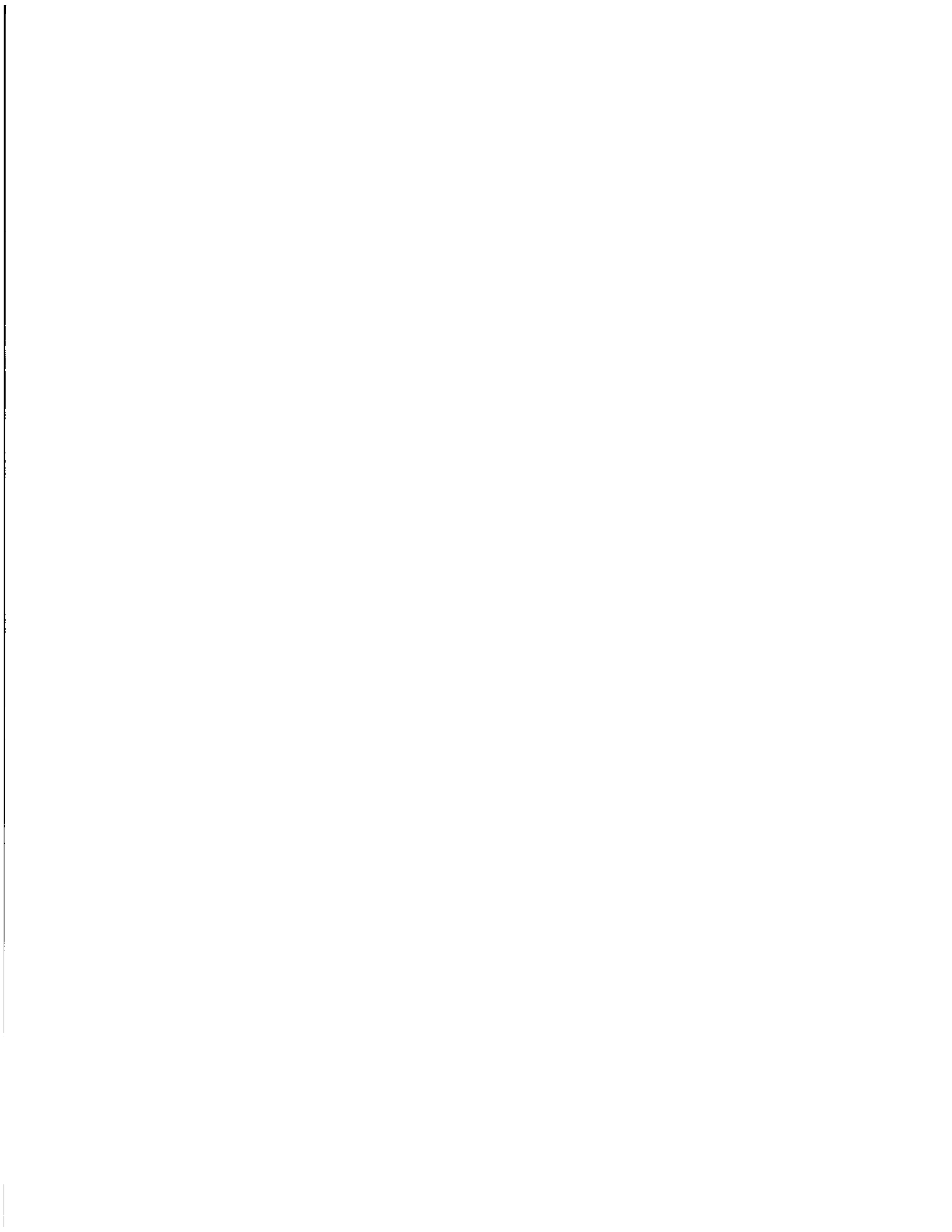
ADVISORY COMMITTEE ON BANKRUPTCY RULES

Sarasota, FL
March 10-11, 2005



ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 10-11, 2005
Hyatt Hotel, Sarasota, FL

Agenda

Introductory Items

1. Approval of minutes of September 2004 meeting. (Judge Zilly)

2. Oral reports on meetings of other committees:

   - January 2005 meeting of the Committee on Rules of Practice and Procedure. (Judge Zilly, Professor Morris, and Judge Small)
   - January 2005 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Montali and Judge Klein)
   - October 2004 meeting of Advisory Committee on Civil Rules. (Judge Walker)
   - January 2005 meeting of Advisory Committee on Evidence. (Judge Klein)

3. (a) Report on amendments to Rules 1011, 2002(j), and 9014 and Official Forms 16D and 17 which were effective on December 1, 2004. (Judge Zilly)
   (b) Report on cancellation of public hearing. (Judge Zilly)

Action Items

4. (a) Summary of comments received on proposed 2005 "fast-track" amendments to Rules 2002(g), 9001, and 9036 and results of e-mail ballot on final action. The summary and copies of the comments will be distributed separately. (Professor Morris)

   (b) Recommendation regarding inclusion of a provision that service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served. (Professor Morris)

5. Summary of comments received on proposed "fast-track" amendment to Rule 5005(a)(2) to authorize courts to permit or require documents to be filed, signed, or verified electronically and the Reporter's recommendation for final action. The summary and copies of the comments will be distributed separately. (Professor Morris)

6. (a) Summary of comments received on the preliminary draft amendments to Rules 1009, 4002, 5005, and 7004, and Schedule I of Official Form 6 and the Reporter's recommendation for final action. The summary and copies of the comments will be distributed separately. An article by Judge Lundin in Norton Bankruptcy Law Advisor on the draft amendment to Rule 4002 is attached. (Professor Morris)

(b) Judge Massey's suggestion concerning the operation of Rule 7004(b)(9). A copy of Judge Massey's decision in In re Khalif, 308 B.R. 614 (Bankr. N.D. Ga. 2004), is attached. (Professor Morris)

7. Recommendation on proposed new Rule 9037 the template privacy rule proposed by the E-Government Subcommittee of the Standing Committee as required by section 205(c)(3) of the E-Government Act, Pub. L. 107-347. (Professor Morris and Judge Swain. Professor Capra will participate by telephone.)

8. (a) Recommendation by the Subcommittee on Forms for amendments to Rule 3001 to authorize filing relevant excerpts and a summary of voluminous documents which accompany a proof of claim. (Professor Morris and Judge Walker)

   (b) Recommendation by the Subcommittee to revise Official Form 10 (Proof of Claim). (Ms. Ketchum and Judge Walker)

9. Recommendation by the Subcommittee on Consumer Issues on Judge Wedoff's proposal to amend Rule 4003 to give the court flexibility to extend the time to object to exemptions that are not claimed in good faith. (Professor Morris and Mr. Frank)

10. Various recommendations by the Subcommittee on Privacy, Public Access, and Appeals on Judge Adams' suggestion to amend the separate document provisions of Rule 9021. (Professor Morris and Mr. Adelman)

11. Recommendation by the Subcommittee on Technology and Cross Border Insolvency, that Rule 8002 or Rule 9006 not be amended to provide additional time for the appeal of judgments, decrees, and orders in bankruptcy cases. A report on Judge McFeeley's poll of bankruptcy judges concerning the need for additional time and the Reporter's memorandum prepared for the September 2004 meeting are attached. (Professor Morris and Judge McFeeley) Discussion of the amendment and re-amendment of Rule 9006(a) in 1987 and 1989. Ms. Ketchum's memorandum on the amendment and re-amendment is attached. The attachments to her memo will be available at the meeting. (Professor Resnick and Ms. Ketchum)

12. Recommendations by the Joint Subcommittee on Venue and Chapter 11 Matters, including final report of proposed draft amendment to Rule 3007 and new recommendations for amendments to Rules 3007, 4001, and 6006, and proposed new Rule 6003, Interim and Final Relief Immediately Following the Commencement of the Case. Report on proposed new rule 2021, Case Management and Participation by Telephonic Means, providing for notice of case procedures and early status conference in chapter 11 cases. (Professor Morris, Mr. Shaffer, Mr. Adelman)

13. Recommendation on amending Rule 7024 or possible new rule to conform to proposed new Civil Rule 5.1 and the amendment of Civil Rule 24(c) concerning challenges to the

constitutionality of a statute. Judge Walker's letter concerning the Civil Rules Committee meeting and proposed Rule 5.1's 60-day period for the Attorney General to intervene is attached. (Professor Morris)

Discussion Items

14. Report on the Director's Procedural Forms and recommendations on which procedural forms, if any, should be considered for designation as Bankruptcy Official Forms. (Ms. Ketchum)

15. Report concerning the restyling of the Civil Rules and discussion of possible review by the Style Subcommittee in light of the need to conform the Bankruptcy Rules to changes in the Civil Rules. (Professor Morris)

16. Report on the Bankruptcy Reform Act, the Federal Courts Improvement Act, and other legislation. An updated legislative report will be distributed at the meeting. Oral report on the Committee's planning in the past for implementation of the Reform Act. (Judge Small, Ms. Ketchum, Professor Morris, and Mr. Wannamaker) Discussion of the need to refer pending legislation to subcommittees.

17. Concerns expressed by Judge Rasure on behalf of the Bankruptcy Judges Advisory Group about timing issues raised by Rule 3002(c)(5). (Professor Morris)

18. Judge Zurzolo's suggestion that all sales of estate property valued above $2,500 be published on a website maintained by the Administrative Office. An article describing the website maintained by the National Association of Bankruptcy Trustees for the sale of estate assets is attached. (Professor Morris)

19. Report on possible amendments to Rules 1010 and 1011 to conform to Civil Rule 7.1 concerning filing corporate ownership statements in involuntary cases. (Professor Morris)

20. Report on tracking individual claims in the courts' CM/ECF system. (Mr. Wannamaker)

21. Suggestion by attorney Thomas Yerbich that Rule 1019(3) be amended to require creditors to file superseding claims in cases converted to chapter 7 after confirmation of a plan. (Professor Morris)

Information Items

22. Oral report on inclusion of a study of local rules relating to electronic filing in the September agenda and requesting input from the CM/ECF Working Group. A map illustrating the status of CM/ECF implementation in the bankruptcy courts is attached.

(Professor Morris)

23. Revision of Director's Procedural Form 210, Notice of Transfer of Claim Other Than for Security, at the request of the CM/ECF project staff and status of implementation of the procedural form. (Mr. Wannamaker)

24. Rules Docket

25. *Bull Pen*: There are no amendments pending in the "bull pen" awaiting transmission to the Standing Committee.

26. Oral report on Long Range Planning. (Judge Zilly)

27. Next meeting reminder: *September 29 - 30, 2005, Eldorado Hotel, Santa Fe, NM*

28. Discussion of date and location for spring 2006 meeting. (Judge Zilly)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:

Honorable Thomas S. Zilly
United States District Judge
United States District Court
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Members:

Honorable R. Guy Cole, Jr.
Circuit Judge
United States Court of Appeals
127 Joseph P. Kinneary
United States Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Honorable Ernest C. Torres
Chief Judge
United States District Court
United States Courthouse
One Exchange Terrace
Providence, RI 02903-1779

Honorable Irene M. Keeley
Chief Judge
United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

Honorable Laura Taylor Swain
United States District Judge
United States District Court
Thurgood Marshall United States
Courthouse, Room 1205
40 Foley Square
New York, NY 10007

Honorable Richard A. Schell
United States District Judge
United States District Court
United States Courthouse Annex
Bank One Building
200 North Travis Street
Sherman, TX 75090

Honorable Eugene R. Wedoff
Chief Judge
United States Bankruptcy Court
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Mark B. McFeeley
United States Bankruptcy Judge
United States Bankruptcy Court
500 Gold Avenue, S.W.
Albuquerque, NM 87102

Dean Lawrence Ponoroff
Tulane University School of Law
Weinmann Hall
6329 Freret Street
New Orleans, LA 70118-6231

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, NY 11549-1210

Eric L. Frank, Esquire
DiDonato & Winterhalter, P.C.
1818 Market Street, Suite 3520
Philadelphia, PA 19103

Howard L. Adelman, Esquire
Adelman, Gettleman, Merens, Berish
& Carter, Ltd.
Suite 1050, 53 West Jackson Boulevard
Chicago, IL 60604

K. John Shaffer, Esquire
Stutman, Treister & Glatt, P.C.
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
P.O. Box 875, Ben Franklin Station
Washington, DC 20044-0875
(1100 L Street, N.W., 10th Floor, Room 10036
Washington, DC 20005)

Reporter:

Professor Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Advisors and Consultants:

James J. Waldron
Clerk, United States Bankruptcy Court
Martin Luther King, Jr. Federal Building
and United States Courthouse
Third Floor, 50 Walnut Street
Newark, NJ 07102-3550

Lawrence A. Friedman
Director, Executive Office for
United States Trustees
20 Massachusetts Avenue, N.W., Suite 8000
Washington, DC 20530

Melissa B. Jacoby, Associate Professor
University of North Carolina School of Law
100 Ridge Road
Chapel Hill, NC 27599-3380

Patricia S. Ketchum, Esquire
1607 22nd Street, N.W.
Washington, DC 20008-1921

Liaison Member:

Honorable Harris L Hartz
United States Circuit Judge
United States Court of Appeals
201 Third Street, N.W., Suite 1870
Albuquerque, NM 87102

Liaison from Committee on the Administration of the Bankruptcy System:

Honorable Dennis Montali
United States Bankruptcy Judge
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON BANKRUPTCY RULES

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Judge Richard A. Schell
Judge Mark B. McFeeley
Howard L. Adelman, Esquire
K. John Shaffer, Esquire

Subcommittee on Business Issues
Professor Alan N. Resnick, Chair
Judge Laura Taylor Swain
Judge Christopher M. Klein
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*

Subcommittee on Consumer Issues
Eric L. Frank, Esquire, Chair
Judge Laura Taylor Swain
Judge James D. Walker, Jr.
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James J. Waldron, *ex officio*

Subcommittee on Forms
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James J. Waldron, *ex officio*
Patricia S. Ketchum, Esquire, Consultant

Subcommittee on Privacy, Public Access, and Appeals
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K. John Shaffer, Esquire

Subcommittee on Style
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Judge Irene M. Keeley
Judge Christopher M. Klein
Dean Lawrence Ponoroff

Subcommittee on Technology and Cross Border Insolvency
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Judge Eugene R. Wedoff

Subcommittee on E-Government
Judge Thomas S. Zilly
Judge Laura Taylor Swain
Professor Jeffrey W. Morris

CM/ECF Working Group
Judge Mark McFeeley

ADVISORY COMMITTEE ON BANKRUPTCY RULES

			Start Date	End Date
Thomas S. Zilly Chair	D	Washington (Western)	Member: 2000 Chair: 2004	---- 2007
Howard L. Adelman	ESQ	Illinois	1999	2005
Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2006
Eric L. Frank	ESQ	Pennsylvania	1998	2005
Irene M. Keeley	D	West Virginia (Northern)	2002	2005
Christopher M. Klein	B	California (Eastern)	2000	2006
J. Christopher Kohn*	DOJ	Washington, DC	-----	Open
Mark B. McFeeley	B	New Mexico	2001	2007
Lawrence Ponoroff	ACAD	Louisiana	2004	2007
Alan N. Resnick	ACAD	New York	1999	2005
Richard A. Schell	D	Texas (Eastern)	2003	2006
K. John Shaffer	ESQ	California	2000	2006
Laura Taylor Swain	D	New York (Southern)	2002	2005
Ernest C. Torres	D	Rhode Island	1999	2005
James D. Walker, Jr.	B	Georgia (Middle)	1999	2005
Eugene R. Wedoff	B	Illinois (Northern)	2004	2007
Jeffrey W. Morris Reporter	ACAD	Ohio	1998	Open

Principal Staff: Jim Wannamaker (202) 502-1910

* Ex-officio

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs	**Reporters**
Honorable David F. Levi Chief Judge, United States District Court United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
Honorable Samuel A. Alito, Jr. United States Circuit Judge 357 United States Post Office & Courthouse 50 Walnut Street Newark, NJ 07101	Prof. Patrick J. Schiltz University of St. Thomas School of Law 1000 La Salle Avenue, MSL 400 Minneapolis, MN 55403-2015
Honorable Thomas S. Zilly United States District Judge United States District Court United States Courthouse 700 Stewart Street, Suite 15229 Seattle, WA 98101	Prof. Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Susan C. Bucklew United States District Judge United States District Court United States Courthouse 801 North Florida Avenue, Suite 1430 Tampa, FL 33602	Prof. David A. Schlueter St. Mary's University School of Law One Camino Santa Maria San Antonio, TX 78228-8602
Honorable Jerry E. Smith United States Circuit Judge United States Court of Appeals 12621 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

February 17, 2005
Projects

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 9-10, 2004
Half Moon Bay, California

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
District Judge Richard A. Schell
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Bankruptcy Judge Eugene R. Wedoff, a new member of the Committee; District Judge Robert W. Gettleman, a former member of the Committee; Professor Jeffrey W. Morris, Reporter; and Ms. Patricia S. Ketchum, advisor to the Committee, attended the meeting. Circuit Judge R. Guy Cole, Jr., a member of the Committee; District Judge Ernest C. Torres, a member of the Committee; and Dean Lawrence Ponoroff, a new member of the Committee, were unable to attend.

District Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure (Standing Committee); Circuit Judge Harris L. Hartz, liaison from the Standing Committee; Peter G. McCabe, secretary of the Standing Committee; Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); and Clifford J. White, III, Deputy Director, Executive Office for United States Trustees (EOUST), attended. Professor Daniel R. Coquillette, reporter of the Standing Committee, and Lawrence A. Friedman, Director, EOUST, were unable to attend.

James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research

Division, Federal Judicial Center (FJC), also attended the meeting. Ms. Lonnie Gandara of Glen Ellen, California attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed Judge Wedoff to the Committee, and congratulated Judge Zilly on his appointment as the new chairman of the Committee. The Chairman announced that Judge McFeeley has been reappointed to the Committee and that Mr. Frank's term has been extended one year. The Chairman welcomed the members, liaisons, advisers, and guests to the meeting. The Chairman praised Professor Wiggins, whose term ends with this meeting, for her work with the Committee, including her keen eye for exact wording and punctuation. The Chairman thanked Mr. Wannamaker and the staff of the Rules Committee Support Office for the expedited production of the agenda book.

Judge Levi recognized Judge Small's service as chairman and indicated that he is looking forward to working with Judge Zilly as the new chairman.

The Committee approved the minutes of the March 2004 meeting.

The Chairman briefed the Committee on the June 2004 meeting of the Standing Committee. The Standing Committee gave its final approval to the proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006; Official Forms 16D and 17; and Schedule G of Official Form 6. The Standing Committee approved for publication the proposed amendments to Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

Judge Levi discussed the Standing Committee's consideration of the proposed amendment to Appellate Rule 35(a) (en banc determinations) and proposed new Appellate Rule 32.1 (citing judicial dispositions), which attracted hundreds of public comments. The Standing Committee gave its final approval to the proposed amendment to Rule 35(a) and returned proposed new Rule 32.1 to the Advisory Committee on Appellate Rules with a recommendation that the FJC undertake an empirical study of the impact of the citation of unpublished opinions on the courts' workload in the circuits which have authorized the practice. Judge Levi praised the contribution to the rule-making process of studies by the FJC. The Standing Committee approved for publication a package of electronic discovery rules, which Judge Levi stated presented some very difficult issues.

Judge Montali reported on the June 2004 meeting of the Bankruptcy Administration

Committee. Judge Montali stated that the Bankruptcy Administration Committee has been overwhelmed by budget issues even though it has primary responsibility for only three budget areas: temporary law clerks, recalled bankruptcy judges, and the bankruptcy administrator program. Judge Marjorie O. Rendell, the chair of the Bankruptcy Administration Committee, has written the chief judges and clerks of the bankruptcy courts requesting their advice on cost-saving ideas and suggestions for further dialogue on sharing administrative services. Judge Montali stated that the use of shared administrative services, more efficiencies in the use of recalled judges, the centralization of processing chapter 7 cases, and a higher threshold for recommending additional bankruptcy judgeships are under study. Judge Montali stated that the Bankruptcy Administration Committee is conducting its biennial study of the need for additional bankruptcy judgeships, which will include on-site surveys of six districts, and is planning a time study and re-examination of the case weights used in judgeship surveys.

Action Items

"Fast Track" Consideration of Amendments to Rules 2002, 9001, and 9036. Proposed amendments to Rules 2002, 9001, and 9036 were published for comment in August 2004. The deadline for comments is February 15, 2005. The proposed amendments to Rules 2002 and 9001 would allow creditors and notice providers to establish their own process for delivery of notices. The proposed amendments to Rule 9036 would delete the requirement that the sender of an electronic communication receive confirmation of receipt in order for the notice to be considered complete. The proposals could produce savings to the Judiciary by increasing the use of electronic noticing and thus reducing postal fees and handling costs.

If approved and promulgated in the normal course, the proposed amendments would be effective on December 1, 2006. If the Committee and the Standing Committee consider and approve the comments by e-mail ballot, the proposed amendments could be considered by the Judicial Conference at its meeting in March 2005 and transmitted to the Supreme Court prior to the May 1 deadline for the Court to transmit proposed amendments to Congress. As a result, if approved and in the absence of Congressional action to the contrary, the amendments would be effective on December 1, 2005, one year early. The Chairman stated that the Standing Committee and the Court have indicated that they are willing to consider the proposed amendments on an expedited basis, provided there is no significant opposition.

Mr. Shaffer stated that the deletion of the confirmation of receipt requirement in Rule 9036 creates an implication of a more lenient standard for the electronic service of notices than for the electronic service of pleadings and other papers under Civil Rule 5, which states that electronic service is ineffective if the party making service learns that the attempted service did not reach the person to be served. He asked whether incorporating the provision from Civil Rule 5 in the proposed amendment to Rule 9036 would require republication. The Chairman stated that it probably would be considered a substantive change which requires republication.

The Reporter stated that Civil Rule 5 only specifies that electronic service is ineffective if the sender learns that the papers did not reach the person to be served. There is no such restriction on service by mail. Judge Zilly stated that parties make service under Civil Rule 5 and the clerk serves notices under Rule 9036. The Chairman stated the Bankruptcy Noticing Center automatically sends a paper copy of the notice if it learns that an electronic notice did not reach the intended recipient. Judge Wedoff stated that he doubted that a party could prevail with an argument that an electronic notice was effective even though the intended recipient did not receive the notice. Judge Montali stated that a hearing can be rescheduled if the notice is ineffective. He noted that the time for appeal continues to run even if notice of the entry of the judgment is ineffective.

Judge Swain stated that there is a technological barrier to the use of Rule 9036 as written because email providers no longer provide confirmation of receipt. She stated that Rule 9036 is about permission to send notices electronically, not the effectiveness of those notices. Mr. Waldron stated that the Committee has been advised that electronic notices are no less reliable than first class mail. He stated that there is a risk of nondelivery with either means of transmission. Professor Resnick stated that a great deal of care went into the drafting of Rule 9036 because in 1993 it was the first electronic notice rule. He stated that in 2004 a party gives its email address to the court for electronic noticing, just as the party gives its postal address to the court for paper notices. The Committee discussed the treatment of returned emails and returned mail when notices cannot be delivered as addressed and the parties' responsibility to maintain a current address with the court. Judge Zilly stated that Civil Rule 5(b)(3)'s provision that service by electronic means is ineffective if the sender knows that the attempted service did not reach the person to be served operates in certain proceedings in bankruptcy. Civil Rule 5(b) is incorporated by Rule 7005 in adversary proceedings and by Rule 9014 for the service of subsequent papers in contested matters.

Professor Resnick said that a vote of a majority of the Committee should not be required to take the proposed amendments off the "fast track;" significant minority opposition should be sufficient to remove the amendments from the "fast track." He said that the full Committee should discuss the matter if there is a single substantive public comment. Judge Zilly stated that he would be inclined to pull the proposed amendments off the "fast track" if there is any significant dissent on the Committee to continuing the expedited treatment. Judge Zilly moved that the Committee consider the public comments on the "fast track" schedule. **With one dissent, the Committee agreed to leave the proposed amendments on the "fast track," subject to a decision by the new chairman to take the matter off the "fast track" based on public comments, concerns of Committee members, and judicial wisdom.** In an informal straw poll on the merits of the proposed amendment to Rule 9036, the Committee favored the proposal by a vote of 9-5.

Mandatory Use of Electronic Filing. The Committee on Court Administration and Case Management (Court Administration Committee) has requested that the Advisory Committees on Civil Rules and Bankruptcy Rules amend those rules to encourage electronic filing. Responding

to budgetary concerns, the Court Administration Committee suggested that Civil Rule 5(e) and Bankruptcy Rule 5005(a)(2) be amended to authorize the courts to "require" the use of electronic filing with appropriate exceptions.

The Chairman stated the proposed amendment could be effective on December 1, 2007, if published in August 2005 and considered in the normal manner. If published late this year and if considered by the Advisory Committee and the Standing Committee next spring, the proposed amendment could be considered by the Judicial Conference at its meeting in September 2005 and take effect on December 1, 2006. If published immediately and considered on an expedited basis, the proposed amendment could be effective on December 1, 2005.

Judge Zilly stated that so many courts are already requiring electronic filing that it may not be necessary to consider the proposed amendment on the "fast track." Mr. Rabiej stated that some courts are reluctant to require electronic filing because of the wording of the national rule. Judge Levi indicated that, if the proposed amendment authorizing the courts to require electronic filing on a local basis is not considered on the "fast track," an amendment may be proposed which requires electronic filing on a national basis. The Committee discussed the desirability of creating a single national standard for filing documents and that the standard be electronic filing.

One Committee member suggested publishing a supplemental Committee Note to the existing rule as an alternative to amending the rule. Professor Resnick stated that Committee Notes are published only with proposed amendments. Rule 5005(a)(1) provides that the clerk shall not refuse to accept papers for filing solely because they are not presented in proper form. Several Committee members suggested that filing a paper document in a court which mandates electronic filing may be matter of form. As a result, the filing would be subject to sanction by the judge, but the clerk could not refuse to accept the document for filing.

Judge Levi stated that the Court Administration Committee's belief that the proposed amendment would produce cost savings should be given deference. He said that, from the rules point of view, the question is whether this is a noncontroversial matter which can be dealt with quickly, or whether there are substantive issues which should be considered more fully. The Committee discussed whether the economic impact of proposed amendments or some other standard should be used to select matters for "fast track" consideration. Judge Levi said "fast track" matters usually respond to legislative changes or technical corrections. Mr. McCabe stated that in the past the Standing Committee declined to set a standard for "fast track" amendments.

Mr. Waldron said mandatory electronic filing is more efficient but that the savings have already been incorporated by reducing the staffing formula for the clerks' offices in bankruptcy courts. Several Committee members expressed concern about the impact of mandatory electronic filing on access to the court for pro se parties, out-of-district attorneys, and infrequent bankruptcy practitioners. **Judge Zilly asked staff to research existing local rules which require electronic filing.** Judge Wedoff stated that access should be addressed separately and

that the question is whether the existing rule discourages courts from mandating electronic filing. Mr. McCabe stated that when courts ask about the rule, the courts are told that the current rule was not intended to include mandatory electronic filing, but that interpretation of the rule is up to the courts.

Judge Klein moved to amend Rule 5005(a)(2) to "permit or require" documents to be filed, signed, or verified by electronic means. **Judge Klein's motion carried without dissent.** Mr. Frank suggested the Committee Note state that local rules should provide appropriate safeguards to ensure access to the court. Professor Resnick suggested that the Committee Note state that many courts have interpreted the existing rule to permit the adoption of local rules which require electronic filing and that the proposed amendment supports that interpretation. Judge Walker moved for early publication of the proposed amendment and a three-month comment period with the goal of an effective date of December 1, 2006. Judge Zilly expressed concern about whether the bench and bar would have time to respond. The Reporter stated that the proposed civil, appellate, and bankruptcy amendments would look the same and would be published as a single package, thus permitting a more focused review by the bench, bar, and public. **Judge Walker's motion carried with three dissenting votes.**

Template Rule to Protect the Privacy of Persons Identified in Court Filings. The E-Government Act of 2002 requires the promulgation of rules to protect the privacy of persons identified in court filings and to govern the availability of documents when they are filed electronically. Judge Swain discussed the development of a template privacy rule for consideration by the Bankruptcy, Civil, Criminal, and Appellate Rules Committees with the expectation that, as adopted, the rule would be as uniform as is possible. The Chairman stated that it is important to tell the other committees that the Committee will adopt the template with only minor exclusions.

The Reporter presented a draft rule which incorporated the Civil Rule version of the template with an exemption from the redaction requirement for the name of a minor who is the debtor in the case. The Reporter stated that the full name of a debtor who is a minor should be included on the petition and the caption of adversary proceedings and contested matters in the case in order to ensure that creditors are given appropriate notice. Several Committee members questioned whether the person preparing the list of creditors would know whether a creditor is a minor and how creditors who are minors would be given notice if their initials were used in place of their names on the mailing matrix. Judge McFeeley stated that the main concern was protection of the debtor's children and that the 2003 amendments to the schedules and statement of financial affairs had already taken care of that. He said there was little danger from including the names of creditors who are minors on the schedules or mailing matrix as long as the creditors are not identified as minors. The Chairman stated that because the Judicial Conference's privacy policy includes the names of minors, the names should be left in the template rule with exceptions as needed.

The statute provides that a party which makes a redacted filing may also file an

unredacted document under seal. Judge Montali stated that the Committee Note should indicate that the unredacted filing is sealed automatically without requiring a motion and order to seal. The Reporter suggested that the Bankruptcy Rules incorporate the Civil Rule version of the template rule in the rules governing adversary proceedings and that the new rule be added to the list of rules that apply in contested matters under Rule 9014. Several Committee members questioned whether that approach would cover the petition, schedules, statement of financial affairs,"first day" orders, applications to employ counsel, proofs of claim, and other case papers which are not part of an adversary proceeding or a contested matter. The Reporter stated that the new rule could be included in Part IX of the rules. Professor Resnick stated that the Bankruptcy Rules use the term "infant" instead of "minor" and suggested that the new rule do the same. Judge Levi stated that the restyled version of the Civil Rules drops the term "infant."

The Committee agreed in principle that a new rule incorporating the template rule should be included in Part IX of the Bankruptcy Rules. The new rule would provide that a minor's name be excluded from the redaction requirement when the minor is either the debtor or a creditor who is not identified as a minor. A final recommendation will be made at the March meeting after the Committee has had the benefit of comments from the other advisory committees.

Proposed Revision of the Statement of Financial Affairs. At the request of the EOUST, the Committee approved for publication an amendment to Schedule I of Official Form 6 that would require disclosure of a non-filing spouse's income in a chapter 7 case, as is already required in a chapter 12 or chapter 13 case filed by a married debtor. At its meeting in March 2004, the Committee considered briefly whether Official Form 7, the Statement of Financial Affairs, also should be amended to require information on a non-filing spouse in a chapter 7 case, as well as in a chapter 12 or chapter 13 case. The matter was referred to the Subcommittee on Forms, which recommended that the Statement of Financial Affairs not be amended.

Mr. White stated that the schedule gives the United States trustee and the trustee a snapshot of the debtor's financial affairs. He said expanding the Statement of Financial Affairs would provide historical information which would help protect the integrity of the bankruptcy system. Judge Walker, the chair of the Forms Subcommittee, stated there is no question that requiring information on a non-filing spouse would be helpful in some cases, but that it also is clear that the information would not be helpful in most cases and would be extremely intrusive. He said requiring the disclosure would be unnecessarily intrusive when other remedies exist in the cases where it is needed.

Mr. Frank stated that the disclosure did not appear to be a major issue for the integrity of the system because the EOUST did not include the proposal in the EOUST's package of amendments requiring additional disclosure. Mr. White said a number of private trustees would support the change if they knew it was being considered. He stated that the disclosure would not be intrusive in chapter 7 cases because it is already required in chapter 12 and chapter 13 cases. Judge Small asked if any Committee members wished to pursue the matter further. **There was**

no response and the Committee accepted the Subcommittee's recommendation not to proceed.

Notice of Transfer of Claim. At its March 2004 meeting, the Committee considered a proposed new Director's Form entitled "Notice of Transfer of Claim" submitted by the Bankruptcy CM/ECF Working Group's claims subgroup. After a discussion, the proposed form was referred to the Forms Subcommittee. Ms. Ketchum reviewed the Subcommittee's changes to the proposed form including deleting most of the language referring to the transaction between the transferor and the transferee, rearranging the columns, and adding a statement that the notice has been filed as evidence of the transfer.

Judge Montali asked whether the notice form was intended to cover scheduled claims deemed to have been filed under section 1111(a) of the Bankruptcy Code. Professor Resnick stated that Rule 3001(e) was originally intended for chapter 11 cases and that deemed filed claims are treated as filed claims which may be transferred under Rule 3001. Ms. Ketchum agreed that including a reference to deemed filed claims is a good idea.

The Chairman stated that the proposed new form is a Director's Form, which does not require approval by the Committee. Ms. Ketchum stated that Director's Forms are submitted to the Committee for its input and suggestions. Judge Zilly stated that the proposed notice form appears to be a good step forward but expressed concern that Director's Forms are not published in some bankruptcy books. **Judge Zilly suggested that the Administrative Office explore how many Director's Forms are used on a regular basis and whether some ought to be designated as Official Forms.** Ms. Ketchum explained that the Director's Forms are available on the Judiciary's website and that many of the procedural forms have been incorporated in software used by the clerks or by bankruptcy attorneys.

Revision of the Proof of Claim. At its March 2004 meeting, the Committee considered a proposal for amending Official Form 10, the Proof of Claim, submitted by the Bankruptcy CM/ECF Working Group's claims subgroup. The Committee was sympathetic to the Working Group's goal of facilitating the electronic filing, processing, and review of claims, but identified several proposed revisions that Committee members believed would conflict with the Bankruptcy Code and Rules. The proposal was referred to the Forms Subcommittee. The Subcommittee discussed the proposal in a series of conference calls and at a meeting on September 8, 2004. In addition, the Subcommittee received additional input from the Working Group.

Judge Walker stated that one issue is whether the form should function as a matter of math with the total claim equal to the sum of the secured, priority, and unsecured amounts. After discussing whether the sum of the three components could exceed the designated total in box 1, the Subcommittee submitted a draft revision which negated the strict math function favored by some clerks and trustees. The creditor would state the amount of the claim in box 1 and complete the boxes for secured and priority claims only if a portion of the claim is secured or entitled to priority.

Judge Walker stated that the biggest discussion concerned attachments. He stated that Rule 3001 anticipates that the required supporting documents will be attached but that the current form states that the filer should attach a summary if the supporting documents are voluminous. The electronic filing environment assumes that there is some limitation on the size of the attachments because large attachments can slow down the operation of the CM/ECF system, and they take longer to file or to call up on a computer. Judge Walker said there was lots of sentiment on the Subcommittee to increase the 10-page limit on attachments suggested by the Working Group, but uncertainty about the proper limit. **The Subcommittee left the page limit blank on the draft revision and asked for guidance from the CM/ECF project staff on the page limit.**

Judge Zilly stated that Rule 3001(c) requires that, if a claim is based on a writing, the writing shall be filed and that Rule 3001(d) requires that evidence of perfection of a security interest be filed, but that filing relevant excerpts may make more sense in the electronic world than filing the entire documents. Mr. Shaffer stated that the proof of claim is not just an opening salvo and that it would better to either divide the attachments into a number of documents or to require the filer to make copies of the complete documents available on request. Mr. Waldron said a number of courts require that lengthy attachments be divided into segments but that multiple documents still impact CM/ECF system performance by increasing the size of the database and slowing network traffic. Judge Wedoff stated that documents which included thousands of pages were divided into 50-page segments in the United Airlines case and that it was little different from filing lengthy paper documents, which could clog up the clerk's office, too. He stated that it is just a matter of getting bigger computers and more bandwidth.

Judge Walker stated that limiting the size of documents is a matter of controlling the use of resources. Judge Walker stated that, if one arm of the Judiciary says the limitations are important, that should be given some deference. Judge Montali stated that, with the exception of a few mega cases, most proofs of claim are only four to five pages long. **Judge Walker said the Subcommittee hoped to have a final draft ready for the March 2005 meeting and invited the Committee members' input.**

Joinder of Objections to Claims with a Demand for Rule 7001 Relief. The Committee considered a possible amendment to Rule 3007 at its March 2004 meeting. The existing rule attempts to provide a procedural framework for situations in which the parties join a request for relief that should have been brought as an adversary proceeding with an objection to claim. The rule provides simply that the hybrid objection is deemed to be an adversary proceeding without addressing the consequences of the characterization. The Committee referred the matter to the Subcommittee on Attorney Conduct and Health Care. The Subcommittee met by teleconference in late April and recommended an amendment which prohibited joining a demand for Rule 7001 relief with an objection to claim. The proposed Committee Note stated that the two may be joined by filing an adversary proceeding.

