Any response to such motion shall state with particularity the reasons that the motion is opposed and, if appropriate, make a specific offer of adequate protection.

(e) Upon the filing of a motion for relief from stay, the court shall issue an order providing that a hearing shall be held, fixing a day for the filing of any responsive pleading to the motion, providing that the stay shall be continued pending the hearing, and providing that the hearing will not be held should a responsive pleading not be filed.

(f) Any party failing to file a timely responsive pleading shall be deemed not to oppose the motion. If the motion is unopposed, the movant shall present an order granting the relief at or prior to the hearing, with a recitation that no responsive pleading was received as provided in LBR 6.0(d).

If the movant fails to present the appropriate order, the court may enter its own order disposing of the motion or setting the matter for further hearing to consider appropriate relief including imposition of sanctions.

(g) Any party may request a preliminary hearing on the motion, which request may be included in the motion, supported by a memorandum providing the grounds for the request. The request shall be made in writing, shall be filed with the court and shall be served by the requesting party upon all parties entitled to notice pursuant to LBR 5.0(a). Any such request shall be filed not later than ten (10) days after entry of the order setting the final hearing.

(h) A motion for relief from stay shall be filed separately from and not combined in the same pleading with any other request for relief.

Rule 6.1. Use of Cash Collateral and Obtaining Credit.

(a) Any motion or agreed order filed under Fed. R. Bankr. P. 4001(b) (use of cash collateral) or 4001(c) (obtaining credit) shall contain:

(1) a description of the cash collateral to be used, sold or leased, or collateral affected by the credit to be obtained;

(2) a description of the interest claimed by any other entity in the cash collateral, or interests held in collateral affected by the credit to be obtained;

(3) the reasons for which the debtor seeks authorization to use, sell or lease the cash collateral, or has need for credit;

(4) a description of any method or proposal by which the interests of any other entity in the cash collateral or collateral affected by the credit may be protected; and

(5) photocopies of all documents by which the interest of any other entity in the cash collateral or collateral affected by the credit to be obtained was created or perfected, or, if any of those documents are unavailable, the reason for the unavailability. The debtor shall make its best effort to obtain and file any documents which are unavailable as soon as possible after the motion is filed.

1. Definition. A "Motion" is a request for relief which may not be obtained by a Notice or an Application and necessitates notice and an opportunity for a hearing.

2. Applicability. Use of a Motion is proper in all instances where a Notice or an Application is inappropriate and where the Code or Rules mandates its usage. B.R. 9013.

3. Content. All Motions shall contain:

(a) Specific references to Code Sections and elements upon which movant relies

(b) Identification of the property at issue, the amount of claim and proposed valuation

(c) Copies of appraisals and supporting documents shall be provided with the Motion to all interested parties, but *not* filed with the Court

Failure to provide adequate information may result in the denial of the Motion regardless of whether an objection is filed.

4. Proposed Order. All Motions, except those enumerated hereinbelow, shall be accompanied by a proposed Order on a separate document. The proposed Order shall be subscribed by the submitting attorney and set forth sufficient information to properly identify the relief granted and the effect of the execution of the Order. The party submitting the Order shall be responsible for its accuracy. Motions for which an Order shall not be required are:

— Motions to Convert—all chapters
— Motions to Dismiss—all chapters
— Motions for Summary Judgment filed in the main case

5. Service. The movant shall file the Motion and await receipt of a file-stamped copy of the Motion before serving the Motion on all interested parties, as determined by the movant. Said Motion shall be served within 5 days of receipt from the Court. The UST need give no notice in matters pursuant to B.R. 2002(a) or (b) in accordance with B.R. X-1008. The UST shall be served with all such Motions.

6. Opportunity for Hearing. All Motions shall contain the following statement within the body affording interested parties an opportunity to object to the requested relief and for a hearing. Alternatively, the Motion shall request that a hearing be set on the next available Court Docket.

"Attention: You are hereby notified that you have 15 days from the date of filing of this Motion to file a written Objection to the requested relief or said relief shall be granted by the Court."

This 15 day period includes the 3 days allowed for mailing provided in B.R. 9006(f).

7. Fees. All Motions to Modify the Automatic Stay pursuant to 11 U.S.C. Sec. 362, Motions to Compel Abandonment pursuant to 11 U.S.C. Sec. 554 and Motions to Withdraw the Reference shall be accompanied by the fee established in the appendix to 11 U.S.C. Sec. 1930.

8. Affidavit of Service. Within 5 days of service, the movant shall file an Affidavit of Service with the Court which shall contain:

(a) The name and address of the interested parties served
(b) The date service was effectuated

Rule 1017–2. Final Report.

LBR 2015-6 applies.

1019. Converted Cases

Rule 1019–1. § 341(a) Meeting Notice.

LBR 2003-1 applies.

Rule 1019–2. Motions.

A copy of all motions to convert a case shall be served on the UST, debtor, any trustee, any creditor committee, and their respective attorneys in that case, no later than the date the original is filed.

Rule 1019–3. Final Report and Account.

LBR 2015-6 applies.

Rule 1019–4. Claims and Applications for Post-Petition Services and Expenses.

LBR 2016 applies.

2002. Notices

Rule 2002–1. Persons Responsible for Giving Notice.

(a) General. The clerk shall serve all notices specified in BR 2002 except as provided in this Rule.

(b) Chapter 7 Cases. Notices required by BRs 2002(a)(2), (3) and (5) shall be served by the requesting party, except the clerk shall generally serve such notices for any trustee. The clerk shall not, however, serve a trustee's notice if a trustee completed LBF: (1) was prepared pursuant to LBR 1001-6(c) or (2) contains text outside the space provided on such LBF (e.g., for a description or explanation). Notices required by BR 2002(a)(7) shall be served in accordance with LBR 2016.

(c) Chapter 9 and 11 Cases.

(1) General. The applicant, or moving or requesting party, shall serve all notices not specifically mentioned in this subsection, except for those specified in BRs 2002(a)(1), (a)(8), (d)(1), (f)(1), (f)(2) and (f)(6).

(2) Proponent of a Plan or Modified Plan. The proponent of a plan or modified plan shall serve the notices required by:

(A) BRs 2002(b)(1) and (d)(5), together with the documents required by BR 3017(a) (using LBF No. 1165);

(B) BRs 2002(a)(6), (b)(2), (d)(6) and (d)(7), together with the documents required by BR 3017(d) (using LBF No. 1175); and

(C) BR 2002(a)(7) for final compensation applications filed prior to service of the Notice of Confirmation (using LBF No. 1190).

(d) Chapter 12 Cases. The proponent of a plan, applicant, or moving or requesting party, shall serve all notices except for those specified in BRs 2002(a)(1), (a)(8), (f)(1), (f)(2), (f)(3), (f)(5) and (f)(6). LBR 4004 applies to hardship discharge motions.

(e) Chapter 13 Cases. The requesting party shall serve the notices required by BRs 2002(a)(2) and (3). The clerk shall not, however, serve a standing trustee notice if a trustee completed LBF: (1) was prepared pursuant to LBR 1001-6(c) or (2)

contains text outside the space provided on such LBF (e.g., for a description or explanation). Parties filing compensation applications under BR 2002(a)(7) shall use LBF No. 1314 if the request is filed after the confirmation hearing. LBR 3015–3(a) applies in the event attachments to the plan are filed. LBR 4004 applies to hardship discharge motions.

Rule 2002–2. Form of Notice.

(a) General.

(1) LBFs. LBR 1001–6 applies.

(2) Non-LBF Form. Any "notice of intent" to take proposed action where an LBF does not exist (except for compensation applications covered by LBR 2016) may be single spaced, begin one inch from the top of the page, and shall substantially conform to the following:

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re (Insert name(s) found on petition.) Debtor(s).	Case No. (_____ * _____) NOTICE OF INTENT TO [DESCRIPTION OF PROPOSED ACTION]

The (debtor, trustee, etc.) proposes to take the following action:

[Insert a brief description of the proposed action and the reasons therefore; a summary of the effect; names of insiders to the transaction; and, if applicable, other information required by this Rule.]

[If notice pertains to a motion or application] The (motion, application, etc.) may be inspected at the office of the clerk at the address shown below or at the office of the undersigned.

YOU ARE NOTIFIED that unless within twenty (20) days [but see LBR 2002-2(e)] of the mailing date of this notice you file a written objection to it, and set forth the specific grounds for such objection and your relation to the case, with the Clerk of Court at [insert the mailing address for the office in Portland or Eugene, whichever is administering the case] and mail a copy to [insert name, address and phone number of party proposing the action], the undersigned will proceed to take the proposed action or apply for a court order if required, without further notice or a hearing.

(Signature) (OSB No.)

[PRINT OR TYPE NAME]
[ATTORNEY FOR ———, TRUSTEE, ETC.]

3022. Final Decree

A chapter 11 Final Report shall be filed by the debtor (except the trustee shall file the Final Report if one has been appointed to administer the case after confirmation) using LBF No. 1195 within one hundred twenty (120) days after entry of the confirmation order. Filing such report indicates the estate has been fully administered and a final decree may be entered.

4001. Relief from Automatic Stay; Use of Cash Collateral; Obtaining Credit; Agreements

Rule 4001–1. Procedures for Filing Motions.

LBR 9014 also applies.

Rule 4001–2. Non-Judicial Relief from Automatic Stay in Chapter 7 Cases.

(a) Requests. An entity in a chapter 7 case claiming an interest in property of the estate or property in the possession of the debtor or trustee may request non-judicial relief from the automatic stay of § 362 following the procedure set forth in LBF No. 715.

(b) Objections. Objections to a request for non-judicial relief from the automatic stay, unless made at the meeting of creditors held pursuant to § 341(a), shall be in writing with a copy simultaneously served on the debtor, trustee, moving creditor, and their respective attorneys. If the trustee receives a timely objection from the debtor, the trustee shall not grant non-judicial relief or consider repetitive requests by the same creditor unless the debtor withdraws such objection in writing.

(c) Effect of Non-Judicial Relief. After LBF No. 750 has been properly executed, the non-judicial relief so granted shall constitute a termination of the stay of an act against such property under § 362(a). LBF No. 750 does not need to be filed with the clerk to make such relief effective. The trustee shall not be deemed to have abandoned any interest in the property, or have waived any other rights as to the property by completing LBF No. 750. Any non-exempt equity in such property remaining after disposition shall inure to the benefit of the estate and any exempt equity shall inure to the benefit of the debtor.

Rule 4001–3. Motion for Relief from Stay.

(a) General. Motions for relief from the automatic stay shall not be combined with any other motion or alternative relief request. § 362; BRs 4001, 9013 and 9014; and LBRs 4001 and 9014 apply.

(b) Motion Content, Notice of Motion, and Responses. All motions for relief from the automatic stay, and responses thereto, shall conform to the requirements of LBF No. 720.50. In chapter 9, 11 and 12 cases the Notice of Motion and Response shall conform to the requirements of LBF No. 1124. In chapter 7 and 13 cases the Notice of Motion and Response shall conform to the requirements of LBFs No. 720 and No. 721.

(c) Sanctions for an Improper Notice of Hearing. The court may refuse to consider any response to a Motion For Relief From Stay filed in a chapter 7 or 13 case, or impose other sanctions, if a complete Notice of Hearing (using LBF No. 721) is not simultaneously filed with such response.

Oregon

Form 719. Attorney's § 524(c) Declaration Accompanying Reaffirmation Agreement.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re Debtor(s).	Case No. _____ ATTORNEY'S § 524(c) DECLARATION ACCOMPANYING REAFFIRMATION AGREEMENT

The undersigned declares that he/she represented the debtor(s) during the course of negotiating the attached reaffirmation agreement between debtor(s) and _____, and that the reaffirmation agreement either: (1) involves a consumer debt secured by real property, or (2) represents a fully informed and voluntary agreement by the debtor(s) and does not impose an undue hardship on the debtor(s) or a dependent of the debtor(s).

DATED: _____.

_____
Attorney for Debtor(s) OSB#

_____
Print Name, Address and Phone No.

_____

_____

_____

Form 720. Notice of Motion for Relief from Automatic Stay in a Chapter 7 or 13 Case.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re Debtor(s).	Case No. _____ NOTICE OF MOTION FOR RELIEF FROM AUTOMATIC STAY IN A CHAPTER 7/13 (strike one) CASE

You are notified a motion was filed on behalf of the moving party, _____, for the relief from the automatic stay protecting the debtor(s) and debtor's property, as provided by 11 USC § 362. A copy of the motion is attached.

The moving party's attorney's (or moving party, if no attorney) name and address are _____.

If you WISH TO RESIST the motion, YOU SHALL, WITHIN 14 DAYS OF THE MAILING DATE SHOWN BELOW, FILE WITH the Bankruptcy Court Clerk BOTH of the following:

a. A written response;

AND

b. A fully completed notice of a HEARING (conforming to Local Form 721 copied on the back) GIVING the date, time and address of hearing [THIS INFORMATION MUST BE OBTAINED FROM THE CLERK'S OFFICE BEFORE SERVICE!].

Contents of Response. A response shall state the facts upon which relief from the automatic stay is resisted.

Failure to Respond OR mail proper Notice of Hearing. If you fail to file EITHER a timely response OR proper Notice of Hearing, then:

a. The court may sign an ex parte order, submitted by the moving party, granting relief from the automatic stay;

OR

b. The automatic stay will expire under the terms of 11 USC § 362(e) 30 days after the motion was originally filed.

CLERK, U.S. BANKRUPTCY COURT
[NOTE: if Case No. begins with a "3" mail to 1001 S.W. 5th Avenue, No. 900, Portland, Oregon 97204/(503) 326-2231, OR if Case No. begins with a "6" then mail to P.O. Box 1335, Eugene, Oregon 97440/(503) 465-6448]

I certify that on _____ copies of both the above Notice, AND the Motion, were mailed to the Debtor(s), Trustee, U.S. Trustee, members of any committee elected pursuant to 11 USC § 705, and their respective attorneys.

_____
Signature of Moving Party or Attorney (OSB No.)

Form 720.50. Relief from Automatic Stay Procedures.

RELIEF FROM AUTOMATIC STAY PROCEDURES

1. Filing Fee and Motion—The correct filing fee shall be paid, and a written motion shall be filed which states:

a. The present balance owing to the moving party excluding any precomputed interest or other unearned charges;
b. The date upon which the debt was incurred;
c. Whether the moving party holds a security interest or lien upon the debtor's property;

Form 4A. Notice of Hearing With Response Deadline.

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE

Debtors

Movant

v.

Respondent

BANKRUPTCY NO. _____

CHAPTER NO. _____

MOTION NO. _____
Filed under Local Bankr.
Rule 9013.4 ¶ 6(a)

NOTICE OF HEARING
WITH RESPONSE DEADLINE
ON MOTION OF (NAME OF MOVANT)
FOR _____

TO THE RESPONDENT(S):

You are hereby notified that the above Movant seeks an order affecting your rights or property.

You are further notified to serve (in duplicate) a written response to the attached Motion upon the undersigned which the undersigned must receive on or before _____, 19__, (seventeen (17) calendar days after the date of this Notice). If you fail to timely respond, the Motion will be granted by the court by default without a hearing. See Local Bankruptcy Rule 9013.4.

You should take this to your lawyer at once.

If your written response (in duplicate) is timely served, the undersigned will file the Motion and all Responses with the Clerk of the Bankruptcy Court and a hearing will be held on _____ at _____m before Judge _____ in Court Room _____, _____ (address). Only a limited time of 15 minutes is being provided on the calendar. No witnesses will be heard. If there is an issue of fact, an evidentiary hearing will be scheduled at a later date by the Clerk. No hearing will be held if you do not timely serve a written response.

Date of Mailing or other service: _____

Attorney for Movant/Applicant:

_____
(Signature)

_____
(Typed Name)

_____
(Address)

_____
(Telephone and PA Attorney I.D. No.)

* Movant must serve this Notice and a copy of the motion on all Respondents. Movant must serve only the Notice on all creditors and other parties in interest as and when required by applicable bankruptcy rules.

Form 4B. Notice of Hearing With Response Deadline.

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE

Debtors	BANKRUPTCY NO. _____
Movant	CHAPTER NO. _____
v.	MOTION NO. _____ Filed under Local Bankr. Rule 9013.4 ¶ 6(b)
Respondent	

NOTICE OF HEARING
WITH RESPONSE DEADLINE
ON MOTION OF (NAME OF MOVANT)
FOR _____

TO THE RESPONDENT(S):

You are hereby notified that the above Movant seeks an order affecting your rights or property.

You are further notified to serve (in duplicate) a written response to the attached Motion, upon the undersigned which the undersigned must receive on or before _____, 19___, (seventeen (17) calendar days after the date of this Notice). If you fail to timely respond, the Motion may be granted and a judgment entered against you by the court at the hearing. See Local Bankruptcy Rule 9013.4.

You should take this to your lawyer at once.

With or without your written response (in duplicate), the undersigned will timely file the Motion and all Responses with the Clerk of the Bankruptcy Court. A hearing will be held on _____ at _____m. before Judge _____ in Court Room _____, _____ (address). Only a limited time of 15 minutes is being provided on the calendar. No witnesses will be heard. If there is an issue of fact, an evidentiary hearing will be scheduled at a later date by the Clerk.

(9) Entities on whom the court has ordered notice.

(b) Except for matters governed by BLR 4001 and pleadings that do not require notice and hearing, the movant shall include conspicuously on the front page of the pleading this statement:

9801 Hearings

> IF YOU WANT A HEARING, YOU MUST REQUEST ONE IN WRITING, AND YOU MUST RESPOND SPECIFICALLY TO EACH PARAGRAPH OF THIS PLEADING. YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED AND GIVE A COPY TO THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF.
>
> IF A PARTY REQUESTS EMERGENCY CONSIDERATION, THE COURT MAY ACT EXPEDITIOUSLY ON THE MATTER. IF THE COURT ALLOWS A SHORTER RESPONSE TIME THAN TWENTY DAYS, YOU MUST RESPOND WITHIN THAT TIME. IF THE COURT SETS AN EMERGENCY HEARING BEFORE THE RESPONSE TIME WILL EXPIRE, ONLY ATTENDANCE AT THE HEARING IS NECESSARY TO PRESERVE YOUR RIGHTS. IF AN EMERGENCY HEARING IS NOT SET, YOU MUST RESPOND BEFORE THE RESPONSE TIME EXPIRES.

