ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 7-8, 1995
Portland, Oregon

Agenda

Introductory Items

1. Approval of minutes of March 1995 meeting.

2. Report on July 1995 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). [Oral report.]

3. Discussion of Self-Study Report prepared by the Standing Committee's subcommittee on long range planning. [Materials: Reporter's memorandum dated 7/20/95; "A Self-Study of Federal Judicial Rulemaking," dated July 1995.]

Action Items

4. Uniform Local Rules Numbering System, as revised following public comment. [Materials: PSC memorandum dated 8/3/95, with attachments.]

5. Proposed amendments to Rule 7062. [Materials: Reporter's memorandum dated 7/13/95; Mr. Klee's memorandum dated 8/2/95.]

6. Recommendations of the Bankruptcy Judges Advisory Committee to amend Rules 3010, 3015(f), and 9014. [Materials: Reporter's memorandum dated 7/10/95; letter from Hon. Judith K. Fitzgerald dated 11/30/94.]

7. Proposed amendments to Rule 3017(d) to give courts discretion to order that ballots and copies of the plan and disclosure statement not be mailed to an impaired class in a chapter 11 case. [Materials: Reporter's memorandum dated 7/14/95.]

8. Proposed amendments to Rule 3002 concerning notice of tardily filed claims. [Materials: Reporter's memorandum dated 7/19/95; letter from Jon M. Waage, Esq., dated 2/21/95; letter from Donald Ross Patterson, Esq., dated 3/6/95.]

9. Proposed amendments to Bankruptcy Rules 1019(1)(B), 2003(d), 4004(b), 4007(c) and (d) to clarify that a motion must be "filed" (rather than "made") before a specified deadline. [Materials: Reporter's memorandum dated 9/6/95; letter from Professor Tabb dated 12/12/94, with attachments; case of In re Coggin.]

10. Proposed amendments to Rule 3008. [Materials: Reporter's memorandum dated 7/11/95.]

11. Proposed amendments to Rule 1003 concerning joinder of petitioners in involuntary case. [Materials: Reporter's memorandum dated 7/12/95; letter from Hon. S. Martin Teel, Jr., dated 8/3/94.]

12. Proposed amendments to Rule 2004(c) concerning attendance at examinations. [Materials: Reporter's memorandum dated 7/17/95; letter from Hon. Charles E. Matheson dated 9/12/94.]

13. Suggestions to amend Bankruptcy Rules 2002(a)(1) and (f)(1). [Materials: Reporter's memorandum dated 8/6/95; letter from Martin Stone, Esq., dated 2/1/95.]

14. Proposed amendments to Official Bankruptcy Forms 1, 3, 6, 14, 17, 18, and proposed new "generic" notice forms. [Materials: PSC memorandum dated 8/7/95; proposed amendments to forms; additional suggestions from Hon. Geraldine Mund and Hon. Jeremiah Berk.]

15. Preliminary discussion of recommendations of Hon. Steven W. Rhodes concerning 1) adoption of motion practice under local rules of Eastern District of Michigan, and 2) adoption of local rule of E.D.Mich. setting bar date for filing claims and interests in chapter 11 cases at 90 days after the first date set for the § 341 meeting. [Materials: Letter from Judge Rhodes dated 10/5/94; E.D.Mich. local rules 2.08 and 11.1.]

16. Preliminary discussion of recommendations of the Committee on the Administration of the Bankruptcy System concerning: 1) appointment of special masters in chapter 11 cases to observe and assess management's performance; 2) "small claims court" procedures for the adjudication of claims under $5,000; and 3) court-appointed experts to review fee applications. [Materials: letter from Hon. Paul A. Magnuson dated 6/22/95; letter from Peter H. Arkison, Esq., dated 2/18/93, regarding small claims procedures.]

17. Preliminary discussion of proposals for saving costs to the courts that would require amendments to the rules to permit their implementation. [Materials: PSC memorandum dated 8/9/95.]

Subcommittee and Liaison Reports

18. ADR subcommittee report. [Oral report.]

19. Subcommittee on Rule 2014 disclosure requirements. [Oral report. Materials: to be circulated later.]

20. Long range planning subcommittee will report on results of the survey conducted by the Federal Judicial Center. [Oral report. Materials: to be circulated later.]

21. Report of liaison to Advisory Committee on Civil Rules. [Oral report. Materials: letter from Judge Restani dated 4/24/95; see also Item 26, below.]

Information Items

22. Letter from Hon. Richard L. Bohanon regarding need for law enforcement officials to assist trustees. [Materials: Judge Bohanon's letter dated 5/4/95.]

23. Status charts and lists of pending amendments.

24. Proposed amendments to the bankruptcy rules approved by the Standing Committee July 1995 and forwarded to the Judicial Conference. [Materials: texts of amendments and committee notes to Rules 1006(a), 1007(c), 1019(7), 2002(a),(c),(f),(h),(i),(k), 2015(b),(c), 3002(a),(c), 3016, 4004(c), 5005(a), 7004, 8008(a), and 9006(c).]

25. Preliminary draft of proposed amendments to the bankruptcy rules approved for publication by the Standing Committee July 1995. [Materials: texts of amendments and committee notes to Rules 1019(3),(5), 1020 [new rule], 2002(a),(n), 2007.1, 3014, 3017, 3017.1 [new rule], 3018(a), 3021, 8001(a), b),(e), 8002(c), 8020 [new rule], 9011, 9015, and 9035.]

26. Proposed amendments to Federal Rules of Civil Procedure. [Materials: Proposed amendments and committee notes to Rules 5 and 43 approved for transmission to Judicial Conference, to Rules 9, 47, and 48 approved for publication. Proposed amendments to Rule 26(c) to be circulated later.]

Next Meeting

27. The next meeting of the Advisory Committee will be March 21-22, 1996, in Charleston, South Carolina.

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Agenda Item I-3

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 30-31, 1995

Lafayette, Louisiana

Minutes

The Advisory Committee on Bankruptcy Rules met in the Lafayette Hilton Hotel in Lafayette, Louisiana, March 30-31, 1995. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge James W. Meyers
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Alan N. Resnick, Reporter

Joseph Patchan, Director, Executive Office for United States Trustees, and R. Neal Batson, Esquire, were unable to attend.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair
District Judge Thomas S. Ellis, III, liaison to the Advisory Committee

The following additional persons attended the meeting: Judge Edward Leavy, United States Court of Appeals for the Ninth Circuit and former chairman of the Advisory Committee; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mark D. Shapiro, Rules Committee Support Office, Administrative Office of the United States Courts; and Elizabeth C. Wiggins, Federal Judicial Center.

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. Unless otherwise indicated, all memoranda referred to were included in the agenda book for the meeting.

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

INTRODUCTORY MATTERS

The Chairman introduced Judge Leavy, the former chairman of the Advisory Committee. The Chairman also welcomed Judge Stotler and Judge Ellis to the meeting. **The Committee approved a resolution of thanks to the host committee chaired by Bankruptcy Judge Gerald H. Schiff.**

Minutes of Previous Meetings. Mr. Klee moved to approve the minutes of the September 1994 and December 1994 meetings with the substitution of the word "March" for "February" in the second line of page 9 of the September minutes. **The Committee approved the minutes, as amended, without dissent.**

Standing Committee Meeting. The Reporter stated that the Standing Committee had ratified the three suggested interim rules approved by the Advisory Committee at its December meeting. The suggested interim rules were distributed to the courts with a letter dated January 17, 1995, from Judges Stotler and Mannes. The amendments to the Official Forms to conform to the Bankruptcy Reform Act of 1994 were approved by the Standing Committee in January and by the Judicial Conference on March 14.

The Reporter said the Standing Committee thought the Advisory Committee's request for authority to approve future increases in dollar amounts on the Official Bankruptcy Forms was premature because the next three-year adjustment required by 11 U.S.C. § 104(b), as amended, is not due until 1998. Since the statute requires that the Judicial Conference adjust the dollar

amounts in several sections of the Bankruptcy Code after public notice, revision of the Official Forms can be included in the same resolution presented to the Conference. Judge Stotler asked that the Advisory Committee monitor the matter of the dollar adjustments.

The Reporter said the Standing Committee agreed to the Advisory Committee's request to communicate directly with the Bankruptcy Review Commission. In addition, members of the Advisory Committee were invited to communicate directly with Professor Thomas E. Baker concerning their response to the Self-Study of Federal Judicial Rulemaking undertaken by the Long Range Planning Subcommittee of the Standing Committee. Copies of the self-study were distributed at the meeting.

RULES

Comments on Proposed Amendments. The Reporter reviewed the comments on the proposed amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006, which were published in 1994. The first six letters commenting on the proposed amendments are discussed in the Reporter's memorandum of February 28, 1995. The three comments received later are covered by the Reporter's memorandum of March 15, 1995, which was distributed at the meeting. In addition, Bryan A. Garner, consultant to the Style Subcommittee of the Standing Committee, submitted a number of suggestions for stylistic changes in the proposed amendments.

The Reporter recommended no action on the general comments of Raymond A. Noble, Director of Legal Affairs for the New Jersey State Bar Association; Robert L. Jones, III, President, Arkansas Bar Association; and Lee Ann Huntington, Chair, Committee on Federal Courts, State Bar of California.

Susan J. Lewis, Legal Editor, Matthew Bender & Company, Inc., pointed out a typographical error in the reference to Rule 3003(c)(2) in the Committee Note to the proposed amendment to Rule 2002(h). The reference should be to Rule 3002(c)(2). **The Advisory Committee agreed to make the correction.**

Glenn Gregorcy, Chief Deputy Clerk, United States Bankruptcy Court for the District of Utah, commented that the proposed deletion of the words "and account" from Rule 2002(f)(8) "does nothing whatsoever" because, he wrote, only one notice is sent under the current rule in most courts. In other words, he stated, in most districts, the trustee's final report and the final account are the same document. James T. Watkins, who stated that his law firm represents 10 of the top 25 national issuers of credit cards in their bankruptcy cases nationwide, urged the Advisory Committee to abandon the proposed amendment. He stated that his firm regularly reviews the trustee's final report and account in order to verify that the stated distributions have been received.

The Reporter said that, while Mr. Gregorcy assumes that the trustee's final report and account are one document in most courts, Mr. Watkins' comments indicate that there are two separate documents -- both of which may be helpful to creditors. **After a brief discussion, the committee took no action on the two comments.**

Richard M. Kremen offered a redraft of the proposed amendment to Rule 2002(h) on behalf of the Maryland Bar Association-Committee on Creditors' Rights, Bankruptcy, and Insolvency. Judge Batchelder stated that Mr. Kremen's redraft appeared preferable for clarity. The Reporter suggested revising Mr. Kremen's redraft by substituting "under" for "pursuant to" in line 11; moving the phrase "the court may," from line 12 to line 14 before the word "direct"; and substituting the phrase "mailed

only to the entities listed in the preceding sentence" for the phrase "limited as set forth above" in the final line. Judge Meyers moved the acceptance of Mr. Kremen's redraft, as revised. Mr. Rosen suggested changing the word "listed" in the revision to "specified." Judge Meyers agreed to the change. **The motion was approved without dissent.**

Mr. Kremen also suggested a change in the proposed amendment to Rule 3002 in order to implement the amendment to 11 U.S.C. § 502(b)(9) in the Bankruptcy Reform Act of 1994. The Reporter presented an alternative amendment to Rule 3002. The Reporter asked whether the revised amendments to Rules 3002 and 7004, which was amended directly by the Congress, should be published for comment. He said he believes publication is not required because the revisions just conform the rules to statutory changes in the Bankruptcy Reform Act of 1994. **The Committee agreed.**

Mary S. Elcano, Senior Vice President, General Counsel, United States Postal Service, suggested that Rule 2002 be amended to require service of a notice of dismissal on the debtor's employer and that Rule 7004 be revised to require service on the particular department, office, or unit of an agency out of which the debt in question arose. She stated this is needed so the agency can locate the source of the debt and file a proof of claim. The Reporter stated that the suggested change to Rule 2002 was unrelated to the proposed amendment published and would require separate publication. The Reporter stated that Ms. Elcano's concern about locating the source of a debt appeared to relate to notice of the bankruptcy filing and of the meeting of creditors pursuant to Rule 2002(a), not service of process under Rule 7004. He recommended no action on these comments.

Commenting on the proposed amendment to Civil Rule 5(e), and indirectly on a similar amendment to Rule 5005(a), as well as on electronic filing in general, Patricia M. Hynes, Chair, Committee

on Federal Courts, Association of the Bar of the City of New York, expressed concern about access to electronic filing and electronic records, system compatibility, the authenticity and accuracy of electronic records. The Reporter stated that the Advisory Committee's Technology Subcommittee had focused on these same concerns in drafting the proposed amendment to Rule 5005 and the accompanying Committee Note. The proposed amendment mandates public access by reference to 11 U.S.C. § 107. The Reporter recommended no further action on Ms. Hynes' comments.

The Reporter stated that he had reviewed Mr. Garner's proposed stylistic changes and had included a number of the suggestions in a revised draft of the proposed amendments. Judge Duplantier stated that "under" does not mean the same thing as "pursuant to." The Reporter said that a number of years ago the Advisory Committee rejected the universal substitution of "under" for "pursuant to." Judge Restani moved to approve the Reporter's substitution of "under" for "pursuant to" in his revised draft. **After further discussion of the proposed stylistic changes, the Committee rejected the motion with two dissenting votes.** Judge Batchelder suggested that the Advisory Committee's Style Subcommittee consider the drafting conventions used in the proposed amendments to the Supreme Court Rules. **The Chairman requested that she review the proposed amendments to the Supreme Court Rules.**

The Advisory Committee then considered the Reporter's revised draft of each of the proposed amendments, including his post-publication changes.

Rule 1006. Judge Duplantier suggested deleting "that is to be" from lines 10-11 on page 1 of the Reporter's revised draft. After a discussion, he withdrew the motion. **A motion to approve the proposed amendment as published carried unanimously.**

Rule 1007. **The Advisory Committee approved the proposed amendment as published. The Committee subsequently agreed to change "pursuant to" to "under" in lines 25 and 26 on page 5.**

Rule 1019. **The Advisory Committee approved the proposed amendment as published. The Advisory Committee deleted the part of the Committee Note after "3002(c)(6)" in line 3 on page 8 and approved the remaining portion of the Committee Note.**

Rule 2002. Judge Meyers moved to retain "as the court may direct" on lines 4-5 of page 8 rather than substituting "whom the court directs." **The Advisory Committee agreed.** Mr. Smith moved to accept the substitution of "at least 20 days'" for "not less than 20 days" on lines 8-9. **The motion carried with one dissenting vote.** Judge Batchelder moved to accept each of the changes suggested by the Reporter and incorporated in the revised proposed amendments unless the Advisory Committee votes to make a specific modification in the revised proposed amendments. **The Advisory Committee agreed. The Advisory Committee agreed to substitute "that" for "who" on line 93 of page 13.** Mr. Sommer moved to substitute "under" for "pursuant to" on lines 102 and 103 of page 13 in order to track the language used in the Bankruptcy Code for the appointment or election of a committee. **The motion carried by a vote of 5-3. The Advisory Committee agreed to substitute "under" for "pursuant to" on lines 111, 112, and 119 on page 14. The Advisory Committee agreed to retain "pursuant to" rather than substituting "under" on lines 10 and 21 of page 9.** It was moved to delegate to the Reporter to review all of the revised proposed amendments and to use either "pursuant to" or "under" as is consistent with the Bankruptcy Code and to use "pursuant to" when the Code is not specific. **The motion passed by acclamation.**

Rule 2015. There were no changes in the proposed amendment.

Rule 3002(d). In response to the Advisory Committee's request, the Reporter prepared and distributed a draft of a new subsection (d). The new subsection would require a creditor that tardily files a claim in a chapter 12 or chapter 13 case to mail copies of the tardy claim to the trustee and debtor. The Reporter stated that he prepared the draft to focus the discussion but opposed the proposal because of uncertainty about the sanction for failing to give the notice. He said the new subsection would require publication for comment.

The Reporter said that the debtor could provide for tardily-filed claims in its plan and the trustee could periodically check the claims register for tardy claims. Mr. Sommer stated that the notice requirement might create a new area of litigation. He said that, if a party learns about the bankruptcy, it should find out about the deadlines, especially a party with an important priority or administrative claim.

The Committee discussed whether the clerk or the creditor should be responsible for noticing a late-filed claim. The Reporter stated that the creditor may not know that its claim was received after the deadline and that requiring the clerk to give the notice would ensure that it is done. Judge Meyers and Mr. Heltzel said it is easier for the clerk to send every claim than to sort them and just send the tardy ones. **At the Chairman's suggestion, the Committee agreed to set the matter over to the September meeting.**

Rule 3002. The Reporter stated that he had deleted subsection (d) of the published amendment to Rule 3002 and revised subsection (c) and the Committee Note in order to conform the rule to the statute, as amended by the Bankruptcy Reform Act of 1994. He said he believed the revisions did not require publication. Mr. Klee moved to substitute "not later" for "no later" on line 14 of page 20. **The Advisory Committee agreed.** It

was moved to substitute "not later than" for "before" in line 21 on page 21 and explain in the Committee Note that the change was made to clarify a possible ambiguity in the statute. **After discussing whether this extended the deadline, the Advisory Committee voted, with one dissent, to approve the motion. With one dissent, the Advisory Committee approved a motion to submit the revised draft of Rule 3002 to the Standing Committee without further publication.**

The Reporter offered an additional paragraph to be included in the Committee Note on page 22 to explain that "not later than" is used to avoid any confusion over whether a governmental unit's claim is timely filed if the claim is filed on the 180th day. **The Advisory Committee agreed to the inclusion.**

Rule 3016. **The Advisory Committee agreed to delete the Reporter's stylistic changes of "pursuant to" to "under" where not consistent with the usage in the Bankruptcy Code.**

Rule 4004. Mr. Klee suggested inserting "other" after "any" in line 29 on page 26 in order to be consistent with the statute and to move the word "also" to the beginning of the second sentence of the Committee Note. **The Advisory Committee agreed to the stylistic changes.**

The Committee on the Administration of the Bankruptcy System had requested Rule 4004 be further amended to provide that the court may delay issuing a discharge to a chapter 7 debtor who has not paid in full the proposed $15 trustee surcharge fee which is due when a case is converted to chapter 7. The Chairman asked whether the debtor's discharge should be denied over $15. The Reporter stated that the proposed revision should be published for comment if there is any controversy. Mr. Sommer moved to table the matter. **The motion carried without dissent.**

Rule 5005. There were no changes in the proposed amendment.

Rule 7004. The Reporter stated that the changes in this rule subsequent to its publication were stylistic except for specifying that subsection (g) was abrogated, incorporating the new subsection (h), and including the new introductory phrase in subsection (b) added by the Bankruptcy Reform Act of 1994.

Rule 8008. The post-publication changes are stylistic.

Rule 9006. The Reporter said changing "may not" to "shall" in line 4 on page 49 made the meaning clearer. Mr. Klee said the rule of construction in section 102 of the Bankruptcy Code dictates the use of "may not." The Reporter agreed to restore "may not."

Amendments to be submitted for publication. The Reporter presented proposed amendments to Rules 1020, 2002(a), 2002(n), 2007.1, 3018, 3021, 8001(a), 8001(e), 8020, 9015, and 9035 for submission to the Standing Committee with a request for publication. Judge Meyers asked the purpose of the amendment to Rule 3021. The Reporter said it is to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. Judge Restani commented on the frequency of amendments to Rule 2002. The Reporter stated that the Advisory Committee deals with Rule 2002 by subsection to avoid confusion. He said many of the amendments conform Rule 2002 to changes in other rules.

The Reporter stated that he received a number of suggestions for stylistic changes in the proposed amendments from Mr. Garner the night before the meeting. Judge Batchelder said the Advisory Committee should deal with substantive matters and refer the suggested stylistic changes to the Style Subcommittee. It was moved to submit the proposed amendments to Rules 1020, 2002(a),

2002(n), 3018, 3021, 8001(a), 8001(e), 8020, 9015, and 9035 for publication along with the proposed amendment to Rule 3017 included in Agenda Item 7. The Style Subcommittee is to review the proposed amendments and circulate its changes to the committee members, who will have one week to object to the stylistic changes. As restyled, the proposed amendments then will be submitted to the Standing Committee for publication. **The Advisory Committee approved the proposed arrangements.**

Rule 2007.1. At its December meeting, the Advisory Committee approved Interim Bankruptcy Rule 1, which provides that the United States trustee will appoint the person elected as a chapter 11 trustee, subject to court approval. This comports with the other references in chapter 11 to the appointment of a trustee.

Marvin E. Jacob and Una M. O'Boyle had suggested in a letter a number of changes in the interim rule. In drafting proposed Rule 2007.1, the Reporter incorporated their suggestions that copies of the United States trustee's report of a disputed election go to the party who requested the election and to the creditors' committee (line 34) and that the ten-day period for moving to resolve a disputed election run from the filing of the report (line 40).

Mr. Sommer expressed concern that other parties may need notice of the report of disputed election. The Reporter suggested substituting "has made a request to convene a meeting under § 1104(b) or to receive a copy of the report," for "made a request under § 1104(b)". Judge Restani moved to approve the Reporter's suggested change. Judge Robreno suggested adding "all persons for whom ballots were cast". The Reporter said the suggested phrase would include creditors for whom a proxy vote is cast. He said trustee candidates probably would request a copy. **Judge Restani's motion carried with one dissent.**

The Reporter recommended substituting "United States trustee files the report" for "date of the creditors' meeting called under § 1104(b) of the Code". Mr. Rosen so moved. After a colloquy with Mr. Klee, the Reporter agreed to substitute "Unless a" for "If no" in line 38 on page 4, "not later than" for "within" on line 39, and "any" for "a" on line 42. Judge Restani moved for the approval of the revision. **The motion carried without dissent.**

Mr. Klee suggested substituting the language in lines 42 - 45, as revised, for the phrase "a person appointed trustee under § 1104(d) shall serve as trustee" on lines 12 - 13 on page 3. **Mr. Rosen's motion to make the change was approved without dissent.** The Reporter stated that the rule should specify that equity security holders can not convene a meeting to elect a trustee or solicit proxies. **Accordingly, the Advisory Committee agreed without dissent to add the word "only" after "solicited" on line 21 on page 3 and "of creditors" after "committee" on the same line.**

Mr. Rosen asked if someone other than the United States trustee could file a report of a disputed election. The Reporter said they could object to the United States trustee's report. In order to allow a party to object without waiting for the report, Mr. Klee suggested substituting "not later than" for "within" on line 39 of page 4. **The Advisory Committee agreed.** Professor Tabb suggested substituting "Unless a" for "If no" on line 38 of page 4. **Judge Restani moved to make the change and the Advisory Committee approved her motion without dissent.** Mr. Smith suggested deleting "approval of" from line 24 on page 3. **The Advisory Committee agreed.**

The General Counsel for the Executive Office for United States Trustees has expressed concern about the authority of the United States trustee to preside at the election of a chapter 11

trustee. **In response, the Advisory Committee voted unanimously to insert the sentence "The United states trustee shall preside at the meeting." after "2002" on line 20 on page 3.**

After the December meeting and lengthy discussions with Mr. Patchan concerning the application of proposed Rule 2007.1, the Reporter revised the Committee Note to explain the need for court approval of the appointment of the elected trustee. The revised Committee Note, which was distributed at the meeting, includes an example of a situation in which the United States trustee might dispute the election, i.e., the United States trustee believes the person elected is not "disinterested." Mr. Klee suggested changing "not eligible" to "ineligible" in the sixth line of the fourth paragraph and "should" to "may" in the penultimate line of that paragraph. **The Advisory Committee agreed.**

After the Advisory Committee discussed various changes in the paragraph which begins "The rule", Professor Tabb moved to approve the Committee Note with the insertion of "appointment of the" after "the" in the first sentence of the paragraph; Mr. Klee's two stylistic changes in the next paragraph; and the deletion of "(2)" in "§1104(b)(2)". At Mr. Klee's request, Professor Tabb agreed to the insertion of "primarily" after "necessary" in the penultimate line of the paragraph. At Mr. Rosen's suggestion, Professor Tabb agreed to the deletion of "of the appointment of the elected person after the disclosures required under Rule 2007.1(c)". **The amended motion carried without dissent.**

Rules 3017, 3017.1, 3018. At its September meeting, the Advisory Committee approved amendments to Rules 3017 and 3018 to provide flexibility in fixing the record date for the purpose of determining the parties entitled to receive solicitation materials and to vote on a chapter 11 plan. At its December meeting, the Advisory Committee approved the substance of a new

Rule 3017.1 for court consideration of a disclosure statement in a small business case. Judge Kressel moved to approve the Reporter's draft of Rule 3017.1 **The motion carried unanimously.**

Mr. Rosen suggested adding "Other Than Small Business Cases" to the caption of Rule 3017. **The Advisory Committee agreed.** Judge Kressel stated that Rule 3017 does apply in small business cases if the debtor does not make a timely election to be treated as a small business. **The Advisory Committee reconsidered and withdrew the amendment to the caption.** Judge Robreno moved to delete "new. It is" from line 1 of the Committee Note on page 7. **The Advisory Committee agreed.**

Mr. Klee stated, that as the result of the deletion of subsection 1124(a)(3) in the Bankruptcy Reform Act of 1994, classes will be impaired even if they receive cash equal to the full, allowed amount of their claims. He said the rules should give the court discretion to dispense with sending out the disclosure statement if the plan proponent plans to go straight to cramdown on such a class. The Reporter asked if he would limit the amendment to former subsection 1124(a)(3) or make it applicable to any impaired class. Mr. Klee said the procedure should be available for any class not solicited.

Mr. Smith said that, as a matter of due process, members of an unsolicited class should get a one-page summary of what is being done to them and why their votes are not being sought. **The Reporter agreed to prepare a memorandum on the matter for the next meeting.**

Rule 3014. The Reporter prepared an amendment to Rule 3014 to provide a deadline for a section 1111(b) election in small business cases. He said he was unsure whether the deadline should be determined by reference to the date fixed pursuant to subsection (a)(2), (a)(3), or (a)(4) of Rule 3017.1. **After**

discussing the importance of fixing a date, the Advisory Committee agreed that the election "may be made no later than the date fixed under Rule 3017.1(a)(2) or another date the court may fix." The Advisory Committee approved the proposed amendment, as revised.

Rule 9011. At its September 1994 meeting, the Advisory Committee discussed and approved a recommendation to amend Rule 9011 so that it conforms substantially to the 1993 amendments to Civil Rule 11. The Reporter was directed to draft appropriate language for the rule and Committee Note to provide that the 21-day "safe harbor" provision would not apply to motions for sanctions for the improper filing of a petition.

The Advisory Committee discussed revising lines 69 - 70 on page 4 to provide "A motion for sanctions for the filing of a petition in violation of subdivision (b) may be filed at any time. Any other". Several committee members expressed concern about the statement that Rule 9011 motions "may be filed at any time." It was proposed to delete lines 69 - 70, insert "The" at the beginning of line 71, and insert ", except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subsection (b)" after "corrected" on line 76. **The proposal was approved with one dissenting vote.** The Reporter agreed to correct typographical errors by inserting the word "to" at the beginning of line 37 and substituting "withdrawn" for "withdraw" on line 16 of the Committee Note on page 7.

Rule 1019. In February 1994, the Advisory Committee voted to delete the phrase "superseded case" in Rules 1007(c) and Rule 1019(3) and (4) because the use of the phrase gives the erroneous impression that conversion of a case results in a new case. The changes in Rule 1007(c) were part of the package of proposed rule amendments published for comment in September 1994. In addition

to deleting "superseded" from Rule 1019, the Advisory Committee asked the Reporter to restyle the rule and divide it according to applicable Code chapter.

Mr. Klee said "within" on line 31 of page 4 should be "not later than". The Reporter agreed that "not later than" should be substituted for "within" throughout the proposed amendment. **The Advisory Committee accepted the change.** Mr. Klee said lines 19 and 31 should refer to a "holder of a claim" rather than a "creditor." **The Advisory Committee agreed.**

Judge Kressel said "a debtor" should be inserted after "not" in line 14 on page 3. **The Advisory Committee agreed.** Mr. Sommer expressed concern that lines 39 - 41 of the draft appear to take a substantive position on the interpretation of 11 U.S.C. § 348 as amended by the Bankruptcy Reform Act of 1994. **The Advisory Committee agreed that subsection (C)(i) on page 4 should be revised to implement the 1994 amendment to section 348. The Advisory Committee approved the proposed amendment, as revised.**

Rules 8002(c), 7062. In September 1993, the Advisory Committee voted to amend Rule 8002(c) to clarify that a motion for an extension of the time to file a notice of appeal must be "filed" -- rather than "made" -- within the ten-day period. In view of the Ninth Circuit's decision in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), the Advisory Committee approved additional amendments at its September 1994 meeting designed to give a party that files a timely extension motion the benefit of an order granting the motion, regardless of when the extension motion is granted.

After the approval of the September 1994 amendments, the Committee asked the Reporter to compile an appropriate list of orders with respect to which the time to appeal may not be extended at all. In compiling the list the Reporter considered

the orders listed in Rule 7062 as exceptions to Civil Rule 62's ten-day automatic stay of enforcement or execution with respect to a judgment. As a result, he proposed amending both Rule 8002(c) and Rule 7062.

Judge Kressel suggested transposing the numbers "1325" and "1225" in lines 19 and 20 on page 8 and in lines 15 and 16 on page 10. **The Advisory Committee agreed to make the correction. The Advisory Committee agreed to substitute "change the effect of" or similar language for "overrule" in the second sentence of the Committee Note to Rule 8002(c) on page 9.** Judge Restani suggested inserting "the automatic stay under" after "to" in line 2 on page 10. **The Advisory Committee agreed.** Mr. Sommer suggested substituting "may" for "must" in line 36 on page 8. **The Advisory Committee agreed.**

Mr. Smith asked if the court has the ability to make an order effective immediately even if the order otherwise would be stayed for ten days. The Reporter said he believes the phrase "unless the court otherwise directs" in Rule 9014 authorizes the court to waive the application of Rule 7062 in a contested matter. Mr. Smith said Rule 7062 should give the court explicit discretion to except other orders from the ten-day stay, as Civil Rule 62 does. Mr. Klee said the parties should have an opportunity to get a stay pending appeal, even if an order is effective immediately, in order to preserve the constitutional right to consideration by an Article III judge.

Judge Kressel said Civil Rule 62 does not make sense in the bankruptcy context, which causes many of the problems with the bankruptcy rule. Professor Tabb said there should be a separate stay rule for contested matters. Mr. Klee said Rule 7062 should be published for comment as drafted while the Long Range Planning Subcommittee considers rationalizing Rules 9014 and 7062.

Mr. Klee moved to approve the proposed amendment to Rule 8002(c) with the changes made during the discussion. **The motion was approved unanimously.** Mr. Klee moved to approve the proposed amendment to Rule 7062 with the addition of a subsection (f) which states "any other order as the court may direct." **The Advisory Committee approved the motion by a 7-4 vote.**

Rule 2002. Attorney General Janet Reno proposed an amendment to Rule 2002(j)(4) in order to provide more effective notice to the United States. (Copies of her letter were distributed separately.) The proposed amendment, which is fashioned after local rules in several districts, was modified after a series of conversations between Mr. Kohn and the Reporter. The revised proposal would require that the notice to the United States attorney identify the agency through which the debtor became indebted and that the notice to the federal agency be addressed as the United States attorney directs in a filed request. Mr. Kohn said bankruptcy notices sent to the United States attorney often are ignored because there is no practical way to identify the agency and that notices sent to a federal agency often go to the address where the debtor makes payments.

Mr. Klee said he is sympathetic to the government's problem but that the proposed amendment goes to the heart of the bankruptcy process and puts the burden on the debtor to apprise the creditor of the nature of its claim. He said the debtor ought to be required to make a good faith effort to identify the agency, if it knows the name, but that the debtor should not risk losing its discharge. Mr. Smith said the emphasis should be on effective notice, not perceived due process questions. He stated that the government is a major creditor and millions of dollars are at stake. Mr. Smith said the proposed amendment is good for the debtor because compliance with the proposal is fairly easy and compliance should avoid challenges to the discharge.

Mr. Klee said the Congress wrestled with the issue of effective notice to creditors in considering the Bankruptcy Reform Act of 1994. The lawmakers compromised by requiring the debtor's Social Security number or taxpayer ID (instead of the debtor's account number) but excluding challenges to the discharge. The Reporter stated that the 1994 amendments gave the government 180 days to file a claim, which should be enough time to get the notice to the right place. Mr. Kohn said it is better to get the notice on the first day.

Mr. Klee suggested inserting "to the mailing address" after "addressed" on line 5 on page 5 to avoid any implication that the United States attorney could require the use of an account number. **The Advisory Committee agreed. A motion to approve the proposed amendment failed. The Chairman asked Mr. Kohn to revisit the matter and consider preparing another draft for the next meeting.**

The Chairman suggested that the Department of Justice consider preparing a national register of addresses to be used for bankruptcy notices to government agencies. Mr. Kohn said that would be very difficult because federal agencies' procedures for handling bankruptcy notices vary from district to district and agency to agency. Several committee members expressed sentiment for the development of local federal agency address registers similar to the ones which have been published as addendums to some local rules. Mr. Klee suggested requiring the sender to designate the agency only if known to the sender. The Advisory Committee discussed whether the sender or the debtor should be responsible for making sure the right address is used. Mr. Heltzel said the deputy clerk putting the creditor addresses into the court's computer system should not be required to recognize that a government agency's address needs to be changed.

Rule 6007(a). The Attorney General also requested in her

letter that Rule 6007(a) be amended to require notice to the Environmental Protection Agency (EPA) of any proposed abandonment or disposition of estate property with respect to which there may be claims or obligations under statutes or regulations administered by the EPA. After a series of discussions between Mr. Kohn and the Reporter, the proposal was limited to the abandonment of nonresidential real property and the abandonment of hazardous substances and hazardous waste and broadened to include notice to state environmental agencies.

The Reporter stated that it may be difficult for trustees to comply with the proposed notice requirement because the referenced statutory definition of hazardous substances contains cross-references to a number of other environmental statutes. Several committee members questioned the meaning of the phrase "to which there is or may be a claim or cleanup obligation under any law administered by the United States Environmental Protection Agency or a state environmental unit" on lines 14 - 16 on pages 9 - 10.

The Reporter said it might be better to require notice to the EPA of any abandonment of nonresidential real property. Judge Restani stated that requiring notice of every abandonment effectively would be no notice at all. Mr. Klee stated that he favors the current requirement, which is limited to known claims or cleanup obligations. **The Chairman asked Mr. Kohn to revise the proposed amendment so that the notice requirement in subsection (a)(2) is limited to known claims.**

Rule 9006(b)(1). In In re Village Green Associates, No. AZ-94-1232-ZRH, slip op. (Bankr. 9th Cir. August 8, 1994), the Bankruptcy Appellate Panel of the Ninth Circuit found several ambiguities in Rule 9006(b)(1). The Reporter stated that the issues raised by the decision can be analyzed by considering two questions: 1) Should a court have the discretion to act, in the

absence of a request, to extend a chapter 11 claims bar date or another deadline before the time period expires? and 2) Should a court have the discretion to act sua sponte -- for cause but without finding excusable neglect -- to extend a chapter 11 claims bar date or another deadline for all parties after the time period has expired? The Reporter stated that the rule could be revised to specify that the court has no discretion to extend the deadline after the time has expired absent a motion and a showing of excusable neglect, or to specify that the court can extend the deadline for everyone for cause.

Professor Tabb moved to adopt the second, more liberal alternative. The motion was amended to require an initial vote on whether to amend the rule at all. Judge Meyers stated that Village Green Associates was an unpublished decision. **With one dissent, the Advisory Committee voted against making any changes in the rule.**

Rule 2014. Harvey R. Miller, of the law firm of Weil, Gotshal & Manges in New York, requested that the Advisory Committee study Rule 2014(a) and consider appropriate amendments to clarify the duty to disclose. The Reporter stated that, in response to a resolution adopted by the House of Delegates of the American Bar Association (ABA), the Advisory Committee considered Rule 2014 at its meeting in March 1992 and decided not to amend the rule. The Chairman said he put the matter on the agenda for the purpose of deciding whether to revisit it. The Reporter said he believes there are two issues: 1) Whether the rule can be clarified by being more specific and detailed in setting forth the facts that must be disclosed and 2) The application of the rule to large cases in which strict compliance is difficult or impossible.

Mr. Smith stated that he was responsible for the ABA resolution and that it was not intended to reduce disclosure. He

said the rule should give bankruptcy attorneys who practice around the country guidance as to what types of connections they should disclose. Mr. Rosen stated that the rule does not address supplementation, which causes problems in large cases in which the parties change as the result of claims trading.

Judge Meyers agreed with the comments but expressed concern that it would appear that the Advisory Committee is intervening to give an attorney solace. Mr. Rosen said that the decision in In re Leslie Fay, No. 93-B-41724(TLB), slip op. (Bankr. SDNY December 15, 1994), which prompted Mr. Miller's letter, has been settled and there are no pending appeals. Judge Batchelder expressed concern that claims trading could be used as a means of disqualifying competent counsel and said the letter heightened existing concerns about the rule. **The Advisory Committee unanimously approved a motion to revisit the matter. The Chairman appointed Mr. Smith to head a Rule 2014 subcommittee. Mr. Smith may select the other members of the subcommittee.**

SUBCOMMITTEES

Local Rules. Ms. Channon distributed her memorandum on the 12 letters commenting on the proposed uniform numbering system for local rules. She said the Advisory Committee also received one oral comment from a former committee member. Ms. Channon said the comments were generally either favorable or favorable with qualifications or suggestions for modification. Two persons were opposed to both the proposed system and the entire idea of uniform numbering.

Ms. Channon said the Local Rules Subcommittee had decided that the subdivisions of the national rules should not be carried over into the uniform numbers, that the use of the prescribed titles should be mandated for the uniform numbers, and that the

uniform numbers should not have the exact same titles as the national rules.

Professor Tabb suggesting putting all miscellaneous matters in the 9000 series numbers unless there is an exact match with a national rule. Mr. Sommer said it is more logical to assign these rules to related national rules. Mr. Klee said there appears to be little impetus for completely restructuring the national rules and, therefore, the Advisory Committee should go forward with uniform numbers based on the current national rules.

Judge Leavy suggested that a list be published of the uniform numbers for all local rules, rather than requiring the districts to reorganize their rules according to the national numbers. Mr. Rosen said the problem in implementing the uniform numbers is that one local rule may relate to several national rules. Mr. Heltzel said that it would require a tremendous amount of work for each district to revise its local rules. He suggested compiling a database of local rules and making it available in a scannable format.

Judge Batchelder said the issue is no longer whether to require uniform local rule numbers but what is the best uniform number system. She said the question is what is the most expeditious, most efficient, and least objectionable system. Judge Meyers suggested that the districts be authorized either to use the uniform numbers or to add references to the uniform numbers to their existing rules. Professor Tabb moved to adopt the proposed uniform numbers set out in the attachment to Director Mecham's memorandum of November 22, 1994, except that references to subdivisions of the national rules are to be deleted and cross-references are to be included. **The motion carried with one dissenting vote.**

Long Range Planning. Judge Stotler led a discussion of the

report prepared by the Long Range Planning Subcommittee of the Standing Committee. The committee members agreed that a five-year term for the chair of an Advisory Committee is desirable in order to oversee the lengthy rule-making process and preserve an institutional memory. There was no agreement on whether committee members should be eligible for appointment to a third term or whether the terms should be for two, three or four years.

At the request of the Advisory Committee, the Federal Judicial Center conducted a survey concerning the scope, format, and organization of the bankruptcy rules. A memorandum setting out the survey questions and a tabulation of the initial responses was distributed at the meeting.

Mr. Klee said the survey has not been completed but that some trends are apparent. He said that, although there is no ground swell of sentiment for a complete overhaul of the rules, there is support for improving the rules related to motion practice and the interaction between the 7000 series rules and the 9000 series. Ms. Wiggins stated that the survey indicated there is room for improving a number of rules. Mr. Klee said interest was expressed for developing ethical standards for practicing before the bankruptcy courts. The Reporter stated that the Standing Committee's reporter is tackling the issue as it relates to all federal courts.

Technology. **The Chairman assigned Mr. Heltzel, Mr. Klee, and Mr. Sommer to the Technology Subcommittee and designated Mr. Heltzel as chairman.** The Chairman stated that he will ask Judge James Barta, a former member of the Advisory Committee and the former chairman of the subcommittee, to serve as a consultant. Professor Tabb stated that the American Bankruptcy Journal will publish a symposium issue on the bankruptcy rules, including a section on automation.

Civil Rules Liaison. Judge Restani stated that the Advisory Committee on Civil Rules met in Philadelphia with a number of experts to consider the need for revising Fed. R. Civ. P. 23, Class Actions. She stated that, although the rule does not work well in mass tort cases, there was little sentiment among the experts for a major overhaul of the rule. She said the Civil Committee will continue its exploration of the rule at a seminar at New York University in April.

Alternative Dispute Resolution. With the help of Ralph Mabey, a former member of the Advisory Committee, the subcommittee has conducted a national survey on local Alternative Dispute Resolution (ADR) programs in the bankruptcy courts. Professor Tabb promised to distribute copies of an article on the survey to committee members.

He stated that the ADR Subcommittee will meet at 3 p.m. on May 24, 1995, to consider drafting an ADR proposal for the September meeting. The meeting will be held at a hotel in the vicinity of O'Hare International Airport. Professor Tabb asked that any committee member interested in ADR contact him or another subcommittee member before the May meeting. Several committee members expressed their opposition to mandatory arbitration or mandatory mediation.

Forms. Mr. Sommer said the Forms Subcommittee has almost completed its revision of a number of forms and hopes to present the new, revamped forms at the September meeting. He said the Forms Subcommittee will meet at 10 a.m. on May 25, 1995, at a hotel in the vicinity of O'Hare International Airport.

UPCOMING MEETINGS

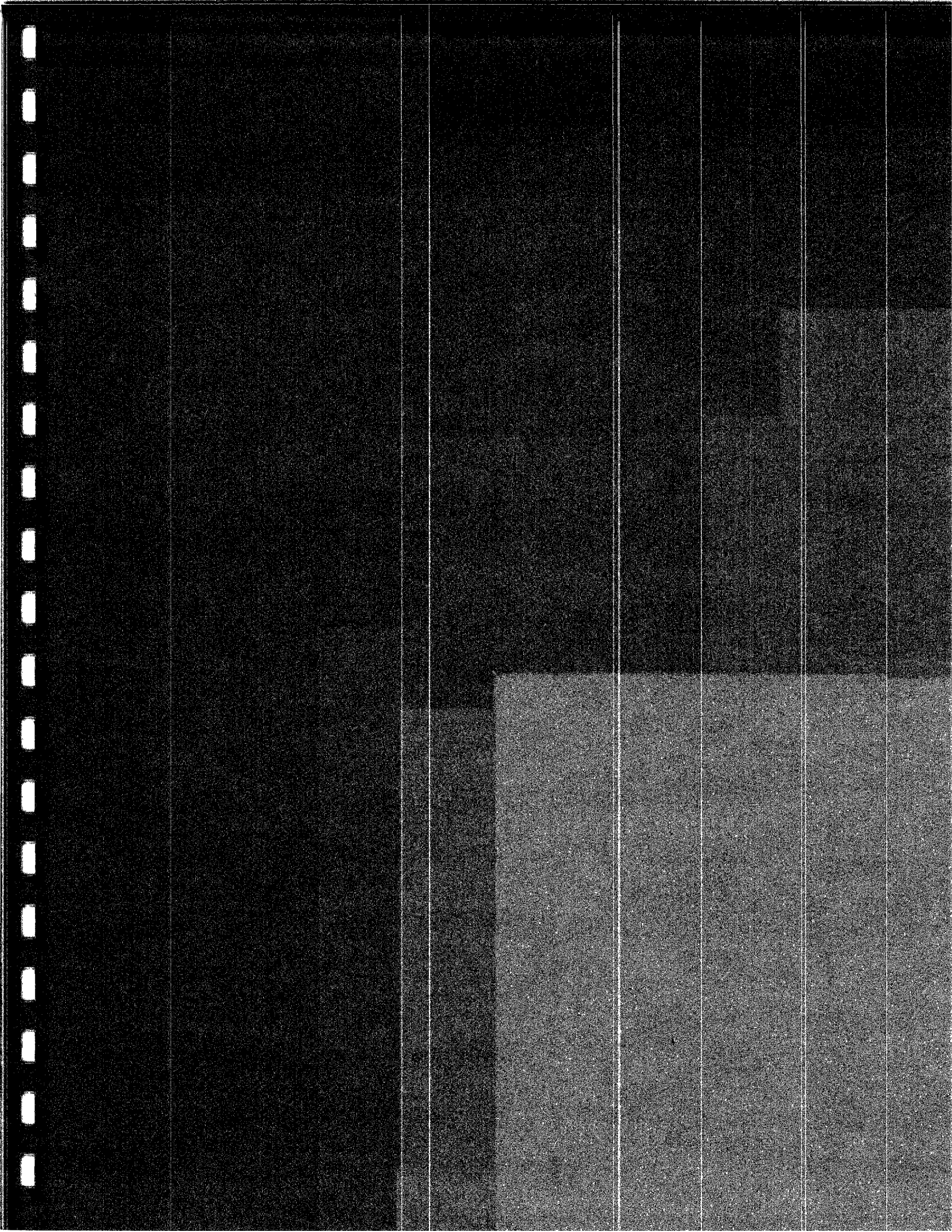
The Chairman announced that the next meeting will be in Portland, Oregon, on September 7 - 8, 1995. He suggested that

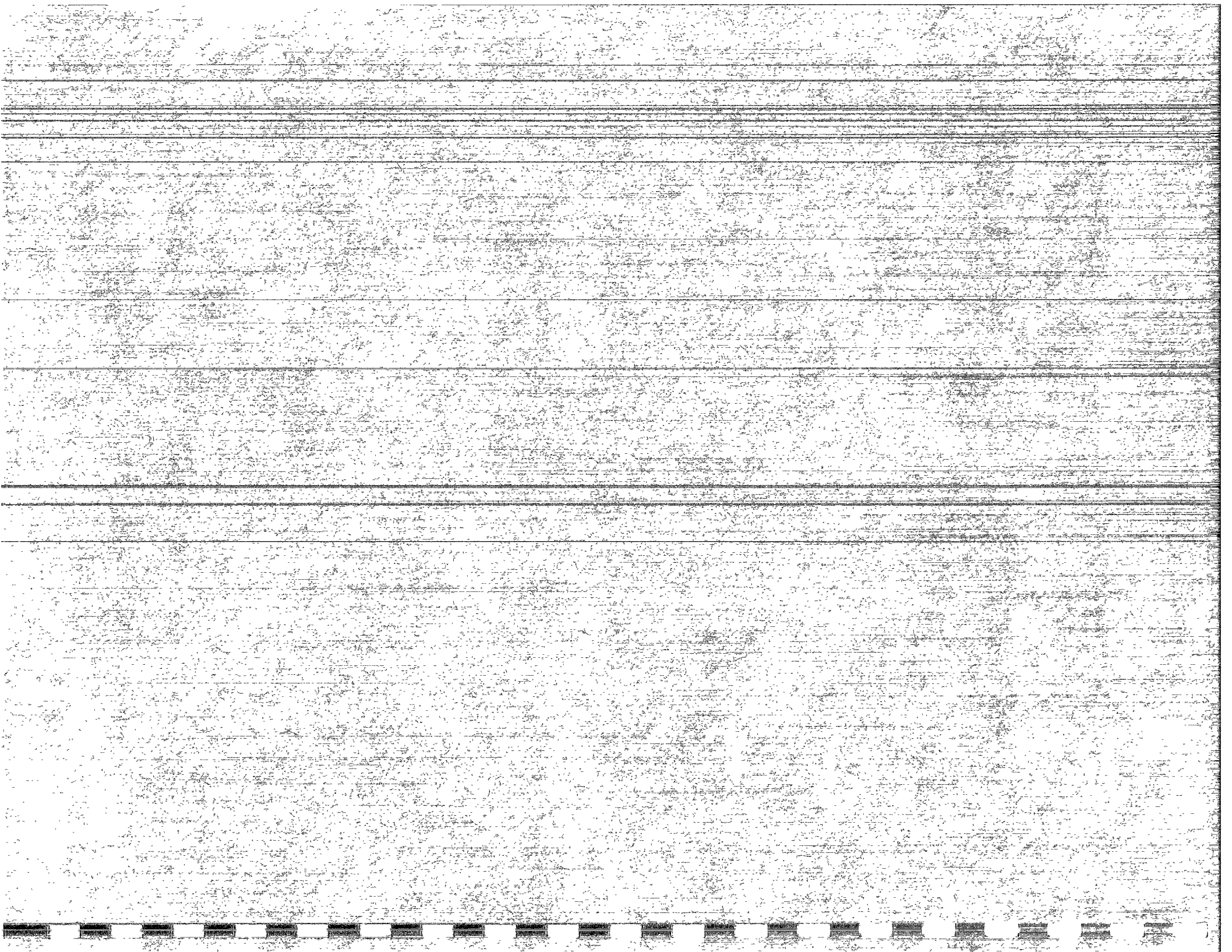
the winter - spring meeting for 1996 be held in the eastern part of the country. The Reporter suggested March 21 - 22 or March 28 - 29, 1996, as possible meeting dates. The committee members agreed to inform Ms. Channon of their schedule conflicts for those dates within one week.

Respectfully submitted,

James H. Wannamaker, III

Item 2 is an oral report on the July 1995 meeting of the Standing Committee.





TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: SELF-STUDY REPORT OF THE STANDING COMMITTEE'S SUBCOMMITTEE ON LONG RANGE PLANING

DATE: JULY 20, 1995

The Standing Committee on Rules of Practice and Procedure has requested that each Advisory Committee review and discuss at its next meeting "A Self-Study of Federal Judicial Rulemaking" that was prepared by the Standing Committee's Subcommittee on Long Range Planning. The Standing Committee welcomes the reactions and comments of the Advisory Committees.

A copy of the Self-Study Report is enclosed for your review in preparation for the September 1995 meeting in Portland.

A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

July 1995

Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 Executive Session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. Appendix A to this Report contains a Summary of the Comments Received. In addition, the Subcommittee canvassed the secondary literature. Appendix B to this Report is an Annotated Bibliography. An Interim Report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The Interim Report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. A draft was circulated to the Standing Committee in January 1995, and now this semi-final draft has been completed. The Chair of the Standing Committee wants to solicit comments from the Advisory Committees, so the Subcommittee's work will be back on the agenda for the winter 1995–96 meeting of the Standing Committee.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a **History** of the origins of modern rulemaking; a description of **Current Procedures**; a discussion of **Evaluative Norms**; the **Issues and Recommendations** for reforms; and a brief **Conclusion**.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law; the procedure for actions at law remained the same while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828 when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress withdrew rulemaking authority from the federal courts and required that all actions in law conform to the corresponding state forum's rules and procedures.[6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since

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1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991).

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197 (repealed 1934).

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

9 304 U.S. 64 (1938).

1842.[10] And in the same year, after more than two decades of effort, national rules of procedure were drafted by an ad hoc Advisory Committee appointed by the Supreme Court under the provision of the Rules Enabling Act of 1934.[11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—still recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee was comprised of distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules themselves, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee recommended to the Supreme Court what it considered the best and most workable rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these two traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process took a few more years to evolve. A year after the new rules went into effect, the Supreme Court called upon the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s.[15] In 1955 the continuing Advisory Committee submitted an extensive report to the Supreme Court with numerous suggested amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked the Committee's authority as a continuing body.[16]

The resulting void in rulemaking procedure was an object of concern expressed by the American Bar Association, the Judicial Conference, and other groups.[17] At the time, there was no small controversy over whether the Court should designate a new continuing committee and

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10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

12 Wright & Miller, supra note 7, §1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

17 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

how the members might be selected. Dissatisfaction was expressed that the Supreme Court was merely rubber-stamping the recommendations from the previous Advisory Committee, and several of the Justices were heard to agree with that criticism, dissenting from orders, from time to time, to complain that the proposals were not actually the work of the Court.[18] Apparently, there were misgivings expressed behind the scenes about the tenure and influence of the members of the continuing Advisory Committee, who served indeterminate terms, remaining until resignation or death. This discrete Third Branch discussion took place alongside the perennial separation-of-powers debate between the Judiciary and Congress over which institution should make rules and how.

A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled, "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' "[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress ended up mandating, by statute, that the evidence rules not take effect until approved by legislation. Then Congress reviewed the proposed rules and made substantial revisions before enacting rules of evidence into law, effective in 1975.[22] The legislative veto provision that attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved

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18 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

by Congress.[23] After a 20-year hiatus the Chief Justice reestablished an Advisory Committee on the Rules of Evidence in 1993. This committee has embarked on a comprehensive review.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice and longer periods for public commentary on proposed rules.[24] These amendments were designed to increase attention to rules initiatives and public participation. Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures foı judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States (Chair), the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference holds plenary meetings twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

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23 28 U.S.C. §2074(b).

24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar). Thomas E. Baker, Recent Developments in the Federal Rules of Procedure: The 1993 Changes and Beyond, 11 Fifth Cir. Reptr. 531 (June 1994).

26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.[33]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.[34]

By delegation from the Judicial Conference, authorized by the relevant statute, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of

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29 Ibid.

30 Ibid.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. §2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 A Summary for Bench and Bar, supra note 25.

the general rules of practice and procedure" in its particular field.[35] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and other relevant legal commentary. In fact, "[p]roposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."[36] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register*, and meetings are open to the public.[37] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[38]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[39] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter*, *Federal Reporter–Third Series*, and *Federal Supplement*.[40] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

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35 See 28 U.S.C. §2073(b).

36 A Summary for Bench and Bar, supra note 25.

37 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

38 A Summary for Bench and Bar, supra note 25.

39 A Summary for Bench and Bar, supra note 25.

40 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register*.[41] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record their separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[42] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[43] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the

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41 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

42 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

43 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

enabling statutes,[44] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no adverse action.[45]

Since 1958 this rulemaking procedure has been followed regularly.[46] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the last package of wholesale changes to the discovery provisions in the Civil Rules drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House, but did not reach the floor of the Senate. Controversy akin to the separation of powers doctrine often surrounds exercises of the legislative prerogative to pass a statute to effectuate a change in the federal rules of procedure. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[47] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[48]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court proce-

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44 28 U.S.C. §§2071-77.

45 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

46 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

47 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995).

48 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

dures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures

themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom

of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. The organization to be followed will take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress.[49]

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the diversity of the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and

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49 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be much larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not "bar" committees. The notion of representativeness, i.e., that there ought to be a seat on the Advisory Committee for each identifiable faction of the bar, contravenes the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or bar polls.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with substantial experience on both sides of the bench. The ability to compare these two experiences (not to mention the diverse backgrounds that brought still others to the bench) makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention within the present appointment process and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[50]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.[51]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The present practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in

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50 28 U.S.C. §478(b).

51 See also Proposed Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed;[52] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far more than half of the state bars have done this.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, now appearing in print media and on commercial services, can be made available electronically on the Internet promptly. The judiciary could maintain a World Wide Web server at minimal cost.[53] If the committees operate their own server, persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. E-mail availability networked internally within the Advisory Committee might be feasible, once the judiciary-wide network is operational.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals and receipt of comments.

The need for research: It is frequently asserted, most often by academic critics,[54] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this

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[52] The memorandum from John K. Rabiej to the Standing Committee, dated December 6, 1994, details these procedures. The mailing list contains 2,500 names. Any given recipient who does not respond over the course of three years will be replaced with a new name.

[53] The Administrative Office has established a home page at http://www.uscourts.gov, but the page is still "under construction," meaning that comprehensive links to major data sources have not been established. Other institutions have taken the lead. Cornell has put several sets of rules online at http://www.law.cornell.edu, and Professor Theodore Eisenberg has made the AO's entire database available, with search and computation abilities added, at http://teddy.law.cornell.edu:8090/questata.htm. Undoubtedly there are other sites.

[54] Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[55] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from demonstration projects rather than controlled experiments—which are rare indeed—or sophisticated econometric analysis of variation (the subject of the next section below).

We cannot expect members of the rules committees to be experts in empirical research techniques, although over the years a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should be expected to notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, these are not a source of reliable data. Advisory Committees must take advantage of these possibilities. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available.

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[56] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[57]

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55 Baker, supra note 1, at 335.

56 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

57 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving then *de jure* the roles that many have assumed *de facto* in recent years, participating in the

discussion of subjects of Advisory Committees other than their own and exercising substantial influence (but not voting). We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is altogether fitting and proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[58] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed. R. Civ. P. 83, to become effective on December 1, 1995, unless legislation intervenes, insists that local rules be consistent with, and not duplicate, national rules.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee of the Standing Committee to recommend a once-and-for-all "solution" to these variables—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[59] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

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58 Baker, supra note 1, at 334.

59 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the considered opinion of the Standing Committee a proposal requires substantial changes for either style or substance, the proposal ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the opinion of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair and Liaison Members: The Standing Committee recommends the continuation of the practice of appointing liaison members from the Standing Committee to the various Advisory Committees.

Subcommittee on Style. The immediate past Chair of the Standing Committee established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Reporter who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules. The Supreme Court has shown some unease with this process, which produces differences in style across rules; the "restyled" rules use terminology in a different way from the older rules, and when sending a package to Congress on April 27, 1995, the Supreme Court changed "must" to "shall" to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling creates risks of accidental change in meaning (even as other unintended implications in the existing rules are caught and squelched). The Federal Rules of Civil Procedure have gone through several drafts of complete restyling; the Appellate Rules are halfway through. What remains undetermined, however, is how to proceed with the sets of restyled rules. The Long Range Planning Subcommittee has no special perspective on this frequent topic of discussion.

[14] Recommendation to the Standing Committee: The Standing Committee should decide what is to become of the restyled sets of federal rules.

Subcommittee on Numerical and Substantive Integration: In 1992 the Standing Committee created a Subcommittee on Numerical and Substantive Integration. As its name suggests, the Subcommittee is charged with two tasks: (1) explore the feasibility of integrating subjects common to the different sets of rules and dealing with them in a single rule that would then be considered part of all the other sets of rules and (2) develop a single numbering system that includes all the different sets of federal rules. This Subcommittee has lapsed into desuetude. We do not make a recommendation concerning it—beyond wishing that our own Subcommittee suffer the same fate (on which see the next recommendation).

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In the 2½ years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.)