Judge Montali asked whether the existing rule is a problem. Judge Klein said the existing

rule creates difficulties for clerks because it leaves so many procedural questions unanswered, including just how the transformation to an adversary proceeding takes place. It is unclear whether the person requesting Rule 7001 relief must pay a filing fee, serve the demand for relief with a summons, or repeat anything done earlier. Judge Montali stated that the proposed amendment creates an unnecessary obstacle by requiring a separate adversary proceeding. Instead of an absolute bar, he suggested allowing the party to join the objection and demand for relief and stating in the Committee Note that a filing fee is required. The Reporter said the Subcommittee found it easier to separate the two concepts than to specify how the deemed adversary proceeding would be treated.

Professor Resnick suggested stating that a party may join the objection and demand for relief by commencing an adversary proceeding. Judge Wedoff suggested adding "but an objection to claim may be included in an adversary proceeding" at the end of the Subcommittee's draft. Professor Resnick suggested substituting "with' for "to" in line 9. Mr. Frank suggested inserting "If a party files a separate adversary proceeding," at the beginning of the third paragraph of the Committee Note. Professor Resnick suggested deleting the second paragraph of the Committee Note. He suggested replacing "matter" with "proceeding" in the second line of the first paragraph of the Committee Note and inserting "or for other relief specified in Rule 7001" after "claimant" in the penultimate line of the paragraph. **With no dissenting votes, the Committee approved the proposed amendment for publication with the revisions suggested by Professor Resnick, Judge Wedoff, and Mr. Frank.**

Effect of 2003 Amendments to Civil Rule 23. Professor Resnick stated that Civil Rule 23 was amended effective December 1, 2003, to add new subdivisions (g) and (h). Rule 23(h) establishes new procedures for the award of attorney fees in class actions and states that Civil Rule 54(d) applies to awards of attorney fees in class actions. Bankruptcy Rule 7023 applies all of Civil Rule 23 in adversary proceedings. Therefore, it appears that new Rule 23(h) applies in adversary proceedings. Bankruptcy Rule 7054(a) applies Civil Rule 54(a)-(c) in adversary proceedings, but not Civil Rule 54(d). At its meeting in March 2004, the Committee discussed whether Bankruptcy Rule 7023 or Rule 7054 should be amended to address the amendment of Civil Rule 23.

The Chairman referred the matter to the Subcommittee on Business Issues, which voted 5-1 to recommend that no changes be made to the Bankruptcy Rules at this time with respect to the application of Civil Rule 54(d) in class action adversary proceedings. The reasons for the recommendation included the rarity of class actions in bankruptcy, concern about raising complex and controversial issues relating to the use of special masters and magistrate judges in bankruptcy proceedings, and the desire not to deal with the complex issue of attorney fees in bankruptcy in the context of class actions only. Professor Resnick suggested that the Committee defer action and see what develops in the case law. Judge Montali suggested carving out references to magistrate judges and special masters in Rule 23(h)(4). Professor Resnick stated that doing so could be a lightning rod for controversy. **The Committee agreed not to amend Rules 7023 or 7054 at this time.**

Limiting the Application of Rule 7026 in Adversary Proceedings. As a result of the Committee's discussion of the possibility of exempting specific categories of adversary proceedings from the operation of the mandatory disclosure requirements of Civil Rule 26, Mr. Niemic conducted a study of the use of mandatory disclosure in adversary proceedings. The survey demonstrated that the views of the bankruptcy judges were quite mixed. The Committee discussed the study at its March 2004 meeting and referred the matter to the Subcommittee on Privacy, Public Access, and Appeals. Mr. Adelman, the chair of the subcommittee, stated that the Subcommittee recommended doing nothing because there was no real consensus on which categories of proceedings to exclude and because the parties can stipulate that the "mandatory" disclosures will not be required.

The issue was discussed at the roundtable meeting of bankruptcy judges held in conjunction with an FJC seminar held in Seattle in August 2004. The consensus of the judges was that the system is working and should not be changed. Another sentiment expressed was that amending the rule would highlight that the "mandatory" disclosures are not made in many proceedings. Judge Klein stated that Rule 7026 requires the disclosures but nobody complies. Judge Zilly stated that the rule allows the parties to stipulate that the disclosures are not needed and that is what the parties are doing, explicitly or implicitly. **The Committee agreed not to amend Rule 7026.**

Retroactive Extension of the Deadline to Object to Exemptions. Judge Wedoff has requested that the Committee consider an amendment to Rule 4003(b) to allow the retroactive extension of the time to object to claims of exemptions in certain circumstances. Judge Wedoff suggested that late objections be permitted when there is no good faith basis for the debtor's claim of exemptions and for secured creditors when the debtor files a lien avoidance under section 522(f)(1) of the Bankruptcy Code. Judge Walker suggested that the standard should be whether the debtor had no reasonable basis for the claim of exemptions. Judge Montali suggested specifically requiring that the objection be filed before the case is closed.

Mr. Frank expressed concern about the amendment's effect on finality and questioned whether a change is needed. He stated that the possibility of a bankruptcy fraud prosecution or Rule 9011 sanctions keeps debtors from getting a free ride to file false claims of exemption. Judge Walker stated that there is little chance of prosecution for this. Several Committee members discussed the use of the good faith standard. Professor Resnick suggested that the standard be whether the debtor knowingly and intentionally made a false claim of exemptions. Judge Montali suggested using the "knowingly and fraudulently" standard in section 727(a)(4) of the Code. Instead of extending the objection period, Judge Hartz suggested using equitable estoppel with the time to object running from when there were reasonable grounds to object.

Judge Klein stated that the same change would be needed in a number of rules with parallel construction and that creditors have standing to object and should be charged with protecting their own interests. Judge Montali stated that the proposed amendment was an effort to override Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), in which the Court held that a

trustee who failed to object timely to the debtor's claim of exemptions was barred from raising the issue outside of that deadline. He said Taylor required the trustee to do the trustee's job. Judge Wedoff said Taylor enforced the rule and the amendment is an effort to say what the rule should be on the basis of Rule 9011. Professor Resnick said that focuses on the culpability of the actor, and the facts on which the actor believed he was entitled to the exemption. **The Committee agreed to refer the issue to the Subcommittee on Consumer Matters.**

Separate Document Requirement for Judgments. Bankruptcy Rule 9021 requires that a judgment entered in an adversary proceeding or a contested matter be set forth in a separate document, which is comparable to the separate document requirement in Civil Rule 58. Rule 9021 states that a judgment is effective when entered as provided in Rule 5003. Civil Rule 58 applies in bankruptcy cases except as otherwise provided in Rule 9021. Civil Rule 58(b) states that if a separate document is required, the judgment is entered when the separate document is entered on the docket and when the earlier of two events occurs: the judgment is set forth in a separate document or 150 days has run from the entry on the docket.

The Chairman stated that there is a question whether a judgment is effective when the judge rules from the bench and directs a party to prepare the order or when the formal judgment is entered. Just as attorneys may ignore the mandatory disclosure requirements in Civil Rule 26, judges sometimes ignore the separate document requirement. The Reporter stated that, in many contested matters, the order is set out in a docket entry and there is no separate document. Judge Klein said the 150-day limit applies to any appealable order in an adversary proceeding or contested matter unless it is set out in a separate document. Because there may be a question about the application of the 150-day alternative in bankruptcy cases, the Reporter suggested revising Rule 9021 either to delete the separate document requirement or to clarify the application of Rule 58 by only incorporating the provisions of subparts (a), (c), and (d) of the Civil Rule. **The Chairman referred the matter to the Subcommittee on Privacy, Public Access, and Appeals for further study.**

Debtor-in-Possession Duties under Rule 1019(5)(A). R. Bradford Leggett, an attorney in North Carolina, requested that the Committee consider amending Rule 1019(5)(A), which requires a post-conversion report by a former debtor-in-possession. Mr. Leggett stated that the conversion to chapter 7 terminates the debtor's status as a debtor-in-possession. The Chairman said the courts require the former DIP to prepare the report but that the real problem is that the attorney for the DIP is not paid for preparing the report. The Chairman asked whether the problem was serious enough to change the rule. Mr. Adelman said he considered preparing the report part of the cost of doing business as counsel to the former DIP and that the attorney should have access to the information needed for the report.

Judge Klein asked whether the attorney for the former DIP could be retained as special counsel to the chapter 7 trustee under section 327(e) of the Bankruptcy Code to prepare the post-conversion report. The Chairman said a bankruptcy court denied Mr. Leggett's request to be designated as special counsel on the basis of the Supreme Court's holding in Lamie v. U.S.

Trustee, 124 S.Ct. 1023 (2004). The Supreme Court held in Lamie that the chapter 7 debtor's counsel could not be paid out of the estate because section 330(a)(1) does not authorize payment of fees to the debtor's counsel in chapter 7 cases. Relying on Rule 1019(5)(A) and Lamie, the bankruptcy court held that preparing the post-conversion report is the DIP's obligation, not the trustee's.

Judge Klein suggested incorporating in Rule 1019(5)(A) the concept of Rule 1007(k), which governs the preparation of lists, schedules, and statements on the debtor's default. Under Rule 1007(k), the court may order the trustee, a petitioning creditor, committee, or other party to prepare any of these papers and be reimbursed from the estate as an administrative expense. Professor Resnick stated that it would cost more to prepare an application for retention under section 327(e) than it would cost to prepare the post-conversion report. Judge Walker asked if the rule was "broken" and moved that the Committee take no action. **With no dissenting votes, the Committee agreed to take no action.**

Time for Filing Corporate Ownership Statements under Rule 7007.1. The current version of Rule 7007.1 requires that any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, file a corporate ownership statement with its first pleading in the adversary proceeding. The first filing by a defendant in an adversary proceeding may not be a "pleading," as that term is defined in Civil Rule 7, which is applied in adversary proceedings by Bankruptcy Rule 7007. The Reporter suggested that Rule 7007.1 be amended to require filing the ownership statement with the party's "first appearance, pleading, petition, motion, response, or other request addressed to the court."

Judge Montali suggested requiring the statement with the party's first filing. Professor Resnick stated that electronic filings are considered papers under Rule 5005(a). Judge Klein suggested incorporating Rule 7007.1 in Rule 1018. The Reporter suggesting incorporating it in Rule 1010, instead. The Reporter stated that Rule 7007.1 is about recusal and should be applied only where recusal is possible. He said the corporate ownership statement is required in adversary proceedings under Rule 7007.1 and in voluntary petitions under Rule 1007, but not in involuntary petitions or contested matters. Judge Klein moved to use the language of Civil Rule 7.1 in the proposed amendment to Rule 7007.1 and to amend rule 1010 to require the corporate ownership statement when an involuntary petition is filed. **The motion carried with one dissenting vote. The proposed amendment to Rule 7007.1 will be submitted to the Standing Committee with a request that it be approved without publication as a conforming or technical amendment.** An amendment to Rule 1010 will require publication.

Joint Subcommittee on Venue and Mega-Cases. The Joint Subcommittee on Venue and Mega Cases (Joint Subcommittee) is composed of members of the Committee and members of the Bankruptcy Administration Committee. The Subcommittee, which is chaired by Mr. Shaffer, held its first meeting in Seattle in August 2004. Mr. Shaffer stated that the Joint Subcommittee hopes to make the system fairer and more efficient for mega cases. Mr. Shaffer outlined a four-prong effort to improve the system by (1) amending the rules to specifically authorize sua sponte

venue changes, (2) making the rest of the country more user friendly for large chapter 11 cases like the handful of districts which receive the majority of these cases now, (3) recognizing that the large chapter 11 practice is a national practice and making the system work better for out-of-town creditors and attorneys, and (4) identifying the real problems that cannot be solved in the rules context and providing guidance to the judges on these matters.

Rule 1014: Although legislation has been proposed to authorize sua sponte motions to transfer venue, Mr. Shaffer stated that he believed this could be accomplished by amending Rule 1014. Judge Zilly stated that a civil action in the district court can be transferred under section 1404 of title 28 only to a district where the action could have been filed and asked whether the transfer of a bankruptcy case or proceeding under section 1412 is subject to the same limitation. Judge Montali stated that section 1412 provides for the transfer of a bankruptcy case or proceeding to a district in the interest of justice or for the convenience of the parties. Mr. Adelman asked whether the rules amendment went beyond scope of section 105 of the Bankruptcy Code, which refers to carrying out the provisions of title 11, not the provisions of title 28. Professor Resnick stated that the rule provides who may make the motion, which is procedural.

Judge Wedoff said he had no opposition to the amendment because bankruptcy judges either already have the power to transfer cases sua sponte or the amendment gives the judges more discretion. Judge Walker stated that a specific reference in Rule 1014 to sua sponte motions could imply that the court cannot act on its own motion in other instances. Professor Resnick stated that he was not concerned about the inference. He said Rule 1017 refers to dismissal under section 707(b) on motion by the United States trustee or on the court's own motion. Professor Resnick stated that a party in interest must make a timely motion but that the court could act at any time. Judge Swain stated that the court is acting in the interest of justice and should have the broadest interpretation of time.

Professor Resnick suggested reversing the phrases so that the amendment would refer to a timely motion of a party in interest or on the court's own motion. **The Committee agreed.** Judge Klein stated that the Committee Note should state that the amendment clarifies that the court may act sua sponte, rather than it provides that authority. **The Committee agreed. Mr. Adelman's motion to approve the amendment for publication was approved without dissent.**

Rule 3007: Mr. Shaffer stated that the proposed amendment to Rule 3007 would provide needed guidance to the courts. He said there is concern about the practice in at least one district of permitting omnibus objections to claims on the merits. Judge Montali stated that disallowing a claim is substantive but that proposed Rule 3007(c) draws a distinction based on whether the objection goes to the merits. He stated that the question is whether these types of objections can be lumped together without going to the merits. Professor Resnick asked what is wrong with joining objections to claims on any grounds, including substantive grounds. Professor Morris stated that the nature of the defenses and the ease of resolving the objections differ, depending on

whether the objections are substantive.

The Chairman stated that proposed Rule 3007(c) would permit the objections to claims listed in that subsection to be joined without court approval, but that court approval would be needed to join the objections to claims listed in proposed Rule 3007(b). Judge Zilly suggested that the Committee Note state that Rule 3007(c) is intended to cover objections to claims which do not go to the merits. Judge Wedoff stated that the lack of supporting documents is not a basis for the invalidity of a claim under section 502 of the Code. Professor Resnick suggested striking section 3007(c)(7). Professor Resnick stated that the references in lines 9-10 and lines 13-14 to "objections to claims held by more than one claimant" would include individual objections to joint claims. **The Committee agreed to change the references to "objections to more than one claim."**

Judge Walker stated that the proposed rule is really guidance for better practices and that it would be better to prepare a manual than to try to develop a rule acceptable to everybody. Judge Montali responded that a revised edition of the megacase manual and other resources for judges are planned. The Chairman stated that proposed Rule 3007(d) incorporates both best practices and due process. Judge Klein stated that creditors may have difficulty finding their claims in the omnibus objections that are being filed now. He stated that the claims may not be listed in alphabetical order and that a claim may be included in multiple categories of objections. Mr. Shaffer said the debtor in the United Airlines case included page references to creditors in its omnibus objections. Mr. Adelman said the complexity of the omnibus objections to claims in the K-Mart case prompted more objections.

Professor Wiggins stated that the text to be deleted from Rule 3007 should be set out in the draft. **The Committee agreed.** Judge Klein suggested that the Committee Note state that the amendment is an exception to the Restatement on finality for appeal. **A motion for the Reporter to present a final draft of the proposed amendment at the March meeting carried without dissent.**

Rule 6006: Mr. Shaffer stated that the proposed amendment to Rule 6006 concerning omnibus assumption, rejection, or assignment of executory contracts and unexpired leases parallels the proposed amendment for omnibus objections to claims. The proposed amendment permits omnibus motions to reject but requires permission from the court for omnibus motions to assume or assign. Professor Resnick suggested that line 2 be revised to refer to "requests for court approval." He stated that motions to assume should not be combined in an omnibus motion without court permission unless the executory contracts or unexpired leases are held by the same party. Judge Swain suggested adding a provision that the motions could be combined if the contracts and leases are held by the same party.

Judge Zilly asked why no more than 100 executory contracts and unexpired leases was chosen as the maximum that could be combined. Judge Montali said the limit changed several times in earlier drafts and that the number is arbitrary in a sense. Mr. Shaffer asked whether the

rule should permit some motions to assume or assign to be combined without court permission, perhaps if the contracts or leases arose in the same transaction. Professor Resnick suggested a carve out for assumptions and assignments as part of a sale under section 363 of the Code. **The Committee agreed to combining assumptions and assignments in a section 363 sale provided that the omnibus motion is subject to proposed Rule 6006(f).**

Professor Resnick stated that the proposed amendment should deal with the assumption or assignment of contracts and leases in a plan. Judge Montali stated that Rule 6007(a) excludes plans. He stated that plans should be required to follow a "user friendly" approach to omnibus assumptions. **The Committee agreed that there should be a provision for omnibus assumption or assignment in plans but not in Rule 6006.** Judge Klein suggested renumbering sections (e) and (f) as sections (c) and (d). Mr. Shaffer stated that renumbering could cause problems with research. Professor Resnick suggested breaking section (e) into sections (e)(1) and (e)(2). Professor Wiggins suggested either deleting the word "other" in line 27 or making the wording of proposed Rule 6006(g) parallel with that of proposed Rule 3007(e). **A motion to approve the proposal in concept with a provision for the combination of related assumptions and assignments carried without dissent.**

First Day Orders: Mr. Shaffer stated that the Joint Subcommittee would make recommendations at the March meeting on what can be done on the first day of a chapter 11 case. He said the concept is similar to the interim approval of compensation for professionals, *i.e.,* that you can not bind the world forever on the first day. He said that, absent a clear showing of an emergency, the estate should not be bound by major expenditures, obligations, and waivers before the creditors' committee is organized and creditors have a chance to evaluate what is going on. Judge Wedoff stated that critical vendor payments in the United Airlines case were made on an interim basis subject to disgorgement.

Mr. Adelman stated that the provision in Rule 4001(b) for the emergency use of cash collateral for 15 days before the hearing is a perfect solution for limiting first day orders. The Chairman stated that the process should be slowed down because first day orders often are unfair to underfinanced debtors, to creditors who do not have time to review lengthy proposals, and to the court. The Committee discussed interim approval of the employment of counsel and interim payments while the court and creditors review the applicant's disclosures for possible conflicts. Judge Montali stated that it is fair to say the professional takes the risk but it may not be fair to say the professional knows the risk. Mr. Shaffer stated that waiting 15 days to review the application is not unfair and that the proposed rule may not have to provide one way or the other on disgorgement. He stated that the proposed rule would cover transactions outside the normal course of business under sections 362, 363, 364, and 365 of the Code. The Chair suggested adding waivers under section 506(c). **Mr. Shaffer stated that the Joint Subcommittee would address the issue at its meeting in January and will present a draft rule at the March meeting.**

Case Information and Pro Hac Vice: Mr. Shaffer stated that the Joint Subcommittee is

also considering how to encourage the courts to post relevant information on their websites, such as a summary of the case prepared by the debtor, case management orders, calendars, notice lists, and the like.

Mr. Adelman stated that the Joint Subcommittee is considering the feasibility of a national rule for pro hac vice admission of attorneys, especially for claims allowance and preference actions. The Subcommittee may start by developing ideas for the use of CM/ECF, teleconferences, video conferences, and limited appearances. Judge Keeley stated that requiring local counsel had been very valuable to her court. She stated that the jurisdiction of the bankruptcy rules may be challenged if the rules do not require local counsel and that the provision could reduce the fees collected for pro hac vice admission. Mr. Adelman stated that the Subcommittee was not trying to affect those fees. Judge Keeley said requiring local counsel familiar with the judges and local procedures is especially important in a small court where out-of-state attorneys appear infrequently and the court has limited control over their conduct. In addition, if the out-of-state attorney drops out of the case, the local attorney continues to represent the party.

Judge McFeeley stated that the court can sanction out-of-state attorneys but that referring disciplinary matters to an out-of-state bar may be ineffective. Mr. Adelman said Judge Rendell had suggested that out-of-state attorneys be required to consent to discipline by the local bar and to pay a fee for pro hac vice admission. Judge Schell stated that his court does not require local counsel but does require out-of-state attorneys to read the local rules and standards of practice. **Mr. Adelman stated that the Subcommittee hopes to present a more full treatment of the issues at the next meeting.**

Information Items

Extending the Appeal Time. Judge McFeeley suggested that the time for filing a notice of appeal be extended. The existing 10-day period runs from the entry of the judgment but the parties may have only six days to act because it takes two days to process the notice of the entry at the Bankruptcy Noticing Center and another two days for the notice to arrive by mail. The Reporter stated that the Committee could extend the time for appeal, change the rule to run the time for appeal from service of the notice, or change the way time is computed under Rule 9006.

Professor Resnick stated that a party could monitor the electronic docket to determine when the judgment is entered. Judge Walker stated that is a problem for pro se parties. Professor Resnick outlined the history of efforts to standardize the computation of time in the federal rules. Mr. McCabe stated that Judge Edward Leavy, the former chair of the Committee, had proposed that all the federal rules use multiples of seven days. Judge Montali stated that many courts mail notice of the entry themselves or direct the prevailing party to do so, rather than relying on the BNC to serve the notice. Judge Klein stated that the 10-day appeal period is unique in federal practice and is a barrier to entering bankruptcy practice. Judge Walker stated

that the short time for appeal and the delay at the BNC reinforce the perception that a small core of attorneys are the exclusive users of the bankruptcy system. Judge Klein suggested considering permitting the time for appeal to be reopened retroactively, as is done under Appellate Rule 4. **The issue was referred to the Subcommittee on Technology.**

National Rules for Electronic Filing. The Chairman stated that the Judicial Conference has adopted model rules for electronic filing, which the courts can follow or not. He asked whether the Committee should start considering national rules for electronic filing now or wait for further technical developments and for the development of best practices in the courts. He said the Committee should not start too early but that it takes a long time to adopt rules. Judge Wedoff stated that many large courts are just starting electronic filing and suggested waiting a little more time. Judge Zilly stated that the courts with mandatory electronic filing are just working through the glitches in their local rules. **The Committee agreed to wait in order to have the experience of more courts. The matter will remain on the agenda for consideration in the future.**

Cross Reference to Rule 4004 in Rule 9006(b)(3). The Committee discussed whether a cross reference to Rule 4004(b) should be added to Rule 9006(b)(3) or whether the existing cross reference to Rule 4004(a) should be broadened to cover Rule 4004 generally. Mr. Frank asked if the issue had ever arisen in a case. **The Committee agreed to defer the matter until such time as more substantive changes to Rule 9006 are considered.**

Servicemembers Relief Act. Judge Joan Feeney asked whether the Committee is considering proposing national rules to implement the Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-117. **There was no sentiment to pursue a national rule at this time.**

After-the-Fact Extensions of Time to File Proofs of Claim. The Committee discussed Judge Dennis Michael Lynn's suggestion to amend Rule 9006 to make after-the-fact extensions of time to file a claim under Rule 3004 or Rule 3005 more in line with the extension of time to file a claim under Rule 3002 or Rule 3003. **The Committee agreed to defer consideration of the change to such time as more substantive changes to Rule 9006 are considered.**

Revision of Final Decree. Mr. Wannamaker stated that the Director's Procedural Form entitled "Final Decree" includes a provision cancelling the trustee's bond. At the time the form was developed, many trustees had a separate bond for each case and the bond was cancelled when the case was closed. Most trustees now use "blanket" bonds which cover all of their cases. The provision is no longer needed in the Final Decree because the trustee's "blanket" bond continues in effect for other cases. **No action was required by the Committee.**

Other Information Matters. The other Information Items are set out in the agenda materials for the meeting.

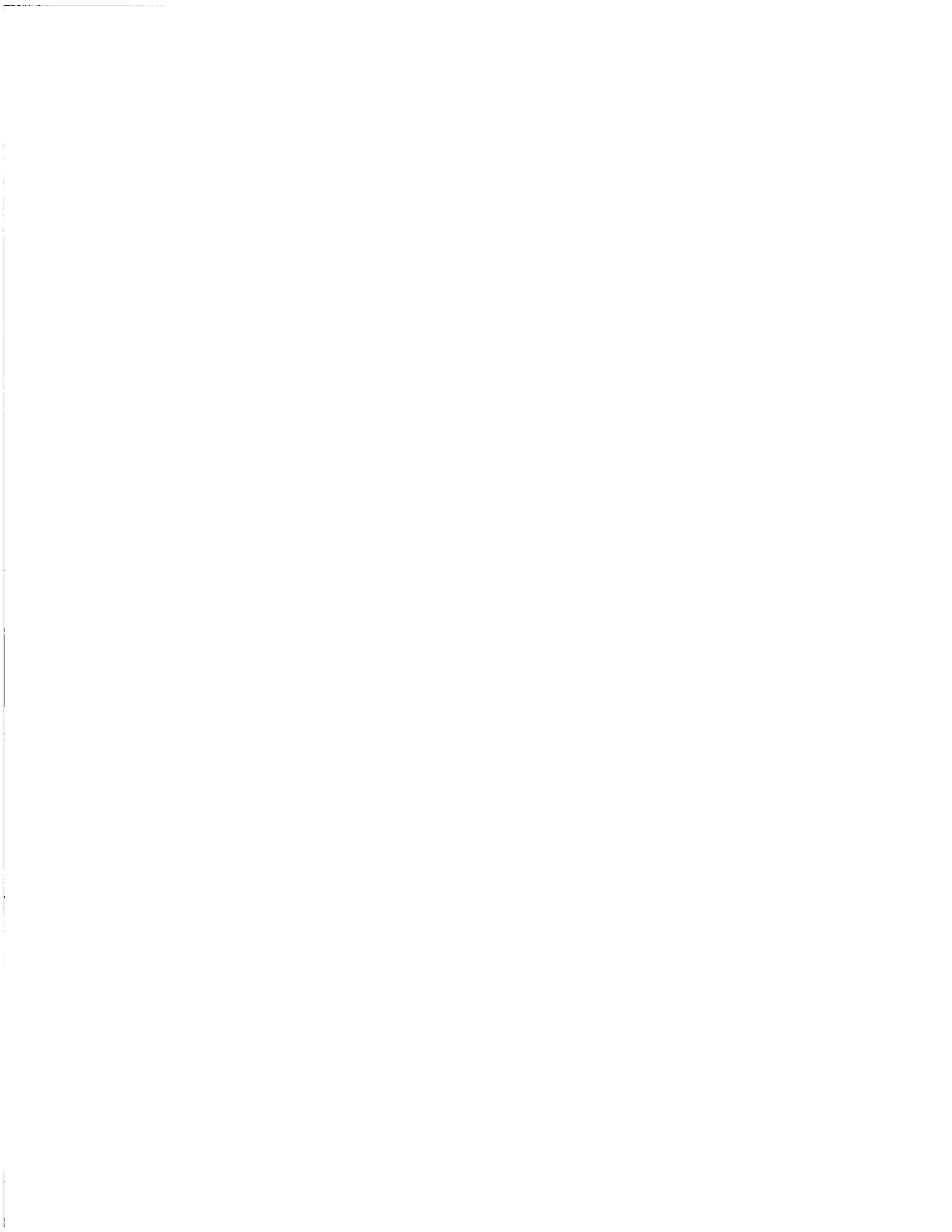
Administrative Matters

Judge Zilly, the new chairman, stated that he intends to continue the existing subcommittees with Judge McFeeley taking his position as chair of the Technology and Cross Border Insolvency Subcommittee. Judge Swain would replace Judge Zilly on the Subcommittee on Business Issues and Judge Wedoff would replace Professor Wiggins on the Subcommittee on Consumer Issues. Judge Zilly asked Committee Members to contact him within 10 days if they would like to change their subcommittee assignments. Judge Small praised the new chairman and the subcommittee chairs. Judge Small stated that he is leaving the Committee with a good feeling about what the Committee is doing and where it is going.

The Committee's next scheduled meeting will be at the Sarasota Hyatt Hotel, Sarasota, FL, on March 10-11, 2005. Judge Zilly discussed several locations as possible sites of the fall 2005, meeting, including Jackson Hole, WY, Santa Fe, NM, and Lake Tahoe, CA/NV. September 15-16 and September 29-30 are the most likely dates.

Respectfully submitted,

James H. Wannamaker, III



Items 2 and 3 will be oral reports.

A summary of the comments received on the 2005 "fast track" amendments to Rules 2002(g), 9001, and 9036 will be distributed separately along with copies of the comments.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS

RE: RULE 9036 AND ELECTRONIC SERVICE THAT DOES NOT REACH THE INTENDED RECIPIENT

DATE: FEBRUARY 12, 2005

The published version of the amendment to Rule 9036 simply deleted the final sentence of the rule so that confirmation of receipt of the transmission would no longer be necessary to "complete" the transmission. The purpose of the amendment is to encourage electronic noticing. Since internet service providers generally do not provide confirmation of receipt, the rule could discourage electronic noticing.

The Committee discussed the matter briefly in Half Moon Bay, and several members expressed concern that the rule does not address the effect of a notice being returned to the sender with a message that the notice was not received by the intended recipient. Civil Rule 5 specifically provides that an electronic notice for which the sender receives a failed delivery notice is ineffective. That rule is also applicable in adversary proceedings under Rule 7005 and in contested matters through Rule 9014(b). The question is whether Rule 9036 should contain a similar provision so that this limitation would be applicable to electronic notices that are sent in the case but that are not issued in either an adversary proceeding or a contested matter. The notices that would be covered by Rule 9036 but that are generated in other than adversary proceedings and contested matters include a variety of notices under Rule 2002, and the notice of discharge, among others. These notices are sent by the clerk, and the information provided to the

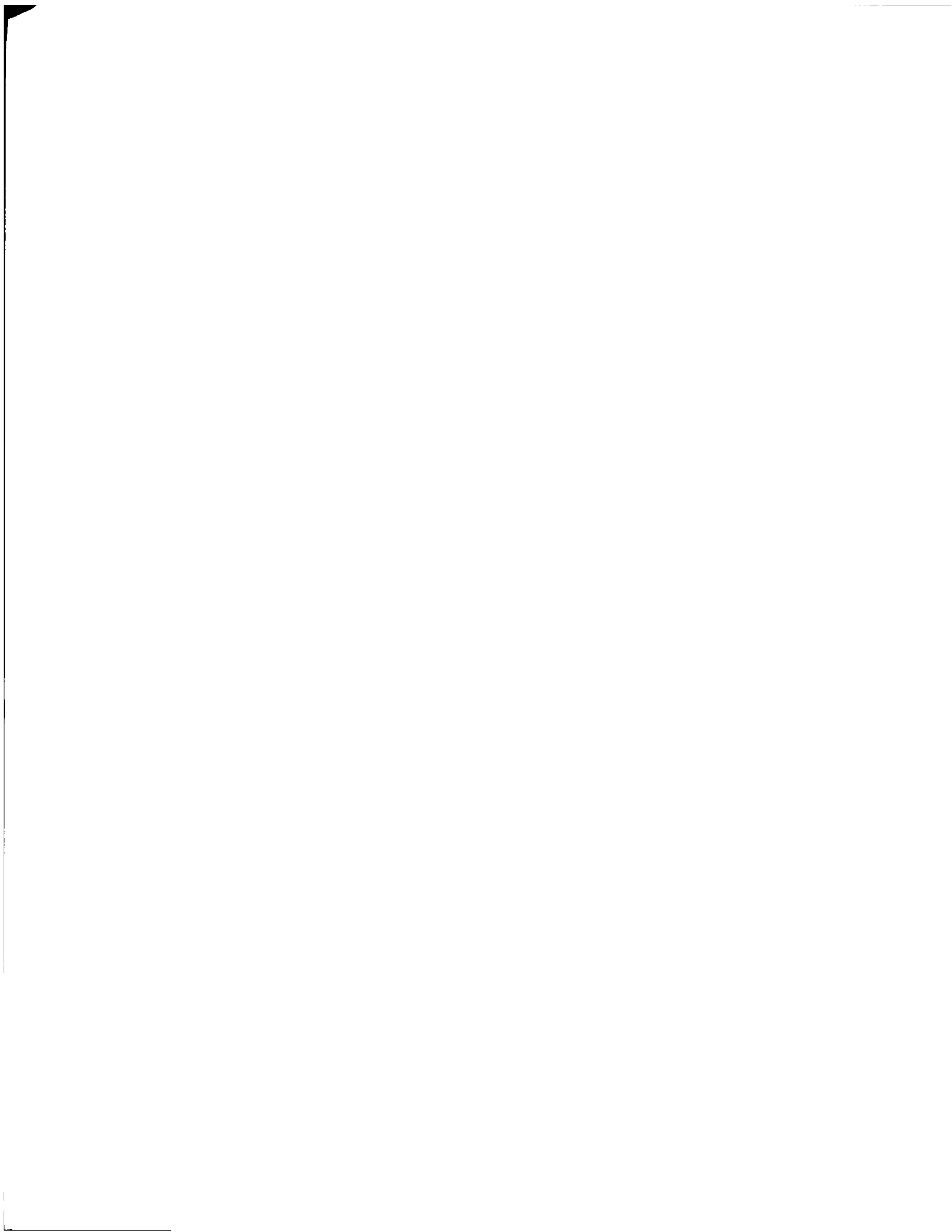
Committee in the past is that unsuccessful electronic notices are followed by mail notices to the intended recipients. Other notices that come to mind that are sent by someone other than the clerk are notices sent by the debtor of amendments to schedules under Rule 1009(a). The debtor must give notice to any entity affected by an amendment, such as when the debtor amends the schedules to claim an asset as exempt.

The issue presented is the effectiveness of the notice when the sender (be it the clerk, the debtor, or anyone else) receives a notification that the message was not received. While the rules applicable to adversary proceedings and contested matters specifically provide that these electronic notices are ineffective, Rule 9036 that governs the rest of the notices does not include that language. Interestingly, neither Civil Rule 5 nor Bankruptcy Rule 7004 contain a provision stating that service by mail (as opposed to electronic service) is ineffective when the mailing is returned to the sender as undeliverable to the intended recipient. Yet, when the issue was discussed at the meeting in Half Moon Bay there was a clear consensus that service by a mailing that was returned undelivered would not be considered effective. It would seem that the same rule should apply to electronic notices even in the absence of such a provision. In that event, an electronic notice that generates a message that the notice was not received by the intended recipient would also result in the notice being incomplete or ineffective even under the existing language of the rule.

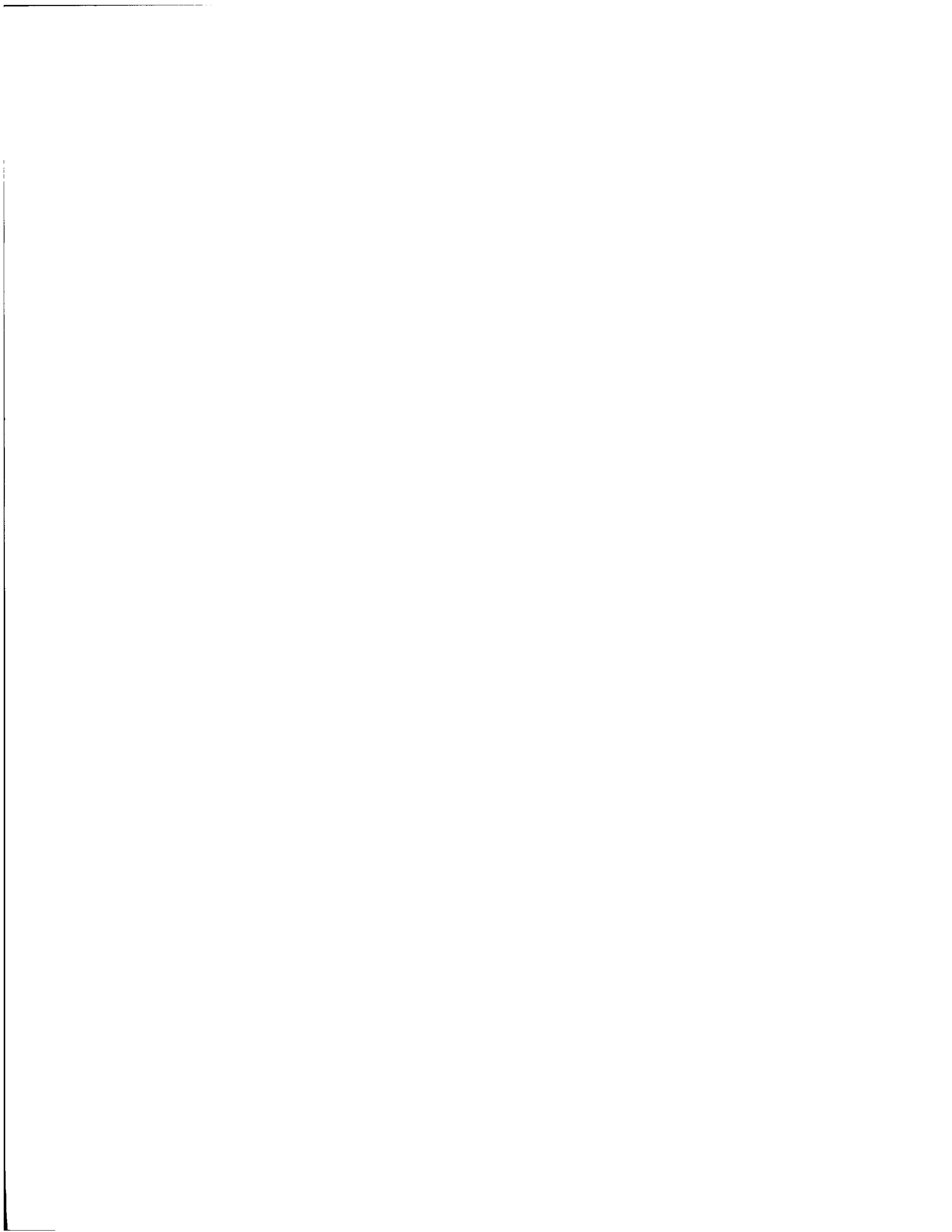
Moreover, it is not clear that the language is necessary in any event. Consider that the language of Civil Rule 5 essentially requires that the court determine as a fact that the sender of the notice thereafter received notification that the intended recipient did not receive the notice. Certainly if the court makes such a finding, the sender of the notice would not argue that the

notice is nevertheless effective. Furthermore, the court is not likely to find the notice nevertheless effective when it is an established fact that the notice was not received. Consequently, I believe that adding the language to Rule 9036 would make no real difference in the rule. Notices that we know have not been received, whether they are sent electronically or by regular mail, will not be considered effective. Therefore, I do not believe that Rule 9036 would need to be amended either by reinstating the last sentence of the rule, or by adding a sentence to the rule to the effect that the notice is ineffective if the sender receives a notification that the message was not received.