If a hearing has been set on the matter by the Court, movant shall include conspicuously on the front page of the pleading:

HEARING HAS BEEN SET ON THIS MOTION FOR _____.

9703 certif. of service

(c) Certificate of service. Pleadings shall contain a certificate of service in compliance with BLR 1001(h) and a list specifically setting forth the name, address, and status of each party served, and identifying each party under the categories enumerated in (a)(1) - (a)(9). The certificate shall state that all parties entitled to notice have been served.

(d) If there is an order limiting the parties to whom notice must be given, or if there is an order limiting the time for parties to respond, the certificate of service shall state the entry date and enough substance of the order so that the existence of and compliance with it may be determined from the certificate of service.

1207(a) Hearing - list of Mailing

(e) Mailing labels. When the rules allow notice to be given to the other parties-in-interest by a person other than the clerk, on three days notice, the clerk will furnish mailing labels reproduced from the master mailing list kept by the clerk. These labels may be used to give the notices required by FRBP 2002.

S.D. Texas

(B) Notice to Parties in Interest. All motions requesting relief from the automatic stay provisions of 11 U.S.C. 362 shall include the following notice:

"ANY OBJECTION OR REQUEST FOR HEARING MUST BE FILED WITH:

UNITED STATES BANKRUPTCY CLERK
211 W. FERGUSON—4TH FLOOR
TYLER, TEXAS 75702

"UNLESS A WRITTEN OBJECTION OR REQUEST FOR HEARING IS FILED WITHIN (15) DAYS, INCLUSIVE OF MAILING TIME, FROM THE DATE SHOWN IN THE CERTIFICATE OF SERVICE HEREIN, THIS MOTION SHALL BE DEEMED TO BE UNOPPOSED AND THE COURT MAY ENTER AN ORDER WITHOUT A HEARING, *AT THE END OF 30 DAYS*, REFLECTING THAT THE AUTOMATIC STAY HAS LIFTED."

● Motions which fail to include this admonition shall be deemed deficient. *See* Section (I), hereafter.

(C) Objection to Relief from Stay. Where a motion requesting relief from the automatic stay is filed under § 362(d), any party opposing the motion may file a written answer or other response as may be appropriate, within fifteen (15) days, inclusive of mailing time.

(D) Uncontested Motions. Where a written response is not properly filed and served within 15 days from the date shown in the certificate of service on the motion to lift stay, the motion shall be treated as uncontested. At the end of thirty (30) days, the party seeking relief shall then receive a court order, confirming the automatic lifting of the stay provisions of § 362.

(E) Hearings. When any response is timely filed to a pending motion to lift stay, a hearing will be immediately scheduled, in compliance with § 362. The bankruptcy clerk shall serve a written notice on all parties in interest, who shall have been properly reflected in the certificate of service attached to the motion to lift stay, in compliance with Local Court Rule 21(B).

(F) Requests for Continuance.

(1) When a request is made for continuance of a scheduled hearing on a motion for relief from stay, this court requires the following:

(a) A written motion, with proper certificate of service, must be filed with the bankruptcy clerk which sets out specifically the reasons for the requested delay of proceedings. Motions for continuance must be accompanied by proposed orders and otherwise comply with General Order 87-2 regarding motion practice in this court.

(b) If a continuance of a scheduled hearing is sought, counsel are encouraged to file *joint* requests whenever possible; however, *all counsel are required to appear on the date of the scheduled hearing unless an order of the court has been docketed which continues the hearing.*

Tennessee (M.D.)

Appendix B. [Notice of Hearing and Pretrial Order.]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE:

Debtor,

Movant,

VS.

Respondent.

CASE NO.
CHAPTER
JUDGE

NOTICE OF HEARING AND PRETRIAL ORDER

YOU ARE HEREBY NOTIFIED THAT A PRELIMINARY HEARING OF THE MOTION FOR RELIEF FROM THE STAY HAS BEEN SET FOR ——— AT ——— O'CLOCK —M., IN ROOM ———, CUSTOMS HOUSE, 701 BROADWAY, NASHVILLE, TENNESSEE.

RESPONDENT SHALL FILE AN ANSWER to the motion at least seven (7) days before the preliminary hearing. FAILURE TO FILE AN ANSWER to the motion for relief from the stay shall be deemed a statement of no opposition to the relief requested.

In the event a final hearing is necessary, a final hearing will be scheduled by the court at the preliminary hearing.

COUNSEL FOR ALL PARTIES ARE ORDERED to confer with all opposing counsel at least seven (7) days before the preliminary hearing, and together prepare in writing and file with the Court **no less than 72 hours prior to the preliminary hearing,** a JOINT DOCUMENT, captioned "PRETRIAL STATEMENT" containing the following:

FOR MOVANT

1. A brief statement of the theory of each cause of action.
2. A brief summary of movant's contentions of fact in support of the cause(s) of action and the evidence to be relied upon to establish each of the facts contended.

FOR RESPONDENT

1. A brief statement of the defense(s) including the theory of each defense.
2. A brief summary of respondent's contentions of fact in support of the defense(s), and the evidence to be relied upon to establish each of the facts contended.

FOR ALL PARTIES

In addition, the PRETRIAL STATEMENT is to include the following:

1. A statement of all admitted or uncontested facts.

Form 5. Chapter 13 Order and Notice of Hearing.

UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF TENNESSEE

In re:

Case No. _____

Debtor(s)

Chapter 13

ORDER AND NOTICE OF HEARING COMBINED WITH RELATED ORDERS
RE FORM, MANNER AND SERVING OF NOTICE

A _____ having been filed by _____ on _____, seeking _____

IT IS ORDERED AND NOTICE IS HEREBY GIVEN THAT:

1. The hearing to consider the _____ shall be held on _____, 19__, at _____ o'clock __.m. in the United States Bankruptcy Court, Courtroom No. _____, _____, _____, Tennessee.

   At the time of the hearing, it may be continued or adjourned from time to time by oral announcement of the continued or adjourned date and time, without further written notice.

2. Within five (5) days of receipt of this order and pursuant to F.R.B.P. 2002, 9007, 9013, or 9014, the moving party herein shall give proper notice of the foregoing hearing by transmitting, serving, or mailing by first class mail, postage prepaid, a copy of this Order and Notice to the following entities:

The moving party herein (or attorney for moving party) within three (3) days after service shall file a certificate of service with the Bankruptcy Court Clerk, certifying notice of this order, motion, or application.

BY THE COURT

_____

UNITED STATES BANKRUPTCY JUDGE

DATE: _____

Rule 14. Summons.

Adversary Complaints. Summons shall be prepared by parties or their counsel and issued by the clerk. Upon the filing of an adversary complaint, the moving party shall furnish the original complaint and the original summons and one copy of the summons for each defendant. (Summons forms are available in, and may be requested from, the office of the clerk.) The moving party shall provide a cover sheet indicating the names of the parties to the proceeding, and their counsel if known. A certificate of service shall be filed in compliance with Local Rule 15. In addition, two sets of mailing labels shall be provided in compliance with Local Rule 11(A)(5). Unless otherwise requested by filing an entry of appearance and request for notices, only those parties provided on the labels shall receive notice.

In all particulars, summons, notice and service shall be governed by Bankruptcy Rule 7004 and all parties shall comply with its requirements.

Rule 15. Certificate of Service Required [Vacated].

Rule 16. Presiding Person for Creditors Meetings.

Pursuant to Bankruptcy 2003(b)(1), the court designates the following persons to preside at creditors' meetings:

(A) in Chapter 7 cases, the interim trustee;
(B) in Chapter 11 cases, the estate administrator; and
(C) in Chapter 13 cases, the Chapter 13 trustee.

In the event these persons are not available, the clerk or the clerk's designee shall preside.

Nothing contained in this rule shall be construed as a limitation on the power of creditors to elect a presiding officer in conformity with Rule 2003(b)(1).

IV. COURT PROCEDURES

Rule 17. General Motion Practice.

I. Motions—Requirements for Filing.

A. A motion shall comply with Rule 9, Local Court Rules, U.S. Bankruptcy Court, Eastern District of Texas.

B. A motion must be signed by an attorney for movant. The signature of the attorney constitutes a certificate by the attorney that he has read the motion, that there are good grounds to support it, and that it is not interposed for delay.

C. A motion shall bear a title which describes the specific relief sought.

D. A motion shall specify the statutory or case-law basis for the relief requested.

E. A *separate* motion shall be filed *for each type of relief sought.*

F. A motion shall be accompanied by a proposed order which complies with Subsection VII of this General Order.

G. A motion shall contain a certificate of service complying with Subsection II, herein.

H. Unless specifically listed in subsection IV, hereafter, as an exception, all motions shall include the following notice.

"NO HEARING WILL BE CONDUCTED ON THIS MOTION UNLESS A WRITTEN OBJECTION OR REQUEST FOR HEARING IS

Form 6. Chapter 7, 11, and 12 Order and Notice of Hearing.

UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF TENNESSEE

In re:

Case No. _____

Debtor(s)

Chapter _____

ORDER AND NOTICE OF HEARING COMBINED WITH RELATED ORDERS
RE FORM, MANNER AND SERVING OF NOTICE
(APPLICABLE TO CHAPTERS 7, 11 AND 12)

A having been filed by

on , seeking

IT IS ORDERED AND NOTICE IS HEREBY GIVEN THAT:

1. The hearing to consider the

shall be held on _____, 19__, at _____ o'clock __m. in the United States Bankruptcy Court, Courtroom No. _____, _____, _____, Tennessee, BUT ONLY IF an objection to the requested relief is filed by ——— and served as required by Local Rule 6.

At the time of the hearing, it may be continued or adjourned from time to time by oral announcement of the continued or adjourned date and time, without further written notice.

2. Within five (5) days of receipt of this order and pursuant to F.R.B.P. 2002, 9007, 9013, or 9014, the moving party herein shall give proper notice of the foregoing hearing by transmitting, serving, or mailing by first class mail, postage prepaid, a copy of this Order and Notice to the following entities:

The moving party herein (or attorney for moving party) within three (3) days after service shall file a certificate of service with the Bankruptcy Court Clerk, certifying notice of this order, motion, or application.

3. If no objection is filed by any creditor or interested party, including the debtor, by the date stated above in paragraph one, the movant shall promptly file a certificate in compliance with Local Rule 6 and the proposed order on such matter with the Bankruptcy Court for entry thereof, and there will not be a hearing conducted on the date stated in paragraph one above.

BY THE COURT

_____

UNITED STATES BANKRUPTCY JUDGE

DATE: _____

Form 7. Certificate of Service.

UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF TENNESSEE

_____

In re: Case No. _____

Debtor(s) Chapter _____

_____

CERTIFICATE OF SERVICE

_____

The undersigned party, attorney for a party, or agent therefor hereby certifies that on this _____ day of _____, 19__, copies of the documents identified below were mailed or hand-delivered to the parties listed.

DOCUMENTS SERVED:

A pleading or proposed order captioned _____, filed by _____ on _____, 19__ and Notice of Hearing thereon.

"IF NO OBJECTION OR REQUEST FOR HEARING IS TIMELY FILED, THE AGREEMENT SHALL BE DEEMED TO BE UNOPPOSED AND THE COURT MAY ENTER AN ORDER APPROVING THE AGREEMENT WITHOUT A HEARING. THE COURT RESERVES THE RIGHT TO SET ANY MATTER FOR HEARING."

3. The proposed order shall only state that the Court approves the agreement, or grants the motion for approval of stipulation or agreement; it shall not contain court findings or specify other relief. The motion requesting approval, the stipulation and the proposed order, if they are not deficient, will be placed in suspense until 15 days has passed for the filing of responses or objections, at which time the motion, stipulation and proposed order approving the stipulation will be presented to the court for consideration.

4. When a matter covered by the provisions of Bankruptcy Rule 4001 has been set for hearing and counsel then reach agreement *AS TO DISPOSITION OF THAT MATTER*, at least one attorney must be present at the time scheduled for the hearing to announce the terms of such agreement in open court. (See Subsection D. "Agreed Orders/Resolution of Matters Set.")

F. "Under Advisement"/Order Requested by Court. In all matters where the Court has heard evidence, withheld ruling and taken the matter under advisement, and subsequently requests the prevailing party to prepare and submit a proposed order, counsel shall prepare said proposed order *forthwith*, forwarding same to the Court *with a cover letter*, which states the specific date, time and place of the hearing, the nature of the matter heard and under advisement, and that the court has requested the particular order.

Proposed orders with cover letter may be mailed or delivered directly to the office of the Bankruptcy Judge. Orders submitted without cover letters will be returned to counsel as deficient.

IV. COURT PROCEDURES

Rule 18. Motion To Lift Stay.

A motion requesting relief from the automatic stay provisions of 11 U.S.C. 362 SHALL NOT contain a request for any other type of relief, save and except for adequate protection or abandonment. Motions to lift or modify the automatic stay SHALL BE accompanied by proposed orders.

(A) Headings for Motions for Relief from Stay. Preferably, all motions for relief from the automatic stay shall be entitled as follows:

"MOTION OF ——— (Name of Movant) FOR RELIEF FROM AUTOMATIC STAY AND WAIVER OF 30-DAY HEARING REQUIREMENT AND REQUEST FOR HEARING IN ——— (Tyler, Beaumont or Sherman), TEXAS"

Where motions contain this waiver in the heading, the Court will, when possible, schedule the preliminary hearing at the location movant requests, if any objection is subsequently filed in response to that motion.

Where motions do not contain waiver-of-30-day-hearing language in the heading, the preliminary hearing will be set within 30 days from the filing date of the motion, at the Court's convenience, wherever court is convened at that time.

[CAPTION]

NOTICE

_____ [Name of Movant] is asking the bankruptcy court to act in your case. The papers attached explain what _____ wants the court to do and why. YOUR PROPERTY AND OTHER RIGHTS IN YOUR BANKRUPTCY CASE MAY BE IN DANGER. You should read these papers carefully and discuss them with your lawyer, if you have one.

IF YOU DO NOT WANT THE COURT TO DO WHAT _____ IS ASKING, THEN NO LATER THAN _____ [DATE] YOU MUST:

File with the court a request for hearing [Answer]. [You may sign and date this notice below, and file it with the court.]

You must also make a copy of your request [Answer] [this signed notice], and send it to _____ [movant's name and address].

If you mail your request [Answer] [signed notice] to the court, you should do so in time for it to get there before the deadline.

A hearing will be held on this request [ONLY IF YOU FILE A REQUEST FOR A HEARING] on _____ at _____.

IF YOU DO NOT ASK FOR A HEARING, the court may decide that you agree with the request and do what _____ is asking without giving you another chance to argue against it.

_____

I OPPOSE THIS MOTION AND REQUEST A HEARING:
[Reasons:]

_____ Dated: _____, 1993

_____
Signature

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

AGENDA XVI
Jackson Hole, Wyoming
September 13-14, 1993

August 5, 1993

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

At the February 1993 meeting, the Advisory Committee decided to defer until the September meeting consideration of amendments to Official Form 14 (Ballot for Accepting or Rejecting Plan).

I enclose two alternatives for the Committee's consideration. The first alternative would continue the current practice of having one form only that could be used for one plan or for multiple plans. The instructions on the form and several minor changes have been made for clarity. The second alternative, which was suggested by Judge Duplantier, consists of alternate forms (14A and 14B).

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

Form B14
6/90

Form 14. BALLOT FOR ACCEPTING OR REJECTING PLAN [AND EXPRESSING PREFERENCE]

[Caption as in Form 16A]

BALLOT FOR ACCEPTING OR REJECTING PLAN

Filed By _____ on *[date]* _____.

The [A] plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm [a] plan if the court finds that the plan accords fair and equitable treatment to the class or classes rejecting it and otherwise satisfies the requirements of § 1129(b) of the Code. To have your vote count you must complete and return this ballot.

[If holder of general claim] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ _____,

[If bondholder, debenture holder, or other debt security holder] The undersigned, the holder of *[state unpaid principal amount]* $ _____ of *[describe security]* _____ of the above-named debtor, with a stated maturity date of _____, *[if applicable]* registered in the name of _____, *[if applicable]* bearing serial number(s) _____,

[If equity security holder] The undersigned, the holder of *[state number]* _____ shares of *[describe type]* _____ stock of the above named debtor, represented by Certificate(s) No. _____, [*or* held in my/our brokerage Account No. _____ at *[name of broker-dealer]* _____],

[Check One Box]

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____,

and *[if more than one plan is to be voted on]*

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____.

[If only one plan is to be voted on, the ballot should not contain the language appearing below this point and above the line marked "Dated: _____."]

voted on

[If more than one plan is ~~accepted~~, the following may but need not be completed.] The undersigned prefers the plans ~~accepted~~ in the following order.

[Identify plans]

1. _____.

2. _____.

Dated: _____

Print or type name: _____

Signed: _____

[If appropriate] By: _____

as: _____

Address: _____

Return this ballot on or before _____ (date) to: _____ (name)

Address: _____

_____

COMMITTEE NOTE

This form is amended to clarify that the language relating to a competing plan should be deleted if only one plan is to be voted on.

Form B14
6/90

Form 14A.

~~Form 14.~~ BALLOT FOR ACCEPTING OR REJECTING PLAN

[Caption as in Form 16A]

BALLOT FOR ACCEPTING OR REJECTING PLAN

(only one plan voted on)

Filed By _____
on *[date]* _____.

The plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to the class or classes rejecting it and otherwise satisfies the requirements of § 1129(b) of the Code. To have your vote count you must complete and return this ballot.