The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It recommended and performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired; his vacancy on the Subcommittee has not been filled. The two remaining members unanimously and enthusiastically recommend that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Any issues regarding long range planning in the rules process ought to be reassigned to the individual member of the Standing Committee who serves as liaison to the Committee on Long Range Planning of the Judicial Conference and to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee—except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends legitimacy and authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[60] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are in place and operating properly and that the particular proposals before the Court are the careful products of that rulemaking process. The transmittal letters from the Chief Justice since then have made the same point. Admittedly, over the years different Justices have had different views of their role in judicial rulemaking, but a majority of the Court has never questioned the appropriateness of its participation. We accordingly leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether if it is best to maintain the Court's current role whether it would be appropriate to reduce the role of the Judicial Conference. Whether it is necessary for *both* of these bodies to pass on rules that have already been fully ventilated is doubtful.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may want to consider whether it wishes to invite public comments on the rules in the wake of these transmissions—for there is no other opportunity for public comment after the Advisory Committees hold hearings.

[16] Recommendation to the Judicial Conference and the Supreme Court: The Conference and the Justices should consider whether it is advisable to establish a procedure for a period of public notice and written comment during the Supreme Court's evaluation of proposed rules.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a legislative power delegated to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."[61] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[62] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice

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60 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

61 28 U.S.C. §2072 (a) & (b).

62 U.S. Const. art. III, §1.

wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar. 1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

[17] Recommendation to the Standing Committee: The Standing Committee must be vigilant and alert to rulemaking initiatives in Congress and must be prepared to assist the Judicial Conference in the Conference's efforts to protect the integrity of the Rules Enabling Act procedures.

F. Miscellaneous

The rulemaking calendar/cycle: Three changes in the rulemaking environment have occurred at roughly the same time. The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. Simultaneously, the national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Committee. Meanwhile local rulemaking has burgeoned, in part at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—that is, that Congress is the source of the delay it bemoans—is no answer to those who seek prompt changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the

process of overlapping amendments in no uncertain terms.[63] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or two of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before sheparding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed. R. App. P. 3 and 4 that Prof. Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees always should choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve the points of stress.

One important step would be to establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-

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[63] Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litigation 1 (1994).

numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[64]

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought. We therefore make the following

[18] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee's overall impression of federal rulemaking echoes the hackneyed phrase, "If it ain't broke, don't fix it." There is nothing "broken" about the procedures for amending the federal rules. Federal court practices and procedures "continue to be the outstanding system of

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[64] The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule wiold take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

procedure in the world,"[65] admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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65 Charles Alan Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 555 (1954).

APPENDIX A

Summary of Comments Received for the Self-Study of Judicial Rulemaking

by

Thomas E. Baker
Chair, Subcommittee on Long Range Planning
May 2, 1994

Notice: The following notice of the self-study was mailed to several thousand individuals and organizations on the mailing list the Administrative Office uses to announce proposed rules amendments. It also appeared in several legal newspapers and in some of the advance sheets of the West Publishing Company's federal courts reporters. It was signed by the Chairs of the Standing Committee and the Subcommittee. Interested persons were asked to send in comments and suggestions to the Chair of the Subcommittee. Also enclosed was a copy of the Administrative Office's brochure entitled, "The Federal Rules of Practice and Procedure — A Summary for Bench and Bar."

SELF-STUDY

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, through its Subcommittee on Long Range Planning, is conducting a self-study of judicial rulemaking procedures.

The self-study will consider:

What are the appropriate goals of federal judicial rulemaking?

How well do the existing rulemaking procedures accomplish those goals?

What are the criticisms of the way rules are made?

How might rulemaking procedures be improved?

What follows are summaries of the comments and suggestions

received. The complete responses have been distributed to members of the Subcommittee and the Chair, Reporter, and Secretary of the Standing Committee. These summaries are in rough chronological order.

(1) Laurens Walker, Boyd Professor of Law, University of Virginia, Feb. 17, 1994: sends two articles, A Comprehensive Reform of Federal Civil Rulemaking, 61 Geo. L.J. 455 (1993) and Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51 Law & Contemp. Prob. 67 (1988); proposes a synopic model from administrative law known as "comprehensive rationality"; advocates an empirical approach to rulemaking; suggests that the Supreme Court require that the Advisory Committees engage in social scientific cost/benefit analysis preliminary to any rules changes; as the title indicates, the earlier article advocates thinking of the present rules as a baseline for conducting restricted field experiments in order to gather empirical information on the likely impact of changes before implementing them in the national rules.

(2) Jonathan F. Lewis, Editor-in-Chief, George Washington Law Review, undated: forwards a copy of the 1993 article by Professor Walker, described in (1).

(3) Stephen B. Burbank, Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania, Feb. 17, 1994: sends a forthcoming article from the Brooklyn Law Review; concludes there is a compelling need for a clearer, shared conception of the proper spheres respectively for judicial rulemaking and legislative initiatives; urges that more time and energy be devoted to collecting and analyzing empirical data before changes are made in the national rules; recommends a moratorium on further civil rules changes until such a study has been undertaken, with the cooperation of the bench and bar and Congress.

(4) Frank J. Remington, Professor of Law, University of Wisconsin-Madison Law School, Feb. 17, 1994: suggests that the reporters to the Advisory Committees ought to respond on the merits to public comments and suggestions, beyond a form acknowledgment, to achieve more substantive give-and-take that might benefit and inform rulemaking and would encourage more public participation; was sent a form letter of acknowledgment(!).

(5) John P. Frank, Esq., Lewis & Roca, Phoenix, AZ, Feb. 25, 1994: endorses the goals in FRCP 1; criticizes the civil rules for what they have become, unduly long and unnecessarily complex, compounded by turgid committee notes, chaotic when contemplated against the Civil Justice Reform Act, disuniform for

all the local options; advocates the restoration of the balance of lawyer-members on the Advisory Committees; urges that reconstituted committees, each with a majority of lawyer-members, should reconsider the rules from beginning to end with the fundamental goal in mind to restore simplicity and to end the present insiders' game that federal procedure has become.

(6) Susan P. Graber, Associate Justice, Supreme Court of Oregon, Feb. 28, 1994: suggests a topic for possible rules changes in both the Civil and the Appellate Rules; recommends consideration of rules establishing standards and procedures for certifying questions of state law to state courts.

(7) Jeffrey A. Parness, Professor, Northern Illinois University College of Law, Mar. 1, 1994: recommends better record keeping and indexing of the public comments received by the Advisory Committees for researchers and scholars; the Rules Committees should hire outside consultants to conduct literature surveys and specified research to supplement the research support from the Administrative Office and the Federal Judicial Center; suggests that formal relations be established with relevant state governmental entities that may be impacted by rules changes, e.g., the 1993 amendments to Civil Rule 11 likely will increase the number of state bar disciplinary referrals made by federal judges.

(8) Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, Mar. 11, 1994: complains that the memberships of the various Advisory Committees include too many (appellate) judges and too few practitioners; practitioner-members too often are prominent lawyers or high level government officials who do not work day-in and day-out with the rules; there are too many law professors without real-world, in-court experience; while geographic diversity is useful, more important representativeness is lacking for the variety of firms and lawyers that appear in federal court, such as civil rights attorneys or plaintiffs' attorneys; Advisory Committees almost never offer explanations for rejecting individual suggestions and comments on proposed changes; the current format for public hearings is unsatisfactory and ineffective, because so many persons want to be heard time is limited, thus it is hardly worth it for many groups to send representatives (closed circuit television might be an improvement); access to the public records of the committees should be improved, perhaps through more readily accessible print and electronic sources like Law Week or the Internet; recently, there has been a significant increase in the number and the complexity of rules changes, exacerbated by locally-optional provisions that greatly reduce uniformity; recommends more frequent meetings by reconstituted Advisory Committees, with larger, professional, full-time staff.

(9) Thomas Earl Patton, Schnader, Harrison, Segal & Lewis,

Washington, DC, Mar. 11, 1994: suggests that the system is reverting to the pre-1938 stage of local procedures, with the loss of the two basic principles of uniformity and simplicity; criticizes the latest rules changes for including opt-out provisions; draws attention to the wide opposition from all portions of the bar to the 1993 discovery reforms; argues that the "case-management" philosophy of judging has taken over rulemaking and is being taken to the extreme; the views of the experienced trial bar are not being given adequate weight in rulemaking; urges that the Advisory Committees be more representative of the practicing bar and be protected from reformers on a mission; urges that Congress somehow be taken out of rulemaking.

(10) Marc Galanter, Institute for Legal Studies, University of Wisconsin-Madison Law School, Mar. 13, 1994: urges greater use and reliance on systematic, empirical research for rulemaking; identifies a system need for better data collection and the development of "civil justice indicators" to aid in the assessment of current and proposed rules; recommends that procedures be adopted to draw upon social science expertise, such as adding a social scientist to the membership or commissioning experts to conduct reviews of the relevant social science literature.

(11) A. Leo Levin, Professor, University of Pennsylvania Law School, Mar. 14, 1994: the rulemaking process is too long; the rules have become too long and too complex; the trend is away from national uniformity in procedures; differentiated procedures, common in case processing, should be developed for rulemaking, so that less controversial amendments might proceed more expeditiously; endorses a rules amendments moratorium and the creation of a commission to study rulemaking procedures and make legislative recommendations to Congress.

(12) James F. Roman, Duxbury, MA, Mar. 15., 1994: an ex-convict and former pro se litigant accuses the federal court system of wrongdoing and fraud; argues that present rulemaking procedures are unduly cumbersome and duplicitous; at all levels, federal courts are not performing adequately; maintains that the Administrative Office and the courts are self-aggrandizing institutions.

(13) Ed Hendricks, Chairman, American Judicature Society Justice System Reform Committee, Mar. 15, 1994: concludes that judicial rulemaking has improved over the years through greater representativeness in the memberships of the committees and broader access and participation; advocates more systematic, affirmative efforts to gather information as a basis for rules changes; recommends expansion of list of organizations and individuals from whom comments are solicited; prior to consideration of rules changes, there should be a careful

canvassing of the available literature, including relevant empirical data each time a proposal is considered; the committees should communicate with the research community and fund particular studies for possible rules changes; there is a need for systematically and longitudinally gathering and recording civil justice indicators (akin to criminal justice indicators) and data about caseloads and existing court procedures; the memberships of the committees should be more representative of the bar and other groups; questions whether the Supreme Court should continue to play a role in rulemaking.

(14) James A. Parker, U.S. District Judge, Dist. NM, member of the Standing Committee, Mar. 15, 1994: consider reducing the number of members of the Standing Committee to improve efficiency; the criminal defense bar may not be adequately represented on the Standing Committee; the self-study should evaluate the 6-month publication period, whether it is too long or too short, how often the Standing Committee has adjusted the period for particular rules changes, and whether the "substantial change" standard for republication needs better definition; the experience under the procedures for closed committee meetings and redacted public minutes should be examined.

(15) John C. Smith, Publisher, West Publishing Company, Mar. 16, 1994: publishes several "products" with multiple sets of federal rules and statutes; suggests that better coordination of publications could be achieved by making the amendments to the Bankruptcy Rules effective on the same date as the other federal rules; suggests that annual supplements and pocket parts could be published more timely if Congress were to approve or disapprove amendments by December 1 of the session to which the proposals are made, but the amendments would become effective on March 1 of the following calendar year.

(16) Robert D. Evans, Director, Governmental Affairs Office, American Bar Association, Mar. 23, 1994: statement from the ABA; urges that appointments to the rules committees reflect the demographic diversity of the legal community and that membership also more substantially represent the practicing bar, especially trial lawyers and criminal defense lawyers, and the academy; the membership of the Evidence Rules Advisory Committee needs this sort of attention; records should be kept and made public giving some accounting of the diversity of memberships and appointments; if the Supreme Court does not and cannot participate actively in rulemaking, the rules enabling legislation should be amended to eliminate the Court's formal role that adds approximately six months to the already lengthy process; deadlines for public comments – illustrated by the deadline for responses in the present self-study – do not afford ample time for meaningful participation by institutions like the ABA; calendaring meetings twice a year results in a two or three year cycle for rules changes; a priority should be given to

providing interested individuals and organizations timely notification of public meetings and hearings; publishing an agenda in advance of meetings, including proposals being considered for publication and approval, would encourage greater outside participation; any publication for comment of a rule that would delegate to the Judicial Conference the authority to issue guidelines or standards should include a draft of the actual guideline or standard for comment; the current provisions for republication of "substantial changes" in proposals after public comment are not adequate, as the recent changes in Civil Rule 26 illustrate; the Criminal Rules Advisory Committee is criticized for being unwilling to overturn case law and statutes and for not following the ABA standards in areas like defense discovery; the Civil Rules Advisory Committee is criticized for being too willing to take the initiative for reform and for not deferring to the Civil Justice Reform Act of 1990; provisions in the national rules that allow for local opting out compromise the goal of uniformity; there is a need for greater reliance on empirical data in rule making, including controlled experiments; coordination is needed among the various rules committees, especially among the committees dealing with the rules of evidence and the civil and criminal rules; the national rules ought to better address the development and implementation of ADR procedures; some thought ought to be given to making future rules changes substance-specific, so that different types of lawsuits would proceed on different procedural tracks; the rulemaking process needs to determine appropriate responses to the CJRA; overall, the self-study should attend to ways to improve and maintain the fairness and openness of the rulemaking process.

(17) Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center, Mar. 19 & 24, 1994: concludes that rulemaking goals vary over time; endorses the Rule 26 model of a national rule with local options, to accommodate the CJRA; the rulemaking committees should seek to structure and lead the conversation among local rulemakers; the CJRA is an opportunity for gathering empirical information; suggests specific ways the rules committees might develop background information for evaluating proposals; notes the untapped resource of procedure professors at the law schools; raises practical problems with the archives materials on rulemaking, how they are accessed and how they are maintained; From "Cases" to "Litigation", 54 Law & Contemp. Prob. 5 (1991); sent her Letter to Judge Becker of the Long Range Planning Committee of the Judicial Conference; advocates structural mechanisms to increase and improve understanding of federal courts; adequate and useful data still is lacking on such commonplace federal court practices as complex litigation, class actions, the pretrial process, and settlement practices; little is known about the demographics of litigants and their perceptions; decisionmaking personnel, such as magistrate judges and bankruptcy judges, have not been studied; the appellate process likewise is relatively unstudied;

recommends a national meeting of researchers, academics, lawyers, and judges to consider the kind of information that is available and to contemplate what other information might be gathered; concludes some permanent structure, perhaps similar to the lawyers advisory committees under the CJRA, is needed to provide systemic information from those "outside" the judiciary.

(18) Larry A. Hammond, Chair, Criminal Justice Reform Committee of the American Judicature Society, Phoenix, AZ, Mar. 25, 1994: urges that rulemakers evaluating civil rule changes take into account the impact of those changes on the criminal justice system; so long as there are more cases than there are enough judges to handle them, any change on the civil side will affect the criminal docket; the system is a whole.

(19) Myrna Raeder, Professor of Law, Southwestern University, Mar. 28, 1994: serves as Vice Chairperson of the A.B.A. Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence; urges that the Judicial Conference attempt to achieve committee memberships that reflect the diversity of the federal bar, rather than the current level of diversity of the federal bench; greater diversity can be fostered by better record keeping and by obtaining wider input, from relevant groups, to identify potential members; expresses concern for the recent trend of proliferating rules changes effected outside the Rules Enabling Act process; suggests that short of a formal amendment to the authorizing legislation, there ought to be some informal understanding that Congressional initiatives will be referred to the appropriate Advisory Committee; comments on the uncertainty surrounding the Civil Justice Reform Act of 1990 and its implications for judicial rulemaking; recommends that the rules committees gather and evaluate data from the CJRA plans to seek to harmonize local experiments and to identify proposals worthy of national implementation; requests advanced notification and publication of proposed rules changes, agendas, and minutes of committee meetings.

(20) Alfred W. Cortese, Jr., Kirkland & Ellis, Washington, DC, Apr. 4, 1994: goals of rulemaking ought to include external neutrality from external politics, internal neutrality so far as litigants are concerned, responsiveness to those who use the federal courts, maintenance of the distinction between procedure and substantive or jurisdictional changes, efficiency measured against fairness; preserving the integrity of judicial rulemaking obliges both the Congress and rulemakers to be sensitive to the tensions in the Rules Enabling Act procedures and recent incidents suggest both sides have not always succeeded; the rules presently favor the initiation and maintenance of a lawsuit; responsiveness would be enhanced by greater public participation in rulemaking and by more bar participation as committee members; rulemaking procedures are working reasonably well and no significant changes are indicated; how to balance independence

and responsiveness, insularity and participation, is rightly left to the professionalism of the members and staffs of the rules committees.

(21) William R. Slomanson, Professor, Western State University College of Law, San Diego, CA, Apr. 4, 1994: supports the self-study; proposes the appointment of one local subcommittee member in each district to be responsible for communication between the bar in that district and the Standing Committee; such a decentralized system would take more time, but would provide far greater participation than the present comment period and public hearings.

(22) Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure, Boston, MA, Apr. 5, 1994: describes the current duties of the Reporter to the Standing Committee, which have been greatly expanded over the years,; concludes that the Rules Enabling Act process is the only mechanism capable of restoring and maintaining procedural uniformity to the federal courts.

(23) Joseph F. Weis, Jr., U.S. Circuit Judge, Third Circuit, Pittsburgh, PA, Apr. 14, 1994: former Chair, Standing Committee; expresses twin concerns over delay in rulemaking and insufficient uniformity among the different sets of rules; suggests that two members from each Advisory Committee be selected to reconstitute the Standing Committee and the Chair of the Standing Committee be an ex officio member of each Advisory Committee; further efficiency would be obtained by scheduling all the meetings of all the advisory committees at the same time and place, to be followed immediately by a meeting of the Standing Committee; continued emphasis must be placed on the partnership between the judiciary and the Congress under the Rules Enabling Act process; renewed efforts should be made to keep Congressional staff informed about rulemaking initiatives.

APPENDIX B

Federal Judicial Rulemaking: An Annotated Bibliography

Prepared under the supervision

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Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 GEO. WASH. L. REV. 1165 (1990): asserts that interlocutory appeals can and should play a greater role in the adjudicative process in the federal courts.

Stephen N. Subrin, Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. PA. L. REV. 1999 (1989): examines the goal of uniformity and the proliferation of local rules.

Stephen N. Subrin, Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure, 73 JUDICATURE 1 (1989): discusses the six symposia held to commemorate 50th anniversary of FRCP; highlights the often controversial nature of the FRCP and the opposing viewpoints on the Rules' effectiveness.

Edson R. Sunderland, The Grant of Rulemaking Power to the Supreme Court of the United States, 32 MICH. L. REV. 1116 (1934): discusses the history of the procedural reform movement which culminated with 1934 passage of the Rules Enabling Act.

Edson R. Sunderland, Implementing the Rule-Making Power, 25 N.Y.U. L. REV. 27 (1950): weighs the pros and cons of legislative promulgatian of federal court rules as opposed to the courts promulgating these rules.

Edson R. Sunderland, The Regulation of Procedure by Rules Originating in the Judicial Council, 10 IND. L.J. 202 (1935): concludes that an independent body like the judicial council would be an appropriate body for development of rules of procedure.

Carl Tobias, Civil Justice Reform and the Balkanization of

Federal Civil Procedure, 24 ARIZ. ST. L.J. 1393 (1992): details recent developments which threaten the continued viability of a uniform, simple system of federal civil procedure.

Carl Tobias, Civil Justice Reform Roadmap, 142 F.R.D. 507 (1992): charts recent developments in civil justice reform efforts among legislative, judicial and executive branches of the federal government.

Carl Tobias, The Clinton Administration and Civil Justice Reform, 144 F.R.D. 437 (1993): presents a general overview of substance and procedure of civil justice reform as of January 1994.

Carl Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 CORNELL L. REV. 270 (1989): criticizes the traditional rulemaking process and its underlying trans-substantive philosophy of the FRCP.

Carl Tobias, Reconsidering Rule 11, 46 U. MIAMI L. REV. 855 (1992): examines the new federal rule-making procedure, which allows for more public comment, and its effect on the re-examination of Rule 11.

Janice Toran, 'Tis A Gift to be Simple: Aesthetics and Procedural Reform, 89 MICH. L. REV. 352 (1990): hypothesizes that aesthetic considerations (simplicity, elegance, coherence, and the like) should and do play a role in the formulation of legal procedures and the procedural reform process.

George G. Tyler, The Origin of the Rule-Making Power and its Exercise by Legislatures, 22 A.B.A. J. 772 (1936): chronicles the history of the changing locus of rulemaking power, from the legislature to the courts.

Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 60 GEO. WASH. L. REV. 455 (1993): focusing on the changes to Rules 11 and 26, criticizes the whole rulemaking process; suggests that the controversy over recent amendments threatens judicial control of rulemaking and worries that the expertise of federal judges may be lost as a major asset in this process.

Laurens Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51 LAW & CONTEMP. PROBS. 67 (Sum. 1988): theorizes that the process that guided the development of the FRCP through its first 50 years is not appropriate for the work that lies ahead; identifies as the chief deficiency the lack of a systematic official plan to collect valid information about the likely impact of changes to the Rules before they are amended; proposes a series of field experiments as a solution.

Sam B. Warner, The Role of Courts and Judicial Councils in

Procedural Reform, 85 U. PA. L. REV. 441 (1937): explores the extent of courts' rulemaking powers and who should exercise those powers.

Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. PA. L. REV. 1901 (1989): discusses the first 50 years of the FRCP and poses and answers a series of rhetorical questions about the possibility that the FRCP are denying justice to certain classes of litigants.

Jack B. Weinstein, REFORM OF COURT RULEMAKING PROCEDURES 90 (1977): condensed version of book published as: Weinstein, Reform of Federal Court Rulemaking Procedures, 76 COLUM. L. REV. 905 (1976); recommended changes that Weinstein makes at the end of his book are also published as: Jack B. Weinstein, Reform of the Federal Rule-Making Process, 63 A.B.A. J. 47 (1977).

Jack B. Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, 14 VAND. L. REV. 831 (1961): uses the bifurcation rule to demonstrate some problems that can arise when rules with substantive weight are appraised merely on their procedural characteristics.

Jack B. Weinstein, The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie, 54 BROOK. L. REV. 1 (1988): describes the adoption of FRCP and the Erie decision; focuses on the relative ignoring that surrounded these two events when they occurred in 1938 and the huge impact they have had in the 50 years since.

Russell R. Wheeler, Broadening Participation in the Courts Through Rule-Making and Administration, 62 JUDICATURE 281, 282-83 (1979): describes the federal rulemaking process; characterizes it as "relatively simple"; examines the tension between the judiciary working to govern itself by making its own rules and the "democratic" method of allowing substantial public involvement in the rulemaking process.

Ralph U. Whitten, Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4, 40 ME. L. REV. 41 (1988): examines the permissible scope of supervisory rulemaking by the Supreme Court under the separation of powers doctrine.

Joseph A. Wickes, The New Rulemaking Power of the United States Supreme Court, 13 TEX. L. REV. 1 (1934): examines the historical background of the Rules Enabling Act.

John H. Wigmore, All Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 ILL. L. REV. 276 (1928): editorial asserts that any time a legislature attempts to impose upon the judiciary any rules for the discharge of the judiciary's duties,

the rules are void constitutionally.

Charles A. Wright, Amendments to the Federal Rules: The Functioning of a Continuing Rules Committee, 7 VAND. L. REV. 521 (1954): describes 1954 set of amendments to the FRCP and the rulemaking process used to make them.

Charles A. Wright, Book Review, 9 ST. MARY'S L. J. 652, 653-58 (1978) (Jack B. Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES): Professor Wright endorses Judge Weinstein's suggested improvements of the rulemaking process.

Charles A. Wright, Procedural Reform: Its Limitations and Its Future, 1 GA. L. REV. 563 (1967): describes the apparently smooth operation of "procedural reform" within the federal system.

21 Charles A. Wright and K. Graham, FEDERAL PRACTICE AND PROCEDURE §5006 (1977): chronicles the history of the drafting process for the FRE.

4 Charles A. Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §§1001-1008 (1969 and Supp. 1993): chronicles the history of procedure in federal courts; discusses the drive for procedural reform which culminated in the Rules Enabling Act; examines the formation of the federal rules and the contributions of the advisory committee.

12 Charles A. Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE §3152 (1973): discusses the abuse of local rulemaking power.

Comment, Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemakng Power, 1974 ARIZ. ST. L.J. 77 (1974): explores the validity of "substantiveness" as a curb on the Court's rulemaking power; concludes that Congressional involvement can be avoided by the realization that this power is administrative in character and exercisable pursuant to a delegation of legislative power; advocates the prescription of safeguards to ensure the consideration of all competing interests.

Comment, Separation of Powers and the Federal Rules of Evidence, 26 HASTINGS L.J. 1059 (1975): proposes an arrangement permitting the judiciary to promulgate procedural evidentiary rules and the legislature to enact privilege rules, to avoid the substantive limitation on the judicial rulemaking power.

Note, The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Powers, 76 MICH. L. REV. (1978): examines constitutional division of rulemaking power; emphasizes the development of federal evidence law.

Note, Separation of Powers and the Federal Rules of Evidence, 26

HASTINGS L.J. 1059 (1975): analyzes the Supreme Court's historical rulemaking power to determine whether privilege rules are within that power.

Charles W. Grau, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY (AMERICAN JUDICATURE SOCIETY 1978): analyzes critical issues in judicial rulemaking; suggests ways to increase accountability and access to the rulemaking process.

THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (West 1979): includes addresses and commentary from several notable authorities or issues pertaining to rulemaking.

Agenda Item A

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BANKRUPTCY JUDGES DIVISION

MEMORANDUM

DATE: August 3, 1995

FROM: Patricia S. Channon for the Local Rules Subcommittee

SUBJECT: Revisions to the Proposed Uniform Local Rule Numbering System as a Result of Comments Received

TO: Advisory Committee on Bankruptcy Rules

As you will recall, at the March 1995 meeting, the Advisory Committee approved the proposed Uniform Local Rule Numbering System, subject to certain revisions recommended by the local rules subcommittee on the basis of comments received. The approved revisions were 1) the deleting of any subdivisions of national rules from the uniform numbers, and 2) the adding of "cross-references."

Subsequently, during the drafting of the minutes of the March 1995 meeting and of the report to the Standing Committee, questions arose over the meaning of the directive to add cross-references. Although Professor Resnick and Ms. Channon attempted to resolve the matter by listening to the tape of the meeting and talking with participants in the March 1995 discussion, the ambiguities remained.

Accordingly, the Chairman decided it would be unwise to forward the numbering system for consideration by the Standing Committee at its July 1995 meeting and that the numbering system - with proposed cross-references and other revisions in place - should be reconsidered for final approval at the September 1995 meeting of the Advisory Committee. Assuming the Advisory Committee approves the revised numbering system, it will be considered by the Standing Committee in January 1996 along with the proposed numbering systems for the appellate, civil, and

criminal rules. If approved by the Standing Committee, it would proceed to the March 1996 agenda of the Judicial Conference for promulgation.

The decision to return the proposed uniform local rule numbering system to the Advisory Committee for another review also provided an opportunity to perform some additional "clean up" or fine tuning of the system. The most important task, in addition to providing more cross-references, seemed to be the elimination of multiple rule numbers connected to a single topic, an improvement that had been suggested in a comment letter. In addition, the Reporter reviewed and commented on the proposal.

In July, the local rules subcommittee met by conference call to review a revised proposal that incorporated cross-references and deleted lettered subdivisions and multiple numbers for single topics and to consider other issues that arose during the revision process. Chairman Mannes and the Reporter also participated in the conference call. The attached revised uniform local rule numbering system reflects the results of the July conference call meeting. The local rules subcommittee recommends approval of the revised system by the Advisory Committee.

CHANGES MADE TO PUBLISHED DRAFT

The changes that have been made to the uniform numbering system can be summarized as follows:

- The contents of the left column of the preliminary draft have been changed. Instead of the national rule numbers, this column contains the uniform local rule numbers. The right column now is labeled "See Also LBR" and contains the uniform local rule number(s) of any cross-referenced rule(s);

- Multiple numbers for a single topic have been eliminated. Making this change results in a system that should be less confusing for local rules committees when they renumber their rules. Multiple numbers arose when the conversion was made from an alphabetical list (with numbers) to a listing arranged by national rule number. In making that conversion, every national rule with a subject-matter connection to a local rule topic was shown. In the case of the topic "Filing Papers - Requirements," for example, five related national rule numbers were noted. From a standpoint of actual subject matter of local rules, some of these national rule numbers were not needed;

- A combination of strategies was used to correct the problem of multiple numbers, including the addition of cross-references to numbers for similar topics in "distant" parts of the rules. Other strategies included breaking down a topic (e.g., "Motion Practice," 9013-1, and "Motion Practice - APs," 7007-1), deleting unnecessary numbers entirely, and changing the numbers of a few topics (e.g., the number for "Investment of Estate Funds" changed from 5008-1 to 5095-1);

- Several completely new topics were added as a result of Advisory Committee decisions to publish preliminary drafts of new rules covering small business chapter 11 cases and damages and costs for frivolous appeals;

- Two topics determined to be undesirable (and arguably unnecessary, because "covered" by other topics) were eliminated: Fax Filing/Service (covered by Electronic Filing), and Clerk - Orders Grantable by (covered by Clerk - Delegated Functions of);

- The small separate section after Part IX for rules by District Courts and Bankruptcy Appellate Panels was deleted;

- The note about the citation form was revised and directions for citing a rule prescribed by a circuit council for a Bankruptcy Appellate Panel added;

- A note was added stating that districts should use the prescribed topic names in addition to the uniform rule numbers. See "Issues to Be Resolved," below.

The editing process highlighted the usefulness of the alphabetical list of uniform local rule number topics as an adjunct to the system itself, which is organized numerically. The subcommittee recommends that the Advisory Committee request the Standing Committee and Judicial Conference to authorize distribution of the alphabetical listing along with the uniform numbering system, for the convenience of those who will have to renumber their existing rules.

CHANGES TO THE ACCOMPANYING MEMORANDUM SINCE PUBLICATION

The memorandum as published has been shortened substantially, so that it can serve as a guide to using the numbering system. Some of the comments indicated that any guide to using the system would need to be more explicit in stating that the presence of a topic in the numbering system is not a recommendation that a district needs a local rule on that topic. Accordingly, the subcommittee in March 1995 concluded that the memorandum accompanying the system should include such a statement.

In addition, some of the comments indicated misunderstanding about the role of the national rules. In going over these

comments, the subcommittee agreed in March 1995 that the public memorandum should stress that many of the national rules do not need a counterpart local rule, and that numerical "gaps" in the local rule numbering system are attributable to the fact that no local rule is necessary.

The subcommittee also rejected those comments that called for tracking exactly the titles of national rules. Rather, the subcommittee supported using different wordings as a means of emphasizing that these are local rules topics, and further that, although some are related to a national rule, they usually address some aspect of the subject that is not part of the national rule. The memorandum now explains the philosophy of the topic names.

The subcommittee also directed inclusion in the memorandum of a statement that, although a court need not have a rule on a subject, if it does prescribe one, the court should use both the uniform number and the rule title provided in the numbering system. One of the computer services had recommended mandating use of the topic names as an aid to the search process. During the discussion of this issue, subcommittee members expressed a range of views before settling on the suggestive "should" wording. The directive seems to go beyond what the amendment to Rule 9029 requires, however, and should be considered by the full Advisory Committee. Accordingly, I have bracketed the suggested language. See also the discussions in "Changes Made to Published Draft," above, and "Issues to Be Resolved," below.]

ISSUES TO BE RESOLVED

The subcommittee agreed to recommend that districts use the names of the topics along with the uniform numbers in their local rules. This suggestion may exceed the scope of the amendment to

Rule 9029 and needs to be considered by the full Advisory Committee before the local rules package is forwarded to the Standing Committee.

The amendment to Rule 9029 will be effective December 1, 1995, (probably), and the Judicial Conference most likely will officially prescribe the proposed uniform numbering system in March 1996, along with numbering systems for appellate, civil, and local rules. It appears from the discussion of uniform local rule numbering at the July 1995 Standing Committee meeting that consensus is building for a deadline of about December 1996 for districts to convert their local rules to the uniform numbering system. The Advisory Committee needs to consider whether to join that consensus or suggest another deadline.

ACTIONS REQUIRED

The various issues that need Advisory Committee action are listed below:

1. Recommend use of topic names?

2. Include alphabetical list?

3. Approve package?

4. Recommend deadline to comply -- how long?

5. Designate Bankruptcy Judges Division to support conversion?

Attachments

[AO Letterhead]

(Date)

MEMORANDUM TO: JUDGES, UNITED STATES COURTS OF APPEAL
JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES BANKRUPTCY COURTS
CIRCUIT EXECUTIVES

SUBJECT: Uniform Numbering System for Local Bankruptcy Rules (ACTION REQUIRED)

ACTION DUE DATE: _____ (December 31, 1996 or other date)

Federal Rule of Bankruptcy Procedure 9029 as amended December 1, 1995, requires that local bankruptcy rules conform to a uniform numbering system prescribed by the Judicial Conference of the United States. The Judicial Conference prescribed the attached uniform numbering system for local bankruptcy rules on March __, 1995.

Uniform numbering based on the numbers used in the Federal Rules of Bankruptcy Procedure is intended to make it easier for attorneys or parties to search for relevant local rules. An alphabetical listing is included also, for the convenience of attorneys and as an aid to those charged with converting their districts' local rules to the new numbering system.

History and Method of Development

A proposed numbering system was developed by the Bankruptcy Judges Division of the Administrative Office and the Advisory Committee on Bankruptcy Rules and published in November 1994 for public comment. After consideration of the public comment, the original proposal was substantially revised. For example, as a result of the comments received, no subdivisions of the national rules are used, leaving lettered subdivisions available as a tool for districts having lengthy or multiple rules on a particular topic.

Starting with a list of local rules topics prepared by the Bankruptcy Judges Division of the Administrative Office of the United States Courts, the Advisory Committee identified those topics which relate to a national rule and assigned them uniform numbers consisting of the four-digit national rule number, a dash, and a fifth digit, starting with 1. For instance, local rules relating to chapter 13 trustees are assigned the uniform number 2015-5 and local rules relating to United States trustees are assigned the uniform number 2020-1.

Local rule topics for which there is no related national rule have been assigned to the part of the national rules to which each topic is most closely related. These topics are assigned available, unused numbers within the part, starting with 1070, 2070, etc. For example, rules related to attorney admission and discipline are assigned to uniform numbers 2090-1 and 2090-2.

Converting to Uniform Numbering

The existence of a uniform local rule number should not be interpreted as a recommendation that any district needs a local rule on the topic. The numbering system was derived from a review of existing local rules and represents the subjects on which bankruptcy courts actually have local rules. Some courts have few rules; others many. No court has a rule on every topic for which a uniform number has been assigned.

Likewise, many national rules address matters about which there is no apparent need for local rules. Accordingly, users may perceive "gaps" in the numbering system, where there is no uniform local rule number assigned to a national rule. This exclusion of various national rules from the uniform local rule numbering system is deliberate; only subjects that actually appear in local rules are included.

[If a district does have a local rule, on a subject, then the district should use both the assigned uniform local rule number and the topic name. This procedure will make local rules searchable both by uniform local rule number and by topic name.]

A deadline of __(date)__ has been set for local courts to implement the new system. The Bankruptcy Judges Division of the Administrative Office is available to provide technical and logistical support to the districts as they convert to the new numbering system. The telephone number of the Bankruptcy Judges Division is (202) 273-1900.

L. Ralph Mecham
Director

Attachments

cc: Clerks, United States Courts of Appeal
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts
Bankruptcy Administrators

UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

Cite as "_____LBR ____ - __." Example: "E.D.Va. LBR 1007-1."
(District) (Number)

If a rule is prescribed by a circuit council for a Bankruptcy Appellate Panel Service, cite as ____Cir.BAP LBR ____ - __." Example: "9th Cir.BAP LBR 8009-1."

[The topic names are part of this uniform numbering system and should be used in addition to the rule numbers.]

PART I

Uniform Local Rule Number	Topic	See Also LBR
1002-1	PETITION - GENERAL	1004-1, 1005-1 1010-1, 5005-2
1004-1	PETITION - PARTNERSHIP	
1005-1	PETITION - CAPTION	9004-2
1006-1	FEES - INSTALLMENT PAYMENTS	5080-1, 5081-1
1007-1	LISTS, SCHEDULES, & STATEMENTS	5005-2
1007-2	MAILING - LIST OR MATRIX	
1007-3	STATEMENT OF INTENTION	
1009-1	AMENDMENTS TO LISTS & SCHEDULES	
1010-1	PETITION-INVOLUNTARY	
1014-1	TRANSFER OF CASES	
1014-2	VENUE - CHANGE OF	
1015-1	JOINT ADMINISTRATION/ CONSOLIDATION	
1015-2	RELATED CASES	
1017-1	CONVERSION - REQUEST FOR/ NOTICE OF	
1017-2	DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	
1019-1	CONVERSION - PROCEDURE FOLLOWING	
1020-1	CHAPTER 11 SMALL BUSINESS CASES - GENERAL	
1070-1	JURISDICTION	
1071-1	DIVISIONS - BANKRUPTCY COURT	
1072-1	PLACES OF HOLDING COURT	

PART I, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
1073-1	ASSIGNMENT OF CASES	
1074-1	CORPORATIONS	

PART II

Uniform Local Rule Number	Topic	See Also LBR
2002-1	NOTICE TO CREDITORS & OTHER INTERESTED PARTIES	
2002-2	NOTICE TO UNITED STATES OR FEDERAL AGENCY	
2002-3	UNITED STATES AS CREDITOR OR PARTY	
2003-1	MEETING OF CREDITORS & EQUITY SECURITY HOLDERS	
2004-1	DEPOSITIONS & EXAMINATIONS	7027-1, 9016-1
2007.1-1	TRUSTEES & EXAMINERS (Ch. 11)	
2010-1	TRUSTEES - BONDS/SURETY	
2014-1	EMPLOYMENT OF PROFESSIONALS	6005-1
2015-1	TRUSTEES - GENERAL	
2015-2	DEBTOR-IN-POSSESSION DUTIES	
2015-3	TRUSTEES - REPORTS & DISPOSITION OF RECORDS	
2015-4	TRUSTEES - CHAPTER 12	
2015-5	TRUSTEES - CHAPTER 13	
2016-1	COMPENSATION OF PROFESSIONALS	6005-1
2019-1	REPRESENTATION OF MULTIPLE PARTIES	
2020-1	UNITED STATES TRUSTEES	
2070-1	ESTATE ADMINISTRATION	
2071-1	COMMITTEES	
2072-1	NOTICE TO OTHER COURTS	
2080-1	CHAPTER 9	
2081-1	CHAPTER 11 - GENERAL	

PART II, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
2082-1	CHAPTER 12 - GENERAL	
2083-1	CHAPTER 13 - GENERAL	
2090-1	ATTORNEYS - ADMISSION TO PRACTICE	9010-1
2090-2	ATTORNEYS - DISCIPLINE & DISBARMENT	9011-3
2091-1	ATTORNEYS - WITHDRAWALS	

PART III

Uniform Local Rule Number	Topic	See Also LBR
3001-1	CLAIMS AND EQUITY SECURITY INTERESTS - GENERAL	5003-3
3006-1	CLAIMS - WITHDRAWAL	
3007-1	CLAIMS - OBJECTIONS	
3008-1	CLAIMS - RECONSIDERATION	
3009-1	DIVIDENDS - CHAPTER 7	
3010-1	DIVIDENDS - SMALL	
3011-1	UNCLAIMED FUNDS	
3012-1	VALUATION OF COLLATERAL	
3015-1	CHAPTER 13 - PLAN	
3015-2	CHAPTER 13 - AMENDMENTS TO PLANS	
3015-3	CHAPTER 13 - CONFIRMATION	
3016-1	CHAPTER 11 - PLAN	
3016-2	DISCLOSURE STATEMENT - GENERAL	
3017-1	DISCLOSURE STATEMENT - APPROVAL	
3017-2	DISCLOSURE STATEMENT - SMALL BUSINESS CASES	
3018-1	BALLOTS - VOTING ON PLANS	
3018-2	ACCEPTANCE/REJECTION OF PLANS	
3019-1	CHAPTER 11 - AMENDMENTS TO PLANS	
3020-1	CHAPTER 11 - CONFIRMATION	
3021-1	DIVIDENDS - UNDER PLAN (Ch. 11)	
3022-1	FINAL REPORT/DECREE	
3070-1	CHAPTER 13 - PAYMENTS	

PART IV

Uniform Local Rule Number	Topic	See Also LBR
4001-1	AUTOMATIC STAY - RELIEF FROM	
4001-2	CASH COLLATERAL	
4001-3	OBTAINING CREDIT	
4002-1	DEBTOR - DUTIES	
4002-2	ADDRESS OF DEBTOR	
4003-1	EXEMPTIONS	
4003-2	LIEN AVOIDANCE	
4004-1	DISCHARGE HEARINGS	
4004-2	OBJECTIONS TO DISCHARGE	
4007-1	DISCHARGEABILITY COMPLAINTS	
4008-1	REAFFIRMATION	
4070-1	INSURANCE	
4071-1	AUTOMATIC STAY - VIOLATION OF	

PART V

Uniform Local Rule Number	Topic	See Also LBR
5001-1	COURT ADMINISTRATION	
5001-2	CLERK - OFFICE LOCATION/HOURS	
5003-1	CLERK - GENERAL/AUTHORITY	
5003-2	COURT PAPERS - REMOVAL OF	
5003-3	CLAIMS - REGISTER	
5005-1	FILING PAPERS - REQUIREMENTS	1002-1, 1007-1, 9004-1, 9004-2
5005-2	FILING PAPERS - NUMBER OF COPIES	
5005-3	FILING PAPERS - SIZE OF PAPERS	9004-1
5005-4	ELECTRONIC FILING	
5009-1	FINAL REPORT/DECREE	
5010-1	REOPENING CASES	
5011-1	WITHDRAWAL OF REFERENCE	

PART V, Cont'd.

Uniform Local Rule Number	Topic	See Also LBR
5011-2	ABSTENTION	
5070-1	CALENDARS & SCHEDULING	9073-1, 9074-1
5071-1	CONTINUANCE	
5072-1	COURTROOM DECORUM	
5073-1	PHOTOGRAPHY, RECORDING DEVICES & BROADCASTING	
5075-1	CLERK - DELEGATED FUNCTIONS OF	
5076-1	COURT REPORTING	
5077-1	TRANSCRIPTS	
5078-1	COPIES - HOW TO ORDER	
5080-1	FEES - GENERAL	1006-1
5081-1	FEES - FORM OF PAYMENT	1006-1
5090-1	JUDGES - VISITING & RECALLED	
5091-1	SIGNATURES - JUDGES	
5092-1	SEAL OF COURT	
5095-1	INVESTMENT OF ESTATE FUNDS	

PART VI

Uniform Local Rule Number	Topic	See Also LBR
6004-1	SALE OF ESTATE PROPERTY	
6005-1	APPRAISERS & AUCTIONEERS	2014-1, 2016-1
6006-1	EXECUTORY CONTRACTS	
6007-1	ABANDONMENT	
6008-1	REDEMPTION	
6070-1	TAX RETURNS & TAX REFUNDS	

PART VII

Uniform Local Rule Number	Topic	See Also LBR
7001-1	ADVERSARY PROCEEDINGS - GENERAL	
7003-1	COVER SHEET	
7004-1	SERVICE OF PROCESS	
7004-2	SUMMONS	
7005-1	CERTIFICATE OF SERVICE (APs)	9013-3
7005-2	FILING OF DISCOVERY MATERIALS	
7007-1	MOTION PRACTICE (in APs)	9013-1
7008-1	CORE/NON-CORE DESIGNATION (Complaint)	
7012-1	CORE/NON-CORE DESIGNATION (Responsive Pleading)	
7016-1	PRE-TRIAL PROCEDURES	
7023-1	CLASS ACTION	
7024-1	INTERVENTION	
7024-2	UNCONSTITUTIONALITY, CLAIM OF	
7026-1	DISCOVERY - GENERAL	
7027-1	DEPOSITIONS & EXAMINATIONS (APs)	2004-1
7040-1	ASSIGNMENT OF ADVERSARY PROCEEDINGS	1073-1
7052-1	FINDINGS & CONCLUSIONS	
7054-1	COSTS - TAXATION/PAYMENT	
7055-1	DEFAULT - FAILURE TO PROSECUTE	
7056-1	SUMMARY JUDGMENT	
7065-1	INJUNCTIONS	
7067-1	REGISTRY FUND	
7069-1	JUDGMENT - PAYMENT OF	

PART VIII

Uniform Local Rule Number	Topic
8001-1 ff.	APPEALS For District Court/Bankruptcy Appellate Panel uniform local rule numbers, see "Appendix of Uniform Local Rule Numbers for Bankruptcy Appeals."

PART IX

Uniform Local Rule Number	Topic	See Also LBR
9001-1	DEFINITIONS	
9003-1	EX PARTE CONTACT	
9004-1	PAPERS - REQUIREMENTS OF FORM	5005-1, 5005-3
9004-2	CAPTION - PAPERS, GENERAL	1005-1, 5005-1
9006-1	TIME PERIODS	
9009-1	FORMS	
9010-1	ATTORNEYS - NOTICE OF APPEARANCE	2090-1, 9011-1
9010-2	POWER OF ATTORNEY	
9011-1	ATTORNEYS - DUTIES	
9011-2	PRO SE PARTIES	
9011-3	SANCTIONS	2090-2
9011-4	SIGNATURES	
9013-1	MOTION PRACTICE	7007-1
9013-2	BRIEFS & MEMORANDA OF LAW	
9013-3	CERTIFICATE OF SERVICE - MOTIONS	7005-1
9015-1	JURY TRIAL	
9016-1	SUBPOENAS	
9016-2	WITNESSES	2004-1
9019-1	SETTLEMENTS & AGREED ORDERS	
9019-2	ALTERNATIVE DISPUTE RESOLUTION (ADR)	
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Uniform Local Rule Number	Topic	See Also LBR
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9029-1	LOCAL RULES - GENERAL	
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9029-3	LOCAL RULES - DISTRICT COURT	
9035-1	BANKRUPTCY ADMINISTRATORS	
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APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR BANKRUPTCY APPEALS

PART VIII

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8001-3	ELECTION FOR DISTRICT COURT DETERMINATION OF APPEAL
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8008-1	FILING PAPERS - APPEAL
8008-2	SERVICE OF ALL PAPERS REQUIRED - APPEAL
8008-3	MANNER OF SERVING PAPERS - APPEAL
8008-4	PROOF OF SERVICE OF FILED PAPERS - APPEAL
8009-1	TIME FOR FILING BRIEFS - APPEAL
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8010-1	FORMS OF BRIEFS - APPEAL
8010-2	REPRODUCTION OF STATUTES, ETC. - APPEAL
8010-3	LENGTH OF BRIEFS - APPEAL
8011-1	MOTION, RESPONSE, REPLY - APPEAL
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Uniform Local Rule Number	Topic
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8018-1	LOCAL RULES OF CIRCUIT JUDICIAL COUNCIL OR DISTRICT COURT
8019-1	SUSPENSION OF PART VIII, FED.R.BANKR.P.
8020-1	DAMAGES AND COSTS FOR FRIVOLOUS APPEAL
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MOTION, RESPONSE, REPLY - APPEAL	8011-1
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Topic	Uniform Local Rule Number
ORAL ARGUMENT - APPEAL	8012-1
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Agenda Item 5

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 7062

DATE: JULY 13, 1995

Prior to the March 1995 meeting of the Advisory Committee in Lafayette, I was asked to review the list of orders in Bankruptcy Rule 8002(c) for which an "excusable neglect" extension of the time to appeal may not be granted. I was also asked, in connection with that review, to consider, compare, and possibly conform to Rule 8002(c) the list of orders that are excluded from the 10-day automatic stay in Bankruptcy Rule 7062 (incorporating Civil Rule 62). Rule 7062 applies in adversary proceedings. Rule 9014 provides that Rule 7062 also applies in contested matters unless the court orders otherwise.

As a result of my review of these rules, I recommended that orders confirming a plan be added to the list of excluded orders in Rule 7062. In particular, I included the following paragraph in my memorandum of February 24, 1995, which was contained in item #10, pages 6-7, of the agenda materials for the Lafayette meeting:

> "After reviewing Rule 7062, I believe that amendments to that rule, as well as to Rule 8002(c), are warranted at this time. I want to emphasize that I made several close judgment calls in determining whether to include certain orders in these rules and that reasonable people could differ on these calls. I also added to the list of orders in Rule 7062 an order confirming a plan. I do not think that parties should have to wait ten days to seek enforcement of a confirmation order if no party has obtained a stay pending appeal. Although I do not think that Rule 7062, as it now reads, prohibits consummation of a chapter 11 plan within ten days after entry of the confirmation

order (because consummation is not executing on the order and is not a proceeding to enforce the order), I have heard lawyers suggest that it does. For the sake of clarity, I suggest that confirmation orders be included."

As is my usual practice, while proposing the substantive change to Rule 7062, I also made suggestions for stylistic improvements. The draft that I recommended to the Committee in the agenda materials was as follows:

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. The following orders are additional exceptions to Rule 62(a):

(a) An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code~~,~~ ;

(b) an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363~~,~~ ;

(c) an order authorizing ~~the trustee to obtain~~ the obtaining of credit ~~pursuant to~~ under § 364~~, and~~ ;

(d) an order authorizing the assumption or assignment of an executory contract or unexpired lease ~~pursuant to~~ under § 365; and

(e) an order confirming a plan under §§ 943, 1129, 1225, or 1325 of the Code ~~shall be additional exceptions to Rule 62(a)~~.

COMMITTEE NOTE

This rule is amended to include as an additional exception to Rule 62(a) an order confirming a plan. A plan may be consummated and a confirmation order may be enforced -- with the assistance of the court if necessary -- without the need to wait ten days under Rule 62(a).

The other amendments to this rule are stylistic.

At the Lafayette meeting, there was little discussion of the suggested change regarding confirmation orders. Rather, the discussion focused primarily on two new suggestions for amendments that were not raised before the meeting and were not in the agenda materials. My recollection and understanding is that these two amendments were offered to make the rule clearer and easier to apply, and that they were not intended to make any substantive changes. These amendments (shown below in bold) added the words "the automatic stay under" on line 3, and added subdivision (f) on line 18 of the following draft. The following amendments were approved by the Advisory Committee by a 7-4 vote.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. The following orders are additional exceptions to **the automatic stay under** Rule 62(a):

(a) An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code;

(b) an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363~~,~~ ;

(c) an order authorizing ~~the trustee to obtain~~ the obtaining of credit ~~pursuant to~~ under § 364~~, and~~ ;

(d) an order authorizing the assumption or assignment of an executory contract or unexpired lease ~~pursuant to~~ under § 365; and

(e) an order confirming a plan under §§ 943, 1129, 1225, or 1325 of the Code; **and** ~~shall be additional exceptions to Rule 62(a)~~.

(f) any other order as the court may direct.

COMMITTEE NOTE

This rule is amended to include as an additional exception to Rule 62(a) an order confirming a plan. A plan may be consummated and a confirmation order may be enforced -- with the assistance of the court if necessary -- without the need to wait ten days under Rule 62(a).

The other amendments to this rule are stylistic.

After the meeting, I realized for the first time that the two amendments made for the purpose of clarity would or could have far-reaching substantive effects that were never contemplated or intended by the Advisory Committee. I explained my concerns in my April 25th letter to Judge Paul Mannes, which was circulated to the Committee together with his letter of April 28th. It was determined that the proposed amendments to Rule

7062 would be brought back to the Committee for further consideration at the September 1995 meeting.

The addition of "automatic stay" to clarify the rule.

Although Civil Rule 62(a) (see attached copy) provides for a 10-day automatic stay of enforcement of judgments, it also provides that "[unless] otherwise ordered by the court, an interlocutory order or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal." This sentence is significant for two independent reasons. First, as was discussed at the meeting, the 10-day automatic stay does not apply to these "exceptions." But the second effect of this sentence (which we did not discuss) is that the listed types of orders may not be stayed "as of right" by the posting of a supersedeas bond under Rule 62(d).

Civil Rule 62(d) says that "the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule." Therefore, a judgment in an action for an injunction (1) is not "automatically" stayed for 10-days under Rule 62(a), and (2) may not be stayed merely by filing a bond under Rule 62(d). Such a judgment may be stayed only by the exercise of the court's discretion. See Rule 62(c).

Under current Rule 7062, certain orders in bankruptcy (such as orders authorizing the sale of property) "shall be additional exceptions to Rule 62(a)." That means that these listed orders (1) are not subject to the 10-day automatic stay, and (2) may not be stayed merely by posting a bond. Any doubt that the exceptions listed in Rule 7062 go beyond the 10-day automatic stay is removed when you consider the original Committee Note to Rule 7062 which states:

> "The additional exceptions set forth in this rule make applicable to those matters the consequences contained in Rule 62(c) and (d) with respect to orders in actions for injunctions."

Nonetheless, for the purpose of "clarifying" the rule, Rule 7062 was changed at the Lafayette meeting so that the listed orders will be "exceptions to the automatic stay under Rule 62(a)." I recall that the proponent of this change indicated that it would make it clear that the only significance of these exceptions is that they are not subject to the 10-day stay. I believe that the Committee did not focus on the applicability of the stay "as of right" by filing a supersedeas bond under Rule 62(d), or on the original committee note to Rule 7062. I know that I did not focus on them and that nobody mentioned them at the meeting.

I now think that the proposed amendment -- adding "the automatic stay under" -- may be taken by courts to mean that the only effect of the list of orders in Rule 7062 is that these orders will not be subject to the 10-day automatic stay, but that

they can be stayed merely by filing a bond. This will be a substantial change in the Rule and one that probably does not make sense. If the Committee does not want orders granting relief from the automatic stay or orders authorizing sales of property to be stayed for ten days, does it want to permit parties to obtain a stay "as of right" by filing a bond? Although I personally think the answer should be "no", perhaps members of the Committee may disagree. In any event, I suggest that the Committee consider this matter further at the next meeting.

Adding "any order as directed by the court" as an additional exception

The Committee also approved a recommendation made at the meeting that the following be added to the list of exceptions in Rule 62(a): "any order as directed by the court." My recollection and notes indicate that the purpose of this change was to clarify that the court may except other types of orders that may arise in contested matters -- such as an order to appoint a chapter 11 trustee. This was not intended to reflect a change in substance, but was designed to avoid the cumbersome indirect route of having to go to Rule 9014 to find out that the court may order that Rule 7062 does not apply in a particular contested matter. It was suggested that Rule 7062 itself should indicate that the court may so order.

It was also expressed at the meeting that Rule 62 itself gives the court discretion to order that the automatic 10-day

stay shall not apply in a particular matter, and that Rule 7062 should explicitly give the court the same discretion. Therefore, the proposal to add the new subdivision (f) to Rule 7062 was intended to (1) avoid the indirect route of going to Rule 9014 to find that the court may order that Rule 7062 not apply in a contested matter, and (2) to clarify (consistent with Rule 62) that the court may order that Rule 7062 be inapplicable in a particular matter.

However, a careful review of Rule 62 reveals that it does not give the court discretion to order that the automatic 10-day stay not apply in a particular case. Rather, Rule 62(a) gives the court discretion to order that the automatic stay shall apply to orders that would otherwise be excepted, such as an order in an action for an injunction. To confirm my reading of the rule, I discussed it with Dean Edward Cooper, Reporter to the Civil Rules Committee, and he agreed with my reading.

In contrast to the intention of the Committee that the proposed new subdivision (f) of Rule 7062 would only clarify existing law, this amendment would permit the court to order that the 10-day stay is not applicable in an adversary proceeding. This is a significant change from current law and would allow, for the first time, a court to order that immediate execution could occur with respect to a money judgment rendered in a preference, fraudulent conveyance, or even an ordinary breach of contract action against a third party. Since a district court

has no such discretion in an action for a money judgment in a non-bankruptcy civil case, it would be difficult to justify giving bankruptcy courts this discretion in an adversary proceeding (especially a noncore proceeding).

Moreover, if this change is made so that the court would have discretion to order the 10-day automatic stay inapplicable in an adversary proceeding, the Committee also may want to consider the question of whether the court also should have discretion to order that the stay "as of right" in Rule 62(d) be inapplicable in the adversary proceeding. This question was neither raised nor discussed at the meeting.[1]

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[1] To make a complex matter even more complex, which I hesitate to do, there is uncertainty as to whether Bankruptcy Rule 8005 gives the bankruptcy judge discretion to order that the stay as of right in Rule 62(d) shall be inapplicable in a particular case. Rule 8005 (Stay Pending Appeal) provides, among other things, that:

> "Notwithstanding Rule 7062 but subject to the power of the district court or bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest."

In In re Trans World Airlines, Inc., 18 F3d 208 (3rd Cir. 1994), the Court of Appeals was faced with the issue of "[w]hether Bankruptcy Rule 8005 endows the lower courts with sufficient discretion to depart from the 'stay as of right' concept of Rule 62 of the Federal Rules of Civil Procedure in order to 'protect the rights of all parties in interest' during the pendency of an appeal." The court did not decide this issue because it was neither discussed nor decided by the district court, and was not necessary to decide in this appeal. See also In re Dakota Rail, Inc., 111 B.R. 818, 820 (Bankr. D. Minn. 1990) (Rule 62(d) "mandates that a stay must be granted if the appellant files a bond sufficient to protect the interests of adverse parties. Bankruptcy Rule 8005, however, grants this Court discretion to grant or deny

In sum, I now think that the Committee unintentionally made two significant substantive changes to Rule 7062 that may, for the first time, (1) give an appellant the right to obtain a stay of certain orders merely by filing a supersedeas bond under Civil Rule 62(d) (including an order granting relief from the stay under section 362, an order authorizing the sale of property, an order authorizing the use of cash collateral, etc.), and (2) give the court discretion to eliminate the automatic 10-day stay under Civil Rule 62(a) in adversary proceedings.

A recent example of confusion in applying Rule 7062 to confirmation orders

The relationship of the exceptions stated in Rule 62(a) and the application of Rule 62(d) in a bankruptcy case, and the difficulty and confusion in applying Rule 62 to a chapter 11 confirmation order, were demonstrated in the recent case of In re Capital West Investors, 180 B.R. 240 (N.D. Cal. 1995) (copy attached), which was decided only two weeks after the Lafayette meeting.

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a stay, notwithstanding the mandate contained in Rule 62(d))"; The court continued in a footnote that "I need not decide whether the requirement of a bond imposed by Rule 62 is abrogated by Bankruptcy Rule 8005."). Compare Collier on Bankruptcy, ¶ 8005.03 (15th ed.) ("When Rules 8005 and 7062 are read together, the procedure they mandate is this: an appellant who desires the stay ... should present to the bankruptcy court a supersedeas bond in an amount adequate for the protection of the appellee; an appellant who desires the stay of a judgment that is not stayable as of right ... should present to the bankruptcy court an application to grant the stay, stating reasons why the court should exercise its discretion to grant the stay.").