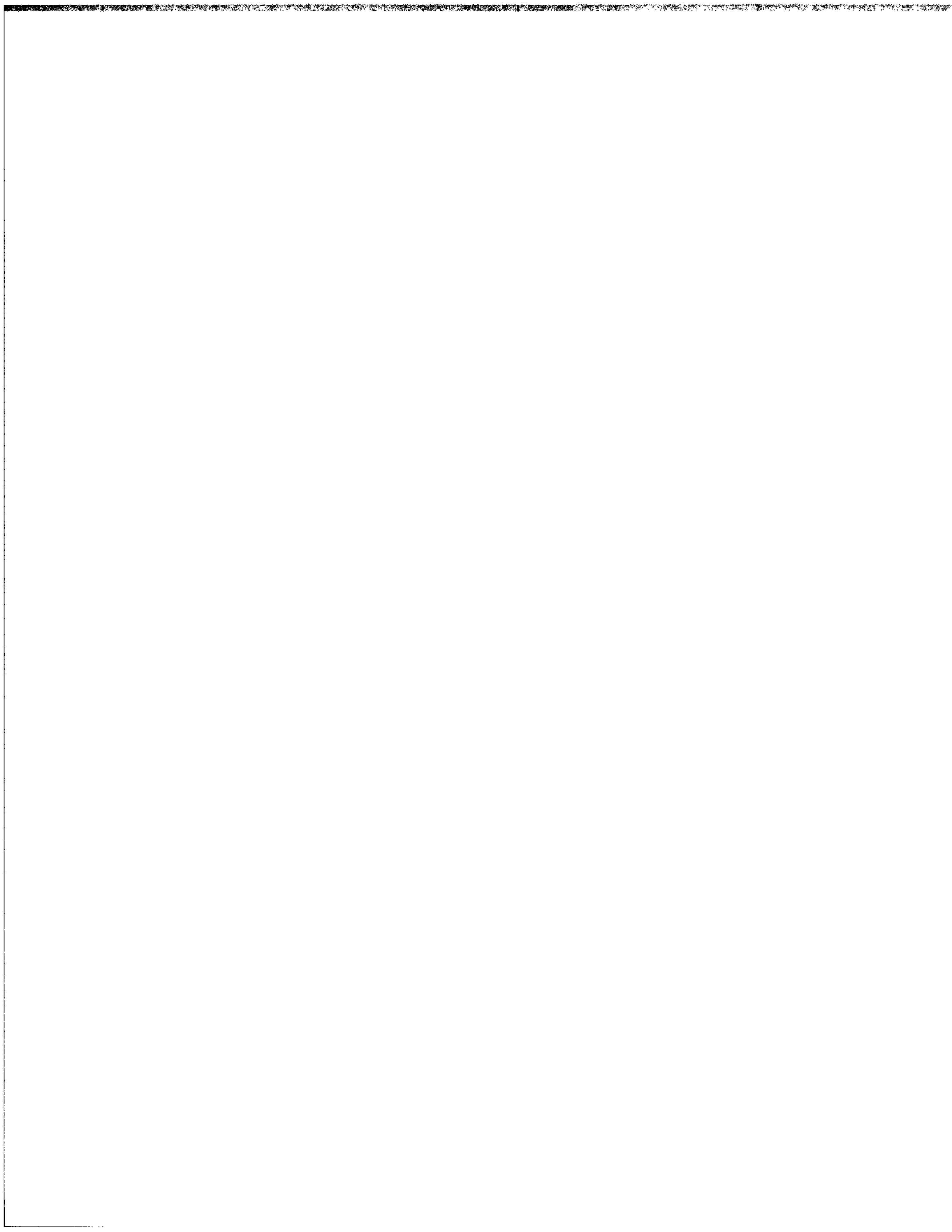
If the Committee believes, however, that the rule should be amended to provide specifically that electronic notices that are returned as undelivered are ineffective, the rule can be so amended. The Committee should also consider whether a similar provision should be added to Rule 7004(b) to avoid the appearance that a mailed notice that is returned to the sender is effective because Rule 7004(b) would be inconsistent with the provision in Rule 9036 that an undelivered electronic notice is ineffective. Making these amendments to ensure that we do not create an inconsistency that might support an argument that some returned notices are nonetheless effective could have an impact on the Civil Rules. It would seem to highlight that Civil Rule 5 does not provide that undelivered mail notices are ineffective while undelivered electronic notices are ineffective.



A summary of the comments received on the "fast track" amendment to Rule 5005(a)(2) will be distributed separately along with copies of the comments.



A summary of the comments received on the amendments to Rules 1009, 4002, 5005, and 7004, and Schedule I of Official Form 6 will be distributed separately along with copies of the comments.



PROPOSED BANKRUPTCY RULE 4002(b): TROUBLE BREWING FOR DEBTORS AND COUNSEL

Hon. Keith M. Lundin
Bankruptcy Court, M.D. Tenn.
Nashville, TN

The Judicial Conference Advisory Committee on Bankruptcy Rules has proposed amendments to Bankruptcy Rule 4002 that will require individual debtors to produce income and asset information for review by the trustee at (or before? see below) the meeting of creditors. For an uncertain return, the proposed new rule will require significant additional work of debtors and debtors' counsel, and there is a substantial likelihood that this new bankruptcy admission ticket will morph into a trap for the unwary. The details of this proposed rule are buried in the Committee Notes, and the Notes raises more questions than are answered. Public comment must be received by the Judicial Conference before February 15, 2005 (address below).

The proposed amendment to Bankruptcy Rule 4002 is the culmination of efforts by the Executive Office of the United States Trustee to require debtors to supply case trustees with tax returns, income information, and other documents that support the asset and income information already in Official Forms 6 and 7—the Schedules and Statement of Financial Affairs. The Advisory Committee on Bankruptcy Rules did not approve all of the U.S. trustee's requests but proposed Bankruptcy Rule 4002(b) imposes these new duties on individual debtors:

> (b) INDIVIDUAL DEBTOR'S DUTY TO PROVIDE DOCUMENTATION.
>
> (1) *Personal Identification.* Every individual debtor shall bring to the meeting of creditors under § 341 a picture identification issued by a governmental unit and evidence of social security number(s) or provide a written statement that such documentation does not exist or is not in the debtor's possession;
>
> (2) *Financial Information.* Unless the trustee, the United States trustee, or the bankruptcy administrator instructs otherwise every individual debtor shall bring to the meeting of creditors under § 3451 and make available to the trustee the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:
>
> (A) evidence of current income, such as the most recent pay stub;
>
> (B) the debtor's most recently filed federal income tax return, including any attachments; and
>
> (C) statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition.

The personal identification requirement in proposed Rule 4002(b)(1) is already demanded by the U.S. trustee in most districts—although this ID "requirement" is not supported by any existing provision of the Bankruptcy Code or Rules. The picture ID is perhaps intended to deal with identify theft problems. The alternative that the debtor may provide a "written statement that such documentation does not exist or is not in the debtor's possession" provides an out for the debtor who does not have a picture ID and/or does not have evidence of a social security number. The draft doesn't say so, but, presumably, an "undocumented" debtor who states in writing that there is no picture ID and/or evidence of a

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social security number can proceed with the meeting of creditors without further obligations with respect to proof of identity.

The financial information required by proposed Rule 4002(b)(2) is more complicated. "Unless the trustee, the United States trustee, or the bankruptcy administrator instructs otherwise," every individual debtor must "bring to the meeting of creditors... and make available to the trustee" evidence of income, the debtor's most recent federal income tax return and statements for bank accounts and brokerage accounts. The first obvious issue is the introductory, "unless the trustee, the United States trustee, or the bankruptcy administrator instructs otherwise." At the very least, this introductory phrase vests discretion in the case trustee, the U.S. trustee, and the bankruptcy administrator to instruct individual debtors to do something different than bringing the identified documents to the meeting of creditors. Can the case trustee or the U.S. trustee "instruct" individual debtors in a district to make the documents available to the trustee before the meeting of creditors? The proposed rule introduces the possibility that there will be a preliminary stage of document discovery in every consumer bankruptcy case in a district if the case trustee or U.S. trustee so "instructs." Will different panel trustees within a district have different "instructions" with respect to when and where debtors must produce the new documents?

It is easy to conceive that meetings of creditors will be substantially delayed under the proposed new rule. Debtors will show up at the meeting of creditors with income tax returns and bank account information in hand, which was never before seen by the case trustee. The trustee will be hard pressed to make meaningful comparison of the documents carried in by debtors and the previously filed schedules and statement. Are these new documents intended to aid the trustee after the meeting of creditors? Are panel trustees supposed to conduct a new review of each "no asset" case file after the meeting of creditors in each Chapter 7 case?

Evidence of current income seems simple enough—the proposed new rule itself provides, "such as the most recent pay stub." This, of course, makes sense with respect to a wage earner; it makes less sense with respect to a debtor whose income is retirement payments, social security, or other sources that don't produce a "pay stub."

The debtor's most recently filed federal income tax return could be a problem for electronic filers who don't have a paper copy and for any filer who didn't keep a copy. On the other hand, some debtors will have voluminous income tax returns and attachments that will not easily be reviewed for the first time at the meeting of creditors.

Statements with respect to a debtor's bank accounts and brokerage accounts may or may not be available for the time period that "includes the date of the filing of the petition"—depending on how quickly meetings of creditors are scheduled in a district and the timing of statements to the debtor. Mutual funds and brokerage accounts are more and more common for debtors in bankruptcy and more likely than regular bank accounts to not have statements for a time period that includes the date of the filing of the petition.

The rule contemplates that the debtor can "provide a written statement that the documentation does not exist or is not in the debtor's possession" in lieu of actually producing the listed documents. It can be anticipated that in almost every bankruptcy case one or more of the documents required by the proposed new rule will not exist or will not be in the debtor's possession—producing the likelihood that a "written statement" will be required in nearly every bankruptcy case.

The Committee Note states: "The rule does not require that the debtor create documents or obtain documents from third

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parties; rather, the debtor's obligation is to bring to the meeting of creditors under § 341 the documents which the debtor possesses." This critical piece of advice from the Committee—if read into the rule—would excuse the debtor from bringing to the meeting of creditors new copies of bank statements that have been thrown away or of tax returns that were filed electronically or without retained copies. Pity this comment is not somewhere in the proposed rule itself.

The written statement that documents do not exist or are not in the debtor's possession is not described in the rule but is (ominously) explained in the Committee Note as a written statement that "must be verified or contain an unsworn declaration as required under Rule 1008." For those not schooled in such things, the Committee Note says that the debtor faces the penalties attendant to perjury if an untruthful written statement is made that a payroll stub is not in the debtor's possession or a bank account statement was thrown away. Explaining this potential jeopardy becomes an important new responsibility for debtor's counsel—a responsibility that should be satisfied well in advance of the urgency of the meeting of creditors itself.

Curiously, the Committee Note contains this additional advice with respect to use of the proposed new disclosures: "the materials would not be made available to any party in interest at the § 341 meeting of creditors." The Committee Note states that only the "trustee" will be allowed to review the pay stubs, the income tax returns, and the account statements made available by the debtor. The Note seems not to contemplate that the U.S. trustee would have access to this information, and the Note goes on quite specifically that creditors will not be allowed to review these documents at the meeting of creditors but must proceed under Bankruptcy Rule 2004 to get their own information. In essence, the proposed rule creates a new class of discovery materials in bankruptcy cases that must be produced only to "the trustee."

These Committee comments raise the odd specter of a case trustee questioning the debtor at the meeting of creditors from documents that no one else is allowed to see with respect to information that may be "private information that should not be disseminated" (as stated in the Committee Note). This will happen in the unsupervised context of a meeting of creditors typically presided over by the person holding the goodies—the case trustee. How can a debtor prevent public dissemination of otherwise protected, privileged, or just plain "private" information handed to the trustee pursuant to the mandate of this new rule? Where is the procedure for a debtor to refuse to provide documents without facing some (unspecified!) jeopardy?

There is no provision of the proposed rule (or of any other rule or statute that comes immediately to mind) that would impose this quasi-confidentiality on the materials produced for the trustee. Can creditors get these documents by discovery from the trustee? On what basis would the trustee refuse a creditor's demand for access to the documents at the meeting of creditors?

Gathering and vetting the documents required by the proposed rule becomes a problem for the debtor and debtor's counsel. Debtor's counsel will have to give the debtor a list of the things that the debtor must search for in anticipation of the meeting of creditors. Debtor's counsel will have to consult with the debtor after the debtor's search to prepare the written statements when documents do not exist or are not in the debtor's possession. Amendments to the Schedules and Statement of Affairs may be necessary in advance of the meeting of creditors when documentation gathered by the debtor is not precisely consistent with information given by the debtor at the time of preparation of the Schedules and Statement of Affairs. To be on the safe side,

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debtor's counsel will have to arrange an additional meeting with the debtor in advance of the meeting of creditors to look over the documents gathered by the debtor to comply with the proposed new rule. Debtors' counsel with multiple cases on a meeting of creditors docket will not be able to review the documents collected by their clients in the moments before delivery to the case trustee at the meeting of creditors. When the debtor shows up with original documents at the meeting of creditors, there is the immediate problem of making copies for the trustee and for counsel.

Neither the proposed new rule nor the Committee Note suggests that any of the information required from the debtor is also required with respect to a nonfiling spouse. Elsewhere, the Advisory Committee has proposed amendments to Schedule I—Current Income of Individual Debtors—to require a married debtor to complete the "spouse" column without regard to whether the spouse joins the petition. As proposed, new Bankruptcy Rule 4002(b) is not complementary. In Chapter 13 cases—and proposed new Rule 4002(b) would apply in all Chapter 13 cases—income and asset information about a nonfiling spouse often is critical to determining whether a plan satisfies the disposable income test in § 1325(b). Apparently, Chapter 13 was not the focus of this proposed new rule.

The public comment period on proposed new Bankruptcy Rule 4002(b) ends on February 15, 2005. Comments should be sent to: Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments can be forwarded electronically to: <http.www.uscourts.gov/rules >.

Research References: Norton Bankr. L. & Prac. 2d §§ 45:5, 119:2; Bankr. Serv., L Ed §§ 54:20, 54:21

West's Key Number Digest, Bankruptcy 🔑 3022, 3044

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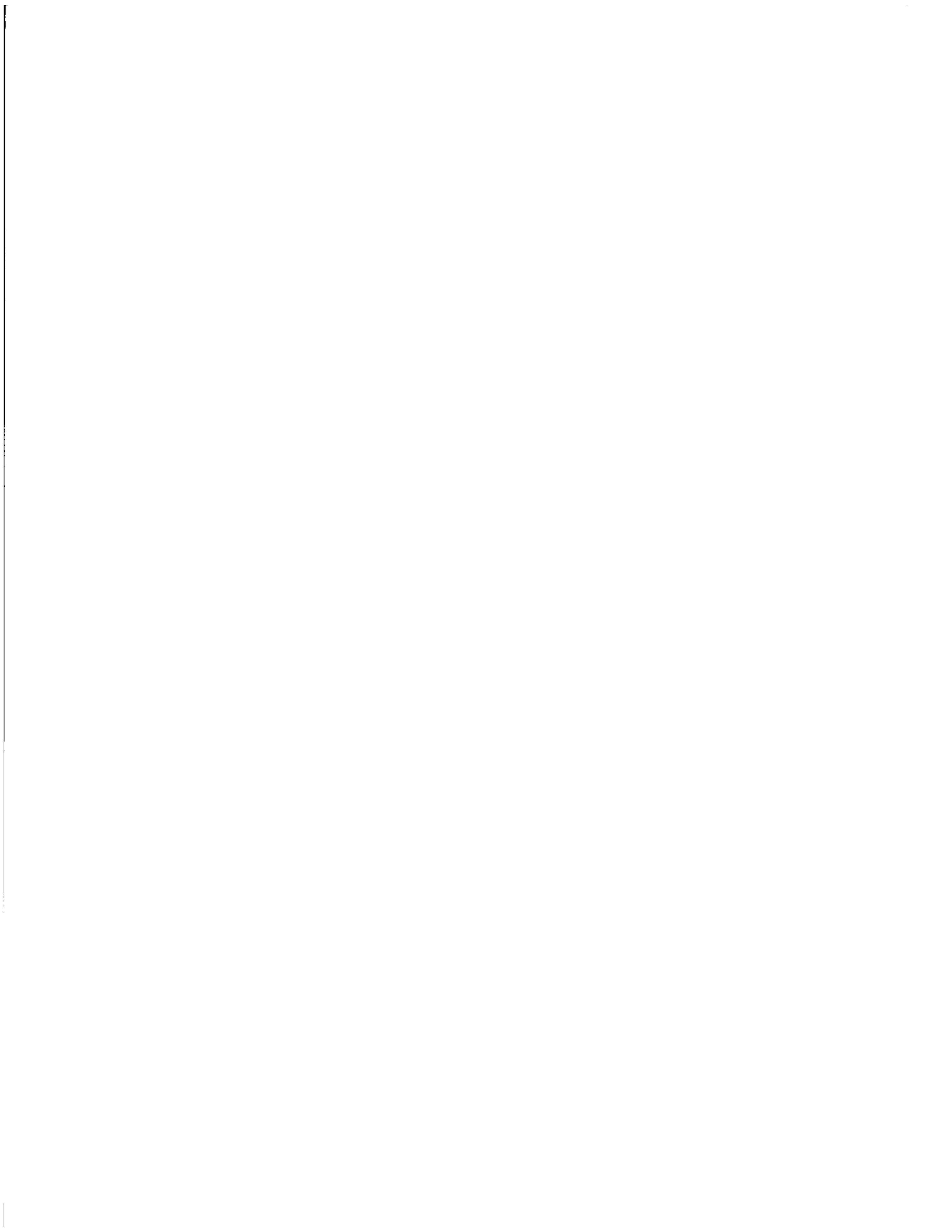


MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FORM: JEFF MORRIS, REPORTER

RE: ADDRESS FOR SERVICE ON THE DEBTOR

DATE: JANUARY 28, 2005

The Committee received a request from Bankruptcy Judge James E. Massey (N.D.Ga.) regarding the operation of Rule 7004(b)(9). Attached is a copy of his email to Judge Walker raising the issue. Specifically, Judge Massey referred the Committee to his decision in In re Khalif, 308 B.R. 614 (Bankr. N.D. Ga. 2004). A copy of the decision also is attached to this memorandum. In the case, two creditors initiated an adversary proceeding to have their joint claim against the debtor declared nondischargeable. The debtor/defendant filed no answer in response to the summons and complaint, and the creditors sought the entry of a default judgment. Judge Massey noted that the first question to be resolved was whether the debtor had been properly served in the matter. He examined the certificate of service executed by the creditors' attorney and noted that it indicated service on the debtor's attorney at her proper address (see Rule 7004(b)(9)), as well as on the debtor at an address set out in response to question 18 of the debtor's schedule of financial affairs which directs the debtor to list inter alia all business entities in which he or she served as an officer or director. The court found, however, that service on the debtor at the address listed in response to question 18 in the Statement of Financial Affairs was not the address anticipated by Rule 7004 (b)(9), so the service was ineffective and the court denied the motion for a default judgment.

The problem Judge Massey identified is the result of a change in Official Forms 1

(Petition) and 7 (Statement of Financial Affairs) in 1991. Under the 1991 amendments to these forms, the petition required the disclosure of both the debtor's residence or street address, and , if different, the debtor's mailing address. Previously, the separate information about a debtor's mailing address was contained in Question 1 of the statements of financial affairs (there used to be two separate statements, one for business debtors and another for persons not engaged in business). The 1991 amendment to the statement of financial affairs consolidated the business and non-business forms, and it deleted the question regarding the debtor's mailing address. The movement of that information to the petition form presumably rendered the question unnecessary in the statement of financial affairs. Although the statement of financial affairs no longer included a question on the debtor's mailing address, no amendment was ever made to Rule 7004(b)(9) to delete the reference in the rule to the debtor's address "as shown in the statement of financial affairs."

The Committee has already taken action to correct this problem. The currently pending proposal (published for comment in August 2004) amending Rule 7004(b)(9) deletes this phrase from the rule. The amendment also amends the provision to segregate the obligation to serve the debtor's attorney from the obligation to serve the debtor, and in new subdivision (g) it permits service on the debtor's attorney in any manner allowed by Civil Rule 5(b). Perhaps the Committee Note for that proposed rule should be revised to state more clearly the reason for the deletion of that language from the rule. For example, the following paragraph could be added to the end of the proposed note:

> The rule also is amended to delete the reference in subdivision (b)(9) to the debtor's address as set forth in the statement of financial affairs. In 1991, the Official Form of the statement of

> affairs was revised and since that time has no longer included a question regarding the debtor's current residence. Since that time, Official Form 1, the petition, has required the debtor to list both the debtor's residence and mailing address. Therefore, the subdivision is amended to delete the statement of affairs as a document that might contain an address at which the debtor can be served.

Dual service by mailing to the debtor's street address and mailing address

The rule, as amended in the currently published version, permits service by mail on the debtor either at the address set out on the petition, or at any address that the debtor designates in a filed writing. The form of the petition includes a separate box for the debtor's street address and a mailing address, if it is different from the street address. Judge Massey has suggested that the rule should be amended to provide that service on the debtor under Rule 7004(b)(9) should be mailed to the debtor both at the street address and the mailing address, if the mailing address is different than the street address. He asserts that such an amendment would increase the likelihood that service would actually occur and would permit the courts to get to the merits of the underlying matter. The current rule is arguably ambiguous in that it does not distinguish between the debtor's street address and mailing address, both of which may be included on the debtor's petition. By requiring service on both addresses, the ambiguity is resolved.

The countervailing argument is that Rule 7004(b)(9) is not ambiguous. The rule as it exists governs service by mail. Therefore, if the debtor's petition includes a mailing address that is different from the debtor's street address, the debtor has himself or herself set out the address at which mailed notices should be sent. Furthermore, Rule 4002(5) requires the debtor to "file a statement of any change of the debtor's address," so that any failure of delivery of service because the debtor moved would be the debtor's own fault.

A revised Rule 7004(b)(9) to adopt Judge Massey's suggestion follows.

RULE 7004. Process; Service of Summons, Complaint

1 * * * * *

2 (b) SERVICE BY FIRST CLASS MAIL

3 * * * * *

4 (9) Upon the debtor, after a petition has been filed by or

5 served upon the debtor and until the case is dismissed or closed, by

6 mailing a copy of the summons and complaint to the debtor at the

7 street address and mailing address, if different from the street

8 address, shown in the petition ~~or statement of affairs~~ or to such

9 other address as the debtor may designate in a filed writing ~~and, if~~

10 ~~the debtor is represented by an attorney, to the attorney at the~~

11 ~~attorney's post-office address~~.

COMMITTEE NOTE

The rule is amended to require that service of a summons and complaint on a debtor by mail must be sent both to the debtor's street address and mailing address, if that mailing address is different from the street address. The petition sets out both addresses, and requiring service by mail on both addresses provides a greater assurance that the debtor will actually receive the service of the summons and complaint.

Should there be an option to serve a debtor under subdivisions other than Rule 7004(b)(9)?

Another issue raised in Khalif is whether the otherwise defective service might have been

sufficient if it met the requirements of Rule 7004(b)(1) in lieu of (b)(9). Subdivision (b)(1) governs service on "an individual other than an infant or incompetent", while subdivision (b)(9) governs service on the debtor. If the debtor is an individual, service arguably might be sufficient under (b)(1) even if it is not sufficient under (b)(9). While there are not many decisions on the issue, there certainly exists the potential for conflict in the decisions. Most courts have held that Rule 7004(b)(9) provides the exclusive means for service on the debtor and debtor's counsel. See e.g., In re Shapiro, 265 B.R. 373 (Bankr. E.D.N.Y. 2001); In re Terzian, 75 B.r. 923 (Bankr. S.D.N.Y. 1987). Other courts have held that service on the debtor may be effected under Rule 7004(b)(1). See, e.g., In re Anderson, 179 B.R. 401, 408, n.10 (Bankr. D. Conn. 1995). The pending amendment to Rule 7004(b)(9) and the insertion of a new subdivision (g) might help to resolve any conflict. The new version of the rule arguably strengthens the argument that service on the debtor is proper only under subdivision (b)(9). The new subdivision (g) leaves subdivision (b)(9) solely to govern the issue of service on the debtor. Presumably, this would highlight that when the debtor is to be served, that service must be made under (b)(9) and not another subdivision of the rule.

The court in Anderson argued that service under subdivision (b)(1) is actually more likely to provide actual notice to the debtor because the place of service is the debtor's "dwelling house or usual place of abode or ... the place where the individual regularly conducts a business or profession" rather than to an address that the debtor provided in the past and may not have updated. The Shapiro decision, on the other hand, offers a persuasive response to that position. In Shapiro, the court noted that the debtor had failed to update his address as required by Rule 4002(5), so the court held that service on the debtor at the address set out in a variety of places,

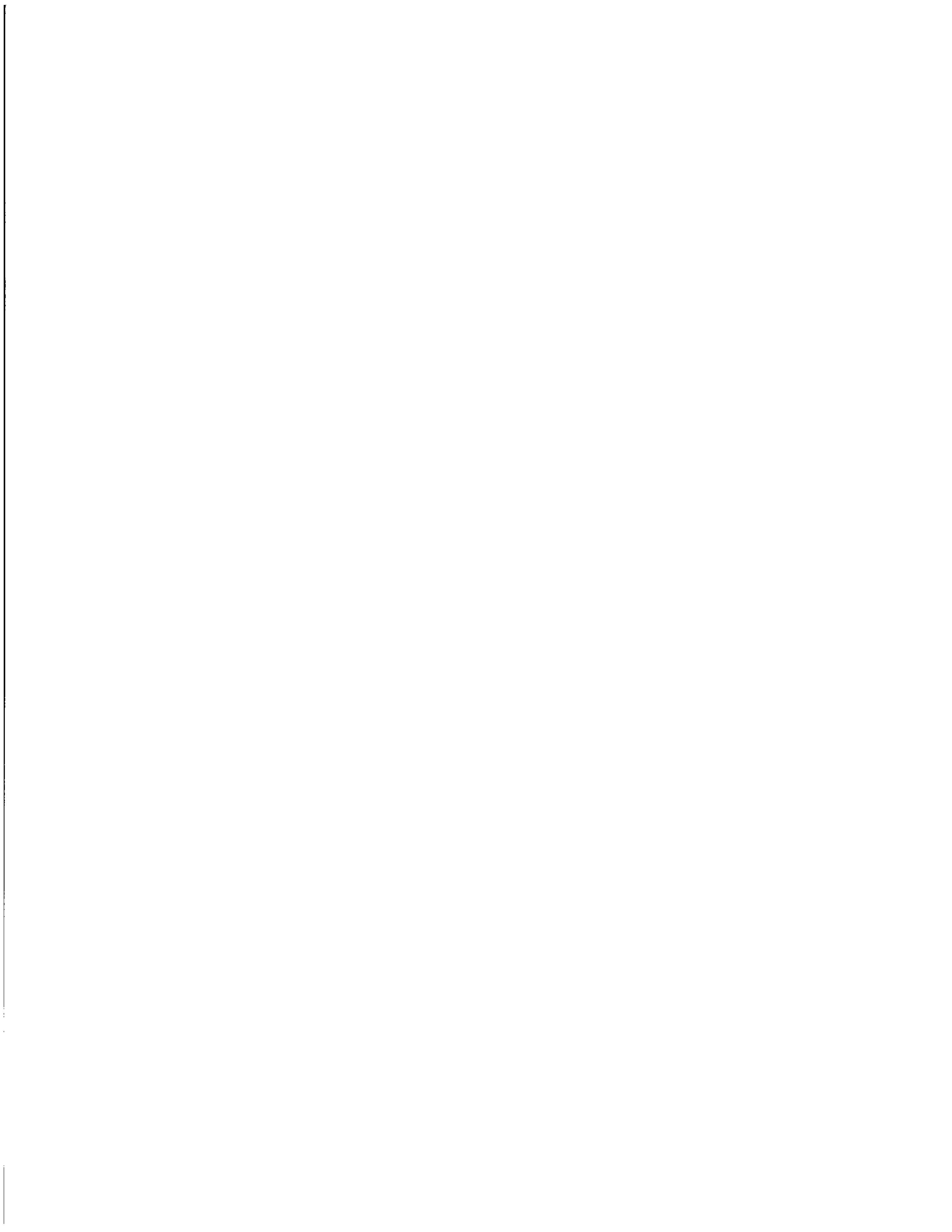
but not on the petition, was nevertheless effective. The court also directed the debtor to file a corrected statement of address that would be treated as having been filed as of the time of the service of the summons and complaint. The courts have looked behind the facts of the manner and address of service and held that in the proper circumstances that the matter should not be dismissed for the failure to serve the documents properly. See, e.g., Beard v. United States Trustee, 188 B.R. 220 (W.D. La. 1995)(court upholds decision not to dismiss objection to confirmation of chapter 13 plan for failure to serve debtor's attorney as well as debtor).

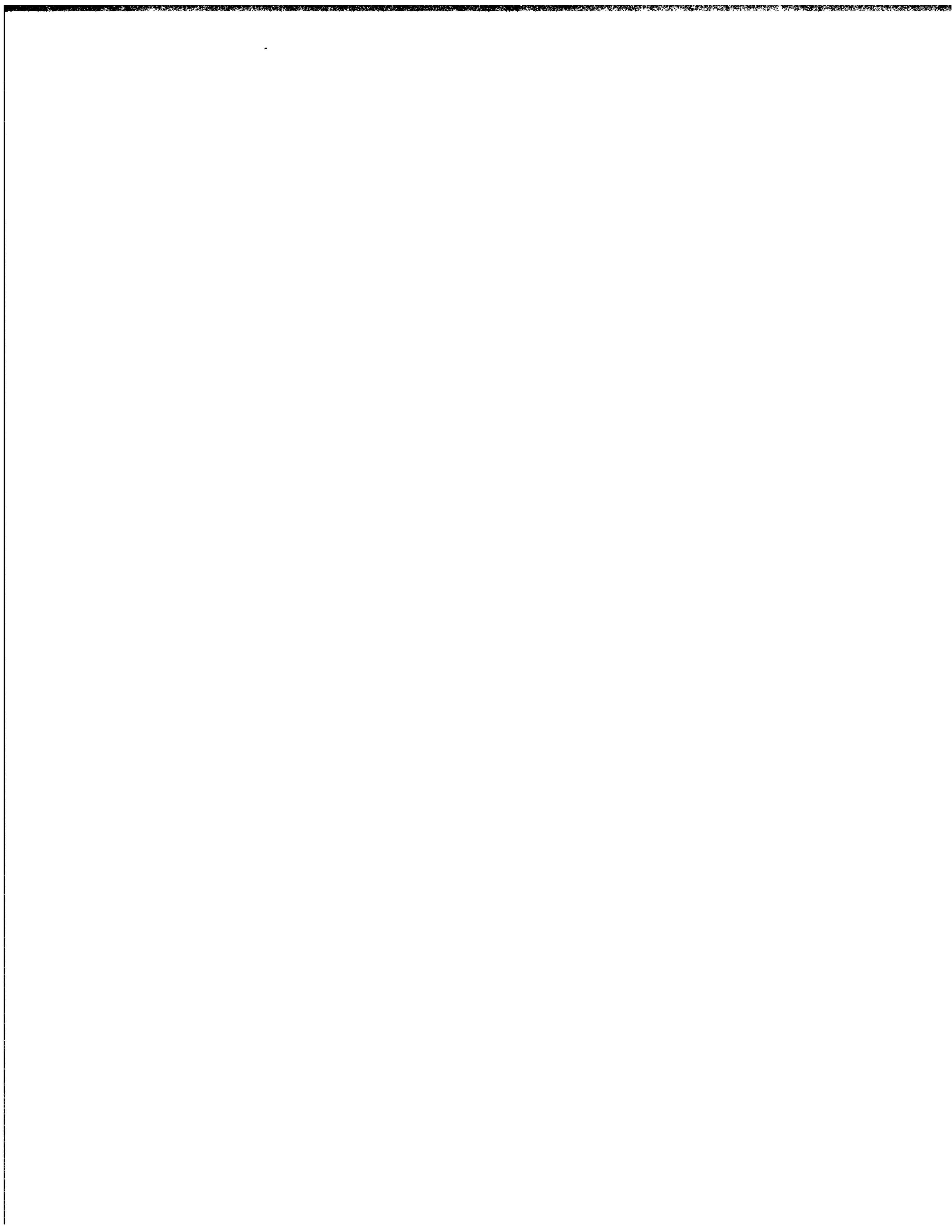
The courts have considered the reasons for the plaintiff's failure to effect proper service in these cases and have permitted subsequent service generally when the plaintiff can show good cause for the failure to make a timely and effective service. Under F. R. Civ. P. Rule 4(m), made applicable by Bankruptcy Rule 7004(a), the courts have a process under which defective service can be remedied in appropriate circumstances. To the extent that the failure is in some way attributable to actions or inactions by a debtor who has actual notice of the proceeding, the courts generally will deny a motion to dismiss the action. If, however, the plaintiff has made a strategic decision to make service in a particular way and has chosen not to effect proper service when the opportunity arose, the courts have granted motions to dismiss for failure to properly serve the debtor.

Given the number of adversary proceedings and contested matters that require service under Rule 7004, there does not appear to be a pressing need for amendment of the rule to clarify that subdivision (b)(9) governs service on the debtor. The courts have generally noted that this more specific provision governs the more general directive of subdivision (b)(1). Only the court in In re Anderson, 179 B.R. 401 (Bankr. D. Conn. 1995) has taken the directly opposite position,

and that decision has not been followed on those grounds. Instead, the courts seem to be vigilant about the requirements of service under Rule 7004 while also preventing gamesmanship by debtors who are seeking to dismiss actions on the grounds of defective service when the debtor has played any role in the plaintiff's failure to serve the documents properly. Consequently, I do not believe that we should amend the rule any more than is already proposed.

If the Committee believes that the rule should be amended to clarify whether service on a debtor can be made only by compliance with subdivision (b)(9), the Rule could be amended by inserting additional language at the beginning of that subdivision. For example, it could begin with: "Notwithstanding subdivisions (b)(1)-(8),". This would make service under the other subdivisions either worthless or insufficient. The rule also could be amended to insert in the opening phrases of subparts (1)-(3) a statement that the debtor is excluded from the operation of that provision. For example, (b)(1) would provide that service could be made "upon an individual who is not the debtor and who is not an infant or incompetent..." On the other hand, if the Committee believes that service under any provision of Rule 7004 (b) is sufficient, the rule would likely require more extensive amendment. The rule could be amended to provide in subdivision (b)(9) that service under that subpart is deemed to be service under subparts (b)(1)-(3), as appropriate. The policy issue to be decided is whether plaintiff's should be limited to service on a debtor by subpart (b)(9) or whether other addresses for service should likewise be available to the plaintiff when commencing an action against the debtor.