[If holder of general claim] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ _____,

[If bondholder, debenture holder, or other debt security holder] The undersigned, the holder of *[state unpaid principal amount]* $ _____ of *[describe security]* _____
of the above-named debtor, with a stated maturity date of _____,
[if applicable] registered in the name of _____,
[if applicable] bearing serial number(s) _____],

[If equity security holder] The undersigned, the holder of *[state number]* _____ shares of *[describe type]* _____ stock of the above named debtor, represented by Certificate(s) No. _____, [*or* held in my/our brokerage Account No. _____ at *[name of broker-dealer]* _____,

[Check One Box]

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____,

~~and *[if more than one plan is to be voted on]*~~

~~[ ] Accepts~~

~~[ ] Rejects~~

~~the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____.~~

[If more than one plan is accepted, the following may but need not be completed.] The undersigned prefers the plans accepted in the following order.

[Identify plans]

1. _____

2. _____

Dated: _____

Print or type name: _____

Signed: _____

[If appropriate] **By:** _____

as: _____

Address: _____

Return this ballot on or before _____ (date) **to:** _____ (name)

Address: _____

_____

Form B14
6/90

Form 14B.

~~Form 14~~. BALLOT FOR ACCEPTING OR REJECTING PLANS AND EXPRESSING PREFERENCE (more than one plan voted on)

[Caption as in Form 16A]

BALLOT FOR ACCEPTING OR REJECTING PLANS

Filed By _____
on *[date]* _____.

A ~~The~~ *plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class and the holders of two-thirds in amount of equity security interests in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm ~~the~~ plan if the court finds that the plan accords fair and equitable treatment to the class or classes rejecting it and otherwise satisfies the requirements of § 1129(b) of the Code.* To have your vote count you must complete and return this ballot. (a)

[If holder of general claim] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ _____,

[If bondholder, debenture holder, or other debt security holder] The undersigned, the holder of *[state unpaid principal amount]* $ _____ of *[describe security]* _____
of the above-named debtor, with a stated maturity date of _____,
[if applicable] registered in the name of _____,
[if applicable] bearing serial number(s) _____],

[If equity security holder] The undersigned, the holder of *[state number]* _____ shares of *[describe type]* _____ stock of the above named debtor, represented by Certificate(s) No. _____, [*or* held in my/our brokerage Account No. _____ at *[name of broker-dealer]* _____,

[Check One Box]

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____,

and ~~*[if more than one plan is to be voted on]*~~

[ ] Accepts

[ ] Rejects

the plan for the reorganization of the above-named debtor proposed by *[name of proponent]* _____.

[If more than one plan is accepted, the following may but need not be completed.] The undersigned prefers the plans accepted in the following order.

[Identify plans]

1. _____.

2. _____.

Dated: _____

Print or type name: _____

Signed: _____

[If appropriate] By: _____

as: _____

Address: _____

Return this ballot on or before _____ (date) to: _____ (name)

Address: _____

_____

COMMITTEE NOTE

Form 14 is replaced by two alternative forms. Form 14A is to be used when only one plan will be voted on. Form 14B is to be used when more than one plan will be voted on.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
1300 CLAY STREET
P.O. BOX 2070
OAKLAND, CALIFORNIA 94612

AGENDA XVII
Jackson Hole, Wyoming
September 13-14, 1993

EDWARD D. JELLEN
JUDGE

TELEPHONE (415) 273-7716
(FTS) 536-7716

March 25, 1993

Francis F. Szczebak, Chief
Division of Bankruptcy
Administrative Office
United States Courts
Washington, D. C. 20544

Re: Amendments to Official Bankruptcy Forms

Dear Mr. Szczebak:

I am writing to request consideration of an amendment to Official Form 5 (Involuntary Petition). Under Bankruptcy Code Section 303(b), there are five different fact patterns under which the petitioner or petitioners would be eligible to file an involuntary petition. See, Bankruptcy Code Sections 303(b)(1) - (4). Nevertheless, all of these five possibilities are encompassed within a single form allegation reading as follows:

> "Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. §303(b)."

There is no space on the form for the petitioner(s) to indicate whether: (1) they are three entities holding claims against a debtor that has twelve qualified creditors, (2) the petitioner is a single creditor of a debtor that has fewer than twelve creditors, (3) the petitioner is a general partner of a partnership debtor, (4) the petitioner is a person mentioned in Section 303(b)(3)(B) or (5) the petitioner is a foreign representative under Section 303(b)(4).

I believe the form would be more useful and more descriptive if it were designed to allege facts rather than a legal conclusion and if the facts alleged corresponded to an applicable subdivision of Section 303(b).

Would you kindly forward this letter to the appropriate person.

Many thanks.

Very truly yours,

Edward D. Jellen
United States Bankruptcy Judge

EDJ/lc

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

FRANCIS F. SZCZEBAK
CHIEF, DIVISION OF BANKRUPTCY

April 9, 1993

Honorable Edward D. Jellen
United States Bankruptcy Court
1300 Clay Street
Post Office Box 2070
Oakland, California 94612

Re: Official Bankruptcy Form 5

Dear Judge Jellen:

Your recent letter to Francis F. Szczebak suggesting amendments to the above-referenced form has been referred to me. Pursuant to your request, I am forwarding your letter to Mr. Peter G. McCabe, Secretary to the Committee on Rules of Practice and Procedure. Mr. McCabe will distribute your suggestion to the members of the Advisory Committee on Bankruptcy Rules and to its reporter, Professor Alan N. Resnick.

The Advisory Committee on Bankruptcy Rules welcomes comments and suggestions to improve the rules and forms. It assists the Advisory Committee greatly, however, if a commentator also can suggest specific language to implement a recommended change. If you would care to submit language that would implement the amendments you have suggested, you may want to send them directly to:

Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Thank you for your interest in bettering the bankruptcy system.

Sincerely,

Patricia S. Channon

Patricia S. Channon
Deputy Assistant Chief
Division of Bankruptcy

cc: Peter G. McCabe

PSC:ff

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
1300 CLAY STREET
P.O. BOX 2070
OAKLAND, CALIFORNIA 94612

EDWARD D. JELLEN
JUDGE

TELEPHONE (415) 273-7716
(FTS) 536-7716

April 22, 1993

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure of the Judicial
Conference of the United States
Washington, D. C. 20544

Re: Official Bankruptcy Form 5 (Involuntary Petition)

Dear Mr. McCabe,

I am writing to you at the suggestion of Patricia S. Channon, as set forth in her letter to me of April 9, 1993. That letter responded to my letter of Francis F. Szczebak of March 25, 1993. Copies of these letters are enclosed for your reference.

As you will note from my letter to Mr. Szczebak, I am recommending a change to Official Bankruptcy Form 5 (Involuntary Petition) so that the petition would allege the specific facts that entitle the petitioner(s) to relief rather than the bare legal conclusion that the petitioners are eligible to file the petition.

In accordance with Ms. Channon's suggestion, I also enclose the language that I recommend be added to the "Allegations" portion of the petition. The enclosed language would replace what is now paragraph 1; the remaining allegations would remain unchanged. I also have the following comments:

1. My paragraph 1.a. does not refer to the possibility that one of the petitioners is an indenture trustee representing the holder of a claim and acting pursuant to Bankruptcy Section 303(b)(1). My thinking is that this is such a rare occurrence that if the situation arises, the person preparing the form can easily make the appropriate modification; and

2. I realize that there is only so much room on the form. If room needs to be made to accommodate the changes I recommend, I believe the "Request for Relief" and "Petitioning Creditors" sections (on the reverse or second page) can easily be combined into one section because these portions of the form are somewhat redundant.

If you have any questions or thoughts, I would be happy to respond or assist in any manner.

Very truly yours,

Edward D. Ellen
United States Bankruptcy Judge

EDJ/lc
CC: Patricia S. Channon
Deputy Assistant Chief
Division of Bankruptcy

ALLEGATIONS
(Check applicable boxes)

1. Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. §303(b) because:

1.a. ☐ petitioners are three or more entities holding claims, not contingent as to liability or the subject of a bona fide dispute, that aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; or

1.b. ☐ there are fewer than 12 such holders of such claims (excluding debtor's employees, insiders and transferees of avoidable transfers) and petitioner(s) hold claims that aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; or

1.c. ☐ debtor is a partnership and petitioner(s) are fewer than all of the general partners of the debtor; or

1.d. ☐ debtor is a partnership, relief under the Bankruptcy Code has been ordered with respect to all of the general partners in such partnership and petitioner is ☐ a general partner in such partnership, ☐ the trustee of such a general partner ☐ a holder of a claim against such partnership; or

1.e. ☐ petitioner is a foreign representative of the estate in a foreign proceeding concerning the debtor.

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

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY
BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

April 29, 1993

Honorable Edward D. Jellen
United States Bankruptcy Court
1300 Clay Street
P.O. Box 2070
Oakland, California 94612

Re: Proposals relating to the Federal Rules of Bankruptcy Procedure

Dear Judge Jellen:

Thank you for your letter of April 22, 1993, proposing changes to Official Bankruptcy Form 5. A copy of your letter and your suggested language for revising form 5 will be sent to the chairman and reporter of the Judicial Conference Advisory Committee on Bankruptcy Rules for their consideration.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Robert E. Keeton
Honorable Edward Leavy
Honorable Thomas S. Ellis, III
Professor Alan N. Resnick

FORM B5
(6/90)

FORM 5. INVOLUNTARY PETITION

United States Bankruptcy Court _____ District of _____	INVOLUNTARY PETITION

IN RE (Name of debtor - If individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 6 years (Include married, maiden, and trade names.)
SOC SEC./TAX I.D. NO. (If more than one, state all)	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS	MAILING ADDRESS OF DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)	

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Petitioners believe
☐ Debts are primarily consumer debts
☐ Debts are primarily business debts (Complete sections A and B)

TYPE OF DEBTOR
☐ Individual ☐ Corporation Publicly Held
☐ Partnership ☐ Corporation Not Publicly Held
☐ Other _____

A. TYPE OF BUSINESS (Check one)
☐ Professional ☐ Transportation ☐ Commodity Broker
☐ Retail/Wholesale ☐ Manufacturing/ Mining ☐ Construction
☐ Railroad ☐ Stockbroker ☐ Real Estate
☐ Other

B. BRIEFLY DESCRIBE NATURE OF BUSINESS

VENUE

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS
(Check applicable boxes)

1. ☐ Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. §303(b).
2. ☐ The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.

3.a. ☐ The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

FORM 5 Involuntary Petition
(6/92)

Name of Debtor ____________________

Case No. ____________________
(court use only)

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor by or to any petitioner. Attach all documents documents evidencing the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioners(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, Code, specified in this peitition.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

X ____________________
Signature of Petitioner or Representative (State title)

Name of Petitioner   Date Signed

Name & Mailing
Address of Individual
Signing in Representative
Capacity

X ____________________
Signature of Attorney   Date

Name of Attorney Firm (If any)

Address

Telephone No.

X ____________________
Signature of Petitioner or Representative (State title)

Name of Petitioner   Date Signed

Name & Mailing
Address of Individual
Signing in Representative
Capacity

X ____________________
Signature of Attorney   Date

Name of Attorney Firm (If any)

Address

Telephone No.

X ____________________
Signature of Petitioner or Representative (State title)

Name of Petitioner   Date Signed

Name & Mailing
Address of Individual
Signing in Representative
Capacity

X ____________________
Signature of Attorney   Date

Name of Attorney Firm (If any)

Address

Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, petition(s) signatures under the statement and the names(s) of attorneys(s) and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____ continuation sheets attached

COMMITTEE NOTE

This form has been redesigned in a box format similar to that of Form 1. See Advisory Committee Note to Form 1.

The allegations required under § 303 are grouped together, and a separate section has been provided for additional allegations based upon the prohibitions and requirements set forth in Rule 1003(a) concerning transfer of claims by petitioning creditors. Petitioners may wish to supplement the allegations set forth in the form with a further statement of facts. Additional information concerning any allegation can be requested by the debtor as part of the discovery process.

Each petitioning creditor, by signing on the line provided, signs both the petition and the unsworn declaration which 28 U.S.C. § 1746 permits instead of verification. The addresses as well as the names of individuals signing the petition in a representative capacity are required, together with disclosure of which petitioner is represented by each signatory.

This form is intended to be used in every involuntary case, including that of a partnership. The separate form for a petition by a partner has been abrogated. Pursuant to § 303(b)(3)(A) of the Code, a petition by fewer than all of the general partners seeking an order for relief with respect to the partnership is treated as an involuntary petition. Such a petition is adversarial in character because not all of the partners are joining in the petition.

Section 303(b)(3)(B) permits a petition against the partnership if relief has been ordered under the Code with respect to all of the general partners. In that event, the petition may be filed by a general partner, a trustee of a general partner's estate, or a creditor of the partnership. This form may be adapted for use in that type of case.

28 U.S.C. § 1408(1) specifies the proper venue alternatives for all persons, including partnerships, as domicile, residence, principal place of business, or location of principal assets. Venue also may be based on a pending case commenced by an affiliate, general partner, or partnership pursuant to 28 U.S.C. § 1408(2). Both options are set forth in the block labeled "Venue."

28 U.S.C. § 1746 permits the unsworn declaration instead of a verification. See Committee Note to Form 2.

1992 COMMITTEE NOTE

The form has been amended to require the dating of signatures.

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

May 10, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Proposed Amendments to Rules 8002(b) and 8006 of the Federal Rules of Bankruptcy Procedure

On behalf of the Advisory Committee on Bankruptcy Rules, I have the honor to transmit proposed amendments to Bankruptcy Rules 8002(b) and 8006 for consideration by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in December, 1992. Comments were received from three respondents after publication of the preliminary draft. A summary of the comments received after publication of the preliminary draft is enclosed. A public hearing was scheduled to be held in Washington, D.C. on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify. The proposed amendments to Rules 8002(b) and 8006 are not the subject of substantial controversy.

The Advisory Committee considered the three written comments received from the bench and bar, as well as the recommendations of the Style Subcommittee. Except for several stylistic changes, and the deletion of a sentence in the committee note to Rule 8002, the Advisory Committee has not made any changes to the proposed amendments subsequent to publication of the preliminary draft. The change to the committee note is explained below.

A summary of the proposed amendments to Rules 8002(b) and 8006 is provided for your convenience:

(1) Rule 8002(b). Time for Filing Notice of Appeal.

This rule is amended to conform to the proposed amendments to F.R.App.P. 4(a)(4) in two respects: (1) to add a motion for relief from a judgment or order pursuant to F.R.Civ.P. 60 (made applicable by Bankruptcy Rule 9024) to the list of postjudgment motions that toll the time for filing a notice of appeal, and (2) to provide that a notice of appeal filed prior to disposition of a postjudgment motion does not become a nullity, but is suspended until such disposition.

The proposed amendments to Rule 8002(b) differ from the proposed amendments to F.R.App.P. 4(a)(4) in one respect. Instead of requiring that the motion for relief from a judgment under Rule 9024 be "served" within 10 days after entry of the judgment in order to toll the appeal time, the proposed amendment to Rule 8002(b) requires that the motion be "filed" within that 10-day period. The reason for recommending that filing be required within the 10-day period is to achieve greater certainty for parties in interest who want to determine whether the motion has been made. Greater certainty is more important in bankruptcy cases, in which there is only a 10-day appeal period and parties often rely on finality of orders before closing transactions, then it is in district court civil actions where the time to appeal is 30 days.

In response to the public comment, the Advisory Committee deleted the following sentence that appeared in the published version of the committee note to Rule 8002: "This amendment eliminates the difficulty of determining whether a postjudgment motion made within 10 days after entry of the judgment is a Rule 9023 motion, which tolls the time for filing an appeal, or a Rule 9024 motion, which historically has not tolled the time." The Committee believes that this sentence is not entirely accurate in that, under the present rules, a Rule 9023 (Civil Rule 59) motion only has to be served within the 10-day period to toll the appeal time. If the motion is both served and filed within the 10-day period, under the amended rule there will be no need for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. However, if a motion is served within the 10-day period, but not filed until after the 10-day period, it may be necessary for the court to determine whether it is a Rule 9023 or a Rule 9024 motion. The Advisory Committee understands that the need for the court to distinguish between Rule 9023 and Rule 9024 motions may be temporary in that the Civil Rules Committee is considering changes to require that Rule 59 motions be filed within the 10-day period.

(2) Rule 8006. Record and Issues on Appeal.

The proposed amendment to this rule is related to the proposed amendment to Rule 8002(b). The purpose of the amendment is to suspend the 10-day period for filing and serving a designation of the record and statement of the issues if a timely postjudgment motion is made that suspends the time for filing a notice of appeal under Rule 8002(b). The only changes that have been made subsequent to the publication of the proposed amendments to Rule 8006 are stylistic.

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

May 10, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Report of the Comments Received Subsequent to the Publication of the Preliminary Draft of Proposed Amendments to Bankruptcy Rules 8002(b) and 8006

A preliminary draft of the proposed amendments to Bankruptcy Rules 8002(b) and 8006 was circulated to members of the bench and bar in December 1992. A public hearing was scheduled to be held in Washington, DC, on April 2, 1993, but was cancelled because of the lack of witnesses requesting to testify.

The Advisory Committee on Bankruptcy Rules received letters from three commentators. Listed below are the names and addresses of the commentators and a summary of each comment.

(1) Arnold P. Peter, Esq.
Chair, Committee on Federal Courts
of the State Bar of California
555 Franklin Street
San Francisco, CA 94102-4498
(April 13, 1993)

Mr. Peter reports that the California State Bar Committee on Federal Courts enthusiastically supports the proposed revisions to Rules 8002(b) and 8006. His letter does not contain any suggestions for further modifications.