The United States (on behalf of HUD), which insured a deed of trust held by a mortgagee on the debtor's real estate, sought a stay pending appeal of an order confirming the debtor's chapter 11 plan. A discretionary stay was denied, but HUD argued that it was entitled to a stay as a matter of right under Civil Rule 62(d) (if a federal agency is entitled to a stay as of right under Rule 62(d), it would not have to actually post a bond because of Rule 62(e)). The district court followed the holding of those courts that have held that Rule 62(d) applies only to money judgments or its equivalent, although several courts have indicated otherwise.

> "When an appeal is taken from a judgment that is not a money judgment or an exception of Rule 62(a) within the strict meaning of those terms, but is comparable to one or the other of these judgments, most of the few courts that have addressed the issue appear (for purposes of Rule 62) to treat that judgment like the judgment to which it is comparable.
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> * * *
>
> In the instant case, HUD seeks to appeal a bankruptcy court order confirming a Chapter 11 plan of reorganization. By its terms, such an order is neither a money judgment, nor a judgment in an action for an injunction or [one of the other exceptions listed in Rule 62(a)]. The question then becomes whether an order confirming a plan of reorganization is comparable to any of these orders for purposes of Rule 62(d).
>
> An order confirming a plan of reorganization in bankruptcy is not necessarily of a particular kind. As plans of reorganizations in bankruptcy differ, so too do the orders confirming those plans. Such an order may confirm provisions of the plan that require a party to the bankruptcy to pay a sum certain and thus approximate a money judgment; it may confirm provisions that require a party to do or refrain from doing a particular act and thus approximate an injunction; or it may confirm provisions analogous neither to money judgments nor injunctions.

> Where, like the typical order of confirmation in bankruptcy, an order makes multiple provisions, e.g., for both injunctive and monetary relief, the Court may (or may be required to) stay execution of the order as to some of its provisions but not others. . . Thus, a portion of the Order comparable to a money judgment may be subject to a stay as a matter of right, whereas a portion comparable to an injunction may not be subject to a stay at all.
>
> Whatever the merits of such an approach in the ordinary case, separate analysis of the components of an order is inappropriate in analyzing a bankruptcy order confirming a plan of reorganization. Unlike the components of a garden-variety order, the components of an order confirming a plan of reorganization are interdependent....
>
> Whether or not more like one than the other, an order confirming a plan of reorganization, taken as an aggregate of its components, however multi-varied, is not comparable to a money judgment or a judgment in an action for an injunction or [the other exceptions listed in Rule 62(a)]. An order confirming a Chapter 11 plan simply represents the court's determination that the plan passes muster under 11 U.S.C. § 1129, e.g., that the plan is fair and equitable, does not unfairly discriminate, and is not proposed by any means forbidden by law."

180 B.R. at 243-245.

The district court concluded that, since a confirmation order is not a money judgment, Rule 62(d) was inapplicable and that HUD was not entitled to a stay as of right. It is important to emphasize that it is not clear that all courts would reach the same result. See In re Rape, 100 B.R. 288 (Bankr. W.D.N.C. 1989), holding without analysis that the U.S. is entitled to a stay as a matter of right under Rule 62(d) pending appeal of an order confirming a chapter 12 plan.

If the only intended (as opposed to inadvertent) substantive amendment to Rule 7062 approved in Lafayette (i.e., adding confirmation orders to the list of exceptions) was in effect,

Rule 62(d) would clearly be inapplicable to confirmation orders and the court in Capital West Investors would have reached the same result without having to struggle with categorizing such an order. If the other amendments to Rule 7062 (adding the words "the automatic stay under" Rule 62(a) -- which seems to limit the Rule 7062 exceptions to the 10-day stay) become effective, courts might have to struggle to categorize (either as a money judgment, injunction, or something else) orders granting relief from a stay to permit foreclosure, orders authorizing the sale of property, and all the other orders now listed as exceptions in Rule 7062.

Judge Kressel's approach

In a letter to Judge Mannes, dated May 3, 1995, agreeing with the recommendation to bring Rule 7062 back for further consideration at the September meeting, Judge Kressel wrote:

> "I have always been troubled by the application of Fed. R. Civ. P. 62 to the motion practice in the bankruptcy court. It appears to me that most of the problems caused by the current rule and the problems that Alan points out that are caused by the amendments proposed in Lafayette arise, not in the context of an adversary proceeding, but in the context of a bankruptcy case. I think that if we thought about it, application of Rule 62, in other than adversary proceedings, makes no sense. I would like to discuss at the meeting and, if you think it appropriate, perhaps Alan could comment for us on the possibility of simply amending Rule 9014 to delete reference to Rule 7062 and deleting all of Rule 7062 other than the first sentence."

I think that Judge Kressel's approach is worthy of serious consideration. In fact, it may be the logical next step in a trend that began in 1983.

The original Bankruptcy Rules, promulgated in 1973,

contained Rule 762 that provided that, unless the court otherwise directed, Civil Rule 62 applied in adversary proceedings (without any exceptions). Rule 914 provided that Rule 762 applied in contested matters and also provided that, for the purposes of Rule 914, any reference to "adversary proceedings" in Part VII "should be read as a reference to contested matters." Therefore, it was clear that Civil Rule 62 applied to all contested matters unless the court directed otherwise.

When new rules were promulgated in 1983, Rule 7062, applicable in contested matters through Rule 9014 unless the court directs otherwise, was virtually identical to the old Rule 762, except that it included new exceptions for orders granting relief from the automatic stay, orders authorizing or prohibiting the use of cash collateral or the use of property of the estate, and orders authorizing the trustee to obtain credit. That is, for the first time, several types of orders granted in contested matters were excluded from Rule 62. In 1991, Rule 7062 was amended further by adding as additional exceptions an order authorizing or prohibiting the sale or lease of property of the estate, and an order authorizing the assumption or assignment of an executory contract or unexpired lease. These additional exceptions also relate only to contested matters, rather than adversary proceedings. Apparently, the list of contested matters excluded from Rule 62 keeps growing. None of the exceptions listed in Rule 7062 relate to adversary proceedings.

At the Lafayette meeting, the Advisory Committee voted to add to the Rule 62(a) exceptions another order that is obtainable in a contested matter -- an order confirming a plan. Perhaps the next step is to exclude all orders issued in contested matters from the scope of Rule 62, unless the court orders otherwise.

I should also add that excepting all contested matters from the scope of Rule 62 may not be such a giant step. First, as discussed above, a number of orders granted in contested matters (such as relief from stay orders) are already excepted from Rule 62. Second, many orders granted in contested matters, such as an order appointing a trustee or examiner, are in the nature of an injunction and probably would fall within the exception for injunctive actions now contained in Rule 62(a). Finally, Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

One benefit that would derive from excluding contested matters from Rule 7062 is that it would add certainty to a murky area that should have bright lines. Lawyers should not have to guess as to how a court would characterize (i.e., injunction or something else) a particular order in a contested matter to determine whether the ten-day automatic stay in Rule 62(a) applies.[2]

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[2] An example of this uncertainty, and the litigation it causes, is the TWA case, 18 F.3d 208 (3rd Cir. 1994). Two federal agencies (the IRS and the EPA) had prepetition claims against TWA

I suggest that the Committee consider the following amendments to Rule 7062 and Rule 9014 as an alternative to my

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aggregating $20 million, and TWA had a $8.36 million judgment against a different federal agency (the GSA) that it was awarded postpetition in the district court in D.C. The Federal Circuit ordered the government to pay the $8.36 million to the registry of the bankruptcy court in Delaware (rather than paying it directly to TWA) which would allow the government to pursue its setoff defense before the bankruptcy court releases these funds. The government moved for relief from the automatic stay under § 362 of the Code to exercise its right to set off the $8.36 million against its $20 million claim against TWA, and TWA filed a cross motion seeking payment of the $8.36 million on the grounds that the government did not have the right of setoff.

The bankruptcy judge denied the government's motion on the grounds that interagency setoffs lack mutuality required for setoffs under the Code, and ordered the immediate release of the $8.36 million to TWA. One issue before the bankruptcy court at a hearing was whether the 10-day stay under Rule 62(a) applied. Characterizing the order to release the funds as a "mandatory injunction," TWA argued that Rule 7062, and therefore the 10-day stay under Rule 62(a), did not apply. The bankruptcy judge agreed that the portion of the order directing the clerk to release the funds to TWA was a "mandatory injunction." Although injunctions are not stayed under Rule 62(a), the bankruptcy judge held that the 10-day stay applied nonetheless, explaining:

> "'[Rule] 7062(a), which brings into play 62(a) of the Federal Rules of Civil Procedure, poses a more difficult question. In effect the Court by virtue of having the motions for relief from stay and a cross motion for the payment of the funds and the necessary orders has what amounts to dual orders and one is a question of preserving the issue of whether the government is entitled to set off and the other is a mandatory injunction directing the clerk of the court to release the funds immediately to TWA, which is in accordance with the original order of the district court for the circuit.
>
> I'm going to find that the 7062(a) injunction is in effect for the ten-day period subsequent to the entry of the court's order....'"

18 F.3d at 212. On appeal, the district court disagreed with the bankruptcy judge's characterization of the portion of the order to release the funds as a mandatory injunction and held it was a money judgment.

original suggestion made in Lafayette (i.e., adding confirmation orders to the list of exceptions in Rule 7062):

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule as unnecessary because of the amendment to Rule 9014 that renders this rule inapplicable in contested matters unless the court otherwise directs.

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party

against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062~~, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

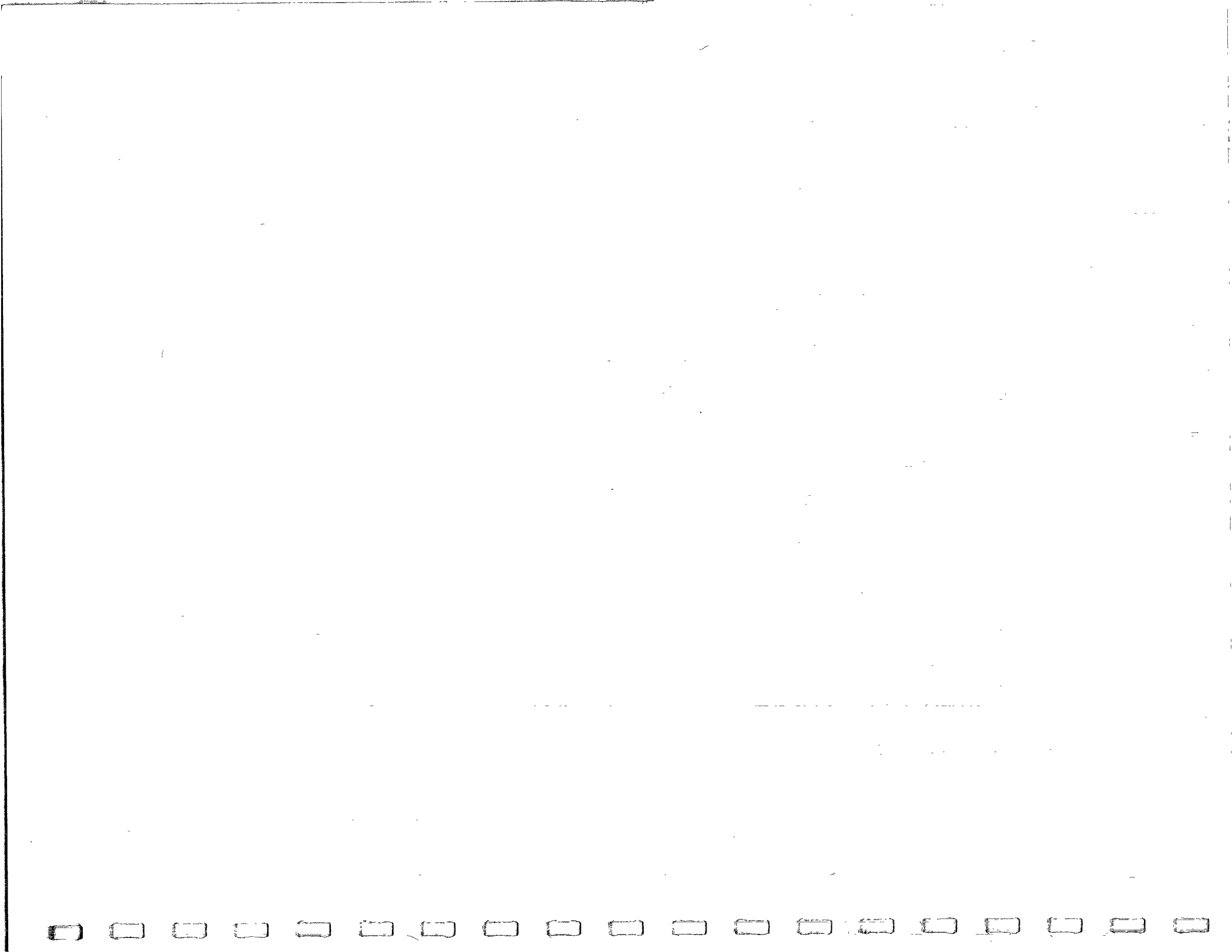
COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the

enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter. In addition, Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.



sentative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of Proceedings To Enforce a Judgment

(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) STAY IN FAVOR OF THE UNITED STATES OR AGENCY THEREOF. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) STAY ACCORDING TO STATE LAW. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) STAY OF JUDGMENT AS TO MULTIPLE CLAIMS OR MULTIPLE PARTIES. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

In re CAPITAL WEST INVESTORS, a California Limited Partnership, Debtor.

No. C-95-11MISC EFL.

United States District Court,
N.D. California.

April 12, 1995.

Confirmation was held on deed of trust grantor's proposed Chapter 11 plan. The United States Bankruptcy Court for the Northern District of California entered order confirming plan, and denying reconsideration, 178 B.R. 824, and governmental agency guarantying debtor's obligations under deed of trust note appealed. On denial of agency's motion for stay pending appeal, agency appealed. The District Court, Lynch, J., held that order confirming Chapter 11 plan was not "money judgment" or its "equivalent," execution of which would be stayed as matter of right on posting of supersedeas bond.

So ordered.

[1] FEDERAL COURTS ⇐ 687
170Bk687
Generally, upon posting of supersedeas bond, appellant is entitled, as matter of right, to stay of money judgment or its equivalent entered by court below. Fed.Rules Civ.Proc.Rule 62(d), 28 U.S.C.A.

[2] BANKRUPTCY ⇐ 3776.5(2)
51k3776.5(2)
Order confirming Chapter 11 plan which altered debtor's obligations under deed of trust note was not "money judgment" or its "equivalent," enforcement of which would be stayed as matter of right upon appellant's posting of supersedeas bond. Fed.Rules Civ.Proc.Rule 62(d), 28 U.S.C.A.

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

[2] BANKRUPTCY ⇐ 3776.5(3)
51k3776.5(3)
Order confirming Chapter 11 plan which altered debtor's obligations under deed of trust note was not "money judgment" or its "equivalent," enforcement of which would be stayed as matter of right upon appellant's posting of supersedeas bond. Fed.Rules Civ.Proc.Rule 62(d), 28 U.S.C.A.

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

*241 J. Christopher Kohn, U.S. Dept. of Justice, Commercial Litigation Branch, Civ. Div., Washington, DC, for U.S.

Craig M. Prim, Murray & Murray, Palo Alto, CA, for debtor.

ORDER DENYING STAY PENDING APPEAL

LYNCH, District Judge.

**1 The United States of America, on behalf of the Department of Housing and Urban Development ("HUD"), seeks a stay pending appeal of a bankruptcy court order confirming the Debtor's Plan of Reorganization under Chapter 11 of the Bankruptcy Code. At a March 24 hearing on the matter, the Court denied the United States' motion for a discretionary stay, and submitted the question whether the United States is entitled to a stay as a matter of right. Whether an agency of the United States is entitled to such a stay from an order of the kind at bar is an issue of first impression in the Ninth Circuit. For reasons set out below, the Court holds that HUD, as an agency of the United States, is not entitled to a stay as a matter of right.

FACTS

Capital West Investors, the Debtor, is a single asset limited partnership owning a multifamily housing project in Fremont, California (the "Project"). Riggs National Bank of Washington, Trustee ("Riggs"), whose interest in this matter is represented by its servicing agent, Reilly ("Reilly"), holds a first Deed of Trust Note on the Project in the amount of approximately $2,600,000. [FN1] HUD insures Reilly's Deed of Trust pursuant to § 221(d)(4) of the National Housing Act.

FN1. Because Reilly represents Riggs, Riggs' claim is referred to as Reilly's.

The bankruptcy court issued a Memorandum Opinion on July 23, 1994, holding that the Debtor's Plan of Reorganization ("the "Plan") was

confirmable. On October 21, 1994, that court entered an order confirming the Plan (the "Plan") over Reilly's objection. HUD filed a Notice of Appeal in the bankruptcy court on February 23, 1995, and elected to pursue its appeal in district court, rather than before the Bankruptcy Appellate Panel.

HUD appears to appeal those portions that confirm Plan provisions (1) altering the first Deed of Trust Note on the Project to eliminate the requirements that the Debtor (a) pay mortgage insurance and (b) service junior deeds from cash surplus only; (2) excising language that permits HUD, in the event it acquires title to the Project, to terminate the liens of junior mortgage holders; and (3) entitling Reilly to a lesser rate of interest (albeit the same rate as on its pre-existing Note) on its Note than the rate provided the holders of other Deed of Trust Notes.

DISCUSSION

[1][2] According to the United States, HUD is entitled to a stay as a matter of right under Federal Rule of Civil Procedure 62, because the Order directs the payment of money. According to the Debtor, HUD is not entitled to a stay as a matter of right pending appeal of the Order, because HUD lacks standing to appeal the Order and because an appellant is not entitled to a stay of right from an order confirming an plan of reorganization in bankruptcy. [FN2] The Court holds that HUD is not entitled to a stay of right, because that entitlement has been limited to an appeal from a money judgment or the equivalent (upon posting of a supersedeas bond), and an order confirming a plan of reorganization is not a money judgment or the equivalent within the meaning of Rule 62(d). [FN3]

FN2. Because the Court holds that HUD is not entitled to a stay as a matter of right under Rule 62, the Court need not decide whether HUD has standing to appeal the bankruptcy court's order.

FN3. In seeking a stay pursuant to Federal Rule of Procedure 62(d), HUD, as an agency of the United States, stands in the same position as any other appellant, except that it need not post a supersedeas bond according to Rule 62(e).

**2 Analysis begins with Federal Rule of Civil Procedure 62(d), which governs stays on appeal. The rule provides that "[w]hen an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject *242 to the exceptions contained in subdivision (a) of this rule. [FN4] The exceptions of Rule 62(a) are "an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters of patent," which orders may only be stayed by order of the court. [FN5]

FN4. In its entirety, Rule 62(d) provides that [w]hen an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

FN5. Rule 62(a) provides, in its entirety, that [e]xcept as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters of patent, shall not be stayed during the period after its entry and until and appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

Although the language of Rule 62(d) is not unambiguous, the better view of the rule's plain meaning is that when an appeal is taken the appellant, by giving a supersedeas bond, is entitled to a stay as a matter of right (subject to the exceptions of Rule 62(a)). While Rule 62(d) provides that the appellant may obtain a stay upon posting a supersedeas bond, the rule enumerates the conditions on which such a stay issues--to wit, upon giving a supersedeas bond and subject to the exceptions of Rule 62(a). Thus, by its terms, Rule 62(d) entitles the appellant to a stay as a matter of right upon satisfaction of these conditions. [FN6] See 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2905, at 326

(1973) (hereinafter "Wright & Miller") (indicating that "[t]he stay issues as a matter of right in cases within the rule"); 7 James W. Moore & Jo D. Lucas, Moore's Federal Practice § 62.06, at 62-31 (2d ed.1990) (hereinafter "Moore") (noting that "[b]y doing all the acts necessary to perfect an appeal and by giving a proper supersedeas bond an appellant may obtain a stay as of right"). Expressio unius est exclusio alterius: the expression of one thing is the exclusion of another.

FN6. Where Rule 62 provides for a discretionary (as opposed to a mandatory) stay, it does so in unmistakable terms: "the court in its discretion" may suspend, modify, restore, or grant an injunction." Fed.R.Civ.P. 62(c).

Most of the cases interpreting Rule 62(d) to entitle an appellant to a stay as a matter of right upon posting a supersedeas bond appear to involve appeals taken from money judgments (or, as discussed below, the equivalent). See American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 87 S.Ct. 1, 3, 17 L.Ed.2d 37 (1966) (Harlan, J., as Circuit Justice); Hoban v. Washington Metropolitan Area Transit Authority, 841 F.2d 1157 (D.C.Cir.1988); Clark Co. v. Hogan, 296 F.Supp. 407 (S.D.N.Y.1969); Dewey v. Reynolds Metals Company, 304 F.Supp. 1116 (D.C. Mich.1969), rev'd on other grounds, 429 F.2d 324 (6th Cir.1970). [FN7]

FN7. Cf. Federal Trade Commission v. TRW, 628 F.2d 207, 210 n. 3 (D.C.Cir.1980) (indicating in dicta that "it is clear that stays of district court enforcement orders [at issue was an order enforcing a subpoena duces tecum issued by the FTC] should be governed by the discretionary standards of Rule 62(c), and should not obtain as a matter of right pursuant to Rule 62(d)"); United States v. United States Fishing Vessel Maylin, 130 F.R.D. 684, 686 (S.D.Fla.1990) (noting that the automatic stay refers to money judgments and holding that the government is not entitled to a stay of right pending appeal of an order releasing a seized vessel).

**3 The Seventh and Ninth Circuits have given clear effect to the limitation (of the stay of right to appeals from money judgments) that the above-cited cases suggest. In Donovan v. Fall River Foundry Co., 696 F.2d 524 (7th Cir.1982), the Seventh Circuit considered whether a party appealing a government health inspection order is entitled to a stay as a matter of right under Rule 62(d). In holding that an appellant is not entitled to a stay as a matter of right pending appeal of such an order, the court indicated that "had the framers thought about the point they would have limited the right to an automatic *243 stay to cases where the judgment being appealed from was a money judgment." Id. at 526.

The Ninth Circuit confronted a similar issue in National Labor Relations Board v. Westphal, 859 F.2d 818 (9th Cir.1988). The question in Westphal was whether a party appealing an order directing compliance with NLRB subpoenas is entitled to a stay of the order as a matter of right under Rule 62. The Ninth Circuit expressly adopted the reasoning of the Donovan court in holding that an appellant is not entitled to a stay of right pending appeal an such an order of enforcement. [FN8] Id. at 819; see 16 Wright, Miller & Cooper, § 3954, n. 1, at 663 (1994 Supplement) (indicating that "Rule 62(d) provides an automatic stay upon filing a supersedeas bond only in cases of a money judgment"). [FN9]

FN8. This result comports with the rule of statutory construction that the plain language of a law governs unless its literal application produces "a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). Were the stay of right in Rule 62(d) not limited to money judgments, an appellant would be entitled to such a stay pending appeal of orders—not specifically excepted from the rule—for which a bond would be insufficient to preserve the status quo.

FN9. But see Becker v. United States, 451 U.S. 1306, 101 S.Ct. 3161, 68 L.Ed.2d 828 (1981) (Rehnquist, J., as Circuit Justice) (indicating in dicta that 62(d) provides for an automatic stay and that an order enforcing an IRS summons falls outside the exceptions of 62(d), implying that the automatic stay is not limited to money judgments); United States v. Neve, 80 F.R.D. 461 (E.D.La.1978) (holding that an order to enforce an IRS summons comes within 62(d) and (apparently) that 62(d) provides for a stay as of right pending appeal of orders not excepted from the rule). In addition to relying on Becker and Neve, HUD also

relies on Metz v. United States of America, 130 F.R.D. 458 (D.Kan.1990), In re Olson, Civ. No. 86-4138, 1990 WL 5725 (D.Kan.1990), J. Perez & Cia., Inc. v. United States, 578 F.Supp. 1318 (D.P.R.1984), among other cases, for the proposition that the Rule 62(d) stay of right it not limited money judgments. While these cases contain language arguably supportive of that proposition, their actual holdings extend the availability of the stay of right no further than appeals from orders comparable to money judgments. See infra note 11.

When an appeal is taken from a judgment that is not a money judgment or an exception of Rule 62(a) within the strict meaning of those terms, but is comparable to one or the other of these judgments, most of the few courts that have addressed the issue appear (for purposes for Rule 62) to treat that judgment like the judgment to which it is comparable. In Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th Cir.1992), the Fifth Circuit found no meaningful distinction between a money judgment for declaratory relief and a money judgment, and held that a money judgment in the form of declaratory judgment constitutes a money judgment for purposes of Rule 62(d). Likewise, in Donovan, the Seventh Circuit analogized an OSHA inspection order to an injunctive type remedy, and held it to be within the exceptions of Rule 62(a)). 696 F.2d at 526-27. [FN10] See also United States v. Mansion House Center Redevelopment Co., 682 F.Supp. 446, 450 (E.D.Mo.1988) (treating a mortgage foreclosure judgment like a money judgment for purposes of Rule 62(d)) [FN11]; but see Becker v. United States, 451 U.S. 1306, 101 S.Ct. 3161, 68 L.Ed.2d 828 (1981) (Rehnquist, J., as Circuit Justice) (declining in dicta to equate an order enforcing an IRS summons with a mandatory injunction for purposes of 62(d).

FN10. Despite the Westphal court's citation to Donovan, the Ninth Circuit's approach under Rule 62(d) to stays from orders comparable to money judgments or exceptions of Rule 62(a) is not altogether clear. The Westphal decision is ambiguous as to whether the court held that a party appealing an order directing compliance with NLRB subpoenas is entitled to a stay of the order of right because an order directing compliance with NLRB subpoenas is analogous to the orders excepted from Rule 62(d) per Rule 62(a), or because the entitlement to a stay under Rule 62(d) applies solely to money judgments or the equivalent and an order directing compliance with NLRB subpoenas is neither.

FN11. See also Metz v. United States of America, 130 F.R.D. 458 (D.Kan.1990) (granting stay of right pending appeal of judgment holding real property subject to foreclosure); In re Olson, Civ. No. 86-4138, 1990 WL 5725, *1 (D.Kan.1990) (same regarding default judgment excepting from dischargeability a $176,026.15 debt); cf. J. Perez & Cia., Inc. v. United States, 578 F.Supp. 1318 (D.P.R.1984) (affirming order of forfeiture of $12,500 supersedeas bond).

In the instant case, HUD seeks to appeal a bankruptcy court order confirming a Chapter *244 11 plan of reorganization. By its terms, such a order is neither a money judgment, nor a judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters of patent. The question then becomes whether an order confirming a plan of reorganization is comparable to any of these orders for purposes for Rule 62(d).

**4 An order confirming a plan of reorganization in bankruptcy is not necessarily of a particular kind. As plans of reorganization in bankruptcy differ, so too do the orders confirming those plans. Such an order may confirm provisions of the plan that require a party to the bankruptcy to pay a sum certain and thus approximate a money judgment; it may confirm provisions that require a party to do or refrain from doing a particular act and thus approximate an injunction; or it may confirm provisions analogous neither to money judgments nor injunctions.

Where, like the typical order of confirmation in bankruptcy, an order makes multiple provisions, e.g., for both injunctive and monetary relief, the Court may (or may be required to) stay execution of the order as to some of its provisions but not others. See 11 Wright & Miller § 2905, at 325-26 (indicating that "[i]f a judgment includes both a money award and the grant or denial of an injunction, a supersedeas stays the money award but not that the part of the judgment that deals with injunctive relief"). Thus, a portion of the Order comparable to a money judgment may be subject to

a stay as a matter of right, whereas a portion comparable to an injunction may not be subject to a stay at all.

Whatever the merits of such an approach in the ordinary case, separate analysis of the components of an order is inappropriate in analyzing a bankruptcy order confirming a plan of reorganization. [FN12] Unlike the components of a garden-variety order, the components of an order confirming a plan of reorganization are interdependent. While execution on one component of a garden-variety order can generally be stayed pending appeal without affecting those components that are not stayed, the same is not true of an order confirming a plan of reorganization in bankruptcy.

FN12. Even if the Court were to separately analyze the portions of the Order on appeal, the same ultimate result would obtain. The portions of the Order that HUD appears to appeal confirm Plan provisions that (1) alter the first Deed of Trust Note on the Project to eliminate the requirements that the Debtor (a) pay mortgage insurance and (b) service junior deeds from cash surplus only; (2) excise language that permits HUD, in the event it acquires title to the Project, to terminate the liens of junior mortgage holders; and (3) entitle Reilly to a lesser rate of interest on its Note than the rate provided the holders of other Deed of Trust Notes. Except in senses too remote to recognize for purposes of Rule 62(d) analysis, as to these provisions, the Order is not comparable to a money judgment or to the orders within the exceptions of Rule 62(a). The provisions subject to appeal do not, at least in the ordinary sense, award money or command action or inaction. Rather, they concern the terms of Deed of Trust Notes, more or less beneficial to the parties to the bankruptcy; they distribute rights, however contingent. Thus, analysis of the separate provisions of the Order yields the same result for purposes of determining the treatment of an order of confirmation under Rule 62(d) as does analysis of the Order as a whole.

Consider, for example, the situation where a court stays pending appeal the execution of an order of confirmation only as it relates to the debtor's obligation to pay one of several similarly situated creditors out of the same pool of the debtor's property. One creditor's gain is likely another's loss. If the appellant creditor is successful in enlarging the debtor's obligation to it on appeal, then satisfaction of that award likely entails a reduction of the debtor's obligations to the non-appealing creditors.

Whether or not more like the one than the other, an order confirming a plan of reorganization, taken as an aggregate of its components, however multi-varied, is not comparable to a money judgment or a judgment in an action for an injunction or receivership, or an order directing an accounting in an action for infringement of letters of patent. [FN13] An order *245 confirming a Chapter 11 plan simply represents the court's determination that the plan passes muster under 11 U.S.C. § 1129, e.g., that the plan is fair and equitable, does not unfairly discriminate, and is not proposed by any means forbidden by law.

FN13. But see In re Rape, 100 B.R. 288 (Bankr.W.D.N.C.1989) (holding without analysis that the United States is entitled to a stay as a matter of right without the necessity of posting a supersedeas bond pending appeal of a bankruptcy court's order confirming a chapter 12 plan).

Because the stay of right under Rule 62(d) has been limited to an appeal from a money judgment or its equivalent--which limitation the principles of stare decisis require this Court to follow--and because an order of confirmation is not a money judgment or the like, HUD is not entitled to a stay as a matter of right in appealing the bankruptcy court's order confirming the Plan. [FN14] The only stay available pending appeal of such an order is the discretionary stay which the Court has already denied. [FN15]

FN14. That Bankruptcy Rule 7062 suggests, and the Advisory Committee notes to the rule provide, that orders confirming plans of reorganization are not excepted from Rule 62(d) per Rule 62(a) do not compel a contrary result. Neither the rule nor the Advisory Committee notes expand the Westphal limitation (of the Rule 62(d) stay of right to money judgments) or determine that orders of conformation constitute money judgments for purposes of Rule 62.

FN15. Had the Rule 62(d) stay of right not been limited to appeals from money judgments or the equivalent, HUD would be entitled to a stay as

matter of right pending appeal of the Order. Because, subject to the exceptions of Rule 62(a), Rule the plain language of Rule 62(d) entitles a party appealing a judgment to a stay as a matter of right upon posting of a supersedeas bond, because the exceptions of Rule 62(d) do not include an order confirming a plan of reorganization, and because when the United States takes an appeal and obtains a stay, no bond is required, the United States or an agency thereof is entitled to a stay on appeal of the Order as a matter of right. But see C.H. Sanders Co., Inc. v. BHAP Housing Development Fund Co., Inc., 750 F.Supp. 67, 76 (E.D.N.Y.1990) (holding that "when the government files a notice of appeal it need not file a bond and that the notice in and of itself does not operate as a stay"); In re Westwood Plaza Apartments, Ltd., 150 B.R. 163 (Bankr.E.D.Tex.1993) (holding that Rules 62(d) and 62(e) should not be read together to entitle the United States to a stay as a matter of right upon giving a supersedeas bond).

CONCLUSION

**5 To summarize, subject to the exceptions of Rule 62(a), the language of Rule 62(d) entitles a party appealing a judgment to a stay as a matter of right upon posting of a supersedeas bond. However, the Rule 62(d) stay of right has been limited to appeals from money judgments or the equivalent (upon posting the same bond). An order confirming a plan of reorganization is not a money judgment. Therefore, in appealing the Order of confirmation, HUD is not entitled to a stay of right.

IT IS SO ORDERED.

END OF DOCUMENT

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

TO: Members of the Advisory Committee on Bankruptcy Rules
FROM: Kenneth N. Klee
RE: Fed. R. Bankr. P. 7062
DATE: August 2, 1995

Since I am uncertain whether I will be able to attend the September meeting of the Bankruptcy Rules Committee, I thought it would be useful to share a few thoughts regarding the urgent need to clarify the application of Rule 7062 to orders confirming a plan. Whatever is done on the merits, we should all be able to agree that the worst result is to create litigation and uncertainty through an ambiguous rule of procedure. Rule 7062 is such a rule. Nobody can be sure whether and to what extent the Rule applies to an order confirming a plan. The Committee should act to eliminate this uncertainty one way or the other.

In an effort to conform the Bankruptcy Rules to the Federal Rules of Civil Procedure, Rule 7062 largely incorporates Fed. R. Civ. Pro. 62 by reference. Rule 62(a) states in pertinent part that "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry." This rule was drafted to deal with the ordinary adversary judgment. It gives the defendant an opportunity to obtain a stay pending appeal before execution or enforcement. It does not fit well with an order confirming a plan for the reasons developed below.

Before discussing how Rule 7062 applies to an order confirming a plan, it is fair to address whether the Rule applies to such an order at all. One court that considered this issue with respect to a sale order concluded that the Rule didn't apply because there is no execution or enforcement of a sale order. See In re Ewell, 958 F.2d 276, 280 (9th Cir. 1992)(construing predecessor version of Rule 7062 that did not expressly exclude sale orders). To reach its conclusion, the court ignored the plain meaning of Federal Rule of Bankruptcy Procedure 9002(5) which requires the word "judgment", in the context of an incorporated federal rule of civil procedure, to include "any order appealable to an appellate court." Certainly a confirmation order is appealable. And in the context of a contested confirmation, Rule 7062 will apply to the contested matter unless the bankruptcy court orders otherwise. See Fed. R. Bankr. P. 9014.

Whether Rule 7062 applies to automatically stay a confirmation order is particularly important where the circumstances require, or the plan provides, for an effective date to occur before 10 days following entry of the confirmation order. For example, the plan may provide for a year end sale; or the plan may provide for new financing that may be obtained within a narrow window. Of course the clever lawyer can ask the court to waive application of Rule 7062. And if this is contained in the plan and disclosed in the disclosure statement, perhaps there is no problem. But for the ordinary lawyer, the rule creates an uncertainty that is a trap for the unwary. Moreover, when lawyers for the purchaser, seller, and financier are required to give opinion letters, the uncertainty created by the rule can add unnecessary transactions costs.

On balance, I am of the view that objecting parties ought to have a reasonable opportunity to obtain a stay of the confirmation order before it is enforced. But even if the Reporter and the Committee believe otherwise, this Committee should act to eliminate the ambiguity in Rule 7062. To maintain the status quo is to perpetuate an uncertainty that never should have existed in the first place.

As a postscript, I apologize for the rough form of this memo. Unfortunately, I have just returned from sabbatical, moved across the country, and not yet unpacked my boxes. Whether or not I attend the meeting in September, I am confident that you will consider these views as you deliberate changes to Rule 7062.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO RULES 3010, 3015(f) & 9014 SUGGESTED BY THE BANKRUPTCY JUDGES ADVISORY COMMITTEE

DATE: JULY 10, 1995

Agenda Item 6

The Subcommittee on Bankruptcy Procedures and Rules of the Bankruptcy Judges Advisory Committee (referred to in this memorandum as the "Judges Committee") has recommended amendments to Bankruptcy Rules 3010, 3015, and 9014. These recommendations are contained in the attached letter from Judge Judith Klaswick Fitzgerald dated November 30, 1994.

Rule 3010

The Judges Committee recommends that Rule 3010 be amended as follows:

Rule 3010. Small Dividends and Payments in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases

(a) CHAPTER 7 CASES. In a chapter 7 case no dividend in an amount less than ~~$5~~ $30 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Any dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds as provided in § 347 of the Code.

(b) CHAPTER 12 AND CHAPTER 13 CASES. In a chapter 12 or chapter 13 case no payment in an amount less than ~~$15~~ $45 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates ~~$15~~ $45. Any funds remaining shall be distributed with the final payment.

The $5 and $15 amounts in this rule have been the same since the rule was first promulgated in 1983. Adjustments for

inflation have not been made.

With respect to the $5 amount in Rule 3010(a), the Committee should be cautious about increasing it too much. This rule effectively deprives creditors of their small distributions in chapter 7 cases. Rule 3010(a) treats these small distributions as unclaimed funds, which means that they are paid into the court and, unless the creditor makes a specific demand for the funds, are held for five years after which they escheat to the Treasury. The original Committee Note to Rule 3010(a) indicates that its purpose is to eliminate the disproportionate expense and inconvenience incurred by the issuance of a dividend check of less than $5. "Creditors are more irritated than pleased to receive such small dividends, but the money is held subject to their specific request." Keeping in mind that the Rules Enabling Act (28 U.S.C. § 2075) provides that the Rules shall not "abridge, enlarge, or modify any substantive rights," I would be reluctant to increase the $5 amount too much ($30 may be too high).

The effect of Rule 3010(b) is not as far reaching as Rule 3010(a) because small dividends (less than $15) are merely deferred in chapter 12 and chapter 13 cases -- they are not treated as funds that escheat to the Treasury if unclaimed. The Committee should consider raising the $15 figure to enable chapter 12 and chapter 13 trustees to avoid the expense and inconvenience of preparing and mailing checks for small amounts.

The Judges Committee did not indicate how it arrived at the

specific dollar amounts in its recommendation. I am not aware of any available empirical data that could assist us in determining the most appropriate amounts for Rule 3010, or whether the amounts in the current rule have caused unreasonable expenses or any other significant problems. I also think that this issue may be of interest to the National Association of Bankruptcy Trustees and the Executive Office for the United States Trustee (United States trustees supervise trustees), as well as consumer credit organizations, but we have not had any input from them. If proposed increases in these dollar amounts are published for comment, it will be interesting to see whether these organizations and others respond.

Rule 3015(f)

Rule 3015 provides as follows:

> **Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case**
>
> * * * * *
>
> (f) *Objections to Confirmation; Determination of Good Faith in the Absence of an Objection.* An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan. An objection to confirmation is governed by Rule 9014. If no objection it timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

The Judges Committee recommends that Rule 3015(f) be amended to set a deadline for filing objections to confirmation "so the

debtor will be on notice and delays in confirmation proceedings can be minimized." Specifically, the recommendation is that an objection to confirmation of a chapter 13 plan be filed and served on the specified entities two days before the hearing on confirmation unless otherwise ordered by the court. Judge Fitzgerald's letter indicates that the two-day period should be made applicable to those districts which conduct § 341 meetings and plan hearings on the same or succeeding days. A longer time could be required in districts that hold confirmation hearings later in the chapter 13 process.

Before the 1993 rule amendments, Rule 3020 governed objections to confirmation in cases under every chapter. It provided that an objection must be served and filed "within a time fixed by the court." In 1993, Rule 3020 was amended to apply in chapter 9 and chapter 11 cases only, and Rule 3015(f) was added to apply in chapter 12 and chapter 13 cases. These 1993 amendments were part of a larger package of amendments dealing with chapter 13 cases.

Prior to the 1993 rule amendments dealing with chapter 13 cases, the Advisory Committee (through a Subcommittee on Chapter 13) studied the practice, customs, and procedures that existed in chapter 13 cases. The conclusion reached was that chapter 13 practice varied greatly from district to district. In some districts, such as the Central District of California, the § 341 meeting and the confirmation hearing are held on the same day. In other areas, such as in Philadelphia, the confirmation hearing

is held several months after the § 341 meeting (after expiration of the bar date for filing claims). The Advisory Committee decided to leave to local districts sufficient flexibility to generally maintain their current practices.

One of the purposes of the § 341 meeting in a chapter 13 case is to determine, by examining the debtor, whether there are grounds to object to confirmation of the plan. If the meeting is held in the morning, followed by the confirmation hearing in the afternoon, it would be virtually impossible to file objections based on information learned at the § 341 meeting before a deadline that is earlier than the confirmation hearing. In those districts that hold the § 341 meeting and confirmation hearing on the same day, it appears (based on testimony of bankruptcy judges) that courts freely grant requests to adjourn the hearing if a party indicates at the hearing that it wants to file an objection to confirmation.

To provide a flexible rule to accommodate districts that hold § 341 meetings and confirmation hearings on the same day, Rule 3015(f) simply provides that the objections must be filed and served before confirmation of the plan.

Perhaps the concern of the Judges Committee could be met by amending Rule 3015(f) to make it clear that courts by local rule may impose a time limit for filing confirmation objections. This would recognize local variations in chapter 13 practice (which was the Advisory Committee's goal in 1993).

I prepared the following drafts of proposed amendments. The

first draft will give courts broad discretion in promulgating a local rule fixing the deadline for filing objections. The second draft gives the court similar discretion, but assures that the deadline for filing objections will never be earlier than the meeting of creditors under § 341.

I suggest that the Advisory Committee consider the following alternative amendments to Rule 3015(f):

Alternative A.

(f) *Objections to Confirmation; Determination of Good Faith in the Absence of an Objection.* An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan or by an earlier date prescribed by local rule. An objection to confirmation is governed by Rule 9014. If no objection it timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

COMMITTEE NOTE

This rule is amended to clarify that a local rules may impose a deadline for filing objections to confirmation that is earlier than the date on which the confirmation hearing is held. A local rule may provide a deadline applicable in all chapter 12 and chapter 13 cases in the district, or may provide that the court may fix the deadline in a particular case, or both. This flexibility is warranted because of existing variations in local practice regarding the scheduling of

confirmation hearings.

Alternative B

(f) *Objections to Confirmation; Determination of Good Faith in the Absence of an Objection.* An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan or by an earlier date prescribed by local rule that is later than the meeting of creditors held under § 341 of the Code. An objection to confirmation is governed by Rule 9014. If no objection it timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

COMMITTEE NOTE

This rule is amended to clarify that local rules may impose a deadline for filing objections to confirmation that is earlier than the date on which the confirmation hearing is held. A local rule may provide a deadline applicable in all chapter 12 and chapter 13 cases in the district, or may provide that the court may fix the deadline in a particular case, or both. This flexibility is warranted because of existing variations in local practice regarding the scheduling of confirmation hearings.

The trustee and creditors may examine the debtor at the meeting of creditors under § 341 to determine whether there are facts that would support an objection to confirmation of the plan. To assure that the trustee and creditors have this opportunity to examine the debtor before the deadline for filing objections to confirmation,

this rule prohibits any deadline for filing objections that is earlier than the meeting of creditors held under § 341 of the Code.

Rule 9014

A contested matter, which is commenced by motion rather than a summons and complaint, is governed by Rule 9014. The rule requires that the motion be served in the manner provided for service of a summons and complaint under Rule 7004.

Rule 7005 (which incorporates Civil Rule 5 for adversary proceedings) is not applicable in a contested matter unless the court orders otherwise. Civil Rule 5(b) permits a party to serve a motion by mailing it to the respondent's attorney without serving the respondent itself. The reason for making Rule 7005 (Civil Rule 5) inapplicable in contested matters is to require service on the respondent (rather than the respondent's lawyer) whenever a contested matter is commenced. Each contested matter in a case is treated as a separate and distinct legal proceeding that requires service on the party as if the motion is a summons and complaint. For your convenience, a copy of Civil Rule 5 is attached.

Rule 9014 also provides that "[n]o response is required under this rule unless the court orders an answer to a motion." Although it may have been originally anticipated that motions commencing a contested matter will not be followed by written responses in most cases, the practice in many (if not most) districts is that written responses are filed.

Because of Rule 9014, service of responses or other papers

filed in connection with a contested matter (subsequent to the original motion papers) must be served on the parties under Rule 7004, rather than on the attorneys under Rule 7005. The Judges Committee believes that this procedure "often causes delays in any contested matter involving more than one exchange of pleadings, as parties vary in their diligence in transmitting these documents to their lawyers." Therefore, the Judges Committee suggests that Rule 9014 be amended to add Rule 7005 to the list of Part VII rules that automatically apply in contested matters. They also recommend that the rule require that the party served through counsel be designated on the certificate of service (such as "John Jones, Esq., [office address], Counsel for Jane Doe").

One way to deal with these recommendations is to refer them to the Subcommittee on Long-Range Planning which is considering changes to motion practice. Perhaps service of responses to motions and of other papers should be considered as part the overall review of motion practice.

If the Committee wants to deal with these recommendations at this time, it should consider amending Rule 9014. In my opinion, a problem presented by the addition of Rule 7005 to the list of sections that are applicable in contested matters is that Civil Rule 5 contains provisions that may not be appropriate for a contested matter. For example, Rule 5(a) and (b), when read together, could lead to the conclusion that a motion commencing a contested matter may be served on a party's attorney by mail. As

mentioned above, the rules now treat a motion commencing a contested matter as a new and separate litigation requiring service on the parties under Rule 7004. Rule 5(a) also provides that pleadings asserting new or additional claims against a defaulting party must be served "in the manner provided for service of summons in Rule 4." Rule 4 differs from Rule 7004 in that it does not permit service by first class mail. Rule 5(e), dealing with filing papers with the court, is similar to, but not the same as, Bankruptcy Rule 5005 on the same subject. If Rule 9014 is amended to include Rule 7005, I think it would be best to limit the application to Civil Rule 5(b) which permits service of papers by mailing or delivering then to an attorney of record, and to make it clear that it applies only to papers other than the original motion.

With respect to the suggestion that the certificate of service list the name of the party as well as the attorney's name and address, I question the need for such a requirement. Perhaps it is a good idea to have the certificate of service indicate the party's name, especially since numerous parties in interest may be served in a contested matter. However, I would think (but may be wrong) that ordinarily the party's name, as well as the attorney served, would be included in the certificate of service. Civil Rule 4(l), which governs proof of service of a summons and complaint, and Civil Rule 5(d), which governs certificates of service with respect to subsequent papers, do not contain such a requirement. Perhaps the Committee Note could state that the

party's identity should be included in the certificate of service.

The Committee may wish to consider the following draft of proposed amendments to Rule 9014. I dealt with the identification of the party served through counsel in the certificate of service by mentioning it in the Committee Note:

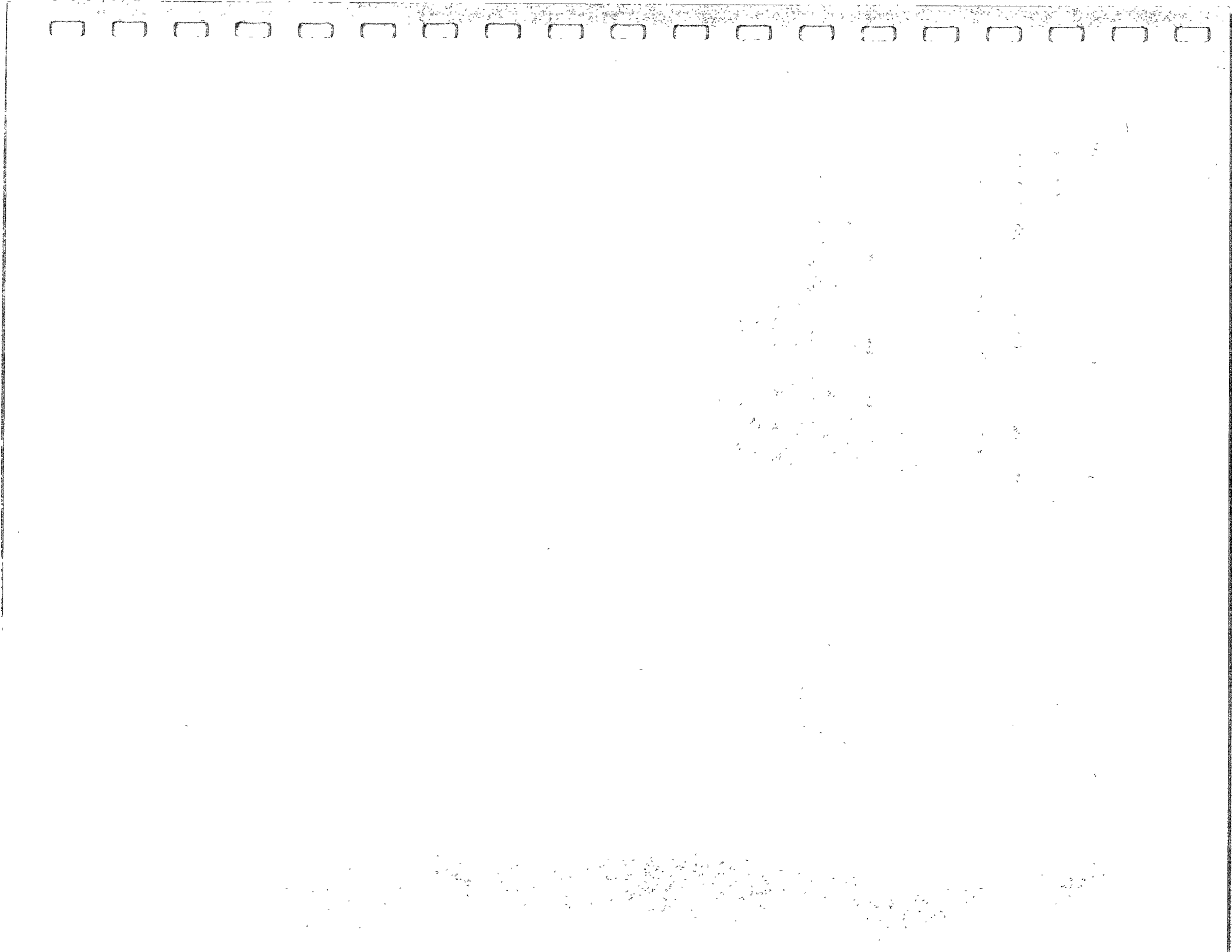
Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004~~, and~~. Any response or other paper filed after service of the motion shall be served in the manner provided by Rule 5(b), F.R.Civ.P.~~, unless~~ Unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are

applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

This rule is amended to provide for service of a response or other paper relating to a contested matter, other than the motion commencing the contested matter, by mail or delivery to an attorney of record of the party to be served in accordance with Rule 5(b), F.R.Civ.P. The person effecting service by mail or delivery to an attorney of record should file a certificate of service that identifies both the name and address of the attorney and the name of the party upon whom service is made.



UNITED STATES BANKRUPTCY COURT
Western District of Pennsylvania

JUDITH KLASWICK FITZGERALD
Bankruptcy Judge

831 Federal Building
Pittsburgh, PA 15222-4095

94-BK - D

November 30, 1994

Peter G. McCabe, Esq.
Secretary, Committee on Rules of
Practice & Procedure
Administrative Office of the
United States Courts
Washington, DC 20544

Dear Mr. McCabe:

At the suggestion of its Subcommittee on Bankruptcy Procedures and Rules, the Bankruptcy Judges Advisory Committee, which I chair, voted at its October 1994 meeting to recommend several amendments to the Federal Rules of Bankruptcy Procedure. The recommendations are detailed below, and I request that you transmit them to the Advisory Committee on Bankruptcy Rules.

Rule 3010. This rule states that a trustee is not required to distribute a dividend smaller than $5.00 in a chapter 7 case or $15.00 in a chapter 12 or chapter 13 case. The Bankruptcy Judges Advisory Committee recommends that these minimums be raised to $30.00 and $45.00 respectively.

Rule 3015. Subdivision (f) of the rule states that an "objection to confirmation of a [chapter 13] plan shall be filed and served . . . before confirmation of the plan." The Bankruptcy Judges Advisory Committee recommends that the rule be amended to set a deadline for filing objections, so the debtor will be on notice and delays in confirmation proceedings can be minimized. The Bankruptcy Judges Advisory Committee recommends that the deadline for objecting to confirmation of a chapter 13 plan be amended to require that an objection be filed and served on the specified entities two days prior to the hearing on confirmation unless otherwise ordered by the court. (Note: the addition of the two-day period should be made applicable to those districts which conduct § 341 meetings and plan hearings on the same or succeeding days. A longer time would be required in districts which hold confirmation hearings later in the chapter 13 process.)

Rule 9014. Rule 9014 states that motions "shall be served in the manner provided for service of a summons and complaint by Rule 7004 . . . ." Rule 7004(a) incorporates Fed.R.Civ.P. 4(d), which requires service to be made on the party. For subsequent pleadings, Rule 7005 incorporates Fed.R.Civ.P. 5, which in subdivision (b) permits service on the party's attorney. Rule 7005, however, applies in contested

matters only if the court so directs. Thus, in contested matters service continues to be made on the parties rather than their attorneys. This procedure often causes delays in any contested matter involving more than one exchange of pleadings, as parties vary in their diligence in transmitting these documents to their lawyers. Accordingly, the Bankruptcy Judges Advisory Committee recommends that Rule 9014 be amended to add Rule 7005 to the list of Part VII rules that automatically apply in contested matters, absent an affirmative order of the court otherwise.

In addition, the Rule should require that the party who is served through counsel be designated on the certificate of service. For example:

John Jones, Esq.
1111 A Street
Anytown, USA
(Counsel for Jane Doe)

The members of the Bankruptcy Judges Advisory Committee appreciate the opportunity to present these suggestions to the Committee on Rules of Practice and Procedure and its Advisory Committee on Bankruptcy Rules.

Sincerely,

Judith K. Fitzgerald

Judith K. Fitzgerald
Chair
Bankruptcy Judges Advisory Committee

JKF/cw

cc: Honorable Alan H.W. Shiff
Chairman, Subcommittee on the
Bankruptcy Code, Rules and Official Forms
United States Bankruptcy Court
915 Lafayette Boulevard
Bridgeport, CT 06604

Francis F. Szczebak
Chief, Bankruptcy Division
Administrative Office of the
United States Courts
Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20544

Rule 5. Service and Filing of Pleadings and Other Papers

(a) SERVICE: WHEN REQUIRED. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) SAME: NUMEROUS DEFENDANTS. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) FILING; CERTIFICATE OF SERVICE. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admis-

sion, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) FILING WITH THE COURT DEFINED. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(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.

Agenda Item 7

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 3017(d)

DATE: JULY 14, 1995

Bankruptcy Rule 3017(d) governs the distribution to creditors and equity security holders of certain materials (plan, disclosure statement, ballots, notice of voting deadline, notice of time to file objections to plan confirmation, notice of the confirmation hearing, etc.) in a chapter 9 or chapter 11 case. Proposed amendments to Rule 3017(d) were approved for publication by the Advisory Committee at its March 1995 meeting, and by the Standing Committee at its July 1995 meeting. In addition to stylistic changes, one substantive amendment was approved that would give the court flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive the vote solicitation materials pursuant to this subdivision.

A copy of Rule 3017(d), which includes but does not show (by strike-outs or underlines) the proposed amendments already approved for publication, is as follows:

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

* * * * *

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon approval of a disclosure statement -- except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders -- the debtor in possession, trustee, proponent of the plan, or

clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,

(1) the plan or a court-approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of the plan may be filed; and

(4) any other information as the court may direct, including any court opinion approving the disclosure statement or a court-approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. If the court opinion is not transmitted or only a summary of the plan is transmitted, the court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on the date the order approving the disclosure statement is entered or another date fixed by the court, for cause, after notice and a hearing.

Prior to 1991, this rule required that all creditors and equity security holders receive a plan and disclosure statement, without any exceptions. Although "unimpaired" classes do not vote, the rule provided such classes with sufficient information to object to confirmation if they so desired.

As a result of a few large cases, most notably the Texaco

case, in which very large classes of creditors were unimpaired, the rule was amended in 1991 to permit the court to order that these materials not be sent to one or more unimpaired classes (see first sentence of subdivision (d)). If the court so orders, the rule requires that notice must be mailed to such classes informing them that they are designated in the plan as unimpaired and notifying them of the name and address of the person from whom the plan and disclosure statement may be obtained upon request and at the plan proponent's expense.

The intention of the Committee in 1991 was that this new exception would be used in rare cases where the expense of printing and mailing the plan and disclosure statement to large numbers, perhaps thousands, of unimpaired creditors was great. The Committee Note to the 1991 amendments to Rule 3017(d) stated:

> "Although disclosure statements enable members of unimpaired classes to make informed judgments as to whether to object to confirmation because of lack of feasibility or other grounds, in an unusual case the court may direct that disclosure statements shall not be sent to such classes if to do so would not be feasible considering the size of the unimpaired classes and the expense of printing and mailing."

Ken Klee has suggested that Rule 3017(d) be amended further to give the court discretion to order that the plan, disclosure statement, and ballots not be mailed to <u>impaired</u> classes, as well as unimpaired classes. If the court so orders, the impaired creditors or interest holders would receive notice of the name and address of the person from whom they could obtain these documents. In a preliminary discussion of Ken's suggestion at the March meeting, Gerry Smith suggested that a brief (one-page)

statement be sent to any such class informing them of how their claims are treated under the plan. I believe that the following amendments are consistent with these suggestions:

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon approval of a disclosure statement -- except to the extent that the court orders otherwise with respect to one or more ~~unimpaired~~ classes of creditors or equity security holders -- the debtor in possession, trustee, proponent of the plan, or clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee,

(1) the plan or a court-approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of the plan may be filed; and

(4) any other information as the court may direct, including any court opinion approving the disclosure statement or a court-approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with Rule 2002(b)~~, and~~ Except to the extent that the court orders otherwise with respect to one or more classes of creditors or equity security holders, a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. If the court opinion is not transmitted or only a summary of the plan is transmitted, the court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, or that the

form of ballot, the disclosure statement and the plan or summary of the plan shall not be mailed to any impaired class, notice that the class is designated in the plan as unimpaired or that it is designated as impaired, a brief statement of the treatment of the claims or interests held by the class, and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be mailed to members of the ~~unimpaired~~ class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on the date the order approving the disclosure statement is entered or another date fixed by the court, for cause, after notice and a hearing.

COMMITTEE NOTE

Subdivision (d) is amended to give the court discretion to order that one or more impaired classes are not entitled to receive ballot forms, a disclosure statement, and the plan or summary of the plan, except for those class members that specifically request such documents. This amendment is designed to save the expense of printing and mailing these materials to classes consisting of large numbers of creditors or equity security holders if the plan proponent states that it intends to ask the court to confirm the plan under § 1129(b) without the acceptance of such classes.