From: James Massey/GANB/11/USCOURTS
To: James Walker/GAMB/11/USCOURTS@USCOURTS

Date: Friday, October 01, 2004 08:56AM
Subject: Service by mail on Debtor under Rule 7004

FYI Jeff Morris re rule change

Jimmy,

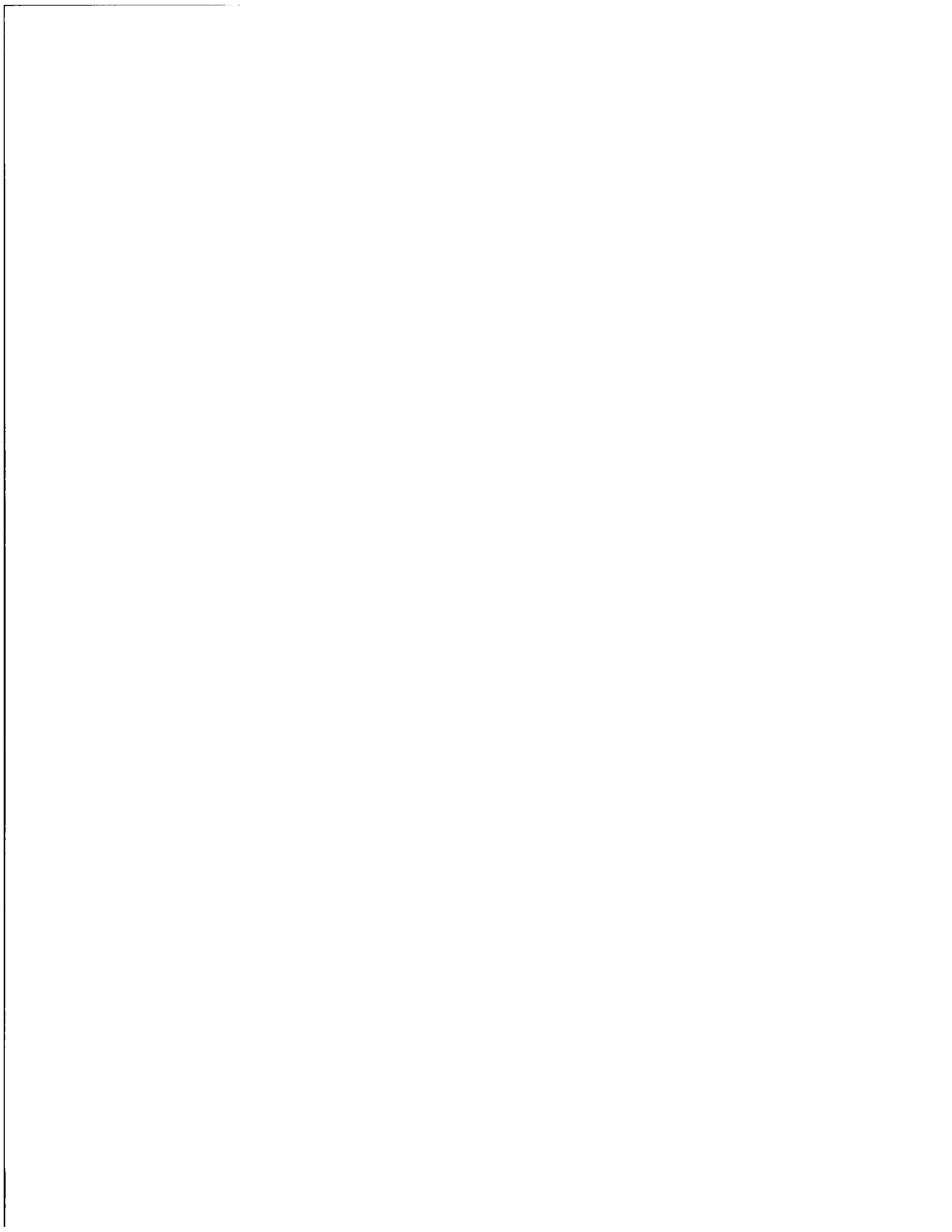
The decision I published that dealt with the provision in Rule 7004(b)(9) is In re Khalif, 308 BR 614. I spoke to Jeff Morris about the issue before I published it. I should also point out that subsection (b) (9) is also confusing, if not inaccurate, in referring to "the" address shown in the petition in those cases in which the debtor's mailing address is different from the street address.

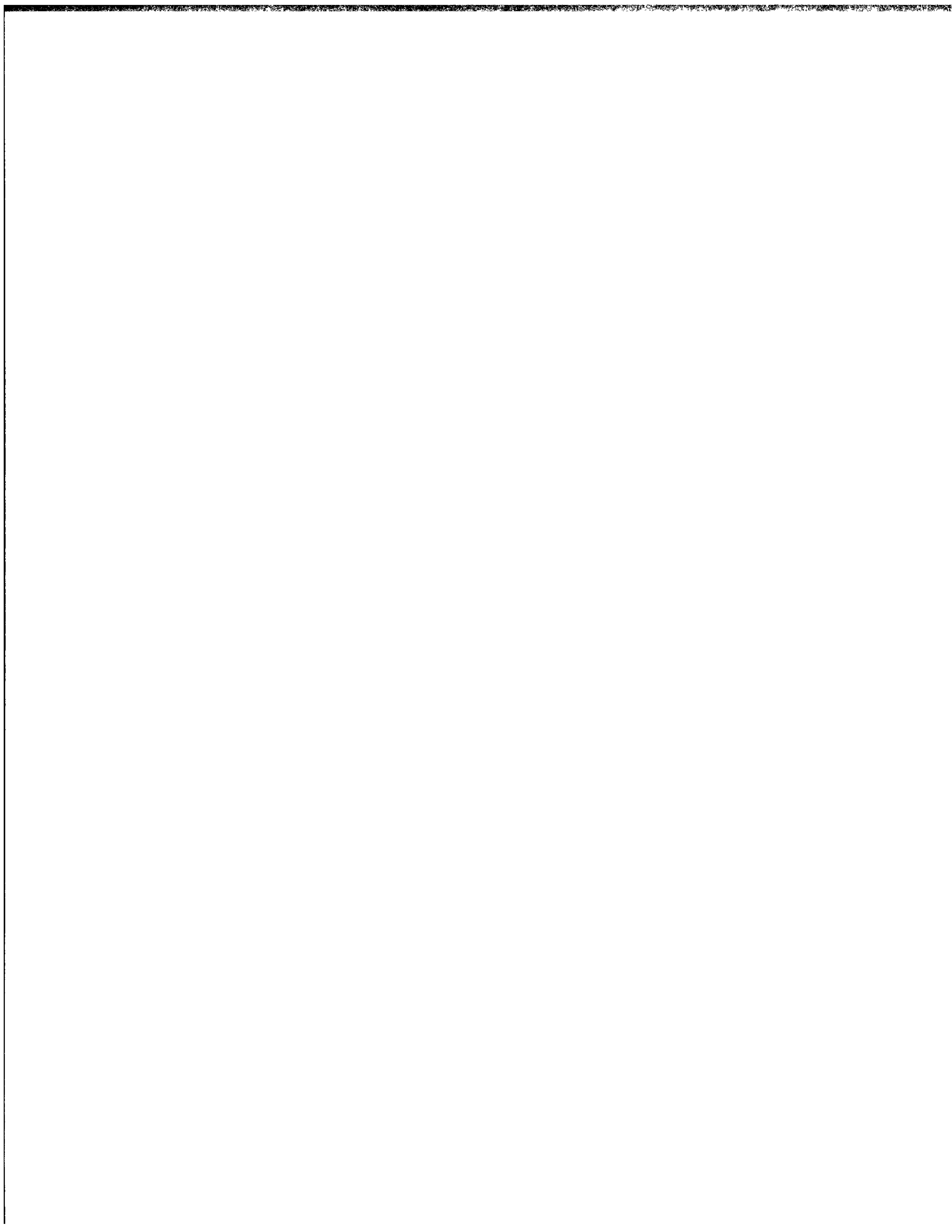
While you all are about amending the rule, you might write it so say, "the street address and mailing address, if different, shown in the petition." I don't think that debtors are officially told, except that they are presumed to know what Rule 4002 says, a test that well more than half the lawyers here would fail if asked what it covers. Many of us hold that if a complaint or motion is mailed to the debtor at a petition address and no other current address is known, service is good, even if the pleading comes back marked "moved, no forwarding address" by the PO.

If the debtor moves, and the street address is used but is invalid, but the mailing address is good, is service at the street address good? Or, more importantly, vice versa, where the mailing address is bad and used but the street address remains valid? If both addresses are good and the plaintiff or movant uses only one, is that sufficient? One solution is to require that both addresses be used, and I favor that, as indicated by the suggested language above, on the theory that the object is to reach the merits and that one but not both addresses may be valid at the time of service. If the decision were to be that the mailing address must be kept current for service by mail, that fact needs to be more prominently communicated to debtors. The best way to do this would be to indicate the requirement next to the mailing address line in the petition.

I have every intention of getting back to you shortly on the question of pages of attachments to POC's but busy I am.

Jim.





United States Bankruptcy Court,
N.D. Georgia,
Atlanta Division.

In re Saeed KHALIF, Debtor.
Gregory Smith, M.D. and Dominique Smith, M.D., Plaintiffs,
v.
Saeed Khalif, Defendant.

Bankruptcy No. 03-92269.
Adversary No. 03-9296.

April 26, 2004.

Background: Creditors brought adversary proceeding to except from discharge an obligation arising from loan which Chapter 7 debtor obtained, two days before filing for bankruptcy, by falsely promising to repay creditors, with substantial interest, in period of just four months.

Holdings: On creditors' motion for entry of default judgment based on debtor's failure to answer their complaint, the Bankruptcy Court, James E. Massey, J., held that:

(1) allegations in creditors' complaint, that debtor who had in the past acted as their accountant induced them to lend him money by falsely promising to repay this loan with interest, were insufficient to state claim to except resulting debt from discharge as one for debtor's fraud while acting in fiduciary capacity, even assuming that debtor owed fiduciary duties to creditors' in his capacity as their accountant;

(2) debtor's refusal to honor unenforceable oral agreement to reaffirm debt could not support damages claim against him for his alleged fraud; and

(3) by failing to respond to creditors' complaint, debtor did not admit bare allegation in creditors' complaint that they had justifiably relied on debtor's false representation.

Motion denied.

West Headnotes

[1] Bankruptcy 🔑2162
51k2162
Defendant who willfully fails to respond to complaint is deemed to admit any well-pleaded allegations of fact therein concerning liability, but is not held to admit facts that are not well-pleaded or to admit conclusions of law.

[2] Bankruptcy 🔑2165
51k2165
Decision to enter judgment by default rests in court's sound discretion.

[3] Bankruptcy 🔑2165
51k2165
Default judgments are not generally favored, and any doubts about entering or setting aside a default judgment must be resolved in favor of defaulting party.

[4] Bankruptcy 🔑2158
51k2158
Nondischargeability complaint that was mailed to Chapter 7 debtor, not at street and mailing address shown on his petition, but at prepetition address mentioned in his statement of financial affairs in response to question about businesses for which he was officer, director, partner, or managing executive within two years of petition date, was not served at address "shown in the petition or statement of affairs," within meaning of Bankruptcy Rule governing service of complaint, even if address remained valid postpetition. Fed.Rules Bankr.Proc.Rule 7004(b)(9), 11 U.S.C.A.

[5] Bankruptcy 🔑2162
51k2162
Chapter 7 debtor lacked authority to turn over, to secured creditors, nonexempt estate property that had not been abandoned by trustee, so that turnover count in creditors' complaint against debtor, which did not include any allegation that property was exempt or had been abandoned and did not name trustee as additional defendant, failed to state claim on which relief could be granted.

[6] Bankruptcy 🔑3384
51k3384
Allegations in creditors' complaint that debtor who had in the past acted as their accountant induced them to lend him money by falsely promising to repay this loan with interest in four months, even though he intended at time to file for bankruptcy, were insufficient to state claim to except resulting debt from discharge as one for debtor's fraud while acting in fiduciary capacity, even assuming that debtor owed fiduciary duties to creditors' in his capacity as their accountant, where creditors did not allege the kind of technical trust relationship required by dischargeability exception, nor did they allege any connection between alleged fraud, on loan which they made to debtor solely in his personal capacity, and debtor's conduct as fiduciary. Bankr.Code, 11 U.S.C.A. § 523(a)(4).

[7] Bankruptcy 🔑3357(2.1)
51k3357(2.1)
Meaning of the term "fiduciary," as it is used in "fiduciary fraud" dischargeability exception, is question of federal law. Bankr.Code, 11 U.S.C.A. § 523(a)(4).

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[8] Bankruptcy 🔑3357(3)
51k3357(3)
Term "fiduciary," as it is used in "fiduciary fraud" dischargeability exception, is not to be construed expansively, but is intended to refer to technical trusts. Bankr.Code, 11 U.S.C.A. § 523(a)(4).

[9] Bankruptcy 🔑3357(3)
51k3357(3)
"Technical trust," of kind required to support complaint to except debt from discharge as one for debtor's "fraud or defalcation while acting in fiduciary capacity," includes voluntary trust created by contract, which is often referred to as express trust. Bankr.Code, 11 U.S.C.A. § 523(a)(4).

[10] Bankruptcy 🔑3357(1)
51k3357(1)
For debt to be excepted from discharge, as one for debtor's "fraud or defalcation while acting in fiduciary capacity," bankruptcy court must find that debtor acted as a fiduciary and that, in course of performing his fiduciary duties, he committed act of fraud or defalcation. Bankr.Code, 11 U.S.C.A. § 523(a)(4).

[11] Bankruptcy 🔑3357(3)
51k3357(3)
For debt to be excepted from discharge, as one for debtor's "fraud or defalcation while acting in fiduciary capacity," trust relationship must have existed prior to act which created the debt. Bankr.Code, 11 U.S.C.A. § 523(a)(4).

[12] Bills and Notes 🔑534
56k534
Under Georgia law, creditor suing to collect on promissory note has valid contractual right to attorney fees as long as (1) note's terms include an obligation to pay attorney fees; (2) debt owed under note has matured; (3) notice was given to debtor informing him that if he pays the debt within ten days of receipt of notice, he may avoid attorney fees; (4) ten day period has expired without payment of the principal and interest in full; and (5) debt is collected by or through attorney. West's Ga.Code Ann. § 13-1- 11.

[13] Bankruptcy 🔑3384
51k3384

[13] Bills and Notes 🔑471
56k471
Allegations in creditors' complaint to recover sums allegedly owing on debtor's promissory note as nondischargeable debt of debtor, regarding their alleged contractual right to attorney fees based on terms of note, were insufficient to state enforceable claim for attorney fees under Georgia law, absent any allegation that creditors had given proper notice to debtor of their intent to collect attorney fees, or of debtor's ability to avoid liability for such fees by promptly paying principal and interest owed. West's Ga.Code Ann. § 13-1- 11.

[14] Bankruptcy 🔑3415.1
51k3415.1
Chapter 7 debtor's refusal to honor unenforceable oral agreement to reaffirm debt could not support damages claim against him for his alleged fraud, given debtor's statutory right to rescind even an executed reaffirmation agreement within 60 days of signing it. Bankr.Code, 11 U.S.C.A. § 524(c)(2)(A).

[15] Bankruptcy 🔑3388
51k3388
Bankruptcy court had jurisdiction to enter money judgment in dischargeability proceeding. Bankr.Code, 11 U.S.C.A. § 523(a).

[16] Bankruptcy 🔑3388
51k3388
Amount of nondischargeable debt, in proceeding to except debt from discharge as debt for money, property, services or credit obtained by debtor's "false pretenses, false representation or actual fraud," is not limited to value of money or property received by debtor. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A).

[17] Bankruptcy 🔑3388
51k3388
In proceeding to except debt from discharge based on Chapter 7 debtor's alleged fraud in inducing creditors to lend him $25,000 by falsely promising, within four months, to pay them $31,250, even though he allegedly intended to immediately file for bankruptcy, creditors were not entitled to money judgment in their favor for both the $25,000 lent and the promised $6,250 in interest, to extent that interest rate violated Georgia usury law. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A); West's Ga.Code Ann. § 7-4-18(a).

[18] Usury 🔑42
398k42
Where debtor, in exchange for $25,000 loan, had promised to pay lenders $31,250 in just four months, this additional $6,250 above amount lent had to be viewed as interest, for purpose of deciding whether loan violated Georgia usury law. West's Ga.Code Ann. § 7-4-18(a).

[19] Usury 🔑61
398k61
Daily late charge of "2% per day of the entire overdue amount," that borrower agreed to pay in promissory note, bore no reasonable relationship to costs lenders might incur for administering loan, and had to be viewed as additional interest, for purpose of deciding whether loan violated Georgia usury law. West's Ga.Code Ann. § 7-4-18(a).

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[20] Usury 145
398k145
[20] Usury 146
398k146
Under Georgia law, civil penalty for usury is forfeiture of all interest and other charges owed, though lender is allowed to recover its principal.
[21] Bankruptcy 3353(1)
51k3353(1)
In order to prevail on a complaint to except debt from discharge as one for money, property, services or credit obtained by debtor's false representation, creditor must prove traditional elements of common law fraud: (1) that debtor made false representation to deceive creditor; (2) that creditor relied upon this misrepresentation; (3) that reliance was justified; and (4) that creditor sustained loss as result. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A).
[22] Bankruptcy 3387.1
51k3387.1
By failing to respond to creditors' fraud-based nondischargeability complaint, Chapter 7 debtor did not admit the bare allegation in creditors' complaint that they had justifiably relied on debtor's false representation, which was in nature of conclusion of law; accordingly, court would not enter default judgment against debtor, but would require creditors to prove that, in loaning money to debtor at exceedingly high rate of interest without investigating his purported finances and reasons for money, they had justifiably relied on oral promise of repayment that debtor made two days prior to filing for bankruptcy. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A).
[23] Bankruptcy 3353(14.6)
51k3353(14.6)
"Justifiable" reliance, such as creditor must demonstrate in order to prevail on complaint to except debt from discharge based on debtor's "false pretenses, false representation or actual fraud," is matter of qualities and characteristics of particular creditor, and circumstances of particular case, rather than of application of community standard of conduct. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A).

[24] Bankruptcy 3353(14.6)
51k3353(14.6)
While "reasonable reliance" standard is objective one, that is measured by the reliance that a reasonable person would place on representation, and that often entails duty to investigate, the standard of "justifiable reliance," of a kind implicated in proceeding to except debt from discharge based on debtor's "false pretenses, false representation or actual fraud," is more relaxed in that investigation is required only in event of clear warnings of deception arising from creditor's own knowledge or intelligence in making cursory observation, or from facts known to creditor at time of reliance. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A).
***617** Monica R. Owens, Jay Michael Barber, Decker, Hallman, Barber & Briggs, PC, Atlanta, GA, for Plaintiffs.

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

JAMES E. MASSEY, Bankruptcy Judge.

In this adversary proceeding, Plaintiffs Gregory Smith and Dominique Smith seek a judgment declaring that a debt allegedly owed to them by Defendant and Debtor Saeed Khalif is not dischargeable. Defendant has not filed an answer or other response with the Court, as indicated by the Clerk's entry of default made on November 20, 2003, and Plaintiffs move for the entry of a default judgment.

Rule 7012(a) of the Federal Rules of Bankruptcy Procedure provides that "[i]f a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons." Rule 5(d) of the Federal Rules of Civil Procedure, made applicable by Fed. R. Bank. P. 7005, requires a litigant to file any pleading subsequent to the complaint "within a reasonable time after service." Rule 55(a) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7055, provides that "[w]hen a party against whom a judgment for affirmative relief is sought ***618** has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Rule 55(b) describes the circumstances in which "judgment by default may be entered" by the Clerk or the Court.

[1] "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed.R.Civ.P. 8(c), made applicable by Fed. R. Bankr.P. 7008. Hence, a defendant that willfully fails to respond to a complaint is deemed to admit the well-pleaded allegations concerning liability. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155 (2nd Cir.1992). "The [defaulting] defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank,* 515 F.2d 1200, 1206 (5th Cir.1975).

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[2][3] "The decision to enter judgment by default rests in the court's sound discretion. *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.,* 115 F.3d 767, 771 (10th Cir.1997) (citing *Ruplinger v. Rains,* 946 F.2d 731, 732 (10th Cir.1991))." *Busey v. Board of County Com'rs of County of Shawnee, Kansas* 163 F.Supp.2d 1291, 1297 (D.Kan.2001). "Default judgments are not generally favored and any doubt in entering or setting aside a default judgment must be resolved in favor of the defaulting party." *Finch v. Big Chief Drilling Co.,* 56 F.R.D. 456, 458 (E.D.Tex.1972).

[4] The first question presented by Plaintiffs' motion for a default judgment is whether they "duly served" the summons and complaint on Defendant. If not, the Court would lack in personam jurisdiction over Defendant to grant the relief demanded. *In re Brackett,* 243 B.R. 910, 913 (Bankr.N.D.Ga.2000).

Bankruptcy Rule 7004(b)(9) specifically provides the method for service by mail on a debtor as follows:

> b) Service by First Class Mail.
> Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
> [...]
> (9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

Plaintiffs filed a certificate of service executed by their attorney, Monica R. Owens, in which she stated that on September 25, 2003 she served Defendant by mailing a copy of the summons and complaint to him at 4282 Memorial Drive, Suite D, Decatur, Georgia 30032 and by properly mailing a copy to Defendant's attorney, Divida Gude, at her address shown in the Defendant's bankruptcy petition.

The street and mailing address of Defendant shown in his petition was 3480 Donegal Way, Lithonia, Georgia. Unfortunately for Plaintiffs, the Memorial Drive address was not "the address shown in the ... statement of affairs." As explained in detail below, the reference in Rule 7004(b)(9) to "the address in the ... statement of affairs" is to the debtor's response to a question about a debtor's current address ***619** in abrogated official forms. Consequently, the service by mail on Defendant described in the certificate of service filed by Plaintiffs' counsel did not and could not satisfy Bankruptcy Rule 7004(b)(9).

The text of Bankruptcy Rule 7004(b)(9) is taken from the similar text of old Bankruptcy Rule 704(c)(9) in effect under the old Bankruptcy Act, which also contained a provision permitting service by mail on a bankrupt "at the address shown in the petition or statement of affairs." 11 U.S.C. app.- Bankruptcy Rule 704(c)(9) (1976). The form of the voluntary petition used to commence a bankruptcy case under the Bankruptcy Act required a bankrupt to state a "post-office address." 11 U.S.C. app.-Official Bankruptcy Form 1 (1976). Under the old Bankruptcy Rules, there were two versions of the statement of affairs, depending on whether the bankrupt was engaged in business. Question 1(c) of the Statement of Affairs for Bankrupt Not Engaged in Business asked: "Where do you now reside?" 11 U.S.C. app.-Official Bankruptcy Form 7 (1976). Question 1(a) of the Statement of Affairs for Bankrupt Engaged in Business asked: "Under what name and where do you carry on your business?" 11 U.S.C. app.-Official Bankruptcy Form 8 (1976).

The Bankruptcy Act was repealed, and on October 1, 1979 the Bankruptcy Code became effective. 11 U.S.C. § 101 et seq. (1976 ed., Supp. IV). The Federal Rules of Bankruptcy Procedure, including official forms, became effective on August 1, 1983. The revised Official Form 1, the voluntary petition, referred to a "debtor" instead of a "bankrupt," but the requirement to provide a "post-office address" remained the same. 11 U.S.C. app.- Official Form 1 (1982 & Supp. I 1984). The titles of Official Forms 7 and 8 were amended to add the word "financial" before the word "affairs," but question 1(c) in Form 7 and question 1(a) in Form 8 remained the same. 11 U.S.C. app.-Official Forms 7 and 8 (1982 & Supp. I 1984).

Official Forms 1, 7 and 8, among others, were significantly amended as of August 1, 1991. Revised Official Form 1 was amended to require the debtor's "street address" and a mailing address if different from the debtor's street address. 11 U.S.C. app.-Official Form 1, (1988 ed., Supp. III). Among other changes, the revised Official Form 7 became the only form for the statement of financial affairs, thereby eliminating a distinction based on whether the debtor was engaged in business, and it omitted the questions in the abrogated

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Forms 7 and 8 about the debtor's current residence and business addresses. 11 U.S.C. app.-Official Form 7, (1988 ed., Supp. III). (A new form, Chapter 7 Individual Debtor's Statement of Intention, was designated as Official Form 8. 11 U.S.C. app.-Official Form 8 (1988 ed., Supp. III)).

Defendant mentioned the Memorial Drive address in response to a question on his Statement of Financial Affairs about businesses in which he was "an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship or was a self-employed professional within the two years preceding the commencement of the case...." The possible coincidence that he used the Memorial Drive address at the time of service is irrelevant with respect to service pursuant to Bankruptcy Rule 7004(b)(9). A prepetition address mentioned in a debtor's statement of financial affairs, even if valid postpetition, is not "the address shown in the ... statement of affairs" to which that Rule refers. Hence, service of the summons and complaint on Defendant at the Memorial Drive address could not have complied with Bankruptcy Rule 7004(b)(9), even if he maintained a place of abode or ***620** regularly conducted his business at that address on and shortly after September 25, 2003.

Bankruptcy Rule 7004(b)(1) permits service on "an individual other than a minor or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession." Courts have given inconsistent answers to the question of whether a debtor may be served pursuant to Rule 7004(b)(1) instead of, or in addition to, Rule 7004(b)(9). Compare *U.S. Escrow v. Bloomingdale (In re Bloomingdale),* 137 B.R. 351 (Bankr.C.D.Cal.1991) with *Ingerman v. Shapiro (In re Shapiro),* 265 B.R. 373 (Bankr.E.D.N.Y.2001) and *Union Trust Co. v. Anderson (In re Anderson),* 179 B.R. 401, 408 (Bankr.D.Conn.1995). The Court does not presently reach this question because the record contains no evidence that the Memorial Drive address was Defendant's dwelling house or usual place of abode or the place where he regularly conducted a business or profession at the time the envelope containing those documents would have been delivered.

The problems facing Plaintiffs do not end with the issue of service. The complaint is also deficient in important respects. Understanding the defects requires a statement of the facts alleged in the complaint.

The complaint properly alleged the following facts. Defendant was Plaintiffs' tax preparer and personal accountant. On June 1, 2002, Plaintiffs loaned $25,000 to Defendant, and Defendant signed a promissory note promising to pay Plaintiffs $31,250 on October 1, 2002. The promissory note provided that in the event of a default, Defendant would owe, after a five-day grace period, a "late charge of 2% per day of the entire overdue amount until payment in full is received," additional interest on the unpaid balance at the rate of 5% per month and attorney's fees in the amount of 20% of the unpaid balance.

Defendant also executed a security agreement in which he granted Plaintiffs a security interest in "all personal investment accounts with Charles Schwab, Fidelity Investments, TD Waterhouse and Fairbanks Capital Corp." The security agreement further provided that in the event of a default, Defendant would pay "a sum equal to thirty percent (30%) of the outstanding unpaid amount of the Debtor's account and previously incurred costs for the collection of that as and for a reasonable attorney's fee."

Debtor made a false representation to Plaintiffs that he would repay them the sum of $31,250.00 on or before October 1, 2002 in accordance with the terms of the note. Debtor made the false representation with the intent of deceiving Plaintiffs to induce them to lend him $25,000.00. Debtor did not inform Plaintiffs on June 1, 2002 that he intended to file bankruptcy.

On June 3, 2002, Defendant filed a Chapter 13 case under case number 02- 95793. He was represented by counsel. His Schedules did not mention the debt owed to Plaintiffs, list Plaintiffs as creditors, or include the property mentioned in the security agreement. While that case was pending, the note between Plaintiffs and Defendant became due. Unaware of Defendant's bankruptcy, Plaintiffs demanded payment of the note from Defendant and received a check in the amount of $31,250 dated November 6, 2002. This check was returned by Defendant's bank for insufficient funds. On December 18, 2002, this Court dismissed Defendant's Chapter 13 case for failure to remit payments to the trustee, and that case was closed on January 22, 2003.

***621** On February 28, 2003, Defendant filed the present bankruptcy case. Again, Defendant's Schedules did not mention the debt owed to Plaintiffs, list Plaintiffs as creditors or include the property mentioned in the security agreement. On March 27, 2003, unaware of the new bankruptcy petition,

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Plaintiffs filed suit against Defendant in the State Court of DeKalb County, Georgia to collect on the note. When Plaintiffs served Defendant with the State Court complaint, Defendant informed Plaintiffs of the pending bankruptcy case.

Plaintiffs' complaint contains seven counts, numbered I, II, III, IV, VI, VII and VIII. There is no count V. The Court will discuss each count, beginning with the ones that fail to state a claim for relief.

[5] In count II, entitled "Replevin--Recovery of Collateral," Plaintiffs seek a judgment directing Defendant to turn over collateral allegedly securing Plaintiffs' claim. All property in which Defendant had an interest on the petition date, however, became property of the estate under section 541 of the Bankruptcy Code. The Court takes judicial notice that the Chapter 7 Trustee has not abandoned any estate property and that Defendant did not exempt in his Schedule C any property described in the security agreement with Plaintiffs. Therefore, property in which Defendant had an interest on the petition date, excluding exempted property but including property securing Plaintiffs' claim, remains property of the estate. Debtor lacks the authority to turn over estate property even if it is still in his possession. The representative of the estate is the Chapter 7 Trustee, who is an indispensable party in an action seeking a turn-over of property of the estate, but Plaintiffs did not name the Trustee as a defendant. Hence, count II fails to state a claim on which relief can be granted. It should be noted that Plaintiffs also failed to show that they perfected a security interest in the collateral described in the security agreement. If the collateral exists and Plaintiffs failed to perfect their security interest, that unperfected lien will be voidable by the Trustee under section 544 of the Bankruptcy Code.

[6] In count III, Plaintiffs assert that a fiduciary duty existed between the parties because Defendant was their accountant and tax advisor. They allege that Defendant breached a fiduciary duty to them by defaulting on the note and bouncing a check and that they are entitled to damages in an amount to be determined at trial. In count VIII, Plaintiffs reassert that Defendant breached a fiduciary duty as alleged in count III. In this count they assert that the debt for the alleged breach of a fiduciary duty is not dischargeable, but they do not refer to any section of the Bankruptcy Code. (In count VIII, Plaintiffs also repeat the contention that they were defrauded as alleged in count IV.) Counts III and VIII must be read together because the Court cannot grant relief on the claim for money damages in count III unless the debt sued on in count III is not dischargeable.

The only section of the Bankruptcy Code applicable to Plaintiffs' contention that Defendant committed fraud while acting as a fiduciary, thereby rendering the debt owed to Plaintiffs nondischargeable, is section 523(a)(4). It provides that a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" is excepted from the general discharge granted under section 727. If Plaintiffs thought they were stating a claim for relief under section 523(a)(4) in counts III and VIII, they are mistaken.

[7][8][9][10] The meaning of the word "fiduciary" in section 523(a)(4) is a question of ***622** federal law. *See Davis v. Aetna Acceptance Co.,* 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934). "The Supreme Court has consistently held that the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts." *Quaif v. Johnson,* 4 F.3d 950, 953 (11th Cir.1993) (citations omitted). A technical trust includes "a voluntary trust, created by contract, often referred to as an 'express' trust." *Id.* "For a debt to be non-dischargeable under 11 U.S.C. § 523(a)(4), the bankruptcy court must find that the debtor acted as a fiduciary and that in the course of performing his fiduciary duties, he committed an act of fraud or defalcation." *Eavenson v. Ramey,* 243 B.R. 160, 164-165 (N.D.Ga.1999).

[11] Even if Defendant owed some kind of fiduciary duty to Plaintiffs with respect to his services as their accountant, that duty would have no application to a loan transaction unrelated to his accounting services. Plaintiffs do not allege the existence of a technical or express trust as to which Defendant owed Plaintiffs a fiduciary duty. Nor do they show any connection between the alleged fraud and the conduct of Defendant as a fiduciary. Under the holding of the *Davis* case, "the trust relationship [must] have existed prior to the act which created the debt in order to fall within the statutory exception." *Quaif,* 4 F.3d at 953. In other words, section 523(a)(4) is inapplicable to a trust created as result of fraud that gives rise to the debt. Hence, counts III and VIII fail to state a claim upon which relief can be granted.

[12][13] In count VI of the complaint, entitled "Attorney's Fees," Plaintiffs seek attorney's fees pursuant to the note equal to "20% of the total amount due as a result of having to bring the instant action to collect upon the unpaid debt owed by Debtor" and

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pursuant to the security agreement equal to "30% of the outstanding unpaid amount of the Debtor's account and previously incurred costs of collection." Under Georgia law, a contractual obligation to pay attorney's fees is governed by O.C.G.A. § 13-1-11. That section provides in part that an obligation in a note or other evidence of indebtedness for payment of attorney's fees is "enforceable up to but not in excess of 15 percent of the principal and interest owing on said note or other evidence of indebtedness," so long as the party seeking attorney's fees complies with the balance of that statute. The security agreement constitutes an "evidence of indebtedness" within the meaning of the statute because the "outstanding unpaid amount of the Debtor's account" on which attorney's fees are to be computed is nothing more than a cross-reference to the amount due under the note.

> This provision is enforceable so long as: (1) the note's terms include an obligation to pay attorney fees; (2) the debt owed under the note has matured; (3) notice was given to the debtor informing him that if he pays the debt within ten days of the notice's receipt, he may avoid attorney fees; (4) the ten day period has expired without payment of the principal and interest in full; and (5) the debt is collected by or through an attorney. As stated in the Code section quoted above, once these conditions are established, contractual provisions to pay attorney fees in connection with a creditor's efforts to collect on a note "shall be valid and enforceable."

Termnet Merchant Services, Inc. v. Phillips, 277 Ga. 342, 344, 588 S.E.2d 745, 747 (2003). The complaint here fails to allege that Plaintiffs gave Defendant proper notice of their intent to collect attorney's fees of up to fifteen percent of principal and interest owing and that any such notice informed Defendant that he would avoid ***623** having to pay attorney's fees by paying the principal and interest owed. Hence, count VI fails to state a claim upon which relief can be granted.

[14] In count VII of the complaint, entitled "Voluntary Petition For Bankruptcy," Plaintiffs allege that in his prior Chapter 13 case, Defendant engaged in "fraudulent conduct" and acted in bad faith by agreeing to execute a reaffirmation agreement and then refusing to do so. Section 524 of the Bankruptcy Code sets out the ground rules for entering into reaffirmation agreements. It provides in relevant part:

> (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--
>
> (2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and
>
> (B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection[.]

It does not take a law degree to understand this language. Because a debtor can legally rescind an executed reaffirmation agreement within 60 days of signing it, it is frivolous to contend that a debtor's refusal to honor an unenforceable oral agreement to reaffirm a debt constitutes a fraudulent act or bad faith, giving rise to a claim for damages. This count also fails to state a claim upon which relief can be granted.

[15] The remaining two counts I and IV read together state claims for relief at least in part. In count I, Plaintiffs seek a judgment for the "sums due in accordance with the terms of the Promissory Note, including principal, interest, late charges and attorney's fees." Complaint, ¶ 14. "[A]ll circuit courts that have addressed the issue [of whether a bankruptcy court may enter a money judgment in a dischargeability proceeding] have concluded that bankruptcy courts do have jurisdiction to enter money judgments." *In re Lang,* 293 B.R. 501, 516-517 (10th Cir. BAP 2003) (citing cases from the 2nd, 6th, 7th and 9th Circuit Courts of Appeal; footnote omitted). In count IV, Plaintiffs allege that the debt owed by Defendant arises from fraud, that they are entitled to a judgment declaring the debt to be nondischargeable and that the amount of debt should be determined at trial.

In their brief in support of their motion for a default judgment, they ask the Court to enter a judgment for $31,537.98, which includes principal of $21,250, interest of $2,520, expenses of $397.48 and attorney's fees of $7,370.50. According to exhibit D attached to their brief, Plaintiffs computed interest at the rate of 5 % per month, which is the default rate stated in the note. The motion and brief do not state the total amount paid by Defendant to Plaintiffs on the debt, but the disclosure that the principal amount of the debt is presently $21,250 must mean that Defendant repaid at

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least $3,750, perhaps $10,000 and possibly more.

[16] The amount of nondischargeable debt under section 523(a)(2)(A) is not limited to the value of money or property received by the debtor. *Cohen v. de la Cruz,* 523 U.S. 213, 218, 118 S.Ct. 1212, 140 ***624** L.Ed.2d 341 (1998) ("The most straightforward reading of § 523(a)(2)(A)" is that it prevents discharge of "any debt" respecting "money, property, services, or ... credit" that the debtor has fraudulently obtained....") Hence, Plaintiffs are entitled to relief on count I to the extent of Defendant's liability to repay a contractual debt that is also a debt respecting money fraudulently obtained by Defendant.

[17] The debt at issue is less than Plaintiffs imagine. The portion of count I seeking attorney's fees fails to state a claim for relief to the extent that the claim is based on the attorney's fees provisions in the note for the reason given above in the discussion of count VI. Plaintiffs would be entitled to an award of reasonable attorney's fees under O.C.G.A. § 13-6-11, if they can prove fraud. *See Cary v. Guiragossian,* 270 Ga. 192, 508 S.E.2d 403 (1998). The demand for interest and late charges in count I is without merit because the note is usurious, as discussed below. Hence, any payment made by Defendant that Plaintiffs applied to interest must be reallocated to principal.

In Georgia, usury is a crime. O.C.G.A. § 7-4-18(a) provides in relevant part:

> (a) Any person, company, or corporation who shall reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 5 percent per month, either directly or indirectly, by way of commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or device whatsoever shall be guilty of a misdemeanor[.]