(2) Hon. S. Martin Teel, Jr.
United States Bankruptcy Court for the
District of Columbia
United States Courthouse
Washington, DC 20001
(January 25, 1993)

Judge Teel suggests that the amendment to Rule 8002(b) provide that a Rule 9024 motion tolls the time to file an appeal if "made within the time for filing and serving a motion under Rule 9023" (instead of the proposed language: "if the motion is filed within 10 days after the entry of judgment"). Judge Teel suggests that linking the time for the Rule 9024 motion to the time for a Rule 9023 motion would be preferable for two reasons. First, the Advisory Committee's language will create only an illusion of certainty. Although there will be greater certainty regarding the making of a Rule 9024 motion, there will remain uncertainty because a Rule 9023 motion may toll the appeal time even if it is not filed within the ten day period. Second, Judge Teel comments that the Advisory Committee proposal will continue to require courts to determine whether a motion to reconsider a judgment is a Rule 9023 or a Rule 9024 motion if the motion is served but not filed within the 10-day period.

Judge Teel states that "[t]he obvious way to achieve the goal of certainty desired would be to amend Rules 7005, 7052 and 9023 to require that motions under Rules 7052 and 9023 be served and filed on the tenth day."

(3) Honorable Robert J. Kressel
Chief Judge
United States Bankruptcy Court for the
District of Minnesota
600 Towle Building
330 Second Avenue South
Minneapolis, Minnesota 55401
(April 9, 1993)

Judge Kressel apparently agrees with the requirement that a Rule 9024 motion be filed in order to toll the time to appeal, but suggests that the amendment go further to also require that a Rule 7052 motion or Rule 9023 motion be filed within ten days.

Judge Kressel also suggests that Rule 8002(c) be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment in order to toll the appeal period. Judge Kressel recognizes that this change to Rule 8002(c) may be outside the scope of the pending amendments, and has asked that the Advisory Committee consider it at its next opportunity.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 8002. Time for Filing Notice of Appeal

* * * * *

(b) EFFECT OF MOTION ON TIME FOR APPEAL. If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion: ~~is filed by any party:~~

(1) ~~under Rule 7052(b)~~ to amend or make additional findings of fact under Rule 7052, whether or not ~~an alteration of~~ granting the motion would alter the judgment ~~would be required if the motion is granted~~;

(2) ~~under Rule 9023~~ to alter or amend the judgment under Rule 9023; ~~or~~

(3) ~~under Rule 9023~~ for a new trial

under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment.~~, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed.~~ A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate

review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees ~~shall~~ will be required for ~~such~~ filing an amended notice.

* * * * *

COMMITTEE NOTE

These amendments are intended to conform to the 1993 amendments to F.R.App.P. 4(a)(4) and 6(b)(2)(i).

This rule as amended provides that a notice of appeal filed before the

disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel.

Because a notice of appeal will ripen into an effective appeal upon disposition of a postjudgment motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. The appeal may be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a postjudgment motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the rule does not require an additional notice of appeal in that situation.

The amendment provides that a notice of appeal filed before the disposition of a postjudgment tolling motion is sufficient to bring the judgment, order, or decree specified in

the original notice of appeal to the district court or bankruptcy appellate panel. If the judgment is altered upon disposition of a postjudgment motion, however, and if a party who has previously filed a notice of appeal wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Subdivision (b) is also amended to include, among motions that extend the time for filing a notice of appeal, a motion under Rule 9024 that is filed within 10 days after entry of judgment. The addition of this motion conforms to a similar amendment to F.R.App.P. 4(a)(4) made in 1993, except that a Rule 9024 motion does not toll the time to appeal unless it is filed within the 10-day period. The reason for providing that the motion extends the time to appeal only if it is filed within the 10-day period is to enable the court and the parties in interest to determine solely from the court records whether the time to appeal has been extended by a motion for relief under Rule 9024.

Rule 8006. Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided by Rule 8001(a), ~~or~~ entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement ~~of the appellant~~ the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve

a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement ~~of the cross appellant~~, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall

prepare the copy at the party's expense ~~of the party~~. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

COMMITTEE NOTE

The amendment to the first sentence of this rule is made together with the amendment to Rule 8002(b), which provides, in essence, that certain specified postjudgment motions suspend a filed notice of appeal until the disposition of the last of such motions. The purpose of this amendment is to suspend the 10-day period for filing and serving a

designation of the record and statement of the issues if a timely postjudgment motion is made and a notice of appeal is suspended under Rule 8002(b). The 10-day period set forth in the first sentence of this rule begins to run when the order disposing of the last of such postjudgment motions outstanding is entered. The other amendments to this rule are stylistic.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 1001

DATE: AUGUST 25, 1993

At the February 1993 meeting, Ken Klee suggested that I look into adding the word "proceedings" to Rule 1001 more explicitly than at present "so that there is no question that the Bankruptcy Rules apply whenever a bankruptcy matter is before the trial court, regardless of whether a district judge or a bankruptcy judge is presiding." (See minutes of February 18-19 meeting set forth as item 1 in the agenda materials for the September meeting). I included on the agenda for the September meeting (as agenda item 13) a discussion of Ken's suggestion.

After considering Ken's suggestion, I drafted the following two alternative amendments to Rule 1001. I think that these would accomplish Ken's goal. In any event, these drafts should help to focus the discussion. Please bring this memorandum with you to the meeting.

Alternative 1:

> "The Bankruptcy Rules and Forms govern procedure <u>in United States district courts, bankruptcy courts, and bankruptcy appellate panels</u> in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."
>
> COMMITTEE NOTE
>
> This amendment clarifies that these rules apply whether the case or proceeding is in a district court, bankruptcy court, or bankruptcy appellate panel.

Alternative 2:

"The Bankruptcy Rules and Forms govern procedure in United States district courts, bankruptcy courts, and bankruptcy appellate panels, in cases under title 11 of the United States Code and in civil proceedings arising under title 11 or arising in or related to cases under title 11. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."

COMMITTEE NOTE

This amendment clarifies that these rules apply in every case and proceeding in a district court, bankruptcy court, or bankruptcy appellate panel, if the case or proceeding is within the jurisdiction conferred on such courts by sections 157, 158, or 1334 of title 28 of the United States Code.

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

August 23, 1993

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

Item number 11 on the agenda for the September meeting includes consideration of Ken Klee's recommendation that Rule 9024 be amended to prevent a court from granting relief under Civil Rule 60 with respect to an order of confirmation if the effect of such relief would be the modification of a confirmed plan in a manner that is inconsistent with the Bankruptcy Code's restrictions on plan modification (see, e.g., section 1127(b)).

Although it is not specifically on point, I thought that you might find helpful a recent decision, In re Cisneros, 994 F2d 1462 (9th Cir. 1993), in which the Court of Appeals upheld the use of Rule 60 to vacate an order of discharge in a chapter 13 case based on mistake, despite section 1328(e) which provides that such an order of discharge could be revoked only for fraud. Please add this case to your agenda materials.

I am circulating this case for several reasons. First, I think that it illustrates how Rule 60 may be used to obtain relief that, it could be argued, is inconsistent with a specific Code provision limiting that kind of relief. Here, mere mistake was the basis of revoking a discharge when the statute clearly limits revocation to situations involving fraud. This is similar to the kind of problem raised by Ken.

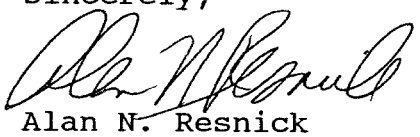
Whether or not the Committee agrees with the ultimate conclusion of the Ninth Circuit, at least the Court started with the position (I think the correct one) that Rule 60 may not be the basis for relief if such relief is inconsistent with the Code. "If the bankruptcy rule and the Code itself are indeed in conflict, then the Debtors are clearly correct -- the statute must take precedence." 994 F2d at 1465. The court then concluded (rightly or wrongly) that in this case the statute was not in conflict with the revocation of the discharge order based on mistake. If courts follow this method of analysis -- i.e., examining whether relief under Rule 60 is inconsistent with a

Code section -- then the Committee may conclude that there is no need to amend Rule 9014. On the other hand, the Committee may wish to overrule the Ninth Circuit by expressly providing that Rule 9024 does not apply with respect to chapter 13 orders of discharge if the effect of the relief is to vacate the order.

I also think that this decision shows that, if there is any problem regarding the use of Rule 60, the problem goes beyond impermissible plan modifications.

I look forward to seeing you in Wyoming.

Sincerely,



Alan N. Resnick

In re Alfred L. CISNEROS; In re Colleen Collins Cisneros, Debtors.

Alfred L. CISNEROS; Colleen Collins Cisneros, Appellants,

v.

UNITED STATES of America; Department of Treasury; Internal Revenue Service, Appellees.

No. 91-55883.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 3, 1993.

Decided June 8, 1993.

The United States filed motion to reopen Chapter 13 debtors' case and to vacate bankruptcy court's previous order of discharge because of mistake. The Bankruptcy Court granted motion. Debtors appealed. The Bankruptcy Appellate Panel affirmed. Debtors appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) provision of Bankruptcy Code authorizing court to revoke discharge only if such discharge was obtained by debtor through fraud did not conflict with Bankruptcy Rule authorizing court to grant relief from judgment due to mistake, inadvertence, surprise, or excusable neglect on motion of party, and thus, Bankruptcy Code provision did not limit power conferred upon court to vacate order of discharge entered by mistake and reopen closed Chapter 13 case; (2) "mistake" or "inadvertence," that Bankruptcy Rule authorizing relief from judgment was intended to reach, included order of discharge entered by bankruptcy court under misapprehension as to facts of case; and (3) finding that government's delay of eight months in responding to discovery that Chapter 13 debtors had been discharged despite fact that IRS' proof of claim had not been satisfied was reasonable was not clear error.

Affirmed.

1. Bankruptcy ⇐3782

Decisions of Bankruptcy Appellate Panel are reviewed de novo.

2. Bankruptcy ⇐3782, 3786

Bankruptcy court's findings of fact are reviewed by Court of Appeals for clear error; its conclusions of law considered de novo. 28 U.S.C.A. § 157(b)(1).

3. Bankruptcy ⇐3784

Bankruptcy court's decision whether or not to reopen closed case is reviewed for abuse of discretion. Bankr.Code, 11 U.S.C.A. § 350.

4. Bankruptcy ⇐3320.1

Chapter 13 debtors were not entitled to invoke right established by Bankruptcy Code provision authorizing court to revoke bankruptcy discharge only if discharge was obtained by debtor through fraud to defend against creditor's motion to vacate discharge order entered by mistake since debtors had never satisfied statutory requirements for earning such right; in order to earn right to preclude revoking of discharge except if discharge was obtained by fraud, debtors were required to complete all payments under plan and debtors had not met this condition. 28 U.S.C.A. § 2075; Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(a, e).

5. Bankruptcy ⇐3321

Bankruptcy Code provision authorizing revocation of discharge only if discharge was obtained by debtor through fraud was not intended to prevent bankruptcy court from correcting its own mistakes with regard to granting of discharge; provision authorizing revoking of discharge only for fraud was means of emphasizing that other grounds for revocation, whether general equitable principles or some reason set forth in Bankruptcy Code governing revocation of discharge granted in Chapter 7 proceeding, were not to be imported into Chapter 13 context. 28 U.S.C.A. § 2075; Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(a, e).

6. Bankruptcy ⇐3321, 3322

Bankruptcy Code provision prohibiting revocation of discharge unless discharge was attained by debtor through fraud did not

conflict with Rule of Bankruptcy Procedure which appeared to provide grounds other than those specified in Code on which to revoke discharge, and thus, bankruptcy court was authorized to vacate order of discharge entered by mistake pursuant to motion for relief from judgment under Bankruptcy Rule. Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(e); Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.

7. Bankruptcy ⇐3321

Chapter 13 debtor's right to have his discharge revoked only for fraud and not on general equitable grounds or for some reason that would justify revocation of Chapter 7 discharge is in no way infringed when court vacates order of discharge entered by mistake. Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(e); Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.

8. Bankruptcy ⇐3321

"Mistake" or "inadvertence," for purposes of bankruptcy rule authorizing court to grant relief from judgment for reasons of mistake, inadvertence, surprise, or excusable neglect, included bankruptcy court's mistaken entry of order of discharge in Chapter 13 case pursuant to trustee's misrepresentation to the bankruptcy court that all creditors that had filed proofs of claim had been paid in full; although problems that arose were ultimately attributable to failure of trustee to learn that Internal Revenue Service (IRS) had filed proof of claim, order of discharge was entered by bankruptcy court under the misapprehension as to facts of case and had court been apprised of actual facts it would never have entered order. Bankr.Code, 11 U.S.C.A. § 1328(a, e); Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.; Fed.Rules Civ. Proc.Rule 60(b)(1), 28 U.S.C.A.; 28 U.S.C.A. § 2075.

See publication Words and Phrases for other judicial constructions and definitions.

9. Bankruptcy ⇐2164.1

Although bankruptcy rule governing relief from judgment on grounds of mistake, inadvertence, surprise, or excusable neglect, provides that court may relieve party from final order upon motion, it does not prohibit bankruptcy judge from reviewing, sua sponte, previous order. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.

10. Bankruptcy ⇐3322

Bankruptcy court did not "sua sponte" raise issue of application of rule governing motions for relief from judgment to bankruptcy court's prior order discharging Chapter 13 debtors based on full compliance with plan, even though it was the court itself that brought forward rule as possible source of authority for relief requested, where court's reconsideration of its previous order was prompted by the government's motion to reopen debtor's case and to vacate previous order of discharge. Bankr.Code, 11 U.S.C.A. §§ 350(b), 1328(e); Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr.Proc. Rule 9024, 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

11. Bankruptcy ⇐3787

Bankruptcy court's finding that Internal Revenue Service's (IRS) eight-month delay in challenging entry of order of discharge in Chapter 13 case on ground that case was improperly closed without IRS obtaining payments on its proof of claim was reasonable was not clear error. Fed.Rules Civ. Proc.Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rule 9024, 11 U.S.C.A.; Bankr. Code, 11 U.S.C.A. §§ 350(b), 1328(a).

A. Lavar Taylor, Burd & Marshack, Santa Ana, CA, for appellants.

Gary D. Gray, Tax Div., U.S. Dept. of Justice, Washington, DC, for appellees.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel.

Before: HUG, SKOPIL, and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We decide whether a bankruptcy court may vacate its order of discharge entered in a Chapter 13 proceeding because of a mistake of fact.

I

Alfred and Colleen Cisneros ("the Debtors") filed for personal bankruptcy under Chapter 13 on August 6, 1987. A payment plan ("the Plan") was confirmed shortly thereafter, under which the Debtors were to pay $4,320 per month to the Chapter 13 trustee (the "Trustee") for a period of fifty-three months. Of this amount, the Trustee was to pay over $3,388 to the Internal Revenue Service each month for the duration of the Plan.

In the Bankruptcy Court for the Central District of California, routine practice apparently calls for the clerk's office to notify the trustee in a Chapter 13 case of all timely filed proofs of claim. The IRS filed such a proof of claim in the Debtors' bankruptcy case, but, for reasons that remain obscure, the Trustee did not receive notice of this fact. The Debtors made their scheduled payments for a period of sixteen months, and the Trustee distributed the funds to all creditors that, so far as she was aware, had filed proofs of claim. Neither the Trustee nor the Debtors ever inquired of the clerk's office whether the IRS had filed a proof of claim, even though the Debtors' outstanding tax debt was by far the most significant of their prepetition obligations. For its part, the IRS never inquired of the Trustee or the Debtors why it was not receiving payment on account of the Debtors' tax liability, even though that liability was substantial by any measure.

At the end of sixteen months, the Trustee issued a Final Report and Accounting representing to the bankruptcy court that all creditors that had filed proofs of claim had been paid in full. In reliance on this representation, the bankruptcy court granted Debtors a "full compliance" discharge under section 1328(a)[1] on June 9, 1989. No hearing was held on the matter, and the IRS received no notice of the court's intent to grant a discharge.

The Debtors thereafter contacted the IRS and requested abatement of the prepetition tax assessment on the grounds that their tax liabilities had been discharged in bankruptcy. Not surprisingly, the IRS refused this request. The parties apparently conferred by telephone and letter during June and July of 1989, but were unable to agree on how to resolve the situation. Nothing further was done by either side until February 1990, when the government filed a motion in the bankruptcy court asking the court to reopen the Debtors' Chapter 13 case under section 350 and to vacate its previous order of discharge. The government predicated its request for relief on the fact that the Debtors had not completed "all payments required under the plan," and were therefore not entitled to a full compliance discharge under section 1328(a).

A hearing was held on April 19, 1990, at which time the bankruptcy court sua sponte raised the issue of whether it could vacate the discharge order on the basis of Federal Rule of Civil Procedure 60(b). After supplemental briefing on this question, the court issued a decision granting the government's motion. The Bankruptcy Appellate Panel ("BAP") affirmed by memorandum. This appeal follows. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

II

[1-3] Decisions of the BAP are reviewed de novo. *In re Dewalt*, 961 F.2d 848, 850 (9th Cir.1992); *In re Two S Corp.*, 875 F.2d 240, 242 (9th Cir.1989). The bankruptcy court's findings of fact are reviewed by this court for clear error, its conclusions of law considered de novo. 28 U.S.C. § 157(b)(1) (1988); *In re Professional Inv. Properties of America*, 955 F.2d 623, 626 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 63, 121 L.Ed.2d 31 (1992); *In re Jogert, Inc.*, 950 F.2d 1498, 1501-02 (9th Cir.1991). The bankruptcy court's decision whether or not to reopen a case under section 350 is reviewed

1. All references are to the Bankruptcy Code, Title 11, United States Code, unless otherwise noted.

for abuse of discretion. *In re Herzig*, 96 B.R. 264, 266 (9th Cir. BAP 1989).

III

A

[4] The source of the bankruptcy court's power to reopen a closed case is section 350(b). This section gives the court discretion to reopen a case "to administer assets, to accord relief to the debtor, or for other cause." The primary issue in this appeal is whether the bankruptcy court had legal authority to vacate its discharge order. If the court lacked such authority, then there could have been no valid "cause" for reopening the case. On the other hand, if the court did have such authority, then the only remaining question is whether it was exercised without abuse of discretion.