The rule as amended would permit the proponent of a plan to avoid the need to solicit acceptances of any impaired class whose acceptance of the plan is not required for confirmation. Therefore, before the court exercises its discretion to order that vote solicitation materials not be mailed to all members of an impaired class, the court should determine that the plan is likely to satisfy the requirements for confirmation under § 1129(b), including that the plan is fair and equitable and does not discriminate unfairly against the impaired class. The court also should determine that the costs of printing and mailing

these materials to the class would be so substantial as to outweigh the benefit of providing each member with the plan and disclosure statement.

If the court orders that a particular impaired class not receive vote solicitation materials, the proponent of the plan must send the members of the class a brief statement of the treatment that their claims or interests will receive under the plan, as well as the name and address of the person from whom the plan or summary of the plan and a disclosure statement may be obtained at the plan proponent's expense. The class also must receive notice of the confirmation hearing and the time for filing objections to confirmation.

The reason for this change is that it would permit a plan proponent to "go straight to cramdown" under § 1129(b) without soliciting votes of one or more impaired classes. The benefit would be to avoid the costs of sending solicitation materials to any class that, under § 1129(b), could be crammed down. Section 1129(b) permits cram down against a non-accepting class if certain requirements are met.

As Ken pointed out at the March meeting, the meaning of "unimpaired" changed as a result of the amendment to § 1124 made by the Bankruptcy Reform Act of 1994. Prior to the Act, there were three ways in which a class could be unimpaired. First, under § 1124(1), if the plan leaves unaltered the legal, equitable, and contractual rights of the class. Second, under § 1124(2), if the plan provides for the curing of defaults, reinstatement of maturity of the claim, payment of damages incurred as a result of reliance on contractual provisions, and the plan does not otherwise alter the legal, equitable, or contractual rights of the class. Third, under § 1124(3), if the

plan provides for full cash payment of the "allowed" amount of the claims of the class on the effective date. The allowed amount of an unsecured claim does not include postpetition interest.

In 1994, the third way to leave a class unimpaired -- payment of the allowed claim in full -- was deleted from the Code. This Code amendment was prompted by a case, In re New Valley Corp., 168 B.R. 73 (Bankr. D.N.J. 1994), in which a solvent debtor was permitted to deprive unsecured creditors of postpetition interest and still treat them as unimpaired (i.e., deemed to have accepted the plan).

To illustrate, in a case commenced before the 1994 Act, a plan could provide for cash payment for the full allowed amount of the claims of a class on the effective date of the plan (without postpetition interest) and such class would be treated as an unimpaired class not entitled to vote (deemed to have accepted the plan). Under Rule 3017(d), the court would have the discretion to order that the plan and disclosure statement not be mailed to that class (except for members who specifically request copies from the plan proponent). However, in a case commenced after the 1994 Act, that class is "impaired" because its rights are being altered by the deprivation of postpetition interest. Under Rule 3017(d), that class must receive the plan, disclosure statement and ballots.

I recommend that the suggested changes to Rule 3017(d) not be made. First, I believe that the rule, if so amended, would be

inconsistent with the Code. Second, even if the suggested change would not violate the Code, I believe that the benefit of reducing these printing and mailing costs are outweighed by the policy in favor of providing full disclosure of relevant information to parties in interest who are adversely affected by a chapter 11 plan.

Inconsistent with the Code

Section 1126(a) of the Code provides that: "The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan." I read this to mean that each creditor and interest holder has a statutory right to either accept or reject the plan. The only way to exercise this right is to vote on the plan.

There are only two exceptions to this provision in the statute. Section 1126(f) provides: "Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required." Similarly, § 1126(g) provides: "Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests."

Therefore, unless the class is either unimpaired or will not receive or retain anything under the plan, the members of the class have the statutory right to vote to accept or reject.

The legislative history to the Bankruptcy Reform Act of 1994 confirms that impaired creditors have a right to vote on the plan. As reported in the Congressional Record, "[a]s a result of this change [deletion of § 1124(3) of the Code], if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired entitling creditors to vote for or against the plan of reorganization." 140 Cong. Rec. H 10,768 (October 4, 1994).

Under § 1125(b), "[a]n acceptance or rejection of a plan may not be solicited after the commencement of the case ... unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement..." When § 1126 and 1125 are read together, I believe that they lead to the conclusion that impaired creditors must receive a ballot, plan and disclosure statement -- even if the plan is eventually crammed down under § 1129(b).

When Rule 3017(d) was amended in 1991, there was no such legal obstacle to giving the court discretion to order that these materials not be mailed to unimpaired classes because § 1126(f) specifically says that "solicitation of acceptances with respect to such [unimpaired] class ... is not required." No similar provision exists for impaired creditors.

Policy reasons for not amending Rule 3017(d)

If the Committee disagrees with my conclusion that the suggested amendments would violate the Code, it should focus on policy considerations. I realize that notions of fairness are subjective and that the Advisory Committee may disagree with my view, but I believe there is a strong policy in favor of providing parties whose legal rights will be adversely affected by a plan with information sufficient for them to determine whether the plan meets the statutory requirements for confirmation and, if it appears that such requirements have not been satisfied, to make intelligent choices as to whether or how it will object to confirmation.

To illustrate, suppose a corporate debtor files a plan that provides that a certain class of unsecured trade creditors will receive payment of only 50% of their claims. The plan also provides that all existing shares of stock in the corporation will be cancelled and the new shares will be issued to a few of the existing shareholders in exchange for a new $100,000 capital contribution. Suppose also that the debtor asks the court to order that the class of trade creditors not receive ballot forms, a plan, or a disclosure statement, asserting that the plan is confirmable without their acceptances. The debtor states that the plan is fair and equitable because the only junior class (the class of shareholders) is not retaining or receiving anything on account of the existing shares, and that the plan does not unfairly discriminate against any other class. Should the rule

be changed to give the court discretion to order that these creditors (who are getting only a 50% recovery) shall not receive a plan and disclosure statement, except for those that specifically request these documents?

If the class does not receive these documents, they will not know how other classes are being treated as compared to their treatment? Perhaps the unsecured bondholders are getting 60% recovery in new shares in the corporation, so that the plan may discriminate unfairly. Also, how will these trade creditors know whether they are getting at least what they would get in a chapter 7 liquidation? How will they know if the plan is feasible? How do they know if it is fair and equitable (perhaps the capital contribution being made by the existing shareholders is too low)? All of these questions are relevant in determining whether the statutory requirements for confirmation can be met.

I realize that the proposed amendment would require that such impaired creditors receive a brief statement telling them what treatment they will receive under the plan and giving them notice of the name and address of the person from whom they may request a copy of the plan and disclosure statement. However, I do not think that is a substitute for sending all impaired creditors a copy of the plan itself and a court-approved disclosure statement.

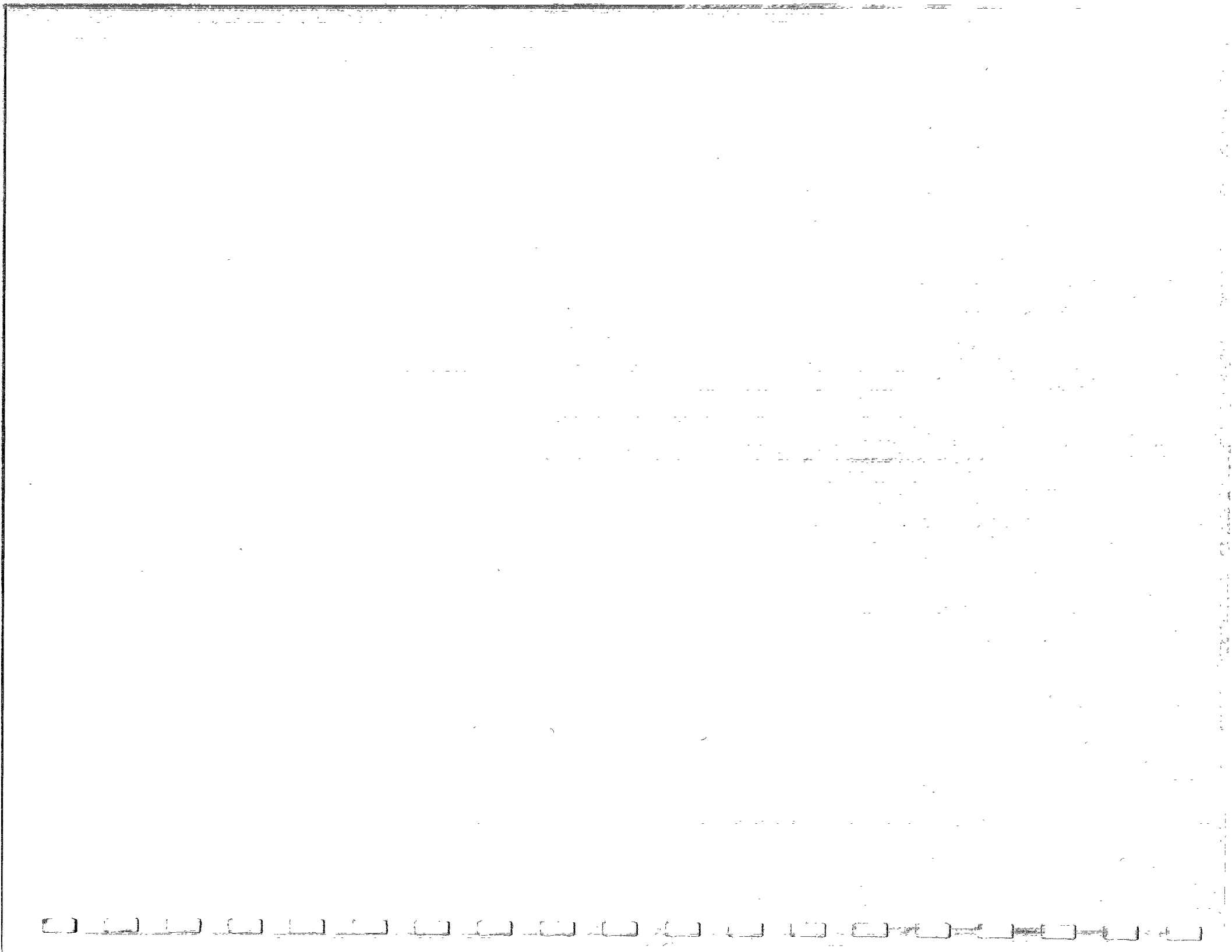
I should point out that providing impaired classes with a plan and disclosure statement does not require the drafting or preparation of any new documents. Since § 1129(a)(10) requires

that at least one impaired class accept the plan, a disclosure statement must be drafted and approved by the court in any event. The cost savings is limited to printing and mailing (although these costs could be substantial in a large case).

The Committee also should consider whether the suggested amendments would increase litigation costs that could offset some or all of the savings from reduced printing and mailing costs. If a plan proponent asks the court to order that certain impaired classes not receive vote solicitation materials, I would think that the court would have to make some preliminary determination that the plan is likely to be confirmed under § 1129(b). This could result in issues usually reserved for the confirmation hearing (fair and equitable, etc.) being raised and litigated to some extent at the disclosure statement hearing.

At the meeting in March, I asked Ken if his suggestion is limited to the situation in which the impaired class is receiving payment in full of its allowed claim on the effective date of the plan, i.e., the treatment that before the 1994 Reform Act would have left the class unimpaired but which now impairs the class. Ken indicated that the suggestion is broader than that and is applicable to any class the proponent intends to cram down under § 1129(b) without soliciting their votes. Nonetheless, if the Committee is inclined to adopt Ken's suggestion, at least in part, it should consider limiting the amendment to situations in which the impaired class is being paid cash for the full amount of its allowed claims. This would at least provide full

disclosure to those impaired creditors who are losing more than postpetition interest. However, for the reasons discussed above, I believe that the suggested amendment -- even if limited to creditors receiving full payment of allowed claims -- would be inconsistent with § 1126. I also think it would be inconsistent with the 1994 Reform Act's repeal of § 1124(3) to deprive such creditors of the right to accept or reject a plan.



Note, *Disclosure in Chapter 11 Reorganizations: The Pursuit of Consistency and Clarity*, 70 Cornell L. Rev. 733 (1985).

Phelan & Cheatham, *Would I Lie to You—Disclosure in Bankruptcy Reorganizations*, 9 Sec. Reg. L.J. 140 (1981).

SECTION 1126 (11 U.S.C. § 1126)

§ 1126. Acceptance of plan.

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests,

other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on acount of such claims or interests.

Bankruptcy Rule References: 3016, 3017 and 3018

Legislative History

Subsection (a) of this section permits the holder of a claim or interest allowed under section 502 to accept or reject a proposed plan of reorganization. The subsection also incorporates a provision now found in section 199 of the Bankruptcy Act that authorizes the Secretary of the Treasury to accept or reject a plan on behalf of the United States when the United States is a creditor or equity security holder. The form and procedure for changing or withdrawing an acceptance or rejection of a plan after modification of the plan is left to the Rules of Bankruptcy Procedure.

[*House Report No. 95–595, 95th Cong., 1st Sess. 410 (1977).*]

Subsection (a) of this section permits the holder of a claim or interest allowed under section 502 to accept or reject a proposed plan of reorganization. The subsection also incorporates a provision now found in section 199 of chapter X that authorizes the Secretary of the Treasury to accept or reject a plan on behalf of the United States when the United States is a creditor or equity security holder.

[*Senate Report No. 95–989, 95th Cong., 2d Sess. 122 (1978).*]

Agenda Item 8

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 3002 -- NOTICE OF TARDILY FILED CLAIMS

DATE: JULY 19, 1995

The Advisory Committee and the Standing Committee have approved proposed amendments to Rule 3002 (shown on attached draft) to conform to the Bankruptcy Reform Act of 1994. These amendments will be presented to the Judicial Conference at its September 1995 meeting and, if approved, will be sent to the Supreme Court for promulgation in 1996.

The 1994 Reform Act has added § 502(b)(9) which provides that a claim shall be disallowed if there is an objection to the claim and the proof of claim is tardily filed, except to the extent that the tardily filed claim is entitled to a distribution in a chapter 7 case under § 726(a)(1), (2), or (3). In general, tardily filed claims may be subordinated to other claims in a chapter 7 case, but are not disallowed. In contrast to a chapter 7 case, tardily filed claims in a chapter 11, 12, or 13 case may be disallowed if an objection is filed. In any case, in the absence of an objection to a tardily filed claim, the claim must be allowed.

At the December 1994 meeting in Washington, D.C., the Advisory Committee considered the proposed amendments to Rule 3002 designed to conform to the 1994 Reform Act. During the discussion, Henry Sommer moved to add the following language to Rule 3002: "If the claim is tardily filed, the party filing the

claim shall serve copies on the trustee and the debtor." Henry suggested adding this language so that chapter 13 trustees do not have to constantly check the claims dockets in thousands of cases that may remain pending for several years. The Committee discussed whether it is an unreasonable burden for the trustee to check dockets periodically and whether sanctions should be imposed for not serving a trustee with a copy of a tardily filed claim. A motion to table Henry's motion until the next meeting was adopted and the remaining proposed amendments to Rule 3002 were approved.

At the March 1995 meeting in Lafayette, I distributed to the Advisory Committee the following draft of a proposed new subdivision to Rule 3002:

> (d) NOTICE OF TARDILY FILED CLAIM IN CHAPTER 12 OR CHAPTER 13 CASE. If a creditor tardily files a proof of claim in a chapter 12 or chapter 13 case, the creditor shall mail notice of the tardy filing together with a copy of the proof of claim to the trustee and the debtor no later than the date on which the proof of claim is filed.
>
> COMMITTEE NOTE
>
> Subdivision (d) is added to provide notice to the trustee and the debtor of a tardily filed proof of claim in a chapter 12 or chapter 13 case so that an objection to the allowance of the claim may be filed under § 502(b)(9).

Although I presented this draft for discussion purposes, I expressed my opinion that it should not be adopted because of uncertainty regarding the consequences of failing to give the notice. If a creditor fails to give the notice, I would think that the claim would be allowed under § 502(b)(9) nonetheless.

This issue reminded me of the so-called Hausladen issue on which courts were divided, i.e., could Rule 3002 (or any other rule) create a ground for disallowing a claim that is not contained in § 502 of the Code?

I also questioned whether the above draft of subdivision (d) is necessary. A chapter 12 or chapter 13 debtor could provide in the plan that tardily filed allowed claims shall be in a separate class and shall receive no distribution. Then, in case a proof of claim is filed late and goes unnoticed by the trustee, there would not be any adverse consequences.

The Committee discussed whether the clerk or the creditor should be responsible for noticing a late-filed claim. I indicated that the creditor may not know that the claim was received after the deadline (if mail is slow, etc.), and requiring the clerk to give the notice would better ensure that it is done. Judge Meyers and Richard Heltzel stated that it would be easier for the clerk to send the trustee copies of every claim (whether filed timely or late) than to sort them and send copies of only the tardy ones. At that point in the discussion, the matter (sending notice of tardy filing and copies of proof of claim) was set over to the September 1995 meeting for further discussion. Other amendments to Rule 3002 were finally approved for presentation to the Standing Committee at its July 1995 meeting.

Since the Lafayette meeting, the Committee received written comments from two attorneys, Donald Ross Patterson and Jon M.

Waage, both of Texas, that were submitted in response to the published draft of proposed amendments to Rule 3002. Although the letters are dated February 21 and March 6, 1995, they were not received by the Administrative Office until May 1 (the letters were delayed because they were mistakenly mailed to the House Judiciary Committee rather than the Rules Committee). Copies of the letters are attached.

Both letters contain the same proposed language to be added to Rule 3002:

> "Any creditor filing a Proof of Claim shall serve a copy of the Proof of Claim complete with attachments, if any, on the Debtor and the attorney for the Debtor along with a Certificate of Service. Failure to serve a copy of the Proof of Claim is grounds for disallowance of the Claim."

See Mr. Waage's letter for a suggested Committee Note explaining the purpose of the amendment.

The language suggested by Mr. Patterson and Mr. Waage differs in several respects from the language that I presented to the Committee for discussion purposes in Lafayette. First, the obligation to serve a copy of the proof of claim is not limited to tardily filed claims under their proposal. Second, their proposal is not limited to chapter 12 and chapter 13 cases, but includes chapter 7 cases (as mentioned above, late claims are not disallowed in chapter 7 cases). Third, they would require service on the debtor and the debtor's counsel (but not the trustee). Fourth, they make it clear that the sanction for failure to comply is disallowance of the claim.

I recommend that the amendment proposed by Mr. Patterson and

Mr. Waage not be adopted. I do not perceive any need to impose on all creditors this burden, especially in chapter 7 cases. I also do not understand why the creditor should be required to send copies to both the debtor and debtor's counsel (it is more important that the trustee receive it, if anyone). Finally, their proposal raises serious questions as to whether the rule could create a new ground for disallowing a claim (i.e., Hausladen revisited!).

As mentioned above, this matter was set over for further discussion at the September meeting in Portland. I prepared this memorandum to refresh your recollection and to provide you with an update in advance of the meeting.

PROPOSED AMENDMENTS TO RULE 3002 APPROVED BY THE STANDING COMMITTEE IN JULY 1995

Rule 3002. Filing Proof of Claim or Interest

(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, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim ~~shall be filed within~~ is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under ~~pursuant to~~ § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of ~~the United States, a state, or subdivision thereof~~ a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the ~~United States, state or subdivision thereof~~ governmental unit.

* * * * *

~~(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 herein above prescribed.~~

COMMITTEE NOTE

The amendments are designed to conform to §§ 502(b)(9) and 726(a) of the Code as amended by the Bankruptcy Reform Act of 1994.

The Reform Act amended § 726(a)(1) and added § 502(b)(9) to the Code to govern the effects of a tardily filed claim. Under § 502(b)(9), a tardily filed claim must be disallowed if an objection to the proof of claim is filed, except to the extent that a holder of a tardily filed claim is entitled to distribution under § 726(a)(1), (2), or (3).

The phrase "in accordance with this rule" is deleted from Rule 3002(a) to clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code, rather than by this rule.

Section 502(b)(9) of the Code provides that a claim of a governmental unit shall be timely filed if it is filed "before 180 days after the date of the order for relief" or such later time as the Bankruptcy Rules provide. To avoid any confusion as to whether a governmental unit's proof of claim is timely filed under § 502(b)(9) if it is filed on the 180th day after the order for relief, paragraph (1) of subdivision (c) provides that a governmental unit's claim is timely if it is filed not later than 180 days after the order for relief.

References to "the United States, a state, or subdivision thereof" in paragraph (1) of subdivision (c) are changed to "governmental unit" to avoid different treatment among foreign and domestic governments.

JON023

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5/1/95

94-BK - I

February 21, 1995

RECEIVED
MAR 1 1995
COMMITTEE OF THE JUDICIARY

Judiciary Committee
Judicial Conference Standing Committee
on Rules of Practice and Procedure
2138 Rayburn House Office Building
Washington, DC 20515

RE: Written comments to proposed amendments to the Federal Rules of Bankruptcy Procedure
Bankruptcy Rule 3002(a) & (b)
FILING PROOF OF CLAIM OR INTEREST

To Whom It May Concern:

The following is a proposed addition: "(c) any creditor filing a Proof of Claim shall serve a copy of the Proof of Claim complete with attachments, if any, on the Debtor and the attorney for the Debtor along with a Certificate of Service. Failure to serve a copy of the Proof of Claim is grounds for disallowance of the Claim."

COMMENT: The change is respectfully requested for a number of reasons:

Cases such as Howard (972 F.2d 649 (5th Cir. 1992)) make it necessary for the Debtors and Debtors' counsel to be aware of the Proof of Claims filed in a case. A relatively fast moving confirmation docket makes it such that Debtors' attorneys are not always able to keep up timely with the Proof of Claims that are filed. Because of the effect a Proof of Claim is given by Bankruptcy Rule 3001(f), it is absolutely necessary that in order to proceed appropriately the Bankruptcy Court and Debtors' attorneys should take appropriate action on any Proof of Claim which is inconsistent with the proposed Plan of Reorganization. Failure of Debtors' counsel to receive in a timely fashion copies of the Proof of Claims can and does result in a waste of the Court's time, the Debtors' time, and for that matter, the Creditor's time because of the resetting of various hearings.

Respectfully submitted,

Jon M. Waage

JMW/dkb

* TEXAS BOARD OF LEGAL SPECIALIZATION

DONALD ROSS PATTERSON
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(903) 592-8186

94-BK-J

March 6, 1995

Judiciary Committee
Judicial Conference Standing Committee
on Rules of Practice and Procedure
2138 Rayburn House Office Building
Washington, DC 20515

Re: Written comments to proposed amendments to the Federal Rules of Bankruptcy Procedure
Bankruptcy Rule 3002 (a) & (b)
FILING PROOF OF CLAIM OR INTEREST

To Whom It May Concern:

The following is a proposed addition: "(c) any creditor filing a Proof of Claim shall serve a copy of the Proof of Claim complete with attachments, if any, on the Debtor and the attorney for the Debtor along with a Certificate of Service. Failure to serve a copy of the Proof of Claim is grounds for disallowance of the Claim."

I support this proposal for it will require little additional effort on the part of the Creditor but will reduce the formidable task of traveling to the clerk's office -- often in another city -- and reviewing the Proof of Claims file for every Chapter 13 Debtor an attorney represents.

Your consideration of passage of an addition to Bankruptcy Rule 3002(c) requiring creditors to send a copy of any Proof of Claim to the attorney for the debtor is strongly solicited and will be appreciated.

Sincerely yours,

Donald Ross Patterson

Donald Ross Patterson

DRP/pp

Agenda Item 9

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULES 1019(1)(B), 2003(d), 4004(b), 4007(c), AND 4007(d) TO CLARIFY THAT A MOTION MUST BE "FILED" (RATHER THAN "MADE") BEFORE A SPECIFIED DEADLINE

DATE: AUGUST 6, 1995

Several Bankruptcy Rules provide that a party may obtain certain relief only if a motion requesting the relief is "made" before a specified deadline. For example, Rule 4004(b) permits the court, on motion of a party in interest and for cause, to extend the time to file a complaint objecting to discharge, but provides that the "motion shall be made" before expiration of such time. Similar provisions are found in Rule 2003(d) (motion for resolution of election dispute), Rule 4007(c) (motion for extension of time to file complaint to determine dischargeability of a debt), and Rule 4007(d) (motion for extension of time to file complaint to determine dischargeability of a debt in a chapter 13 case). I believe that these rules contemplate that the motion for relief will be in writing and not made orally at a hearing.

Prompted by a suggestion made by Charles Tabb, I recommend that the word "made" be changed to "filed" in these rules. The text of the proposed amendments, with committee notes, are set forth at the end of this memorandum.

Rule 1019(1)(B) is similar to the rules listed above in that it requires that a motion for an extension of time to file a statement of intention regarding collateral securing a consumer

debt in a case that has been converted to chapter 7 be "made" before the expiration of the specified 30-day period for filing the statement. However, in contrast to the rules listed above, I believe that this provision does not necessarily contemplate the filing of a written motion for such an extension of time. These statements are required only in consumer chapter 7 cases and, in my opinion, consumer debtors should be able to request an extension of time orally in open court. Rule 9013 generally permits a request for an order to be made during a hearing, as well as in writing, and I believe that the current Rule 1019(1)(B) permits such oral motions. Therefore, I recommend that Rule 1019(1)(B) be amended to provide that the request for an extension of time shall be made either by oral motion or by written motion filed before the deadline.

The *Coggin* Case

As demonstrated by the Eleventh Circuit's decision in In re Coggin, 30 F.3d 1443 (11th Cir. 1994), it is not clear when a motion is "made" within the meaning of the Bankruptcy Rules. Is a motion "made" when it is filed? When it is served? When it is both filed and served? As discussed in Coggin -- in which the Court of Appeals held that a motion is made when it is filed -- courts have not been in agreement on this question. A copy of the opinion is attached, as is a copy of an excellent comment on Coggin written by Charles Tabb for the *BANKRUPTCY LAW LETTER*.

Consistent with Other Rules

These proposed amendments are consistent with amendments recently made in other rules. The Advisory Committee decided in the context of the 1994 amendments to Rule 8002(b), as well as the proposed amendments to Rule 8002(c) that will be published for comment this year, that use of the word "filed" is, in general, better than use of "made", "served", or "served and filed" when there is a time limit for initiating the motion. In fact, when the Advisory Committee voted to change "made" to "filed" in Rule 8002(b), it asked me to write to the Advisory Committee on Civil Rules to recommend that various Civil Rules that are applicable in bankruptcy cases be amended to use "filed" (rather than "made","served", or "served and filed") when the rules impose a time limit for acting. The Civil Committee reacted by amending Civil Rules 50, 52, and 59 accordingly. The Supreme Court promulgated these amendments to the Civil Rules and they will become effective on December 1, 1995.

The rationale for using "filed" rather than "served" or "served and filed" is to make the time more definite and ascertainable from court dockets and records. Since a motion is served when it is dropped in a mailbox (a time which is not ascertainable from court dockets), the Advisory Committee decided that it is better to use "filed" to avoid confusion and litigation over the actual time when motion papers were "served."

Maintaining the Word "Made" In Certain Rules

Charles has suggested that the word "made" (when used in such phrases as "motion shall be made") be eradicated from the rules. My recommendation is more limited than that.

There are a number of rules that speak of a motion being "made" that do not relate to time limits. For example, Rule 4001(a)(1) provides that "[a] motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) shall be made in accordance with Rule 9014...." The purpose of this provision is to state the method of making the motion, rather than a time limit. The precise time of the motion is irrelevant. Similar provisions are found in Rules 2007.1(a), 2007.1(b), 4001(b)(1), 4001(c)(1), 4001(d)(4), and 6004(c). I do not think that it is necessary to amend these rules and, in any event, use of the word "filed" would not make sense in this context (Rule 9014 does not deal with filing). Therefore, I am not recommending deletion of the word "made" in those rules that do not require the initiation of the motion before a certain time.

Stylistic Changes

In accordance with our usual practice of making stylistic improvements to those rules or subdivisions of rules that we are amending, I also have included suggestions for stylistic changes to these rules.

In addition, I have included amendments to Rule 2003(d)

(regarding an election for a chapter 7 trustee or committee) that are designed to conform to proposed amendments to Rule 2007.1 (regarding the election of a chapter 11 trustee) that will be published for comment this year.

Text of Proposed Amendments

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) *Filing of Lists, Inventories, Schedules, Statements.*

* * * * *

(B) The statement of intention, if required, shall be filed within 30 days following entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. An extension of time may be granted for cause only on written motion filed, or oral request made during a hearing, ~~motion made~~ before the time has expired. 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 (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT TO THE COURT. The ~~presiding officer~~ United States trustee shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. ~~If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. Not later than the date on which the report is filed, the presiding officer shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the~~

~~court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files a report of the disputed election for trustee, the interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are stylistic and designed to conform to the proposed amendments to Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Rule 4004. Grant or Denial of Discharge

* * * * *

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a

complaint objecting to discharge. The motion shall be ~~made~~ filed before such time has expired.

COMMITTEE NOTE

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. See, e.g., In re Coggin, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Rule 4007. Determination of Dischargeability of a Debt

* * * * *

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, AND CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may extend for cause ~~extend~~ the time fixed under this subdivision. The motion

shall be ~~made~~ filed before the time has expired.

(d) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing a time for ~~the~~ filing ~~of~~ a complaint to determine the dischargeability of any debt pursuant to § 523(c) and shall give not less than 30 days notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

* * * * *

COMMITTEE NOTE

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. See, e.g., In re Coggin, 30 F.3d 1443 (11th Cir. 1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

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Professor Charles J. Tabb
Direct telephone (217) 333-2877

December 12, 1994

Prof. Alan N. Resnick
Hofstra University School of Law
Hempstead, NY 11550

Dear Alan:

As you requested at the meeting last week, I am enclosing a copy of the recent *Coggin* case which deals with the question of when a motion is "made." I also have enclosed a draft copy of my comment on the case for the Bankruptcy Law Letter, which is being published this month. As I note in my comment, the Rules need to be clarified. "Made" should be eradicated, with either "filed," "served," or "filed and served" utilized as appropriate. As my comment points out, the Rules contain varying references throughout.

It was good to see you last week. Have a pleasant holiday season.

Sincerely yours,

Charles J. Tabb

The dissenting judge did not accept the conclusion that a trust that, as events played out, entered into a $500 million sale-leaseback transaction, for the purpose of producing a return to investors, and that then actively managed a large fleet of commercial jet aircraft for many years, was not "operating a business." Accordingly, the dissent would have held that the trust did qualify as a business trust. The dissenting judge pointed out that the trust was much more than "a typical trust for the simple preservation of assets," and certainly "was no eleemosynary entity."

WG&L Observation. The Eastern case presents a unique set of facts that test the outer limits of what constitutes a business trust for purposes of eligibility to be a debtor under the Bankruptcy Code. As might be expected in a divided opinion, there is much to be said for both sides. On the one hand, the initial purpose of the trust was definitely to create a secured financing vehicle for a single debtor, which does not bring to mind the idea of a "business" that would merit "reorganization" under chapter 11. Yet one is left with a not inconsiderable disquiet at the thought that a trust that is operating a substantial fleet of commercial jet aircraft for several years to facilitate the realization of a profitable return for investors is not a business. In the final analysis, the deadlock perhaps should be broken by stepping back and considering first principles: what is bankruptcy relief designed to accomplish, and should that relief be freely available or not? The Second Circuit did not focus on those fundamental questions. If operation under the auspices of the Bankruptcy Code would have facilitated liquidation of the collateral pool in the trust's possession, perhaps the case should have been decided the other way.

When Is a Motion "Made"?

Time is often critical in legal proceedings. Throughout the Federal Rules, parties are required to take an action by a certain time. If they fail to do so, they either lose the right entirely or must seek out-of-time relief from the court. Given the central importance of these numerous time deadlines, it is essential that litigants know exactly what is expected of them and when. Unfortunately, the Federal Rules of Civil and of Bankruptcy Procedure in many instances are anything but clear. One prominent example of this troubling ambiguity is the pervasive provision that a motion must be "made" by a specified time. Believe it or not, nothing in the Civil Rules or Bankruptcy Rules explains when a motion is deemed to be made. Is it when the party *files* the document with the court? Or is it when the paper is *served* on parties entitled to receive service? Both? The courts are divided.

Motion to Extend Discharge Objection Deadline. In the case of *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994), the Eleventh Circuit recently faced this issue in deciding whether a motion under Bankruptcy Rule 4004(b) to extend the deadline for filing a complaint objecting to the debtor's discharge had been "made" before the original period for filing such complaints had expired. The two movants each had filed their motion to extend time before the period expired, but did not serve the motion until after expiration of the deadline. Therefore, if filing was the operative fact, the motions were timely, but if service was required, the motions to extend were late. The resolution was outcome determinative: courts may not grant out-of-time extensions of the discharge objection deadline, and the debtor ultimately was denied his discharge. If a motion must be served to be made, the debtor would be entitled to a discharge. The *Coggin* court, however, held that a motion for purposes of Rule 4004(b) is "made" when it is filed, irrespective of when it is served, and that accordingly the motions were timely and the denial of discharge must stand. In so holding, the Eleventh Circuit parted company with the great majority of courts, which had held that a motion is made when served.

The Rules: a Tower of Babel. The Bankruptcy Rules as well as the Civil Rules nowhere explain when a motion is considered to be "made." Nor are the Rules uniform in stating what must be done for a motion or other filing to be operative. In varying places the Bankruptcy Rules require a motion or other document to be:

- *"Made"*—the present case of 4004(b), as well as 4007(c), 4001(a), 4001(b), 4001(c), 3014, 7012 (incorporating Civil Rule 12), 7052 (Civil 52), 9024 (Civil 60), and 8002(c).
- *"Served"*—1017(e)(2), 9023 (Civil 59), 7024 [Civil 24], 7025 [Civil 25], 7027 [Civil 27], 7033 [Civil 33], 7034 [Civil 34], 7036 [Civil 36], 7055 [Civil 55], 7056 [Civil 56], 7068 [Civil 68].
- *"Filed"*—1017(e)(1), 3002(c), 4004(a), 4007(c), 4008, 5009, 7003 (Civil 3), 7014 (Civil 14), 7041 (Civil 41), 8001(a), 8001(b), 8002(a), 8002(b), 8003(c), 9024(2), and 9024(3).
- *"Filed and served"*—1017(d), 3015(f), 3017(a), 3020(b), 6004(b), 6004(d), 6007(a), and 6007(b), 8006.

The variance in the terms used makes it impossible to invoke traditional rules of interpretation to ascribe a meaning to "made." The other categories (filed, served, filed and served) are of course self-explanatory, actually describing the action that must be taken. "Made," how-

ever, is not facially clear, and yet it must mean filed, or served, or filed and served—but which one? Since every one of the possible choices is itself used somewhere in the Rules, the "knew how to" interpretation canon cannot be used. To demonstrate, if the only options in the Rules were that a motion must be "filed" or must be "made," a plausible interpretation would be that "made" must mean "served," since the Rules specifically use "filed" where that is required.

The Received Wisdom (Before *Coggin*). Before the Eleventh Circuit's decision in *Coggin*, most courts had interpreted "made" to mean "served." Indeed, the only two reported bankruptcy decisions specifically addressing the question in the context of a motion to extend the discharge complaint bar date went the other way, concluding that a motion is made when "served." (Although the cases technically involved the companion Rule to 4004, namely 4007(c), which governs the filing of complaints objecting to the dischargeability of a particular debt under Section 523, the result should not differ from that under Rule 4004.) Filing then must occur within a reasonable time after service, in accordance with Civil Rule 5. Service, by the way, is easy to accomplish in bankruptcy: it may be made by first-class mail, and is complete upon mailing.

The reasoning of these pre-*Coggin* decisions is traceable to a passage from *Moore's Federal Practice*, dealing with postjudgment motions under Rules 52 and 59. Rule 52 states that a motion to amend the findings must be "made" within 10 days after entry of judgment, and Rule 59 states that motions for a new trial or to alter or amend the judgment must be "served" within 10 days. Moore confidently asserted that the two periods were identical. Incidentally, it bears noting that a proposal has been sent from the Standing Committee on the Rules to the Supreme Court recommending that Rules 52 and 59 (and 50) be amended to require "filing." Further support for the "made equals served" theory was drawn from Civil Rule 5(d), which requires papers to be filed within a reasonable time after service, supporting the view that service is the operative act by which periods are measured. Even in other contexts, courts have not unreasonably taken the view that "made" probably means "served" throughout the Rules.

A New View: "Made" Means "Filed." The Eleventh Circuit was not persuaded by the weight of previous authority. It held that a motion to extend the bar date for filing discharge complaints under Rule 4004(b) was made when filed, and that service was not necessary. The court did not believe that *Moore's* reasoning in the setting of postjudgment motions applied to a bankruptcy motion to extend the bar date for filing a complaint objecting to discharge. The Rule 4004(b) motion by definition comes before a complaint is even filed. Therefore, Rule 5(d), which only applies to papers filed after the complaint, is not applicable. Instead, the court viewed the motion to extend the complaint filing deadline as a "contested matter" governed by Rule 9014. Rule 9014, in turn, states that "the motion shall be served in the manner provided for service of a summons and complaint by Rule 7004." Rule 7004(a), in turn, incorporates certain provisions of Civil Rule 4, including 4(j) (now 4(m)), which speaks to the time limits for service. That rule allows 120 days after filing of the complaint to effect service. The *Coggin* court concluded that it was illogical to allow 120 days after filing to effect service if a motion must be "served" to be made in the first instance. This reasoning meant that "made" must require "filing."

The Eleventh Circuit found additional support for conclusion that made means filing in the fact that Rule 4004(c) requires the court, on expiration of the deadline for filing a complaint objecting to discharge, to "forthwith" grant the discharge, assuming of course that no complaints objecting to discharge had been filed. The court reasoned that if a motion to extend the time only had to be served by the deadline, and not filed, a court could not know whether to grant the discharge or not. If filing of the motion to extend the time were required, however, the court would know.

The reasoning in *Coggin* is not completely persuasive. Note that Rule 9014 only says that a motion initiating a contested matter must be served "in the manner" provided for serving a summons and complaint by Rule 7004. "Manner" would seem to go to the question of "how," not of "when." Given the need for expedition in many bankruptcy proceedings, it would also be odd to conclude that a motion must be filed by a deadline, but then need not be served for another 120 days. Conversely, in those instances in which Rule 5(d) applies (not including contested matters, unfortunately), filing must be accomplished within a "reasonable time" of service, and "reasonable time" can be and often has been given a fairly short fuse. Finally, there does seem to be some justification for giving "made" a uniform meaning throughout the Rules.

WG&L Comment. Whether one agrees with the decision in *Coggin* or not, the Bankruptcy and Civil Rules are crying out to be revised to clarify what a party must do and when. That the rules are sufficiently vague that courts can reach different conclusions as to whether a movant must file or must serve a motion under Rule 4004(b) to preserve its rights is reason enough to make a change. Partial steps have been taken—proposed amendments to Civil Rules 50, 52, and 59 that would require filing are under consideration, and so too an amendment to Bankruptcy Rule 8002(c) that would change "made" to "filed" is in the works. However, many more rules (such as Rule 4004(b)) remain ambiguous, leaving litigants uncertain as to their rights. In the meantime, any careful movant should both file and serve by the required deadline. Recall that service can be accomplished by mail, and is complete upon mailing.

the deficiency on that date to be $936,952. The court then looked to the date the Debtor filed the bankruptcy petition and found that on February 21, 1990, First Alabama's collateral was valued at $70,442, securing an obligation of $1,034,815 and resulting in a $964,373 deficiency. Applying the "improvement in position" test, the bankruptcy judge found an increase in the amount of the deficiency between the two relevant points in time.

It is clear from these numbers that First Alabama did not improve its position with regard to the cash collateral account during the one year immediately preceding the Chapter 11 filing to the prejudice of the debtor's unsecured creditors. The amount by which the debt exceeded the value of the collateral increased rather than decreased during this time. . . .

Bankruptcy Opinion at 10.

Discovering no error in the factual findings of the lower courts, and no abuse of discretion, we affirm the judgment of the district court in its entirety.

AFFIRMED.

In re Thomas Edward COGGIN, Debtor.

Phyllis B. COGGIN, Plaintiff–Appellee,

v.

Thomas Edward COGGIN, Defendant–Cross–Plaintiff–Appellant–Cross–Appellee,

Thomas E. Reynolds, Trustee–Cross–Defendant–Appellee–Cross–Appellant.

No. 93–6914.

United States Court of Appeals, Eleventh Circuit.

Sept. 8, 1994.

Time for filing objections to Chapter 7 debtor's discharge was extended by order of the United States Bankruptcy Court for the Northern District of Alabama, No. 89–06188, Clifford Fulford, J., which entered order denying debtor's discharge and authorizing avoidance of debtor's prepetition transfer to son, but denying trustee's request to recover value of avoided transfer directly from Chapter 7 debtors. Both sides appealed. The District Court, No. CV–90–HM–1476–S, E.B. Haltom, Jr., J., affirmed. On further appeal, the Court of Appeals, Birch, Circuit Judge, held that: (1) motion to extend bar date was "made" prior to expiration of bar date, on date that motion was filed; (2) debtor's discharge was properly denied based on prepetition transfer to son at time when debtor was insolvent and already had many existing creditors; and (3) trustee could not recover value of avoided transfer from debtor.

Affirmed.

1. Bankruptcy ⇐3782

Bankruptcy court's determination that motions to extend bar date for objecting to Chapter 7 debtor's discharge were timely filed was determination of law, which Court of Appeals reviewed de novo. Bankr.Code, 11 U.S.C.A. §§ 523, 727; Fed.Rules Bankr. Proc.Rule 4004(b), 11 U.S.C.A.

2. Bankruptcy ⇐2156

Motion to extend bar date for objecting to debtor's discharge is "contested matter," which must be initiated by motion and requires notice and hearing. Bankr.Code, 11 U.S.C.A. §§ 523, 727; Fed.Rules Bankr.Proc. Rule 4004(b), 11 U.S.C.A.

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

3. Bankruptcy ⇐2158

Creditor moving to extend bar date for objecting to debtor's discharge must file copy of motion on both debtor and debtor's attorney, where service is accomplished by mail. Bankr.Code, 11 U.S.C.A. §§ 523, 727; Fed. Rules Bankr.Proc.Rules 4004(b), 7004(b)(9), 11 U.S.C.A.

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4. Bankruptcy ⇐3312

Motion to extend bar date for objecting to debtor's discharge is "made" on date that it is filed, regardless of when it is served on debtor or debtor's attorney; as long as motion is filed prior to expiration of bar date, it is "made" in timely fashion and may be acted upon by bankruptcy court. Bankr.Code, 11 U.S.C.A. §§ 523, 727; Fed.Rules Bankr.Proc. Rule 4004(b), 11 U.S.C.A.

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

5. Bankruptcy ⇐2158

Every written motion, other than one which may be considered ex parte, must be served by moving party on trustee or debtor-in-possession and on those entities specified by bankruptcy rules.

6. Bankruptcy ⇐2158, 3311

Creditor's and trustee's failure to serve Chapter 7 debtor with copies of their motions for extension of bar date for filing objections to debtor's discharge was excusable, and did not preclude grant of relief requested, where service had not been accomplished only as a result of bankruptcy judge's error in granting motions ex parte; requiring service on debtor, after motions had already been granted, would have been exercise in futility. Fed.Rules Bankr.Proc.Rule 7004(a), 11 U.S.C.A.

7. Bankruptcy ⇐2126, 2131

Bankruptcy court could exercise its statutory power to enter any necessary or appropriate orders in order to correct its error in extending nondischargeability bar date ex parte, without notice to Chapter 7 debtor; bankruptcy court could vacate its previous order and extend bar date after proper notice to debtor, where creditor's and trustee's motions to extend bar date had been filed in timely fashion and would have been served on debtor but for bankruptcy judge's error in granting motions ex parte. Bankr.Code, 11 U.S.C.A. §§ 105(a), 523, 727; Fed.Rules Bankr.Proc.Rule 4004(b), 11 U.S.C.A.

8. Bankruptcy ⇐3277

Debtor was properly denied his discharge in Chapter 7, for allegedly transferring property to his son with actual intent to hinder, delay or defraud creditor, based on evidence that transfer was made as advance payment on child support obligation not dischargeable in bankruptcy, at time when debtor was already insolvent and had many existing creditors. Bankr.Code, 11 U.S.C.A. § 727(a)(2)(A).

9. Bankruptcy ⇐3787

Bankruptcy court's finding that transfer was made with actual intent to hinder, delay or defraud creditor, within meaning of statutory exception to discharge, was finding of fact which Court of Appeals could not disturb except for clear error. Bankr.Code, 11 U.S.C.A. § 727(a)(2)(A).

10. Bankruptcy ⇐2701

Trustee could not recover value of avoidable transfer from Chapter 7 debtor, as transferor; debtor was not "the entity for whose benefit such transfer was made" within meaning of bankruptcy transfer-avoidance provision. Bankr.Code, 11 U.S.C.A. § 550(a)(1).

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

J.N. Holt, Birmingham, AL, for appellant.

Thomas E. Reynolds, pro se.

Appeals from the United States District Court for the Northern District of Alabama.

Before BIRCH and CARNES, Circuit Judges and MORENO *, District Judge.

BIRCH, Circuit Judge:

This case requires us to carefully untangle a knot that each party has played a role in tying. The appellant and debtor in the underlying bankruptcy case, Thomas Edward Coggin ("Coggin"), appeals the district court's affirmance of the decision of the

* Honorable Federico A. Moreno, U.S. District Judge for the Southern District of Florida, sitting by designation.

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bankruptcy court. The bankruptcy court held that it had jurisdiction over the challenges to Coggin's discharge. The challenges were filed after the statutorily mandated date by the appellees, Phyllis B. Coggin ("Mrs. Coggin"), a creditor and Coggin's ex-wife, and Thomas E. Reynolds (the "trustee"). Coggin argues that the appellees' motions to extend the time for filing such challenges to his discharge were not timely made and, therefore, should not have been granted. Coggin also challenges the bankruptcy court's denial of his discharge. The trustee cross appeals the bankruptcy court's determination that the value of Coggin's avoidable conveyance to his son, Tommy, is not recoverable by the estate from Coggin himself. We affirm the bankruptcy and district court decisions in all respects.

I. BACKGROUND

On April 25, 1989, Coggin filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Alabama. The bankruptcy court set the section 341[1] hearing for June 5, 1989, and fixed August 4, 1989 as the last day for filing a complaint objecting to Coggin's discharge under section 727 or 523 (the "bar date"). On July 28, 1989, the trustee filed a motion to extend the bar date, pursuant to Federal Rule of Bankruptcy Procedure 4004(b),[2] and the bankruptcy court granted the motion the same day without notice or a hearing being granted Coggin. The trustee did not serve either Coggin or his attorney with the motion. A copy of the order granting the trustee's motion to extend the bar date, however, was mailed to Coggin when it was granted. On August 3, 1989, Mrs. Coggin filed an identical motion under Rule 4004(b), which the bankruptcy court also granted immediately, without affording Coggin either notice or a hearing. On the day she filed the motion, Mrs. Coggin served it by mail on Coggin's attorney, but not on Coggin himself.

On September 28, 1989, Mrs. Coggin initiated an adversary proceeding by filing a complaint objecting to the discharge of certain debts of Coggin, pursuant to section 523, or, in the alternative, objecting to his discharge generally, pursuant to section 727. The bankruptcy court granted partial summary judgment to Mrs. Coggin, holding that Coggin was obligated to Mrs. Coggin for past due monthly alimony in the amount of $17,486.50 and that such obligation was nondischargeable under section 523. Coggin does not appeal this decision. On October 26, 1989, the trustee filed a complaint objecting to Coggin's discharge under sections 727(a)(2)(A) and 727(a)(4)(A). Specifically, the trustee made two arguments under section 727(a)(4)(A) and one under section 727(a)(2)(A). First, he asserted that Coggin had knowingly and fraudulently made false oaths, in violation of section 727(a)(4)(A), by failing to disclose that he was to receive $8,000 from the settlement of a lawsuit. Secondly, the trustee asserted that Coggin had again knowingly and fraudulently made a false oath when he failed to disclose a transfer of $13,000 to his son, Tommy, within one year of his filing the petition.[3] Lastly, the trustee alleged that Coggin's transfer of $13,000 to his son, an occurrence which Coggin does not dispute, was a transfer made with the intent to hinder, delay, or defraud creditors in violation of section 727(a)(2)(A).

Coggin filed a motion to dismiss both the trustee and Mrs. Coggin's complaints on the basis that they had failed to file the complaints by the bar date and had not properly moved for an extension of the bar date under Rule 4004(b). Specifically, Coggin asserted that in order for a motion to extend the bar date to be timely, it must be "made" by the

1. Unless otherwise noted, all references to sections are to the Bankruptcy Code.

2. Hereinafter all references to rules will be to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

3. There was much discussion and dispute in the lower courts as to whether Coggin's statements or failures to disclose were, in fact, false. Because we uphold the determination of nondischargeability under § 727(a)(2)(A), we need not address the issue of nondischargeability under § 727(a)(2)(A), we need not address the issue of nondischargeability under § 727(a)(4)(A). Therefore, the truthfulness or falsity of Coggin's statements is irrelevant, and we do not address the arguments or repeat the alleged false statements or omissions.

bar date, and that such a motion is "made" when it is served. The bankruptcy court acknowledged at that time that it had erred in granting the trustee and Mrs. Coggin's motions *ex parte*, without giving Coggin notice or a hearing. The bankruptcy court, therefore, vacated its earlier grant of the extension of the bar date pursuant to section 105(a) and gave Coggin an opportunity to show cause why such an extension should not have been granted. Coggin responded that the motion for extension should not be granted because it was not timely made (i.e., served) and, therefore, the bankruptcy court was procedurally barred from extending the bar date and was required to dismiss the trustee's and Mrs. Coggin's complaints. The bankruptcy court rejected this argument, granted the extension of time, and accepted the complaints as timely filed within the extended time.

In April, 1990, trial was held on the claims of the trustee and on Mrs. Coggin's claim that Coggin owed her a portion of several tax refund checks. The bankruptcy court found that Coggin owed Mrs. Coggin $8,398.67 in tax refunds and that such obligation was nondischargeable under section 523(a)(6). The court also found that sufficient evidence was presented to deny Coggin's discharge on all three grounds asserted by the trustee—the two false oaths under section 727(a)(4)(A) and the $13,000 transfer under section 727(a)(2)(A).

The district court affirmed the bankruptcy court in all respects on September 30, 1993. Coggin timely filed this appeal. He challenges the rejection of his argument that the trustee and Mrs. Coggin's motions for extension of the bar date were untimely. He also appeals the judgments made against him as to dischargeability under section 727.

Additionally, the trustee brought suit against Coggin and his son, Tommy, for recovery of the $13,000 payment Coggin made to Tommy. The trustee settled his case with Tommy prior to the trial in the bankruptcy court. The bankruptcy court found that the transfer of $13,000, in addition to being grounds for denying Coggin's discharge, was also an avoidable conveyance under section 548. The court held, however, that the trustee could not recover that transfer from Coggin under section 550(a)(1). This ruling was affirmed by the district court. The trustee cross appeals this denial of recovery from Coggin.

II. DISCUSSION

In reviewing the judgment of the bankruptcy court in this case, we are presented with three specific holdings. First, we examine the determination of the bankruptcy court that the appellees' motions for extending the bar date were timely made. Secondly, we evaluate the bankruptcy court's denial of Coggin's discharge under section 727. Finally, we review the determination that a trustee cannot, under section 550(a)(1), recover the value of a fraudulent transfer from the transferring debtor.

A. Timeliness Of Motion To Extend Time

[1] The bankruptcy court's determination that the appellees' motions to extend the bar date were timely made is a question of law reviewable *de novo*. *Southtrust Bank v. Thomas (In re Thomas)*, 883 F.2d 991, 994 (11th Cir.1989), *cert. denied*, 497 U.S. 1007, 110 S.Ct. 3245, 111 L.Ed.2d 756 (1990). The facts underlying this determination are not in dispute.

The trustee filed a motion to extend the bar date on July 28, 1989, seven days prior to the bar date. Mrs. Coggin filed a similar motion to extend time on August 3, 1989, the day before the bar date. The bankruptcy court granted both motions *ex parte*, without a hearing of any kind, on the day each motion was filed. In the case of the trustee's motion, neither Coggin nor his attorney was ever served with the motion. Coggin admits, however, that after the court granted the motion, he received a copy of the order in the mail. Mrs. Coggin's motion contains a certificate of service which includes Coggin's attorney, but not Coggin himself. There is no evidence as to whether the order granting her motion was sent to Coggin.

[2] A motion to extend the bar date is a contested matter under the Code. *Collier on Bankruptcy* states:

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Broadly speaking, proceedings in bankruptcy cases can be divided into: (1) adversary proceedings, governed by Part VII of the Bankruptcy Rules; (2) administrative matters, in which there is no adversary party (for example, an unopposed motion by a trustee to sell property of the estate); and (3) contested matters, which do not qualify as adversary proceedings because they are not defined as such by Rule 7001 but which, nevertheless, resemble adversary proceedings in that there are two parties who are opposing each other with respect to relief sought by one of them.

9 *Collier on Bankruptcy* ¶ 9014.03 (15th ed. 1994) (footnote omitted). A motion to extend time best fits in the third category, as it is opposed by the debtor, but is not an adversary proceeding enumerated in Rule 7001. As a result, Rule 9014 applies to this motion.[4] Rule 9014 provides in pertinent part:

> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. *The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004* . . . .

Fed.R.Bankr.P. 9014 (emphasis added). In the case of a motion under Rule 4004(b), the rule provides that the matter will be initiated by motion and specifically requires notice and hearing. Rule 4004 does not, however, provide how service shall be accomplished on a motion for extension of the bar date. As a result, the requirement of Rule 9014, applicable by default to contested matters, applies. It provides that service will be in the manner provided in Rule 7004 for a summons and complaint.[5]

[3, 4] Under Rule 7004(b)(9), if a movant is conducting service by mail, such service must be made on both the debtor and his attorney. There is no question here that neither the trustee nor Mrs. Coggin executed service on Coggin himself. Under Rule 4004(b), a motion to extend the time for filing a complaint objecting to the discharge of a debtor must "be *made* before such time [for filing a complaint] has expired." Fed.R.Bankr.P. 4004(b) (emphasis added). According to Coggin, a motion for extension of the bar date is "made" when it is served. Since the appellees failed to serve Coggin as required under Rule 7004(b)(9), Coggin contends that the motion was not timely made. Further, he argues that under the current rules the failure of a party to properly make a motion under Rule 4004(b) deprives the bankruptcy court of jurisdiction and, consequently, of any discretion to extend the bar date.

In support of his position, Coggin cites several cases that hold that a motion is "made" when it is served. The majority of these cases, however, can be distinguished. Coggin cites a line of cases in which courts have held that a motion to amend findings, or to make additional findings and amend the judgment, is made when it is served, not when it is filed. *Sonoma v. Sells (In re Sonoma V)*, 703 F.2d 429 (9th Cir.1983) (per curiam); *Keohane v. Swarco, Inc.*, 320 F.2d 429 (6th Cir.1963); *In re Sonoma V*, 21 B.R. 21 (Bankr. 9th Cir.1982) (mem.). All three of these cases, however, make reference to a motion under Federal Rule of Civil Procedure ("FRCP") 52(b). The two *In re Sonoma V* cases were decided under the old Federal Rule of Bankruptcy Procedure 752, but, as noted by the bankruptcy court, "[t]his language tracks the language of Fed.R.Civ.P. 52(b)." *In re Sonoma V*, 21 B.R. at 21. *Keohane* was decided under FRCP 52(b) itself. In all three cases, the court relied on the following language from *Moore's Federal Practice:*

> Although Rule 52(b) refers to a motion of a party "made," while Rule 59(b) and (d)

4. Rule 9014 makes applicable to contested matters certain of the Federal Rules of Bankruptcy Procedure that are nominally applicable only to adversary proceedings.

5. Coggin agrees that Rule 7004 governs the method of service here. Presumably he would also agree that other portions of Rule 7004, including those relating to timing of service, also apply.

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refer to a motion "served," there is no difference in effect, since a motion is "made" by causing it to be served.

5A *Moore's Federal Practice* ¶ 52.11[1] n. 8. In support of this proposition, *Moore's* currently cites *Keohane* itself. It does so, however, with the following parenthetical explanation: "[T]he court reasoned that if a Rule 52(b) motion had to be filed as well as served within the ten day period, there would be little reason for Rule 5(d), granting a reasonable time after service to file the motion." *Id.*

This explanation shows that these cases are not authoritative relative to a motion under Rule 4004(b). FRCP 5(d) provides that "[a]ll papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service." Fed.R.Civ.P. 5(d). A motion under FRCP 52(b), of course, would be just such a post-complaint motion to which FRCP 5(d) would apply. A motion under Rule 4004(b), however, is not the same as a motion under FRCP 52(b). Under Rule 9014, a contested-matter motion such as one under Rule 4004(b) is to be treated and served just as a summons and complaint. As such, under Rule 7004(a), service of a motion under Rule 4004(b) is governed by FRCP 4(j).[6] FRCP 4(j) provides that a summons and complaint must be served within 120 days of filing with the court. Fed.R.Civ.P. 4(j). Thus, if the logic of this trio of cases is that it makes no sense for FRCP 5(d) to allow for a reasonable time after *service* to file a motion if a motion must be filed to be "made," then likewise we are drawn to the conclusion that it makes no sense for Rule 7004(a), by way of FRCP 4(j), to allow 120 days for service after *filing* a motion under Rule 4004(b) if a motion must be served to be "made." The logic of *Moore's* statement that a motion is "made" when it is served, therefore, is limited to the particular Federal Rule of Civil Procedure to which it was referring. Likewise, the three cited cases are limited to FRCP 52(d) and old Bankruptcy Rule 752(b).

Two bankruptcy court decisions, however, have explicitly held that under Rule 4004(b), a motion to extend the bar date is not "made" until and unless it is served. *In re Friscia*, 123 B.R. 9 (Bankr.E.D.N.Y.1991); *In re Mancini*, No. 85-30168, 1986 WL 28905 (Bankr.S.D.N.Y. Mar. 26, 1986). These cases are indistinguishable from the present case. Nevertheless, we disagree with their holdings and hold that a motion to extend the bar date under Rule 4004(b) is "made" when filed.