[18] The loan in question was made on June 1, 2002. Under the note, Plaintiff was required to repay Plaintiffs the sum of $31,250 on October 1, 2002, which was four months (122 days to be precise) after the loan was made. The difference between the amount borrowed and the amount to be repaid is $6,250. That this amount is interest there can be no doubt.

In *Norris v. Sigler Daisy Corp.,* 260 Ga. 271, 392 S.E.2d 242 (1990), the Georgia Supreme Court had occasion to consider the meaning of the word "interest" in O.C.G.A. § 7-4-18(a). There, the appellant contended that a loan in the face amount of $12,310.50, which included a so-called "origination fee" of $5,800, was usurious, but he had lost in the trial court and in the Court of Appeals. Reversing, the Supreme Court opined:

> OCGA § 7-4-18(a) prohibits "... any rate of interest greater than 5 percent per month, either directly or indirectly, by way of commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or device whatsoever...." The origination fee on the loan in question was clearly a fee paid for the extension of credit. The disclosure form provided by the lender indicated that the cost of the credit included that fee. Whether it be considered a "commission for advances," part of "other fees," or a "contrivance" or "device," we find the origination fee to be within the scope of the word "interest" as it is used in OCGA § 7-4-18.

Id. at 272-73, 392 S.E.2d 242.

The note in the present case refers to the person signing it, Mr. Khalif, as "Guarantor" and to Plaintiffs as "Investors" and states in the section entitled "Terms of Repayment," that the Guarantor "guarantee[s] the repayment with a twenty five percent (25%) return on investment." Gratuitous use of words like "guarantor" and "investors" do not transform a garden variety loan into a security so as to take the transaction out of O.C.G.A. § 7-4- ***625** 18(a). It is obvious that the use of investment language in the note was a mere contrivance to avoid the impact of O.C.G.A. § 7-4-18(a) and that the $6,250 to have been paid by Defendant to Plaintiffs four months after they loaned him $25,000 was "clearly a fee paid for the extension of credit." The note itself confirms that the charge of $6,250 is interest because it states that if there is a default, the Plaintiffs would receive "*additional* interest on the unpaid balance at the rate of 5% per month." (Emphasis added.)

Under O.C.G.A. § 7-14-18(a), Plaintiffs could legally charge interest on the $25,000 loan at a monthly rate not exceeding 5% of the principal amount or $1,250 per month. The note required Defendant to pay $6,250 for use of $25,000 for four months or $1,562.50 per month. Hence, Plaintiffs charged an usurious rate of interest during the stated term of the loan.

[19] The daily late charge of "2% per day of the entire overdue amount" provided for in the note is also a fee paid for the extension of credit because this charge could bear no reasonable relationship to costs Plaintiffs

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might incur for administering the loan. If the term "entire overdue amount" was intended to include previously charged late fees, the amount due as of the date of this Order would be over $17 billion. If the note is read to mean that the 2% daily late charge and the 5% default interest rate were not to be compounded, the amount owed by Defendant as of the date of this Order would be over $400,000. Needless to say, these default interest charges are usurious.

[20] The civil penalty for usury is the forfeiture of all interest and other charges owed, although the lender is allowed to recover the principal. *Norris v. Sigler Daisy Corp.,* 260 Ga. at 273, 392 S.E.2d 242.

[21] Finally, in count IV Plaintiffs assert that the debt owed by Defendant is not dischargeable under section 523(a)(2)(A) of the Bankruptcy Code, which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> ...
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by--
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

To obtain a judgment on a claim of false representation, Plaintiffs must prove the "traditional elements of common law fraud: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation." *SEC v. Bilzerian,* 153 F.3d 1278, 1281 (11th Cir.1998).

In count IV, Plaintiffs allege that Debtor made a false representation that he would repay them $31,250 on or before October 1, 2002 on which they justifiably relied to induce them to lend him $25,000.

Plaintiffs further allege in paragraphs 44, 45 and 46 of the complaint that filing the bankruptcy petition on June 3, 2002, failing to list Plaintiffs and the debt on his Schedules and failing to notify them of his bankruptcy filings were fraudulent acts, but these allegations do not state a claim upon which relief can be granted under section 523(a)(2)(A) because that conduct did not create the debt. Defendant had already obtained $25,000 from Plaintiffs at the time of these events. Even if Defendant was acting fraudulently in committing ***626** these alleged acts, Plaintiffs do not allege that they thereby suffered any additional loss.

[22] The crux of what is left of the merits of this count is whether Plaintiffs' alleged reliance on Defendant's representation was justified. Merely saying that the reliance was justified does not make it so. A bare allegation in a complaint that reliance was justified is a conclusion of law, which a defendant does not admit by failing to respond to the complaint.

[23][24] " 'Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.' " *Field v. Mans,* 516 U.S. 59, 71, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) (quoting Restatement (Second) of Torts, § 545A, Comment b). Reasonable reliance is an objective standard measured by the reliance that a reasonable person would place on the representation. It often entails a duty to investigate. By contrast, the standard for justifiable reliance is more relaxed in that investigation is required only in the event of clear warnings of deception arising from the plaintiff's own knowledge or intelligence in making a cursory observation or from facts known to the plaintiff at the time of reliance. *Id.* at 71-73, 116 S.Ct. 437. The Supreme Court further observed that there was still a place for testing the reasonableness of the reliance:

> As for the reasonableness of reliance, our reading of the Act does not leave reasonableness irrelevant, for the greater the distance between the reliance claimed and the limits of the reasonable, the greater the doubt about reliance in fact. Naifs may recover, at common law and in bankruptcy, but lots of creditors are not at all naive. The subjectiveness of justifiability cuts both ways, and reasonableness goes to the probability of actual reliance.

Id. at 76, 116 S.Ct. 437.

Plaintiffs include the fact that they are medical doctors in the style of this adversary proceeding. Their profession suggests that they are highly educated people with the ability to think logically, critically and analytically about their business affairs. The usurious interest rates in the note suggest that Plaintiffs knew at the time they loaned $25,000 to Defendant that the loan involved a very high risk of nonpayment. If so, such an understanding by highly educated people probably triggered a duty to conduct an investigation of Defendant's finances and of his purported reason for needing the funds in order to make their reliance on his representations justifiable.

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To prevail in this adversary proceeding, Plaintiffs must prove that they were justified in relying on Defendant's alleged false representation. To do so, they must introduce evidence showing their personal qualities and characteristics relevant to borrowing and lending money and explaining the circumstances surrounding the loan to Defendant, such as what they knew about Defendant, his reason for borrowing $25,000, and his ability to repay the loan in four months. They must credibly explain why they were charging him usurious interest rates. These background facts must demonstrate that a person with their personal qualities and characteristics would not have noticed any red flag casting enough doubt on the truthfulness of Defendant's representation to have required them to investigate further. If they did conduct an investigation into Defendant's representations, they must demonstrate, bearing in mind their personal qualities and characteristics, that their investigation was appropriate under the circumstances, resolved all issues raised by ***627** the red flag that triggered the need for the investigation and did not reveal a new red flag.

Plaintiffs shall have thirty (30) days from entry of this Order within which to file affidavits or other proof that the Memorial Drive address was Defendant's dwelling house, usual place of abode or the place where he regularly conducted business at the time that the envelope containing the summons and complaint would have been delivered by the U.S. Postal Service and a brief of the issue of whether service at that address was sufficient under Bankruptcy Rule 7004, which must be served on the Defendant personally or by mail pursuant to Bankruptcy Rule 7004(b)(9) and at any other mailing address of Defendant of which they are presently aware. Alternatively, Plaintiffs may move for leave to obtain a new summons from the Clerk, *see* Fed.R.Civ.P. 4(m), made applicable by Fed. R. Bankr.P. 7004(a). Such a motion should be served on Defendant personally or by mail in the same manner described above, and Defendant would have the right to oppose the motion. If Plaintiffs take no action on the record in the thirty-day period from the entry of this Order, the Court will construe that inactivity as an intent not to prosecute this case and will dismiss it for failure to prosecute it.

Accordingly, it is

ORDERED that Plaintiffs' motion for default judgment is DENIED without prejudice and that Plaintiffs shall have thirty days from the date of entry of this Order within which to file documents indicating they intend to continue to prosecute this adversary proceeding.

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END OF DOCUMENT

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: PRIVACY TEMPLATE RULE

DATE: FEBRUARY 3, 2005

The E-Government Act of 2002 requires the Supreme Court to promulgate rules to protect privacy rights and security concerns created by the filing of materials, both paper and electronic, with the courts. The E-Government Committee has recommended a rule for the Appellate, Bankruptcy, Civil and Criminal Rules Committees to consider and propose to the Standing Committee for publication. Judge Sidney Fitzwater (N.D. Tex.) serves as the Chair of that Committee, and Professor Daniel Capra is the Reporter. Professor Capra is also the Reporter to the Evidence Rules Committee.

The E-Government Act itself provides that the privacy rule should be uniform among these sets of rules "to the extent practicable". Over the course of the last two years, the E-Government Committee, with input from the various Advisory Committees, has created a proposed Privacy Rule Template for consideration by the Committees. The rule is subject to amendment to the extent that the Advisory Committees see a need for deviation from the template to meet specific problems. For example, the Criminal Rules Committee had serious concerns about the potential danger of including in the public record the home address of witnesses or even co-defendants in criminal cases. That information could put persons at those addresses at risk. Consequently, they suggested that the home address information be redacted. By way of contrast, our Committee sees a fundamental need for that same item of information.

Full publication of the debtor's home address is essential in bankruptcy cases for several reasons. That information may be necessary just to ensure that the creditors are sure that they have correctly identified the debtor. The debtor's residence could well be the subject of a motion for relief from the stay. The debtor may claim an exemption in the residence, and it would be impossible to evaluate the exemption claim without knowing the address for the property. Other reasons may also exist to support a need for full disclosure of the debtor's residence. The different interests being protected by the Bankruptcy Rules and the Criminal Rules provides an example of a divergence in privacy rules between the sets of rules that is proper under the E-Government Act.

The latest iteration of the proposed rule is set out below. The Rule would most likely be numbered 9037 and added to the end of the Part IX rules. It would apply to all papers (tangible or electronic) filed in a bankruptcy case. Adversary proceedings, contested matters, petitions and schedules, and any other documents would be governed by the rule. We have already taken a number of steps to implement the Act. The Official Forms have restricted publication of the debtor's social security number to the final four digits since the December 1, 2003 effective date of the amendments to Rule 1005 and 1007(f). The schedules also have provided since that time that the debtor may list only the last four digits of a financial account number, unless the debtor chooses to list the full account number. We decided to allow debtors to make the choice of publishing either the full or the partial account number because the debtor may have concerns that the only the full account number will accurately identify a particular claim, especially when the debtor has several accounts with the same creditor. It may be that the debtor has no outstanding balance on one account with a creditor but does owe a debt on another account.

Listing the full account number, at the debtor's choice, might avoid problems in the future. Moreover, it is the debtor who is listing the debtor's own account, so in a sense it can be viewed as a waiver of the identity theft protection that is one reason for the limitation on publication of the full account number. As you can see below in the proposed template, publication of financial account numbers would be limited to the final four digits. The Committee must determine whether the rule should contain an exception for information about financial account numbers that the debtor may choose to list in full on the schedules. It is possible that subdivision (g) of the proposed rule sufficiently addresses the problem.

Possible "bankruptcy specific" changes to the template are set out in italics on lines 4, 5, 12-13, and 23-24 in the proposed rule that follows. The proposed insert on line 4 would preserve the full name of a minor who is the debtor. Having the debtor's full name is essential for many purposes, and limiting it to just a debtor's initials would probably result in significant confusion among creditors and other parties in interest. Consequently, the Advisory Committee previously concluded that the debtor's full name is necessary, even if the debtor is a minor.

The proposed change on line 5 is offered for your consideration with the following situation in mind. Since the schedules would not identify a creditor other than by name, a person searching the records would not know that a particular creditor was a minor. Therefore, there would be no reason to limit the identification to initials. For example, a toy manufacturer may have information that a number of its creditors are minors, but its identification of those minors on the schedules would not include any statement to that effect. As drafted by Professor Capra, the rule would require the debtor/manufacturer to list only the initials of creditors who the debtor knows are minors. The debtor may have compiled that information either by warranty cards or

other surveys, and if that information is in a database, the debtor would "know" which creditors are minors and would be obligated to limit the creditor's name to initials. That could create problems when notices are sent to persons solely by initial. Use of the full name would alleviate or at least reduce those problems.

The proposed change on lines 12-13 is to make the rule consistent with the instructions given to debtors on the schedules of debts in Official Form 6. Since December 1, 2003, the form has offered the debtor the option to provide a full account number or just the last four digits of that number. The inserted language on lines 12 to 13 is intended to retain that option for the debtor. The Advisory Committee may conclude that the exception should not be available, but I wanted to bring to your attention the impact of the proposal as it was formulated by the E-Government Committee.

Another matter that we must consider is whether to add a fourth exception to the redaction requirements as set out in subdivision (b) of the rule on lines 23-24. Section 110(c)(2) of the Code provides that a petition preparer's identifying number is his or her social security number, and subsection (c)(1) requires the preparer to place that number on any document prepared by that person. Section 342(c) of the Code also requires the debtor to include a taxpayer identification number on any notice that the debtor sends to a creditor. Consequently, we should consider adding another exception to the redaction requirement for these two statutes. Judges Swain and Small raised with the E-Government Committee the possibility of a more general exception for any document filed that is required by statute to include the information that the rule would otherwise require to be redacted, but the E-Government Committee decided not to include such an exception. In the absence of such an exception, the italicized (b)(4) would

except these two "bankruptcy specific" items from the reach of the rule. The insertion of the (b)(4) provision would require minor grammatical changes that are not set out in the proposed rule below, but they would, of course, be made if the Advisory Committee recommends the addition to the proposed rule.

The changes in italics on lines 22, 30, 35, 37, 41, and 49 are stylistic changes. The rule as proposed by the E-Government Committee is set out in regular font. Professor Capra, the Reporter for the E-Government Committee will be participating by telephone in our discussion of the proposal in Sarasota. He has been the principal drafter of the proposal.

Proposed Bankruptcy Rule to Implement E-Government Act

Date: January 25, 2005.

Rule [*9037*] Privacy Protection For Filings Made with the Court

1 **(a) Limits on Information Disclosed in a Filing.** Unless
2 the court orders otherwise, an electronic or paper filing made with
3 the court that includes a social security number or tax identification
4 number,[1] a name of a person, *other than the debtor,* known to be

[1] The Bankruptcy committee may wish to consider whether to cover other private "numbers" such as driver's license, alien registration card, and the like. CACM considered the merits of covering more information (such as driver's licenses) and decided that "the line had to be drawn somewhere". CACM approved a comment to its privacy policy that would warn litigants that information such as driver's license numbers in court filings would be published on the internet, and concerned parties should seek a sealing order. The Committee Note, infra,

5 *and identified as* a minor, a person's birth date, [or] a financial

6 account number may include only [2]

7 **(1)** the last four digits of the social-security number

8 and tax-identification number;

9 **(2)** the minor's initials;

10 **(3)** the year of birth; and

11 **(4)** the last four digits of the financial account

12 number.

13 **(b) Exemptions from the Redaction Requirement.** The

14 redaction requirement of ~~Rule []~~ *subdivision* (a) does not apply to

15 the following:

16 **(1)** the record of an administrative or agency

17 proceeding;

18 **(2)** the record of a court or tribunal whose decision

19 is being reviewed, if that record was not subject to

20 (a) when originally filed; and

21 **(3)** filings covered by *subdivision* (c) of this rule. [3]

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provides similar comment.

[2] The stylistic revision of the opening clauses of subdivision (a) deletes the use of the term "identifiers" in the text of the rule. Some of those present at the previous Bankruptcy Committee meeting found it confusing to refer to "identifiers" that were not specifically identified in the body of the rule.

[3] This addition is intended to clarify that sealed filings are exempt from the redaction requirements.

22 *(4) filings that are subject to §§ 110 or 342(b) of the*

23 *Code.*

24 **(c) Filings Made Under Seal.** The court may order that a

25 filing be made under seal without redaction. The court may later

26 unseal the filing or order the person who made

27 the filing to file a redacted version for the public record.[4]

28 **(d) Protective Orders.** In addition to the redaction

29 requirement of s*ubdivision* (a), a court may by order in a case[5] limit

30 or prohibit non-parties' remote electronic access to a document

31 filed with the court. The court must be satisfied that a limitation on

32 remote electronic access is necessary to protect against widespread

33 disclosure of private or sensitive information that is not otherwise

34 protected under *subdivision* (a).[6]

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[4] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

[5] The "in a case" limitation was suggested by the Criminal Rules Committee.

[6] Ed Cooper suggests that the text of this subdivision can be shortened as follows:

> If necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under (a), a court may by order limit or prohibit remote access by nonparties to a document filed with the court.

Judge Rosenthal suggests that "document filed with the court" should be shortened to "court filing" or "an electronic or paper filing?" The latter is consistent with the language in (a). The former is just simpler.

35 **(e) Option for Additional Unredacted Filing Under Seal.**
36 A party making a redacted filing under *subdivision* (a) may also
37 file an unredacted copy under seal. The court must retain the
38 unredacted copy as part of the record.
39 **(f) Option for Filing a Reference List.** A filing that
40 contains information redacted under *subdivision* (a) may be filed
41 together with a reference list that identifies each item of redacted
42 information and specifies an appropriate identifier that uniquely
43 corresponds to each item of redacted information listed. The
44 reference list must be filed under seal and may be amended as of
45 right. Any references in the case to an identifier in the reference list
46 will be construed to refer to the corresponding item of
47 information.[7]
48 **(g) Waiver of Protection of Identifiers.** A party waives
49 the protection of *subdivision* (a) as to the party's own information
50 by filing that information without redaction.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to

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[7] This language tracks the amendment to the E-Government Act that permits the filing of a registry list as an alternative to an unredacted document under seal.

prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (c) or (d).[8] Moreover, the Rule does not affect the protection available under other rules, such as [Civil Rules

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[8] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

16 and 26(c)], or under other sources of protective authority.[9]

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The inclusion of a debtor's full social security number on the notice of the § 341 meeting of creditors, however, is an example of full information that is made available to creditors. Of course, that information is not filed with the court, see Rule 1007(f) (the debtor "submits" this information), and the notice to creditors that is filed with the court does not include the full social security number. Thus, since the full social security number is not filed with the court, it is not available to a person searching that record. Similarly, while § 342(b) of the Code requires that any notice the debtor may send to a creditor must include the debtor's social security number, the notice that is filed with the court should not include that full number even though the notice sent to the creditor would set forth the debtor's full social security number. See 2003 Committee Note to Official Form 16C.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (e) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (f) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act,

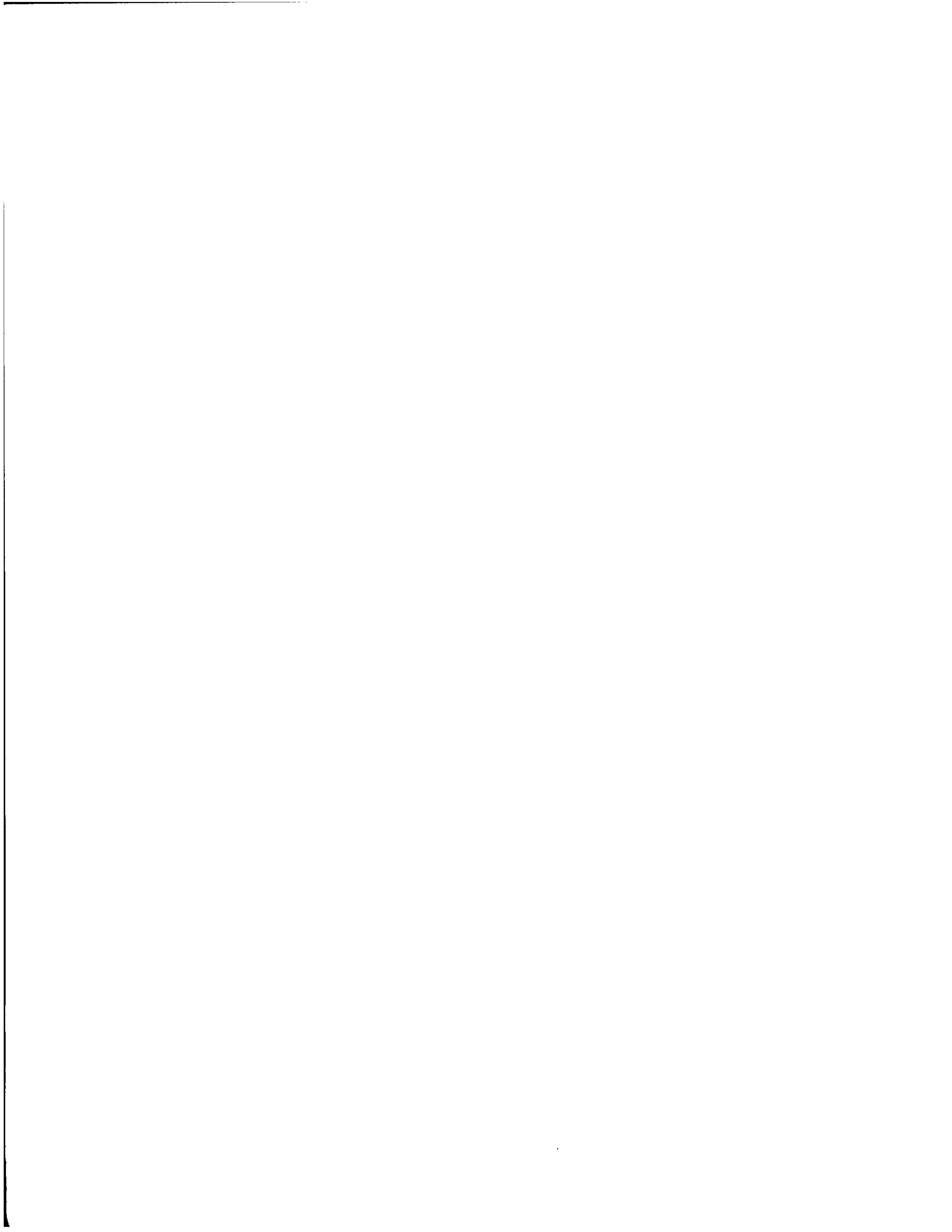
[9] This sentence was suggested by the Civil Rules Committee, and obviously must be adapted to protective rules that exist in the other rules if this language is to be included in the Note.

subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal information by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. *As to financial account numbers, the instructions to Schedules E and F of Official Form 6 note that the debtor may elect to include the complete account number on those schedules rather than limit the number to the final four digits. Including the complete number would operate as a waiver by the debtor under subdivision (g) as to the full information that the debtor set out on those schedules.* If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule [*9037*] to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons. [10]

[10] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: AMENDMENTS TO RULE 3001 TO CONFORM TO THE OFFICIAL FORM FOR A PROOF OF CLAIM

DATE: JANUARY 31, 2005

The Subcommittee on Forms has been working diligently to revise Official Form 10, the proof of claim. A number of the changes to the proof of claim were made to support the filing of those claims in electronic form. In the course of doing so, the Subcommittee determined that at least two significant amendments should be made to Rule 3001. First, the rule should be amended to state that claimants should file duplicates of the documents that support their claims and perfection of security interests, and second, the rule should set limits on the length of documents that can be attached to the proof of claim form.

The Subcommittee had little difficulty in concluding that the rule as it currently exists should be amended to direct claimants to file duplicates of the documents rather than the originals. The existing proof of claim form directs the claimant to file duplicates of the documents, but Rule 3001(c) provides that the claimant may file either the original or a copy of the applicable documents. The Subcommittee concluded after a brief discussion that the rule should be amended to conform to the instructions on the form. Consequently, the amendment to Rule 3001 set out below includes changes in both subdivisions (c) and (d) that require the claimant to attach duplicates of the relevant documents rather than the originals.

The second significant change to Rule 3001 relates to the volume of documents that the

rule allows claimants to attach to the proof of claim form. There is no current limitation in the rule, but the movement to electronic filing of proofs of claims makes it imperative that the Committee consider setting limits on those attachments. In an electronic environment, voluminous attachments to an electronically submitted form can cause a number of problems for the court, the party filing the proof of claim, other parties attempting to file their own proof of claim form, and others searching the claims records in the case. Extremely voluminous attachments can place a strain on the court's computer system and can even operate to prevent others from filing their claims in some instances. Lengthy attachments also can tie up the claimant's computer system while the court's system downloads the form and its attachments. The Subcommittee considered the comments of Administrative Office personnel and others regarding the need for these restrictions on attachments as well as issues raised directly in the Subcommittee meetings on the issue. The information available to the Subcommittee suggested that the vast majority of attachments do not exceed ten pages. Nevertheless, a single claim with voluminous attachments can have a serious impact on all parties involved in the case. The Subcommittee considered a number of different maximum page limits, largely in response to persons raising the issue from an electronic file management perspective, and settled on 25 pages and 5 pages for the attachments supporting the claim and those evidencing perfection of a security interest, respectively.

The Subcommittee discussed at length whether the filing of a proof of claim is more akin to the filing of a complaint against the debtor, or whether an objection to the claim is more properly identified as comparable to a complaint. The Subcommittee did not resolve this issue, but it did come to some conclusions regarding limits on documents attached to the proof of claim

form. The Subcommittee considered proposals that would have placed a single, aggregate limit on all documents attached to the proof of claim, whether they supported the claim or were evidence of perfection of a security interest claimed by the creditor. Drafting a rule that would operate to limit the aggregate number of pages that could be attached when there were two categories of documents at issue (those supporting the claim and those relating to perfection of the security interest) proved extremely difficult. The Subcommittee then decided that a better solution would be to set separate page limits for the documents supporting the claim as called for under Rule 3001(c), and those documents to be supplied to evidence perfection of a claimed security interest under Rule 3001(d). The Subcommittee believes that the number of pages allowable to support the claim generally will be greater than the number necessary to evidence perfection, and the rule as drafted adopts that assumption. The rule further provides that if the relevant document or documents exceed the maximum allowable pages, the claimant must file a summary of the documents and relevant excerpts in lieu of the originals. Again, the summaries and excerpts together may not exceed the maximum page limits allowed for attachments. This should resolve the problems associated with voluminous attachments being filed in an electronic form.

The Subcommittee also considered that the debtor, trustee, and other parties in interest may have a need to review the full documents if the claimant files only a summary of the document with the proof of claim form. As a result, the draft amendments provide that if the claimant files a summary either of the documents that support the claim or evidence perfection of a security interest, the claimant must serve a copy of the full document on any party in interest that requests the documents. Rather than set a specific deadline for serving those documents, the

propose rule directs the claimant to serve the documents "promptly" after such a request has been made. A copy of the proposed amendments to Rule 3001 follows.

RULE 3001 Proof of Claim

1 * * * * *

2 (c) CLAIM BASED ON A WRITING. When a claim, or an
3 interest in property of the debtor securing the claim, is based on a
4 writing, ~~the original or~~ a duplicate of the writing shall be filed with
5 the proof of claim. If the writing has been lost or destroyed, a
6 statement of the circumstances of the loss or destruction shall be
7 filed with the claim. If the writing exceeds 25 pages, the claimant
8 shall file a duplicate of relevant excerpts of the writing and a
9 summary of the writing, and these attachments shall not exceed a
10 total of 25 pages. If the claimant has not filed a copy of the
11 complete documentation, upon the request of the trustee or any
12 other party in interest, the claimant shall promptly serve upon that
13 party a copy of the complete documentation.

14 (d) EVIDENCE OF PERFECTION OF SECURITY
15 INTEREST. If a security interest in property of the debtor is
16 claimed, the proof of claim shall be accompanied by evidence that
17 the security interest has been perfected. If the evidence of
18 perfection is a writing, the claimant shall file a duplicate of the

19 writing with the proof of claim. If the writing exceeds 5 pages, the

20 claimant shall file a duplicate of relevant excerpts of the writing

21 and a summary of the evidence of perfection, and these

22 attachments shall not exceed a total of 5 pages. If the claimant has

23 not filed a copy of the complete documentation, upon the request

24 of the trustee or any other party in interest, the claimant shall

25 promptly serve upon that party a copy of the complete

26 documentation.

27 * * * * *

COMMITTEE NOTE

Subdivisions (c) and (d) of the rule are amended to provide that claimants must file duplicates of writings upon which a claim is based or which evidence perfection of any claimed security interest. The rule previously authorized the claimant to file either the original writing or a duplicate thereof. If the writings that support the claim are 25 pages or less, the claimant must attach a copy of the writings to the proof of claim, whether or not the claimant provides a summary of the writings. The attached writings and summary together must not exceed 25 pages. Similarly, if the writings that evidence perfection of a security interest do not exceed 5 pages, the claimant must file a copy of those writings with the proof of claim. The claimant also may attach a summary of the writings evidencing perfection, but the total of the summary and the writings evidencing perfection of a security interest must not exceed 5 pages.

Subdivisions (c) and (d) are amended to establish limits on the length of documents being attached to a proof of claim. Some documents can be extremely lengthy and may pose particular problems, especially when they are filed electronically. Voluminous documents can cause undue delays both in the filing of the proof of claim as well as in searches of the court's record.

Shortened versions of the writings should prevent these problems. Consequently, the rule directs the claimant to file a summary of the writing upon which the claim is based along with copies of the relevant portions of the writing. For example, if a writing must be signed by the debtor to be enforceable, the relevant excerpts likely would include the debtor's signature. The claimant makes the initial determination of relevancy, but to the extent that the attachment does not include relevant excerpts, the evidentiary effect of the proof of claim under subdivision (f) would be limited.

Under subdivision (c), writings on which the claim is based may not exceed twenty-five pages in length, and if they do, the claimant must instead attach a duplicate of relevant excerpts of the writings and a summary of the complete writings. The summary and the relevant excerpts also may not exceed twenty-five pages in the aggregate. Similarly, under subdivision (d), any attachment to the proof of claim to provide evidence of perfection of a security interest may not exceed five pages in length. If the writings exceed five pages, the claimant must instead file a summary of the writings and a duplicate of relevant excerpts. The summary and relevant excerpts of evidence of perfection may not exceed five pages in the aggregate.

Under both subdivisions (c) and (d), if the claimant files a summary rather than a duplicate of the complete documentation, the claimant must serve a copy of the complete documentation upon any party in interest that requests a copy.

UNITED STATES BANKRUPTCY COURT __________ DISTRICT OF __________	PROOF OF CLAIM

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):

Name and address where notices should be sent:

Telephone number:

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:______________
(If known)

Filed on:______________

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. **Amount of Claim as of Time Case Filed:** $______________

   If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

   If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of all interest or additional charges.

2. **Basis for Claim:** ______________________________
   (See instruction #2 on reverse side)

3. **Last four digits of any number by which creditor identifies debtor:** __________

   3a. Debtor may have scheduled account as: ______________
   (See instruction #3a on reverse side.)

4. **Secured Claim**
   Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

   Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle
   Describe:

   Value of Property: $______________ **Annual Interest Rate:**____%

   Amount of arrearage and other charges as of time case filed included in secured claim,

   if any: $______________ **Basis for perfection:**______________
   (See instruction #4 on reverse side)

   Amount of Secured Claim: $______________ **Amount Unsecured: $**______________

5. **Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.**

   Specify the priority of the claim.

   ☐ Wages, salaries, or commissions (up to $4,650*) earned within 90 days before filing of the bankrupty 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 $2,100* 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 owed to governmental units - 11 U.S.C. §507(a)(8).

   ☐ Other - Specify applicable paragraph of 11 U.S.C. §507(a)(______).

   Amount entitled to priority:

   $______________

   **Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. **Credits:** The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. **Documents:** Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. If the documents supporting the claim and any summary together exceed 25 pages, see the page limitation set out in instruction #7 on reverse side. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. If the documents and any summary together exceed 5 pages, see instruction #7 on reverse. *(See definition of "redacted" on reverse side.)*

   DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, please explain:

Date:	**Signature:** The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from notice address above. Attach copy of power of attorney, if any.	FOR COURT USE ONLY

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 certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. **Amount of Claim as of Time Case Filed:**
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. **Basis for Claim:**
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

3. **Last Four Digits of Any Number by Which Creditor Identifies Debtor:**
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

   3a. Debtor May Have Scheduled Account As:
   Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. **Secured Claim:**
Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. **Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**
If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. **Credits:**
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. **Documents:**
Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary of these documents, but together the documents and the summary may not exceed 25 pages. If the documentation supporting the claim exceeds 25 pages, attach instead a copy of relevant excerpts of the documentation along with a summary. The summary and excerpts together must not exceed 25 pages. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary of these documents, but together these documents may not exceed 5 pages in length. If the documents that evidence perfection of any security interest exceed 5 pages, you must attach relevant excerpts of the documents and a summary. This summary and excerpts together must not exceed 5 pages.
DO NOT SEND ORIGINAL DOCUMENTS

Date and Signature:
The person filing this proof of claim must sign and date it. Rule 9011, FRBP. If the claim is filed electronically, Rule 5005(a)(2), FRBP, authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

Claim
A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right of setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact all but the last four digits of any social security, tax identification, or financial account number, all but the initials of a minor's name, and all but the year of a person's date of birth.

Relevant Excerpts/Evidence of Perfection
Relevant excerpts are those parts of a larger document that bear directly on the matter to be considered by the trustee or the court. Excerpts with respect to a claim should provide information about the amount and validity of the claim: including names of parties, date signed, amount of the debt, and evidence of perfection of the creditor's interest, if any. Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded. Attach no more than 25 pages of relevant excerpts that support the claim, including any summary. FRBP 3001(c). Attach no more than 5 pages of relevant excerpts of evidence of perfection. FRBP 3001(d) The creditor must serve a copy of the complete documentation on any party that requests it.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to Rule 3001(e) FRBP, any applicable provisions of the Bankruptcy Code (11 U.S.C § 101 et seq.), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE (2006)

The form and its instructions are amended in several respects based on the experiences of creditors and trustees in using it and on the technological changes that have occurred in the courts' processing of claims. A definition of the word "redacted" has been added in furtherance of the privacy policy of the Judicial Conference of the United States.

The creditor now has a space in which to provide a separate payment address if different from the creditor's address for receiving notices in the case. The checkboxes for indicating that the creditor's address provided on the proof of claim is a new address, and that the creditor never received any notices from the court in the case have been deleted. The computer systems now used by the courts make it unnecessary for a creditor to "flag" a new address or call attention to the fact that the creditor is making its first appearance in the case. In place of the deleted items is a new checkbox to be used when a debtor or a trustee files a proof of claim for a creditor and will alert the clerk to send the notice required by Rule 3004. The box for indicating whether the claim replaces a previously filed claim also has been deleted as no longer necessary in light of the 2005 amendments to Rule 3004 and Rule 3005. The creditor simply will amend the claim filed by the other party.

Requests for the creditor to state the date on which the debt was incurred and the date on which any court judgment concerning the debt was obtained have been deleted, based on reports from trustees that they rely on the documents supporting the claim for this information. The checkboxes for stating the basis for the creditor's claim have been replaced with a blank in which the creditor is to provide this information. Examples of the most common categories, based on the former checkboxes, can be found in the instructions on the form. The request to state the account number by which the creditor identifies the debtor has been moved to paragraph 3 of the form and has been revised to request only the last four digits of the number, in furtherance of the privacy policy of the Judicial Conference. In addition, a new paragraph 3a gives the creditor a place to notify the trustee and the court of any change in the creditor's name, that the claim has been transferred, or provide any other information to clarify a difference between the proof of claim and the creditor's claim as scheduled by the debtor.

The adjective "total" has been deleted from the sections of the form where the creditor states the amount of the claim and the creditor now simply reports the amount of the claim. If the claim is a general unsecured claim, no further details are stated on the form, although a creditor still must provide relevant excerpts of

any writing on which the claim is based, as required by Rule 3001(c), and must attach a statement itemizing any interest or other charges (in addition to the principal) that are included in the claim. If the claim or any part of it is secured or entitled to priority under § 507(a) of the Code, the creditor is directed to provide details in the appropriate sections of the form. The creditor now states the amount to be afforded priority only once, in the section of the form designated for describing the specific priority being asserted. The introductory language in the section where the creditor describes any priority to which it is entitled has been revised for clarity. The word "collateral" has been replaced with the less colloquial and more accurate phrase "lien on property" throughout the form.

The directions concerning documents to be attached have been revised to specify that these are to be redacted, in light of the privacy policy of the Judicial Conference. The "Definitions" section on the reverse side of the form explains the terms "redacted," "relevant excerpts," and "evidence of perfection." In conformity with amended Rule 3001, if the documents are longer than 30 pages, the creditor is permitted to file with the proof of claim only relevant excerpts of no more than 25 pages including any summary to support the claim, and no more than five pages of evidence of perfection. The form repeats the directive in Rule 3001 that the creditor must serve a complete copy of the documentation on any party that requests it.

Information about obtaining from the court acknowledgment of the filing of the proof of claim has been revised and moved to a new section called "Information." This new section also alerts a creditor to the possibility that it may be approached about selling its claim, advises that the court has no role in any such solicitations, and states that a creditor is under no obligation to accept any offer to purchase its claim. A new instruction has been added about signing a proof of claim. This instruction includes citations to Rules 9011 and 5005(a)(2) concerning signature requirements in an electronic filing environment.