The bankruptcy court relied upon Federal Rule of Civil Procedure 60(b)(1) in vacating its discharge order. In relevant part, the rule states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for ... reasons [of] mistake, inadvertence, surprise, or excusable neglect. ... The motion shall be made within a reasonable time and ... not more than one year after the judgment, order, or proceeding was entered or taken.

This rule is made applicable to bankruptcy proceedings by Bankruptcy Rule 9024, as follows:

> Rule 60 applies in cases under the Code except that (1) a motion to reopen a case under the Code ... is not subject to the one year limitation prescribed in Rule 60(b) ...

The Debtors argue that it was error for the bankruptcy court to apply Rule 60(b)(1) under the circumstances. They maintain that any power the bankruptcy court may enjoy to vacate a discharge order entered because of a mistake of fact is limited by the express terms of section 1328(e). This section provides:

> On request of a party in interest before one year after discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge *only* if—
>
> (1) such discharge was obtained by the debtor through fraud; and
>
> (2) the requesting party did not know of such fraud until after such discharge was granted.

(emphasis supplied). The Debtors draw our attention to the emphasized language, arguing that, once a "full compliance" discharge is granted under section 1328(a), it simply cannot be taken away absent a showing that it was procured by fraud on the part of the debtor.[2] The Debtors thus contend that to the extent Bankruptcy Rule 9024, through its incorporation of Federal Rule of Civil Procedure 60(b)(1), appears to provide grounds other than those specified in section 1328(e) on which to revoke a discharge, the rule is in conflict with the statute and must yield to it. Put another way, the Debtors argue that in vacating the discharge order pursuant to Rule 9024, the bankruptcy court violated the express terms of section 1328(e).

If the bankruptcy rule and the Code itself are indeed in conflict, then the Debtors are clearly correct—the statute must take precedence. *See, e.g., In re Cleveland*, 89 B.R. 69, 72 (9th Cir. BAP 1988). The statute pursuant to which the bankruptcy rules are promulgated by the Supreme Court specifically provides that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2075. The Debtors argue that section 1328(e) conferred upon them a substantive right not to have their discharge revoked unless they obtained it by fraud. This right, they claim, was "abridged" by the bankruptcy court's action under Rule 9024.

We cannot agree with the Debtors' analysis. To begin, we note that it is by no means apparent why the Debtors should be permitted to invoke any rights established by sec-

2. The government has not argued that the Debtors are guilty of any fraud in connection with their Chapter 13 case. We therefore do not consider whether § 1328(e) would itself permit the revocation of their discharge.

tion 1328(e) given that they never satisfied the statutory requirements for earning such rights. Section 1328(a) mandates the granting of a "full compliance" discharge "after completion by the debtor of all payments under the plan...." The Debtors have not met this condition, and so cannot claim any right to the discharge granted them. The bankruptcy court is, after all, a court of equity, and it strikes us as anomalous in this context to say that the Debtors have a right to retain that which they had no right to receive in the first place.[3]

[5] More to the point, the Debtors have suggested no reason to believe that Congress intended section 1328(e) to prevent the bankruptcy court from correcting its own mistakes. That this section specifies that a discharge may be revoked "only" for fraud may be explained, we think, as a means of emphasizing that other grounds for revocation—whether general equitable principles or some reason set forth in section 727(d), which governs revocation of a discharge granted in a Chapter 7 proceeding—are not to be imported into the Chapter 13 context.

[6, 7] Section 1328(e) therefore does not conflict with Rule 9024 as applied by the bankruptcy court. A Chapter 13 debtor's right to have his discharge revoked only for fraud (and not on general equitable grounds or for some reason that would justify revocation of a Chapter 7 discharge) is in no way infringed when a court vacates an order of discharge entered by mistake. The bankruptcy court and the BAP therefore properly rejected the Debtors' argument that section 1328(e) serves to limit the power conferred upon the court by Rule 60(b) through Bankruptcy Rule 9024.

3. We note that the Debtors have not demonstrated that they will suffer any undue prejudice from having their inadvertently granted discharge taken away. They are still entitled to earn their discharge by making all the payments required under their confirmed Chapter 13 plan.

4. The debtors appear to argue that the bankruptcy court erred in raising the issue of Rule 60(b)'s application sua sponte. This court has clearly foreclosed any such argument. *See Lenox*, 902 F.2d at 740 ("Although FRCP 60(b) provides that a court may relieve a party from a final order upon motion, it does not prohibit a bankruptcy judge from reviewing, sua sponte, a previous order."). Moreover, although it was the court itself that brought forward Rule 60(b) as a possible source of authority for the relief requested, its reconsideration of its previous order was prompted by the government's motion, and in that sense did not occur sua sponte.

B

[8–10] It remains to ask whether these rules in fact authorized the bankruptcy court to vacate its discharge order in the case at hand. The court reasoned that "the discharge order was entered under a mistake of fact and under Rule 9024 I have the power to review that order sua sponte." The plain language of Rule 60(b) and Bankruptcy Rule 9024 appears to support the court's understanding of its authority. *See In re Lenox*, 902 F.2d 737, 739–40 (9th Cir.1990) ("[B]ankruptcy courts, as courts of equity, have the power to reconsider, modify or vacate their previous orders so long as no intervening rights have become vested in reliance on the orders. This power has been formalized in Bankruptcy Rule 9024, which makes Federal Rule of Civil Procedure 60 applicable to bankruptcy cases.") (citations omitted).[4]

The Debtors contend, however, that the "mistake" that prompted the entry of the order of discharge was made by the Trustee, and is not attributable to the bankruptcy court.[5] They argue that the bankruptcy court itself committed no mistake, since the court acted properly in granting the discharge on the basis of the information presented for its consideration.

By characterizing matters in this fashion, the Debtors seek to bring this case within the reach of our decision in *Matter of Gregory*, 705 F.2d 1118 (9th Cir.1983). The effort is unavailing. In *Gregory* we held that a creditor's failure to object to the confirmation of a Chapter 13 plan at the confirmation hearing or to appeal from the order confirm-

5. The BAP stated that any error made by the Trustee here was attributable to the bankruptcy court because the Trustee committed that error while performing "an integral part of the judicial process." *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir.1986). In view of our disposition of this appeal, we find it unnecessary to address this issue.

ing the plan precluded the creditor from mounting a collateral attack on the plan after it became final. We had no occasion to consider whether the bankruptcy court had confirmed the plan under the influence of a mistaken view of the facts, and, if so, whether this mistake could have been corrected under Rule 60(b) and Bankruptcy Rule 9024. *Gregory* is inapposite, and thus unhelpful to the Debtors here.

In any event, we reject the Debtors' suggestion that the bankruptcy court itself "acted properly" in granting their discharge, and that there is therefore no basis for relief under Rule 60(b). We acknowledge that the problems that have arisen in this case are ultimately attributable to the failure of the Trustee to learn that the IRS had filed a proof of claim. For present purposes, however, this is immaterial. The order of discharge was entered by the bankruptcy court under a misapprehension as to the facts of the case. Had the court been apprised of the actual facts, it would never have entered the order. In our view, this is precisely the sort of "mistake" or "inadvertence" that Rule 60(b) was intended to reach. Since "no intervening rights have become vested in reliance on the order[ ]," *Lenox*, 902 F.2d at 740, there is no obstacle to the bankruptcy court's invocation of the rule to correct itself.

[11] Finally, the Debtors contend that the government's motion was not brought within a "reasonable time" after the entry of the discharge order, as required by Rule 60(b), and therefore that the bankruptcy court erred in granting the requested relief. The Debtors point out that the government offered no explanation for its lengthy delay—the motion to reopen was not filed until eight months after the discharge was granted—and insist that the bankruptcy court gave insufficient weight to this fact. However, the court clearly heeded the standard set down by this court in arriving at its decision (citing *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir.1981)), and explicitly found that the delay had caused the Debtors no prejudice, while a failure to grant the motion to reopen would have been highly prejudicial to the government. We cannot say that the bankruptcy court committed clear error in finding the government's behavior "reasonable," and the court therefore did not abuse its discretion in reopening the case and vacating the Debtors' discharge order.

IV

The decision of the BAP affirming the bankruptcy court's order vacating the Debtors' discharge is AFFIRMED.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BANKRUPTCY DIVISION

MEMORANDUM

DATE: August 31, 1993

FROM: Patricia S. Channon

SUBJECT: Proposed Guidelines for Facsimile Filing

TO: John K. Rabiej, Chief, Rules Committee Support Office

Judge Leavy has requested that the attached materials concerning "fax filing" be distributed to the members of the Advisory Committee on Bankruptcy Rules prior to the Committee's September 1993 meeting.

Attachment

Agenda F-7 (Summary)
Court Administration/Case Mngt.
September 1993

CONFIDENTIAL

SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

The Committee on Court Administration and Case Management recommends that the Judicial Conference:

1. a) Support in principle the substance of Section 3 of the Civil Justice Reform Act of 1993 and refer the issue of whether the matter is more appropriately within the authority of federal rules to the Committee on Rules of Practice and Procedure for a report to the March 1994 Session of the Judicial Conference.

   b) Support Section 5(b) of the Act;

   c) Oppose Section 5(a) of the Act as written and offer the provisions of the judiciary housekeeping bill as an alternative. pp. 2-5

2. a) Amend the Miscellaneous Fee Schedule promulgated under 28 U.S.C. § 1913 to provide a fee for usage of electronic access to court data, as follows:

   > For usage of electronic access to court data, $ 1 per minute of usage [provided the court may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information]. All such fees collected shall be deposited to the Judiciary Automation Fund.

   b) Limit the application of the fee to users of PACER and other similar electronic access systems. No fee will be applied to users of ACES/EDOS at the present time, with the option of charging a fee for that service reserved for future consideration.

c) Delegate to the Director of the Administrative Office the authority to determine the appropriate date to implement the fee, once usage rates warrant the administrative expense of collecting the fee, in order that the appropriate software and the billing and fee collection procedures may be developed for implementation in the appellate courts. . . . . pp. 5-8

3. Urge Congress to enact legislation amending 28 U.S.C. § 1827 (g) to insert the following language:

If the Director of the Administrative Office of the United States Courts finds it necessary to develop and administer criterion-referenced performance examinations for purposes of certification, or other examinations for the selection of otherwise qualified interpreters, the Director shall prescribe for each examination a uniform fee for applicants to take such examination. In determining the rate of the fee for each examination, the Director shall consider the fees charged by other organizations for examinations that are similar in scope or nature. Notwithstanding section 3302(b) of title 31 of the United States Code, the Director is authorized to provide in any contract or agreement for the administration of examinations and the collection of fees that the contractor may retain all or a portion of the fees in payment for the services. All fees hereafter collected and not retained by a contractor shall be deposited in the fund established under section 1931 of this title and shall remain available until expended for the interpreters program.

The Director of the Administrative Office of the United States is hereby granted retroactive authority to include in any contract for the development of examinations for interpreters a provision which permits the contractor to collect and retain fees in payment for contractual services, notwithstanding sections 3302(b), 1341, and 1517 of title 31 of the United States Code. . . . . pp. 8-9

4. a) Adopt the following resolution:

Effective December 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice which was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements

included in the Technical Guidelines for the Acceptance of Documents by Facsimile.

b) Approve the proposed Technical Guidelines for the Acceptance of Documents by Facsimile. . . . . pp. 10-13

5. Support the enactment of legislation that would provide authorization to all federal courts to utilize mandatory arbitration at the courts' discretion. . . . . pp. 13-17

6. Allow the six courts that participated in the videotape experiment to continue to utilize videotape as a method of recording court proceedings without the simultaneous use of other methods, but without a provision to allow the use of videotape as the record on appeal. pp. 17-19

7. Amend the schedule of fees for bankruptcy courts pursuant to 28 U.S.C. 1930(b) to allow the payment of the $30 administrative fee for noticing services performed by the clerk in chapter 7 and 13 cases in installments in the same manner as installment payments allowed by Section 1930(a) of title 28. The first $30 received shall be applied to the $30 administrative fee. . . . . pp. 19-20

Filing By Facsimile

The Judicial Conference, through its Court Administration and Case Management, Automation and Technology and Rules Committees, has examined the use of facsimile technology for the filing of court documents over the last several years. In June 1989, the former Committee on Judicial Improvements recommended amendments to the Appellate, Civil, and Bankruptcy Rules to provide for local rules permitting papers to be filed by facsimile transmission or other electronic means, consistent with guidelines promulgated by the Judicial Conference. Subsequently, the Committees on Automation and Technology and Court Administration and Case Management, while developing the guidelines required by the amended Federal Rules, determined that until such time as the technological, budgetary, and procedural implications of facsimile filings were resolved, the Conference should authorize the promulgation of local rules permitting the filing of papers by facsimile only in the most limited circumstances. In September 1991, the Judicial Conference adopted a resolution implementing guidelines for the use of facsimile for the filing of court papers (JCUS Sept 91, 52-53). The guidelines took into consideration the practical and technological constraints regarding the acceptance of court documents by facsimile, as previously identified by the Committee on Judicial Improvements. The Conference action was an initial measure, intended to provide a narrow margin of opportunity for courts to allow the filing of papers by facsimile transmission. The Conference resolution as adopted is as follows:

> Effective December 1, 1991, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment, provided that such filing is permitted only (a) in compelling circumstances or (b) under a practice which was established by the court prior to May 1, 1991.

This resolution serves as the guideline mandated by the Federal Rules of Appellate and Civil Procedure, and by adoption of Civil Rule 5, the Federal Rules of Bankruptcy Procedure regarding the acceptance of documents by facsimile, which became effective December 1, 1991.

At its June 1992 meeting, the Committee on Court Administration and Case Management revisited this issue as it relates to the implementation of the Civil Justice Reform Act and determined that, notwithstanding the practical and economical problems related to facsimile use, courts should be allowed to determine at the local level whether to implement the practice of accepting papers for filing by facsimile transmission on a routine basis. Several courts have expressed a desire to implement local rules to routinely accept papers by this method since the Conference adopted the more restrictive policy. Therefore, your Committee recommends that the Conference modify the resolution adopted in 1991 to allow courts to adopt by local rule a broader policy regarding the acceptance of papers by facsimile transmission. Your Committee recognizes that for many courts, the technological, budgetary, and procedural problems may continue to pose enough of a hardship as to prevent any divergence from the guidelines established in 1991. Under the proposed resolution, those courts that elect to maintain the existing, narrower guidelines may continue to do so. However, your Committee also believes that those courts with the capability of accepting filings by facsimile on a more routine basis should be allowed to do so, particularly in

consideration of the obligations placed on both the courts and parties involved in federal litigation under the Civil Justice Reform Act. Your Committee has further determined that national guidelines to be followed by courts enacting local rules should be adopted. Proposed guidelines for the technical requirements for equipment, procedures for compliance with the requirement of an original signature, filing procedures, and potential fees for the service, are included as Appendix A. These guidelines were developed with assistance from appellate, district and bankruptcy clerks. Issues not governed by the guidelines may be left to the discretion of the courts.

The Committee on Automation and Technology has reviewed the proposed guidelines and this recommendation and opposes any change to the current Judicial Conference policy. This position is based upon the determination of that Committee's Subcommittee on Filing by Facsimile that "while the concept of filing by facsimile transmission may be feasible in some instances, the Federal Judiciary is not ready to change its current policy, even by means of a pilot project, unless full funding were available for nationwide implementation and until the clerks' concerns have been addressed adequately". The Subcommittee's findings were based on a survey sent to all clerks of the appellate, district, and bankruptcy courts.

Your Committee believes sufficient provisions have been included in the proposed guidelines to address all of the identified concerns. Further, the proposed resolution would simply create the option in those districts that have the inclination and the resources to accept documents by this method and would not impose the policy on those courts that object. In addition, the Committee on Rules of Practice and Procedure has expressed concern about the relationship between the proposed

guidelines and the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. Your Committee has attempted to address these concerns through revisions to the proposed guidelines. Your Committee understands, however, that the Rules Committee remains opposed to the adoption of the guidelines in their present form, because it believes that the specific areas left to the courts' discretion under the guidelines affect the rulemaking process and require further study. Finally, the Committee on Rules believes the local option should not be applied to bankruptcy courts. Your Committee considered a similar motion and determined that there is no valid reason for excluding bankruptcy courts from the proposed resolution.

Recommendation 4: that the Judicial Conference a) adopt the following resolution:

Effective December 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice which was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements included in the Technical Guidelines for the Acceptance of Documents by Facsimile.

b) Approve the proposed Technical Guidelines for the Acceptance of Documents by Facsimile.

Arbitration

The Judicial Improvements and Access to Justice Act of 1988, Public Law No. 100-702, provided formal statutory authorization to continue the mandatory non-binding arbitration programs previously piloted by the Judicial Conference in ten

Agenda F-7 (Appendix A)
Court Administration/Case Mngt.
September 1993

GUIDELINES FOR FILING BY FACSIMILE

CONFIDENTIAL

I. *General Purpose and Scope:*

(1) Purpose of the Guidelines: The Guidelines for Filing by Facsimile are the standards established by the Judicial Conference of the United States to assist those courts that permit filing of papers by facsimile transmission pursuant to the Federal Rules of Appellate, Civil, Criminal and Bankruptcy Procedure.

(2) Compliance with Rules of Procedure: These Guidelines for Filing by Facsimile are designed to guide the activities of litigants and court personnel relating to facsimile filing consistently with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. §§ 2072 and 2075. They do not amend, modify, or excuse noncompliance with any applicable rules.

(3) Prohibited Documents: Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

II. *Definitions:*

(1) "Facsimile transmission" means sending a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(2) "Facsimile filing" or "filing by fax" means a court's receipt of a paper generated by a facsimile machine in the clerk's office. Electronic transmission of a document by facsimile machine does not constitute filing; rather, filing is complete only when the document is received by the clerk.

(3) "Facsimile machine" means a machine used to transmit or receive documents.