Prior decisions of the bankruptcy court support our position. Although we have found no other case that directly addresses the issue of whether a motion under Rule 4004(b) is "made" when it is filed or when it is served, many cases have mentioned the section in passing. These cases universally use the term "file" when referring to the time limitation imposed on making a motion under Rule 4004(b).[7] None of these cases

6. It is important to note that Rule 7004(g) makes clear that the numbers of the Federal Rules of Civil Procedure referred to in Rule 7004 are the numbers in effect on January 1, 1990, prior to any amendments. Therefore, although the timing of service of a summons and complaint is now governed by FRCP 4(m), the reference to FRCP 4(j) in Rule 7004(a) is to the pre-amendment version in which FRCP 4(j) was still the section governing service of a summons and complaint.

7. *See In re Harvey*, 69 B.R. 411, 412 (N.D.Ohio 1987) ("The conclusion must be that the court has no discretion to enlarge the time for filing a complaint objecting to discharge when the motion for extension has been *filed* past the deadline." (emphasis added)); *In re Park*, 154 B.R. 741, 743 (Bankr.W.D.Mo.1993) ("There is nothing in the ... rules which extends the 60 day time frame from the first scheduled meeting of creditors unless a motion is *filed* within the specified time." (emphasis added)); *In re Sherf*, 135 B.R. 810, 812 (Bankr.S.D.Tex.1991) ("[T]he time for *filing* motions to extend the time under Bankruptcy Rule 4004(b) had expired by March 7, 1991." (emphasis added)); *In re Hall*, 128 B.R. 175, 176 (Bankr.S.D.Tex.1990) ("Bankruptcy Rules 4004(b) and 4007(c) provide that such motions must be *filed* before the 60 days from the first date set for the meeting of creditors has expired...." (emphasis added)); *Columbia First Fed. Savs. & Loan Ass'n v. Rae (In re Rae)*, 115 B.R. 6, 8 (Bankr.D.D.C.1990) ("Bankruptcy Rules 4004(b) and 4007(c), in conjunction with Bankruptcy Rule 9006(b)(3), prohibit extension based on a motion *filed* after the bar date." (emphasis added)); *Park View Fed. Savs. & Loan Ass'n v. Argust (In re Argust)*, 100 B.R. 896, 897 (Bankr.N.D.Ohio 1989) ("Even, if Park View had sought an extension of time within which to file

specifically deals with the issue of whether a motion filed but not served prior to the expiration of the original bar date is timely. Rather, most deal with a motion that was neither filed nor served prior to the original bar date and conclude that the bankruptcy court is without discretion under the current rules to enlarge the time for filing a complaint under Rule 4004(a) when the movant fails to *file* the motion before the expiration of the bar date.

Our position is supported by *Collier on Bankruptcy*, which states: "Current Bankruptcy Rule 4004(b) permits an extension of the deadline only on motion of a party in interest, only for cause, determined at a hearing on notice, and *only if the motion is filed* before the original deadline expires." 8 *Collier on Bankruptcy* ¶ 4004.02[1] (emphasis added). It further states that "[t]he motion [under Rule 4004(b)] must be *filed* within the original time period for complaints objecting to discharge." *Id.* ¶ 4004.04[1] (emphasis added).

Common sense also supports our conclusion that a motion under section 4004(b) is "made" when it is filed, rather than when it is served. Rule 4004(c) provides: "In a Chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), *the court shall forthwith grant the discharge*...." Fed.R.Bankr.P. 4004(c). Black's Law Dictionary defines "forthwith" as:

> Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch. Within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished. The first opportunity offered.

Black's Law Dictionary 654 (6th ed. 1990) (citation omitted). Under Rule 4004(c), therefore, the bankruptcy court is obligated, as soon as practicable after the passage of the bar date, to enter a discharge for the debtor, assuming no complaints objecting to such discharge have been filed. If service on the debtor and his attorney is adequate for a motion to be "made" under Rule 4004(b), but filing is not required to be achieved prior to the bar date, then the court could be left in the position of entering a discharge when there is a validly "made" motion for an extension of time outstanding. Common sense tells us that it is imperative for the court to know, prior to the expiration of the bar date, whether any motions for extension of the bar date have been "made." The court will be so informed if a motion is "made" when filed.

[5] Having ruled that a motion under Rule 4004(b) is "made" when it is filed, we determine the effect of that holding on this case. It is true that "[e]very written motion other than one which may be considered *ex parte* must be served by the moving party on the trustee or debtor in possession and on those entities specified by the Bankruptcy Rules." 9 Am.Jur.2d § 74. As discussed above, Rule 9014 applies Rule 7004 to a

its complaint, such an extension would have been denied in that such a motion should have been *filed* before October 7, 1987." (emphasis added)); *In re Wilson*, 90 B.R. 491, 495 (Bankr. N.D.Ala.1988) ("[A] request for such an extension must be *filed* before the expiration of the time for filing such complaints." (emphasis added)); *In re Gallagher*, 70 B.R. 288, 289 (Bankr. S.D.Tex.1987) ("[Bankruptcy Rule] 4004(b) states that a motion for extension of time may not be *filed* more than 60 days following the first date set for meeting of creditors." (emphasis added)); *Stodd v. Mufti (In re Mufti)*, 61 B.R. 514, 518–19 (Bankr.C.D.Cal.1986) ("Under the current Bankruptcy Rules, however, a motion for an extension of the time to file a complaint objecting to discharge must, pursuant to Bankruptcy Rules 4004(b) and 9006(b)(3), be *filed* before expiration of the original bar date set by Bankruptcy Rule 4004(a)." (emphasis added)); *In re Betinsky*, 58 B.R. 814, 816 (Bankr.E.D.Pa. 1986) ("Since Cohen's [Rule 4004(b)] motion was *filed* after the 60 day periods had expired, we will deny the motion." (emphasis added)); *Agway Ins. Co. v. Grant (In re Grant)*, 45 B.R. 265, 266 (Bankr.D.Me.1984) ("At no time prior to [the bar date] did Agway Insurance Company *file* a motion [under Rule 4004(b)] for the enlargement of time." (emphasis added)); *Bradco Supply Corp. v. Lane (In re Lane)*, 37 B.R. 410, 414 (Bankr.E.D.Va.1984) ("It would be an abuse of this Court's discretion to reach any conclusion other than a requirement that a motion [under Rule 4004(b)] be *filed* prior to the expiration of the time limitations set out in Rules 4004(a) and 4007(a)." (emphasis added)).

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motion under Rule 4004(b). Rule 7004(a), incorporating FRCP 4(j), requires service within 120 days of the filing of a complaint or, in this case, a motion. When serving a motion by mail, Rule 7004(b)(9) requires service on both the debtor and his attorney. It is undisputed that neither the trustee nor Mrs. Coggin served Coggin. The issue of the exact timing of acceptable service of a motion to extend the bar date, therefore, is not before us in this case, as it is undisputed that service was never properly completed.[8]

As a corollary to our holding that a motion is "made" when filed, we also hold that failure to serve the debtor or his attorney or both prior to the expiration of the bar date does not constitute failure to "make" a motion within the prescribed time. It is well-settled that under the new Bankruptcy Rules, the bankruptcy court has no discretion to grant an extension of the bar date when a motion to do so is not "made" prior to the expiration of the bar date. *See In re Lane*, 37 B.R. at 412–13. We hold that if a motion is filed but not served prior to the bar date, the jurisdictional requirement of rule 4004(b) is met, and the bankruptcy court retains jurisdiction to extend the bar date if service is proper, or to employ its equitable powers if service is not perfected properly.

[6] We are called upon here to determine whether the bankruptcy court erred as a matter of law in allowing the appellees additional time to file a complaint objecting to Coggin's discharge. The facts of this case indicate that the court had this power and did not abuse its discretion in doing so. Thinking that it had the power to give the appellees an extension *ex parte*, the court granted their motions as soon as they were submitted, with no notice and no opportunity for Coggin to be heard. This decision, of course, was erroneous, as it was contrary to the plain language of Rule 4004(b), which provides that such a motion may only be granted "after hearing on notice." Fed. R.Bankr.P. 4004(b). The error, however, was that of the court and not of the appellees. The appellees had time to serve Coggin after they filed their motions, but because of the court's immediate granting of the motions and the fact that notice of the extension was given to Coggin, such service would have been futile. Hence, while the appellees erred in never serving Coggin and his attorney, the actions of the court in granting the motions *ex parte* created a situation where such error was excusable.[9]

[7] Having decided that the motions of the appellees to extend the bar date were properly "made" when filed, and that their failure to serve Coggin in this case was excusable due to the error of the court, we must determine whether the court properly granted those motions. We are not addressing the merits of such a decision, but rather whether the process followed by the court was proper. Upon determining that it had

8. We do make the following comments about service, however. First, service, like filing, will generally be expected to be made prior to the expiration of the original bar date. Service by mail is permitted, and service is considered complete when mailed. Fed.R.Bankr.P. 7004(b) and (f). In addition, the debtor and his attorney are both under an ongoing obligation to keep their addresses current in the records on file with the bankruptcy court. *Cossio v. Cate (In re Cossio)*, 163 B.R. 150, 156 (Bankr. 9th Cir.1994). In addition, under Rule 7004(b)(9), service is effective on a debtor if it is mailed to "the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing." Fed.R.Bankr.P. 7004(b)(9). Therefore, service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing. Service of the debtor and his attorney should, therefore, generally present no difficulty to a movant and should be completed at the same time as filing, prior to the expiration of the bar date. This reasoning is supported by common sense, for while the court's need to know of the existence of a motion to extend the bar date may be slightly greater than that of a debtor, a debtor still has a vital interest in the status of his discharge. This view further comports with the bankruptcy policy of granting a debtor a discharge, and hence a "fresh start," as expediently, efficiently, and fairly as possible in appropriate circumstances.

9. As we noted at the outset, this case is a knot that each party participated in tying. Coggin, when he received notice that the trustee's motion had been granted, apparently prior to the expiration of the bar date, should have moved the court to revoke or amend that grant, as it was improper without a hearing on notice. Instead, whether consciously or not, Coggin sat on his rights and later brought this jurisdictional challenge.

erred in granting the motions *ex parte*, the court set aside its earlier order pursuant to section 105(a) and afforded Coggin a hearing and an opportunity to dispute the appellees' motions for extension of the bar date. After the hearing, the court found that there were sufficient facts to justify the grant of the extension and that Coggin was not prejudiced by the extension.

Section 105(a) provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The bankruptcy court has the equitable power to correct, modify, or vacate its own interlocutory orders. *See A & A Sign Co. v. Maughan*, 419 F.2d 1152, 1155 (9th Cir.1969); *Dore & Assocs. Contracting, Inc. v. American Druggists' Ins. Co.*, 54 B.R. 353, 360 (Bankr.W.D.Wis.1985). Coggin argues that such modification here is beyond the equitable power of the court because the failure of the appellees to serve him prior to the expiration of the bar date amounts to a failure to meet the requirements of Rule 4004(b) and therefore amounts to a jurisdictional bar. Since we have held, however, that only failure to file a motion for extension of the bar date raises a jurisdictional bar under Rule 4004(b), the court retained equitable power in this case. We find no error in the court correcting its own mistake of granting the appellees' motions *ex parte*. In addition, service by the appellees after the court had granted the motions and sent the orders to Coggin would have been fruitless. As a result, the failure of the appellees to serve Coggin here was excusable. Moreover, Coggin received notice and a hearing, which is the key to service. We hold, therefore, that the appellees satisfied the jurisdictional bar of Rule 4004(b) when they filed their motions prior to the expiration of the bar date, that appellees' failure to serve Coggin himself was excusable in light of the court's error in granting their motions *ex parte*, and that the court had the equitable power to correct its earlier mistake and grant the motions after affording Coggin notice and a hearing. The extension of the bar date here was valid.

B. Validity Of Denial Of Discharge

[8] Coggin next complains that the court erred in denying his discharge under section 727.[10] The bankruptcy court denied Coggin's discharge on two bases. First, it found that certain statements or omissions Coggin made constituted knowingly and fraudulently made false oaths under section 727(a)(4)(A). Secondly, it held that the transfer of $13,000 to his son, Tommy, constituted a transfer of property of the debtor with the actual intent to hinder, delay or defraud a creditor, in violation of section 727(a)(2)(A). Coggin challenges both of these determinations.

[9] The bankruptcy court held that Coggin should be denied a discharge under section 727(a)(2)(A). Section 727(a) provides in pertinent part:

> (a) The court shall grant the debtor a discharge, unless—
>
> ....
>
> (2) the debtor, *with intent to hinder, delay, or defraud* a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a) (emphasis added). In this respect, the court found as follows:

> Coggin converted various assets to cash in February and March, 1989 and then transferred Thirteen Thousand Dollars

10. Coggin also challenges the bankruptcy and district court's determinations relating to a 1986 tax refund he received which is addressed in his divorce decree. The bankruptcy court held that he owed Mrs. Coggin one-half of the actual amount of the refund received after the 1986 return was amended. The court also held that this obligation was nondischargeable. Coggin does not, in his brief, address the issue of the dischargeability of this debt. He does, however, challenge the determination of the amount of the refund owed to his former wife. After a careful examination of the evidence and decisions of the lower courts, we find no error in their determinations and affirm their holdings in all respects relevant to this obligation.

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($13,000) in cash to his son, Tommy. It is clear from the testimony that the transfer of such sum was to pay future child support obligations and was to avoid the claims of his ex-wife. Such transfer was with the intent to hinder, delay and defraud his Creditors, including his ex-wife, and constitutes a violation of § 727(a)(2)(A), *Bankruptcy Code.*

....

The transfer of the Thirteen Thousand Dollars ($13,000) from Coggin to Tommy was made with the actual intent to hinder, delay or defraud Phyllis Coggin and the other Creditors of the Debtor. The transfer was made while the Debtor was insolvent and while there were many existing Creditors. Pursuant to Section 502(b)(5), *Bankruptcy Code,* Tommy would not be able to have any claim with the estate in that, even though the obligation of Coggin to pay child support would not be dischargeable through his bankruptcy. [sic] Only a pre-petition obligation for support could be considered a Claim in the Estate. Congress clearly intended that post-petition support obligations were to be paid out of the Debtor's post-petition income, and not from property of the Estate. The overall plan and concept of bankruptcy, in this regard, is that the assets of the Estate are to be used only to pay the legitimate Claims of the Creditors in existence as of the filing of the Petition. The future support owed to Tommy was not a matured debt and, thus, Section 502(b)(5) would prevent the payment of such Claim from the assets of the estate. For this reason, the Debtor could not be permitted to pay such support from those assets before the filing of his Petition.

... The Court is convinced that the transfer of the Thirteen Thousand Dollars ($13,000) by Coggin to Tommy was a transfer made within one year before the filing of the Petition and was made with the actual intent to hinder, delay or defraud Phyllis Coggin or the other Creditors of the Debtor.

Bankruptcy Court Memorandum of Decision at 9, 11–12 (citation omitted). The bankruptcy court's finding that the transfer in question was made with the actual intent to hinder, delay, or defraud is a question of fact which we will only disturb if it is clearly erroneous. *Williamson v. Fireman's Fund Ins. Co.,* 828 F.2d 249, 251 (4th Cir.1987). The bankruptcy court, after a trial on the merits of this action, determined that Coggin made the transfer here with actual intent and in violation of section 727(a)(2)(A). Finding ample evidence in the record to support this conclusion, we find no clear error in the court's decision.

A denial of discharge under section 727(a) is total, causing all creditors to continue to have a post-petition claim against the debtor and his present and future assets. As the denial under any one of the subsections of section 727(a) yields the same result, only one of the bankruptcy court's bases for denial need be upheld. We therefore need not address the court's finding of nondischargeability under section 727(a)(4)(A). We hold that the bankruptcy court properly denied Coggin's discharge under section 727(a)(2)(A) for making a transfer to his son with the actual intent to hinder, delay, or defraud a creditor.

C. Trustee's Cross Appeal For Money Judgment Against Debtor

[10] Finally, the trustee appeals the bankruptcy court's determination that the Code vested no power in the trustee to recover the amount transferred to Tommy from Coggin. The bankruptcy court held that although the transfer from Coggin to Tommy was avoidable under section 548, "Section 550 does not authorize or permit recovery against a Debtor for the value of property fraudulently transferred." Bankruptcy Court Memorandum of Decision at 13. Based on our analysis affirming the finding of a fraudulent transfer in violation of section 727(a)(2)(A), there is no question that the transfer here is avoidable under section 548(a)(1), which employs the same legal standard as section 727(a)(2)(A).[11] The relevant portion of section 550 provides:

11. Coggin does not materially dispute this point in his brief aside from a reiteration of his challenge to the finding that he committed a transfer in violation of § 727(a)(2)(A).

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(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section ... 548 ... of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or *the entity for whose benefit such transfer was made.*

11 U.S.C. § 550(a)(1). The trustee argues that Coggin is an "entity for whose benefit such transfer was made," *id.*, and, therefore, that the estate is entitled to recover from Coggin the value of the property conveyed to Tommy.[12]

This issue appears to be one of first impression. We have not found, and the parties did not cite, a single case in which a court decided whether a transferring debtor is an "entity for whose benefit such transfer was made" under the Code. By applying its plain language and apparent purpose, and by consulting our bankruptcy compass, however, we hold that section 550(a)(1) does not allow recovery of an avoided transfer from the transferring debtor. First, the plain language of the statute indicates that a debtor was not intended to be an entity from whom recovery may be had under section 550(a)(1). The statute states that the trustee may recover an avoided transfer from an "entity for whose benefit such transfer was made." *Id.* In reality, an avoidable transfer of which section 550(a)(1) allows recovery will only occasionally directly benefit a debtor. Generally, a debtor has a fixed amount of assets and liabilities, and bankruptcy will schedule these in such a way as to deplete the debtor's assets, aside from those which are exempt, in achieving the maximum possible satisfaction of the existing liabilities. The debtor will usually receive a benefit in making an avoidable transfer in only two situations. First, the debtor may benefit in the case of a fraudulent transfer where the debtor retains an interest in the transferred assets, thereby protecting some assets from the reach of the bankruptcy process and benefitting the debtor. The second situation in which the debtor may benefit from an avoidable conveyance arises when the conveyance is made to satisfy a nondischargeable obligation, so that the debtor will receive his discharge with less post-discharge obligations remaining. Thus, it is arguable that section 550(a)(1) was intended to apply to debtors when the court finds that the transfer did, in fact, benefit the debtor in some way beyond that afforded by the liquidation or reorganization and the subsequent discharge. For this reason, we look for other guideposts.

The traditional usage of section 550(a)(1) also indicates that it was not intended to allow recovery from a transferring debtor. The phrase "entity for whose benefit such transfer is made" typically has been employed when the trustee attempts to recover from a guarantor of an underlying debt. If one guarantees a debt of the debtor, and the debtor then satisfies that debt with an avoidable conveyance, the guarantor receives a direct benefit in the elimination of his matured obligation to pay the unsatisfied portion of the debt. This is particularly true in the bankruptcy context, where the underlying debt is generally listed as an obligation of the estate, it is not paid in full by the debtor, and the guarantor's obligation matures.[13]

In the typical case where a guarantor is the "entity" from which the trustee can recover under section 550(a)(1), there is a real

12. There has apparently been a settlement between the trustee and Tommy. If that settlement calls for Tommy to repay any monies to the estate, that amount would, of course, be deducted from any right of recovery the estate has against Coggin. The estate is entitled to only one satisfaction. 11 U.S.C. § 550(c).

13. Much of the controversy in this area deals with a very specific issue: whether a payment which is avoidable under § 547(b)(4)(B) as a preferential transfer to an insider within one year but more than ninety days prior to the filing of the petition may be recovered not only from the insider but also from the non-insider who is either the guarantor or the direct transferee. The courts are split on this question. *Compare Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1194–1200 (7th Cir.1989) (non-insiders liable) *with Rubin Bros. Footwear, Inc. v. Chemical Bank (In re Rubin Bros. Footwear)*, 119 B.R. 416, 425 (S.D.N.Y.1990) (non-insiders not liable, refusing to follow *Levit*). In any event, the phrase "entity for whose benefit such transfer was made," has heretofore primarily addressed the guarantor situation.

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and immediate financial benefit to the guarantor. By the debtor satisfying the underlying obligation, the guarantor is relieved of his matured obligation to pay any unsatisfied portion. This relief from an obligation to pay money is the economic equivalent of the receipt of money by one to whom money is owed.

We have found no cases in which a court allowed a trustee to recover the value of an avoidable conveyance directly from the transferring debtor under section 550(a)(1). Having no guidance, we have applied the language of the statute and its apparent purpose, as well as economic reality and the contextual sense of the statutory scheme, to interpret the likelihood that Congress intended to include the debtor as an "entity" from which the trustee could recover under section 550(a)(1).[14] After examining these factors, we agree with the bankruptcy and district courts that there is no cause of action created by section 550(a)(1) in a trustee to recover the value of an avoidable conveyance from a transferring debtor.

III. CONCLUSION

Coggin has challenged the bankruptcy court's determination that the trustee and Mrs. Coggin "made" their motions to extend the bar date in a timely fashion, and that he is a nondischargeable debtor under section 727. In addition, the trustee has challenged the court's holding that the trustee cannot recover the value of an avoidable transfer directly from the transferring debtor under section 550(a)(1). We hold that a motion for extension of the bar date under Rule 4004(b) is "made" when it is filed, and we affirm the court's grant of said extension and acceptance of the complaints by the trustee and Mrs. Coggin. Next, we find that the district court properly denied Coggin's discharge under section 727(a)(2)(A). Finally, we hold that there is no cause of action under section 550 for the value of an avoidable transfer against the transferring debtor as an "entity for whose benefit such transfer was made."

AFFIRMED.

14. There is very little legislative history on section 550(a), and none at all addressing the meaning of the term "entity for whose benefit such transfer was made." We note, however, that § 60b of the Bankruptcy Act, the precursor to § 550 of the Bankruptcy Code, allowed recovery from "the *creditor* receiving [the transfer] or to be benefitted thereby." Act of June 22, 1938, Pub.L. No. 75-696, § 60b, 52 Stat. 840, 870. Section 60b clearly did not contemplate recovery from the debtor himself, and we find no indication that Congress intended to permit such recovery when it enacted § 550.

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WEST KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff-Appellee,

v.

Joseph P. BAGWELL, Defendant-Appellant.

No. 93-8854.

United States Court of Appeals, Eleventh Circuit.

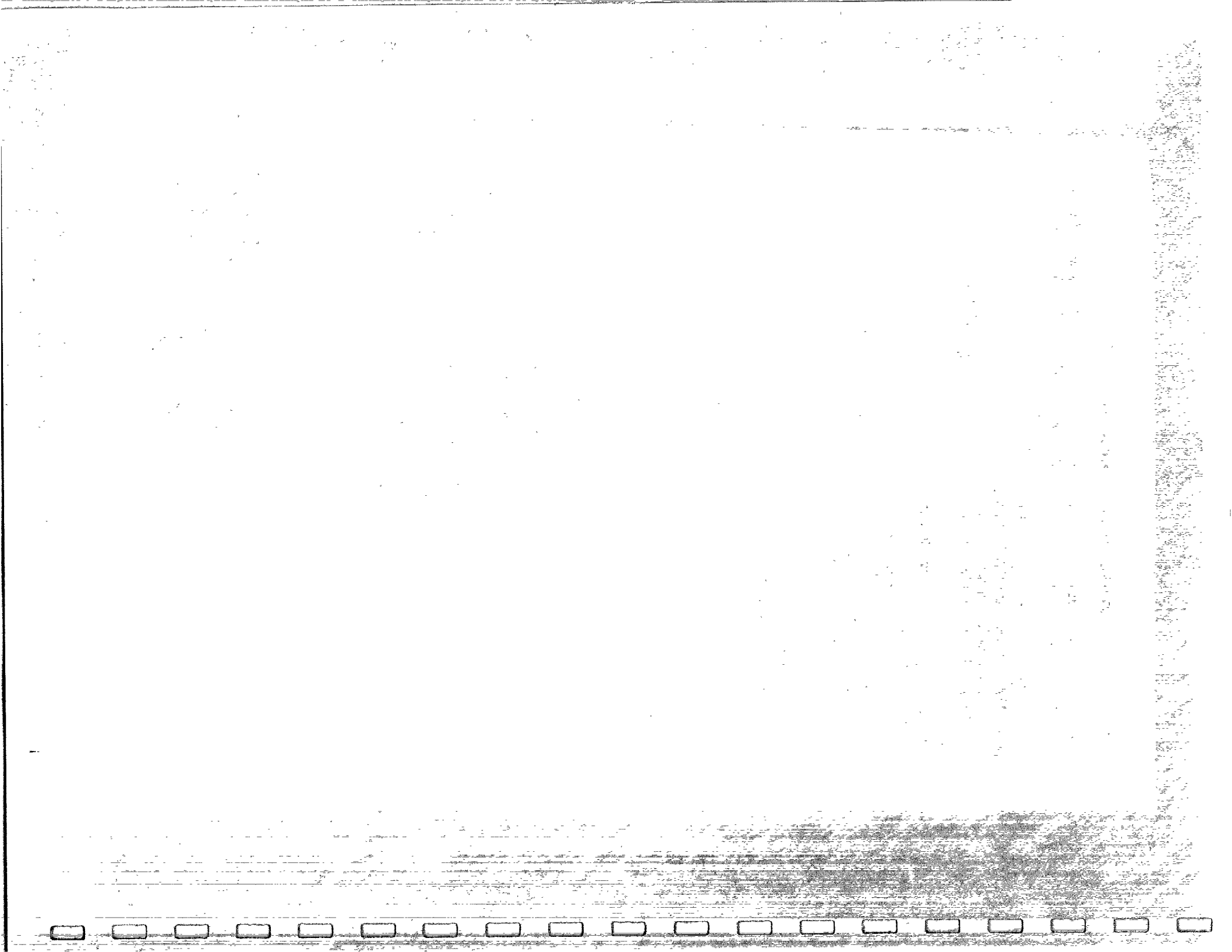
Sept. 8, 1994.

Defendant was convicted in the United States District Court for the Northern District of Georgia, No. 2:92-00021-CR-1, William C. O'Kelley, Chief Judge, pursuant to his guilty plea, of possession of marijuana with intent to distribute and assaulting federal officer, and he appealed. The Court of Appeals, Vollmer, District Judge, sitting by designation, held that obstruction of justice enhancement under Sentencing Guidelines had to be based on determination that defendant obstructed investigation of offense of conviction, rather than some other offense.

Vacated and remanded.

1. Criminal Law ⇐1139, 1158(1)

District court's findings of fact are reviewed for clear error, while its application of Sentencing Guidelines to facts is subject to



Agenda Item 10

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO RULE 3008

DATE: JULY 11, 1995

Section 502(j) of the Bankruptcy Code provides that a claim that has been allowed or disallowed may be reconsidered for cause. Bankruptcy Rule 3008 governs the procedure for reconsideration of an order allowing or disallowing a claim against the estate. It provides as follows:

Rule 3008. Reconsideration of Claims

> 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.

The intent of the Advisory Committee when it originally adopted Rule 3008 was to permit the court to deny a motion to reconsider the allowance or disallowance of a claim without notice or a hearing, but that, if the motion to reconsider is granted, notice and an opportunity to be heard must be given before the court can rule on the allowance or disallowance of the claim. This is confirmed by the original Committee Note to Rule 3008 which provides that "[t]he court may decline to reconsider an order of allowance or disallowance without notice to any adverse party and without affording any hearing to the movant. If a motion to reconsider is granted, notice and hearing must be afforded to parties in interest before the previous action in the claim taken in respect to the claim may be vacated or modified."

Professor Lawrence P. King has suggested the following

amendment to Rule 3008 for the purpose of clarifying the original intention and to avoid the implication that notice and a hearing is required before the court may deny a motion to reconsider:

Rule 3008. Reconsideration of Claims

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court may deny the motion without notice or a hearing. If the motion is granted, the ~~The~~ court after a hearing on notice shall enter an appropriate order.

I agree with Professor King's suggestion to clarify the rule, but would further clarify the second sentence by referring to the motion that may be granted before the notice and hearing on the merits as the "motion for reconsideration." I also would modify the last sentence to use the phrase "after notice and a hearing" rather than "after a hearing on notice." Section 102 of the Bankruptcy Code defines "after notice and a hearing" or "a similar phrase" to mean that the court may act without a hearing if proper notice is given and a request for a hearing is not made by a party in interest. Use of this phrase would be consistent with Rule 9014 on contested matters which provides that "reasonable notice and opportunity for a hearing shall be afforded the party against whom relief is sought." [emphasis added]. Although I think that "after a hearing on notice" is a "similar phrase" within the meaning of § 102 of the Code, there has been some doubt about that in the context of other rules and

it makes sense to clarify this by using the exact phrase "after notice and a hearing."

In sum, I suggest that the Committee consider the following amendments to Rule 3008:

Rule 3008. Reconsideration of Claims

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court may deny the motion without notice or a hearing. If the motion for reconsideration is granted, the ~~The~~ court after notice and a hearing ~~on notice~~ shall enter an appropriate order.

COMMITTEE NOTE

This rule is amended to clarify that a motion for reconsideration of an order allowing or disallowing a claim may be denied without notice or a hearing. If the court grants the motion for reconsideration, notice and an opportunity to be heard must be afforded to parties in interest before the court may vacate or modify its previous order regarding the allowance or disallowance of the claim. The phrase "after a hearing on notice" is changed to "after notice and a hearing" to conform to § 102(1) of the Bankruptcy Code.

Agenda Item 11

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 1003 -- JOINDER OF PETITIONERS IN AN INVOLUNTARY CASE

DATE: JULY 12, 1995

Section 303(b) of the Code requires that, if a debtor has 12 or more creditors (excluding employees, insiders and creditors who received voidable transfers) holding claims that are not contingent as to liability or the subject of a bona fide dispute, there must be at least three petitioners holding such claims aggregating at least $10,000 (above the value of liens) to commence an involuntary case. That is, a petitioning creditor does not count as one of the required three if its claim is contingent or disputed. Section 303(c) permits creditors to join in the petition after it has been filed and before it has been dismissed.

To assist petitioning creditors in identifying other creditors who may be willing to join in the petition to satisfy the requirements of § 303(b), Rule 1003(b) provides as follows:

Rule 1003. Involuntary Petition

* * * * *

(b) JOINDER OF PETITIONERS AFTER FILING. If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

Bankruptcy Judge S. Martin Teel, Jr., in his letter of August 3, 1994 (copy attached), has pointed out the following two deficiencies in Rule 1003(b) which he explains in greater detail in his letter.

(1) Although the rule applies if less than three creditors sign the petition, it does not address the case in which three creditors sign the petition, but the debtor maintains that at least one of them does not count because its claim is contingent or disputed.

(2) The rule does not require the answering debtor to state on the list of creditors whether each creditor's claim is contingent or disputed (it only requires that it state the "nature of the claim"). This information would be useful in identifying those creditors who are eligible to serve as petitioning creditors under § 303(b).

I agree with Judge Teel's suggestions for the reasons stated in his letter, and I believe that the rule could be improved by adopting his recommendation. Please see page 2 of his letter which sets forth his draft of recommended changes to Rule 1003(b). I would only make a few minor stylistic changes to his proposed amendments, and a few more to the portion of the rule that Judge Teel did not suggest amending (especially in the last sentence of the rule).

I suggest that the Committee consider the following amendments to Rule 1003(b) which are based on Judge Teel's draft with a few of my own stylistic changes:

Rule 1003. Involuntary Petition

* * * * *

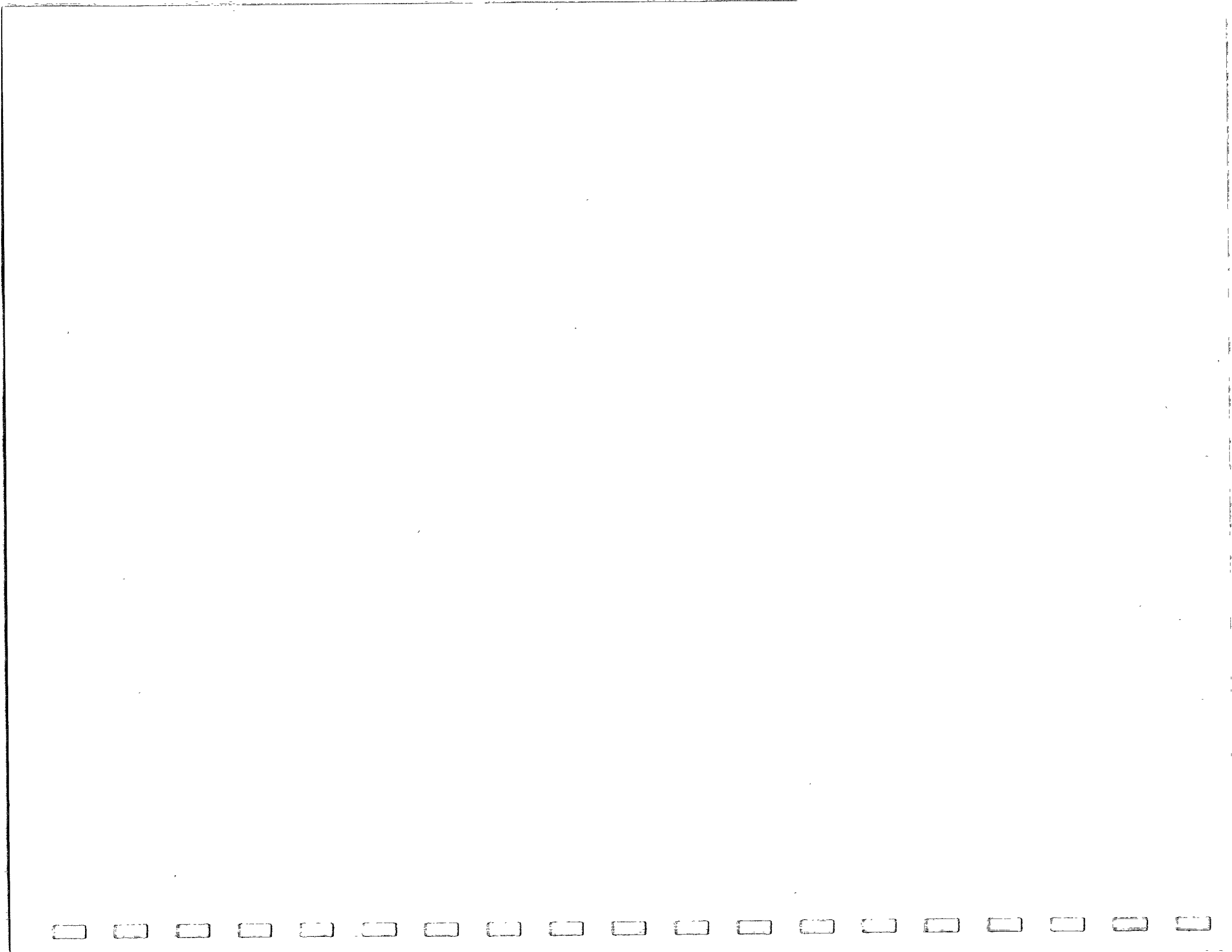
(b) JOINDER OF PETITIONERS AFTER FILING. If the answer to an involuntary petition ~~filed by fewer than three creditors~~ avers the existence of 12 or more creditors and raises as a defense that fewer than three creditors holding claims of a type described in § 303(b)(1) of the Code have filed the petition, the debtor shall file with the answer a list of all creditors with their addresses~~,~~ and a brief statement of the amount and nature of ~~their claims~~ each claim, including whether the claim is contingent as to liability or the subject of a bona fide dispute ~~, and the amounts thereof~~. ~~If it appears that there are 12 or more creditors as provided in § 303(b) of the Code~~ Unless it appears that § 303(b)(2) is applicable, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

COMMITTEE NOTE

Subdivision (b) is amended to require the debtor file a list of creditors, regardless of the number of petitioning creditors, if the answer avers that there are 12 or more creditors and raises as a defense that there are fewer than three creditors that satisfy the requirements of § 303(b)(1) of the Code.

The subdivision is amended further to require that the list of creditors that the debtor must file state whether each claim is contingent as to liability or the subject of a bona fide dispute. This information will assist petitioning creditors in identifying those creditors that are eligible to join in the petition to satisfy the requirements of § 303(b)(1).

Other amendments to this rule are stylistic.



UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

S. MARTIN TEEL, JR.
Judge

UNITED STATES COURTHOUSE
WASHINGTON, D. C. 20001
202-535-1595

August 3, 1994 202/273-0708

Peter G. McCabe
Secretary, Committee on
Rules of Practice and Procedure
Administrative Office of the
United States Courts
Washington, D. C. 20544

RE: Proposed Amendment to F.R. Bankr. P. 1003(b)

Dear Mr. McCabe:

F.R. Bankr. P. 1003(b) provides:

> (b) Joinder of Petitioners After Filing. If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

Rule 1003(b) falls short, first, by failing to address the case in which three or more creditors filed the petition but the debtor maintains that less than three of them are holders of claims as described in 11 U.S.C. § 303(b)(1).[1] When the debtor raises § 303(b)(1) as a defense, the debtor ought not be any better off when three or more petitioners filed the petition than when only one or two petitioners filed the petition. That is, the debtor ought not face any less arduous burden to identify creditors who may join in the petition in order that three holders described in § 303(b)(1) of the Code are pursuing the petition.

Rule 1003(b) falls short, second, with respect to the type of information that must be furnished on the list of creditors filed with the answer. It merely requires that the debtor file a "brief statement of the nature of their claims" without requiring the

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[1] Section 303(b)(1) provides that an involuntary petition may be commenced "by three or more entities each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate that 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[.]"

debtor to state whether the claims are "contingent as to liability" or "the subject of a bona fide dispute" within the meaning of § 303(b)(1) of the Code. If the debtor maintains that § 303(b)(1) is a bar to the granting of the petition, the debtor should articulate why by indicating which creditors exist that hold claims that are not contingent as to liability or the subject of a bona fide dispute. Such a requirement would not be too burdensome and would expedite the resolution of the case. Once the debtor commits to certain creditors being of the type described in § 303(b)(1), or not being of that type, that should both narrow the issues and enable the petitioners more readily to identify creditors who can join as petitioners as eligible holders described in § 303(b)(1).[2]

By way of historical background, Rule 1003(b) appears to have been derived from Bankruptcy Rule 104(e) which in turn implemented Bankruptcy Act § 59(d). That statutory provision specifically required the debtor to file a list but only when the petitioners averred that there were fewer than 12 eligible creditors to be petitioners and when less than three creditors had joined in the petition. Section 303(b) of the Bankruptcy Code, in contrast, does not address the procedural issues. Accordingly, the rulemakers are free to adapt procedures that will allow more efficient case administration in addressing the issues presented by § 303(b)(1) of the Code.

Accordingly, I recommend that Rule 1003(b) be amended as follows:

> (b) Joinder of Petitioners After Filing. If the answer to an involuntary petition ~~filed by fewer than three creditors~~ avers the existence of 12 or more creditors and raises as a defense that fewer than three creditors holding claims of a type described in § 303(b)(1) of the Code have filed the petition, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of ~~their claims~~ each claim, including whether the claim is contingent as to liability or the subject of a bona fide dispute, and the ~~amounts~~ amount thereof. If it appears that there are 12 or more creditors as

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[2] All creditors should still continue to be listed under Rule 1003(b) because the petitioners are entitled to contest the debtor's say as to which claims are claims described in § 303(b)(1). The creditors may challenge the debtor's assertion that 12 or more creditors hold claims described in § 303(b)(1) or they may challenge the debtor's assertion that certain creditors, who join as petitioners, do not hold claims described in § 303(b)(1).

provided in § 303(b)(1) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

I thank you and the Advisory Committee on Bankruptcy Rules for any attention that can be given to this proposal.

Sincerely yours,

S. Martin Teel, Jr.

S. MARTIN TEEL, JR.
United States Bankruptcy Judge

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2004(c) -- ATTENDANCE AT EXAMINATION

DATE: JULY 17, 1995

Agenda Item 12

Bankruptcy Rule 2004(a) provides that "[o]n motion of any party in interest, the court may order the examination of any entity." Rule 2004(c) provides that "[t]he attendance of an entity for examination ... may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial." Rule 9016 provides that Civil Rule 45 applies in cases under the Code. Therefore, the provisions of Civil Rule 45 on compelling the attendance of witnesses at a hearing or trial govern the attendance of an entity at a Rule 2004 examination.

Civil Rule 45 (copy attached) distinguishes between procedures governing attendance at a trial or hearing and procedures governing attendance at a deposition. With respect to the issuance of a subpoena compelling attendance at a hearing or trial, Rule 45(a)(2) provides that it must issue from the court for the district in which the hearing or trial is to be held. With respect to the issuance of a subpoena compelling attendance at a deposition, Rule 45(a)(2) provides that it must issue from the court for the district designated in the notice of deposition as the district in which the deposition is to be taken. In either situation, only the "local" district (the place of the examination) may issue the subpoena.

With respect to service of the subpoena, Rule 45((b)(1)

provides that it may be served "at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial... specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial... specified in the subpoena."

When Bankruptcy Rules 2004(a), 2004(c), and 9016, and Civil Rule 45, are read together, I think the clear result is that (1) a bankruptcy court presiding over a case may order that any entity be examined under Rule 2004(a) (regardless of where the entity is located); (2) the subpoena must issue from the bankruptcy court for the district in which the examination will take place; and (3) the subpoena must be served within the issuing district, or outside the district but within 100 miles of the place of the examination, or as provided by state law where the examination will take place.

This application of Rule 2004 is confirmed by two cases (the only two that a Lexis search produced on the application of Rule 2004(c)). In In re Texas Int'l Company, 97 B.R. 582 (Bankr. C.D. Cal. 1989), the Bankruptcy Court for the Western District of Oklahoma issued an order under Rule 2004(a) granting the creditors' committee leave to examine a financial advisor in connection with a chapter 11 case pending in that district. The committee then filed a certified copy of the order with the

Bankruptcy Court for the Central District of California, which issued a subpoena duces tecum compelling the financial advisor to appear at an examination to be held in the Central District of California (where it resides). The procedural question raised was "whether a nondebtor can be subpoenaed to attend a Rule 2004(a) examination in the district where the witness resides, based on a Rule 2004(c) examination Order issued in a different district where the underlying bankruptcy case is pending." The court answered affirmatively and held that the procedure followed in that case was proper.

In In re Federated Department Stores, Inc., 1990 Bankr. LEXIS 1143 (Bankr. S.D. Ohio, 1990), the bankruptcy court presiding over the debtor's chapter 11 case granted the creditors' committee's motion for a Rule 2004(a) order requiring six entities to produce certain documents. The court, in granting the order, stated that:

> "Under Bankruptcy Rules 2004(c), 9016, and Rule 45 of the Federal Rules of Civil Procedure, the appropriate procedure for obtaining documents from persons located in another federal district is for this Court to enter an Order authorizing the discovery, and for the Committee then to present certified copies of the Order to the United States Bankruptcy Court for the district in which the person from whom documents are requested resides. The latter court will the [sic] issue a subpoena duces tecum to the appropriate party."

Since the Texas Int'l and Federated Stores cases were decided, Rule 45 has been entirely restructured and amended (in 1991) in ways that would not affect the reasoning or result in those cases. For example, Rule 45 now permits an attorney as an officer of the court to issue and sign the subpoena.

Judge Matheson's Proposal

Bankruptcy Judge Charles E. Matheson, in his letter dated September 12, 1994 (copy attached), suggests that, based on Bankruptcy Rules 2004, 9016, and Civil Rule 45, "it appears that a bankruptcy court can only order the Rule 2004 examination of a nondebtor within the judicial district of the bankruptcy court issuing the order (or within 100 miles of the place where that court sits)." Judge Matheson suggests that this "makes no sense" because "there may be many occasions, such as the matter which is currently before me where parties, whose examination under Rule 2004 would be very appropriate, reside beyond the judicial district of the bankruptcy court administering the case." He suggests that this problem could be cured by amending Rule 2004(c) to specify that "attendance of a person for examination may be commanded, if the examination is to be conducted within the issuing court's judicial district, in the manner specified in Rule 9016 for attendance at a hearing or trial or, if the examination is to be conducted outside of that judicial district, then in the manner provided in Rule 9016 for attendance at a deposition."

I agree with Judge Matheson that a rule that would not permit the court to order an examination of a nondebtor that resides outside the district would not make sense. However, I respectfully disagree with Judge Matheson's interpretation of the current rule. As discussed above, I think the rule is clear that Rule 2004(a) gives the court the power to order the examination

of any entity (without geographic limitations). It is important not to confuse the authority of the bankruptcy court to order an examination of an entity under Rule 2004(a) with the separate questions of which court must issue the subpoena and where the subpoena may be served pursuant to Rule 2004(c) and Civil Rule 45.

For the reasons discussed above, I do not believe that any amendments to Rule 2004 are required. In addition, if Rule 2004(c) is amended as Judge Matheson suggests, it could create a new step that is not now required. Rule 45(a)(2) provides that a subpoena commanding attendance at a deposition "shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken." [emphasis added]. If this procedure must be followed for Rule 2004 examinations, it probably would be necessary for the court order issued under Rule 2004(a) to designate the district in which the examination is to be taken (apparently, the court order under Rule 2004(a) serves as the equivalent of the notice of deposition). Under the current rules, as I read them, the court need not specify any district in which the Rule 2004 examination is to take place. Rather, the court can simply order the examination of a particular entity. This leaves to the movant's attorney the problem (and flexibility) of later determining the location of the entity and identifying the appropriate district from which to obtain the subpoena. If the movant later discovers that the entity has changed residence, there is no need under the

current rules for the movant to return to the home court to amend the Rule 2004(a) order to designate the district in which the examination is to be taken. If Judge Matheson's suggestion is adopted, I believe that the movant would have to seek amendment of the court order to so designate the district where the examination is to take place.

Although, as discussed above, I believe that no action is required with respect to Judge Matheson's recommendation, the Committee may wish nonetheless to amend Rule 2004(c) to clarify that an examination ordered under Rule 2004(a) may be held outside the district in which the case is pending. This clarification could be accomplished by the following amendment:

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE. The attendance of an entity for examination and the production of documentary evidence, whether it is to be held within or without the district in which the case is pending, may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered pursuant to Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

Issuance of the subpoena by an attorney

In considering Judge Matheson's suggestion and in preparing this memorandum, I came across a glitch resulting from the 1991 amendments to Civil Rule 45 that should be fixed. Rule 45(a)(3) provides, in part, that:

> "An attorney as officer of the court may also issue and sign a subpoena on behalf of (A) a court in which the attorney is authorized to practice; or (B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice."

Since under Rule 2004(c) the procedures for compelling attendance of an entity for a Rule 2004 examination are the procedures in Civil Rule 45 for compelling the attendance of witnesses at a hearing or trial, rather than for attendance at a deposition, it could be argued that Rule 45(a)(3)(B) does not apply and, therefore, an attorney may sign the subpoena only if he or she is authorized to practice in the district from which the subpoena is issued. For example, an attorney who is admitted in, and is representing a party in a bankruptcy case pending in, the Southern District of New York would not be able to issue a subpoena to compel attendance at an examination to be held in the Central District of California (where the witness resides) unless the attorney is also admitted to practice in California. This result is inconsistent with the purpose of the 1991 amendments to Civil Rule 45 as stated in the Committee Note ("In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the

United States by an attorney representing any party. This change is intended to ease the administrative burdens of interdistrict law practice.").

It would be better for the rule to clarify that an attorney admitted in the court in which the case is pending could issue and sign the subpoena on behalf of any other bankruptcy court for the purpose of compelling attendance at a Rule 2004 examination. Otherwise, an attorney not admitted in the district in which the examination is to be held would have to obtain a subpoena from the clerk of that court (see Rule 45(a)(3)) or ask local counsel to sign the subpoena.

To solve this problem, I suggest adding the following sentence and Committee Note to Rule 2004(c):

> "An attorney as officer of the court for the district in which the examination is to be held may issue and sign a subpoena on behalf of that court if the attorney is authorized to practice in that court or in the court in which the case is pending."

COMMITTEE NOTE

> This rule is amended to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, which is to ease the burdens of interdistrict law practice.

Summary of proposed changes

As discussed above, I respectfully recommend that the Committee not adopt Judge Matheson's proposed amendment to Rule

2004(c). It is unnecessary and could require the court to include in its Rule 2004(a) order the place of the examination (which is not now required).

The Committee may, however, want to clarify Rule 2004(c) to avoid any confusion as to whether the court in which a case is pending may order the examination of an entity that must be examined outside that district.

I also recommend that the Committee consider my suggested amendment to make it clear that an attorney admitted in the court in which the case is pending may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held.

I prepared the following draft that includes amendments that would (1) clarify that the examination could be compelled outside the home district, and (2) clarify that an attorney admitted in the home district could sign the subpoena regardless of the place of the examination.

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE. The attendance of an entity for examination and the production of documentary evidence, whether it is to be held within or without the district in which the case is pending, may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial. An attorney as officer of the court for the district in which the examination is to be held may issue and sign a subpoena on behalf of that court if the attorney is

authorized to practice in that court or in the court in which the case is pending.

COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered pursuant to Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, which is to ease the burdens of interdistrict law practice.

and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) LACK OF RECORD. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Nov. 20, 1972, [illegible])

Rule 45. Subpoena

(a) FORM; ISSUANCE.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) SERVICE.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(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.

(e) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

~~Rule 46. Exceptions Unnecessary~~

~~Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.~~

~~(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)~~

Rule 47. Selection of Jurors

(a) EXAMINATION OF JURORS. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) PEREMPTORY CHALLENGES. The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) EXCUSE. The court may for good cause excuse a juror from service during trial or deliberation.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1991, eff. Dec. 1, 1991.)

Rule 48. Number of Jurors—Participation in Verdict

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO
U.S. CUSTOM HOUSE
721 NINETEENTH STREET, FIFTH FLOOR
DENVER, COLORADO 80202-2508

CHARLES E. MATHESON
CHIEF BANKRUPTCY JUDGE

September 12, 1994

The Honorable Paul Mannes, Chief Judge
U.S. Bankruptcy Court for the
District of Maryland
451 Hungerford Drive
Rockville, MD 20850

Dear Judge Mannes:

I write in connection with your position as chair of the Subcommittee on Bankruptcy Rules for the Judicial Conference. In dealing with a recent matter brought before me, my attention was drawn to the provisions of Fed.R.B.P. 2004(c). That rule specifies that the attendance of an entity for examination under Rule 2004 may be compelled in the manner provided in Fed.R.B.P. 9016 "for the attendance of witnesses at a hearing or trial."

Rule 9016, of course, tracks Rule 45 of the Federal Rules of Civil Procedure. Pursuant to Rule 45 a person can be commanded to compel at a "hearing or trial" pursuant to a subpoena served in the district where the trial is to be held or within 100 miles of that trial. This is to be contrasted with the right to compel attendance at depositions. With respect to depositions, Rule 45(a)(2) provides that a subpoena commanding the attendance of a person at a deposition may issue from the court for the district in which the deposition is to be taken.

Because Rule 2004(c) is limited to the application of Rule 9016 for attendance of a person at a "hearing or trial," it appears that a bankruptcy court can only order the Rule 2004 examination of a nondebtor within the judicial district of the bankruptcy court issuing the order (or within 100 miles of the place where that court sits). Frankly, this makes no sense. There may be many occasions, such as the matter which is currently before me where parties, whose examination under Rule 2004 would be very appropriate, reside beyond the judicial district of the bankruptcy court adminstering the case.

I can perceive of no policy reason for the rule to be so restricted. The obvious answer is to amend Rule 2004(c) to specify that attendance of a person for examination may be commanded, if the examination is to be conducted within the issuing court's judicial district, in the manner specified in Rule 9016 for attendance at a hearing or trial or, if the examination is to be conducted outside of that judicial district, then in the manner provided in Rule 9016 for attendance at a deposition.

Your committee may wish to consider whether this is worthy of an amendment to the rule.

Respectfully submitted,

Charles E. Matheson, Chief Judge

CEM:cbs
cc: The Honorable Donald E. Cordova

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: SUGGESTIONS TO AMEND BANKRUPTCY RULE 2002(a)(1) AND (f)(1)

DATE: AUGUST 6, 1995

Agenda Item 13

Bankruptcy Rule 2002(a)(1) requires the clerk or some other person as the court may direct to mail to the debtor, the trustee, and all creditors and indenture trustees notice of the meeting of creditors under § 341 of the Code. Rule 20002(f)(1) requires the clerk or some other person as the court may direct to mail to the debtor and to all creditors and indenture trustees notice of the order for relief. Both of these notices are included in Official Forms 9A through 9I ("Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates").

Martin Stone, Esq., of Shaker Heights, Ohio, in his letter of February 1, 1995, (copy attached) has suggested that Rules 2002(a)(1) and (f)(1) be amended to add to these notices -- when mailed to creditors -- certain information that is not currently included. The information that he would like to have added to these notices includes the following:

(1) the amount which the debtor believes is owed to the creditor;

(2) the account number by which the debtor is known to the creditor;

(3) whether the debtor claims that the amount owed is

contingent, unliquidated, or disputed; and

(4) information regarding the presence of a codebtor (guarantor, etc.).

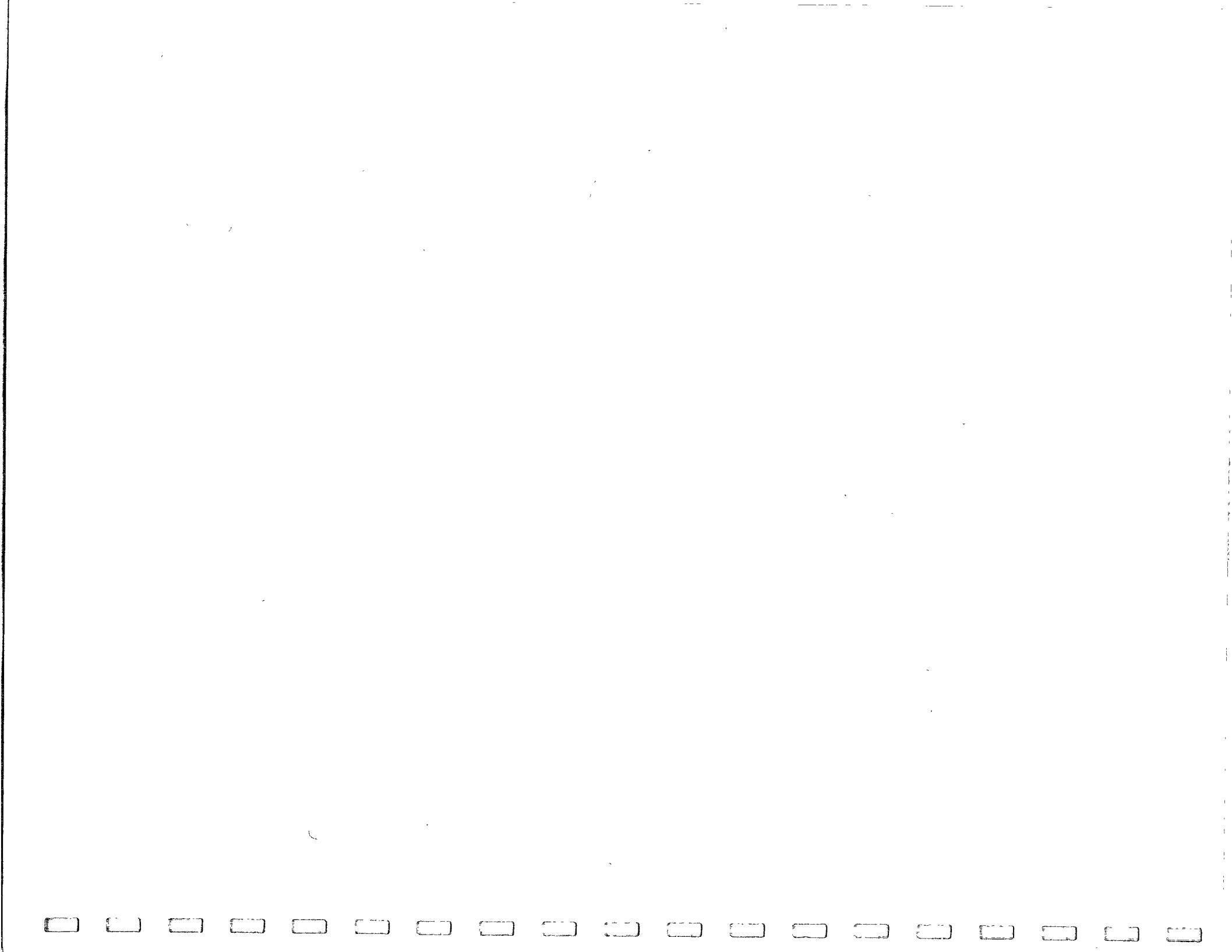
As Mr. Stone indicates, this information is obtainable from the debtor's schedules. He asserts that these changes would be of little, if any, cost to debtors. "The greatest burden which I can imagine is a *de minimis* burden upon the third-party agencies which provide printing and noticing services to the Courts."

At this time, I do not recommend that Mr. Stone's suggestions be adopted by the Advisory Committee. Although this information may be helpful to creditors, I question whether the expense of including such information with respect to each creditor would be so low. I also question the benefit of having at least some of this information (i.e., the amount the debtor believes is owed and whether the debt is contingent, unliquidated, or disputed), unless the case is a chapter 11 case. In chapter 11 cases only, a claim is "deemed filed" if it is scheduled, unless it is scheduled as contingent, unliquidated, or disputed. See § 1111(a). However, in chapter 7, 12, or 13 cases, a proof of claim must be filed regardless of how the claim is scheduled.

It also is relevant that recent legislative proposals to require inclusion of the debtor's account number on all notices have failed. The result of these efforts is the new subsection (c) of § 342, added by the Bankruptcy Reform Act of 1994, which requires notices that must be sent **by the debtor** (rather than the

clerk) to include the name, address, and taxpayer identification number of the debtor, "but the failure of such notice to contain such information shall not invalidate the legal effect of such notice." Given this recent legislative compromise, I do not think that the Rules should be amended at this time to require inclusion of the debtor's account number on all notices.

In viewing of changing technology, however, it may be possible at some future time to include this information without adding significant expense or delay. I am not in a position to know whether such technology is available and feasible at this time (I am still amazed at how I can spell-check this memorandum by pressing a button). In any event, I suggest that Mr. Stone's suggestions be discussed at the next meeting.



MARTIN STONE
ATTORNEY AND COUNSELOR-AT-LAW

2889 Weymouth Road
Shaker Heights, Ohio
44120-2232
Voice: (216) 295-8050
Fax: (216) 295-8060

94-BK - F

February 1, 1995

Peter McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, N.E.
Suite 4-170, South Side
Washington, D.C. 20544

Re: Proposed changes to Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

I should like to propose that F.R.Bankr.P. 2002 be amended, in §§(a)(1) and (f)(1), to include certain minimal additional informations.