Finally, all of the definitions and instructions on the second page of the form are amended generally to reflect the deletions, additions, and other changes made on page 1. These include a reminder to the creditor to keep the court informed of any changes in its address. The instructions have been moved to the top of the page, and all of the text has been rewritten both to reflect the substantive changes to the form and to improve the clarity and style of this explanatory material.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: AMENDMENTS TO RULE 4003

DATE: JANUARY 29, 2005

During the meeting at Half Moon Bay, the Committee considered proposed amendments to Bankruptcy Rule 4003. The amendments included an amendment to Rule 4003(b) that would extend the time allowed for objections to exemptions when the exemption claim was one made not in good faith. The second proposal was an amendment to Rule 4003(d) to permit creditors whose liens were subject to avoidance under § 522(f) of the Bankruptcy Code to object to the debtor's claim of exemption as a part of the lien avoidance contested matter notwithstanding that the thirty-day objection period of 4003(b) had expired.

After discussion of these issues within the Committee, the matter was referred to the Subcommittee on Consumer Issues. The Subcommittee met by teleconference on November 23, 2004, to discuss the issues. After consideration of the matter, the Subcommittee is recommending amendments to Bankruptcy Rule 4003 as set out below.

Rule 4003(b)–Extension of Time to Object to Improperly Claimed Exemptions.

This issue was originally raised with the Committee by Judge Wedoff and is described in greater detail at Tab 11 of the Agenda Book for the Half Moon Bay meeting in September, 2004. Under Rule 4003(b), parties in interest have thirty days from the conclusion of the § 341 meeting of creditors to file an objection to a claim of exemption. The Supreme Court in *Taylor v.*

Freeland & Cronz, 503 U.S. 638 (1992), held that the deadline for objecting to exemptions would be strictly construed against a trustee who attempted to object beyond the thirty-day deadline. While the Court noted that an argument might exist under § 105 of the Bankruptcy Code to authorize a later objection, the Court did not consider that argument since it had not been raised in the lower courts.

A consequence of the relatively short deadline set out in the Rule and the Supreme Court's holding in *Taylor* is that trustees and other parties in interest face a relatively short deadline for objecting to claims of exemption. Under *Taylor*, if the objection is not timely made, the property is exempt. Section 522(*l*) specifically provides that in the absence of an objection, "property claimed as exempt ... is exempt." Thus, even property for which there is no available exemption under applicable law becomes exempt if no party in interest files a timely objection. This "exemption by declaration" process operates to grant debtors greater exemptions than those to which they are entitled under the applicable law thereby creating a loss for creditors who would otherwise share in a distribution out of the sale of those properties.

Judge Wedoff suggested that the Rule be amended to permit later filed objections to exemptions when there is no good faith basis for the exemption claim under applicable law. He argued that the rules should not operate to permit "exemptions by declaration." Allowing objections to exemptions at any time up to the closing of the case when those exemption claims have no good faith basis furthers the goal of protecting debtors' interests in their right to claim appropriate exemptions while still protecting the interests of creditors and discouraging debtors from overreaching in their claims of exemption.

Countervailing arguments were raised to the proposal. For example, as the Supreme

Court noted in *Taylor*, deadlines are essential in litigation. The debtor has a right to know that a claim of exemption is final so that he/she can move on in their financial life. Furthermore, a debtor's claim of exemption is made in the context of an adversary process. The Code imposes no obligation of good faith on a debtor in the selection of exemptions. Rather, the Code and Rules authorize the trustee and other parties in interest to interpose objections to those claimed exemptions. If the trustee and other parties in interest fail to raise objections timely, the exemptions should be allowed. Moreover, the information necessary for the trustee or parties in interest to determine whether an objection is warranted generally is available to them at or before the § 341 meeting.

The Subcommittee reconsidered these arguments as well as several others. It also addressed a series of questions relevant to the issue. First, should there be any amendment to Rule 4003(b) to extend the deadline for objecting to exemption claims for which there is no basis in applicable law? Second, if an amendment is appropriate, what standard should apply to the extension of the objection deadline? The Subcommittee considered three separate standards for extending the deadline. Objections could be raised after the normal thirty-day deadline if the exemption was

- not claimed in good faith,
- claimed in a manner that was not warranted by existing law or a non-frivolous extension of the law, or
- claimed knowingly and fraudulently by the debtor.

The Subcommittee concluded that Rule 4003(b) should be amended. In reaching that conclusion, however, there were some widely divergent views as to the extent to which

amendments should be adopted. For example, several Subcommittee members were of the view that simply extending the thirty-day deadline in Rule 4003(b) to sixty days would be a sufficient change in the rule to allow trustees and other parties in interest sufficient time to evaluate debtors' claims for exemption. To the extent that the amendment was viewed as necessary to provide additional time for the review of exemption claims, this amendment would solve the problem. Others, however, took the view that the limited time available to object under the current rule is not the only problem. Rather, they consider the potential for exemption by declaration to be inconsistent with fundamental bankruptcy policy and should be prevented without the restriction of a time deadline when there is no basis for the debtor's claim. Consequently, simply extending the deadline to sixty days would not be a sufficient response.

A significant majority of the Subcommittee concluded that simply extending the deadline to sixty days was an insufficient amendment to resolve the problem. Thus, the discussion proceeded to the proper standard for inclusion in the amendment to Rule 4003(b). There was some support for the subjective "no good faith basis for claiming an exemption" standard. The argument in favor of the standard is that this would prevent intentional acts by debtors who are engaging in gamesmanship in the claim of excessive exemptions without penalizing a well meaning debtor.[1] The majority of the Subcommittee, however, took the position that an objective standard should be employed because the purpose of the amendment is not simply to

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[1] The Subcommittee considered a hypothetical posed by Prof. Resnick in which the debtor was unsophisticated and claimed a particular exemption because he had been told by a third party (not by his or her attorney) that certain property could be retained as exempt. Despite the debtor's honesty in holding this mistaken belief, the Subcommittee concluded that the trustee should be permitted to object to the exemption, and under the proposal the trustee could object to the exemption even if the thirty day period had expired.

prevent gamesmanship, but also to prevent exemptions by declaration even if done in good faith. In either

instance (i.e. intentional or unintentional claim of excessive exemptions), the harm to the bankruptcy estate and the bankruptcy process is the same. Consequently, the Subcommittee rejected the subjective standards of the "knowing and fraudulent" claim of exemptions[2] and exemptions claimed in good faith, in favor of the standard that permits later objections to the exemptions if the exemption claim is not "warranted under existing law or any non-frivolous argument for an extension of the existing law." This standard is taken from Rule 9011(b)(2) and represents perhaps the most "objective" standard among the three considered by the Subcommittee. The Subcommittee rejected the notion of using a direct cross-reference to Rule 9011 in Rule 4003(b) because of the possibility of changes in that rule (whether under the pending bankruptcy reform legislation, or otherwise), and instead suggests the restatement of the language of that rule as it currently exists within Rule 4003(b).

The Subcommittee also addressed several other issues relevant to the amendment. First, the Subcommittee concluded that the extension of time beyond thirty days should apply only to the trustee and not to other parties in interest. The concern was that creditors could use the extended time for objection to engage in strategic behavior to seek reaffirmation agreements with debtors. Moreover, permitting the trustee to bring the action still would allow creditors to raise the issue through the trustee in appropriate circumstances. Consequently, the extended time under the proposed rule would apply only to the trustee. Secondly, the Subcommittee concluded

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[2] This standard is taken from § 727(a)(4) of the Bankruptcy Code, and employing this standard in Rule 4003(b) would provide a link to case law decided under that Code section.

that the time within which to object should be cut off with the closing of the case. In most Chapter 7 cases, the closing of the case happens relatively quickly and debtors would not be unduly inconvenienced by the potential for an exemption objection being raised prior to the closing of the case. The Subcommittee recognized, however, that some Chapter 7 cases, particularly asset cases, remain open for quite some time. Delaying the expiration of the objection period until the close of the case could, in those instances, create significant inconvenience for debtors. Consequently, the proposed amendment includes optional language that would permit the debtor to seek an early determination of the propriety of the claimed exemption. This is comparable to a motion filed under Rule 6007(b) requiring the trustee to abandon property of the estate. A proposed version of Rule 4003(b) as amended is set out below.

RULE 4003 EXEMPTIONS

1 * * * * *

2 (b) OBJECTION OR MOTION FOR ALLOWANCE.

3 (1) A party in interest may file an objection to the

4 list of property claimed as exempt only within 30 days after the

5 meeting of creditors held under § 341(a) is concluded or within 30

6 days after any amendment to the list or supplemental schedules is

7 filed, whichever is later. The court may, for cause, extend the time

8 for filing objections if, before the time to object expires, a party in

9 interest files a request for an extension. Copies of the objections

10 shall be delivered or mailed to the trustee, the person filing the list,

11 and the attorney for that person.

12 (2) Notwithstanding the time limits set forth in

13 subdivision (b)(1) of this rule, if the claim of exemption is not

14 warranted by existing law or by a non-frivolous argument for the

15 extension, modification, or reversal of existing law or the

16 establishment of new law, the trustee may file an objection to the

17 claim of exemption on such grounds at any time prior to the

18 closing of the case. The trustee shall deliver or mail the objection

19 to the person filing the list and the person's attorney.

20 (3) The debtor or any dependent of the debtor may

21 move for the allowance of any exemption at any time after 30 days

22 after the conclusion of the meeting of creditors held under §

23 341(a).

COMMITTEE NOTE

The rule is amended to permit the trustee to object to an exemption at any time up to the closing of the case on the ground that the claim of exemption is not warranted under existing law or through an extension of that law or under new law. The amendment does not extend the generally applicable objection deadline which still requires objections to be made within 30 days of the conclusion of the § 341 meeting of creditors, or within 30 days of any amendment to the list of exemptions. The Supreme Court has held that the deadline for filing objections is inelastic, and the short deadline can result in debtors retaining property as exempt simply by claiming it as exempt. *See* 11 U.S.C. § 522(*l*) ("property claimed as exempt on such list is exempt.) This can lead debtors to claim exemptions to which they are not entitled in

> the hope that no party in interest will object and the exemption will arise solely by listing the property on the schedule of exempt property. Extending the deadline for trustees to object to an exemption when there is no basis for the claim under existing law or a reasonable extension of that law discourages a debtor from asserting these exemptions. It would also permit the court to review and, in proper circumstances, deny improperly claimed exemptions thereby protecting the legitimate interests of creditors and the bankruptcy estate.
>
> The amendment extends the objection deadline only for trustees. If a creditor or other party in interest becomes aware of information that calls into question an exemption claimed by debtor, and the thirty day deadline has passed, the party in interest can contact the trustee who may pose an objection if the underlying exemption claim is unwarranted. Since the extension of the objection deadline to the closing of the case could present difficulties for a debtor who needs a determination that particular property is exempt, the amendment also provides that the debtor can expedite consideration of the exemption claim by appropriate motion.

Lien Avoidance and Exemption Objections

The second issue considered by the Subcommittee on Consumer Issues was the need for an amendment to Rule 4003(b) to authorize a lien holder whose lien is subject to avoidance under § 522(f) of the Bankruptcy Code to defend that contested matter by raising an objection the debtor's initial claim of exempt property. Once again, the issue arises because of the ability to engage in claiming "exemptions by declaration" under Rule 4003(b). In that circumstance, the debtor can make a claim of exemption for specific property that is much greater than that amount allowed under applicable law. A creditor with a lien on that property would have little or no

incentive to review, evaluate, and object to the debtor's exemption claim because exemptions are subject to creditor's liens. It is also true that the trustee and other creditors would have little or no incentive to object to an excessive exemption claim in that circumstance if the result of the granting of the objection would be no additional funds available to the estate. (If the objection were successful, it would not generate funds for the estate because the asset would still be liquidated for the benefit of the secured creditor.)

As noted in the materials at Tab 11 in the Half Moon Bay Agenda Book, the Courts largely have concluded that a creditor with a lien on the property that the debtor claims is exempt can raise the issue of the exemption in a contested matter to avoid that creditor's lien. The debtor can seek to avoid certain liens that impair the debtor's exemption by way of contested matter rather than adversary proceeding. Bankruptcy Rule 4003(d) does not specifically authorize creditors in that position to defend against the 522(f) action by challenging the debtor's exemption. The substantial majority of courts that have addressed the issue, however, have recognized that it would be unfair to require those creditors to file objections to the debtor's initial claim of exemption when they would have no reason to do so given their position as a secured creditor. The Subcommittee concluded that the rules should more closely align with the practice which permits these objections to be raised. As a result, the Subcommittee on Consumer Issues recommends that Rule 4003(d) be amended to clarify that secured creditors can raise objections to the debtor's underlying exemption for purposes of the contested matter seeking to avoid the creditor's lien.

This objection is limited in effect to application in the contested matter in which the debtor is seeking to avoid the creditor's lien. It would not be an objection that would apply generally to the debtor's exemption claim. The thirty-day objection period would continue to apply to the creditor as regards the debtor's exemptions. Rule 4003(d) would be amended as follows to accomplish that goal.

Rule 4003. Exemptions.

* * * * * *

(b) OBJECTING TO A CLAIM OF EXEMPTIONS. Except as provided in this rule, ~~A~~ a party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, the person filing the list, and the attorney for that person.

* * * * * *

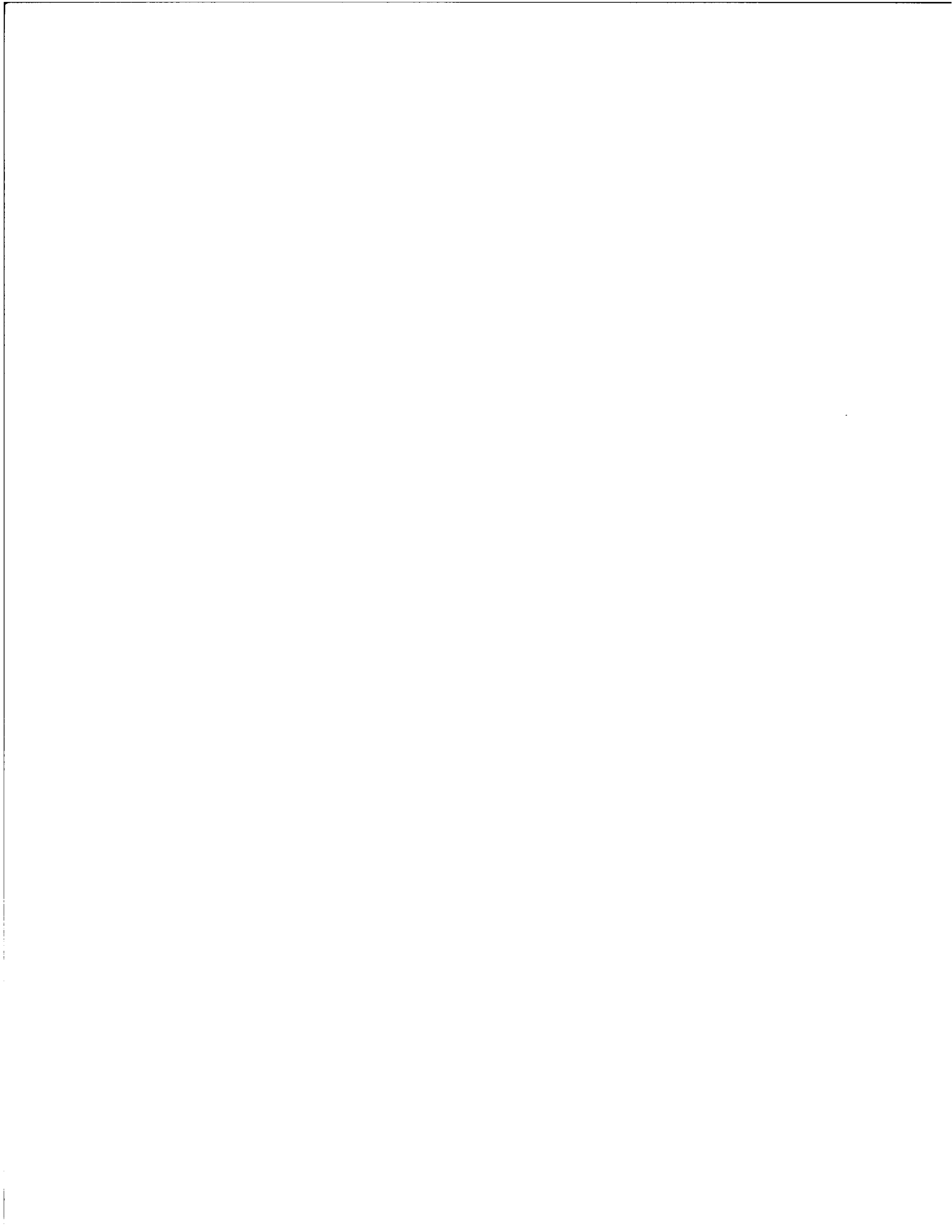
(d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT PROPERTY. A proceeding by the debtor to avoid a

lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014. A creditor may object to such a motion by challenging the validity of an exemption asserted to be impaired by the lien notwithstanding the provisions of subdivision (b).

COMMITTEE NOTE

The rule is amended to clarify that a creditor with a lien on property that the debtor is attempting to avoid on the grounds that the lien impairs an exemption may raise in defense to the lien avoidance action any objection to the debtor's claimed exemption. The right to object is limited to an objection to the exemption of the property subject to the lien and for purposes of the lien avoidance action only. The creditor may not object to other exemption claims made by the debtor. Those objections, if any, are governed by Rule 4003(b).

(Note that this version of subdivision (b) does not reflect the changes to that provision as set out earlier in this memorandum.)



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 9021 AND THE SEPARATE DOCUMENT RULE

DATE: FEBRUARY 10, 2005

The Subcommittee on Privacy, Public Access, and Appeals met by teleconference to consider whether to propose any amendment to Rule 9021 that would address the impact of the recent revisions to Civil Rule 58 that are incorporated by reference under Rule 9021. After a vigorous discussion, the Subcommittee could not reach a consensus on the matter. Instead, the Subcommittee recommends that the issue be reconsidered by the full Committee with that consideration focused on four alternatives. The alternatives are set out at the end of this memo following a presentation of the issues.

The Incorporation of Civil Rule 58 into the Bankruptcy Rules

Bankruptcy Rule 9021 generally incorporates by reference Rule 58 of the Federal Rules of Civil Procedure. One exception to that incorporation, however, is that the reference to Civil Rule 79(a) in Civil Rule 58 is read as a reference to Bankruptcy Rule 5003. Bankruptcy Rule 5003 requires the Clerk to maintain a docket in each case and to enter judgments on that docket showing the date when the entry was made. Bankruptcy Rule 5003(a). This cross-reference to Bankruptcy Rule 5003 in lieu of Civil Rule 79(a) has very little impact. Under either rule, the Clerk maintains a docket and must enter judgments showing the date of those judgments on the docket.

The incorporation of Civil Rule 58, however, recently has taken on a potentially more

significant meaning. Civil Rule 58 was amended effective December 1, 2002. The former Rule 58 provided that judgments are effective only when they are set forth on a separate document and entered as provided in Rule 79(a) of the Civil Rules. The Committee Note to the 2002 revision to Civil Rule 58 indicated that the separate document requirement was frequently ignored. The consequence of ignoring this requirement was that the time to appeal under Appellate Rule 4 did not begin to run. See, e.g., *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), vacated on other grounds 143 F.3d 263 (6th Cir. 1998)(en banc). The failure of a party to raise the absence of a separate document, however, could constitute a waiver of the right to have the judgment entered on the civil docket. *Fiore v. Washington County Community Mental Health Center*, 960 F.2d 229, 226 (1st Cir. 1992)(en banc). In any event, the consequence of the failure to set out judgments on a separate document led the Civil and Appellate Rules Committees to recommend the changes to Rule 58 that became effective on December 1, 2002. Under the new version of Rule 58(b), when a separate document is required, judgment is *deemed* entered when the judgment is entered on the civil docket under Rule 79(a) and when it is either set forth on a separate document or when 150 days have run from the entry of the judgment on the civil docket under Rule 79(a), whichever is earlier. The purpose of the new definition of the time when a judgment becomes effective is to establish a final date on which orders become appealable, even in the absence of the judgment being entered on a separate document.

The incorporation of Civil Rule 58 under Bankruptcy Rule 9021 may be susceptible to two conflicting readings. The rule could be construed as incorporating nearly all of Civil Rule

58, except only that portion of Rule 58 that refers to Civil Rule 79(a). If the remainder of Civil Rule 58 is incorporated, then the provision of subdivision (b)(2) of that rule would apply in bankruptcy proceedings, and it would appear to extend the time for filing an appeal to 150 days after its inclusion on the docket in the absence of a separate document setting forth the order or judgment.

On the other hand, Bankruptcy Rule 9021 only incorporates Civil Rule 58 to the extent not otherwise provided in Rule 9021. Rule 9021 states that "a judgment is effective when entered as provided in Rule 5003." The rule thus arguably "provides otherwise" if Rule 5003 establishes an effective date for judgments that is inconsistent with Civil Rule 58. Under Bankruptcy Rule 9021, the time of the entry of the judgment is defined entirely by Rule 5003. Bankruptcy Rule 5003(a) simply states that "the entry of a judgment or order in a docket shall show the date the entry is made." Entry of a judgment is made in the manner prescribed by the Director of the Administrative office of the United States Courts. This procedure would seem to override the process set out in Civil Rule 58(b)(2).

It is clear that the "separate document rule" for judgments applies in bankruptcy cases. In re *Schimmels*, 85 F.3d 416 (9th Cir. 1996); *In re Seiscom Delta, Inc.*, 857 F.2d 279 (5th Cir. 1988). In *Dynamic Changes Hypnosis Center, Inc., v. PCH Holding LLC*, 306 B.R. 800 (E.D. Va. 2004), the District Court recognized that the separate document requirement applies in bankruptcy cases and concluded that the appellant had "waived its right to have the Bankruptcy Court's judgment entered on a separate document." Id. at 808. The Court in *Dynamic Changes* noted the amendment to Civil Rule 58 and specifically mentioned that Bankruptcy Rule 9021 has not been amended since the change to Civil Rule 58. In footnote 10 to the opinion, the Court

stated that the lack of any amendment to Bankruptcy Rule 9021 means that "the proper procedure for the Bankruptcy Court to follow is to set forth each final order on a separate document on the day the order was rendered, and for the Clerk to note the entry of that order on the publicly available bankruptcy docket." Id. at 807, n.10. Thus, the District Court seems to have interpreted Bankruptcy Rule 9021 as not incorporating the change to Civil Rule 58 into the Bankruptcy Rules. I have been unable to find any other decisions rendered under Bankruptcy Rule 9021applying the 2002 amendment to Civil Rule 58.

In *Garland v. Estate of Moloney (In re Garland)*, 295 B.R. 347 (9th Cir. BAP 203), the court held that a judgment not set forth on a separate document did not become effective under Bankruptcy Rule 9021 and Civil Rule 58 as incorporated into the Bankruptcy Rules. The bankruptcy court subsequent entered a judgment denying the debtor's request for relief from the earlier order, and it was this subsequent order prepared by the court (counsel had prepared the initial order) that was final and presented an appealable order to the BAP. Judge Klein, writing for the court, noted that Bankruptcy Rule 9021 and Civil Rule 58 establish the same requirements for judgments, and he also noted that the revised version of Civil Rule 58 will apply in bankruptcy cases to set an outside date of 150 days after entry in the civil docket as the latest date on which the judgment will become effective.

While it is clear that the separate document requirement applies under both the Bankruptcy Rules and the Civil Rules, the definition of "entry" of a judgment may be different depending on the extent to which Civil Rule 58 is incorporated into Bankruptcy Rule 9021. Since Civil Rule 58(b)(2) now defines entry of a judgment in such a manner that it establishes a definite cut-off date for the entry of a judgment even in the absence of a separate document, the

question arises whether the bankruptcy rules should follow suit. While the *Garland* court construed existing Rule 9021 as fully incorporating Civil Rule 58(b)(2), the court in *Dynamic Changes* indicated that the rule does not include that new definition of entry of a judgment into the Bankruptcy Rules.

The Advisory Committee may conclude that the bankruptcy system is better served by leaving the Rule unchanged. Amending the Rule at this time would highlight the fact that some judgments are not properly entered when the court did not include the judgment on a separate document. In that instance, the circuit decisions under former Civil Rule 58 that held that the absence of a separate document caused the appeal time not to commence would continue to apply to bankruptcy court judgments for which no separate document was filed. This could cause parties to reopen appeals on matters long since resolved, if they realize that the judgment was not set out on a separate document..

The bankruptcy rules and the civil rules generally are intended to be consistent to the greatest extent possible. In the absence of some bankruptcy policy making a different rule necessary or appropriate, the same treatment typically applies in adversary proceedings in bankruptcy cases as compared to general civil cases. While there may be a justification for expediting appeals in bankruptcy cases because resolution of a particular appeal can have an impact on many otherwise unrelated matters in the case (e.g., if we win, we sell the division and reorganize the rest of the business; if we lose, we convert to chapter 7), that may not justify inconsistency between the Civil and Bankruptcy Rules. Therefore, it may be prudent to consider amending the Bankruptcy Rule 9021 to ensure that consistent treatment is available under both the Civil Rules and the Bankruptcy Rules.

In addition to the possibility of taking no action to amend Rule 9021, the following proposals are offered for the Committee's consideration. Alternative 1 is intended to make the appealability of final judgments and orders in bankruptcy adversary proceedings and contested matters consistent with the appealability of final judgments and orders in cases governed by the Civil Rules. This would further the goal of consistency between the sets of rules, and it provides a broader source of decisional law on the operation of the rule. On the other hand, this solution results in the extension of the time to appeal if the court does not comply with the separate document requirement for judgments. In that event, an aggrieved party would have 150 days from the time of the entry of the judgment on the docket to commence an appeal of the judgment.

Alternative 2 is similar to the first alternative, except that it would call for the deletion of only the third sentence of the rule. The result of this edit is that the bankruptcy rules would continue to have a specific and direct requirement of a separate document for judgments, and the rule would otherwise defer to the civil rules. The deletion of the third sentence would arguably prevent the argument that "entry" of a judgment is somehow established under Rule 5003 as asserted by the court in *Dynamic Changes*.

Alternative 3 would set the bankruptcy courts on a course separate from the district courts as regards the entry of judgments. It would delete the requirement that there be a separate document for a judgment to become effective.

ALTERNATIVE 1 – General Adoption of Civil Rule 58

Rule 9021. Entry of Judgment.

1 Except as otherwise provided herein, Rule 58 F.R.Civ.P.

2 applies in cases under the Code. ~~Every judgment entered in an~~
3 ~~adversary proceeding or contested matter shall be set forth on a~~
4 ~~separate document. A judgment is effective when entered as~~
5 ~~provided in rule 5003.~~ The reference in Rule 58 F.R.Civ.P. to Rule
6 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these
7 rules.

COMMITTEE NOTE

The rule is amended to incorporate Rule 58 F.R.Civ.P. into the Bankruptcy Rules in its entirety except for references in Civil Rule 58 to Civil Rule 79(a). Those references are deemed to be references to Bankruptcy Rule 5003 instead of references to Civil Rule 70(a). Consequently, a judgment that must be entered on a separate document is considered entered when it is entered on the bankruptcy docket and when it is either (1) set forth on a separate document or (2) when 150 days passes from the entry on the bankruptcy docket, whichever is earlier.

ALTERNATIVE 2 – Retention of Separate Document Requirement in Rule 9021

Rule 9021. Entry of Judgment.

1 Except as otherwise provided herein, Rule 58 F.R.Civ.P.
2 applies in cases under the Code. Every judgment entered in an
3 adversary proceeding or contested matter shall be set forth on a
4 separate document. ~~A judgment is effective when entered as~~

5 ~~provided in rule 5003.~~ The reference in Rule 58 F.R.Civ.P. to Rule

6 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these

7 rules.

COMMITTEE NOTE

The rule is amended by deleting that portion of the rule that attempted to define the effective date of a judgment. The deletion of the statement extends the incorporation of Rule 58 F. R. Civ. P. into the Bankruptcy Rules to include the provisions of that Civil Rule 58 that define the entry of a judgment whether or not a separate document setting forth the judgment exists. Under that rule, if the court issues a separate document setting forth the judgment, the judgment is entered at the later of the time of the issuance of the separate document or the docketing of that judgment by the clerk. If the court does not issue a separate document setting forth the judgment, then the judgment is deemed entered 150 days after the clerk enters the judgment on the docket. This will resolve matters relating to the timeliness of appeals when no separate document is issued.

Alternative 3 – A Separate "Entry of Judgment Rule" for Bankruptcy Cases

If the Committee believes that the bankruptcy rules should not have the same definition of "entry of judgment" as set out in Civil Rule 58, then it may be prudent to consider being even more specific in Rule 5003. To accomplish that goal, the rule might be amended to eliminate the separate document requirement. In many instances, orders are entered that include more than a simple entry of judgment. This is particularly true in contested matters as compared to adversary proceedings. Thus, eliminating the separate document requirement will follow some current practices. There would be no need to amend Bankruptcy Rule 9021 if the Advisory Committee

selects this option. Of course, such a solution could present problems by making it unclear whether particular orders are final and appealable. This could lead to parties filing notices of appeals in order to protect against a waiver if they are unclear as to whether a particular order is final and appealable. This problem already exists, to some extent, but a rule that would expand the concept of the entry of a final judgment would seem likely to make this an even more frequent occurrence. Of course, is this is what is happening in the courts already (and particularly in matters that are not adversary proceedings), then perhaps the rule should be amended to recognize this practice.

Rule 5003. Records Kept By the Clerk

1 (a) Bankruptcy dockets

2 The clerk shall keep a docket in each case under the Code and
3 shall enter thereon each judgment, order, and activity in that case
4 as prescribed by the Director of the Administrative Office of the
5 United States Courts. The entry of a judgment or order in a docket
6 shall show the date the entry is made. Entry of the judgment is
7 effective notwithstanding the failure of the court to issue a separate
8 document as required under Rule 9021.
9 * * * * *

COMMITTEE NOTE

The rule is amended to clarify that the entry of a judgment dates from its being entered on the docket and is not postponed by the absence of a separate document setting forth the judgment. The

availability of notice of the docket entry by electronic means reduces the likelihood that parties will be unaware of the entry of the judgment, so delaying the effective date of the judgment for the issuance of a separate document is unnecessary. Unlike litigation under the Federal Rules of Civil Procedure, appeals in bankruptcy cases are treated on a more expedited basis with the notice of appeal due within ten days of its entry. This interest in expediting review would be overridden if the extended period of appeal available under Fed. R. Civ. P. 58(b)(2) were to apply in bankruptcy cases. This amendment makes clear that the appeal time begins to run from the time the judgment is docketed rather than from some later time when a separate document setting out the judgment is issued, or even a later point in time under Civil Rule 58(b)(2).

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: DEADLINE FOR NOTICE OF APPEAL AND COUNTING DAYS UNDER RULE 9006

DATE: January 27, 2005

The Advisory Committee considered the issue of the time to file a notice of appeal at the meeting in September at Half Moon Bay. A copy of my memorandum prepared for the September meeting is attached. The discussion centered around two matters: the time to file a notice of appeal under Rule 8002, and the method for counting 10 day periods under Rule 9006. Concerns were expressed that the deadline for filing a notice of appeal was both too short, and that it presented a trap for the unwary who would be more generally familiar with the longer deadlines set for appeals in civil cases in both state and federal courts. The shorter deadline was identified as especially problematic because, unlike Civil Rule 6, Bankruptcy Rule 9006 does not exclude intervening Saturdays, Sundays, and holidays that occur during the 10 day appeal time set by Rule 8002. Thus, the argument was that the shortened deadline when combined with the different and "shorter" counting provision in Rule 9006 justified considering an amendment to Rule 8002 or Rule 9006, if not both. After discussion of the matter, it was referred to the Subcommittee on Technology and Cross Border Insolvency. The matter was sent to the Technology Subcommittee because the problem was initially raised in connection with delays in the service of judgments and orders on the parties by the Bankruptcy Noticing Center (BNC). The expansion of the CM/ECF system might resolve many of the concerns about the delay built

into a system under which the orders would be sent first to the BNC and thereafter to the parties.

The Subcommittee conducted two teleconferences to address the matter. The first meeting included an extensive discussion on the operation of the noticing system, the historical basis for the ten day appeal time, and the circumstances surrounding the change in the counting provisions in Rule 9006 and the nearly immediate reversal of that decision in the late 1980's. The Subcommittee also discussed at length whether any need existed for the proposed change in the Rules. Based on those discussion, the Subcommittee decided that it would be helpful to have additional information about the perceived need for a change to the time for filing a notice of appeal as well as more background on the Advisory Committee's actions in 1986-88 regarding the amendment and reinstatement of the counting provision in Rule 9006. To that end, Judge McFeeley agreed to conduct an informal survey of bankruptcy judges to get some idea of their views on the need for an amendment to extend the appeal time under Rule 8002, and Ms. Ketchum agreed to delve through the Committee's historical records to compile the relevant materials the Committee considered in its decision to reinstate the Rule 9006 counting rule that became effective on December 1, 1989.

The Subcommittee had the benefit of these materials for its second teleconference on the matter. Professor Resnick also participated in the second Subcommittee teleconference to add his recollections about the reinstatement of the counting provision in Rule 9006(a) which occurred just at the time that he first became the Reporter to the Committee. Copies of the survey results and Ms. Ketchum's memorandum are attached to this memorandum. The materials relating to the reinstatement of the Rule 9006(a) counting system which were attached to her original memorandum are lengthy and will be summarized in this memo.

Approximately 63 judges responded to the survey. The survey results indicated that most judges continue to use the BNC to serve orders and judgments, although a significant minority (23 of the 63) do not use the BNC. Of that group of judges who do not use the BNC, a slight majority indicated that delay was not the reason they chose not to use BNC for the service of these documents. More generally, only 5 of the judges indicated that they believed that the ten day rule for filing a notice of appeal had created a problem. Fifty-five of the judges stated that the ten day period had not caused any problems. Overall, the responding judges voted 38 to 19 against amending the rules to extend the appeal time beyond its current ten days. While the survey was not intended to be statistically valid, it gave the Subcommittee at least a feel for what the bankruptcy judges perceived about the need to amend the rules to extend the appeal time.

I also conducted a review of the case law for the past two years, and there does not seem to be any greater number of decisions suggesting a need for an amendment of the Rule. While there are always a few cases in which the ten day deadline cut off an appeal, there does not appear to be any significant increase in those cases. Professor Resnick also noted that he has not seen any noticeable increase in these cases in the past few years.

The Subcommittee also discussed the historical background for the ten day appeal time. The ten day deadline was set out in the Bankruptcy Act, and it was also contained in the Bankruptcy Rules when they were promulgated. The deadline also was included in a number of the versions of the bankruptcy reform legislation in the 1970's, and it was included even in the very latest stages prior to the final enactment of the Bankruptcy Code in 1978. I have not been able to find any reason why it was removed from the bill, but it is my assumption that Congress saw no need to include the deadline in the jurisdictional provisions governing appeals because

the deadline was already set forth in the Bankruptcy Rules. Thus, the ten day appeal time has been a part of the bankruptcy laws for decades.