(4) "Fax" is an abbreviation for "facsimile" and, as indicated by the context, may refer to a facsimile transmission or to a document so transmitted.

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [2];

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - Standard 203 x 98.

(b) A facsimile machine used to send documents to a court must be able to produce a transmission record, as proof of transmission at

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[2] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

the time transmission is completed.[3]

IV. *Resource Availability:* No additional personnel (FTEs) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.

V. *Original Signature:* If authorized by local rules or by order in a particular case, a clerk may provisionally accept a document having the image of the original manual signature on the facsimile copy. A court may order prompt filing of the original signed document, as well. If not filed, the original signed document must be maintained by the attorney of record or the party originating the document until the litigation concludes.

VI. *Transmission record:* The sending party must maintain a copy of all papers filed by facsimile and a copy of the transmission record until the litigation concludes.

VII. *Cover sheet:*

(1) Each document transmitted to the clerk must be accompanied by a cover sheet which lists the following:

(a) the court in which the pleading is to be filed;

(b) the type of action, e.g., civil, criminal, bankruptcy, or adversary proceeding;

(c) the case title information;

(d) the case number identification (except when the document is the original complaint);

(e) the title of document(s);

(f) the sender's name, address, telephone number, and fax number;

(g) the number of pages transmitted including cover sheet;

(h) the billing or charge information for court fees; and

(i) the date and time of transmission.

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[3] This is in addition to the requirement that the original document be maintained.

(2) Unless a local rule or court order in a particular case requires otherwise, the cover sheet must be the first page transmitted. The cover sheet need not be filed in the case and is not counted toward any page limit established by the court.

(3) The facsimile cover sheet does not replace any cover sheet that the court may require. It is for the clerk's use in identifying the document and identifying any applicable fees.

VIII. *Fees:*

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax [4]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . . $ 5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court, for each page [5] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

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[4] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[5] See Miscellaneous Fee Schedules.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

August 16, 1993

MEMORANDUM TO MEMBERS OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBJECT: Judicial Conference Report Including an Appendix Transmitting Proposed Amendments to the Bankruptcy Rules

I am attaching a copy of the Judicial Conference Report including an Appendix transmitting proposed amendments to the Bankruptcy Rules. The rules amendments submitted to the Judicial Conference should have been included in Item 2 of the September 13-14, 1993 agenda book, but they were inadvertently omitted.

Please bring your copy of the agenda book to the meeting.

John K. Rabiej

2 Attachments

cc: Honorable Robert E. Keeton
Honorable Alicemarie H. Stotler

Agenda F-19 (Summary)
Rules
September 1993

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON THE RULES OF PRACTICE AND PROCEDURE

The Committee on the Rules of Practice and Procedure recommends that the Conference:

1. Approve the proposed amendments to Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 of the Federal Rules of Appellate Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....pp. 2-5

2. Approve the proposed amendments to Rules 8002 and 8006 of the Federal Rules of Bankruptcy Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.....p. 6

3. Approve the proposed amendments to Rules 16, 29, 32, and 40 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmit to Congress pursuant to law.....pp. 6-9

4. Approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.....pp. 10-11

5. Not approve the adoption of proposed Guidelines for Filing by Facsimile in their present form.....pp. 13-14

The remainder of the report is for information and the record.

Agenda F-19
Rules
September 1993

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 17-19, 1993. All members of the Committee attended the meeting. Philip B. Heymann, Deputy Attorney General, attended part of the meeting, with Messrs. Roger Pauley and Dennis G. Linder representing him in his absence. The Reporter to your Committee, Dean Daniel R. Coquillette and the Secretary to the Committee, Peter G. McCabe, also participated in the meeting.

Also present were Judge Kenneth F. Ripple, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Edward Leavy, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Chief Judge Sam C. Pointer, Jr., Chair, and Dean Edward Cooper, of the Advisory Committee on Civil Rules; Judge William Terrell Hodges, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

Also present were John K. Rabiej, Chief, Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan Garner and Joseph F. Spaniol, Jr., consultants to the Subcommittee on Style. Other staff from the Administrative Office and the Federal Judicial Center as well as various members of the public also attended the meeting as observers.

I. Amendments to the Federal Rules of Appellate Procedure.

The Advisory Committee on the Rules of Appellate Procedure submitted to your Committee proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, 38, 40, 41, and 48 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. A scheduled public hearing on the proposed amendments was canceled because no one requested to testify.

The proposed amendments to Rules 3, 5, 5.1, 13, 21, 25(e), 26.1, 27, 30, 31, and 35 would establish national standards controlling the number of copies of documents that must be filed with the court of appeals, subject to local court approved variations. The amendments were derived from the work of the local rules project.

The provision prescribing the title of the rules, now found in Rule 48, would be transferred to Rule 1. The proposed changes to Rule 9 would accommodate appeals by the government from a court order releasing a defendant prior to trial or after judgment of

conviction. The changes would also require a party seeking review to provide the court with a copy of the district court's order, its statement of reasons, and a transcript of the release decision, if the appellant challenges the factual basis of the court's decision.

The proposed amendments to Rule 25(a) would prohibit a clerk from refusing to accept papers for filing because of form deficiencies. The provision is similar to Civil Rule 5(e) and proposed Bankruptcy Rule 5005(a).

Under revised Rule 25(d), the proof of service would include the address to which papers were mailed or to which they were delivered. Your Committee voted to eliminate the proposed provision in Rule 25(d) regarding the clerk's duty to file papers absent proper acknowledgement or proof of service. The provision appeared unnecessary and could cause confusion. The proposed amendments to Rule 28 would require the appellant to include a summary of argument in the brief.

The proposed amendments to Rule 32 would affect the form and format requirements governing appellate briefs. They would also clarify the limits on the length of a brief. Your Committee voted to defer transmission of the proposed amendments to Rule 32 and approve republication of the rule to focus public comment on the appropriate standards to measure the length of a brief, i.e., the average number of words or characters per page.

Rule 33 would be revised to authorize the court to require parties to attend appeal conferences and address any matter that may aid in the disposition of the proceedings, including

simplification of the issues and the possibility of settlement. The proposed amendments would authorize the court to designate a judge or other person to preside over the appeal conference.

The proposed amendments to Rule 38 would require a court to provide notice and an opportunity to respond before imposing sanctions for the filing of a frivolous appeal. Your Committee was concerned that it would burden a court if it were required to give notice in each instance. Thus, the Committee voted to change the proposal to require that the notice be given either by the court or by the moving party in a separately filed motion.

Rule 40 would be revised to lengthen the time for filing a petition for rehearing in civil cases involving the United States. The proposed amendments to Rule 41 would make conforming changes consistent with other rule changes involving the time for the issuance of the mandate of the court. In addition, the changes would require parties to file a proof of service at the same time a motion for a stay of mandate is filed.

The title provision in Rule 48 would be moved to Rule 1, and an entirely new provision on masters would be inserted in its place. The proposed amendments to Rule 48 would authorize a court to appoint a special master to make recommendations on ancillary matters, e.g., application for fees or eligibility for Criminal Justice Act status on appeal.

The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, appear in Appendix A together with excerpts from the Advisory Committee report

summarizing the comments received, the committee's review of the issues presented, and the changes made in the published draft.

> **Recommendation:** That the Judicial Conference approve proposed amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Appellate Rules 4, 8, 10, 21, 25, 32, 35, and 41, and recommended that they be published for public comment. The proposed amendments to Rules 4, 8, 10, and 25 are technical or represent conforming changes. Rule 21 would be revised to establish procedures governing an application for a writ of mandamus directed to a trial judge. It would eliminate the trial judge's name from the application. It would also authorize pro forma representation for the trial judge unless the trial judge desires personal representation or the court directs otherwise. Proposed amendments to Rules 32, 35, and 41 would treat a request for a rehearing in banc the same as a petition for a panel rehearing with respect to the finality and tolling of judgment period for filing a petition for writ of certiorari.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment. The timing of the publication was left to the discretion of the Advisory Committee.

III. Amendments to the Federal Rules of Bankruptcy Procedure.

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 8002 and 8006 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. The scheduled public hearing on the amendments was canceled because no one requested to testify.

The proposed amendments to Rules 8002 and 8006, along with conforming changes to the Appellate and Civil Rules, are intended to designate a single event that initiates tolling periods in the Appellate, Bankruptcy, and Civil Rules for certain post-trial motions. Your Committee voted to make several stylistic changes to the proposed amendments. An excerpt from the Advisory Committee report and the proposed amendments, as amended, are set forth in Appendix B.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8002 and 8006 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on Criminal Rules submitted to your Committee proposed amendments to Criminal Rules 16, 29, 32, and 40 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated for public comment in late December 1992 on an expedited four-month timetable to coincide with the timetable for amendments to Evidence Rule 412. A public

hearing on the proposed amendments was held in Washington, D.C. on April 22, 1993.

The Advisory Committee received a substantial number of comments on the proposed amendments to Criminal Rule 32, particularly from probation officers who were concerned about the time deadlines imposed on the completion of presentence reports. In light of these concerns, the Advisory Committee eliminated the reference to the specific time set for the completion of a presentence report and substituted the existing provision, which requires the report to be completed before the sentence is imposed "without unreasonable delay." Specific time periods regulating other stages of the sentencing process, however, were retained in the proposed amendments. The Advisory Committee also retained the proposed amendment's presumption that a probation officer's sentencing recommendation be disclosed to the parties, despite the recommendation of the Committee on Criminal Law to retain the current rule's presumption against disclosure.

The Advisory Committee made several other changes to the original draft regarding the responsibilities and authority of probation officers during the sentencing process. Among other things, the changes would provide defendant's counsel with a reasonable opportunity, instead of an entitlement, to attend any interview with a probation officer, and they would authorize a probation officer to arrange, rather than to require, meetings with defendant's counsel. In addition, your Committee made stylistic changes to the proposed amendments.

Your Committee agreed with the Advisory Committee's conclusion that a victim allocution provision in Rule 32 was unnecessary because a court now has the discretion to permit a victim to speak at sentencing. Mandating victim allocution might lead to greater victim frustration because of the sentencing guidelines restrictions, which limit the impact of a victim's statement. Your Committee, however, eliminated as unnecessary several sections of the Committee Note, which would have explained in detail these and other reasons for not including the victim allocution provision in the Rule.

The proposed changes to Rules 16, 29, and 40 are relatively minor. The proposed change to Rule 16 would explicitly extend the discovery and disclosure requirements of the rule to organizational defendants. The changes to Rule 29 would permit the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all the evidence. Changes to Rule 40 would clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, appear in Appendix C together with an excerpt from the Advisory Committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Criminal Rules 16, 29, 32, and 40 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Criminal Rules 5, 10, 43, and 53, and recommended that they be published for public comment. The proposed amendment to Rule 5 would exempt from the Rule's requirements prosecutions initiated under the Unlawful Flight to Avoid Prosecution (UFAP) statute, because a United States attorney rarely prosecutes defendants under the statute. UFAP is used primarily to assist state law enforcement officers in apprehending and holding alleged state law offenders. Rules 10 and 43 would be amended to allow video teleconferencing of certain pretrial proceedings with the approval of the court. The proposed changes to Rule 43 would also allow the court to sentence a defendant in absentia who flees after the trial has begun. Finally, the proposed amendment to Rule 53 would permit broadcasting of proceedings under guidelines to be adopted by the Judicial Conference. A Conference approved pilot program permitting broadcasts of proceedings in civil cases is presently underway.

Your Committee made stylistic changes and voted to circulate the proposed amendments to the bench and bar for comment. In order to establish an orderly time for publication, your Committee also authorized the Advisory Committee to consult with the other advisory committees and determine the time to distribute the proposed amendments for public comment.

IV. Amendments to the Federal Rules of Evidence.

The Advisory Committee on Evidence submitted to your Committee proposed amendments to Evidence Rule 412 together with Committee Notes explaining their purpose and intent. The proposed amendments would clarify and extend the protection of the rule to victims of sexual misconduct in all criminal and civil cases.

Your Committee was advised that legislation had been considered during the last Congressional session that would bypass the rulemaking process by directly amending Evidence Rule 412. To address the Congressional concern for prompt action your Committee, at the request of the Judicial Conference's Ad Hoc Committee on Violence Against Women, agreed to expedite the rulemaking process to enable Congress to consider the proposed amendments to Rule 412 during the 103rd Congressional session.

The original draft of the amendments to Evidence Rule 412 was prepared by the Advisory Committee on Criminal Rules in consultation with the Advisory Committee on Civil Rules. The proposed amendments would expand the protection of the rule to all criminal and civil cases. They were circulated for public comment under an expedited timetable in late December 1992 for a four-month period. A public hearing was held on the amendments by the newly reactivated Advisory Committee on Evidence Rules in Washington, D.C. on May 6, 1993.

Based on the comments received and the testimony at the hearing, the Advisory Committee on Evidence revised and restructured the original proposal. In particular, the committee

clarified the operation and effect of the amendments in civil cases and on third party witnesses. The Committee Note was also substantially revised to clarify the meanings of several phrases used throughout the rule and explain the precise extent of the rule's protections. The changes to the original draft did not alter, however, the principal purpose of the amendments, which was to protect the privacy interests of a victim of a sexual offense in all civil and criminal cases. Your Committee adopted several additional revisions, including language explicitly allowing the prosecutor to introduce evidence of prior sexual acts by the defendant with the victim.

The proposed amendments to Rule 412 of the Federal Rules of Evidence appears in Appendix D.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Rule 412 of the Federal Rules of Evidence and transmit the proposal to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress pursuant to law.

V. Report of the Advisory Committee on Civil Rules.

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 26, 43, 50, 52, and 59 and recommended that they be published for public comment. Proposed changes to Rule 23 were also submitted for discussion but without a request for immediate publication.

The proposed changes to Rule 26 would clarify the authority of a court to dissolve or modify a protective order. Several factors would be listed for the court to consider in making its decision, including the impact on the public. Rule 43 would be changed to

allow a court to view the testimony of a witness via audio or video transmission during a trial in open court. Finally, the proposed amendments to Rules 50, 52, and 59 would set uniform time periods to file certain post-trial motions consistent with the proposed changes to the Appellate and Bankruptcy Rules.

Your Committee voted to circulate the proposed amendments to the bench and bar for comment after slightly revising the changes to Rules 50, 52, and 59 to achieve uniformity with the changes in the Appellate and Bankruptcy Rules. The timing of the publication was left to the discretion of the Advisory Committee because of the possibility of confusion resulting from the large package of rules amendments now pending before the Congress.

VI. Technical Amendments and Conformance of Local Rules with National Rules.

Your Committee reviewed draft uniform provisions prepared by the committees' reporters that would: (1) authorize the Judicial Conference to make technical corrections and conforming amendments to the rules directly, without action by the Supreme Court and the Congress; (2) authorize the Judicial Conference to prescribe a uniform numbering system that must be followed in the local court rules, and (3) permit the imposition of a sanction for noncompliance with certain local court procedures only if a party has had actual notice of the requirement. The uniform provisions would be included in the following rules: (1) Rules 47 and 49 of the Federal Rules of Appellate Procedure; (2) Rules 8018, 9029, and 9037 of the Federal Rules of Bankruptcy Procedure; (3) Rules 83 and 84 of the Federal Rules of Civil Procedure; and (4) Rules 57

and 59 of the Federal Rules of Criminal Procedure. The Advisory Committee on Evidence was requested to determine whether the proposed amendments should be included in the Federal Rules of Evidence.

The amendments proposed by the Advisory Committee on Civil Rules included an additional provision that would relieve a party, who failed through negligence to comply with a local rule imposing a requirement of form, from any loss of rights. Your Committee voted to circulate the proposed amendments with the addition of the provision recommended by the Advisory Committee on Civil Rules to the bench and bar for comment.

VII. Proposed Guidelines For Filing by Facsimile.

At the request of the Committee on Court Administration and Case Management, your Committee reviewed proposed Guidelines for Filing by Facsimile. Under Appellate Rule 25, Bankruptcy Rule 7005 (incorporating the civil procedures in adversary proceedings), Civil Rule 5, and Criminal Rule 49 (incorporating the civil procedures), papers may be filed with the court by "facsimile transmission if permitted by rules of the (court), provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." In 1991, the Conference issued very restrictive guidelines that allow facsimile filing only in compelling circumstances or where it had been authorized previously by a court. The proposed guidelines would liberalize the opportunity of courts to authorize filing by facsimile.

Your Committee requested each of the Advisory Committees to determine whether the proposed guidelines were inconsistent with the federal rules. After considerable discussion, your Committee voted to recommend against adoption of the proposed Guidelines for Filing by Facsimile in their present form.

The reporters to the respective advisory committees attempted to draft an acceptable revision of the proposed guidelines. After examining the draft of the reporters, your Committee is of the view that many issues would still remain that require careful consideration before approval of a revised draft could be recommended. In particular, concerns were raised regarding potential abuse by pro se litigants, the likelihood that extensive local rulemaking would be necessary to resolve issues left outstanding under the guidelines, and the consequences for failing to comply with specific provisions of the guidelines, e.g., using equipment not prescribed by the guidelines.

> **Recommendation:** That the Judicial Conference not approve the adoption of the proposed Guidelines for Filing by Facsimile in their present form.

VIII. Report of the Subcommittee on Long-Range Planning.

Your Committee discussed the request of the Long-Range Planning Committee for its views on the size of the Article III judiciary. After careful consideration, your Committee determined that any cap or limitation on the size of the federal judiciary would have no material effect on the Rules Enabling Act process or the federal rules. Accordingly, your Committee voted not to take a position as a committee on this issue.

IX. Report to the Chief Justice on Proposed Amendments Generating Substantial Controversy.

In accordance with the standing request of the Chief Justice, a summary of the proposed amendments generating substantial controversy is set forth as Appendix E.