For my creditor clients, the largely boilerplate notices which they receive pursuant to the above-captioned rules is not truly adequate for their needs in either a personal or a commercial context. While I appreciate the extra work which the inadequate notice provides, I suspect that my clients do not.

All that I believe is necessary to meet creditor needs is that information which is already provided by the Debtor in Schedules D, E and F. I believe that the change which I propose will be of little, if any, cost to Debtors, and might even save a Debtor or Debtor's Counsel the time, effort and cost of responding to creditor inquiries as to the amount or manner of scheduling.

The greatest burden which I can imagine is a *de minimis* burden upon the third-party agencies which provide printing and noticing services to the Courts.

Thus, I propose that the notice which is at present provided by F.R.Bankr.P. 2002(a)(1) and (f)(1) ought to include, at a minimum, (a) the amount which the Debtor believes is owed to the Creditor, (b) the account number by which the Debtor is known to the Creditor and (c) the classification (contingent, unliquidated or disputed) which the Debtor has assigned to the amount owed. These pieces of information would, I believe, not only be of great benefit to a Creditor, but might be of benefit to a Debtor if, as suggested above, their communication might tend to reduce inquires made of a Debtor or Debtor's counsel as to the amount and classification of a claim.

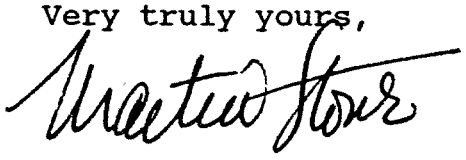
I further propose that with respect to (d) the co-debtor information provided in Schedules D, E and F, communication of the presence of a co-debtor could be helpful in those contexts where distribution to Creditors could be increased by a successful recovery against a non-debtor co-obligor.

With respect to the husband/wife/joint/community information provided in Schedules D, E and F, I regret that I am insufficiently experienced in personal bankruptcies to comment

intelligently on the advisability of adding this information to the notices discussed above.

Thank you very much for the opportunity to submit a comment during the rule-making process.

Very truly yours,



Martin Stone

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BANKRUPTCY JUDGES DIVISION

MEMORANDUM

Agenda Item 4

DATE: August 7, 1995

FROM: Patricia S. Channon for the Subcommittee on Forms

SUBJECT: Proposed Amendments to Forms

TO: Advisory Committee on Bankruptcy Rules

The forms subcommittee, having reviewed all of the official forms, recommends publishing for comment amendments to selected forms. Copies of the proposed amendments and committee notes are attached.

The subcommittee's goals were to make the forms and the events in a bankruptcy case easier for the public to understand by simplifying the format and language, highlighting important deadlines and other vital information, and using as much plain English as possible.

From the beginning, the subcommittee determined to focus on those forms that are either completed or received by large numbers of people. Reports from bankruptcy clerks' offices and other feedback on the existing forms indicated that the four most widely used forms are, in fact, confusing for the public either to use or to understand. Accordingly, the subcommittee concentrated on these --- Form 1, Voluntary Petition; Forms 9A-9I, the "§ 341 Notices"; Form 10, Proof of Claim; and Form 18, Discharge.

The petition and the § 341 notices were substantially revised. The specifics are described in the committee notes. Definitions and instructions for completion were drafted for the proof of claim, although the form itself was not revised. The discharge was revised to a simple order, and an expanded -- but separate -- explanation was drafted for printing on the reverse side of the order. The proposed amendments to the petition affected Exhibit "A" to the petition. Accordingly, the subcommittee decided to solicit the views of the Securities and Exchange Commission on the proposed changes. A copy of my letter to the SEC is attached.

Form 3, the application and order for installment payments, was revised to conform more closely to the requirements of the Code and Rule 1006. Form 8, the debtor's statement of intention concerning consumer debts secured by property of the estate, was revised to conform more closely to the Code and to reflect the

split of authority over whether a debtor may retain the property and continue making payments without either reaffirming the debt, claiming the property as exempt, or redeeming the property.

Form 14, the ballot, also was completely redrafted. The new committee note contains guidance for a plan proponent concerning alterations that will be necessary to address competing plans, "convenience" classes, and similar situations that the subcommittee decided would be distracting if included in the form itself.

The proposed amendments to Form 6, Schedule F, and to Form 17, Notice of Appeal, are basically technical corrections.

The subcommittee proposes adding two new official forms, Forms 20A and 20B, that would be used to notify debtors and other parties in interest of actions taken in a bankruptcy case that might adversely affect their interests and of the responsive actions that these parties must take to protect their interests. Particular care was taken to use plain English in drafting these forms.

In addition, the subcommittee drafted a new procedural form for a reaffirmation agreement by a debtor not represented by an attorney. This form includes a statement of the debtor's rights and an admonition that the discharge will not apply to the reaffirmed debt, which are mandated under the Bankruptcy Reform Act of 1994. The form will be issued by the Director of the Administrative Office. A copy is attached.

The subcommittee also seeks the views of the Advisory Committee concerning two suggestions received from bankruptcy judges. One is a package of local rules and forms addressing the procedure for sanctioning a bankruptcy petition preparer that was received from the Hon. Geraldine Mund. The other is a suggestion from the Hon. Jeremiah Berk concerning Schedule C that was transmitted by the Reporter. Copies of both suggestions are attached.

Attachments

United States Bankruptcy Court

_____ District of _____

VOLUNTARY PETITION

NAME OF DEBTOR (If individual, enter Last, First, Middle)	NAME OF JOINT DEBTOR (Spouse) (Last, First, Middle)
ALL OTHER NAMES used by the debtor in the last 6 years (include married, maiden, and trade names)	ALL OTHER NAMES used by the joint debtor in the last 6 years (include married, maiden and trade names)
SOC. SEC./ TAX I.D. NO. (If more than one, state all)	SOC. SEC./ TAX I.D. NO. (If more than one, state all)
STREET ADDRESS OF DEBTOR (No. and Street, City, State and zip code)	STREET ADDRESS OF JOINT DEBTOR (No. Street, City, State and zip code)
COUNTY of Residence or of Principal Place of Business :	COUNTY of Residence or of Principal Place of Business :
MAILING ADDRESS OF DEBTOR (if different from street address)	MAILING ADDRESS OF JOINT DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different than street address above)	VENUE: (Check any applicable box) ☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceeding the date of this petition or for a longer part of such 180 days than in any other District. ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

INFORMATION REGARDING THE DEBTOR (Check the Applicable Boxes)

TYPE OF DEBTOR (Check any applicable box)

☐ Individual(s) ☐ Railroad

☐ Corporation ☐ Stockbroker

☐ Partnership ☐ Commodity Broker

☐ Other _____

NATURE OF DEBT (Check one box)

☐ Consumer/Non-Business ☐ Business

CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH THE PETITION IS FILED (Check one box)

☐ CHAPTER 7 ☐ CHAPTER 11 ☐ CHAPTER 13

☐ CHAPTER 9 ☐ CHAPTER 12

☐ SEC. 304 -- Case ancillary to foreign proceeding

SMALL BUSINESS (Chapter 11 only)

☐ Debtor is a small business as defined in 11 U.S.C. § 101

☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

FILING FEE (Check one box)

☐ Filing Fee is attached

☐ Filing Fee to be paid in installments (Applicable to individuals only.) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

STATISTICAL /ADMINISTRATIVE INFORMATION (Estimates Only)

THIS SPACE FOR COURT USE ONLY

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

ESTIMATED NUMBER OF CREDITORS

1-15	16-49	50-99	100-199	200-999	1000 -over
☐	☐	☐	☐	☐	☐

ESTIMATED ASSETS

$0 to $ 50,000	$ 50,001 to $100,000	$100,001 to $ 500,000	$500,001 to $1 million	$1 million to $10 million	$10 million to $100 million	More than $100 million
☐	☐	☐	☐	☐	☐	☐

ESTIMATED LIABILITIES

$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1 million to $10 million	$10 million to $100 million	More than $100 million
☐	☐	☐	☐	☐	☐	☐

ESTIMATED NO. OF EMPLOYEES (CH. 11 & 12 ONLY) ☐ 0 ☐ 1-19 ☐ 20-99 ☐100-999 ☐ 1000-over

ESTIMATED NO. OF EQUITY SECURITY HOLDERS (CH. 11 & 12 ONLY) ☐ 0 ☐ 1-19 ☐ 20-99 ☐ 100-499 ☐ 500-over

Name of Debtor_____

(This page must be completed and filed in every case)

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS (If more than one, attach additional sheet)		
Location Where Filed	Case Number	Date Filed

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THIS DEBTOR (If more than one, attach additional sheet)		
Name of Debtor	Case Number	Date
Relationship	District	Judge

SIGNATURES

SIGNATURE(S) OF DEBTOR (Individual/Joint)

I (we) declare under penalty of perjury that the information provided in this petition is true and correct.

[If petitioner is an individual whose debts are primarily consumer debts and who has filed under chapter 7.] I (we) am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

I (we) request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X_____
Signature of the Debtor

X_____
Signature of Joint Debtor

Telephone number (if not represented by attorney)

Date:

SIGNATURE OF DEBTOR (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

I request relief in accordance with the chapter of title 11, United States Code, as specified in this petition.

X_____
Signature of Authorized Individual

Printed Name of Authorized Individual

Title of Authorized Individual

Date:

SIGNATURE OF ATTORNEY

X_____
Signature of Debtor(s)' Attorney

Printed Name of Debtor(s)' Attorney

Firm Name

Address

Telephone Number

Date:

EXHIBIT A

(To be completed if debtor is a corporation requesting relief under chpater 11)

☐ Exhibit A is attached and made a part of this petition.

SIGNATURE OF NON-ATTORNEY PETITION PREPARER

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

Printed or Typed Name of Bankruptcy Petition Preparer

Social Security Number

Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate official form for each person.

X_____
Signature of Bankruptcy Petition Preparer

Date:

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

EXHIBIT B (To be completed if petitioner is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

Date:

X_____
Signature of Debtor(s)' Attorney

Form B1XA

Exhibit "A"

[If debtor is a corporation filing under chapter 11 of the Code, this Exhibit "A" shall be completed and attached to the petition.]

[Caption as in Form 16B]

Exhibit "A" to Voluntary Petition

1. Debtor's employer identification number is _____.

2. Is debtor a publicly held corporation? (check one box) ☐ yes ☐ no

3. If any of debtor's securities are registered under section 12 of the Securities and Exchange Act of 1934, the SEC file number is _____.

4. The following financial data is the latest available information and refers to debtor's condition on _____.

a. Total assets $ _____

b. Total liabilities $ _____

		Approximate number of holders
Fixed, liquidated secured debt	$ _____	_____
Contingent secured debt	$ _____	_____
Disputed secured claims	$ _____	_____
Unliquidated secured debt	$ _____	_____

		Approximate number of holders
Fixed, liquidated unsecured debt	$ _____	_____
Contingent unsecured debt	$ _____	_____
Disputed unsecured claims	$ _____	_____
Unliquidated unsecured debt	$ _____	_____
Number of shares of preferred stock	_____	_____
Number of shares of common stock	_____	_____

Exhibit "A" continued

Comments, if any: _____

5. Brief description of debtor's business: _____

6. List the name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the voting securities of debtor: _____

7. List the names of all corporations 20% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by debtor: _____

Form B1XA

Exhibit "A"

[If debtor is a corporation filing under chapter 11 of the Code, this Exhibit "A" shall be completed and attached to the petition.]

[Caption as in Form 16B]

Exhibit "A" to Voluntary Petition

1. Debtor's employer identification number is _____.

2. Is debtor a publicly held corporation? (check one box) ☐ yes ☐ no

3. If any of debtor's securities are registered under section 12 of the Securities and Exchange Act of 1934, the SEC file number is _____.

4. The following financial data is the latest available information and refers to debtor's condition on _____.

a. Total assets $ _____

b. Total liabilities $ _____

		Approximate number of holders
Fixed, liquidated secured debt	$ _____	_____
Contingent secured debt	$ _____	_____
Disputed secured claims	$ _____	_____
Unliquidated secured debt	$ _____	_____

		Approximate number of holders
Fixed, liquidated unsecured debt	$ _____	_____
Contingent unsecured debt	$ _____	_____
Disputed unsecured claims	$ _____	_____
Unliquidated unsecured debt	$ _____	_____
Number of shares of preferred stock	_____	_____
Number of shares of common stock	_____	_____

Exhibit "A" continued

Comments, if any: _____

5. Brief description of debtor's business: _____

6. List the name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the voting securities of debtor: _____

7. List the names of all corporations 20% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by debtor: _____

COMMITTEE NOTE

The form has been substantially amended to simplify its format and make the form easier to complete correctly. The Latin phrase "In re" has been deleted as unnecessary. The instructions concerning venue have been changed to recognize the nonjurisdictional nature of venue requirements. The amount of information requested in the boxes labeled "Type of Debtor" and "Nature of Debt" has been reduced, and the reporting by a corporation of whether it is a publicly held entity has been moved to Exhibit "A" of the petition. The box labeled "Representation by Attorney" has been deleted; the information it contained is requested in the signature boxes on the second page of the form.

In the statistical information section, the labels on the ranges of estimated assets and liabilities have been rewritten to improve the accuracy of reporting. Requests for information in chapter 11 and chapter 12 cases concerning the number of the debtor's employees and equity security holders have been deleted.

The second page of the form has been simplified so that a debtor need only sign the petition once. The request for information concerning the filing of a plan has been deleted.

Form 3. APPLICATION AND ORDER TO PAY FILING FEE IN INSTALLMENTS

[Caption as in Form 16B]

APPLICATION TO PAY FILING FEES IN INSTALLMENTS

1. In accordance with Fed.R.Bankr.P. 1006, I apply for permission to pay the filing fee amounting to $_____ in installments.

2. I certify that I am unable to pay the filing fee(s) except in installments.

3. I further certify that I have not paid any money or transferred any property to an attorney or to any other person for services in connection with this case and that I will neither make any payment nor transfer any property for services in connection with this case until the filing fee is paid in full.

4. I propose the following terms for the payment of the filing fee(s):*

$ _____ With the filing of the petition

$ _____ On or before _____

$ _____ On or before _____

$ _____ On or before _____

$ _____ On or before _____

* The number of installments proposed shall not exceed four (4), and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. Fed.R.Bankr.P. 1006(b)(2).

5. I understand that if I fail to pay any installment when due my bankruptcy case may be dismissed and I will not receive a discharge of my debts.

_____ _____
Signature of Attorney Date

_____ _____
Signature(s) of Applicant(s) Date
(In a joint case, both spouses must sign.)

_____
Name of Attorney

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document. I also certify that the debtor has not paid me for services in connection with this case and that I will not accept money or any other property from the debtor before the filing fee is paid in full.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

In re _____, Case No. _____
Debtor (if known)

ORDER

IT IS ORDERED that the debtor(s) shall pay the filing fee in installments on the terms proposed in the foregoing application.

IT IS FURTHER ORDERED that until the filing fee is paid in full the debtor shall not pay, and no person shall accept, any money for services in connection with this case, and the debtor shall not relinquish, and no person shall accept, any property as payment for services in connection with this case.

BY THE COURT

Date: _____

_____
United States Bankruptcy Judge

COMMITTEE NOTE

The form has been reorganized and the paragraphs numbered. The debtor's certification concerning payment for services in the case has been placed ahead of the statement of proposed terms for installment payment of court fees. Acknowledgement by the debtor of the potential consequences of failure to pay any installment when due has been added. (See 11 U.S.C. § 707(a)(2).)

FORM B6F
(10/89)

In re _____, Debtor

Case No. _____ (If known)

SCHEDULE F—CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H—Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint, or Community".

If the claim is contigent, place an "X" in the column labeled "Contigent". If the claim is unliquidated, place an "X" in the column labeled "Unliquidated". If the claim is disputed, place "X" in the column labeled "Disputed". (You may need to place an "X" in more than one of these three columns.)

Report total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured non priority claims to report on this Schedule F.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE	CODEBTOR	HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							

_____ continuation sheets attached

Subtotal ▶ $

Total ▶ $

(Report total also on Summary of Schedules)

COMMITTEE NOTE

The form is amended to add to the column labels a reference to community liability for claims. The amendment is technical and corrects an editorial oversight.

Form B8
DRAFT

Form 8. INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

[Caption as in Form 16B]

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I, the debtor, have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. My intention with respect to the property of the estate which secures those consumer debts is as follows:

a. *Property to Be Surrendered.*

Description of Property	**Creditor's name**

b. Property to Be Retained. [Check any applicable statement.]

Description of property	Creditor's name	Debt will be reaffirmed pursuant to § 524(c)	Property is claimed as exempt and will be redeemed pursuant to § 722	Lien will be avoided pursuant to § 522(f) and property will be claimed as exempt

3. I understand that § 521(2)(B) of the Bankruptcy Code requires that I perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period, fixes.

Date: _____

_____
Signature of Debtor

CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petitioner preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document.

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X_____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedures may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

The form is amended to conform more closely to the language of the Bankruptcy Code. The amendments also make clear that the form is not intended to take a position regarding whether the options stated on the form are the only choices available to the debtor. Compare Lowry Federal Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989), with In re Taylor, 3 F.3d 1512 (11th Cir. 1993).

Form B9A (Individual or Joint Debtor No Asset Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 7 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR(s):	Address of debtor(s)	Social Security/Taxpayer ID Nos.

Debtor(s) Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:

Hours Open:

Date

EXPLANATIONS

FILING OF CHAPTER 7 BANKRUPTCY CASE.
A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor (both husband and wife in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

DO NOT FILE A PROOF OF CLAIM AT THIS TIME.
The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt, if any. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. However, at this time there does not appear to be any property available to the trustee to pay creditors. You therefore should not file a proof of claim at this time. If it later appears that assets are available to pay creditors, you will receive another court notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.

DISCHARGE OF DEBTS.
The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor should not receive a discharge under Bankruptcy Code § 727(a) OR that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts" listed on the front side. The clerk's office must receive the complaint and the required filing fee by that Deadline.

EXEMPT PROPERTY.
The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to those exemptions. The clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9B (Corporation/Partnership No Asset Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 7 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 7 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights.

All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR:	Address of debtor	Taxpayer Id. Nos.

Debtor's Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:
Hours Open:

Date

EXPLANATIONS

FILING OF CHAPTER 7 BANKRUPTCY CASE.
A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor listed on the front side, and an order for relief has been entered.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

DO NOT FILE A PROOF OF CLAIM AT THIS TIME.
The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property, if any. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. However, at this time there does not appear to be any property available to the trustee to pay creditors. You therefore should not file a proof of claim at this time. If it later appears that assets are available to pay creditors, you will receive another court notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9C (Individual or Joint Debtor Asset Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 7 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR(s):	Address of debtor(s)	Social Security/Taxpayer ID Nos.

Debtor(s) Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:
Hours Open:

Date

EXPLANATIONS

FILING OF CHAPTER 7 BANKRUPTCY CASE.
A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor (both husband and wife in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedule of claims filed by the debtor.

DISCHARGE OF DEBTS.
The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor should not receive a discharge under Bankruptcy Code § 727(a) OR that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts" listed on the front side. The clerk's office must receive the complaint and the required filing fee by that Deadline.

EXEMPT PROPERTY.
The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to those exemptions. The clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.

LIQUIDATION OF THE DEBTOR'S PROPERTY AND PAYMENT OF CREDITORS' CLAIMS.
The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you should file a Proof of Claim, as described above.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9D (Corporation/Partnership Asset Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 7 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 7 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____ (date)]. *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR:	Address of debtor	Taxpayer Id. Nos.

Debtor's Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

MEETING OF CREDITORS:

Date & time:

Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:

Hours Open:

Date

EXPLANATIONS

9D

FILING OF CHAPTER 7 BANKRUPTCY CASE.
A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor listed on the front side, and an order for relief has been entered.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedule of claims filed by the debtor.

LIQUIDATION OF THE DEBTOR'S PROPERTY AND PAYMENT OF CREDITORS' CLAIMS.
The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you should file a Proof of Claim, as described above.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9E (Individual or Joint Debtor Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 11 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:
[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 11 on _____.]
You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR(s):	Address of debtor(s)	Social Security/Taxpayer ID Nos.

Debtor(s) Attorney (name and address)

Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:
Notice of deadline will be sent at a later time

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

For the Court:
Clerk of the Bankruptcy Court

Telephone number:

Hours Open:

Date

9E

EXPLANATIONS

FILING OF CHAPTER 11 BANKRUPTCY CASE.
A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. You probably will receive a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be notified of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor (both husband and wife in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. You may look at the schedules of creditors that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you receive further notice about the claim. In any event you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim against the debtor in the bankruptcy case. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will receive another court notice.

DISCHARGE OF DEBTS.
The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts" listed on the front side. The clerk's office must receive the complaint and the required filing fee by that Deadline. If you believe that the debtor should not receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will receive another court notice informing you of that date.

EXEMPT PROPERTY.
The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to those exemptions. The clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9E (Alt.) (Individual or Joint Debtor Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 11 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR(s):	Address of debtor(s)	Social Security/Taxpayer ID Nos.

Debtor(s) Attorney (name and address)

Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:
Notice of deadline will be sent at a later time

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

Telephone number:
Hours Open:

For the Court:
Clerk of the Bankruptcy Court

Date

9E Alt.

EXPLANATIONS

FILING OF CHAPTER 11 BANKRUPTCY CASE.
A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. You probably will receive a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be notified of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor (both husband and wife in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. You may look at the schedules of creditors that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you receive further notice about the claim. In any event you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim against the debtor in the bankruptcy case. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will receive another court notice.

DISCHARGE OF DEBTS.
The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts" listed on the front side. The clerk's office must receive the complaint and the required filing fee by that Deadline. If you believe that the debtor should not receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will receive another court notice informing you of that date.

EXEMPT PROPERTY.
The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to those exemptions. The clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9F (Corporation/Partnership Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 11 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:
[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 11 on _____.]
You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR:	Address of debtor	Taxpayer Id. Nos.

Debtor's Attorney (name and address)

Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:

Hours Open:

Date

EXPLANATIONS

FILING OF CHAPTER 11 BANKRUPTCY CASE.
A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. You probably will receive a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be notified of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. You may look at the schedules of creditors that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you receive further notice about the claim. In any event you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim against the debtor in the bankruptcy case. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will receive another court notice.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9F (Alt.) (Corporation/Partnership Case)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 11 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 11 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR:	Address of debtor	Taxpayer Id. Nos.

Debtor's Attorney (name and address)

Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

MEETING OF CREDITORS:

Date & time:

Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:

Hours Open:

Date

9 F Alt.

EXPLANATIONS

FILING OF CHAPTER 11 BANKRUPTCY CASE.
A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless approved by the court at a confirmation hearing. You probably will receive a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be notified of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of its property and will continue to operate any business unless a trustee is appointed.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. You may look at the schedules of creditors that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you receive further notice about the claim. In any event you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim against the debtor in the bankruptcy case. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will receive another court notice.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9G (Individual or Joint Debtor Family Farmer)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 12 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 12 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR(s):	Address of debtor(s)	Social Security/Taxpayer ID Nos.

Debtor(s) Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: _____ (Date) _____ (Time) _____ (Location)] *or*
[The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] *or*
[The debtor has not filed a plan as of this date. You will be given separate notice of the hearing on confirmation of the plan.]

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

For the Court:

Clerk of the Bankruptcy Court

Telephone number:
Hours Open:

Date

EXPLANATIONS

FILING OF CHAPTER 12 BANKRUPTCY CASE.
A bankruptcy case under chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers to adjust their debts pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of its property and will continue to operate its business unless the court orders the trustee to take over for the debtor.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor (both husband and wife in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedule of claims filed by the debtor.

DISCHARGE OF DEBTS.
The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts" listed on the front side. The clerk's office must receive the complaint and the required filing fee by that Deadline.

EXEMPT PROPERTY.
The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to those exemptions. The clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9H (Corporation/Partnership Family Farmer)

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 12 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 12 bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was filed on _____(date).] *or* [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR:	Address of debtor	Taxpayer Id. Nos.

Debtor's Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts:

Filing of Plan, Hearing on Confirmation of Plan

]The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: _____ (Date) _____ (Time) _____ (Location)] *or*

[The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] *or*

[The debtor has not filed a plan as of this date. You will be given separate notice of the hearing on confirmation of the plan.]

MEETING OF CREDITORS:

Date & time:

Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court: For the Court:

Clerk of the Bankruptcy Court

Telephone number:

Hours Open:

Date

EXPLANATIONS

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FILING OF CHAPTER 12 BANKRUPTCY CASE.
A bankruptcy case under chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers to adjust their debts pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of its property and will continue to operate its business unless the court orders the trustee to take over for the debtor.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedule of claims filed by the debtor.

DISCHARGE OF DEBTS.
The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Types of Debts" listed on the front side. The clerk's office must receive the complaint and the required filing fee by that Deadline.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

Form B9I

United States Bankruptcy Court

Case Number

_____ District of _____

NOTICE OF
CHAPTER 13 BANKRUPTCY CASE, MEETING OF CREDITORS, & DEADLINES

IMPORTANT:

[A chapter 13 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).] *or* [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 13 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

SEE REVERSE SIDE FOR IMPORTANT EXPLANATIONS

DEBTOR(s):	Address of debtor(s)	Social Security/Taxpayer ID Nos.

Debtor(s) Attorney (name and address)	Telephone number	Bankruptcy Trustee (name and address)	Telephone number

DEADLINES:

NOTE: Papers must be received by the bankruptcy clerk's office by the following deadlines.

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held: _____ (Date) _____ (Time) _____ (Location)] *or*
[The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] *or*
[The debtor has not filed a plan as of this date. You will be given separate notice of the hearing on confirmation of the plan.]

MEETING OF CREDITORS:

Date & time:
Location:

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Clerk of the Bankruptcy Court:

Telephone number:
Hours Open:

For the Court:

Clerk of the Bankruptcy Court

Date

EXPLANATIONS

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FILING OF CHAPTER 13 BANKRUPTCY CASE.
A bankruptcy case under chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust their debts pursuant to a plan. A plan is not effective unless approved by the bankruptcy court at a confirmation hearing. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of its property and will continue to operate its business, if any, unless the court orders the trustee to take over for the debtor.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS.
Prohibited collection actions are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.

MEETING OF CREDITORS.
A meeting of creditors is scheduled for the date, time and location listed on the front side. The debtor (both husband and wife in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors. Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.

CLAIMS.
A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at the clerk's office at any bankruptcy court. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedule of claims filed by the debtor.

EXEMPT PROPERTY.
The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to those exemptions. The clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.

BANKRUPTCY CLERK'S OFFICE.
All papers that you may file in this bankruptcy case must be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.

LEGAL ADVICE.
The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

NOTICE TO PERSONS WITH DISABILITIES
If you have a disability, and require reasonable accommodations to file a claim, participate in bankruptcy proceedings, or use any service provided by the Bankruptcy Court, please call the bankruptcy clerk's office.

REFER TO OTHER SIDE FOR IMPORTANT DEADLINES AND NOTICES.

COMMITTEE NOTE

Forms 9A - 9I (and the alternate versions of Forms 9E and 9F) have been amended, redesigned, and rewritten. First, minor conforming changes have been made to respond to amendments made in the Bankruptcy Reform Act of 1994: the longer claims filing period for governmental units in section 502(b)(9) of the Code (see Forms 9C, 9D, 9E(Alt.), 9F(Alt.), 9G, 9H, and 9I); and a reference to dischargeability actions under section 523(a)(15) of the Code (see Form 9A, 9C, 9E, and 9E(Alt.), 9G, and 9H). Second, all of the forms have been substantially rewritten to make them easier to read and understand. The titles have been simplified. Recipients are told why they are receiving the notice. The bulk of the explanations have been moved to the reverse side of the form and are set in type that is large enough for most people to read. Plain English is used as much as possible. All deadlines are highlighted on the front of the form. Recipients are told that papers must be received by the bankruptcy clerk's office by the applicable deadline. The box for the trustee has been deleted from the chapter 11 notices (Forms 9E and 9F and their alternates). Various alternatives are set out in brackets in many of the forms, permitting each clerk's office to tailor the forms even more precisely to fit the needs of a particular case.

B10 (Official Form 10)
(Rev. 7/95)

United States Bankruptcy Court _____ District of _____	PROOF OF CLAIM
In re (Name of Debtor)	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor *(The person or other entity to whom the debtor owes money or property)*	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Name and Address Where Notices Should be Sent Telephone No.	☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated: _____

1. BASIS FOR CLAIM

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other (Describe briefly)

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (Fill out below)
Your social security number _____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED	3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority, (2) Unsecured Priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.
CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM AT TIME CASE FILED.

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ _____

☐ UNSECURED NONPRIORITY CLAIM $ _____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____
Specify the priority of the claim.

☐ Wages, salaries, or commissions (up to $4000),* earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3)
☐ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4)
☐ Up to $1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6)
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)
☐ Taxes or penalties of governmental units—11 U.S.C. § 507(a)(8)
☐ Other—Specify applicable paragraph of 11 U.S.C. § 507(a)_____
*Amounts are subject to adjustment on 4/11/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

5. TOTAL AMOUNT OF CLAIM AT THE TIME CASE FILED: $ _____ (Unsecured) $ _____ (Secured) $ _____ (Priority) $ _____ (Total)

☐ Check this box if claim includes charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed enveloped and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Instructions for Proof of Claim Form

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

Definitions

Debtor – The person or company that has filed a bankruptcy case is called the debtor.

Creditor – A creditor is any person, company, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim – A form filed with the clerk of the bankruptcy court where the bankruptcy case was filed, to tell the bankruptcy court how much the debtor owed a creditor when the bankruptcy case was filed (the amount of the creditor's claim).

Secured Claim – A claim is a secured claim if the creditor has a lien on particular property that provides for the creditor to be paid from that property before creditors who do not have liens on the property. Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien on real estate. (See also Unsecured claim, below.)

Unsecured claim – If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured priority claim – Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy or reorganization cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as unsecured nonpriority claims.

Items to be completed in proof of claim form (if not already filled in).

Court, Name of Debtor and Case Number: Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor who filed the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor: Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim: Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, state your social security number and the dates of work for which you were not paid.

2. Date debt incurred: Fill in the date when the debt first was owed by the debtor.

3. Court judgments: If you have a court judgment for this debt, state the date the court entered the judgment.

4. Classification of Claim: Check the appropriate place to state whether the claim is a secured claim, an unsecured priority claim, or an unsecured nonpriority claim, and state the amount. If the claim is a secured claim, you must state the type of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See Definitions above) A claim may also be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. For partly secured claims or partly priority claims, state the amount of each part in the applicable separate designated section of the form.)

5. Total Amount of Claim: State the total amount of each type of claim included in the proof of claim and the total amount of the entire claim. If charges or other amounts in addition to principal amount of the claim are included, check the appropriate place on the form and attach an itemization of those charges and amounts.

6. Credits or setoffs: By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor and for any amounts that you owe to the debtor.

7. Supporting documents: You must attach to this proof of claim form documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

COMMITTEE NOTE

Explanatory definitions and instructions for completing the form have been added.

Form 14. BALLOT FOR ACCEPTING OR REJECTING A PLAN

[Caption as in Form 16A]

CLASS *[ ]* BALLOT FOR ACCEPTING OR REJECTING PLAN OF REORGANIZATION

[Proponent] filed a plan of reorganization dated *[Date]* (the "Plan") for the Debtor in this case. The Court has *[conditionally]* approved a disclosure statement with respect to the Plan (the "Disclosure Statement"). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from *[name, address, telephone number and telecopy number of proponent/proponent's attorney]*. Court approval of the disclosure statement does not indicate approval of the plan by the Court.

You should review the Disclosure Statement and the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your *[claim] [equity interest]* has been placed in class *[ ]* under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by *[name and address of proponent's attorney or other appropriate address]* on or before *[date]*, and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan. If the Plan is confirmed by the Bankruptcy Court it will be binding on you whether or not you vote.

ACCEPTANCE OR REJECTION OF THE PLAN

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives:]

[If the voter is the holder of a secured, priority or general unsecured claim:]

The undersigned, the holder of a Class *[ ]* claim against the Debtor in the unpaid amount of Dollars ($)

[or, if the voter is the holder of a bond, debenture or other debt security:]

The undersigned, the holder of a Class *[ ]* claim against the Debtor, consisting of Dollars ($) principal amount of *[describe bond, debenture or other debt security]* of the Debtor

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class *[ ]* equity interest in the Debtor, consisting of number of shares of *[describe equity security]* of the Debtor

[In each case, the following language should be included:]

(Check one box only)

[ ] ACCEPTS THE PLAN [ ] REJECTS THE PLAN

Dated: _____

Print or type name: _____

Signature: _____

Title (if corporation or partnership) _____

Address: _____

_____

RETURN THIS BALLOT TO:

[Name and address of proponent's attorney or other appropriate address]

COMMITTEE NOTE

Directions or blanks for proponent to complete the text of the ballot are in italics and enclosed within brackets. A ballot should include only the applicable language from the alternatives shown on this form and should be adapted to the particular requirements of the case.

If the plan provides for creditors in a class to have the right to reduce their claims so as to qualify for treatment given to creditors whose claims do not exceed a specified amount, the ballot should make provisions for the exercise of that right. See Code §1122(b).

If debt or equity securities are held in the name of a broker/dealer, or nominee, the ballot should require the furnishing of sufficient information to assure that duplicate ballots are not submitted and counted and that ballots submitted by a broker/dealer or nominee reflect the votes of the beneficial holders of such securities. See Rule 3017(e).

In the event that more than one plan of reorganization is to be voted upon the form of ballot will need to be adapted to permit holders of claims or equity interests (a) to accept or reject each plan being proposed, and (b) to indicate preferences among the competing plans. See Code §1129(c).

FORM 17. NOTICE OF APPEAL UNDER 28 U.S.C. § 158(a) or (b) FROM A JUDGMENT, ORDER, OR DECREE OF A BANKRUPTCY COURT

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy court (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____, 19__.

The names of the parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Dated: _____

Signed: _____
Attorney for Appellant

Attorney Name: _____
(and Identification No., if required)

Address: _____

_____

Tel No: _____

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

The form has been amended to require complete identification of the attorney for the appellant, including the attorney's telephone number. A party filing a notice of appeal pro se should provide equivalent information.

Form 18. DISCHARGE OF DEBTOR

[Caption as in 16A]

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge,

IT IS ORDERED: The debtor is granted a discharge under section _____ of title 11, United States Code, (the Bankruptcy Code).

Dated: _____

BY THE COURT

_____

United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

EXPLANATION OF BANKRUPTCY DISCHARGE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors. [Unless creditors previously have been notified of a deadline for filing claims in this case, it is unlikely that any payments will be made to creditors.]

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. [There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts that are Discharged

The chapter 7 discharge order eliminates a debtor's obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged, if they were owed when the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.) Some of the common types of debts which are <u>not</u> discharged in a chapter 7 bankruptcy case are:

a. Debts for most taxes;

b. Debts that are in the nature of alimony, maintenance, or support;

c. Debts for most student loans;

d. Debts that the bankruptcy court specifically decides, during the bankruptcy case, are not discharged;

e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle while intoxicated;

g. Some debts which were not properly listed by the debtor;

h. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.

This information is only a general summary of the bankruptcy discharge and there are exceptions to these general rules. The law is complicated, so you may want to consult an attorney to determine the exact effect of the discharge in your case.

COMMITTEE NOTE

The discharge order has been simplified by deleting paragraphs which had detailed some, but not all, of the effects of the discharge. Formerly incomplete and, arguably, technically incorrect material has been replaced with a plain English explanation of the discharge. This explanation is to be printed on the reverse of the order, to increase understanding of the bankruptcy discharge among creditors and debtors.

Form 20A. Notice of Motion or Objection

[Caption as in Form 16A.]

NOTICE OF [MOTION TO] [OBJECTION TO]

_____ has filed papers with the bankruptcy court asking the court to [relief sought in motion or objection]. Your rights may be affected. You should read these papers carefully and discuss them with your lawyer, if you have one in this bankruptcy case. (If you do not have a lawyer, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then by (date), you or your lawyer must:

[File with the court a written request for a hearing {or, *if the court has ordered an answer*, an answer explaining your position}, and mail a copy to

{movant's attorney's name and address}

{names and addresses of others to be served}

If you mail your {request} {answer} to the court for filing, you must mail it early enough so the court will receive it by the date stated above.]

[Attend the hearing scheduled to be held on (date), 19__, at _____a.m./p.m. in Courtroom ___, United States Bankruptcy Court, {address}.

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your lawyer do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date:_____ Signature:_____
Name:
Business Address:

Notice to Persons with Disabilities

If you have a disability and require reasonable accommodations to participate in bankruptcy proceedings or use any service provided by the bankruptcy court, please call the bankruptcy clerk's office at [telephone number].

B 240
(2/95)

REAFFIRMATION AGREEMENT
FOR DEBTOR NOT REPRESENTED BY AN ATTORNEY IN NEGOTIATING AGREEMENT

Debtor's Name	Bankruptcy Case No.

Instructions: If you wish to reaffirm a debt, you must:

1) Write your name and bankruptcy case number above.
2) File this completed form by mailing or delivering to the Bankruptcy Clerk.
3) Attach written agreement, if any.

COURT USE ONLY

PART A - AGREEMENT

Creditor's Name and Address	Summary of Terms of the New Agreement
	a) Principal Amount $ _____ Interest Rate (APR) _____ Monthly Payments $ _____ b) Description of Security: _____ _____ Present Market Value $ _____
Date Set for Discharge Hearing (if any)	

_____ Date

_____ Signature of Debtor

NOTICE OF DEBTOR'S RIGHTS

1. This agreement gives up the protections of your bankruptcy discharge for this debt.

2. You may rescind (cancel) this agreement at any time before the bankruptcy court enters a discharge order or within 60 days after this agreement is filed with the court, whichever is later. You may cancel the agreement by sending a letter to the creditor at the above address saying that the agreement is canceled or by telling the creditor in some other way.

3. This agreement is not required by any law. It is not required by the Bankruptcy Code, by any other law, or by any contract except an earlier valid reaffirmation agreement in this bankruptcy case containing notice of these rights.

4. This agreement may result in the creditor being able to take your property or wages if the amounts agreed to are not paid. The creditor may also take other actions to collect the debt.

5. You are allowed to pay this debt without signing this agreement. If you do not sign this agreement and are later not willing or able to pay the full amount, the creditor will not be able to collect it from you. The creditor also will not be allowed to take your property to pay the debt unless the creditor now has a lien on that property.

6. This agreement is not valid or binding unless it is filed with the bankruptcy court, you have attended a discharge hearing in the bankruptcy court, and the agreement has been approved by the bankruptcy court. (Court approval is not required if the creditor has a mortgage or other lien on your real estate.)

PART B - MOTION FOR COURT APPROVAL OF AGREEMENT

I, the debtor, affirm the following to be true and correct:

1) I was not represented by an attorney in negotiating this reaffirmation agreement.
2) I am entering into this agreement voluntarily.
3) My current monthly net income (take home pay) is $ _____
4) My current monthly expenses total $ _____, including any payment due under this agreement.
5) I believe that this agreement is in my best interest because _____
_____
_____

Therefore, I ask the court for an order approving this reaffirmation agreement.

_____ Date

_____ Signature of Debtor

PART C - COURT ORDER

The court approves/disapproves the agreement upon the terms specified above.

_____ Date

_____ Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
ROYBAL BUILDING
255 EAST TEMPLE STREET, SUITE 1560
LOS ANGELES, CALIFORNIA 90012

GERALDINE MUND
JUDGE

(213) 894-3022

June 12, 1995

Henry J. Sommer
Community Legal Services
3207 Kensington Avenue
Philadelphia, PA 19134

Re: National Rules Committee
Petition Preparer Forms

Dear Mr. Sommer:

Judge Fenning informed me that she had sent you a set of petition preparer forms that are now being used in our court. Attached is a copy of the General Order and flow charts that control the process in the Central District of California. While we have requested our District Court Bankruptcy Committee to begin working on what will happen once a case reaches their court, this only occurred a short time ago and they have not yet met to deal with the issue.

I hope that you find this of some benefit.

Very truly yours,

GERALDINE MUND
United States Bankruptcy Judge

GM:yg

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re)
BANKRUPTCY PETITION PREPARERS)

GENERAL ORDER 95-03

The United States Bankruptcy Code (11 U.S.C. § 110) sets forth certain requirements for bankruptcy petition preparers and provides a procedure for enforcement by the Court. To implement the enforcement procedure, the following provisions will apply:

I. MOTION TO DISALLOW AND ORDER TURNOVER TO TRUSTEE OF EXCESSIVE FEE (11 U.S.C. § 110(h)).

A. MOTION BY PARTY IN INTEREST

1. The debtor, a creditor, the trustee, or the United States Trustee may file a Motion that the Court Disallow and Order Turnover of Excessive Fee Paid to Bankruptcy Petition Preparer (11 U.S.C. § 110(h)). The motion shall be filed on the Court

approved form at the same time notice is given. The motion will be accompanied by a declaration under penalty of perjury or a request for judicial notice and copies of any documentary evidence which support the motion. The moving party shall serve on the bankruptcy petition preparer a Notice of Motion that the Bankruptcy Court Order Turnover of Excessive Fee (11 U.S.C. § 110(h)) using the Court approved form, a copy of the motion, and all supporting evidence. Service may be made personally or by first class mail.

2. If the 20 day response period provided by Local Bankruptcy Rule 111(7) expires without the filing of any response, the moving party shall promptly lodge a proposed order on the Court approved form. At the same time as the proposed order is lodged (and preferably rubber-banded or clipped to the order), the moving party shall also file a declaration attesting that no response was served upon the moving party, to which declaration shall be appended (as exhibits) copies of the motion, notice and proof of service or the notice and motion. These papers shall be accompanied by the necessary copies of the notice of entry for the order, together with the requisite addressed, stamped envelopes. The notices of entry shall provide for the service on the debtor, any trustee, the bankruptcy petition preparer, the United States Trustee and counsel for any of the foregoing.

3. If a timely response and request for hearing is filed and served, the moving party shall schedule and give not less than 11 days notice of a hearing to those responding and to the U. S. Trustee. Movant must act within 20 days from the date of service

of the response to obtain a hearing date and give notice of it or the Court may deny the motion without prejudice, without further notice or hearing. Briefs are generally not required for this motion. The Court may decide in its discretion to dispense with oral argument, in which case the Courtroom Deputy will attempt to give the parties notice of the Court's intention to do so at least 24 hours prior to the hearing date.

B. MOTION BY COURT

1. The Court on its own motion may serve by first class mail a Notice of Intent to Order that Bankruptcy Petition Preparer Turnover Excessive Fee Paid By or On Behalf of Debtor (11 U.S.C. § 110(h)). The notice of intent will include a notice that the bankruptcy petition preparer has 20 days to file and serve a written objection. No hearing will be set on this notice of intent unless the respondent requests it or the Court orders it.

2. Bankruptcy Petition Preparer has 20 days from the date of mailing of the motion to file with the Court and serve on the movant a written objection to the certification of facts. If no timely objection is received from the bankruptcy petition preparer, the Court will review the facts before it and will determine whether a turnover order should be made and will enter an order on that determination.

3. If an objection by the bankruptcy petition preparer is timely received, the bankruptcy judge will determine whether to hold a hearing, whether to enter a turnover order without hearing,

or whether no turnover order will be entered. The bankruptcy judge will give notice of the hearing or will enter an order to turnover the excessive fee or will enter an order that no turnover is to occur.

C. TURNOVER ORDER

1. If a turnover order is entered, the turnover shall be made within 30 days of the service of the turnover order and the bankruptcy petition preparer shall file with the Court a Declaration of Compliance by Bankruptcy Petition Preparer as to Turnover Order (11 U.S.C. § 110(h)). The declaration shall be filed within 30 days of the service of the turnover order and shall be prepared on the Court approved form. Failure to turn over within 30 days of the service of the turnover order and to file the Declaration as specified in this paragraph will lead to certification of the fact to the District Court (11 U.S.C. § 110(i)) without further notice to the bankruptcy petition preparer.

II. DETERMINATION OF WHETHER FACTS(s) SHALL BE CERTIFIED TO DISTRICT COURT

A. MOTION BY PARTY IN INTEREST

1. The debtor, a creditor, the trustee or the United States Trustee may file a Motion that the Court Certify a Fact to the District Court (11 U.S.C. § 110(i)). The motion shall be filed on the Court approved form at the same time as notice is given. The

motion will be accompanied by a declaration under penalty of perjury or a request for judicial notice and copies of any documentary evidence which support the motion. The moving party shall serve on the bankruptcy petition preparer a Notice of Motion that the Bankruptcy Court Certify a Fact to the District Court (11 U.S.C. § 110(i)) using the Court approved form, a copy of the motion, and all supporting evidence. Service may be made personally or by first class mail.

2. If the 20 day response period provided by Local Bankruptcy Rule 111(7) expires without the filing of any response, the moving party shall promptly lodge a proposed order on the Court approved form. At the same time as the proposed order is lodged (and preferably rubber-banded or clipped to the order), the moving party shall also file a declaration attesting that no response was served upon the moving party, to which declaration shall be appended (as exhibits) copies of the motion, notice and proof of service or the notice and motion. These papers shall be accompanied by the necessary copies of the notice of entry for the order, together with the requisite addressed, stamped envelopes. The notices of entry shall provide for the service on the debtor, any trustee, the bankruptcy petition preparer, the United States Trustee and counsel for any of the foregoing.

3. If a timely response and request for hearing is filed and served, the moving party shall schedule and give not less than 11 days notice of a hearing to those responding and to the U. S. Trustee. Movant must act within 20 days from the date of service

of the response to obtain a hearing date and give notice of it or the Court may deny the motion without prejudice, without further notice or hearing. Briefs are generally not required for this motion. The Court may decide in its discretion to dispense with oral argument, in which case the Courtroom Deputy will attempt to give the parties notice of the Court's intention to do so at least 24 hours prior to the hearing date.

B. MOTION BY COURT

1. The Court on its own motion may serve by first class mail a Notice of Intent to Certify a Fact to the District Court (11 U.S.C. § 110(i)). The notice of intent will include a notice that the bankruptcy petition preparer has 20 days to file and serve a written objection. No hearing will be set on this notice of intent unless the respondent requests it or the Court orders it.

2. Bankruptcy Petition Preparer has 20 days from the date of mailing of the motion to file with the Court and serve on the movant a written objection to the certification of facts. If no timely objection is received from the bankruptcy petition preparer, the Court will review the facts before it and will determine whether a certification should be made and will enter an order on that determination.

3. If an objection by the bankruptcy petition preparer is timely received, the bankruptcy judge will determine whether to hold a hearing, or whether or not to certify the fact without hearing. The bankruptcy judge will give notice of the hearing or

will enter an order certifying or not certifying the fact(s).

C. CERTIFICATION OF FACT

If the bankruptcy judge certifies the fact(s) to the District Court, the Certification of Fact(s) to the District Court will be sent by the Bankruptcy Court to the District Court and the procedure in the District Court will be controlled by District Court General Order or Local Rule.

IT IS SO ORDERED.

DATED: June 14, 1995

Calvin K. Ashland

CALVIN K. ASHLAND
Chief Judge, United States
Bankruptcy Court

ACTION IN THE BANKRUPTCY COURT

Acts Subject to Certification

BANKRUPTCY COURT CERTIFICATION OF FACT TO DISTRICT COURT

Bankruptcy or related case dismissed due to failure to file papers. §110(I)(l)

Negligence or intentional disregard of FRBP or Bankruptcy Code. §110(I)(l)

Preparer violates section 110.

Document not signed and preparer's name and address not printed on document. §110(b);
Document does not contain preparer's social security number. §110(c);
Debtor not furnished with a copy of document at time of signing. §110(d);
Preparer executed document on behalf of debtor. §110(e);
Preparers used the word "legal" or similar term in advertising. §110(f);
Preparer collected filing fees. §110(g);
Preparer did not file a disclosure statement within 10 days of the filing of the petition. §110(h);
Preparer did not turn over excessive fees after court order. §110(h).

Preparer commits any fraudulent, unfair, or deceptive act. §110(I)(I)

Initiating the motion in the Bankruptcy Court[1]

Motion to Certify a Fact to District Court brought by the debtor, a creditor, the trustee or the UST. §110(I)

Court on its own motion can serve a Notice of Intent to Certify a Fact to the District Court. §110(I)

Determination by the Bankruptcy Court[2]

Notice is given and the preparer has an opportunity to respond in writing. If the motion is brought by a party and written response is received, hearing set unless the Court orders otherwise. If motion is brought by the Court and written response is received, no hearing unless Court orders it. The Court reviews the facts and determines if a certification is to be made.

Action by the Bankruptcy Court[3]

Bankruptcy Court Certifies to District Court

Bankruptcy Court Does Not Certify to District Court

1. § 110 (I)(1) IF A BANKRUPTCY CASE OR RELATED PROCEEDING IS DISMISSED BECAUSE OF THE FAILURE TO FILE BANKRUPTCY PAPERS, INCLUDING PAPERS SPECIFIED IN SECTION 521(1) OF TITLE, THE NEGLIGENCE OR INTENT DISREGARD OF TITLE THE RULES OF BANKRUPTCY PROCEDURE BY A BANKRUPTCY PETITION PREPARER, OR IF A BANKRUPTCY PETITION PREPARER VIOLATES THIS SECTION OR COMMITS ANY FRAUDULENT, UNFAIR, OR DECEPTIVE ACT, THE BANKRUPTCY COURT SHALL CERTIFY THAT FACT TO THE DISTRICT COURT, AND THE DISTRICT COURT, ON MOTION OF THE DEBTOR, THE TRUSTEE, OR A CREDITOR AND AFTER A HEARING, SHALL ORDER THE BANKRUPTCY PETITION PREPARER TO PAY TO THE DEBTOR—

(A) THE DEBTOR'S ACTUAL DAMAGES;

(B) THE GREATER OF—

(I) $2,000; OR

(II) TWICE THE AMOUNT PAID BY THE DEBTOR TO THE BANKRUPTCY PETITION PREPARER FOR THE PREPARER'S SERVICES; AND

(C) REASONABLE ATTORNEYS' FEES AND COSTS IN MOVING FOR DAMAGES UNDER THIS SUBSECTION.

(2) IF THE TRUSTEE OR CREDITOR MOVES FOR DAMAGES ON BEHALF OF THE DEBTOR UNDER THIS SUBSECTION, THE BANKRUPTCY PETITION PREPARER SHALL BE ORDERED TO PAY THE MOVANT THE ADDITIONAL AMOUNT OF $1,000 PLUS REASONABLE ATTORNEYS' FEES AND COSTS INCURRED.

Section 110(I) is somewhat less than clear about who can bring the request to certify a fact to the district court. It requires [using the term "the bankruptcy court *shall* certify..."] the bankruptcy court to certify any of the facts described in that section. It then requires the district court to order certain payments if there is a motion for those payments. This provision could be read to mean that the bankruptcy court certification is without notice or motion, but is sua sponte. But it is not necessarily limited to that. Therefore the general order provides that while the court may undertake this process on its own motion, the motion to certify a fact can also be brought by the debtor, the trustee, the UST, or a creditor.

2. Although notice is not required by the statute, the general order proposes notice and an opportunity to respond in writing so as to expedite the initial determination of whether there is "cause" for go further. If a written response is filed and the motion was brought by the court, no hearing will occur unless the court orders one. If a written response is filed and the motion was brought by a party, the matter is set for hearing although the court can give notice that it will be determined without hearing. This process follows Local Rule 111(7) and 111(1)(l). This is meant to be an expedited process.

3. §(I)(1) specifies that the bankruptcy court shall certify the fact to the district court. It does not specifically empower the bankruptcy court to impose the sanctions (up to a $500 penalty) described in §§(b) through (h). Nor is any other penalty authorized. The general order contemplates that the bankruptcy court will certify the fact and will not impose any civil penalty under §(I). Should the district court determine that the civil penalty should be imposed by the bankruptcy court and that certification is merely a review process, the general order can be modified accordingly.

ACTION IN THE BANKRUPTCY COURT

MOTION TO DISALLOW AND ORDER TURNOVER OF EXCESSIVE FEE

Preparer Duty[1]

Preparer to file declaration of fees within 10 days of filing of petition. §110(h)(l).

Initiating the motion in the Bankruptcy Court[2]

Debtor, trustee, creditor or UST can file a motion to disallow fees and order turnover to trustee. §110(h)(3).

Court on its own motion can serve a Notice of Intent to Order turnover of excessive fee to trustee. §110(h)(2).

Determination by the Bankruptcy Court[3]

Notice is given and the preparer has an opportunity to respond in writing. If written response to (h)(3) motion, hearing set unless Court orders otherwise. If written response to (h)(2) motion, no hearing unless Court orders it. The Court reviews the facts and determines whether to enter a turnover order.

Action by the Bankruptcy Court

Turnover Order is Entered. Turnover to be made within 30 days and declaration of compliance to be filed. §110(h)(4).

Judge rules that no turnover is required.

Preparer Compliance[4]

Turnover is completed and declaration is filed.

Preparer fails to comply with the order.

Fact is Certified to the District Court with no further notice to the preparer.

1. §110 (H)(1) WITHIN 10 DAYS AFTER THE DATE OF THE FILING OF A PETITION, A BANKRUPTCY PETITION PREPARER SHALL FILE A DECLARATION UNDER PENALTY OF PERJURY DISCLOSING ANY FEE RECEIVED FROM OR ON BEHALF OF THE DEBTOR WITHIN 12 MONTHS IMMEDIATELY PRIOR TO THE FILING OF THE CASE, AND ANY UNPAID FEE CHARGED TO THE DEBTOR.

2. §110 (H)(2) THE COURT SHALL DISALLOW AND ORDER THE IMMEDIATE TURNOVER TO THE BANKRUPTCY TRUSTEE OF ANY FEE REFERRED TO IN PARAGRAPH (1) FOUND TO BE IN EXCESS OF THE VALUE OF SERVICES RENDERED FOR THE DOCUMENTS PREPARED. AN INDIVIDUAL DEBTOR MAY EXEMPT ANY FUNDS SO RECOVERED UNDER SECTION 522(B).

§110(H)(3) THE DEBTOR, THE TRUSTEE, A CREDITOR, OR THE UNITED STATES TRUSTEE MAY FILE A MOTION FOR AN ORDER UNDER PARAGRAPH (2).

3. §110(h)(2) allows the court, on its own motion, to disallow the fee or any part of it as excessive and to order immediate turnover to the trustee. No notice is required prior to the disallowance. However, the general order provides notice of intent to disallow and a procedure for the preparer to object (in writing) to the disallowance. If a written response is filed and the motion was brought by the court under §111(h)(2), no hearing will occur unless the court orders. If a written response is filed and the motion was brought by a party under §110(h)(3), the matter is set for hearing although the court can give notice that it will be determined without hearing. This process follows Local Rule 111(7) and 111(1)(l).

4. §110(H)(4) A BANKRUPTCY PETITION PREPARER SHALL BE FINED NOT MORE THAN $500 FOR EACH FAILURE TO COMPLY WITH A COURT ORDER TO TURN OVER FUNDS WITHIN 30 DAYS OF SERVICE OF SUCH ORDER.

§110(i)(1) provides that if the preparer violates §110, the bankruptcy court shall certify that fact to the district court. The general order contemplates that the district court will impose the civil fine described in §110(h)(4). There will be no further notice given to the bankruptcy preparer of the certification of fact. However there is an open issue of when to give notice to other interested parties, who may wish to file a motion in the district court under §110(i) on behalf of the debtor for damages and attorneys fees. Should this be given by the bankruptcy court at time of certification or should it be given by the district court when it opens a case file so that there will not be multiple unconnected motions?

ACTION IN THE DISTRICT COURT

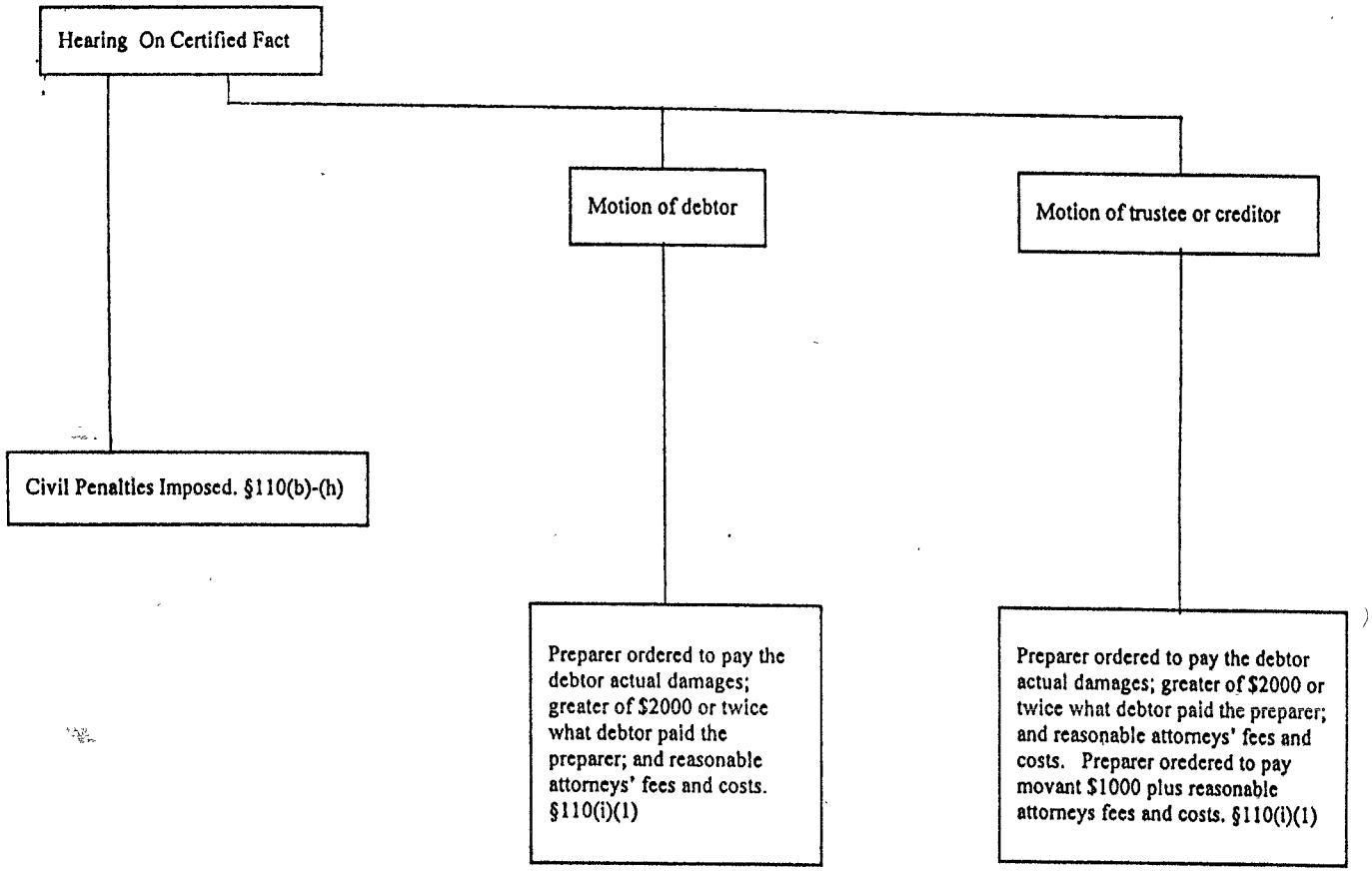
DISTRICT COURT ACTION ON CERTIFIED FACT(S)

Hearing on Certified Fact(s)[1]

Motion by debtor, trustee or creditor[2]

Sanctions[3]

Damages[4]



1. It is contemplated that the hearing on Certified Facts may be similar to the prior methodology for certification of contempt. The bankruptcy court would certify the fact and the district court would issue an Order to Show Cause why the preparer should not suffer the civil fine described in the appropriate subsection of §110. It is presumed that the district court will prepare a standard procedure and set of forms and will determine whether a hearing should be set or whether this should be solely on the papers.