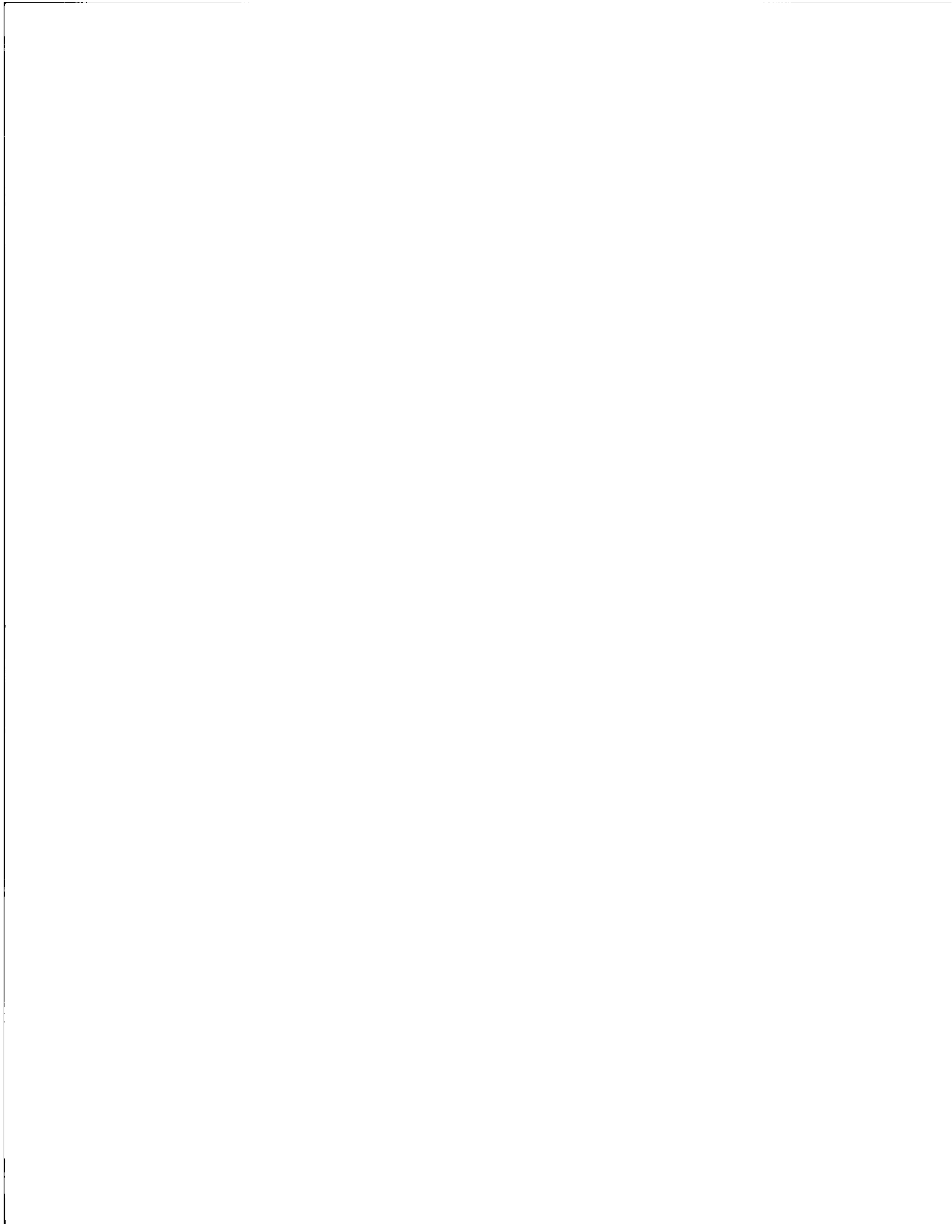
The Subcommittee discussed the impact of changing the long standing ten day appeal rule on bankruptcy practice. The shortened appeal time was noted as particularly important to establish finality of orders of confirmation of plans, sale orders under § 363, and financing orders under § 364 of the Code. The transactions on which these orders depend frequently are made with the finality of these orders specifically in mind. And, as noted below, practitioners have suggested to the Committee in the past that this special shortened appeal rule is both justified and necessary in bankruptcy cases.

The Subcommittee considered whether the problem of shortened appeals could be relieved if the counting provision of Rule 9006(a) were amended to conform to F.R. Civ. P. 6 such that intervening Saturdays, Sundays, and holidays would be excluded for periods less than eleven days as opposed to periods less than eight days as under current Rule 9006(a). The Subcommittee discussion reiterated the need for relatively quick finality for orders as discussed above. Moreover, Rule 9006(a) provides that the rule governs counting not just for purposes of other rules, but also for other applicable statutes. For example, §§ 546(c) and 547(e) contain ten day periods that would be changed by adoption of the Civil Rules counting system. There are also state statutes that apply in bankruptcy cases (for example, UCC § 2-702) that include ten day periods, and the time periods set by those provisions would likewise be altered by an amendment to Rule 9006(a). There is no way to tell how many state statutes there may be that would be affected by a change in the counting rules should one be adopted. When Rule 9006(a) was amended in 1987 to conform to the Civil Rules counting method, the Advisory Committee was

in the midst of considering voluminous materials to implement a wide range of changes made by amendments to the jurisdictional provisions governing bankruptcy cases. This issue seemed to have slipped in under the radar, but it was quickly noted by members of the bar that the change would have a profound affect on bankruptcy cases, particularly as it related to appeals. That led the Committee to seek an expedited reinstatement of the old rule (actually a slightly different version, but one that still treated ten day periods as they always had been). The Committee had a somewhat limited number of comments, but those that were received generally favored a speedy return to the former counting rule. Professor Resnick and Ms. Ketchum each recalled that the Committee felt a strong need to correct the error as quickly as possible once it became aware of the unintended consequences of the amendment.

These factors led the Subcommittee to conclude that it should recommend to the Advisory Committee that no change be made at this time either to Rule 8002 or Rule 9006. The absence of a demonstrated need for the change to meet a current and significant problem, along with the Committee's past experience with the change in the counting method adopted and immediately abandoned in the late 1980's combined to lead to this conclusion. The Subcommittee's vote was unanimous, except for Judge Swain who was unable to participate in the second teleconference and therefore did not vote on the matter.

Attachments: Reporter's memorandum for the Half Moon Bay meeting
Judge McFeeley's Survey Results
Ms. Ketchum's Memorandum on the 1987/1989 Amendment and Re-amendment



Attachment 1

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **RULE 8002 – EXTENDING THE APPEAL TIME**

DATE: **AUGUST 19, 2004**

Under Rule 8002, a notice of appeal must be filed within ten days of the entry of the judgment, order or decree being appealed. This deadline is much shorter than deadlines applicable in other federal civil litigation[1], and the courts generally have applied the deadline strictly.[2] Given that it is both a short period and that it is different from most other appeal deadlines, the bankruptcy appeal rule can be a trap for the unwary. The potential harshness of the rule is exacerbated by the delays in service of judgments, orders, and decrees. For example, several judges at the roundtable discussion of rules issues at the FJC meeting in Seattle last week noted that it frequently takes two to three days for the Bankruptcy Noticing Center to send these orders to the parties. If the delivery of the mail takes an additional two or three days, the party will not receive the order until approximately one-half of the appeal time has run. Further complicating the problem is the different counting rule for ten day periods under Bankruptcy

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[1] Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that a notice of appeal in a civil case must be filed within 30 days of the entry of the order appealed from.

[2] See, e.g., In re Weston,. 18 F.3d 860 (10th Cir. 1994); In re Souza, 795 F.2d 853 (9th Cir. 1986).. The courts upheld the short deadlines even prior to the enactment of the Bankruptcy Code. See, e.g., In re Plotkin, 247 F.Supp. 1965 (S.D.N.Y. 1965)

Rule 9006(a) as compared to Civil Rule 6. Under the Bankruptcy Rules, the ten day period includes all intervening Saturdays, Sundays, and holidays, while those intervening days would be excluded under the Civil Rules. This effectively shortens the ten day period under the Bankruptcy Rules as compared to the Civil Rules.

The roundtable discussion included several possible solutions to the problem of the extremely short appeal time. One solution was to extend the time from ten days to fifteen days in Rule 8002. Another possible solution would be to amend Rule 9006(a) to make it consistent with the civil rules regarding the exclusion of intervening Saturdays, Sundays, and holidays. This would be very comparable to extending the deadline to fifteen days. A third solution suggested, and the one that seemed to generate the most support was to change the starting point for counting the appeal time so that it begins to run from the time of service of the judgment, order or decree rather than from the time of the entry of the order. This solution retains the "short" deadline which is viewed as necessary for the efficient administration of bankruptcy cases while still giving the parties an adequate time to determine whether to appeal the decision. This solution is also superior to the suggested change in the counting mechanism set out in Rule 9006(a) because changing that counting rule would alter the timing of other matters under the Bankruptcy Rules.[3]

The widespread adoption of CM/ECF and electronic noticing may reduce the need for any

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[3] Rule 9006 was amended in 1987 to conform to the civil rule counting provision that excluded intervening Saturdays, Sundays, and holidays if the prescribed period in the rule was less than 11 days. Rule 9006 was amended again, just two years later, to reinstate the rule to its current version as regards intervening weekends and holidays. The Committee Note to the 1989 amendment reinstating the original version of the rule described the effect of the 1987 amendment as "an undesirable result" contrary to prompt administration of cases by extending 10-day time periods to at least 14 calendar days.

amendment of Rule 8002. In the meantime, the Committee may wish to consider whether any change should be made. A draft of an amended Rule 8002 that uses the service of the order appealed from as the triggering event for the start of the appeal time.

RULE 8002. Time for Filing Notice of Appeal

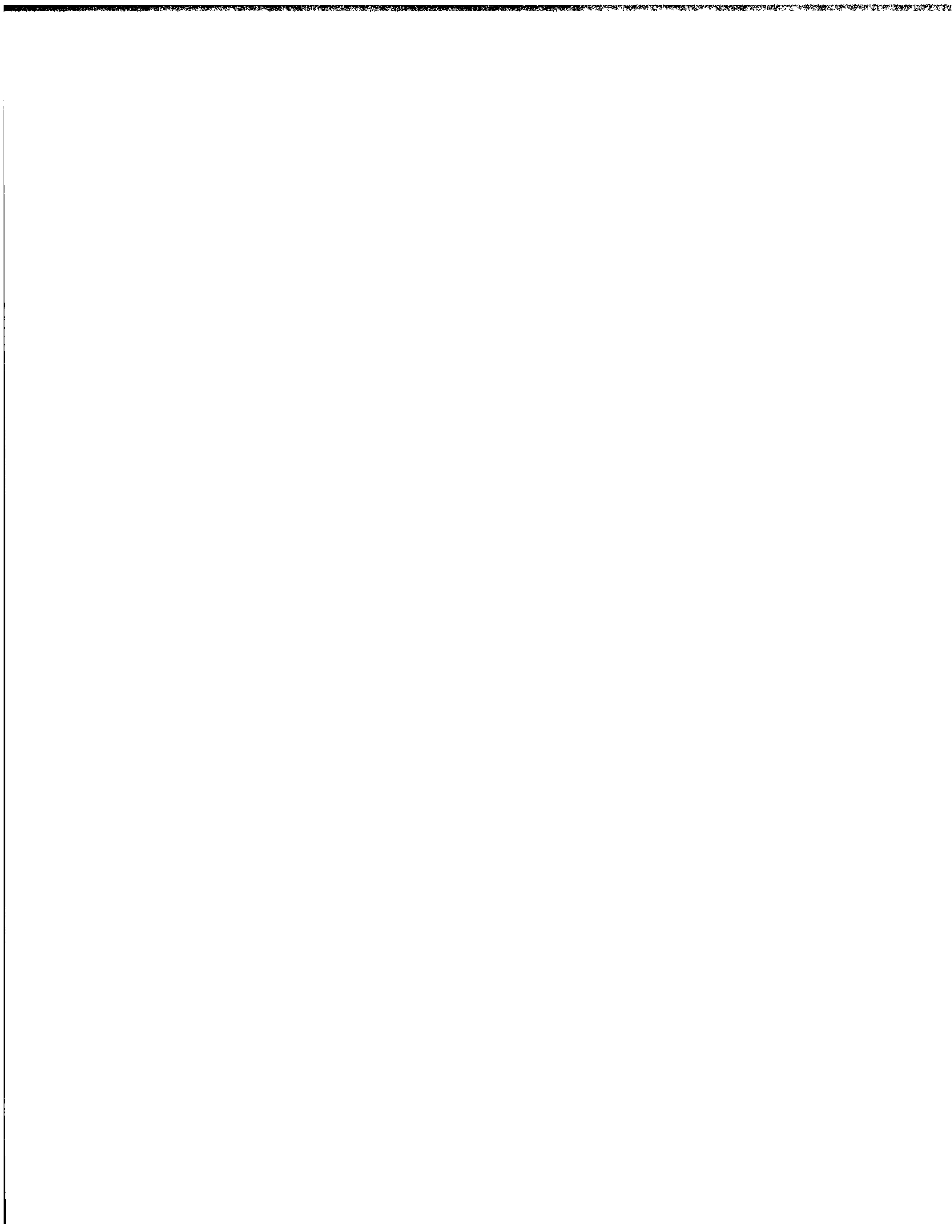
1 (a) TEN-DAY PERIOD

2 The notice of appeal shall be filed with the clerk within 10
3 days of the date of the service ~~entry~~ of the judgment, order, or
4 decree appealed from. If a timely notice of appeal is filed by a
5 party, any other party may file a notice of appeal within 10 days of
6 the date on which the first notice of appeal was filed, or within the
7 time otherwise prescribed by this rule, whichever period last
8 expires. A notice of appeal filed after the announcement of a
9 decision or order but before entry of the judgment, order, or decree
10 shall be treated as filed after such entry and on the day thereof. If a
11 notice of appeal is mistakenly filed with the district court or the
12 bankruptcy appellate panel, the clerk of the district court or the
13 clerk of the bankruptcy appellate panel shall note thereon the date
14 on which it was received and transmit it to the clerk and it shall be
15 deemed filed with the clerk on the date so noted.

COMMITTEE NOTE

The rule is amended to create a new starting point for the running of the time within which to file a notice of appeal. The time begins to run from the date on which the judgment, order, or

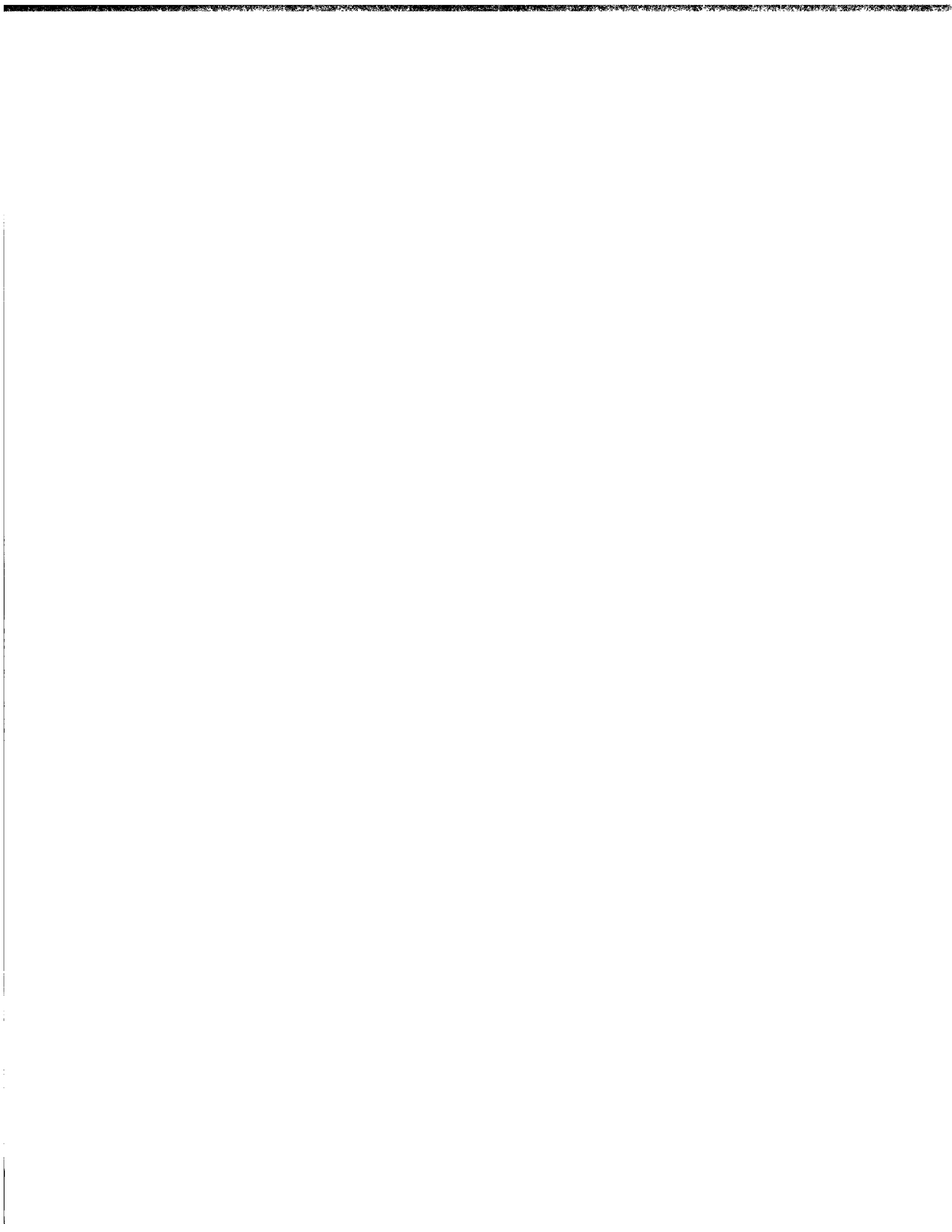
decree is served rather than from the date of the entry of the judgment, order, or decree. Since a party has only 10 days within which to file a notice of appeal, commencing that time period from the date of entry of the judgment, order, or decree appealed from is especially short if the aggrieved party has to await service of the paper before even knowing that the court has issued an appealable order. Delays in service would effectively reduce the time to appeal to a matter of days. Commencing the running of the appeal time with the service of the judgment, order, or decree should provide the parties with a sufficient period of time to determine whether to appeal.



Attachment 2

TALLY OF ANSWERS TO ADVISORY COMMITTEE QUESTIONNAIRE ON DEADLINE FOR NOTICE OF APPEAL

Question				
Does your district use the BNC?	Yes	58	No	4
Do you use BNC for service of orders and judgments?	Yes	40	No	23 (one j uses BNC on uncontested matters only; one j uses BNC only for e-filers)
If you do not use BNC, was delay a factor?	Yes	9 (one judge delay was factor for non-e-filers)	No	12
Has the 10 day period caused any problems in your district?	Yes	5	No	55
Do you favor a change of 10 day deadline?	Yes	19	No	38
If so, which do you favor? Note: some of the judges who preferred no change still answered this question	Amending Rule 9006 to conform to FRCP 6	15	Amending Rule 8002(a) to provide 14 days to file notice of appeal	15



Attachment 3

MEMORANDUM

DATE: January 11, 2005

FROM: Patricia S. Ketchum

SUBJECT: The Amendment and Re-Amendment of Rule 9006(a), 1987-1989

TO: Advisory Committee on Bankruptcy Rules, Subcommittee on Technology and Cross Border Insolvency

During the subcommittee's December 16, 2004, conference call, Judge Zilly asked me to research the background of the amendment and rapid re-amendment of Rule 9006(a). The 1987 amendment had conformed Rule 9006(a) to an amendment to Civil Rule 6 which increased the length of the time periods from which intervening weekends and holidays were to be excluded from the computation from "seven days" to "eleven days." This amendment to Rule 9006(a) had the effect in bankruptcy cases, *inter alia,* of extending the ten-day period for filing a notice of appeal and creating uncertainty with respect to when any particular order would become final. Judge Zilly requested that I look especially for any comments that had drawn the attention of the Advisory Committee to difficulties encountered with the 1987 amendment.

As the attached documents make several points. One, the change from a long tradition in bankruptcy cases of a firm ten days to file an appeal was made solely in the interest of conformity, to accommodate a request of the Committee on Rules of Practice and Procedure (Standing Committee) that all the federal rules treat common issues uniformly, absent a compelling reason for any difference. Although there was some opposition to re-amending the rule, the weight of the comments appeared to support a re-amendment that would restore a firm ten-day period for determining the finality of an order in a bankruptcy case. In particular, a report from the American Bankruptcy Institute[1] noted that the effect of the change in the rule to "eleven days" extended also to statutory ten-day periods, such as the ten-day period for a seller to reclaim goods under 11 U.S.C. § 546(c), and to ten-day periods prescribed in the Uniform Commercial Code.

It is difficult to imagine that the Advisory Committee in the mid-1980s did not foresee the consequences of the conforming change to eleven days in Rule 9006. The National Conference of Bankruptcy Clerks had commented, in connection with the published draft of the 1987 amendment, that the change would "result in a massive increase in the number 9006(c) motions [to shorten time] and orders to show case." The Reporter's notes of the meeting at

[1]This report is summarized in a memorandum from Committee Chairman Lloyd D. George dated 12/27/1988. Unfortunately, I was not able to locate a copy of the ABI report itself.

which comments were considered, however, indicates an affirmative action to make "nc" [no change] in the proposed amendment. (These two documents are not attached.)

The Committee was profoundly distracted in 1986 and 1987. The Advisory Committee had just completed work on amending the rules to conform to the revised jurisdictional provisions governing bankruptcy courts in the Bankruptcy Amendments and Federal Judge Act of 1984, and these amendments had not even taken effect when the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 was enacted, necessitating another comprehensive review and amendment of the bankruptcy rules. In the midst of this statutory turmoil, the effects of a conforming change in Rule 9006(a), proposed at the request of the Standing Committee, simply didn't register with the Advisory Committee. The 1987 amendment just slipped by the Advisory Committee's usually hyper-attentive members.

A similar situation could arise again if the often-threatened Bankruptcy Reform Act passes in the new Congress. Even though the Advisory Committee did a great deal of preparatory work in 2001 when enactment last seemed imminent and the material produced is on file, the period between enactment and the effective date of a far-reaching new law will be only six months. The Advisory Committee could well find itself distracted again.

(The original attachments are voluminous. They will be available at the Committee meeting.)

cc: Judge Zilly
Prof. Morris

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: REPORT OF JOINT SUBCOMMITTEE ON VENUE AND RELATED MATTERS IN LARGE CHAPTER 11 CASES

DATE: JANUARY 29, 2005

Mr. Shaffer chaired the Joint Subcommittee on Venue which was a joint effort of the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee. The Joint Committee studied various issues that may have some impact on the selection of venue in large chapter 11 cases. The Joint Committee sought to identify areas where the rules could be improved to make the location of a court less significant in the selection of the district in which to file a petition.

The Joint Committee first recommended an amendment to Rule 1014 that the Advisory Committee has already proposed for publication. The Standing Committee adopted that recommendation, and the amendment to Rule 1014 will be published in August. The amendment simply clarifies that the court may act on its own in dismissing a case or transferring the case to another district. The amendment also provides that the court can only take such action after notice and a hearing on the issue.

The Joint Committee continued its work since the last meeting of the Advisory Committee informed in large part by the discussions that took place during the meeting at Half Moon Bay in September. The Joint Committee met in early January to consider further drafts and to resolve matters raised by the Advisory Committee. The Joint Committee recommends

that the Advisory Committee recommend to the Standing Committee that three additional rules amendments be published for comment in August 2005. The amendments are to Rules 3007, 4001, and 6006. The amendments would authorize the joinder of objections to multiple claims under Rule 3007, and the joinder of actions to assume, assign, or reject executory contracts and unexpired leases under Rule 6006. A number of courts already permit such actions, and some local rules also allow the practice. These rules, if adopted, would serve to standardize the practice and reduce incentives to select one jurisdiction over another in the filing of a petition.

Other significant proposals from the Joint Committee are the proposed amendment to Rule 4001, and a new rule, Rule 6003, which will both place new limits on the scope of orders the court may enter at the earliest stages of a case. The ability to obtain "first day orders" is often cited as a reason for selecting a particular venue. In addition, the Joint Subcommittee had concerns about the ability of the court, creditors, and other parties in interest to evaluate effectively the often voluminous requests for relief at the initiation of the case. Amended Rule 4001 would impose new disclosure requirements with respect to motions to obtain debtor in possession financing and to use cash collateral. New Rule 6003 would govern a wide range of other requests for relief from the court in the first twenty days of a case. It requires that the court not grant specified kinds of relief at the very start of a case absent a showing of immediate and irreparable harm.

RULE 3007

The proposed amendment to Rule 3007 specifically authorizes the filing of what has been referred to as an "omnibus" claims objection. In some cases there may be thousands of proofs of claims filed in the case. Many of these claims may be objectionable on a common basis. For

example, a proof of claim may duplicate another proof of claim filed by the same creditor in the case.. Where there are related cases pending in the same court, claims may be filed in the case of the wrong debtor (such as claims held against parent company being filed in the case of a subsidiary debtor). Since there may be a significant number of these claims objections in the same case, consolidating the objections in a single objection may create significant savings. The proposal recognizes that these significant savings, but it establishes protections for creditors whose claims may be included in a long list of claims to which the debtor is objecting. The claims objection must list the claimants alphabetically, and it must direct the claimant to the number of the claim as well as the grounds on which the debtor bases the objection. The rule establishes a maximum number of claims objections that may be so joined, and provides other safeguards of the creditors' due process rights.

RULE 6006

The Joint Committee recommends an amendment to Rule 6006 in a manner largely parallel to the amendment to Rule 3007. The Rule 3007 amendment authorizes the joinder of objections to multiple claims in a single action, while the proposed amendment to Rule 6006 allows the joinder of multiple motions to assume, assign, or reject executory contracts and unexpired leases. The proposed rule permits joinder of such motions in limited, defined circumstances, and includes provisions intended specifically to protect the due process rights of non-debtors whose interests may be affected by these actions.

RULE 4001

The Joint Committee proposes extensive amendments to Rule 4001. The amendments would place a new obligation on the party moving for authority to use cash collateral to set out in

greater detail the terms of the requested relief. The party's motion must include a summary not to exceed three pages that will set out the material provisions of the request for relief. Similarly, a party filing a motion to obtain credit is required to include in its motion a summary of the material terms of the agreement. Moreover, the amended rule would require that the motion specifically identify a variety of provisions that may be included in any agreement for which court approval is sought. The identification includes the location in the documents of these provisions. The purpose of these requirements is to eliminate surprise and to give interested parties and the court a full opportunity to evaluate the proposed agreements and orders.

RULE 6003

The Joint Committee also recommends the publication of new Rule 6003. (Former Rule 6003 was abrogated in 1991.) The new rule establishes new service and notice requirements when a party seeks certain forms of relief in the first twenty days after the commencement of a case. The actions subject to the rule are applications for employment of professional persons, motions to use, sell, lease, or otherwise obligate property of the estate, and motions to assume, assign, or reject executory contracts and unexpired leases. The rule also applies to any other request for relief presented to the court in the first twenty days of a case if the court so orders. The amendment also adopts the concept set out in subdivisions (b)(2) and (c)(2) of Rule 4001 that relief is available only to the extent that it is necessary to avoid immediate and irreparable harm.

These rule amendments and new Rule 6003 are intended to reinstate a greater degree of balance among the interests of all parties in the case during the opening stages of the proceedings. It can occur that orders entered immediately after the commencement of the case

can substantially limit the course the case may take. The courts frequently are presented with voluminous documents that they may not even be able to completely read prior to entering some order in the case. With these actions being taken so quickly, a creditors' committee may not even be formed prior to the court rendering a decision in the matter. Under these amendments, there would be a short breathing spell of twenty days at the start of the case that would provide an opportunity for the United States trustee to appoint a creditors' committee that may also be in a position to have employed professionals to assist it in taking a position on these matters. The rules still provide for expedited relief, but persons seeking that relief have the burden of showing the extraordinary need for the relief just as they do under the existing provisions of Rule 4001.

The proposed amendments to Rules 3007 and 6006 are set forth together since they present similar issues. They are followed by the proposed amendments to Rule 4001 and new Rule 6003.

RULE 6003 Alternatives

Rule 6003 is presented in alternative versions. The first version, as noted above, includes new notice provisions for motions made during the first twenty days of the case. The notion is that the creditors' committee would not likely be in place at that time, so special notice rules might be particularly important during that period, but that later in the case, the committee would be in place and could protect the interests of its constituency, making special notice rules unnecessary. The second alternative, in contrast, simply requires that the court enter no order on the covered motions during the first twenty days of the case, imposing no new notice requirements. The notion here is that provisions for more extensive notice should apply regardless of when the motion is filed, and that by requiring a delay in the ruling, the rule would

allow for a creditors' committee to be heard on the covered motions.

The alternatives also differ in regards to the inclusion of any other motion or application that the court finds appropriate to include within the restrictions of the rule. The first alternative specifically notes in subdivision (a)(4) that the court can add any motion or application to the list of restricted actions. The second alternative is silent (it ends with (a)(3)) on the theory that a court needs no special authority to delay its ruling in order to allow for objections. A compromise position would be to delete (a)(4) and add a specific reference to the court's inherent authority in the Committee Note. The reference could be something like: "In addition to the applications and motions listed in subdivision (a)(1)-(3), the court could follow the directives of the rule for any other motion or application that it deems appropriate." Of course, the specific language can be refined, but the Committee should consider this as an alternative solution.

Please note that there alternative language is offered in Rule 3007 at Line 19 as well as on Lines 40-41. There is also alternative language offered in Rule 4001 at Line 13. These are fairly minor differences among persons suggestions improvements to the draft rules, but I wanted to bring them to your attention so that we can resolve those choices (or refer it to the Style Subcommittee) at the meeting in Sarasota.

Rule 3007. Objections to Claims

1 **(a) Objections to Claims**

2 An objection to the allowance of a claim shall be in writing and

3 filed. A copy of the objection with notice of the hearing thereon

4 shall be mailed or otherwise delivered to the claimant, the debtor

5 or debtor in possession, and the trustee at least 30 days prior to the

6 hearing. ~~If an objection to a claim is joined with a demand for~~

7 ~~relief of the kind specified in Rule 7001, it becomes an adversary~~

8 ~~proceeding.~~

9 **(b) No Joinder of Adversary Proceeding**

10 A party in interest shall not include a demand for relief of a

11 kind specified in Rule 7001 in an objection to the allowance of a

12 claim, but an objection to the allowance of a claim may be

13 included in an adversary proceeding.

14 **(c) Limitation on Joinder of Claims Objections**

15 Unless otherwise ordered by the court, or permitted by

16 subdivision (d) of this rule, objections to more than one claim shall

17 not be joined in a single pleading.

18 **(d) Omnibus Objections**

19 Except as provided in *[Subject to the requirements of]*

20 subdivision (e) of this rule, objections to more than one claim may

21 be joined in a single pleading if (i) all of the claims were filed by

22 the same entity, or (ii) the objections to the claims are based solely

23 on the grounds that the claims should be disallowed, in whole or in

24 part, for one or more of the following reasons:

25 (1) they duplicate other claims;

26 (2) they are filed in the wrong case;

27 (3) they are amended or superceded claims;

28 (4) they have been assigned to another claimant;

29 (5) they were not timely filed;

30 (6) they have been satisfied or released during the case, as

31 authorized by the Code, the rules, or an order of the court;

32 (7) the form of the proof of claim does not comply with

33 applicable rules, and the objector certifies that it cannot determine

34 the validity of the claim because of such non-compliance;

35 (8) they are interests rather than claims; and

36 (9) they assert priority in an amount that exceeds the statutory

37 dollar limits established by the Code.

38 **(e) Requirements for Omnibus Objections**

39 Unless otherwise ordered by the court, a pleading that joins

40 objections to more than one claim *[An objection to claims of more*

41 *than one creditor shall]* shall :

42 (1) state in a conspicuous place that claimants receiving the

43 pleading should locate their names and claims as listed in the

44 pleading;

45 (2) list claimants alphabetically and provide a cross reference

46 to claim numbers;

47 (3) state the grounds of the objection for each individual claim

48 and, if an objection to a claim is based on more than one ground,

49 specifically reference each ground;

50 (4) state in the title of the pleading the grounds for the

51 objections included;

52 (5) be numbered consecutively with other pleadings that join

53 objections;

54 (6) group similar claims together; and

55 (7) contain objections to no more than 100 claims.

56 **(f) Finality of Objection**

57 The finality of any order respecting a claim included in a joined

58 objection shall be determined as though the claim had been subject

59 to an individual objection.

COMMITTEE NOTE

Claims Objections and Adversary Proceedings

The rule is amended in a number of ways. First, the amendment bifurcates the former rule into subdivisions (a) and (b) to prohibit a party in interest from including in a claim objection a request for relief that requires an adversary proceeding. A party in interest may, however, include an objection to the allowance of a claim in an adversary proceeding. Unlike a contested matter, an adversary proceeding requires the service of a summons and complaint thus putting the party served on notice of the potential for an affirmative recovery. Permitting the plaintiff in the adversary proceeding to include an objection to a claim would not unfairly surprise the defendant as might be the case if the action were brought as a contested matter that included an action to obtain relief of a kind specified in Rule 7001 from the claimant.

The rule as amended does not require that a party include an objection to the allowance of a claim in an adversary proceeding. If a claim objection is filed separately from a related adversary

proceeding, the court may consolidate the objection with the adversary proceeding under Rule 7042.

Joinder of Objections to Multiple Claims (Omnibus Objections)

The rule also is amended to authorize the filing of a pleading that joins objections to more than one claim. Such filings present significant opportunity for efficient administration of large cases, but the rule includes restrictions on the use of these objections to ensure the protection of the due process rights of the claimants.

Absent specific court authority, objections to more than one claim may be joined in a single pleading only if all of the claims were filed by the same entity, or if the objections are based solely on the grounds set out in subdivision (d) of the rule. Objections of the type listed in subdivision (d) often can be resolved without material factual or legal disputes. Unless the court orders otherwise,[1] objections to multiple claims permitted under the rule must comply with the procedural requirements set forth in subdivision (e).

Subdivision (f) provides that an order resolving an objection to any particular claim is treated as if the claim had been the subject of an individual objection. A party seeking to appeal any such order is neither required, nor permitted, to await the court's resolution of all other joined objections. The rule permits the joinder of objections for convenience, and that convenience should not impede timely review of a court's decision with respect to each claim. Whether the court's action as to a particular objection is final, and the consequences of that finality, are not addressed by this amendment.

Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease.

1 * * * * *

2 **(e) LIMITATIONS.** The trustee shall not seek to assume or

[1] If the Committee concludes that the version of the language on lines 40-41 of the rule should be adopted, the Committee Note would be revised to reflect that choice.

3 assign multiple executory contracts or unexpired leases in one
4 motion unless (i) all such executory contracts or unexpired leases
5 to be assumed or assigned are between the debtor and the same,
6 non-debtor party, (ii) all such executory contracts or unexpired
7 leases are to be assigned to the same assignee, or (iii) the court
8 otherwise permits such a motion to be filed. Subject to subdivision
9 (f) of this rule, the trustee may join requests to reject executory
10 contracts or unexpired leases in one motion.

11 **(f) JOINT MOTIONS.** Unless otherwise ordered by the
12 court, a motion to reject or, if permitted under subdivision (e), to
13 assume or assign executory contracts or unexpired leases between
14 the debtor and more than one non-debtor party shall:

15 (1) state in a conspicuous place that parties receiving the
16 omnibus motion should locate their names and their
17 contracts or leases listed in the motion;

18 (2) list parties alphabetically;

19 (3) specify the terms, including the curing of defaults, for
20 each requested assumption or assignment;

21 (4) specify the terms, including the identity of each
22 assignee and the adequate assurance of future
23 performance by each assignee, for each requested
24 assignment;

25 (5) be numbered consecutively with other joint motions to

26 assume, assign, or reject executory contracts or

27 unexpired leases; and

28 (6) be limited to no more than 100 executory contacts

29 or unexpired leases.

30 **(g) FINALITY OF DETERMINATION.** The finality of any

31 order respecting an executory contract or unexpired lease included

32 in a joint motion shall be determined as though such contract or

33 lease had been the subject of a separate motion.

COMMITTEE NOTE

The rule is amended to authorize the use of joint motions to reject multiple executory contracts and unexpired leases. In some cases there may be numerous executory contracts and unexpired leases, and this rule permits the combining of up to one hundred of these contracts and leases in a single motion to initiate the contested matter.

The rule also is amended to authorize the use of a single motion to assume or assign executory contracts and unexpired leases (i) when such contracts and leases are with a single non-debtor party, (ii) when such contracts and leases are being assigned to the same assignee, or (iii) the court authorizes the filing of a joint motion to assume or to assume and assign executory contracts and unexpired leases under other circumstances that are not specifically recognized in the rule.

A joint motion to assume, assign, or reject multiple executory contracts and unexpired leases must comply with the procedural requirements set forth in subdivision (f) of the rule, unless the court orders otherwise. These requirements are intended to ensure that the non-debtor parties to the contracts and leases receive effective notice of the motion.

Subdivision (g) of the rule provides that the finality of any order respecting an executory contract or unexpired lease included in a joint motion shall be determined as though such contract or lease had been the subject of a separate motion. A party seeking to appeal any such order is neither required, nor permitted, to await the court's resolution of all other contracts or leases included in the joint motion to obtain appellate review of the order. The rule permits the listing of multiple contracts or leases for convenience, and that convenience should not impede timely review of the court's decision with respect to each contract or lease.

RULE 4001. Relief from Automatic Stay; Prohibiting of Conditioning Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

1 * * * * *

2 (b) Use of Cash Collateral.

3 (1) Motion; Service.

4 (A) Motion. A motion for ~~authorization~~

5 authority to use cash collateral shall be made in

6 accordance with Rule 9014 and shall be

7 accompanied by a proposed form of order ~~served on~~

8 ~~any entity which has an interest in the cash~~

9 ~~collateral, on any committee elected pursuant to §~~

10 ~~1102 of the Code or its authorized agent, or, if the~~

11 ~~case is a chapter 9 municipality case or a chapter 11~~

12 ~~reorganization case and no committee of unsecured~~

13 ~~creditors has been appointed pursuant to § 1102, on~~

14 ~~the creditors included on the list file pursuant to~~

15 ~~Rule 1007(d), and on such other entities as the court~~

16 ~~may direct~~.

17 (B) Contents of Motion. A motion brought

18 under this subdivision shall include an introductory

19 statement, not to exceed 3 pages, summarizing all

20 *[the]* material provisions of the motion, including

21 (i) the identification of each entity that has an

22 interest in the cash collateral to be used, (ii) the

23 purposes for the use of the cash collateral, (iii) the

24 terms of the use of the cash collateral, including the

25 duration thereof, and (iv) any liens, cash payments,

26 or other adequate protection that will be provided to

27 each entity that has an interest in the cash collateral

28 or, if no additional adequate protection is proposed,

29 an explanation of how each such entity will be

30 adequately protected. The court may grant

31 appropriate relief under Rule 9024 if the court

32 determines that a material element of the motion

33 was not adequately disclosed in the introductory

34 statement.