Respectfully submitted,

Thomas E. Baker
William O. Bertelsman
Frank H. Easterbrook
Thomas S. Ellis, III
Alan W. Perry
Edwin J. Peterson
George C. Pratt
Dolores K. Sloviter
Alicemarie H. Stotler
Alan C. Sundberg
Philip B. Heymann
William R. Wilson
Charles Alan Wright

Robert E. Keeton, Chairman

Appendix A: Proposed Amendments to the Federal Rules of Appellate Procedure

Appendix B: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Appendix C: Proposed Amendments to the Federal Rules of Criminal Procedure

Appendix D: Proposed Amendments to the Federal Rules of Evidence

Appendix E: Proposed Rules Amendments Generating Substantial Controversy

file

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JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

August 31, 1993

MEMORANDUM TO THE BANKRUPTCY COMMITTEE MEMBERS

SUBJECT: Additional Agenda Material for the September Meeting

At the request of Judge Leavy, I am attaching an excerpt from the report of the Committee on Court Administration and Case Management to the Judicial Conference concerning filing by facsimile. The report will be considered by the Judicial Conference at its September 20-21, 1993 session. The reports of the Committee on Automation and Technology and the Standing Rules Committee to the Judicial Conference contain objections to the recommendation.

I am also attaching an updated membership list for your information.

John K. Rabiej

Attachments

cc: Honorable Robert E. Keeton
Honorable Alicemarie H. Stotler
Dean Daniel R. Coquillette

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BANKRUPTCY DIVISION

MEMORANDUM

DATE: August 31, 1993

FROM: Patricia S. Channon

SUBJECT: Proposed Guidelines for Facsimile Filing

TO: John K. Rabiej, Chief, Rules Committee Support Office

Judge Leavy has requested that the attached materials concerning "fax filing" be distributed to the members of the Advisory Committee on Bankruptcy Rules prior to the Committee's September 1993 meeting.

Attachment

Agenda F-7 (Summary)
Court Administration/Case Mngt.
September 1993

CONFIDENTIAL

SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

The Committee on Court Administration and Case Management recommends that the Judicial Conference:

1. a) Support in principle the substance of Section 3 of the Civil Justice Reform Act of 1993 and refer the issue of whether the matter is more appropriately within the authority of federal rules to the Committee on Rules of Practice and Procedure for a report to the March 1994 Session of the Judicial Conference.

   b) Support Section 5(b) of the Act;

   c) Oppose Section 5(a) of the Act as written and offer the provisions of the judiciary housekeeping bill as an alternative. pp. 2-5

2. a) Amend the Miscellaneous Fee Schedule promulgated under 28 U.S.C. § 1913 to provide a fee for usage of electronic access to court data, as follows:

   > For usage of electronic access to court data, $ 1 per minute of usage [provided the court may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information]. All such fees collected shall be deposited to the Judiciary Automation Fund.

   b) Limit the application of the fee to users of PACER and other similar electronic access systems. No fee will be applied to users of ACES/EDOS at the present time, with the option of charging a fee for that service reserved for future consideration.

c) Delegate to the Director of the Administrative Office the authority to determine the appropriate date to implement the fee, once usage rates warrant the administrative expense of collecting the fee, in order that the appropriate software and the billing and fee collection procedures may be developed for implementation in the appellate courts. . . . . pp. 5-8

3. Urge Congress to enact legislation amending 28 U.S.C. § 1827 (g) to insert the following language:

If the Director of the Administrative Office of the United States Courts finds it necessary to develop and administer criterion-referenced performance examinations for purposes of certification, or other examinations for the selection of otherwise qualified interpreters, the Director shall prescribe for each examination a uniform fee for applicants to take such examination. In determining the rate of the fee for each examination, the Director shall consider the fees charged by other organizations for examinations that are similar in scope or nature. Notwithstanding section 3302(b) of title 31 of the United States Code, the Director is authorized to provide in any contract or agreement for the administration of examinations and the collection of fees that the contractor may retain all or a portion of the fees in payment for the services. All fees hereafter collected and not retained by a contractor shall be deposited in the fund established under section 1931 of this title and shall remain available until expended for the interpreters program.

The Director of the Administrative Office of the United States is hereby granted retroactive authority to include in any contract for the development of examinations for interpreters a provision which permits the contractor to collect and retain fees in payment for contractual services, notwithstanding sections 3302(b), 1341, and 1517 of title 31 of the United States Code. . . . . pp. 8-9

4. a) Adopt the following resolution:

Effective December 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice which was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements

included in the Technical Guidelines for the Acceptance of Documents by Facsimile.

b) Approve the proposed Technical Guidelines for the Acceptance of Documents by Facsimile. . . . . pp. 10-13

5. Support the enactment of legislation that would provide authorization to all federal courts to utilize mandatory arbitration at the courts' discretion. . . . . pp. 13-17

6. Allow the six courts that participated in the videotape experiment to continue to utilize videotape as a method of recording court proceedings without the simultaneous use of other methods, but without a provision to allow the use of videotape as the record on appeal. pp. 17-19

7. Amend the schedule of fees for bankruptcy courts pursuant to 28 U.S.C. 1930(b) to allow the payment of the $30 administrative fee for noticing services performed by the clerk in chapter 7 and 13 cases in installments in the same manner as installment payments allowed by Section 1930(a) of title 28. The first $30 received shall be applied to the $30 administrative fee. . . . . pp. 19-20

Filing By Facsimile

The Judicial Conference, through its Court Administration and Case Management, Automation and Technology and Rules Committees, has examined the use of facsimile technology for the filing of court documents over the last several years. In June 1989, the former Committee on Judicial Improvements recommended amendments to the Appellate, Civil, and Bankruptcy Rules to provide for local rules permitting papers to be filed by facsimile transmission or other electronic means, consistent with guidelines promulgated by the Judicial Conference. Subsequently, the Committees on Automation and Technology and Court Administration and Case Management, while developing the guidelines required by the amended Federal Rules, determined that until such time as the technological, budgetary, and procedural implications of facsimile filings were resolved, the Conference should authorize the promulgation of local rules permitting the filing of papers by facsimile only in the most limited circumstances. In September 1991, the Judicial Conference adopted a resolution implementing guidelines for the use of facsimile for the filing of court papers (JCUS Sept 91, 52-53). The guidelines took into consideration the practical and technological constraints regarding the acceptance of court documents by facsimile, as previously identified by the Committee on Judicial Improvements. The Conference action was an initial measure, intended to provide a narrow margin of opportunity for courts to allow the filing of papers by facsimile transmission. The Conference resolution as adopted is as follows:

> Effective December 1, 1991, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment, provided that such filing is permitted only (a) in compelling circumstances or (b) under a practice which was established by the court prior to May 1, 1991.

This resolution serves as the guideline mandated by the Federal Rules of Appellate and Civil Procedure, and by adoption of Civil Rule 5, the Federal Rules of Bankruptcy Procedure regarding the acceptance of documents by facsimile, which became effective December 1, 1991.

At its June 1992 meeting, the Committee on Court Administration and Case Management revisited this issue as it relates to the implementation of the Civil Justice Reform Act and determined that, notwithstanding the practical and economical problems related to facsimile use, courts should be allowed to determine at the local level whether to implement the practice of accepting papers for filing by facsimile transmission on a routine basis. Several courts have expressed a desire to implement local rules to routinely accept papers by this method since the Conference adopted the more restrictive policy. Therefore, your Committee recommends that the Conference modify the resolution adopted in 1991 to allow courts to adopt by local rule a broader policy regarding the acceptance of papers by facsimile transmission. Your Committee recognizes that for many courts, the technological, budgetary, and procedural problems may continue to pose enough of a hardship as to prevent any divergence from the guidelines established in 1991. Under the proposed resolution, those courts that elect to maintain the existing, narrower guidelines may continue to do so. However, your Committee also believes that those courts with the capability of accepting filings by facsimile on a more routine basis should be allowed to do so, particularly in

consideration of the obligations placed on both the courts and parties involved in federal litigation under the Civil Justice Reform Act. Your Committee has further determined that national guidelines to be followed by courts enacting local rules should be adopted. Proposed guidelines for the technical requirements for equipment, procedures for compliance with the requirement of an original signature, filing procedures, and potential fees for the service, are included as Appendix A. These guidelines were developed with assistance from appellate, district and bankruptcy clerks. Issues not governed by the guidelines may be left to the discretion of the courts.

The Committee on Automation and Technology has reviewed the proposed guidelines and this recommendation and opposes any change to the current Judicial Conference policy. This position is based upon the determination of that Committee's Subcommittee on Filing by Facsimile that "while the concept of filing by facsimile transmission may be feasible in some instances, the Federal Judiciary is not ready to change its current policy, even by means of a pilot project, unless full funding were available for nationwide implementation and until the clerks' concerns have been addressed adequately". The Subcommittee's findings were based on a survey sent to all clerks of the appellate, district, and bankruptcy courts.

Your Committee believes sufficient provisions have been included in the proposed guidelines to address all of the identified concerns. Further, the proposed resolution would simply create the option in those districts that have the inclination and the resources to accept documents by this method and would not impose the policy on those courts that object. In addition, the Committee on Rules of Practice and Procedure has expressed concern about the relationship between the proposed

guidelines and the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. Your Committee has attempted to address these concerns through revisions to the proposed guidelines. Your Committee understands, however, that the Rules Committee remains opposed to the adoption of the guidelines in their present form, because it believes that the specific areas left to the courts' discretion under the guidelines affect the rulemaking process and require further study. Finally, the Committee on Rules believes the local option should not be applied to bankruptcy courts. Your Committee considered a similar motion and determined that there is no valid reason for excluding bankruptcy courts from the proposed resolution.

> **Recommendation 4:** that the Judicial Conference a) adopt the following resolution:
>
> Effective December 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice which was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements included in the Technical Guidelines for the Acceptance of Documents by Facsimile.
>
> b) Approve the proposed Technical Guidelines for the Acceptance of Documents by Facsimile.

Arbitration

The Judicial Improvements and Access to Justice Act of 1988, Public Law No. 100-702, provided formal statutory authorization to continue the mandatory non-binding arbitration programs previously piloted by the Judicial Conference in ten

Agenda F-7 (Appendix A)
Court Administration/Case Mngt.
September 1993

GUIDELINES FOR FILING BY FACSIMILE

CONFIDENTIAL

I. *General Purpose and Scope:*

(1) Purpose of the Guidelines: The Guidelines for Filing by Facsimile are the standards established by the Judicial Conference of the United States to assist those courts that permit filing of papers by facsimile transmission pursuant to the Federal Rules of Appellate, Civil, Criminal and Bankruptcy Procedure.

(2) Compliance with Rules of Procedure: These Guidelines for Filing by Facsimile are designed to guide the activities of litigants and court personnel relating to facsimile filing consistently with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. §§ 2072 and 2075. They do not amend, modify, or excuse noncompliance with any applicable rules.

(3) Prohibited Documents: Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

II. *Definitions:*

(1) "Facsimile transmission" means sending a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(2) "Facsimile filing" or "filing by fax" means a court's receipt of a paper generated by a facsimile machine in the clerk's office. Electronic transmission of a document by facsimile machine does not constitute filing; rather, filing is complete only when the document is received by the clerk.

(3) "Facsimile machine" means a machine used to transmit or receive documents.

(4) "Fax" is an abbreviation for "facsimile" and, as indicated by the context, may refer to a facsimile transmission or to a document so transmitted.

III. *Technical requirements:*

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. [1]

(1) Facsimile Machine Standards:

(a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.

(2) Additional Facsimile Standards for Senders:

(a) Each sender must have the following equipment standards:

(i) CCITT Compatibility - Group 3 [2];

(ii) Modem Speed - 9600-2400 bps (bits per second) with automatic stepdown; and

(iii) Image Resolution - Standard 203 x 98.

(b) A facsimile machine used to send documents to a court must be able to produce a transmission record, as proof of transmission at

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[1] The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

[2] Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

the time transmission is completed. [3]

IV. *Resource Availability:* No additional personnel (FTEs) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.

V. *Original Signature:* If authorized by local rules or by order in a particular case, a clerk may provisionally accept a document having the image of the original manual signature on the facsimile copy. A court may order prompt filing of the original signed document, as well. If not filed, the original signed document must be maintained by the attorney of record or the party originating the document until the litigation concludes.

VI. *Transmission record:* The sending party must maintain a copy of all papers filed by facsimile and a copy of the transmission record until the litigation concludes.

VII. *Cover sheet:*

(1) Each document transmitted to the clerk must be accompanied by a cover sheet which lists the following:

(a) the court in which the pleading is to be filed;

(b) the type of action, e.g., civil, criminal, bankruptcy, or adversary proceeding;

(c) the case title information;

(d) the case number identification (except when the document is the original complaint);

(e) the title of document(s);

(f) the sender's name, address, telephone number, and fax number;

(g) the number of pages transmitted including cover sheet;

(h) the billing or charge information for court fees; and

(i) the date and time of transmission.

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[3] This is in addition to the requirement that the original document be maintained.

(2) Unless a local rule or court order in a particular case requires otherwise, the cover sheet must be the first page transmitted. The cover sheet need not be filed in the case and is not counted toward any page limit established by the court.

(3) The facsimile cover sheet does not replace any cover sheet that the court may require. It is for the clerk's use in identifying the document and identifying any applicable fees.

VIII. *Fees:*

(1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.

(2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.

(3) Other Fees for Filing by Fax [4]

(a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet . . . . . $ 5.00

For each additional page . . . . . $ .75

Any necessary copies to be reproduced by the court, for each page [5] . . . . . $ .50

(b) No fees are to be charged for services rendered on behalf of the United States.

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[4] These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

[5] See Miscellaneous Fee Schedules.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 1001

DATE: AUGUST 25, 1993

At the February 1993 meeting, Ken Klee suggested that I look into adding the word "proceedings" to Rule 1001 more explicitly than at present "so that there is no question that the Bankruptcy Rules apply whenever a bankruptcy matter is before the trial court, regardless of whether a district judge or a bankruptcy judge is presiding." (See minutes of February 18-19 meeting set forth as item 1 in the agenda materials for the September meeting). I included on the agenda for the September meeting (as agenda item 13) a discussion of Ken's suggestion.

After considering Ken's suggestion, I drafted the following two alternative amendments to Rule 1001. I think that these would accomplish Ken's goal. In any event, these drafts should help to focus the discussion. Please bring this memorandum with you to the meeting.

Alternative 1:

> "The Bankruptcy Rules and Forms govern procedure <u>in United States district courts, bankruptcy courts, and bankruptcy appellate panels</u> in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."
>
> COMMITTEE NOTE
>
> This amendment clarifies that these rules apply whether the case or proceeding is in a district court, bankruptcy court, or bankruptcy appellate panel.

Alternative 2:

"The Bankruptcy Rules and Forms govern procedure in United States district courts, bankruptcy courts, and bankruptcy appellate panels, in cases under title 11 of the United States Code and in civil proceedings arising under title 11 or arising in or related to cases under title 11. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."

COMMITTEE NOTE

This amendment clarifies that these rules apply in every case and proceeding in a district court, bankruptcy court, or bankruptcy appellate panel, if the case or proceeding is within the jurisdiction conferred on such courts by sections 157, 158, or 1334 of title 28 of the United States Code.

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

August 23, 1993

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

Item number 11 on the agenda for the September meeting includes consideration of Ken Klee's recommendation that Rule 9024 be amended to prevent a court from granting relief under Civil Rule 60 with respect to an order of confirmation if the effect of such relief would be the modification of a confirmed plan in a manner that is inconsistent with the Bankruptcy Code's restrictions on plan modification (see, e.g., section 1127(b)).

Although it is not specifically on point, I thought that you might find helpful a recent decision, In re Cisneros, 994 F2d 1462 (9th Cir. 1993), in which the Court of Appeals upheld the use of Rule 60 to vacate an order of discharge in a chapter 13 case based on mistake, despite section 1328(e) which provides that such an order of discharge could be revoked only for fraud. Please add this case to your agenda materials.

I am circulating this case for several reasons. First, I think that it illustrates how Rule 60 may be used to obtain relief that, it could be argued, is inconsistent with a specific Code provision limiting that kind of relief. Here, mere mistake was the basis of revoking a discharge when the statute clearly limits revocation to situations involving fraud. This is similar to the kind of problem raised by Ken.

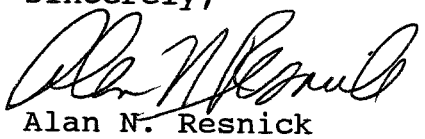
Whether or not the Committee agrees with the ultimate conclusion of the Ninth Circuit, at least the Court started with the position (I think the correct one) that Rule 60 may not be the basis for relief if such relief is inconsistent with the Code. "If the bankruptcy rule and the Code itself are indeed in conflict, then the Debtors are clearly correct -- the statute must take precedence." 994 F2d at 1465. The court then concluded (rightly or wrongly) that in this case the statute was not in conflict with the revocation of the discharge order based on mistake. If courts follow this method of analysis -- i.e., examining whether relief under Rule 60 is inconsistent with a

Code section -- then the Committee may conclude that there is no need to amend Rule 9014. On the other hand, the Committee may wish to overrule the Ninth Circuit by expressly providing that Rule 9024 does not apply with respect to chapter 13 orders of discharge if the effect of the relief is to vacate the order.

I also think that this decision shows that, if there is any problem regarding the use of Rule 60, the problem goes beyond impermissible plan modifications.

I look forward to seeing you in Wyoming.

Sincerely,



Alan N. Resnick

In re Alfred L. CISNEROS; In re Colleen Collins Cisneros, Debtors.

Alfred L. CISNEROS; Colleen Collins Cisneros, Appellants,

v.

UNITED STATES of America; Department of Treasury; Internal Revenue Service, Appellees.

No. 91-55883.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 3, 1993.

Decided June 8, 1993.