2. The motion for damages is brought by or on behalf of the debtor and is filed in the district court. Again the statute is not completely clear, but it can be interpreted to mean that the motion is filed by the debtor, the trustee or a creditor (not the UST) only after the bankruptcy court has certified a fact. The motion is only for the fact certified by the bankruptcy court. The district court and bankruptcy court will need to find a methodology to notify the parties of the certification or will have to decide that the motion for damages can only be brought by a party who seeks the certification in the first place [ie. A creditor cannot bring such a motion if the fact was certified by the bankruptcy court on its own motion or on the motion of the trustee.]

3. Whether there is a motion by the debtor, the trustee or a creditor, the district court will determine whether to impose one of the civil penalties provided in the statute.

4. The motion is brought in the name of the debtor. If a creditor or trustee brings the motion, the debtor still recovers damages, which presumably are not property of the estate. However the creditor or trustee who brings the motions also receives $1000 and fees and costs.

HOFSTRA UNIVERSITY HEMPSTEAD, NEW YORK 11550-1090

SCHOOL OF LAW

Faculty

May 30, 1995

Henry J. Sommer, Esq.
Community Legal Services, Inc.
3207 Kensington Avenue, 5th Floor
Philadelphia, PA. 19134

Dear Henry:

Bankruptcy Judge Jeremiah Berk (S.D.N.Y.) called me to suggest a change in "Schedule C -- Property Claimed as Exempt" of Official Form 6 (Schedules). He recommends that a new column be added to the list of exempt property to indicate whether the exemption is claimed by the husband, wife, or both. There is a similar column on Schedule B ("Husband, Wife, Joint, or Community").

Judge Berk suggests that a husband and wife, in a joint case, may claim different exemptions with respect to the same property. For example, in New York, each spouse may claim a $10,000 homestead exemption (for a total of $20,000). Alternatively, a cash option can be claimed. He had a recent joint case in which only one homestead exemption was claimed in in the jointly-owned home in the amount of $10,000 and one cash option was claimed, but the schedules did not indicate which spouse was claiming which exemption. Subsequently, the wife moved to avoid a judicial lien on the home under § 522(f) that was against only her (not her husband). Her position was that she was the spouse that claimed the homestead exemption (making § 522(f) available), but the judicial lienor took the position that only her husband claimed the $10,000 homestead exemption. If Schedule C had a column to indicate which spouse is claiming the exemption, there would have been no problem. Instead, there was no way to determine which spouse claimed the homestead exemption.

Judge Berk also said that this column could be helpful when a spouse claims personal injury damages as exempt.

I told Judge Berk that I will communicate his suggestion to you with a request that the Subcommittee on Forms consider it.

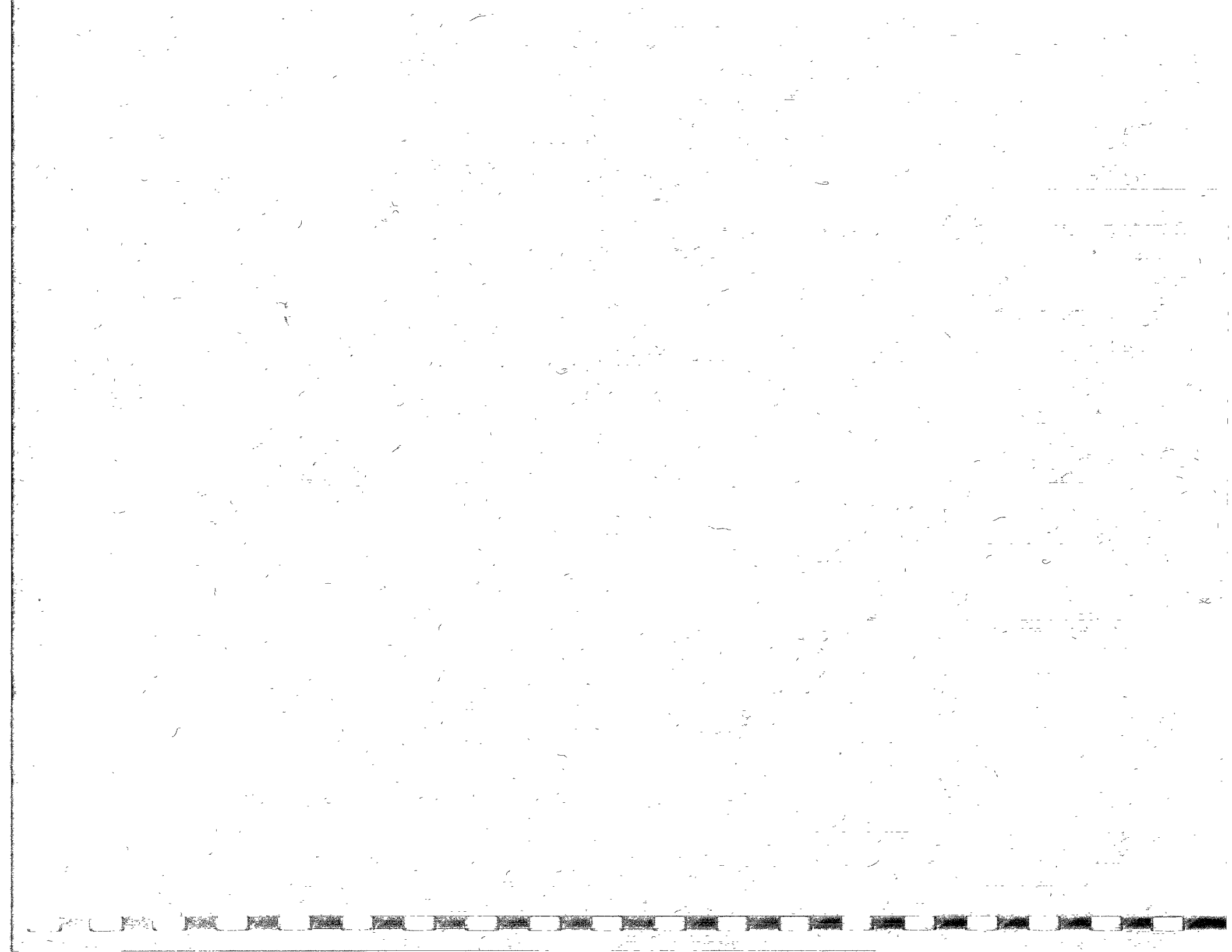
Best regards.

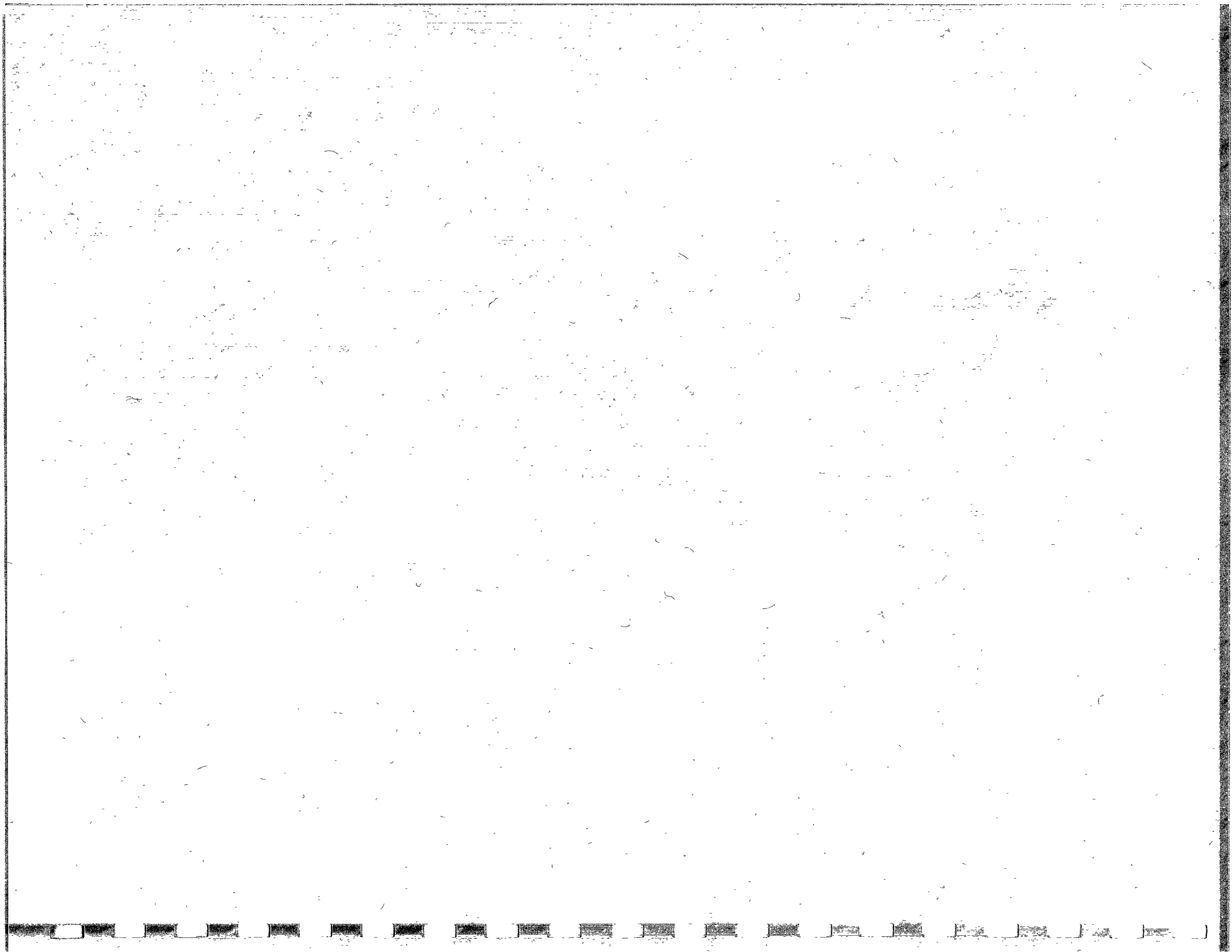
Sincerely,

Alan N. Resnick

cc: Hon. Paul Mannes

JUN -2





L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

FRANCIS F. SZCZEBAK
CHIEF
BANKRUPTCY JUDGES DIVISION

August 7, 1995

Simon M. Lorne, Esquire
General Counsel
Securities and Exchange Commission
450 5th Street N.W.
Washington, D.C. 20549

Re: Official Bankruptcy Form 1, Exhibit "A"

Dear Mr. Lorne:

The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States is considering certain revisions to the Official Bankruptcy Forms. In particular, the Advisory Committee would like to simplify Form 1, the Voluntary Petition, the basic document by which a debtor files a bankruptcy case.

One part of this form that has proved confusing to debtors is the section titled "Type of Debtor," in which the debtor is asked to designate whether the case is being filed by an individual, a partnership, a stockbroker, etc. Among the proposals for simplifying the form and improving the accuracy of the information provided by debtors is a suggestion to replace the current choices of "Corporation Publicly Held" and "Corporation Not Publicly Held" with the single choice of "Corporation." A question concerning whether a debtor corporation is publicly held would be added to Exhibit "A" to the form, an additional document that must be completed by any corporation which files a reorganization case under chapter 11 of the Bankruptcy Code. The Advisory Committee on Bankruptcy Rules requests your comments and suggestions concerning these proposed amendments.

I enclose for your reference copies of the existing Form 1 and the form as the Advisory Committee proposes to revise it. I enclose also copies of Exhibit "A," both the current form and as the Advisory Committee proposes to amend it. The Advisory Committee expects to publish for comment by bench and bar these and other official forms to which amendments are being proposed

The comment period probably will begin October 1, 1995, and close February 29, 1996. The Advisory Committee would appreciate receiving your comments as soon as possible, however,

Exhibit "A" was included in the Official Bankruptcy Forms at the request of the Securities and Exchange Commission. Accordingly, please feel free to make any additional suggestions or comments you may wish concerning Exhibit "A."

Comments should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, as follows:

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

In addition, I would appreciate receiving a copy of your comments.

If you have any questions, please feel free to telephone me at 202-273-1908.

Sincerely,

Patricia S. Channon

Patricia S. Channon
Senior Attorney
Bankruptcy Judges Division

Attachments

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
1055 FEDERAL BUILDING
DETROIT, MICHIGAN 48226

RECEIVED 10/11/94

94-BK-C

OFFICE OF
STEVEN W. RHODES
UNITED STATES BANKRUPTCY JUDGE

(313) 226-2123

October 5, 1994

Agenda Item 15

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Secretary:

Bankruptcy Judge Paul Mannes has requested that bankruptcy judges submit for your committee's consideration any local rules that we think should be adopted as national rules. I submit for your consideration our local rule 2.08 relating to our motion procedure. This local rule is probably the most important rule in enabling us to deal with our heavy caseloads. The key feature of it is that a motion is set for hearing only if a response is filed; otherwise, an order is entered granting the motion without a hearing. While I do not have accurate statistics immediately available, I would say that the vast majority of motions are granted without a hearing because no response is filed.

I would also refer you to our local rule 11.1 which sets a deadline for filing a proof of claim in Chapter 11 cases, 90 days after the meeting of creditors. There ought to be a national rule on this.

I have also enclosed for your consideration my law review article, Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases, 67 Am. Bankr. L.J. 287 (Summer, 1993). I refer you specifically to part VIII of the article at pages 318-322. In that part, I discuss in detail the inherent structural problems with the Federal Rules of Bankruptcy Procedure, and the resulting causes of delay and expense. I hope that you will give the issues addressed in my article serious consideration.

If I can be of any further assistance, please call me.

Sincerely,

Steven W. Rhodes

Enclosures

RULES

UNITED STATES BANKRUPTCY COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

Effective September 1, 1990

LOCAL RULES
UNITED STATES BANKRUPTCY COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

Effective September 1, 1990

pending. The captions of responses shall identify the party to whose motion the response is directed. The captions of notices of hearing shall identify the motion for which the hearing is to be conducted.

(b) *Filing.*

(1) Absent unusual circumstances, all pleadings and other papers shall be filed with the clerk. Unless authorized by the Court, the clerk shall not accept for filing pleadings and other papers if they do not conform with these rules.

(2) Pleadings in adversary proceedings, contested matters and other actions shall use only one side of a page and shall be filed in duplicate, the original of which shall bear an original signature, with the attorney's name, mailing address and telephone number and the name of the client appearing below the signature.

(3) A complaint initiating an adversary proceeding shall be accompanied by an original and a copy of a cover sheet in a form prescribed by the clerk.

(c) *Use of Forms.* The use of a form pleading which contains extraneous factual allegations or legal arguments not applicable to the matter before the Court may subject the individual who submits it to sanctions under Rule 9011 of the Bankruptcy Rules. Factual allegations in pleadings must be made with the proper respect for the applicable rules regarding relevance, specificity, and accuracy.

(d) *Page Numbers.* The pages of all pleadings or papers, excluding exhibits, shall be numbered.

RULE 2.04. Intervention

When the Court has issued an order allowing any interested party to intervene in a case, it shall be the duty of the intervening party to request the clerk to add its name to the matrix for the case. The intervening party may also request of the clerk copies of prior pleadings, which shall be provided at the cost set by the Judicial Conference of the United States.

RULE 2.05. Additional Service of Adversary Complaints in Chapter 7 or Chapter 11 Cases

The plaintiff in an adversary proceeding shall serve a copy of the complaint and any amended complaint upon each of the following entities (if applicable): the trustee, the trustee's counsel, and the chairperson and counsel for any official committee. The plaintiff shall file a proof of service indicating the parties served and the date and method of service.

RULE 2.06. Service on the United States Trustee

With respect to a case pending under Chapter 7 or Chapter 11 which was commenced on or after October 1, 1979, a party who files a document other than a proof of claim, a reaffirmation agreement, and a statement of intent pursuant to 11 U.S.C. §521, shall serve a copy of the document on the United States trustee.

RULE 2.07. Conduct of Counsel During Court Proceedings

During court proceedings, counsel shall, unless otherwise instructed by the Court:

(1) At the onset of the hearing, place his or her name on the record and state the name of the party he or she represents;

(2) Stand when speaking or when addressed by the Court;

(3) Speak in the vicinity of a microphone in those courtrooms equipped with electronic recording machines;

(4) Refrain from confrontation or colloquy with opposing counsel;

(5) Address all persons by their surnames;

(6) State all objections concisely and with specificity.

RULE 2.08. Motion Procedure Generally

(a) Unless the Court directs otherwise upon request, a party seeking relief may obtain such relief upon motion in accordance with the procedures stated herein.

(b) The motion shall be accompanied by:

(1) a signed notice of hearing with the hearing date left blank which shall be filed but not served;

(2) a notice to the respondent that the respondent has 15 days (20 days for matters covered by Bankruptcy Rule 2002(a)) 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 and served, the Court may grant the motion without a hearing;

(3) a proof of service indicating the date and manner of service and the parties served; and

(4) a copy of the proposed order, attached to the motion and labeled as Exhibit A.

(c) With respect to a motion or application by a chapter 7 trustee requesting relief specified in Bankruptcy Rule 2002(a), the clerk shall serve the notice set forth in paragraph (b)(2).

(d) If a response is not timely served, the movant may file a certification so stating together with the proposed order and a copy of the original proof of service of the motion. If the motion was served by mail, the movant shall not file a certification of no response until the 19th day after service, (or 24th day in the case of matters covered by Bankruptcy Rule 2002(a)) in order to comply with Bankruptcy Rule 9006(f). The Court may enter the proposed order without a hearing. If the Court decides not to enter the proposed order, the Court shall promptly schedule a hearing, with notice to the movant and such other parties as it deems necessary.

(e) If a response is timely filed and served, the Court shall promptly schedule a hearing on the motion, and return the notice of hearing to the movant for service upon the appropriate parties.

(f) A brief, not more than 20 pages in length, shall be filed in support of and in opposition to the following motions:

(1) all motions in adversary proceedings;

(2) motions for relief from stay or abandonment in chapter 11 cases;

(3) motions for the appointment of a trustee or examiner in chapter 11 cases;

Reply briefs not more than five pages in length may be filed and served not less than three business days before the hearing on the motion.

(g) This rule does not apply to:

(1) objections to claims or exemptions or to motions for reconsideration, except that objections to exemptions and motions for reconsideration shall be supported by a brief, which shall not exceed 20 pages in length;

(2) matters covered by Rule 2.12 relating to reduction or enlargement of time;

(3) motions to withdraw the reference; and

(4) motions for leave to appeal.

(h)(1) Motions in adversary proceedings shall affirmatively state that concurrence of counsel in the relief sought has been requested on a specified date, and the concurrence has been denied or has not been acquiesced in and hence it is necessary to bring the motion.

(2) With respect to matters relating to discovery to which Bankruptcy Rule 7026 through 7037 apply, counsel for each of the parties shall meet and confer in advance of the hearing in a good faith effort to narrow the areas of disagreement. The conference shall be held a sufficient time in advance of the hearing so as to enable the parties to narrow the areas of disagreement to the greatest extent possible. It shall be the responsibility of counsel for the movant to arrange for the conference and, in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the place of holding court in which the motion is pending.

RULE 2.09. Motion for Relief from the Stay

(a) The Parties to be Served. 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) Contents of Such a Motion. If applicable, the motion shall state the names and purported interests of all parties known, or discoverable upon reasonable investigation, to 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 of perfection, unless such documents are voluminous. A copy of any prior orders of the Court upon which the motion relies shall be attached.

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CHAPTER ELEVEN: RULES RELATING TO CHAPTER 11 CASES

RULE 11.01. Deadline for Filing a Proof of Claim or Equity Security Interest in Chapter 11 Cases

Unless the Court orders otherwise in a particular case, the deadline for filing a required proof of claim or equity interest in a Chapter 11 case shall be 90 days after the first date set for the meeting of creditors called pursuant to 11 U.S.C. §341(a).

RULE 11.02. Classification

If the Chapter 11 plan classifies claims or interests, it shall identify by name, if feasible, the entities who hold a claim or equity interest within each class and the amount of each entity's claim or equity interest within each class. If the plan creates only one class of unsecured creditors, then identification of each holder of claim therein is not required.

RULE 11.03. Obtaining Approval of Disclosure Statements

(a) The filing of a disclosure statement shall be deemed to include a motion for its approval, to which Rule 2.08 applies.

(b) When a disclosure statement is filed, the clerk will deliver to the proponent a form of notice which the movant shall timely serve upon all parties entitled to notice pursuant to Bankruptcy Rule 2002(b). In addition, the proponent shall serve a copy of the disclosure statement and the notice upon the United States trustee and upon the chairperson and counsel for each official committee and shall file a proof of service of each of the foregoing.

(c) Upon a certification by the movant that no objection to the approval of the disclosure statement or request for a hearing was timely served, the Court may enter an order approving the disclosure statement without a hearing.

RULE 11.04. Duties of Proponent of Plan After Approval of Disclosure Statement

Unless otherwise ordered by the Court, upon approval of a disclosure statement in a Chapter 11 case, the proponent of the plan shall provide to the clerk, at least 30 days before the

The American BANKRUPTCY LAW JOURNAL

A Quarterly Journal of the National Conference of Bankruptcy Judges

ARTICLE

VOLUME 67 SUMMER, 1993

and to what extent they need disclosure. In any event, an empirical study of this issue is certainly justified at this time.[219]

VIII. THE PROCEDURES SET FORTH IN THE CODE AND THE RULES FOR REQUESTING RELIEF ARE UNNECESSARILY COMPLEX

The purpose of litigation procedure is to focus attention on resolving the parties' dispute, rather than on the process for resolving it.[220] As the means for requesting relief from the court, litigation procedure ought to be simple, straightforward, and consistent.

There appears to be general agreement that the Federal Rules of Civil Procedure meet this test. One noted authority has concluded, "[t]he federal rules have successfully satisfied every test of a good procedural system. The rules are so flexible, simple, clear, efficient, and successful . . . ."[221] Indeed, Federal Rule of Civil Procedure 1 provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[222]

In bankruptcy the procedural rules have this same lofty goal. The Supreme Court has stated that the chief purpose of the bankruptcy laws is the "expeditious and economical administration" of bankruptcy cases.[223] The modern statement of this concept is found in Bankruptcy Rule 1001, which provides: "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."[224] Unfortunately, as demonstrated below, it is highly questionable whether the Federal Rules of Bankruptcy Procedure are as successful.

Any system of procedure must address a number of issues, including:

- -What should the request be called?
- -Should there be service of the request itself or merely a notice of the request?
- -Who should receive this service?
- -Is a written response required?

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[219]*See* Teresa A. Sullivan et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195 (1987).

[220]"The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies." 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1029, at 118 (1987) (footnote omitted). *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

[221]4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1008, at 46-47 (1987).

[222]FED. R. CIV. P. 1. *See also* Foman v. Davis, 371 U.S. 178, 181 (1962); General Mill Supply Co. v. S.C.A. Servs., Inc., 697 F.2d 704, 711 (6th Cir 1982). *See generally* Hon. Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1, 2-3 (1988).

[223]Katchen v. Landy, 382 U.S. 323, 328 (1966); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 346-47 (1874); *Ex parte* Christy, 44 U.S. (3 How.) 292, 312-14, 320-22 (1845).

[224]FED. R. BANKR. P. 1001. *See* 8 COLLIER, *supra* note 21, ¶¶ 1001.1 to 1001.3.

-How much time is allowed for such a written response?
-Is a hearing required?
-How much notice time is required for the hearing?
-Is a hearing required if no response is filed?

A simple system would establish the same procedure for each type of request for relief. A somewhat more complex system would establish a distinct and complete procedural rule for each distinct type of request.

Unfortunately, the collection of directives and requirements found in the Bankruptcy Code and the Bankruptcy Rules represents neither type of procedural system. Rather, it is a complex hybrid structure, characterized by the following:

Certain provisions apply to all procedures. For example, Bankruptcy Code § 102(1) applies throughout the Bankruptcy Code and the Bankruptcy Rules.[225] It provides that the phrase "after notice and a hearing" or a similar phrase means after such notice and an opportunity for a hearing as is appropriate, and authorizes an act (e.g., the entry of an order) without an actual hearing if there was no timely request for a hearing.[226] Similarly, Bankruptcy Rule 9006(d) appears to apply throughout the rules. This rule requires at least five days' notice before a hearing unless another rule or a court order provides otherwise.[227]

Other provisions have a limited application to a few specified procedures. For example, Bankruptcy Rule 9014 is explicitly incorporated into some, but not all, relief-specific rules.[228] This rule requires only "reasonable notice and opportunity for hearing," and states that no response is required unless the court orders an answer.[229] Likewise, Bankruptcy Rule 2002 sets forth the service and notice requirements for certain identified relief-specific requests, as well as the disclosure statement and confirmation.[230]

Each specific request for relief has its own rule with its own peculiar variations of procedure. One important variable in the Bankruptcy Rules is whether there is an explicit requirement for a written response and an explicit grant of authority to the court to resolve the request without a hearing if no objection is filed.[231] A second important variable in the Bankruptcy Rules is the length of time that the parties are allowed to respond, either in writing or at a hearing, to different requests for relief.

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[225] *See* FED. R. BANKR. P. 9001.

[226] 11 U.S.C.A § 102(1) (West 1993).

[227] FED. R. BANKR. P. 9006(d).

[228] See *infra* note 231.

[229] FED. R. BANKR. P. 9014.

[230] FED. R. BANKR. P. 2002.

[231] Such explicit provisions are found in FED. R. BANKR. P. 3020(b), 4001(d), 6004(b), 6007(a). The Bankruptcy Rules that have no such provisions, or that leave the requirement of a response to the judge's discretion, include FED R. BANKR. P. 1007(c), 2004(a), 3012, 3013, 4001(a), 4001(b), 4001(c), 6006, 6007(b), 9019(a). *See generally* FED. R. BANKR. P. 9014, discussed *supra* note 228.

The Bankruptcy Rules set forth the following time periods:[232]

Five days - Rules 6004(b) and 9006(d)
Fifteen days - Rules 4001(b), (c), and (d), and 6007(a)
Twenty days - Rule 2002(a)
Twenty five days - Rules 2002(b) and 3017(a)
Thirty days - Rule 3007

Rules 9013 and 9014 do not state any specific time.

The result is a system of procedure with several significant problems:

(1) *Reference to more than one relief-specific provision may be necessary to determine the proper procedure.* For example, for the procedure applicable to a motion for relief from the stay, reference must be made to both Bankruptcy Code § 362(e) and Bankruptcy Rule 4001(a). Similarly, the procedures applicable to a motion for authorization to use cash collateral are found in both Bankruptcy Code § 363(c)(3) and Bankruptcy Rule 4001(b). The procedure upon the filing of a disclosure statement is set forth in Bankruptcy Rule 2002(b) and then is restated in Bankruptcy Rule 3017(a), without any apparent need or purpose. For the procedure for plan confirmation after approval of the disclosure statement, reference must be made to both Bankruptcy Rule 2002(b) and Bankruptcy Rule 3021(b)(2).

(2) *The answers in the general rules and in the relief-specific rules may conflict.* Regarding the disclosure statement, Bankruptcy Rule 3017(a) states, "the court shall hold a hearing." This apparently conflicts with § 102(1) of the Bankruptcy Code.[233] Bankruptcy Rule 3020(b)(2) currently also has language appearing to require a hearing.[234]

(3) *Too often no answer can be found.* Several Bankruptcy Rules provide little or no direction regarding such matters as service, notice, objections, or a hearing.[235]

(4) *One issue is just plain silly.* The issue of what to call the request—an adversary proceeding complaint, a motion, an application, a request, or an objection—is technically alive and well under the Bankruptcy Rules. Bankruptcy Rule 7001 identifies the specific requests for relief that must be filed as "adversary proceedings." The term "application" is used in Bankruptcy Rules 2007(b), 2014(a) and 2016(a). Other requests for relief are simply called "motions," as, for example, in Bankruptcy Rule 9014. The distinction between a motion and an application is suggested in Bankruptcy Rule 9013, which states: "[a] request for an order, except when an

[232]However, the determination of the applicable time periods cannot be made by reference to these rules alone, because under FED. R. BANKR. P. 9006(f), an additional three days is added upon service by mail.

[233]The efficacy of this requirement is therefore disputed. *See infra*, note 242 and accompanying text; 5 COLLIER, *supra* note 21, ¶ 1125.03[4], at 1125-32 to 34.

[234]The 1993 amendments to Bankruptcy Rules 6006 and 6007, effective August 1, 1993, deleted the explicit requirement of a hearing. Thus, in the absence of a request for a hearing, none is now required. PROPOSED FED. R. BANKR. P. 6006, 6007 advisory committee's notes.

[235]*See, e.g.*, FED. R. BANKR. P. 1007(c), 2004(a), 2007(a), 2007(b), 2014(a), 2016(a), 3012, 3013.

application is authorized by these rules, shall be by written motion, unless made during a hearing."[236] Although this suggests that the difference between an application and a motion was intentional and not accidental, it is not clear what that intent was. As a result, applications are often called motions, and vice versa, and the intended distinction is simply lost.[237]

Therefore, it is fair to conclude that the procedural requirements in bankruptcy are complex, confusing, and incomplete.[238] It is simply not possible to discern any rational basis for all of this. One commentator stated the problem more diplomatically:

> Conceptual precision is not a necessary requirement of a functioning legal system; it may not even be desirable. But the examination of imprecision may be instructive. It may help us to better cope with the realities of the legal system we have to live with. And it may help identify issues on which the system has failed or refused to commit itself. It may also help us identify an agenda of unfinished business.[239]

The complexity of these provisions leads to delay and expense in three distinct ways. First, it can take attorneys, court personnel, and judges significant time and effort just to determine the proper procedures for each of the numerous types of requests for relief.[240] Second, significant litigation can result when it is alleged that

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[236]FED. R. BANKR. P 9013

[237]"The confusion regarding nomenclature extends even to the most authoritative levels. One court of appeals recently stated that when a trustee's proposal to settle a dispute is uncontested, an "administrative proceeding" is warranted. Kowal v Malkemus (*In re* Thompson), 965 F 2d 1136, 1140 n.5 (1st Cir 1992). It is not clear what an "administrative proceeding" is, and in any event there is no basis for this characterization in the rules.

According to one court, an administrative claim for postpetition taxes is made in a "request for payment" rather than in a proof of claim. *In re* Mansfield Tire & Rubber Co., 73 B.R. 735 (Bankr. N.D. Ohio 1987).

See generally HON. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, NORTON QUICK REFERENCE PAMPHLET, BANKRUPTCY CODE AND RULES 207-9 (1993); John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 307; Hon. William L. Norton, Jr., *Bankruptcy Terminology and Proceedings Procedure*, 1984 ANN. SURV. BANKR. L. 1.

[238]*See* HON. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, NORTON QUICK REFERENCE PAMPHLET, BANKRUPTCY CODE AND RULES 207-9 (1993); DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 17 (1992); Ronald M. Martin & Terence Fagan, *A Guide to Bankruptcy Procedure Under the New Rules*, 89 COM. L.J. 17 (1984) ("The purpose of this article is . . . to help guide the practitioner through the maze of litigation and appeals embodied in the new rules.").

[239]John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 307, 336-37 (footnotes omitted).

[240]In an effort to address the difficulties described in this part, most bankruptcy courts have promulgated local rules, as permitted by FED. R. BANKR. P. 9029. While such local rules may be effective in providing guidance on procedural matters in any given district, they also substantially undermine the important goal of national uniformity in bankruptcy procedure. Peter J. Antoszyk & William E. Connors, *An Overview of Local Rulemaking in Bankruptcy Court*, AM. BANKR. INST. J., May 1993, at 31. That problem has in turn led to an effort to create a Model Uniform Local Bankrtupcy Rule. *See* Hon. James J. Barta, *A Model Uniform Local Bankruptcy Rule*, AM. BANKR. INST. J., Feb. 1993, at 14.

there was insufficient compliance with the proper process.[241] Sometimes, the result of that litigation is that the process must be abandoned or started over. Third, and perhaps most significantly, many bankruptcy judges conduct hearings on most or all requests for relief, despite the explicit language of Bankruptcy Code § 102(1) and certain specific Bankruptcy Rules, because the rules make continuing references to hearings.

The solution to this problem is painful but clear. The Bankruptcy Rules need a thorough review and revision for the purpose of clarification and simplification. In this process, the initial question must be whether to establish a structure in which each type of request for relief has its own procedural rule or a structure in which there is one rule of procedure uniformly applicable to all requests. Focusing on one structure or the other is absolutely necessary in order to eliminate the substantial problems created by the present hybrid structure. Then, care must be taken to assure that each of the procedural questions faced when any given request is filed is actually addressed in the rules. Finally, to promote the best use of scarce judicial resources, the rules should establish an explicit and uniform procedure which requires a written response to any request for relief, and which then authorizes the judge to enter an order resolving any request for relief to which no written objection is filed.[242]

The effort suggested here is of great magnitude, but it is also of great importance. Clarifying and simplifying the Federal Rules of Bankruptcy Procedure holds great potential for significantly reducing delay and expense in chapter 11 bankruptcy cases.

CONCLUSION

The causes of delay and expense in chapter 11 bankruptcy cases are numerous. The statutory causes are significant. Presently, the parties in interest bear an unnecessary burden of expense and delay due to such problems as issues left open in the Bankruptcy Code, duplicate litigation, unnecessary requirements, lack of case management, and awkward and complex jurisdiction and procedure. Each of these problems can and should be addressed. The result would be a substantial benefit to all concerned.

This article has focused on the problems with the present system, and has briefly discussed certain solutions to those problems. It may well be that the problem of expense and delay in chapter 11 cases can also be addressed by creating an alternative

[241] *See, e.g.*, Wedgewood Inv. Fund, Ltd. v. Wedgewood Realty Group (*In re* Wedgewood Realty Group, Ltd.), 878 F.2d 693 (3d Cir 1989); Grundy Nat'l Bank v. Looney (*In re* Looney), 823 F.2d 788 (4th Cir.) *cert. denied*, 484 U.S. 977 (1987); River Hills Assocs., Ltd. v. River Hills Apartments Fund (*In re* River Hills Apartments Fund), 813 F.2d 702 (5th Cir. 1987); Mutual Benefit Life Ins. Co. v. Stanley Station Assoc., L.P. (*In re* Mutual Benefit Life Ins. Co. in Rehabilitation), 140 B.R. 806 (D. Kan. 1992).

[242] *See, e.g.*, E.D. MICH. BANKR. R. 2.08.

structure for reorganization. Indeed, the current proposal in the Bankruptcy Amendments Act of 1993 for a new chapter 10 is such a structure.[243]

In any event, the case for establishing a bankruptcy review commission is clear, and its agenda is substantial.

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[243]Bankruptcy Amendments Act of 1993, S. 540, 103d Cong., 1st Sess. § 201. If enacted, chapter 10 would be tried as a three year experiment in eight districts. Businesses with a maximum total debt of $2.5 million would be eligible. A plan would have to be filed within 90 days of the petition, and the confirmation hearing must be concluded within 45 days of the filing. The plan would pay unsecured creditors from future disposable income, and is confirmable under standards very similar to those applicable in chapter 13 cases.

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Honorable Paul A. Magnuson, Chair
730 Warren E. Burger Building
316 North Robert Street
St. Paul, Minnesota 55101

Telephone
(612) 290-3967

Agenda Item 19

June 22, 1995

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
One Columbus Circle N.E., Suite 4-170
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

At its meeting on June 8-9, 1995, the Committee on the Administration of the Bankruptcy System considered and acted on the long range planning recommendations of the Bankruptcy Committee's Subcommittee on Long Range Planning (subcommittee). The Bankruptcy Committee established the subcommittee in January 1992 to assist in monitoring the ongoing changes facing the bankruptcy system and to permit the Committee to take a proactive role within the long range planning process. The subcommittee issued, and the Bankruptcy Committee approved, a Final Report on Long Range Planning in July 1993 (1993 Final Report) containing 39 specific long range planning recommendations affecting the bankruptcy system. The Bankruptcy Committee's 1993 Final Report was submitted to the Judicial Conference Committee on Long Range Planning (Planning Committee). In March 1995, the Planning Committee submitted to the Judicial Conference its Proposed Long Range Plan for the Federal Courts (the Plan), which contained a number of the recommendations addressed in the 1993 Final Report.

In light of the Judicial Conference's action on the Plan in March 1995, the subcommittee reviewed the 1993 Final Report and reported its recommendations to the Bankruptcy Committee at the Committee's June 1995 meeting. The Bankruptcy Committee approved the actions recommended by the subcommittee with respect to the 20 recommendations of the subcommittee that had not already been adequately handled by implementing legislation, action of the Conference, or action by the Administrative Office.

Three of those 20 recommendations concern matters which the Committee believes should be acted upon favorably by the Advisory Committee on Bankruptcy Rules. The recommendations are as follows:

1. That the court be permitted in its discretion to appoint a special master who would, among other things, observe and assess management's performance in the handling of the case.

As outlined in the 1993 Final Report, a special master in chapter 11 cases would perform many of the same functions as the standing trustee in chapter 12 and 13 cases. Specifically, the special master, who would be paid through the estate, would be responsible for expediting the administration of the case in routine, undisputed matters that ordinarily do not end up in front of the bankruptcy judge. This office would be distinct from and perform functions different than those of an examiner. Neither would the position replace the debtor-in-possession concept. However, in a case where a chapter 11 trustee is appointed under § 1104, the special master would cease to function unless requested to continue by the trustee.

2. That the equivalent of a "small claims court" procedure be established for the adjudication of disputed claims under $5,000, to prevent "strategic" objections to small claims and to facilitate the prompt resolution of bankruptcy cases.

During its discussions in 1993 prior to including the foregoing recommendation in its Final Report, the subcommittee noted that such a procedure could save valuable judicial time and allow small creditors, who might not otherwise go to the time and expense of a full-blown claims objection adjudication, to meaningfully participate in the case and have their interests protected.

3. That bankruptcy judges be encouraged to make use of court-appointed experts to review fee applications for compliance with established submission guidelines, to check for accuracy, and make recommendations to the judge regarding reasonableness.

The Bankruptcy Committee approved the subcommittee's recommendation to refer these matters to the Advisory Committee on Bankruptcy Rules for consideration of possible amendments to the Bankruptcy Rules. I am, therefore, transmitting the recommendations to you for consideration by that Committee. Thank you for your assistance in this matter.

Sincerely,

Paul A. Magnuson

FINAL REPORT AND RECOMMENDATIONS OF THE LONG-RANGE PLANNING SUBCOMMITTEE OF THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

JUNE 1, 1993

MEMBERSHIP ON THE LONG-RANGE PLANNING SUBCOMMITTEE
OF THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY
SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Honorable Paul A. Magnuson, Chair
United States District Judge
United States District Court
754 Federal Courts Building
316 North Robert Street
St. Paul, MN 55101

Honorable Joseph L. Cosetti
Chief Judge
United States Bankruptcy Court
1607 Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222

Honorable W. Homer Drake, Jr.
United States Bankruptcy Judge
1709 United States Courthouse
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United States Circuit Court Judge
United States Court of Appeals
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reorganization cases take too long to resolve and that the poor success rate, particularly of smaller companies, is attributable to this fact. While the consensus of the Subcommittee was that any company should be afforded the opportunity to attempt to restructure its financial arrangements to preserve on-going business value, it often becomes apparent that reorganization is not feasible long before a case is actually dismissed or converted. Similarly, even companies that do eventually reorganize frequently spend more time in Chapter 11 than may be necessary or desirable. Thus, the Subcommittee believes that many of the current deficiencies in Chapter 11 could be remediated by streamlining the process and making provision for more aggressive judicial and administrative management of Chapter 11 cases.

2. *Preliminary Recommendations*

a. Congress should consider amending § 1121 of Title 11 to allow the court to set a date by which a plan must be filed at risk of conversion or dismissal of the case. The Subcommittee considered making such a requirement mandatory, but the sentiment of a majority of the members was that the enormous variation in circumstances from case-to-case argued strongly for the permissive language instead.

b. Congress should consider amending § 1125 of Title 11 to permit the bankruptcy court to grant conditional approval of the disclosure statement. By reducing the number of objections to the adequacy of the disclosure statement and combining the hearings on adequacy and confirmation, this process, which would generally be utilized in smaller cases, would compress by several months the time required to confirm the plan.

c. Because of time constraints and the importance of preserving the aura of independence and impartiality, it would be very difficult

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L.J. 437 (1992); Martin J. Whitman et al., *A Rejoinder to the "Untenable Case for Chapter 11"*, 2 J. Bankr. L. & Prac. 839 (1992). *See also infra* ¶ H.2.e. and Attachment V hereto.

under the existing structure for the bankruptcy judge to take a more active role in case administration. However, in some cases management, to preserve its continued participation in the firm, is moved to delay prompt formulation and confirmation of a plan of reorganization and, in the process, to thwart the most efficacious restructuring of the business. Particularly in large cases where the factors affecting time to confirmation are abundant, it is difficult for the court (whose active involvement occurs only in connection with sporadic disputes arising among interested parties) to monitor and regulate counterproductive behavior. Accordingly, the Subcommittee proposes that the court be permitted in its discretion to appoint a special master (*see infra* ¶ E.2.a. regarding the recommendation to expand the use of experts and special masters in bankruptcy generally) who would, among other things, observe and assess management's performance in the handling of the case.[10] In this connection, the special master would perform many of the same functions (with appropriate modifications, including principally the absence of any role in distribution) as the standing trustee in Chapters 12 and 13. Specifically, the special master, who would be paid through the estate, would be responsible for expediting the administration of the case in routine, undisputed matters that ordinarily do not end up in front of the bankruptcy judge. This office would be distinct from and perform functions different than those of an examiner who might be appointed in a given case for a more limited purpose. Neither would the position replace the debtor-in-possession concept. However, in a case where a Chapter 11 trustee is appointed under § 1104, the special master would cease to function unless requested to continue by the trustee.

d. Congress should consider amending the standard in § 1121 of the Code for extending the 120 and 180 day exclusivity periods to express a bias against enlargement except in specified

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[10] A similar recommendation is made in Whitman et al., *supra* note 9, at 859-60, wherein the authors call for appointment by a committee of the most senior class of creditors participating in the reorganization of a "shadow trustee" whose role would be to observe and learn during the debtor's exclusive period and generally act as a control on entrenched, unproductive management.

E. Professional Fees

1. *General Statement of Background and Underlying Assumptions*

Compensation of professionals in bankruptcy cases has become a source of controversy and, in the public eye, scandal. The Subcommittee endorses the proposition expressed in the Code that fees for professionals must be based on "the cost of comparable services" in nonbankruptcy cases. However, steps must be taken to restore confidence and integrity to the process by which fee applications are reviewed and allowed. In addition, in large cases involving voluminous, quarterly fee applications from multiple professional firms, it is a misuse of valuable judicial resources for the bankruptcy judge to individually review all time and expense records, particularly for purposes of assessing technical compliance with prescribed requirements as to form and content rather than the ultimate question of reasonableness.

2. *Preliminary Recommendations*

a. Bankruptcy Judges should be encouraged to make use of court-appointed experts (Fed. R. Evid. 706) to review fee applications for compliance with established submission guidelines, to check for accuracy, and make recommendations to the judge regarding reasonableness.[23] The Subcommittee also supports amendment of the Bankruptcy Rules to repeal current Rule 9031 and to make Fed. R. Civ. P. 53, authorizing appointment of special masters, applicable in bankruptcy proceedings. *See also supra* ¶ A.2.c. and *infra* ¶ F.2.e. concerning, respectively, the proposed use of a special master in Chapter 11 cases and to adjudicate small claims.

b. National guidelines should be promulgated governing the form and presentation of fee requests, including specification of limits

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[23] *Cf. In re* Joint Eastern & Southern District Asbestos Litigation, 27 C.B.C. 1636 (2d Cir. 1991) (approving of the bankruptcy court's appointment of experts to assure that a plan or reorganization is properly implemented).

Conference and of the on-going efforts of the Administrative Office to impose new management structures and quality control procedures over the adoption and growth of computerized systems for the federal courts. Because of the high volume of paper and large amount of funds that pass through the bankruptcy court clerk's office compared with other courts, the Subcommittee recommends the bankruptcy courts be given high priority in these efforts, including completing installation of the Bankruptcy Case Automation Project in all districts, and developing new systems for case managment as well as for automating filing (imaging technology) and cash functions (automated cash drawers).

c. The Judicial Conference should consider changing the title of the Clerk of the Bankruptcy Court to recognize the wide range of non-clerical, administrative functions performed by or under the supervision of that person.

d. To cope with increasing caseload demands and to address the uneven distribution in caseload across districts at any given time and over time, the Subcommittee recommends study of a system to allow senior status for bankruptcy judges and flexible duty assignments for all bankruptcy judges.

e. To prevent "strategic" objections to small claims, and to facilitate the prompt resolution of bankruptcy cases, the Subcommittee recommends that the equivalent of a "small claims court" procedure be established for the adjudication of disputed claims under $5,000. Use of this procedure would be at the discretion of the bankruptcy judge to be decided on a case-by-case basis. Disputed claims under the jurisdictional amount would be referred to a special master (*supra* ¶ E.2.a.) who would hear all such matters and make recommendations regarding allowability to the bankruptcy judge. This would save valuable judicial time and allow small crditors, who might not otherwise go to the time and expense of a full-blown claims objection adjudication, to meaningfully participate in the case and have their interests protected.

LAW OFFICES OF
Peter H. Arkison
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February 18, 1993

Honorable Robert E. Keeton
Chairman of the Committee on Rules
of Practice and Procedure
Administrative Office of the U. S. Courts
Washington, D.C. 20544

Re: Bankruptcy Court Rules

Dear Judge Keeton:

Bankruptcy Rule 1001 provides in part:

> These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.

It is with this in mind that I would like to propose a rule that would allow for the expeditious and economical resolution of small matters in the bankrutpcy courts. The proposed rule, along with explanatory comments, is enclosed.

Most attorneys frequently have to tell the client that it would cost more to litigate a bankruptcy matter than it is worth. This can happen when someone believes that there is a good case for a dischargeability complaint for $1,250. It happens when someone is served with a summons and complaint by a Trustee seeking to collect an account for $1,500.

Bankruptcy courts consider state law issues, especially property rights, as they relate to a federal law of insolvency. As a practical matter this means that many of the issues to be considered by the Bankruptcy Court involve relatively small sums of money--sums that are often so small that it is not cost effective to retain an attorney.

The inability to be able to afford an attorney means that the party is effectively denied access to justice. Someone once said that "Justice delayed is justice denied." Unaffordable justice is the denial of access to justice. Thus, the system presently allows for equal access to justice in the bankruptcy courts--only by those who have a large enough issue to justify hiring an attorney. The

person who has a good case for a relatively small amount is effectively denied access to the courts. Similarly, Debtors are often unable to effectively respond to a complaint to determine dischargeability of a small debt.

The concept of a small claims procedure does not appear to have arisen before in the federal courts; it appears to be the only effective way to reduce the increasing number of people being barred from the courthouse because of the costs of litigation.

Thanking you in advance for your consideration of this proposal, I am

Sincerely yours,

Peter H. Arkison

PHA:lk

PROPOSED RULE _____

SCOPE OF RULE

This rule applies to cases in which the amount sought is less than $5,000.00 and/or the dischargeability of a debt of less than $5,000.00.

This rule shall not apply to any action to determine the right, title or interest of a party to real property.

This rule shall not apply to any action to seek an injunction or to enforce an injunction except for matters under Section 362, concerning the automatic stay of proceedings, and Sections 727 and 1328.

This rule shall not apply to an action brought under Section 727.

> Comment: This rule is designed to apply to only the small case that does not justify the cost and expense of an attorney. The dollar limits are an amount that virtually any Debtor could repay over a two year period, especially after discharge of the other debts.
>
> The real property and injunction exceptions are a recognition of the complexities of issues related to those types of cases. Generally, they will have more involved than the dollar limitation of the rule.
>
> The adverse consequences of a denial of a discharge are too great to have the matter resolved under this rule.

CONTENTS OF SUMMONS

The Clerk of the Court shall issue a Summons indicating that the adversary proceeding has been filed pursuant to the provisions of this rule. A copy of this rule shall be printed on the back of the Summons or attached to it.

> Comment: There is no official form of a Summons. The current form used by many courts is designed for a procedure which envisions a pretrial conference as being the first court appearance. These rules are designed to simplify those procedures; therefore, a new form will be needed.

The printing of this rule on the reverse side would put the Defendant on notice that the regular rules are not being used and that steps must be taken to opt out of this rule.

CONTENTS OF COMPLAINT

The Complaint shall set forth the following in clear English:

1. The name and address of the Plaintiff(s).

2. The name and address of the Defendant(s).

3. A detailed statement of the facts relied upon.

4. A listing of documents which support the claim, copies of which are to be attached.

5. The name, address and telephone number of each person expected to be called as a witness.

6. A statement of the relief requested.

Comment: The Complaint is designed to set forth the nature of the action on a factual basis as opposed to the notice pleading that is generally required under the Part VII rules. The complaint has been modified to require the production of most of the discovery that would be needed.

CONTENTS OF ANSWER

Each Defendant shall answer by stating which points are admitted and which points are denied. For each point that is denied, the Defendant shall state:

1. The facts relied upon for denying the allegation.

2. A listing of documents which rebut the claim, copies of which are to be attached.

3. The name, address and telephone number of each person expected to be called as a witness.

4. A statement of any facts which would support a claim against the Plaintiff or another Defendant.

5. A listing of documents which support the cross or counter claim, copies of which are to be attached.

6. A statement of the relief requested.

Comment: The provisions for the Answer are the mirror image of the Complaint; they go on to make

provision for cross complaints and counter claims. Counter claims may complicate matters somewhat; however, it is probably the only way that technical defenses, such as setoff, can be alleged by most lay people.

There is no provision for an answer to a counter claim or cross claim. This is to keep the procedural requirements to a minimum.

SCHEDULING OF CASES

Each judge shall advise the Clerk of when a calendar will be held for cases pursuant to this rule. Each judge will hold a calendar pursuant to this rule at least once every two months.

The clerk shall place on the summons information setting forth the date, time and place of the hearing. The hearing date chosen shall be not less than two months and not more than four months after the issuance of the Summons.

Comment: The rule is designed to do everything on an expedited basis with the minimum involvement of court staff. If the hearing dates are set ahead by the various judges, the Clerk's office can simply schedule the case for the next available date.

The rule calls for hearings to be held shortly after the complaint is filed because these are not expected to be complicated cases; most cases would be heard about six weeks after the Defendant is served. The scope of the rule provision, supra, or the removal of cases from the rule, infra, can be used to eliminate those types of cases that turn out to be too complicated to use this rule.

SERVICE OF SUMMONS AND COMPLAINT

In any proceeding to determine the dischargeability of a particular debt, a copy of the Summons and Complaint must be sent by first class mail to the attorney for the Debtor. If the Debtor filed the bankruptcy petition without using an attorney, this copy of the Summons and Complaint must be sent to the Debtor by first class mail.

A copy of the Summons and Complaint shall be sent to each Defendant by certified mail, return receipt requested. The Plaintiff shall bring the returned receipts and/or the returned envelope to the scheduled hearing. The Summons and Complaint must be mailed within 10 days from the date that it issued by the Clerk.

The Answer must be filed with the Court and a copy mailed to the Plaintiff within 40 days from the date that the Summons was issued by the Court.

Comment: Service of the Summons is now permitted by first class mail. This rule envisions a somewhat higher level of proof--certified mail, return receipt requested. This is done to reduce arguments about lack of proper notice. Since the back side of the Summons will have the rule printed on it, the service requirements are clearly set forth for the Plaintiff to follow.

The due date of the Answer is keyed to the date that the Summons is issued by the Clerk. There should be no question on the part of the Defendant as to when it is due.

There is no requirement for the service of an Answer, including those that contain cross claims and counterclaims, by certified mail.

Since there are no provisions for the filing of a default and/or the obtaining of a default judgment prior to the hearing date, the Plaintiff must appear and bring the proof of service to the hearing. Verification of the proof of service could be done by the courtroom deputy at the time the case is called or when the parties check in.

A copy of the Complaint must be mailed to the attorney for the Debtor under Bankruptcy Rule 7004(b)(9). This section is designed to give maximum notice of the proceeding to the Debtor. It is expected that the attorney would attempt to contact the client about the Complaint. If the Debtor is appearing pro se, there will be a copy sent by first class mail and a second copy by certified mail.

The Court is left to its discretion when faced with the Defendant who has not been served or who has refused to sign for the certified letter. The Court could hold that the copy sent to a pro se Debtor by first class mail was sufficient notice. The Court could also order that a new Summons be issued and that it be personally served upon the Defendant.

ATTORNEYS

It is not necessary for a party, including corporations and partnerships, to have an attorney to bring or defend an action under this rule, provided that any nonattorney

representing a party must be a regular employee of the party. It is expected that attorneys will normally not represent parties in proceedings under this rule. Trustees who are attorneys may bring actions under this rule, as any pro se party.

> Comment: At the present time, the only person that can represent a corporation, or possibly a partnership, is an attorney. See Church of the New Testament v. United States, 783 F.2d 771 (9th Cir. 1986).
>
> Presently, an individual party does not need an attorney to appear in a case; however, a sole proprietor cannot send the bookkeeper to court to sue on an account.
>
> This rule eliminates the problems of a nonattorney appearing on behalf of a party; the proviso clause should keep paralegal services from appearing in these matters. The inherent power of the court to manage the proceedings before it would allow the Court to restrict and/or prohibit a particular person representing another entity or individual.

DISCOVERY AND PRETRIAL MOTIONS

The only pretrial motions to be considered by the Court are either 1) to dismiss for lack of jurisdiction or 2) for a continuance.

Bankruptcy Rules 7026 through 7037, pertaining to discovery, shall not apply.

> Comment: This provision addresses the high cost of discovery that most cases incur. The Complaint and Answer attempt to provide all of the necessary discovery.

CONDUCT OF TRIAL

The Rules of Evidence shall not be strictly applied. All documents which are not contested in the Complaint or Answer shall be deemed admissible. Each side shall be limited to 30 minutes to present its case, unless the Court directs otherwise. Cross examination of a witness is limited to 5 minutes unless the court orders otherwise.

> Comment: It is expected that most of these cases will be the Plaintiff claiming that the money is owed for a particular reason and that the debt should not be dischargeable. The Defendant may or may not deny that there is something owed and/or

that the debt should be dischargeable. For example, in a false financial statement case, the Plaintiff would probably bring the loan application, promissory note, and payment history; the testimony would probably be a brief account of how the Debtor was told to completely fill out the form. The Defendant would probably defend on the basis that some employee said not to put down everything, just the major bills. In a §523(a)(2)(A) and (C) action, the Plaintiff would introduce the credit card transactions records. The Defendants would claim that they intended to repay the cash but something prevented them from doing so.

Even when these cases have attorneys, they generally do not take very long. This provision is to insure that things shall be handled in an expeditious manner. It is not expected that someone will be using a stopwatch as long as the case is moving in a proper manner, without a lot of repetition.

This rule does not change the standards of proof required to prevail.

The Complaint and Answer are designed to limit the amount of new documents that will be produced at trial. Since most of them would be admissible if a proper foundation is made, the rule lets them come in if they are not objected to in the initial pleadings. The witnesses will probably give a tremendous amount of hearsay; however, the testimony would still probably be admissible if the property foundation were made.

The rule does more to give substantial justice rather than technical justice. It is a tradeoff that is necessary for the expedited procedure.

JUDGMENTS

The Court shall enter a judgment pursuant to Bankruptcy Rule 7054 without the entry of Findings of Fact and Conclusions of Law under Bankruptcy Rule 7052.

Comment: It is not expected that the parties will know how to prepare technically correct Findings of Fact and Conclusions of Law. If the Court is handling several of these cases in a day, it does not have the time to prepare these documents. Since there is no appeal, the need for Findings and Conclusions has been eliminated. The format for most judgments could be put on a computer with

certain blanks to be filled in upon completion of the case.

ENFORCEMENT OF JUDGMENTS

The judgment entered shall be enforced pursuant to Bankruptcy Rule 7069.

Comment: This just answers the question that will often be asked about how to collect the judgment. It is not necessary for the substance of the rule; it serves primarily as a cross reference.

APPEALS

The Judgment pursuant to this rule cannot be appealed.

Comment: An appeal of a decision would destroy the whole purpose of the rule. The severe limitation on the size of the case would limit how badly a party could be hurt by an adverse judgment.

An appeal from the Bankruptcy Court would go to the Bankruptcy Appellate Panel or the District Court, neither of which have good procedures for resolving appeals of small cases. The appellate process is designed in terms of finding error in the record of the case below. The very nature of this procedure is to simplify matters, including the very record which would be needed for an appeal.

JURISDICTION

All cases are deemed to be core matters under 28 U.S.C. 157(b) or related matters under 28 U.S.C. 157(c). Unless the Defendant specifically alleges otherwise in the Answer, consent is presumed to be given to the entry of a final judgment pursuant to Bankruptcy Rule 7008.

Comment: This resolves any problem about core/non-core/related proceedings. There are enough problems with attorneys understanding what category a particular case fits into; there is no need to make things more complicated for what is expected to be pro se parties in small cases. The parties just want their disputes resolved.

This does not limit the ability of the Bankruptcy Court to rule that there is no jurisdiction.

REMOVAL OF CASE FROM RULE

Any Defendant may object to proceeding under this Rule; the objection must be indicated in the space provided on the Summons and returned to the Court in place of the Answer.

If such an objection is filed, the matter shall be transferred to the regular adversary calendar. The Clerk shall issue a new Summons setting forth the date when an Answer must be filed and the date and time of the pre-trial conference and mail the new Summons to all of the parties.

The Court, on its own, may direct that a matter be transferred to the regular adversary calendar.

> Comment: Just as "notice and hearing" only means that there is an opportunity for a hearing, this allows a party to request a hearing with the full panoply of rights contained in the Bankruptcy Rules.
>
> If a party opts out of this rule, the party has been served; thus, all that is needed is a way of telling the party what the new dates and deadlines are. This can be done by simply using the existing Summons form and mailing it to the parties. This would still leave the party with the right to assert defenses such as lack of jurisdiction and improper service.
>
> Provision is made to allow the Court to take a case out of this rule when it is required in the interests of justice. A judge who does not feel comfortable hearing cases under this rule could simply transfer all of the cases to the regular adversary docket. It is expected that judges will remove fewer and fewer cases from the small claim calendar as they have more experience with it and develop a higher comfort level.

OTHER RULES

Except as otherwise provided in this rule, the Federal Rules of Bankruptcy Procedure.

The Court may waive any non-compliance with this rule in the interests of justice.

> Comment: This provision integrates this rule with the other rules and provides a way to resolve any conflicts.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BANKRUPTCY JUDGES DIVISION

MEMORANDUM

DATE: August 9, 1995

FROM: Patricia S. Channon

SUBJECT: Suggestions for Amending the Rules to Save Costs to the Bankruptcy Courts

TO: Advisory Committee on Bankruptcy Rules

The Administrative Office from time to time solicits money-saving ideas from the courts -- judges, clerks, and other court employees. Those suggestions that concern the bankruptcy system, including any that would require amending the bankruptcy rules, are referred to the Bankruptcy Judges Division.

Many of the proffered suggestions do not require amending the rules, but training in the full utilization of the options already available -- such as exercising the authority given in Rule 2002 to direct another person to provide notice. The Bankruptcy Judges Division responds to these ideas by explaining how the existing rules can be employed to achieve savings.

Suggestions Considered Previously

Occasionally, however, one or more suggestions need to be considered by the Advisory Committee. In 1988 and again in 1993, for example, the Advisory Committee discussed whether Rules 2002 and 4007 might be changed to permit including in the notice of the commencement of the case ("§ 341 Notice") a statement of the debtor's probable future discharge with an estimated date for this event. A second notice would be needed only if the discharge were not issued as expected. Substantial savings in postage would result, because creditors would receive only one

notice in most cases rather than two. The Advisory Committee declined to amend the rule, however, on the ground that due process for creditors requires that they receive notice of the discharge and of the expiration of the automatic stay.

Current Suggestions

Two suggestions presently appear to require Advisory Committee consideration. One is to abrogate Rule 2013 and the other is either to amend Rule 2002 to require the United States trustees to provide notice of their own motions.

Rule 2013(a) requires the clerk to maintain a public record listing the fees paid to trustees, to attorneys and other professionals employed by trustees, and to examiners. Rule 2013(b) requires the clerk to prepare an annual summary by individual or firm name to reflect all fees paid during the year, to transmit a copy to the United States trustee, and to make this report available to the public. A few clerks historically have argued that the listing and the report are burdensome to prepare and that "no one" asks to see them.

The technology for computerized maintenance and compilation and the reports required by Rule 2013 is available in every bankruptcy court today. Most clerk's offices can have the information on compensation authorized by the court extracted automatically by the court's computer; in some a few extra keyboard operations are necessary to record the necessary information. The days of creating these records laboriously, by hand, however, have past. The myth of a heavy burden on clerks to create these public records seems to live on, however.

Although, most clerks probably receive very few requests to examine the court's Rule 2013 records and reports, that fact does not justify discontinuing them. The fact that courts are

required to create the reports, provide them to the United States trustee, and offer them to the public undoubtedly has a prophylactic effect on both the trustees and the United States trustees who appoint them to cases, as any pronounced imbalance in appointments to asset cases is readily ascertainable.

It would appear that the burden of creating the records and reports required by Rule 2013 is minimal. It would appear also that the public interest is strong in having this information available, regardless of whether the public exercises its right of access in any individual court.

Rule 2002 states that "the clerk, or some other person as the court may direct," is to provide notice by mail of significant events in the case to "all creditors." The use of the word "person" in the rule, rather than "entity," effectively exempts the United States trustee from having to provide notice of the events designated in Rule 2002.

Although Rule 2002 permits the court to delegate noticing to a person other than the clerk -- a chapter 11 debtor in possession or a standing chapter 13 trustee, for example -- the clerk usually retains responsibility for noticing in "consumer" cases filed under chapter 7. Many courts also require the moving party to provide all notices required in connection with the motion filed by that party. If the motion is filed by the United States trustee, however, Rule 2002 does not permit shifting of the responsibility for noticing.

Section 707(a)(3) of the Code authorizes dismissal on motion of a case if the debtor fails to file the schedules and statements required by section 521(1) of the Code within the 15 days after the filing of the petition allowed by Rule 1007(c) (or any extension thereof granted by the court). Section 707(a)(3)

restricts the filing of the motion to dismiss to the United States trustee.

Rule 1017(a) adds a further restriction. A case "shall not be dismissed . . . for want of prosecution . . . prior to a hearing on notice as provided in Rule 2002." The effect of this rule is to require that notice be mailed to all creditors by the clerk.

The Advisory Committee, at its September 1988 meeting, discussed the matter of the burden to the clerk in providing this notice for the United States trustee. After discussion, the Advisory Committee decided to continue exempting the United States trustee from providing notices under Rule 2002 because the clerk already had the capability for performing mass mailings and the United States trustee did not.

In the intervening years, technological advances have made it more feasible to shift responsibility for notices required under Rule 2002 when the United States trustee is the moving party. Noticing in the larger courts now is performed under contract by the "Bankruptcy Noticing Center." Within two years, all courts will be able to use the noticing center. Clerks' offices transmit noticing information to the contractor, who performs the printing and mailing function and bills each court. The contractor could as readily bill the United States trustee for notices generated by motions filed by the United States trustee.

There may be reasons to decline to amend Rule 2002 and require the United States trustee either to provide notices or pay the Bankruptcy Noticing Center for sending notices for the United States trustee. First, the Advisory Committee probably would not want to discourage the appropriate filing of motions by the United States trustee. Second, the Judicial Conference in

1992 imposed a $30 administrative fee in chapter 7 and chapter 13 cases to be paid at filing, in lieu of noticing fees, by debtors in both asset and no asset cases. The United States trustees could argue that they should not be charged for noticing fees that already have been paid by debtors.

The Advisory Committee may want to consider another means for conserving the resources now expended on mailing notice to all creditors of the filing of a motion to dismiss for failure of the debtor to file schedules and statements. (Creditors also receive notice of the actual dismissal, if it is granted.) The notice requirements in Rule 1017 for a motion to dismiss under section 707(a)(3) of the Code could be limited in a manner similar to the carve-outs already afforded in the rule for motions to dismiss for failure to pay any installment of the filing fee or for substantial abuse under section 707(b) of the Code. See Rule 1017(b) and (e).

The notice and hearing requirements in Rule 1017(a) provide important safeguards against collusive debtor/creditor activities, potentially punitive dismissal actions by creditors, and potentially abusive file/dismiss actions by debtors. Most failures to meet the deadline for filing schedules and statements, however, probably are careless. Most motions to dismiss under section 707(a)(3) probably result in the debtor rushing in to file the missing documents (and request denial of the motion). Do all creditors need to receive notice of the motion to dismiss for non-prosecution of this type? Many may be confused to receive notice of such a motion followed sometime later by a copy of the debtor's discharge.

Most cases of failure to file schedules and statements would seem to require notice only to the debtor as the trustee, as the rule already permits for missed installments and substantial abuse. The rule could provide for the court to order wider

notice if the United States trustee requests it in an appropriate case.

Providing for notice only to the debtor and the trustee in most cases would be sufficient for proper administration of bankruptcy system, may reduce confusion among creditors about whether a case is dismissed, and would reduce costs to the courts in providing notices.

RECOMMENDATIONS: The Advisory Committee should 1) decline to amend Rule 2013 and 2) request the Reporter to draft an amendment to Rule 1017 restricting to the debtor and the trustee the notice of a motion to dismiss for failure to file schedules and statements, with discretion to order wider notice in appropriate circumstances.

Agenda Items 18-21

Items 18 - 20 will be oral reports.

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10007

CHAMBERS OF
JANE A. RESTANI
JUDGE

April 24, 1995

Honorable Paul Mannes
United States Bankruptcy Court
for the District of Maryland
6500 Cherrywood Lane #385
Greenbelt, Maryland 20770

Re: Civil Rules Committee Meeting of April 20-22, 1995

Dear Judge Mannes:

1. Proposed Civil Rule 5(e) - I raised the concern of the City Bar as to access to electronic filings, which is now the subject of a commentary to the rule. The committee decided to adhere to its amended proposal and not to address this issue in the language of the rule. Expecting that some concern as to uniformity will be taken up at the Standing Committee, the advisory committee empowered the Chair, at his discretion, to agree to a final sentence similar to that of the FRAP provision or our Rule 5005(a)(2), but there was a concern expressed that language was needed to avoid override of local rules that might require supplemental written papers. The alternative sentence might read: "An electronic filing authorized by local rule constitutes a written filing for purposes of these rules." There seems to be no title 28 equivalent to 11 U.S.C. § 107. I made it clear that deletion of the bankruptcy rule sentence is not a viable option for the bankruptcy rules.

2. Rule 5(b) - The committee may begin to look at electronic service and notice. See also Rule 77(d). Alicemarie would like to know if there is any bankruptcy experience with electronic notice.

3. The committee did not take up Judge Easterbrook's comment on Rule 73(b). See our Rule 9015.

4. A good deal of time spent was on the securities bills now pending. Passage of legislation may usurp some rule process consideration of class action changes in this area.

5. The committee is going to exchange views on class actions this summer and probably attempt to draft something in the fall. At the moment interest is gathering on eliminating the biggest differences among the procedures applicable to the various types of action under Rule 23(b). Increasing focus on certification, perhaps to require a likely to succeed standard, is another interest, as is changing the plaintiff to the class itself. In addition, because of recent court decisions, there is concern that a settlement class provision may be needed. There are important competing interests on this point, and there seems to be great trepidation about trying to tailor Rule 23 to mass torts. Some parties believe the bankruptcy option is the answer, and that settlements favor shareholders over creditors.

I am gathering a tremendous amount of data on this topic, but I can't tell you yet which way the committee is going to go.

Very truly yours,

Jane A. Restani
Judge

cc: Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, New York 11550-1090

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF OKLAHOMA
UNITED STATES COURTHOUSE
OKLAHOMA CITY, OKLAHOMA 73102

RICHARD L. BOHANON
JUDGE

TELEPHONE: 405-231-5140
TELECOPIER: 405-231-4769

via telecopier 5/4/95

Agenda Item 22

May 4, 1995

RECEIVED 5/8/95

Frank F. Szczebak
Bankruptcy Division
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

94-BK-K

Dear Frank:

I am writing about a problem that unfortunately may well occur with more frequency in the future and is becoming a factor in an increasing number of cases.

It occasionally occurs in bankruptcy cases that the trustees, or other parties in interest, deem it necessary to request the assistance of law enforcement officials in carrying out their official duties. We most often encounter the problem with farmer-debtors who are involved with or members of organizations which advocate extra-judicial solutions to perceived unfairness within the laws and rules of procedures. These organization bear names such as "Posse Comitatus" and "We the People." The issue also arises, however, in cases where farmers are not involved. Their methods of operations appear somewhat similar to those employed by the various tax-protest organizations around the country. In other words, the issue is not unique to this particular district or to districts where there are substantial numbers of farmers.

Let me provide you an example which has prompted this request. We had in this district cases arising out of a farming operation conducted by a family which is comprised of the father and his two sons. The debtors have been generally uncooperative and have attempted to hinder the trustee in carrying out his statutory duties. After unsuccessful attempts at reorganization under the Bankruptcy Code the trustee has noticed a sale of the farm and equipment used in connection with it. This is all part of the bankruptcy estate. This sale is to be conducted by public auction which has been noticed and advertised for May 5 and 6. The sale is to take place on the farm which some 200 miles northwest of Oklahoma City.

A few days before the sale the organization called "We the People" issues a stream of papers directed to the auctioneer, the trusteee, the creditors, the court clerk, myself, and others in effect ordering that the sale be canceled and proceedings conducted in an *ad hoc* court convened under the organization's "authority." For your information copies of some of the papers are enclosed.

This action understandably causes the trustee concern for his safety and the safety of others involved. A "notice" of these proceedings is published in the local newspaper which obviously may have a chilling effect on the auction.

Trustee and counsel then present me a pleading entitled "Application for Writ of Assistance" requesting that I issue an order directing the Marshal to attend the sale and maintain the peace. The authority for the writ is found in 28 U.S.C. § 1651, the All Writs Statute, and in section 105(a) of the Bankruptcy Code.

There is nothing, however, that states the procedures to be followed in dealing with these requests. The only rule I have found that comes close to dealing with the situation is Bankruptcy Rule 7070 which adopts Civil Rule 70. It, however, is not helpful in these cases and deals with other matters. At my behest the trustee has made an affidavit containing the basic facts. It has been my practice in the past to request similar affidavits in these cases. For your information I am enclosing the papers pertaining to the order I entered today.

In other words, there is no uniform rule of procedure telling us how to deal with instances where a party in interest perceives a need for assistance on the part of the Marshal or other law enforcement official.

What we need, therefore, is a rule that clearly tells the judges and counsel what to do in these cases. It might be something along the lines of Civil Rule 65 that provides the procedures in issuing temporary restraining orders and injunctions. I would assume that the Marshal's Service would want to be consulted and have some provision in the rule for notification and or coordination with the Marshal if, for no other reason, to make sure there are sufficient deputies available to undertake the task ordered by the court. In the case at hand this is a real problem for the Marshal in light of his requirements for increased security following the unfortunate occurrence of last month. He requested that the trustee seek assistance from the local Sheriff but that was of no avail. The Marshal, however, is most cooperative and has agreed to send two of his deputies to attend the sale.

I have mentioned this problem to Paul Manes and his reaction was that perhaps legislation is necessary. That may be so, on the broader scale, but is difficult to comprehend any more encompassing statutes than the All Writs Statute and section 105(a).

What I am requesting is that the Rule makers propose something to the Supreme Court to tell us what to do in these cases. Since the matter is of concern to many of us I also would

request that the proposal be given priority and, if possible, an interim rule be promulgated or the Administrative Office provide suggestion and direction concerning the possibility of appropriate local rules in the meantime.

I, of course, am available to answer any questions you may have.

Sincerely yours,

Richard L. Bohanon

cc: Honorable Paul Mannes
Honorable Paul Lindsey
Honorable John TeSelle

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	BK 94-13628-BH
	)	Chapter 12
SPEED A. ELLIOTT, JR. AND ESTHER ELLIOTT,	)	
DEBTORS.	)	
IN RE:	)	BK 94-14343-BH
	)	Chapter 12
JAMES ALLEN ELLIOTT,	)	
DEBTOR.	)	

WRIT OF ASSISTANCE

Upon Application of Trustee, this Court finds that the above-referenced Debtors are resisting the efforts of the Trustee to administer the estate and are attempting to hinder and delay the Trustee from fulfilling his statutory duties and obligations.

Whereas, this Court has power to issue orders necessary or appropriate to carry out provisions of Bankruptcy Code under 11 U.S.C. Section 105 and whereas this Court is within the scope of All Writs Statute, 28 U.S.C. Section 1651, and may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usage and principles of law;

Wherefore, premises considered, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the office of the United States Marshall is directed to assist the Trustee in performance of his statutory obligations by maintaining peace and orderly conduct at the public auction of estate property scheduled May 5 and 6, 1995 in Wakita, Oklahoma.

It is so Ordered, May 4, 1995

Honorable Richard Bohanon
United States Bankruptcy Judge

Approved for entry:

Karla J. Finnell
5101 N. Classen Blvd., Suite 103N
Oklahoma City, OK 73118
(405) 842-8083
Attorney for Jack Cornelius, Trustee

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	**BK 94-13628-BH**
	)	**Chapter 12**
SPEED A. ELLIOTT, JR.	)	
AND ESTHER ELLIOTT,	)	
	)	
DEBTORS.	)	
	)	
IN RE:	)	**BK 94-14343-BH**
	)	**Chapter 12**
JAMES ALLEN ELLIOTT,	)	
	)	
DEBTOR.	)	

APPLICATION FOR WRIT OF ASSISTANCE

Jack Cornelius, trustee of the above-referenced bankruptcy estates, alleges and states:

AUTHORITY

1. This Court has power to issue orders necessary or appropriate to carryout provisions of the Bankruptcy Code under 11 U.S.C. Section 105. Additionally, this Court is within the scope of the All Writs Statute, 28 U.S.C. Section 1651, and has power to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to usage's and principles of law.

FACTS

2. A public auction of the above-referenced Debtors' personal and real property is scheduled for May 5 and 6, 1995 in Wakita, Oklahoma pursuant to the orders of this Court.
3. The Debtors have become increasingly resistant of the actions taken by the Trustee to administer the estate. Property has been concealed. The wheels have been removed from equipment. James Elliott refused to turn over property of the estate to the Trustee, transferred property of the estate without consideration, and withdrew at least $10,000.00 in

cash from his Debtor-in-Possession bank account thirty days prior to his removal as Debtor-in-Possession.

4. Now on the eve of the auction, Debtors served Trustee, and his agents, with "pleadings" filed in the court of "Country of Oklahoma, Our One Supreme Court, Common Law Venue, Original and Exclusive Jurisdiction, A superior court sitting with the Power of a Circuit and United States District Court in and for Grant County, Oklahoma State, United States of America". The pleadings seek to quiet title; remove the bankruptcy proceeding to the common law court; and orders the named defendants to cease and desist all activities. Legal notices of the common law court's action has been published in the Enid News and Legal.
5. Debtors have also tendered non-negotiable bank drafts which do not appear to be legal tender to Grant Price, the Court Clerk.
6. Trustee is of the information and belief that Debtors are associated with a group that we know as "We the People". The group stands for the proposition that the federal court system is unconstitutional and an inferior court to their common law court.
7. The overall level of resistance of Debtors represents a threat to the auction, the agents conducting the auction, and the public attending the auction and warrants issuance of a writ ordering the U.S. Marshall to assist with maintaining peace at the auction.

Wherefore, premises considered, Jack Cornelius, Trustee request that this Court issue a Writ of Assistance directing the office of the United States Marshall to assist the Trustee and maintain peace at the auction.

May 3, 1995.

Karla Finnell
5101 N. Classen, Suite 204
Oklahoma City, OK 73118
(405) 842-8083

Attorney for Jack Cornelius, Trustee
of the Chapter 11 estate of Speed Elliott, Jr.
and Esther Elliott

Attorney for Jack Cornelius, Trustee of the
Chapter 12 estate of James A. Elliott

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing on May 3, 1995 to James A. Elliott and Speed Elliott, Jr., P.O. Box 138, Wakita, Oklahoma 73771.

Karla Finnell

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	**BK 94-13628-BH**
	)	**Chapter 12**
SPEED A. ELLIOTT, JR.	)	
AND ESTHER ELLIOTT,	)	
	)	
DEBTORS.	)	
	)	
IN RE:	)	**BK 94-14343-BH**
	)	**Chapter 12**
JAMES ALLEN ELLIOTT,	)	
	)	
DEBTOR.	)	
	)	

AFFIDAVIT

STATE OF OKLAHOMA

OKLAHOMA COUNTY

Jack Cornelius, of lawful age, first being duly sworn, deposes and says:

1. A public auction is scheduled for May 5 and 6, 1995 in Wakita, Oklahoma for the purpose of selling both the real and personal property of the above referenced bankruptcy estates.

2. The Debtors are uncooperative and openly hostile to the United States Bankruptcy Court for the Western District of Oklahoma, its rules and procedures. Debtors are concealing property from the Trustee and have refused to turn over property.

3. Debtors sent documents to Grant Price, Court Clerk of the United States Bankruptcy Court for the Western District of Oklahoma ("Court Clerk"), alleging that "Our One Supreme Court in and for Grant County, Oklahoma State, in Common Law Venue with Original and Exclusive Jurisdiction" has ordered this Court and its agents to cease and desist with the scheduled auction. Legal notice of the alleged petition was published in the Enid News & Legal.

4. Debtors tendered non-negotiable bank drafts which do not appear to be legal tender to the Court Clerk.

5. Trustee is of the information and belief that Debtors are associated with a group that we know as "We the People". The group stands for the proposition that the federal court system is unconstitutional and an inferior court to their common law court.

6. Trustee has not received any threats of violence against himself or any of his agents. Nevertheless, Trustee feels the overall level of resistance represents a threat to the auction, the agents conducting the auction, and the public attending the auction and warrants issuance of a writ ordering the U.S. Marshall to assist with maintaining peace at the auction.

Further, your Affiant sayeth not.

Name: Jack M. Cornelius

Title: Trustee

Address: 5101 N. Classen, Suite 204
Oklahoma City, OK 73118
(405) 842-8083

By: _____

Signed and sworn to before me on May 3, 1995.

Brad Yeakley
Notary Public

My Commission Expires: April 5, 1999.

ORIGINAL

APR 23 1995

Clerk

country of Oklahoma
Our One Supreme Court
Common Law Venue; Original and Exclusive Jurisdiction
A Superior court sitting with the Power of a Circuit and United States District Court
in and for Grant county, Oklahoma state
United States of America

People in and for United States of America ex rel; James A. Elliott Demandants, Plaintiff	)	"In Law"
Vs.	)	Case # JE-002-96
United States et al; State of Oklahoma et al; County of Grant et al; and all of Whom It May Concern, Respondents, Defendants	)	Action to Quiet Title

Attest: True and Correct Copy of Original "Prothonotary" of "Necessity"

Petition

I, James A. Elliott, being of Freeman Character, "a State," and One of the United States, Petitions the above captioned court, to Quiet title to all property, as set forth on the Notice of Publication attached hereto, and to my Special Character, in the name of the People in and for the United States of America, for Grant county, Oklahoma state, by the authority of the People, as against the Peace and Dignity of the same, and to declare "In Law" and Complain in equity, against the above named defendants, individually and jointly, as against their surety, under the pains and penalties of perjury to Quiet title on the Property and Characters in Question.

Wherefore: I respectfully request the court to issue a Quiet title in my name, and that all corporations, persons, or legal entities be forever barred from claiming any right title or Interest in said property, and to issue all necessary documents, as required by Law.

Date April 23-1995

James A. Elliott

EXHIBIT C PAGE 1 OF 23

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country of Oklahoma
Our One Supreme Court
Common Law Venue; Original and Exclusive Jurisdiction
A Superior court sitting with the Power of a Circuit and United States District Court
in and for Grant county, Oklahoma state
United States of America

People in and for United States of America ex rel James A. Elliott Demandant, Plaintiff Vs.	)	"In Law"
	)	Case # JE-002-96
United States et, al; and all of Whom it May concern Respondents, Defendants	)	Action to Quiet Title

---

TO: Judge Richard Bohanon, U.S. Bankruptcy Court
Western District of Oklahoma
U.S. Post Office/Federal Bldg
Oklahoma City, Ok., 73102

PRAECIPE

I Sally Frech, special appointed clerk, for the term, in and for United States of America, for Grant county, Oklahoma state, hereby under the order and authority of the People, command Judge Richard Bohanon to prove and place into evidence, Lawful documentation of title, right or interest in said private property as described and attached herewith by Notice of Publication, on or before 2nd day of May 1995, or loose all Right, title or interest forever, without recourse, as required by Law.

Sally Frech
Clerk of the Court

MS

United States of American)
country of Oklahoma (Organic) SS
Grant county, (de Jure))

Affidavit of Return

I,_____,Special appointed Marshall, hereby attest and acknowledge that I did serve upon the above_____, by Certified R.R.R. Mail#_____this Praecipe.
Date _____ Attest_____

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CALL ME SOMETIME.

LEGAL NOTI

Published in the Enid News & Eagle, May 8, 10, 17, 1995 1 (832)

NOTICE

Our One Supreme Court in and for Grant county, Oklahoma state, in Common Law Venue; with Original and Exclusive Jurisdiction; gives Notice and grace in case #SE-001-95, to respondent(s) United States et al; State of Oklahoma et al; County of Grant et al; and all of whom it may concern, of an action to Quiet Title to the below described private property, all in Grant County, Oklahoma, WM.

(W/2) of Sec (4) Twp (28) N Rge (7); (NE/4) Sec (34) Twp (29) N Rge (7); (SW/4) Sec (33) Twp (29) N Rge (7); (SW/4) sec (12), Twp (28) N Rge (8); (NW/4) of Sec (17) Twp (28) N Rge (8); (NE/4) Sec (8) Twp (27) N Rge (8); (NW/4) Sec (21) Twenty-seven N Rge (8); (NE/4) Sec (21), Twp (27) N Rge (8); (E/2 SE/4) Sec (21), Twp (27) North, Rge (8); (SE/4) Sec (22) Twp (29) N Rge (7); Lots 1, 2, 3 & (NE/4) Sec (4), Twp (28) N Rge (7); (NW/4) Sec (10) Twp (28) Rge (7); NW/4) Sec (33), Twp (28) N Rge (7); (NE/4) Sec (33), Twp (29) N Rge (7); (SE/4) Sec (8), Twp (28) N Rge (7); (SW/4) Sec (34), Twp (29) N Rge (7); (SW/4) Sec (8), Twp (28) N Rge (7):

Lot 12, Block 3, Parkview Addition, in Wakita, Grant County, Oklahoma.

Lots 11 and 12, Block 9 in Wakita, Grant County, Oklahoma. Lots 5 thru 9, Block 7; Lots 6 thru 11, Block 8; Lots 1 thru 3, Block 10; Lots 10 thru 17, Block 2; West 10' of Lot 8, Lots 8 & 9, Block 9; Lots 23 & 24, Block 6 all in Wakita, Grant County, Oklahoma. Case 2290 Tractor, Ser. No. 9026912; Case SE1016 Header, Ser. No. 74643; New Stelger 9250 4 WD, Ser. No. JCB0007221; Case IH Ser No JJC0043Sbck; Case 1010 30' Header; also, all farm machinery, equipment, shop equipment, trucks, vehicles, etc. listed or later added to the list not consigned by others in Enid News & Eagle, Sunday, April 16, 1995 to be sold Friday, May 5, 1995, by Jack Cornelius, Trustee, Sale

Respondent(s) must send their claim of lien right, title or interest to the above described property, to Speed A. Elliott, Jr. c/o Box 138, Wakita, Oklahoma, no later than 4 days after the last publication in a local paper, or loose all right, title and interest in said private property, forever, without recourse.

Speed A. Elliott, Jr. James A. Elliott

13

country of Oklahoma
Our One Supreme Court
Common Law Venue; Original and Exclusive Jurisdiction
A superior court sitting with the Power of a Circuit and United States District Court
In and for Grant county, Oklahoma state
United States of America

People in and for United States of America	)	
ex rel; James A. Elliott	)	"In Law"
Demandants, Plaintiff	)	
vs	)	Case #JE-002-96
United States et al; State of Oklahoma et al;	)	
County of Grant et al; and all of Whom it	)	Action to Quiet Title
May Concern,	)	
Respondents, Defendants		

Notice of hearing

Please take notice that a hearing has been set by the special prosecutor, for May 8, 1995, at 9:30 a.m., before full bench, at 110 Cottonwood, Wakita, Oklahoma, for the following:

Matter	Moving party
Appointment of Independent Counsel, for investigation	James Elliott Private Att. General
Hear, Forceable entry, unlawful detainer, Libel and Slander; Bankruptcy Court et al, appellate Division, Jack Cornelius, Karla J. Fennell, esq.	Justices'

Public is invited to testify

Clerk of the Court

ORIGINAL

NOTICE

Our One Supreme Court in and for Grant county, Oklahoma state, in Common Law Venue; with Original and Exclusive Jurisdiction, gives Notice and grace in case #SE-001-95, to respondent(s) United States et al; State of Oklahoma et al; County of Grant et al; and all of whom it may concern, of an action to Quiet Title to the below described private property.

Tract #1: Southwest Quarter (SW/4) of Sec. Twelve (12), Twp Twenty-eight (28) North, Rge Eight (8) WIM, Grant County, Oklahoma.

Tract #2: Southeast Quarter (SE/4) of Sec Twenty-two (22), Twp Twenty-nine (29) North, Rge Seven (7) WIM, Grant County, Oklahoma.

1994 Chevrolet Pickup Truck
1980 Kenworth Truck/Tractor
1980 1100 Yamaha motorcycle
14 x 70 mobile home
1982 Merritt Cattle Trailer
1978 6 x 20 Gooseneck trailer
Wako applicator 36' foot
4 liquid fertilizer storage Tanks
1977 Int'l Spreader Truck
CMI Ground Buried Scales 12 x 70, electronic
(1) 1982 11,000 gallon NH3 Storage Tank
(9) anhydrous Nurse Tanks with trailers of 1000 gallons each

Repondent(s) must send their claim of any right, title or interest to the above described property, to James A. Elliott c/o Box 138, Wakita, Oklahoma, no later than 4 days after the last publication in a local paper, or loose all right, title and interest in said private property, forever, with recourse.

James A Elliott
James A. Elliott

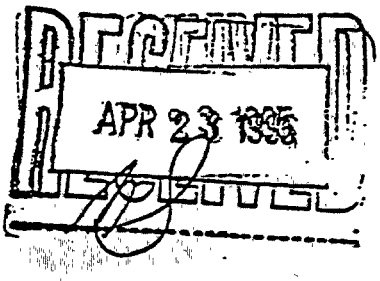
(2)

Attest: True and Correct Copy of Original "Prothonotary" of "Necessity"

EXHIBIT C PAGE 2 OF 237

ORIGINAL

UNITED STATES BANKRUPTCY-COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA



In Re:	)	No. 94-14343BH
James A. Elliott	)	Chapter 12
	)	

JUDICIAL NOTICE

I, James A. Elliott, filed through my attorney, WAYNE M. FOURNERAT, with the above captioned court, July 1, 1994. My attorney tendered the necessary filing fees to the CLERK OF THE U.S. BANKRUPTCY COURT WESTERN DISTRICT OF OKLAHOMA, GRANT E. PRICE, and the court did accept the tender presented, thereby creating a contract, for bankruptcy protection from creditors with the above captioned court. See Exhibit "A" attached hereto. Since that time Mr. FOURNERAT has been respectfully retired.

I have chosen to proceed in my own right and powers to choose the Applicable Law, within the proper territorial application as which I was born, which would include but not be limited to the principle of "Law" and equity, the law merchant and the law relative to capacity to contract, principal and agent, doctrines of law of the case, res judicata, estoppel, fraud misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, pertaining to my Special Character, in the Territory of Oklahoma state, in relation to the above appellate case, involving all private property and Character in question.

I will choose the pre-code Law, that supplement the codes regulating this court of contract, of which the 10th Circuit Court of Appeals have recently upheld, as contained in their Order and Judgment* dated April 7, 1995, in re 94-6415, 94-6417, W.D. Oklahoma (D.C. Nos. CIV-94-1038-R and CIV-94-1040-R); as was stated in District Court Order that the UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA lacked Subject Matter Jurisdiction to Quiet Title to Property, and 10th Circuit upheld that Order and issued an Order and Judgment* (not binding precedent)*, as follows "This action was instigated to determine who has the highest title to property located in [Major and Grady] county, Oklahoma Territory state, of which the United States of America by contract, gave up all right, title or interest in said property, without any conditions set forth; and it is very clear by the defendant's pleadings that it is not that entity that is claiming the property, Mr. Butler for Federal Land Bank clearly stated that the claim is the United States, and that Federal Land Bank and First National Bank in Okeene are not of the United States of America. Mr. Elliott's pleading for the First National Bank in Okeene, plead the resident scam, and didn't object to the Federal Land Bank claim. Then there is a question of the 7th Amendment, and of which would boil over in the Federal

Attest: True and Correct
Copy of Original
"Prothonotary" of "Necessity"

EXHIBIT C PAGE 3 OF 237

(3)

Rules of Civil Procedure, as contained in the 1991 Ed., Supreme Court Rule No. 17.1, the Court's Original Jurisdiction, vs. The Courts Appellate. Then the facts of the courts original jurisdiction, exclusive to the people, did speak, and was placed into evidence." 10th Circuit Order and Judgment* "B" attached hereto.

Judical Notice is given to the Legislative created inferior court known as United States Bankruptcy Court for Western District of Oklahoma, et al, of the "Motion and Brief Requesting James A. Elliott be held in Civil and Criminal Contempt of Court", filed April 7, 1995 by Grant Price, by Karla J. Finnell, Esq., OBA #12289, Attorney for Jack M. Cornelius, trustee, this states "Trustee request that debtor be imprisoned until he complies with the Court's order and his statutory obligations, and that he be fined and directed to pay damages." "Trustee further request that debtor be held in criminal contempt of this court and that he be imprisoned on Account thereof for:"--and list 7 reasons, this is real and prime face evidence that the court et al, Jack M. Cornelius, and Karla J. Finnell and others in their personal capacity, and for own personal gain, is demanding, forecable entry, unlawful detainer, libel and slander be placed upon James A. Elliott, in attempt to hold him to involuntary Bankruptcy, through involuntary servitude, by the Judicial Power of United States, in violation to the 11th Amendment. The Question to the court is, where is the damaged party, and since this court is not a court of law, but is a court of contract, with no real damaged party, then where is the required bond upon which relief could be granted "In Law", didnt the United States declare Bankruptcy, where is the seperation of power to enforce the criminal contempt, doesn't a corporation like the District of Columbia and " its" tribunal only act as an executive administrative capacity or does corporations like G.M. have public courts? And since the 10th Circuit said in their order and Judgement* that the Supreme Courts Original Jurisdiction is Exclusive to the People as to cause of Action to Quiet title to private property, then where is the Venue or Jurisdiction to transfer private property by a Court without Original Jurisdiction?, "whereas a state shall be party," in relation to the Special Character, known as James A. Elliott. Notice given to Peoples Exhibit #7, Pages 1-10, back 11, as to titles of Nobility and Honor not being U.S. Citizens, Revised Statutes of Colorado, 1863, and Peoples Exhibit #8 pages 1 - 145, in relation to War & Emergency Power being involked by the Judcial Power of the United States, under admirallity Law, in violation to the 11th Amendment, whereas the perported agreements are not binding contracts with lawful consideration, as required by Law. Exhibit #9 working paper, by the Federal Reserve Bank of Cleveland, by Walker F. Todd, April, 1994.

Therefore, I, hereby present by Fed Ex #3818824450, a Bill of Exchange, # 0002, in the amount in the amount of $850,000.00 (Eight hundred fifty thousand) to my special appointed receiver in equity, GRANT E. PRICE, CLERK OF THE U.S. BANKRUPTCY COURT, WESTERN DISTRICT OF OKLAHOMA, as tender for payment of all debts, subject to seventy-two (72) hour courtesy, and as bond. Notice of refusal for cause, without dishonor is given so as to hear the Law before the Facts, in response to the Bankruptcy

RECEIVED APR 23 1995

Attest: True and Correct Copy of Original "Prothonotary" of "Necessity"

EXHIBIT C PAGE 4 OF 37

ORIGINAL

courts' Motion and Brief requesting James Elliott be held in Civil and Criminal conte filed April 7, 1995 Grant Price, Clerk, et al; and Notice of Hearing set on May 9, 1995 at 9:30 am, ssssent by certified mail, one 28th day of April, 1995, by Karla J. Finnell, esssq, Notice if given that hearing is set to hear the forcable entry and unlawful detainer, libel and slander, to be held at 110 Cottonwood, Wakita, Ok., at 9:30 a.m., May 8, 1995, and for appointment of independent counsel, in resonable compliance with 28 U.S.C. 592, 593, 594 whereas no person may be appointed who holds an office of profit or trust under the United States, and Writ of Error going to 10th Circuit.

Notice of Removal for cause is hereby given to the inferior UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, of the removal of appellate case #94-14343BH, into Our One Supreme Court with Original and Exclusive Jurisdiction, to Quiet Title to all private property involved, in reasonable compliance with the appellate divisions, Federal Rules of Civil Procedure, Rule 2, amendment to pleading to be brought to right side of Court, Rule 60, independent action, 301 burden of proof presumption, 302 rule of decision determined by State Law, Rule 501 involving privileges, that shall be governed by the principles of the Common Law, Rule 902 as to self-authentication of Our records, Rule 1101, with respect to privileges that applies at all stages of all actions, cases, and proceedings, Supreme Court, Rule 17.1, Other Jurisdiction, 28 USC 1251, Original Jurisdiction, 28 U.S.C. 1651 in relation to all writs in aid of their respective Jurisdictions, 28 U.S.C. 1738 in relation to, "records and Judicial proceedings or copies thereof, so authenticated, shall have the same full Fffaith and Credit in every court within the United States and its Territories and Possessions as they have by Law or Usage in the courts of such State, Territory or Possession from which they are taken," Article III, Section 2, Clause 2, whereas a State shall be party, and with no trespass upon the case under the 11th Amendment, by the Judicial Power of the United States. See finding of facts from Our Court of first and last resort, Exhibit "C" as to my Special Character and Lawful Venue.

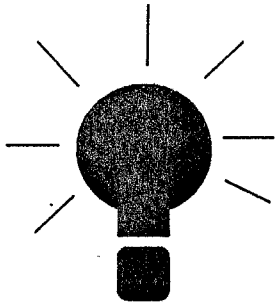
RECEIVED
APR 13 1995

Attest: True and Correct
Copy of Original
"Prothonotary" of "Necessity"

James A. Elliott
"With reservations of all Birth rights, not to be compelled to accept any unrevealed benefit, contract, or commercial agreement, nor subject to any unrevealed presumption, or silent Judicial Notice."

EXHIBIT C PAGE 18 OF 22

THE GESTATION OF AN AMENDMENT



1. Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.
2. This period is of indeterminate length.
3. Proposals come from Committee members, the Reporter, judges clerks, or the public, or result from statutory changes, case law developments, or experience.

Proposed amendments may be at different stages of the process. at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

YEAR 1

Advisory Committee approves draft of proposed amendments. (January -May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited. (October)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). (January-April)

Public comment period closes. (mid-April)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate). (April-May)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

YEAR 3

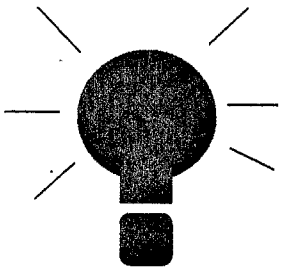
Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress. (March or April) (must be by May 1)

Congress can alter or reject during the next 90 days. If Congress does not act, amendments take effect December 1.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

Agenda Item 23

THE GESTATION OF AN AMENDMENT



YEAR 1

YEAR 2

YEAR 3

1003, 2004(c), 3002, 3008, 3010, 3015(f), 3017(d), 7062, 9014

Uniform Local Rule Numbers
Official Forms

1019(3), (5), 1020 [new], 2002(a), (n), 2007.1, 3014, 3017, 3017.1 [new], 3018(a), 3021, 8001(a), (b), (e), 8002(c), 8020 [new], 9011, 9015, 9035

8018
9029

1006(a), 1007(c), 1019(7), 2002(a), (c), (f), (h), (i), (k), 2015(b), (c), 3002(a), (c), 3016, 4004(c), (d) - (f), 5005(a), 7004, 8008(a), 9006(c)

Proposed amendments may be at different stages of the process, at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

STATUS LIST OF BANKRUPTCY RULES AMENDMENTS

September 1995

1. Before Congress. Amendments prescribed by the Supreme Court and transmitted to the Congress April 27, 1995. Projected effective date 12/1/95.

8018
9029

2. "Class of '96." Approved by Standing Committee 7/95 for recommendation to Judicial Conference 9/95. Projected effective date 12/1/96.

1006(a)
1007(c)
1019(7)
2002(a), (c), (f), (h), (i), (k)
2015(b), (c)
3002(a), (c)
3016
4004(c), (d) - (f)
5005(a)
7004
8008(a)
9006(c)

3. "Class of '97." Approved for publication by Standing Committee 7/95. Projected effective date 12/1/97.

1019(3), (5)
1020 [new rule]
2002(a), (n)
2007.1
3014
3017
3017.1 [new rule]
3018(a)
3021
8001(a), (b), (e)
8002(c)
8020 [new rule]
9011
9015
9035

Agenda Item 24

Materials were distributed with the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference. Additional copies will be available at the meeting.

Agenda Item 25

Preliminary Draft of Proposed Amendments to the Bankruptcy Rules Approved for Publication by the Standing Committee in July 1995

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * * *

(3) CLAIMS FILED BEFORE CONVERSION ~~IN SUPERSEDED CASE~~. All claims actually filed by a creditor ~~in the superseded case~~ before conversion of the case are ~~shall be~~ deemed filed in the chapter 7 case.

* * * * *

(5) FILING FINAL REPORT AND SCHEDULE OF POSTPETITION DEBTS.

---

*New matter is underlined; matter to be omitted is lined through.

(A) *Conversion of Chapter 11 or Chapter 12 Case.* Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the

United States trustee a final report and account;

(B) *Conversion of Chapter 13 Case.* Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,

(i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States trustee a final

report and account;

(C) *Conversion After Confirmation of a Plan.* Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;

(ii) a schedule of unpaid debts not listed in the final report and account

incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(D) *Transmission to United States Trustee.* The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5).

~~Unless the court directs otherwise, each debtor in possession or trustee in the superseded case shall: (A) within 15 days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after~~

~~commencement of the superseded case including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after the commencement of a chapter 12 case. If the conversion order is entered after confirmation of a plan, the debtor shall~~

~~file (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the original petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.~~

* * * * *

COMMITTEE NOTE

The amendments to subdivisions (3) and (5) are technical corrections and

stylistic changes. The phrase "superseded case" is deleted because it creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. Similarly, the phrase "original petition" is deleted because it erroneously implies that there is a second petition with respect to a converted case. See § 348 of the Code.

Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case

In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election not later than 60 days after the date of the order for relief or by a later date as the court, for cause, may fix.

COMMITTEE NOTE

This rule is designed to implement §§ 1121(e) and 1125(f) that were added to the Code by the Bankruptcy Reform Act of 1994.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least ~~not less than~~ 20 days' ~~days~~ notice by mail of:

(1) the meeting of creditors ~~pursuant to~~ under § 341 or § 1104(b) of the Code;

* * * * *

(n) CAPTION. The caption of every notice given under this rule shall comply with Rule 1005. The caption of every notice required to be given by the

debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.

* * * * *

COMMITTEE NOTE

Paragraph (a)(1) is amended to include notice of a meeting of creditors convened under § 1104(b) of the Code for the purpose of electing a trustee in a chapter 11 case. The court for cause shown may order the 20-day period reduced pursuant to Rule 9006(c)(1).

Subdivision (n) is amended to conform to the 1994 amendment to § 342 of the Code. As provided in § 342(c), the failure of a notice given by the debtor to a creditor to contain the information required by § 342(c) does not invalidate the legal effect of the notice.

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a

trustee or an examiner ~~pursuant to~~ under § 1104(a) or § ~~1104(b)~~ 1104(c) of the Code shall be made in accordance with Rule 9014.

(b) ELECTION OF TRUSTEE.

(1) *Request for an Election.* A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall

serve as trustee.

(2) *Manner of Election and Notice.* An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.

(3) *Appointment and Resolution of Disputes.* If it is not necessary to resolve a dispute

regarding the election or if the court has resolved all such disputes, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment in accordance with subdivision (c) of this rule. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. Not later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and

to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.

~~(b)~~ (c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee elected under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner ~~pursuant to § 1104(c)~~ under § 1104(d) of the Code, shall be made ~~only~~ on application of the United States trustee~~,~~. The application shall state ~~stating~~ the name of the

person appointed~~, the names of the parties in interest with whom the United States trustee consulted regarding the appointment,~~ and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest,

their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

COMMITTEE NOTE

This rule is amended to implement the 1994 amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case.

This rule requires the United States trustee to file an application for court approval of the appointment of the elected person in accordance with Rule 2007.1(c). Court approval is necessary primarily because of the requirement under § 1104(b) that the person be disinterested.

The procedures for reporting disputes to the court derive from similar provisions in Rule 2003(d) applicable to chapter 7 cases. An election may be disputed by a party in interest or by the United States trustee. For example, if the United States trustee believes that the person elected is ineligible to serve as trustee because the person is not "disinterested," the United States trustee may file a report disputing the election.

The word "only" is deleted from subdivision (b), redesignated as subdivision (c), to avoid any negative inference with respect to the availability of procedures for obtaining review of the United States trustee's acts or failure to act pursuant to Rule 2020.

Rule 3014. Election ~~Pursuant to~~ Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or ~~and~~ Chapter 11 Reorganization Case ~~Cases~~

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b)(2) may be made

not later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

COMMITTEE NOTE

This amendment provides a deadline for electing application of § 1111(b)(2) in a small business case in which a conditionally approved disclosure statement is finally approved without a hearing.

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS ~~THERETO~~. Except as

provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b) ~~Following the filing of a disclosure statement as provided in Rule 3016(c)~~, the court shall hold a hearing on ~~not less than~~ at least 25 ~~days~~ days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider ~~such~~ the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure

statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code, and any ~~such~~ other entity ~~as may be~~ designated by the court, at any time before the disclosure statement is approved ~~prior to approval of the disclosure statement~~ or by ~~such~~ an earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) DETERMINATION ON DISCLOSURE STATEMENT. Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) DATES FIXED FOR VOTING ON PLAN

AND CONFIRMATION. On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS, AND EQUITY SECURITY HOLDERS. Upon ~~On~~ approval of a disclosure statement, ~~unless~~ -- except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders, -- the debtor in possession, trustee, proponent of the plan, or clerk as ~~ordered by~~ the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to

the United States trustee,

(1) the plan~~,~~ or a ~~court-approved~~ court-approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of ~~such~~ the plan may be filed; and

(4) any ~~such~~ other information as the court may direct, including any court opinion ~~of the court~~ approving the disclosure statement or a ~~court-approved~~ court-approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all

creditors and equity security holders in accordance with ~~pursuant to~~ Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. ~~In the event~~ If the ~~opinion of the~~ court opinion is not transmitted or only a summary of the plan is transmitted, the ~~opinion of the~~ court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense ~~of the proponent of the plan~~. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom

the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense ~~of the proponent of the plan~~, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on ~~at~~ the date the order approving the disclosure statement is ~~was~~ entered or another date fixed by the court, for cause, after notice and a hearing.

(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held pursuant to subdivision (a) of this

rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, ~~and~~ determine the adequacy of the ~~such~~ procedures, and enter any ~~such~~ orders ~~as~~ the court deems appropriate.

COMMITTEE NOTE

Subdivision (a) is amended to provide that it does not apply to the extent provided in new Rule 3017.1, which applies in small business cases.

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents pursuant to this subdivision. For example, if there may be a delay between the oral announcement of the judge's order approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may

expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

The court may set a record date pursuant to subdivision (d) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes a record date pursuant to subdivision (d) with respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date applies for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Other amendments to this rule are stylistic.

Rule 3017.1 Court Consideration of Disclosure Statement in a Small Business Case

(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. If the debtor is a small business and has made a timely

election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Rule 3016(b). On or before conditional approval of the disclosure statement, the court shall:

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely

objection is filed; and

(4) fix a date for the hearing on confirmation.

(b) APPLICATION OF RULE 3017. Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement for the purpose of applying Rule 3017(d).

(c) FINAL APPROVAL.

(1) *Notice.* Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the

hearing on confirmation of the plan.

(2) *Objections.* Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.

(3) *Hearing.* If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

COMMITTEE NOTE

This rule is added to implement § 1125(f) that was added to the Code by the Bankruptcy Reform Act of 1994.

The procedures for electing to be considered a small business are set forth in Rule 1020. If the debtor is a small business and has elected to be considered a small business, § 1125(f) permits the court to conditionally approve a disclosure statement subject to final approval after notice and a hearing. If a disclosure statement is conditionally approved, and no timely objection to the disclosure statement is filed, it is not necessary for the court to hold a hearing on final approval.

Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity

security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or on another date fixed by the court, for cause, after notice and a hearing. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

The court may set a record date pursuant to subdivision (a) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed pursuant to Rule 2002(b).

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed pursuant to Rule 3017(d).

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders ~~of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security~~ whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) ~~and which~~ that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or

the order confirming the plan.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

This rule also is amended to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by providing that they shall receive a distribution only if their claims have been allowed. Finally, the amendments clarify that distributions are to be made to all interest holders -- not only those that are within the definition of "equity security holders" under § 101 of the Code -- whose interests have not been disallowed.

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal

(a) APPEAL AS OF RIGHT; HOW TAKEN.

An appeal from a ~~final~~ judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure ~~Failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~ a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) ~~shall~~ contain the names of all parties to the judgment, order, or decree appealed from

and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) APPEAL BY LEAVE; HOW TAKEN. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

* * * * *

(e) ELECTRION TO HAVE APPEAL HEARD BY THE DISTRICT COURT ~~CONSENT TO APPEAL~~

~~TO BANKRUPTCY APPELLATE PANEL. Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b), or within 30 days of the filing of the notice of appeal, whichever is later.~~ An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158. As amended, a party may -- without obtaining leave of the court -- appeal from an interlocutory order or decree of the bankruptcy court issued under § 1121(d) of the Code increasing or reducing the time periods referred to in § 1121.

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court.

Rule 8002. Time for Filing Notice of Appeal

* * * * *

(c) EXTENSION OF TIME FOR APPEAL.

(1) 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~~ ,

unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125, or;

(F) confirms a plan under § 943, § 1129, § 1225, or

§ 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later ~~request made 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~~. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

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.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after

expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to protect parties that file timely motions to extend the time to appeal from the harshness of the present rule as demonstrated in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

The subdivision is amended further to prohibit any extension of time to file a notice of appeal -- even if the motion for an extension is filed before the expiration of the original time to appeal -- if the order appealed from grants relief from the automatic stay, authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under § 365, or approves a disclosure statement or confirms a plan. These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b).

Rule 8020. Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

COMMITTEE NOTE

This rule is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, has the authority to award damages and costs to an appellee if it finds that the appeal is frivolous. By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and

courts of appeals.

Rule 9011. Signing ~~and~~ of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion, and other paper ~~served or filed in a case under the Code on behalf of a party represented by an attorney~~, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number.~~ Each paper shall

state the signer's address and telephone number, if any. ~~The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document, that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it~~ An unsigned paper shall be stricken unless ~~it is signed promptly after the~~ omission of

the signature is corrected promptly after being called to the attention of the ~~person whose signature is required~~ attorney or party. ~~If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.~~

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is

certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are

likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* A motion

for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct

alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and

directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or , if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of

some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a viclation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing

sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

~~(b)~~ (e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

~~(e)~~ (f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

COMMITTEE NOTE

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

The "safe harbor" provision contained in subdivision (c)(1)(A), which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a petition. The filing of a petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition. In addition, a petition for relief under chapter 7 or chapter 11 may not be withdrawn unless the court orders dismissal of the case for cause after notice and a hearing.

Rule 9015. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made pursuant to Rule 38(b) F.R.Civ.P. shall be filed in accordance with Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed pursuant to Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing

a statement of consent within any applicable time limits specified by local rule.

COMMITTEE NOTE

This rule provides procedures relating to jury trials. This rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute ~~the provisions of title 11 and title 28 of the United States~~

~~Code~~ effective in the case.

COMMITTEE NOTE

Certain statutes that are not codified in title 11 or title 28 of the United States Code, such as § 105 of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106, relate to bankruptcy administrators in the judicial districts of North Carolina and Alabama. This amendment makes it clear that the Bankruptcy Rules do not apply to the extent that they are inconsistent with these federal statutes.

Agenda Item 24

These proposed amendments to Federal Rules of Civil Procedure 5 and 43 were approved by the Standing Committee in July 1995 for transmission to the Judicial Conference.

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may~~,~~ by local rule~~,~~ permit papers to be filed, signed, or verified by ~~facsimile or other~~ electronic means ~~if such means are authorized by and~~ that are consistent with technical standards, if any, ~~established by~~ that the Judicial Conference of the United States establishes. A paper

*New matter is underlined; matter to be omitted is lined through.

filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Committee Note

The present Rule 5(e) has authorized filing by facsimile or other electronic means on two conditions. The filing must be authorized by local rule. Use of this means of filing must be authorized by the Judicial Conference of the United States and must be consistent with standards established by the Judicial Conference. Attempts to develop Judicial Conference standards have demonstrated the value of several adjustments in the rule.

The most significant change discards the requirement that the Judicial Conference authorize local electronic filing rules. As before, each district may decide for itself whether it has the equipment and personnel required to establish electronic filing, but a district that wishes to establish electronic filing need no longer await Judicial Conference action.

The role of Judicial Conference standards is clarified by specifying that the standards are to govern technical

matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules. Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberately seek to copy other local rules.

It is anticipated that Judicial Conference standards will govern such technical specifications as data formatting, speed of transmission, means to transmit copies of supporting documents, and security of communication. Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. Local rules must address these issues until Judicial Conference standards are adopted.

The amended rule also makes clear the equality of filing by electronic means with written filings. An electronic filing that complies with the local rule satisfies all requirements for filing on paper, signature, or verification. An electronic filing that otherwise satisfies the requirements of 28 U.S.C. § 1746 need not be separately made in writing. Public access to electronic filings is governed by the same rules as govern written filings.

The separate reference to filing by facsimile transmission is deleted. Facsimile transmission continues to be included as an electronic means.

Rule 43. Taking of Testimony

(a) Form. In ~~all~~ every trials, the testimony of witnesses shall be taken ~~orally~~ in open court, unless ~~otherwise provided by an Act of Congress or by~~ a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

* * * * *

Committee Note

Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other — and perhaps more important — witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of

securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video

transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

These proposed amendments to Federal Rules of Civil Procedure 9, 47, and 48 were approved for publication by the Standing Committee in July 1995. The Standing Committee also approved for publication amendments to Rule 26(c) on the subject of protective orders, but made changes to the draft submitted by the Advisory Committee on Civil Rules. The proposed amendments to Rule 26(c) will be circulated later, either prior to or at the Portland meeting.

Rule 9. Pleading Special Matters

* * *

(h) **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of * * * district courts * * * determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the § 1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and nonadmiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

The courts of appeals have not achieved full uniformity in

applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities of the parties within the meaning of § 1292(a)(3), it may prove important to permit appeal as to the nonadmiralty claim. Disposition of the nonadmiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and nonadmiralty claims may be interdependent. An illustration is provided by *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for losses of ocean shipments were against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty *claims*; instead, it refers to admiralty *cases*." 899 F.2d at 1297. The advantages of permitting appeal by the nonadmiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the § 1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does – or does not – dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292.

APPROVED FOR PUBLICATION BY STANDING COMMITTEE
ON RULES
7/95

Proposed Amendments to Criminal Rule 24 and Civil Rule 47

The court shall conduct the voir dire examination of prospective jurors. But the court shall also permit the [parties] [defendant or the defendant's attorney and the attorney for the government] to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause.

See next page for Committee Note.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~Examining Jurors. The court may must ~~permit the parties or their attorneys to~~ conduct the examination of prospective jurors ~~or may itself conduct the examination~~. The court must permit the parties to examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter determined by the court in its discretion. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

Committee Note

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See *Shapard & Johnson, Survey Concerning Voir Dire* (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years. The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same regardless of the choice made in allocating responsibility between court and counsel. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case

by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and peremptory challenges, and to elicit it by jury questioning. In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

The strong direct case for permitting party participation is further supported by the emergence of constitutional limits that circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with *Batson v. Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These limits enhance the importance of searching voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has ample power to

control the time, manner, and subject matter of party examination. The process of determining the limits continues throughout the course of each party's examination, and includes the power to terminate further examination by a party that has misused or abused the right of examination. Among other grounds, termination may be warranted not only by conduct that may impair the trial jury's impartiality but also by questioning that is repetitious, confusing, or prolonged, or that threatens inappropriate invasion of the prospective jurors' privacy. The determination to set limits or to terminate examination is confided to the broad discretion of the district court. Only a clear abuse of this discretion – usually in conjunction with a clearly inadequate examination by the court – could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may improve in many ways the development of important information about prospective jurors. Potential jurors are protected against the embarrassment of public examination. A potential juror may be more willing to reveal potentially embarrassing information in responding to a questionnaire than in answering a question in open court. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group.

Questionnaires are not required by Rule 47(a), but should be seriously considered. At the same time, it is important to guard against the temptation to extend questionnaires beyond the limits needed to support challenges for cause and fair use of peremptory challenges. Just as voir dire examination, questionnaires can be used in an attempt to select a favorable jury, not an impartial one. Potential jurors must be protected against unwarranted invasions of privacy; the duty of jury service does not support casual inquiry into such matters as religious preferences, political views, or reading, recreational, and television habits. Indeed the list of topics that might be of interest to a party bent on manipulating the selection of a favorable jury through the use of sophisticated social-science profiles and personality evaluations is virtually endless. Selection of an impartial jury requires suppression of such inquiries, not encouragement. The court's guide must be the needs of impartiality, not party advantage.

Rule 48. Number of Jurors – Participation in Verdict

The court ~~shall~~ must seat a jury of ~~not fewer than six and not more than~~ twelve members, ~~and a~~All jurors ~~shall~~ must participate in the verdict unless excused from service ~~by the court pursuant to~~ under Rule 47(c). Unless the parties ~~otherwise~~ stipulate otherwise, (1) the verdict ~~shall~~ must be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

Committee Note

Rule 48 was amended in 1991 to reflect the conclusion that it had been "rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury." Six-person jury local rules were upheld by the Supreme Court in Colgrove v. Battin, 413 U.S. 149 (1973). The Court concluded that the Seventh Amendment permits six-person juries, and that the local rules were not inconsistent with Rule 48 as it then stood.

Rule 48 is now amended to restore the core of the twelve-member body that has constituted the definition of a civil jury for centuries. Local rules setting smaller jury sizes are invalid because inconsistent with Rule 48.

The rulings that the Seventh Amendment permits six-member juries, and that former Rule 48 permitted local rules establishing six-member juries, do not speak to the question whether six-member juries are desirable. Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

Although the core of the twelve-member jury is restored, the other effects of the 1991 amendments remain unchanged. Alternate jurors are not provided. The jury includes twelve members at the beginning of trial, but may be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned.

Careful management of jury arrays can help reduce the incremental costs associated with the return to twelve-member juries.

Sylistic changes have been made.

Agenda Item 23

NEXT MEETING

The next meeting of the Advisory Committee will be March 21 - 22, 1996, in Charleston, South Carolina.