The United States filed motion to reopen Chapter 13 debtors' case and to vacate bankruptcy court's previous order of discharge because of mistake. The Bankruptcy Court granted motion. Debtors appealed. The Bankruptcy Appellate Panel affirmed. Debtors appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) provision of Bankruptcy Code authorizing court to revoke discharge only if such discharge was obtained by debtor through fraud did not conflict with Bankruptcy Rule authorizing court to grant relief from judgment due to mistake, inadvertence, surprise, or excusable neglect on motion of party, and thus, Bankruptcy Code provision did not limit power conferred upon court to vacate order of discharge entered by mistake and reopen closed Chapter 13 case; (2) "mistake" or "inadvertence," that Bankruptcy Rule authorizing relief from judgment was intended to reach, included order of discharge entered by bankruptcy court under misapprehension as to facts of case; and (3) finding that government's delay of eight months in responding to discovery that Chapter 13 debtors had been discharged despite fact that IRS' proof of claim had not been satisfied was reasonable was not clear error.

Affirmed.

1. Bankruptcy ⇐3782

Decisions of Bankruptcy Appellate Panel are reviewed de novo.

2. Bankruptcy ⇐3782, 3786

Bankruptcy court's findings of fact are reviewed by Court of Appeals for clear error; its conclusions of law considered de novo. 28 U.S.C.A. § 157(b)(1).

3. Bankruptcy ⇐3784

Bankruptcy court's decision whether or not to reopen closed case is reviewed for abuse of discretion. Bankr.Code, 11 U.S.C.A. § 350.

4. Bankruptcy ⇐3320.1

Chapter 13 debtors were not entitled to invoke right established by Bankruptcy Code provision authorizing court to revoke bankruptcy discharge only if discharge was obtained by debtor through fraud to defend against creditor's motion to vacate discharge order entered by mistake since debtors had never satisfied statutory requirements for earning such right; in order to earn right to preclude revoking of discharge except if discharge was obtained by fraud, debtors were required to complete all payments under plan and debtors had not met this condition. 28 U.S.C.A. § 2075; Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(a, e).

5. Bankruptcy ⇐3321

Bankruptcy Code provision authorizing revocation of discharge only if discharge was obtained by debtor through fraud was not intended to prevent bankruptcy court from correcting its own mistakes with regard to granting of discharge; provision authorizing revoking of discharge only for fraud was means of emphasizing that other grounds for revocation, whether general equitable principles or some reason set forth in Bankruptcy Code governing revocation of discharge granted in Chapter 7 proceeding, were not to be imported into Chapter 13 context. 28 U.S.C.A. § 2075; Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(a, e).

6. Bankruptcy ⇐3321, 3322

Bankruptcy Code provision prohibiting revocation of discharge unless discharge was attained by debtor through fraud did not

conflict with Rule of Bankruptcy Procedure which appeared to provide grounds other than those specified in Code on which to revoke discharge, and thus, bankruptcy court was authorized to vacate order of discharge entered by mistake pursuant to motion for relief from judgment under Bankruptcy Rule. Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(e); Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.

7. Bankruptcy ⇐3321

Chapter 13 debtor's right to have his discharge revoked only for fraud and not on general equitable grounds or for some reason that would justify revocation of Chapter 7 discharge is in no way infringed when court vacates order of discharge entered by mistake. Bankr.Code, 11 U.S.C.A. §§ 701 et seq., 727(d), 1328(e); Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.

8. Bankruptcy ⇐3321

"Mistake" or "inadvertence," for purposes of bankruptcy rule authorizing court to grant relief from judgment for reasons of mistake, inadvertence, surprise, or excusable neglect, included bankruptcy court's mistaken entry of order of discharge in Chapter 13 case pursuant to trustee's misrepresentation to the bankruptcy court that all creditors that had filed proofs of claim had been paid in full; although problems that arose were ultimately attributable to failure of trustee to learn that Internal Revenue Service (IRS) had filed proof of claim, order of discharge was entered by bankruptcy court under the misapprehension as to facts of case and had court been apprised of actual facts it would never have entered order. Bankr.Code, 11 U.S.C.A. § 1328(a, e); Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.; Fed.Rules Civ. Proc.Rule 60(b)(1), 28 U.S.C.A.; 28 U.S.C.A. § 2075.

See publication Words and Phrases for other judicial constructions and definitions.

9. Bankruptcy ⇐2164.1

Although bankruptcy rule governing relief from judgment on grounds of mistake, inadvertence, surprise, or excusable neglect, [86] provides that court may relieve party from final order upon motion, it does not prohibit bankruptcy judge from reviewing, sua sponte, previous order. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr. Proc.Rule 9024, 11 U.S.C.A.

10. Bankruptcy ⇐3322

Bankruptcy court did not "sua sponte" raise issue of application of rule governing motions for relief from judgment to bankruptcy court's prior order discharging Chapter 13 debtors based on full compliance with plan, even though it was the court itself that brought forward rule as possible source of authority for relief requested, where court's reconsideration of its previous order was prompted by the government's motion to reopen debtor's case and to vacate previous order of discharge. Bankr.Code, 11 U.S.C.A. §§ 350(b), 1328(e); Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr.Proc. Rule 9024, 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

11. Bankruptcy ⇐3787

Bankruptcy court's finding that Internal Revenue Service's (IRS) eight-month delay in challenging entry of order of discharge in Chapter 13 case on ground that case was improperly closed without IRS obtaining payments on its proof of claim was reasonable was not clear error. Fed.Rules Civ. Proc.Rule 60(b), 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rule 9024, 11 U.S.C.A.; Bankr. Code, 11 U.S.C.A. §§ 350(b), 1328(a).

A. Lavar Taylor, Burd & Marshack, Santa Ana, CA, for appellants.

Gary D. Gray, Tax Div., U.S. Dept. of Justice, Washington, DC, for appellees.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel.

Before: HUG, SKOPIL, and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We decide whether a bankruptcy court may vacate its order of discharge entered in a Chapter 13 proceeding because of a mistake of fact.

I

Alfred and Colleen Cisneros ("the Debtors") filed for personal bankruptcy under Chapter 13 on August 6, 1987. A payment plan ("the Plan") was confirmed shortly thereafter, under which the Debtors were to pay $4,320 per month to the Chapter 13 trustee (the "Trustee") for a period of fifty-three months. Of this amount, the Trustee was to pay over $3,388 to the Internal Revenue Service each month for the duration of the Plan.

In the Bankruptcy Court for the Central District of California, routine practice apparently calls for the clerk's office to notify the trustee in a Chapter 13 case of all timely filed proofs of claim. The IRS filed such a proof of claim in the Debtors' bankruptcy case, but, for reasons that remain obscure, the Trustee did not receive notice of this fact. The Debtors made their scheduled payments for a period of sixteen months, and the Trustee distributed the funds to all creditors that, so far as she was aware, had filed proofs of claim. Neither the Trustee nor the Debtors ever inquired of the clerk's office whether the IRS had filed a proof of claim, even though the Debtors' outstanding tax debt was by far the most significant of their prepetition obligations. For its part, the IRS never inquired of the Trustee or the Debtors why it was not receiving payment on account of the Debtors' tax liability, even though that liability was substantial by any measure.

At the end of sixteen months, the Trustee issued a Final Report and Accounting representing to the bankruptcy court that all creditors that had filed proofs of claim had been paid in full. In reliance on this representation, the bankruptcy court granted Debtors a "full compliance" discharge under section 1328(a)[1] on June 9, 1989. No hearing was held on the matter, and the IRS received no notice of the court's intent to grant a discharge.

The Debtors thereafter contacted the IRS and requested abatement of the prepetition tax assessment on the grounds that their tax liabilities had been discharged in bankruptcy. Not surprisingly, the IRS refused this request. The parties apparently conferred by telephone and letter during June and July of 1989, but were unable to agree on how to resolve the situation. Nothing further was done by either side until February 1990, when the government filed a motion in the bankruptcy court asking the court to reopen the Debtors' Chapter 13 case under section 350 and to vacate its previous order of discharge. The government predicated its request for relief on the fact that the Debtors had not completed "all payments required under the plan," and were therefore not entitled to a full compliance discharge under section 1328(a).

A hearing was held on April 19, 1990, at which time the bankruptcy court sua sponte raised the issue of whether it could vacate the discharge order on the basis of Federal Rule of Civil Procedure 60(b). After supplemental briefing on this question, the court issued a decision granting the government's motion. The Bankruptcy Appellate Panel ("BAP") affirmed by memorandum. This appeal follows. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

II

[1–3] Decisions of the BAP are reviewed de novo. *In re Dewalt*, 961 F.2d 848, 850 (9th Cir.1992); *In re Two S Corp.*, 875 F.2d 240, 242 (9th Cir.1989). The bankruptcy court's findings of fact are reviewed by this court for clear error, its conclusions of law considered de novo. 28 U.S.C. § 157(b)(1) (1988); *In re Professional Inv. Properties of America*, 955 F.2d 623, 626 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 63, 121 L.Ed.2d 31 (1992); *In re Jogert, Inc.*, 950 F.2d 1498, 1501–02 (9th Cir.1991). The bankruptcy court's decision whether or not to reopen a case under section 350 is reviewed

1. All references are to the Bankruptcy Code, Title 11, United States Code, unless otherwise noted.

for abuse of discretion. *In re Herzig*, 96 B.R. 264, 266 (9th Cir. BAP 1989).

III

A

[4] The source of the bankruptcy court's power to reopen a closed case is section 350(b). This section gives the court discretion to reopen a case "to administer assets, to accord relief to the debtor, or for other cause." The primary issue in this appeal is whether the bankruptcy court had legal authority to vacate its discharge order. If the court lacked such authority, then there could have been no valid "cause" for reopening the case. On the other hand, if the court did have such authority, then the only remaining question is whether it was exercised without abuse of discretion.

The bankruptcy court relied upon Federal Rule of Civil Procedure 60(b)(1) in vacating its discharge order. In relevant part, the rule states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for reasons [of] mistake, inadvertence, surprise, or excusable neglect. . . . The motion shall be made within a reasonable time and . . . not more than one year after the judgment, order, or proceeding was entered or taken.

This rule is made applicable to bankruptcy proceedings by Bankruptcy Rule 9024, as follows:

> Rule 60 applies in cases under the Code except that (1) a motion to reopen a case under the Code . . . is not subject to the one year limitation prescribed in Rule 60(b) . . .

The Debtors argue that it was error for the bankruptcy court to apply Rule 60(b)(1) under the circumstances. They maintain that any power the bankruptcy court may enjoy to vacate a discharge order entered because of a mistake of fact is limited by the express terms of section 1328(e). This section provides:

> On request of a party in interest before one year after discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge *only* if—
>
> (1) such discharge was obtained by the debtor through fraud; and
>
> (2) the requesting party did not know of such fraud until after such discharge was granted.

(emphasis supplied). The Debtors draw our attention to the emphasized language, arguing that, once a "full compliance" discharge is granted under section 1328(a), it simply cannot be taken away absent a showing that it was procured by fraud on the part of the debtor.[2] The Debtors thus contend that to the extent Bankruptcy Rule 9024, through its incorporation of Federal Rule of Civil Procedure 60(b)(1), appears to provide grounds other than those specified in section 1328(e) on which to revoke a discharge, the rule is in conflict with the statute and must yield to it. Put another way, the Debtors argue that in vacating the discharge order pursuant to Rule 9024, the bankruptcy court violated the express terms of section 1328(e).

If the bankruptcy rule and the Code itself are indeed in conflict, then the Debtors are clearly correct—the statute must take precedence. *See, e.g., In re Cleveland*, 89 B.R. 69, 72 (9th Cir. BAP 1988). The statute pursuant to which the bankruptcy rules are promulgated by the Supreme Court specifically provides that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2075. The Debtors argue that section 1328(e) conferred upon them a substantive right not to have their discharge revoked unless they obtained it by fraud. This right, they claim, was "abridged" by the bankruptcy court's action under Rule 9024.

We cannot agree with the Debtors' analysis. To begin, we note that it is by no means apparent why the Debtors should be permitted to invoke any rights established by sec-

2. The government has not argued that the Debtors are guilty of any fraud in connection with their Chapter 13 case. We therefore do not consider whether § 1328(e) would itself permit the revocation of their discharge.

tion 1328(e) given that they never satisfied the statutory requirements for earning such rights. Section 1328(a) mandates the granting of a "full compliance" discharge "after completion by the debtor of all payments under the plan...." The Debtors have not met this condition, and so cannot claim any right to the discharge granted them. The bankruptcy court is, after all, a court of equity, and it strikes us as anomalous in this context to say that the Debtors have a right to retain that which they had no right to receive in the first place.[3]

[5] More to the point, the Debtors have suggested no reason to believe that Congress intended section 1328(e) to prevent the bankruptcy court from correcting its own mistakes. That this section specifies that a discharge may be revoked "only" for fraud may be explained, we think, as a means of emphasizing that other grounds for revocation—whether general equitable principles or some reason set forth in section 727(d), which governs revocation of a discharge granted in a Chapter 7 proceeding—are not to be imported into the Chapter 13 context.

[6, 7] Section 1328(e) therefore does not conflict with Rule 9024 as applied by the bankruptcy court. A Chapter 13 debtor's right to have his discharge revoked only for fraud (and not on general equitable grounds or for some reason that would justify revocation of a Chapter 7 discharge) is in no way infringed when a court vacates an order of discharge entered by mistake. The bankruptcy court and the BAP therefore properly rejected the Debtors' argument that section 1328(e) serves to limit the power conferred upon the court by Rule 60(b) through Bankruptcy Rule 9024.

[8-10] It remains to ask whether these rules in fact authorized the bankruptcy court to vacate its discharge order in the case at hand. The court reasoned that "the discharge order was entered under a mistake of fact and under Rule 9024 I have the power to review that order sua sponte." The plain language of Rule 60(b) and Bankruptcy Rule 9024 appears to support the court's understanding of its authority. *See In re Lenox*, 902 F.2d 737, 739-40 (9th Cir.1990) ("[B]ankruptcy courts, as courts of equity, have the power to reconsider, modify or vacate their previous orders so long as no intervening rights have become vested in reliance on the orders. This power has been formalized in Bankruptcy Rule 9024, which makes Federal Rule of Civil Procedure 60 applicable to bankruptcy cases.") (citations omitted).[4]

The Debtors contend, however, that the "mistake" that prompted the entry of the order of discharge was made by the Trustee, and is not attributable to the bankruptcy court.[5] They argue that the bankruptcy court itself committed no mistake, since the court acted properly in granting the discharge on the basis of the information presented for its consideration.

By characterizing matters in this fashion, the Debtors seek to bring this case within the reach of our decision in *Matter of Gregory*, 705 F.2d 1118 (9th Cir.1983). The effort is unavailing. In *Gregory* we held that a creditor's failure to object to the confirmation of a Chapter 13 plan at the confirmation hearing or to appeal from the order confirm-

3. We note that the Debtors have not demonstrated that they will suffer any undue prejudice from having their inadvertently granted discharge taken away. They are still entitled to earn their discharge by making all the payments required under their confirmed Chapter 13 plan.

4. The debtors appear to argue that the bankruptcy court erred in raising the issue of Rule 60(b)'s application sua sponte. This court has clearly foreclosed any such argument. *See Lenox*, 902 F.2d at 740 ("Although FRCP 60(b) provides that a court may relieve a party from a final order upon motion, it does not prohibit a bankruptcy judge from reviewing, sua sponte, a previous order."). Moreover, although it was the court itself that brought forward Rule 60(b) as a possible source of authority for the relief requested, its reconsideration of its previous order was prompted by the government's motion, and in that sense did not occur sua sponte.

5. The BAP stated that any error made by the Trustee here was attributable to the bankruptcy court because the Trustee committed that error while performing "an integral part of the judicial process." *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir.1986). In view of our disposition of this appeal, we find it unnecessary to address this issue.

ing the plan precluded the creditor from mounting a collateral attack on the plan after it became final. We had no occasion to consider whether the bankruptcy court had confirmed the plan under the influence of a mistaken view of the facts, and, if so, whether this mistake could have been corrected under Rule 60(b) and Bankruptcy Rule 9024. *Gregory* is inapposite, and thus unhelpful to the Debtors here.

In any event, we reject the Debtors' suggestion that the bankruptcy court itself "acted properly" in granting their discharge, and that there is therefore no basis for relief under Rule 60(b). We acknowledge that the problems that have arisen in this case are ultimately attributable to the failure of the Trustee to learn that the IRS had filed a proof of claim. For present purposes, however, this is immaterial. The order of discharge was entered by the bankruptcy court under a misapprehension as to the facts of the case. Had the court been apprised of the actual facts, it would never have entered the order. In our view, this is precisely the sort of "mistake" or "inadvertence" that Rule 60(b) was intended to reach. Since "no intervening rights have become vested in reliance on the order[ ]," *Lenox*, 902 F.2d at 740, there is no obstacle to the bankruptcy court's invocation of the rule to correct itself.

[11] Finally, the Debtors contend that the government's motion was not brought within a "reasonable time" after the entry of the discharge order, as required by Rule 60(b), and therefore that the bankruptcy court erred in granting the requested relief. The Debtors point out that the government offered no explanation for its lengthy delay—the motion to reopen was not filed until eight months after the discharge was granted—and insist that the bankruptcy court gave insufficient weight to this fact. However, the court clearly heeded the standard set down by this court in arriving at its decision (citing *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir.1981)), and explicitly found that the delay had caused the Debtors no prejudice, while a failure to grant the motion to reopen would have been highly prejudicial to the government. We cannot say that the bankruptcy court committed clear error in finding the government's behavior "reasonable," and the court therefore did not abuse its discretion in reopening the case and vacating the Debtors' discharge order.

IV

The decision of the BAP affirming the bankruptcy court's order vacating the Debtors' discharge is AFFIRMED.

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

August 25, 1993

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear John:

Please circulate copies of the enclosed materials to the Advisory Committee on Bankruptcy Rules as soon as possible.

Best personal regards.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

August 26, 1993

MEMORANDUM TO MEMBERS OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBJECT: Material for the September 13-14, 1993 Meeting

I am enclosing the attached material, as requested by Professor Alan Resnick.

John K. Rabiej

2 Attachments