35 (C) <u>*Service.* A motion brought under this</u>
36 <u>subdivision shall be served on (i) any entity that has</u>
37 <u>an interest in the cash collateral, (ii) any committee</u>
38 <u>elected under § 705 or appointed under § 1102 of</u>
39 <u>the Code or its authorized agent, or, if the case is a</u>
40 <u>chapter 9 municipality case or a chapter 11</u>
41 <u>reorganization case and no committee of unsecured</u>
42 <u>creditors has been appointed under § 1102, the</u>
43 <u>creditors included on the list filed under Rule</u>
44 <u>1007(d), and (iii) such other entities as the court</u>
45 <u>may direct.</u>

46 * * * * *

47 (c) Obtaining Credit

48 (1) Motion; Service.

49 (A) Motion.~~; Service~~. A motion for authority to
50 obtain credit shall be made in accordance with Rule
51 9014 and shall be <u>accompanied by a copy of the</u>
52 <u>agreement and a proposed form of order</u> ~~served on~~
53 ~~any entity which has an interest in the cash~~
54 ~~collateral, on any committee elected pursuant to §~~

55 ~~1102 of the Code or its authorized agent, or, if the~~
56 ~~case is a chapter 9 municipality case or a chapter 11~~
57 ~~reorganization case and no committee of unsecured~~
58 ~~creditors has been appointed pursuant to § 1102, on~~
59 ~~the creditors included on the list file pursuant to~~
60 ~~Rule 1007(d), and on such other entities as the court~~
61 ~~may direct~~.

62 (B) Contents of Motion. A motion brought
63 under this subdivision shall include an introductory
64 statement, not to exceed 3 pages, summarizing all
65 material provisions of the requested financing,
66 including interest rate, maturity, events of default,
67 liens, borrowing limits, and borrowing conditions.
68 The introductory statement also shall recite whether
69 the relief requested includes any of the type of
70 provisions indicated below in this subdivision and,
71 if so, shall (i) describe the nature and extent of any
72 such provisions, (ii) explain why any such
73 provisions are included in the relief requested, and
74 (iii) identify the specific location of any such
75 provisions in the proposed form of order,
76 agreement, or other document.

77 * the granting of priority or a lien on
78 property of the estate under § 364(c) or (d)
79 of the Code;

80 * the providing of adequate protection
81 on account of a claim that arose prior to the
82 petition date, including the granting of any
83 priority for such claim, the granting of any
84 lien on property of the estate to secure such
85 claim, or the use of property of the estate,
86 the proceeds thereof, or credit obtained
87 under section 364 of the Code to make cash
88 payments on account of such claim;

89 * a determination with respect to the
90 validity, perfection, priority, or amount of a
91 claim that arose prior to the petition date, or
92 of any lien securing such claim;

93 * a waiver, modification, or limitation
94 of the provisions of the Code or these rules
95 relating to the applicability of the automatic
96 stay or to obtaining relief from the automatic
97 stay;

98 * a waiver, modification, or limitation
99 of (i) the authority of the trustee, the debtor,
100 or the debtor in possession to file a plan of
101 reorganization, (ii) the authority of the
102 debtor to seek an extension of the time in
103 which the debtor has the exclusive right to
104 file a plan of reorganization, or (iii) the right
105 of the trustee or debtor in possession to seek
106 to use cash collateral or to obtain credit
107 under § 364 of the Code;

108 * a waiver, modification, or limitation
109 on the applicability of nonbankruptcy law
110 relating to the perfection of a lien on
111 property of the estate, or on the foreclosure
112 or other enforcement of such a lien;

113 * a release, waiver, or limitation on
114 any claim or other cause of action belonging
115 to the estate, the trustee, or the debtor in
116 possession, including any modification of
117 the statute of limitations or other deadline to
118 commence an action;

119 * indemnification of any party;

120 * a release, waiver, or limitation of any
121 rights under § 506(c) of the Code; or

122 * the granting of a lien on any claim or
123 cause of action arising under § 544, 545,
124 547, 548, 549, 553(b), 723(a), or 724(a) of
125 the Code.

126 The court may grant appropriate relief under Rule
127 9024 if the court determines that a material element
128 of the requested financing was not adequately
129 disclosed in the introductory statement.

130 (C) Service. A motion brought under this
131 subdivision shall be served on (i) any committee
132 elected under § 705 or appointed under § 1102 of
133 the Code or its authorized agent, or, if the case is a
134 chapter 9 municipality case or a chapter 11
135 reorganization case and no committee of unsecured
136 creditors has been appointed under § 1102, on the
137 creditors included on the list filed under Rule
138 1007(d), and (ii) on such other entities as the court

139 may direct.

140 * * * * * *

141 (d) Agreement Relating to Relief from the Automatic Stay,
142 Prohibiting or Conditioning the Use, Sale or Lease of Property,
143 Providing Adequate Protection, Use of Cash Collateral, and
144 Obtaining Credit.

145 (1) Motion; Service.

146 (A) Motion. A motion for approval of an
147 agreement (A) to provide adequate protection,
148 (B) to prohibit or condition the use, sale, or lease of
149 property, (C) to modify or terminate the stay
150 provided for in § 362 of the Code, (D) to use cash
151 collateral, or (E) between the debtor and an entity
152 that has a lien or interest in property of the estate
153 pursuant to which the entity consents to the creation
154 of a lien senior or equal to the entity's lien or
155 interest in such property shall be accompanied by a
156 copy of the agreement and a proposed form of
157 order.

158 (B) Contents of Motion. A motion brought

159 under this subdivision shall include an introductory
160 statement, not to exceed 3 pages, summarizing all
161 material provisions of the agreement. A motion
162 also shall recite whether the relief requested
163 includes any of the type of provisions indicated in
164 subdivision (c)(1)(B) of this rule and, if so, shall
165 (i) describe the nature and extent of any such
166 provisions, (ii) explain why any such provisions are
167 included in the relief requested, and (iii) identify the
168 specific location of any such provisions in the
169 proposed form of order, agreement, or other
170 document. The court may grant appropriate relief
171 under Rule 9024 if the court determines that a
172 material element of the agreement was not
173 adequately disclosed in the introductory statement.

174 (C) *Service.* A motion brought under this
175 subdivision shall be served on (i) any committee
176 elected pursuant to § 705 or appointed under § 1102
177 of the Code or its authorized agent, or, if the case is
178 a chapter 9 municipality case or a chapter 11
179 reorganization case and no committee of unsecured
180 creditors has been appointed under § 1102, on the

181 creditors included on the list filed under Rule

182 1007(d), and (ii) on such other entities as the court

183 may direct.

184 * * * * * *

COMMITTEE NOTE

The rule is amended extensively to require that parties seeking authority to use cash collateral, to obtain credit, to obtain approval of agreements to provide adequate protection, modify or terminate the stay, or to grant a senior or equal lien on property submit with those requests a proposed order granting the relief, and that they provide more extensive notice to interested parties of a number of specified terms. The motion must include a summary, not to exceed three pages, which will assist the court and interested parties in understanding the nature of the relief requested. In addition to the summary, the rule requires that motions under subdivisions (c) and (d) state, in addition to the summary, whether the movant is seeking approval of any type of provisions listed in subdivision (c)(1)(B), and where those provisions are located in the documents. These provisions are frequently included in agreements of these types, and the rule is intended to enhance the ability of the court and interested parties to find and evaluate those provisions.

The rule limits the introductory summary to three pages. The parties to agreements and lending offers frequently have concise summaries of their transactions that contain a list of the material provisions of the agreements, even if the agreements themselves are very lengthy. A similar summary should allow the court and interested parties to understand the relief requested. The rule make it clear that if the summary fails to disclose adequately any material aspect of the transaction, relief may be available under Rule 9024.

Other amendments are stylistic.

FIRST ALTERNATIVE RULE 6003

RULE 6003. Interim And Final Relief Immediately Following The Commencement Of The Case – Applications For Employment; Motions For Use, Sale, Or Lease Of Property; Motions For Assumptions, Assignments, And Rejections Of Executory Contracts; And Other Relief

1 (a) Applicability of Rule. This rule applies to the
2 following applications or motions, if such applications or motions
3 are filed within 20 days after the date of the filing of the petition:

4 (1) an application for employment under § 327 of
5 the Code;

6 (2) a motion to use, sell, lease, or otherwise obligate
7 property of the estate, including a motion to satisfy all or part of a
8 claim that arose prior to the date of the filing of the petition, but
9 excluding a motion to use cash collateral or to obtain financing
10 under Rule 4001;

11 (3) a motion to assume, assign, or reject an
12 executory contract or unexpired lease under § 365 of the Code; or

13 (4) an application or motion for such other relief as
14 the court may order.

15 (b) Granting of Relief. The court shall not grant relief on
16 an application or motion of the type described in subdivision (a) of
17 this rule within 20 days after the date of the filing of the petition,

18 except to the extent such relief is necessary to avoid immediate and

19 irreparable harm.

20 (c) Service and Notice

21 (1) Service. In addition to any other service

22 requirements imposed by the Code or these rules, the entity filing

23 an application or motion of the type described in subdivision (a) of

24 this rule, or such other person as the court may direct, shall serve a

25 copy of the application or motion on (i) any committee elected

26 pursuant to § 705 or appointed pursuant to § 1102 of the Code or

27 its authorized agent, or, if the case is a chapter 9 municipality case

28 or a chapter 11 reorganization case and no committee of unsecured

29 creditors has been appointed pursuant to § 1102, on the creditors

30 included on the list filed pursuant to Rule 1007(d), and (ii) on such

31 other entities as the court may direct.

32 (2) Notice. Notice of any hearing on an application

33 or motion of the type described in subdivision (a) of this rule shall

34 be given to the parties on whom service of the motion is required

35 by paragraph (1) of this subdivision, and to such other entities as

36 the court may direct.

COMMITTEE NOTE

Often there is a flurry of activity during the first days of a bankruptcy case. This activity frequently takes place prior the formation of a creditors' committee, and it also can includes substantial amounts of materials for the court and parties in interest to review and evaluate. This rule is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.

Applications for the employment of professional persons, motions for the use, sale, or lease of property of the estate other than such a motion under Rule 4001, and motions to assume, assign, or reject executory contracts and unexpired leases are governed by this rule if the moving party seeks a determination by the court within the first twenty days of the case. Furthermore, the court may grant relief on these motions during that twenty day period only if it is necessary to avoid immediate and irreparable harm. This standard is taken from Rule 4001(b)(2) and(c)(2), and decisions under those provisions should provide guidance for the application of this provision.

The court also may require an entity seeking any other form of relief during this time to comply with this rule if the court deems it appropriate. This rule does not govern motions and applications made more than twenty days after the filing of the petition.

The rule also directs the entity filing an application or motion set out in subdivision (a) of the rule to serve copies of the application or motion and give notice to the creditors's committee if one has been formed or on the creditors included on the list filed under Rule 1007(d), as well as on any other entity that the court directs. This service and notice is in addition to any other service and notice already required under the rules.

SECOND ALTERNATIVE RULE 6003

RULE 6003. Interim And Final Relief Immediately Following The Commencement Of The Case – Applications For Employment; Motions For Use, Sale, Or Lease Of Property; Motions For Assumptions, Assignments, And Rejections Of

Executory Contracts; And Other Relief

1 (a) Applicability of Rule. Except to the extent that relief is
2 necessary to avoid immediate and irreparable harm, the court shall
3 not grant relief within 20 days after the filing of the petition on any
4 of the following:

5 (1) an application for employment under § 327 of
6 the Code;

7 (2) a motion to use, sell, lease, or otherwise obligate
8 property of the estate, including a motion to satisfy all or part of a
9 claim that arose prior to the date of the filing of the petition, but
10 excluding a motion to use cash collateral or to obtain financing
11 under Rule 4001; and

12 (3) a motion to assume, assign, or reject an
13 executory contract or unexpired lease in accordance with § 365 of
14 the Code.

COMMITTEE NOTE

Often there is a flurry of activity during the first days of a bankruptcy case. This activity frequently takes place prior the formation of a creditors' committee, and it also can includes substantial amounts of materials for the court and parties in interest to review and evaluate. This rule is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.

The rule provides that the court cannot grant relief on applications for the employment of professional persons, motions for the use, sale, or lease of property of the estate other than such a motion under Rule 4001, and motions to assume, assign, or reject executory contracts and unexpired leases for the first twenty days of the case, unless it is necessary to avoid immediate and irreparable harm.. This standard is taken from Rule 4001(b)(2) and(c)(2), and decisions under those provisions should provide guidance for the application of this provision. The court also may require an entity seeking any other form of relief during this time to comply with this rule if the court deems it appropriate.

This rule does not govern motions and applications made more than twenty days after the filing of the petition.

Case Management, Telephonic Participation and Status Reports in Chapter 11 Cases

The Joint Committee also determined that the rules should be amended specifically to authorize the use of telephonic conferences and to otherwise allow remote participation in certain circumstances and to employ other case management techniques. The Joint Committee did not have an opportunity to consider specific language for such a rule, so the following should be considered a recommendation from the Joint Committee as to the principle of more open participation in matters without any position as to the draft set out below. The rule requires the court to hold an initial status conference in chapter 11 cases to consider a variety of case management tools such as requiring periodic status reports on the case, creation of a website specific to the case and for the use of interested parties, procedures to allow electronic participation in hearings, and the like. The implementation of these different means of case management are left to the discretion of the court. Experience with different kinds of cases will guide the courts as to the extent to which these case management orders are necessary in

particular cases. In every chapter 11 case, however, the court must hold an initial status conference.

RULE 2021. Case Management and Participation by Electronic Means

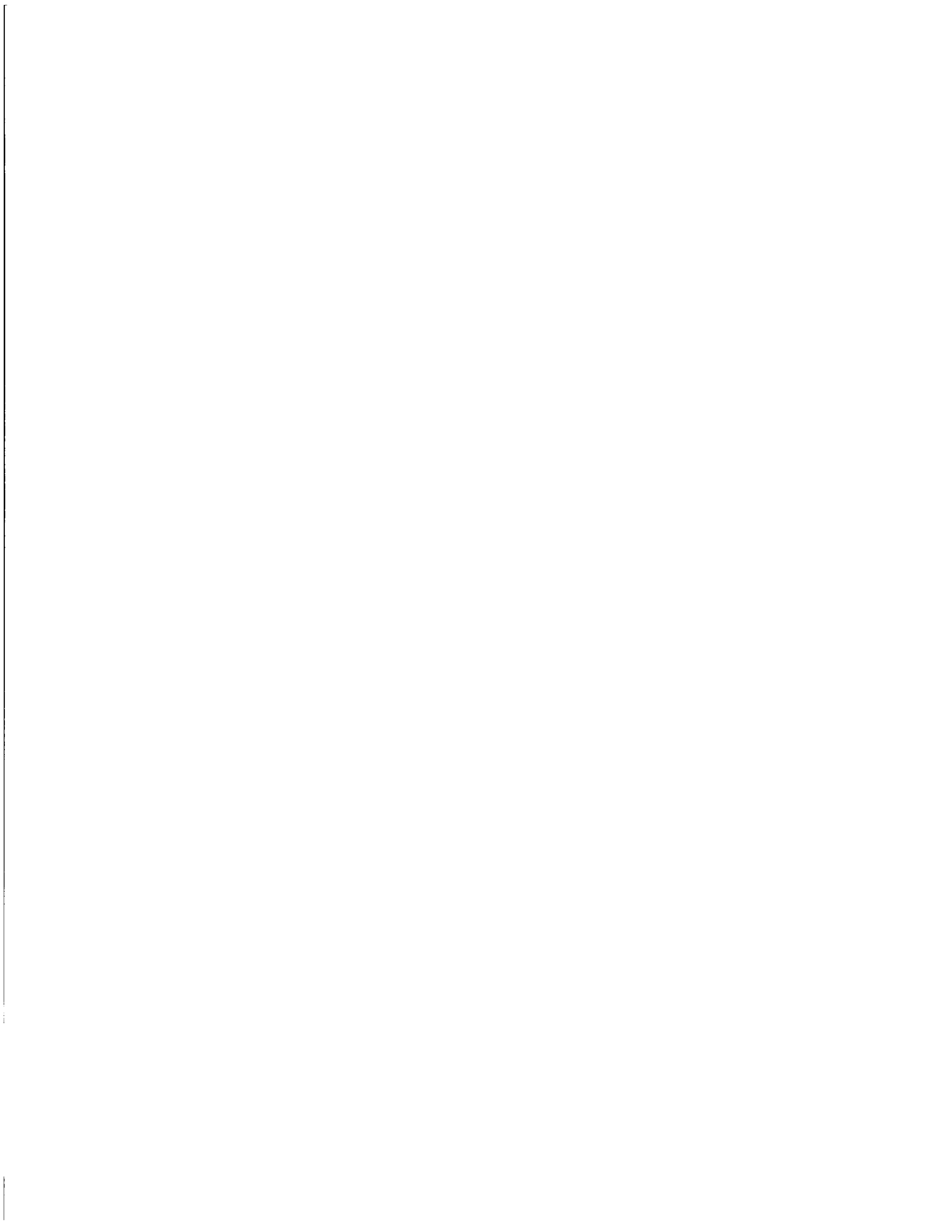
1 (a) As soon as practical after the filing of a chapter 11 case,
2 but not later than 15 days after the meeting of creditors under
3 §341(a), the court shall fix a date to hold an initial status
4 conference in the chapter 11 case to consider, and if appropriate,
5 enter orders:
6 (1) Establishing procedures for [participating or]
7 appearing in hearings by electronic means;
8 (2) Establishing procedures for the creation of a website
9 for the chapter 11 case including information
10 regarding pending and concluded proceedings, bar
11 dates, current service lists, scheduled court hearings,
12 dates for filing or objection deadlines, status reports,
13 any special procedures or case management orders
14 applicable to the chapter 11 case, information
15 regarding electronic access to filings, and such other
16 information as the court may direct which will
17 otherwise promote fair access and facilitate the
18 participation in the chapter 11 case; and

19 (3) Requiring counsel to the debtor in possession or
20 trustee to file with the clerk and serve upon the
21 persons appearing in the chapter 11 case, the
22 creditors included on the list filed pursuant to Rule
23 1007(d), and on such other entities as the court may
24 direct, a written status report on the progress of the
25 chapter 11 case. The status report shall include the
26 information described in subdivision (a)(2) of this
27 rule.
28 (b) Counsel to the debtor in possession or the trustee
29 shall give notice of the time and date of the initial status conference
30 to the persons described in subdivision (a)(3) of this rule.

COMMITTEE NOTE

This rule implements § 105(d) of the Code by requiring the court to hold a status conference at the beginning of a chapter 11 case and to establish a variety of procedures and case management policies to govern the case as it proceeds. Many chapter 11 cases involve parties who are quite distant from the court, and the initial case management order can include procedures to permit participation in hearings by electronic means if the court believes that such procedures are proper. Other possible case management orders include a requirement that periodic status reports be provided to interested parties and that a website be established to make information available to creditors and others about the case.

The need for one or more of these case management tools varies according to the case, and the court is given broad discretion as to the nature and extent to which these orders should be entered.



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: BANKRUPTCY RULE 7005.1

DATE: FEBRUARY 1, 2005

In August 2003, the Civil Rules Committee published a proposed new rule, Rule 5.1. The rule would replace portion of existing Civil Rule 24(c) that requires notice to the United States or a State's Attorney General whenever the constitutionality of a statute is called into question. The Civil Rules Committee initially decided to table the proposal, but the proposal was resurrected and the Advisory Committee recommended to the Standing Committee this January that the amendment be approved and sent to the Judicial Conference. The amendment moves the issue from Rule 24 to a presumably more prominent place in the Rules in the hopes of increasing the effectiveness of the provision. The rule implements 28 U.S.C. § 2403 that requires the courts to provide these notices. A copy of the statute is attached. The rule goes further than the statute, however, in that the new rule requires any party who challenges the constitutionality of a statute to give notice to the appropriate Attorney General. The statute places this obligation only on the court. Moreover, the statute requires the notification only if the statute being challenged affects the public interest, while the rule applies without this limitation. In creating the new rule, the Civil Rules amendments deleted the relevant portions of current Rule 24(c). Therefore, if the new Civil Rule is promulgated and Rule 24(c) is amended, the cross reference to Rule 24 in Bankruptcy Rule 7024 will be inadequate. Consequently, it is necessary to adopt a new rule to reflect this change in the Civil Rules.

The change means that the Bankruptcy Rules need to add a new Rule 7005.1 that would provide that Civil Rule 5.1 applies in adversary proceedings. I believe that Rule 9014 also should be amended to reflect this change. The addition of Rule 7005.1 should not be controversial and would not result in any real change in the Bankruptcy Rules. Civil Rule 24 already applies in adversary proceedings, and adding a Rule 7005.1 would simply continue that practice. Making Rule 7005.1 applicable to contested matters by adding it to the list of rules set out in Rule 9014(c), however, is a change in the current system. Currently, Rule 7024 does not apply in contested matters unless the court directs otherwise. Subdivisions (a) and (b) of Civil Rule 24 govern intervention of right and permissive intervention, respectively. Given the short time in which many contested matters are resolved, it may be appropriate that these intervention rules are not applicable. It is arguably quite a different issue when the purpose of Civil Rule 24(c) and 28 U.S.C. § 2403 are concerned. The statute obviously applies even in the absence of a procedural rule. The statute applies in any "action, suit, or proceeding in any court of the United States", so bankruptcy judges already have the obligation to notify the Attorney General that the constitutionality of a statute has been challenged. The separation of this issue from the general rules governing intervention make it easier to import the new Rule 7005.1 (and by way of cross reference Civil Rule 5.1) into contested matters.

There may be some justification for the concern that making Rule 7005.1 applicable will delay the resolution of contested matters. There are at least two responses to that concern. First, the obligation on the court is statutory, and the rule increases that obligation, if at all, only in the slightest. The only added obligation is to inform the Attorney General of constitutional challenges to statutes that do not affect the public interest. I doubt that there are many (if any)

such statutes. Second, if a party challenges the constitutionality of a statute, the speed with which a contested matter might be resolved should be sacrificed to protect the opportunity of the chief legal officer of the sovereignty whose enactment is being challenged to be heard on the matter. The Civil Rules Committee recognized that a party could try to slow the litigation process by drawing into question the constitutionality of a statute, and to prevent that form of gamesmanship, the proposal allows the court to reject a constitutional challenge even before the 60 day notice to the Attorney General has expired, although the court cannot hold a statute unconstitutional prior to the expiration of the period of notice to the Attorney General. Thus, an argument raised simply to delay a proceeding can be rejected immediately. Contested matters may be delayed in the face of constitutional challenges to relevant statutes, but it seems appropriate given the significance of the matter.

A proposed new Bankruptcy Rule 7005.1 and an amendment to Rule 9014 follow.

RULE 7005.1. Constitutional Challenge to a Statute – Notice, Certification, and Intervention

1 Rule 5.1 F.R.Civ.P. applies in adversary proceedings.

COMMITTEE NOTE

The rule is added to adopt the new rule added to the Federal Rules of Civil Procedure. The new Civil Rule replaces Rule 24(c) F.R.Civ.P., so the cross reference to Civil Rule 24 contained in Rule 7024 is no longer sufficient to bring the provisions of new Civil Rule 5.1 into adversary proceedings.

RULE 9014. Contested Matters

1 * * * * *

2 (c) Application of Part VII Rules

3 Rule 7005.1 applies in contested matters. Unless the court

4 directs otherwise, the following rules shall apply: 7009, 7017,

5 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064,

6 7069, and 7071. An entity that desires to perpetuate testimony may

7 proceed in the same manner as provided in Rule 9027 for the

8 taking of a deposition before an adversary proceeding. The court

9 may at any stage in a particular matter direct that one or more of

10 the other rules in Part VII shall apply. The court shall give notice

11 of any order issued under this paragraph to afford them a

12 reasonable opportunity to comply with the procedures prescribed

13 by the order.

14 * * * * *

COMMITTEE NOTE

Rule 7005.1 sets out the obligation of the court and a party that raises a constitutional challenge to a statute to give notice to the appropriate attorney general. Constitutional challenges to statutes can arise in contested matters as well as adversary proceeding, so the obligation to provide the notice should likewise apply. Since the court's obligation to notify the attorney general is statutory, the court cannot direct that the duty to comply with Rule 7005.1 is not applicable in any contested matter.

An alternative way to add Rule 7005.1 to Rule 9014 would be simply to insert it at the beginning of the list of rules set out in the first sentence of the existing provision. This is a "cleaner" form of amendment, but it would place the rule among those that are within the authority of the court to direct that they do not apply in contested matters. As noted above, the court's obligation to notify the appropriate attorney general is statutory, and that obligation exists whether or not there is a rule establishing the procedure for the court and others to follow in the event that the constitutionality of a particular statute is drawn into question. Thus, under the existing Rule 9014, even though Rule 7024 does not apply, the bankruptcy court still has the statutory duty to notify the attorney general of these constitutional challenges. Therefore, amending Rule 9014 by inserting Rule 7005.1 into the list of Part VII rules that apply in contested matters "unless the court orders otherwise" may not be in conflict with the statute. Moreover, Rule 5.1 of the Civil Rules extends beyond 28 U.S.C. § 2403 in that it puts the notice obligation on the parties as well as the court, and it extends even to constitutional challenges to statutes that do not affect the public interest (if there really are such statutes). The Committee Note could highlight that the court's statutory duty applies even if the court might direct that the rule does not apply in a particular contested matter. It also seems unlikely that the court would direct that the rule not apply, unless, for example, the court had already notified the appropriate attorney general and determined that an additional notice from the party who challenged the constitutionality of the statute into question was unnecessary. If the Committee believes that this solution is viable, the rule could be as follows.

RULE 9014. Contested Matters

1 * * * * *

2 (c) Application of Part VII Rules

3 Unless the court directs otherwise, the following rules shall

4 apply: 7005.1, 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041,

5 7042, 7052, 7054-7056, 7064, 7069, and 7071. An entity that

6 desires to perpetuate testimony may proceed in the same manner as

7 provided in Rule 9027 for the taking of a deposition before an

8 adversary proceeding. The court may at any stage in a particular

9 matter direct that one or more of the other rules in Part VII shall

10 apply. The court shall give notice of any order issued under this

11 paragraph to afford them a reasonable opportunity to comply with

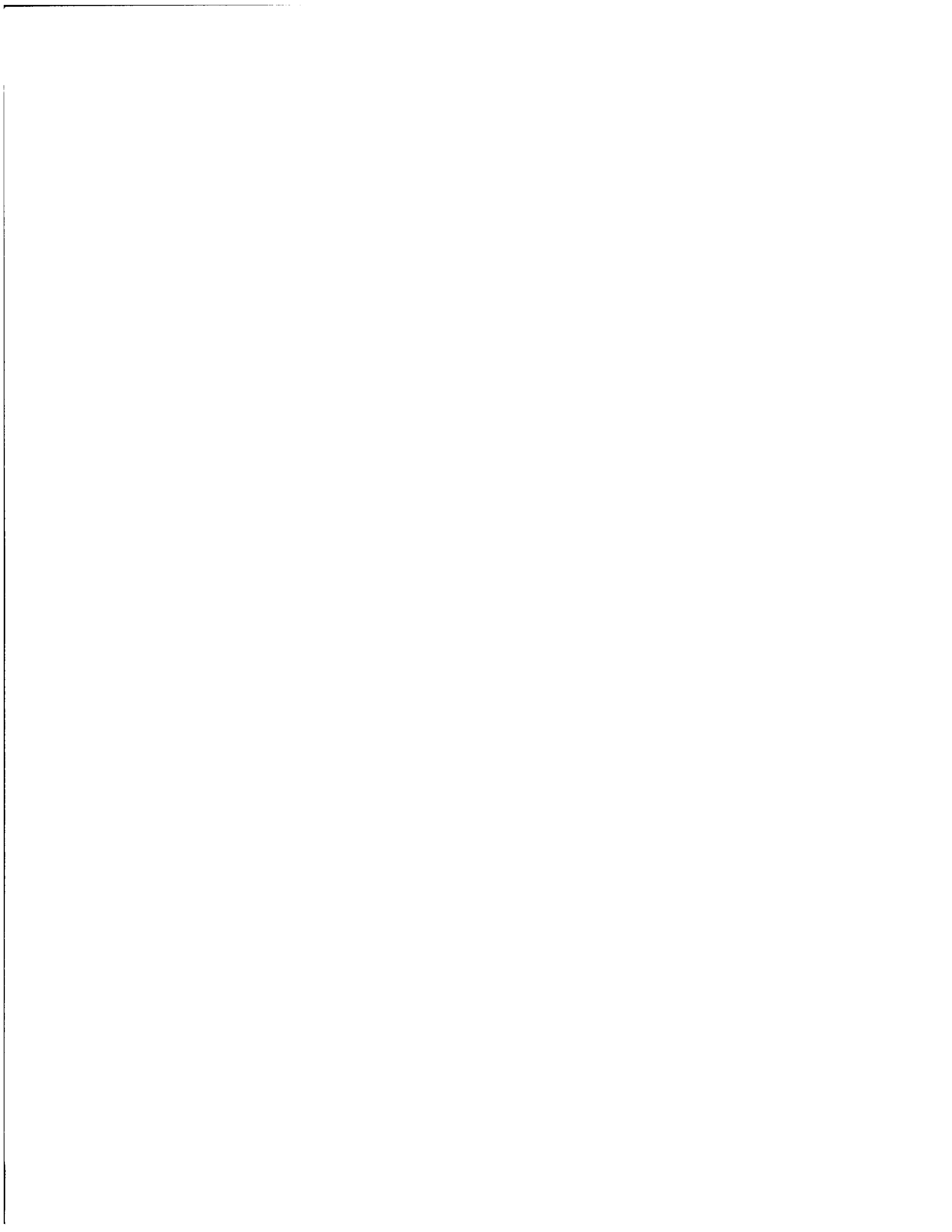
12 the procedures prescribed by the order.

13 * * * * *

COMMITTEE NOTE

Rule 7005.1 sets out the obligation of the court and a party that raises a constitutional challenge to a statute to give notice to the appropriate attorney general. Constitutional challenges to statutes can arise in contested matters as well as adversary proceeding, so the obligation to provide the notice should likewise apply. Although the rule provides that the court can direct that this rule not apply in a particular contested matter, the court's duty under 28 U.S.C. § 2403 to notify the appropriate attorney general of a constitutional challenge to a statute remains. Therefore, if the court were to direct that the rule did not apply in a particular contested matter (for example because the court had already notified the attorney general), the party that drew into question the constitutionality of the statute would be under no duty to notify the

attorney general.



UNITED STATES BANKRUPTCY COURT
MIDDLE AND SOUTHERN DISTRICTS OF GEORGIA
POST OFFICE BOX 64
MACON, GEORGIA 31202

JAMES D WALKER, JR
JUDGE

OFFICES
433 CHERRY STREET
MACON, GA 31201

TELEPHONE 752-8293
AREA CODE 478
TELECOPIER 752-3588

November 12, 2004

Honorable Thomas S. Zilly
United States District Court
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, Washington 98101

RE: Meeting of the Civil Rules Advisory Committee
October 28, 2004 in Santa Fe, New Mexico

Dear Tom:

By this letter I report on my impressions from the Civil Rules Advisory Committee Meeting. The first item of interest was a report from the AO staff regarding legislation. We were told that the Class Action Bill, while still pending, was not likely to be enacted during this term. On the other hand, the Rule 11 Bill providing for mandatory sanctions is still alive but has not yet passed. The new bill would remove the 21 day safe harbor which many believe had successfully avoided the occurrence of satellite litigation over sanctions.

The committee adopted the proposed Rule 5(e) permitting courts to make electronic filing mandatory. There was no discussion as to the question of whether the proposal should be placed on a fast track, unlike the treatment of that subject in our committee meeting. The consensus of the committee was in favor of a more compact committee note. To that end Ed Cooper, the reporter, and Judge Lee Rosenthal, the chairman, indicated that they would consult with our chairman and reporter to try to get agreement on the wording of a note.

Regarding the Civil Rules style project, a completely restyled set of rules was adopted by the committee. As you know, this accomplishment comes after long and diligent effort on the part of members of the committee and its consultants. I will not try to detail the various particulars that were discussed at the meeting, preferring to believe that consideration of the subject would not be useful to us at this time. Because I expect the day is coming when we will be asked to perform this task, we can be glad that much of the spade work has been done on so many difficult style issues and will be available to us when our turn comes.

In the several meetings I have attended where these issues have been discussed extensively, I have not seen any issue whose significance would be different for us than it was for the Civil Rules Advisory Committee. Furthermore, there was a purposeful and methodical effort in favor of adherence to consistency between the Civil Rules Committee and the Criminal and Appellant Rules Committees. I would expect that we would be likewise urged to adopt the same style conventions established during this process by the other committees.

A somewhat controversial issue was discussed at this meeting after having been tabled from the previous meeting. We will be vitally interested in the outcome of this discussion. The newly

proposed Rule, 5.1, lifts and moves the section from current FRCP Rule 24(c) and states the rule in a separate section 5.1 with slightly modified provisions. The rule implements 28 U.S.C. § 2403 and requires notice to the Department of Justice and to a state attorney general where a litigant "draws" into question the constitutionality of a statute in the course of a case. The proposed rule was adopted allowing for sixty days notice to the attorney general(s) before any determination of unconstitutionality. Also, there is a dual requirement for the party as well as the court to give the notice.

Thankfully, the new rule also includes no restriction on a ruling upholding the constitutionality, even though this element had been hotly contested at the previous meeting. The Justice Department argues that they need to be involved at an early stage in a case where the constitutionality of an act is challenged, even if the court rejects the challenge, reasoning that they would need to try to perfect the record for appeal purposes. During the hiatus between the two meetings, I think the DOJ recognized that there was significant resistence to the placing of all cases on a sixty day hold where a party might assert a constitutional challenge. This role could have been particularly troublesome to us in a situation such as a routine motion for stay relief where the unscrupulous debtor might raise a constitutional challenge merely for the purpose of postponing the relief requested by the creditor.

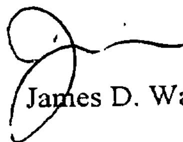
Another issue for us to consider with this rule is the discretion to enlarge or reduce the sixty day time limit. Our Rule 9006(b) and (c) governs enlargement and reduction. As for enlargement, our rule requires a motion must be made within the original time period or else a showing of excusable neglect is required. I suggested to the committee that we might want to avoid the impact of that rule by providing in Rule 5.1 for the enlargement or reduction to be a matter of discretion with the court. The committee had already discussed the question of whether the rule should suggest that the court would be authorized to enlarge or reduce the time period. One view holds that the court always has the authority to change the time period. Another view stated at the meeting was that the time period should be elastic and the rule should state as much. Given the restrictions imposed by our Rule 9006, I urged the committee to consider the latter view and include in the language of the rule a specific recognition of the unusual nature of these circumstances.

A revised draft of this rule will be circulating. Ed Cooper assured me I will receive a copy of it. Hopefully, we will be able to adopt a rule that simply incorporates the Civil Rule 5.1 text without changes.

Regarding the privacy template, most of the discussion was for the different types of proceedings covered and expected by the rule. The committee decided to include immigration proceedings into the exceptions to its coverage. The committee expects a final proposal of the rule to be submitted by the Privacy Subcommittee at the next meeting.

I hope this report is helpful to you. Please let me know if you would like for me to send you a copy of any portions of the agenda book.

Yours truly,



James D. Walker, Jr.

JDWjr/cs

cc: Jeff Morris

A SHORT HISTORY OF BANKRUPTCY FORMS
(What and Where They Are and How They Got There)

In the Beginning

Under the Bankruptcy Act of 1898 and until 1973, the Official Bankruptcy Forms were issued by the Supreme Court as part of its General Orders in Bankruptcy. The first bankruptcy rules were issued in 1973 to replace the Supreme Court's general orders, and the Official Bankruptcy Forms passed through the same levels of review as the rules — the Judicial Conference, the Supreme Court, and the Congress.

Rule 909 of the 1973 rules provided the first official recognition of the role of the Administrative Office in issuing forms for use in bankruptcy cases. Rule 909 provided, in pertinent part, "The Director of the Administrative Office . . . may promulgate illustrative forms for use under the [Bankruptcy] Act [of 1898]." The Committee Note stated that the number of official forms had been reduced and authority to develop and promulgate illustrative forms granted to the Director. The Committee Note thus raises a strong inference that the forms the Administrative Office would begin producing were to replace those which had been removed from the official category.

The first rules drafted to implement the Bankruptcy Reform Act of 1978 (the Bankruptcy Code) took effect August 1, 1983. New Rule 9009 for the first time provided that the Official Forms would be prescribed by the Judicial Conference. The Committee Note to the rule explained that "[t]he Supreme Court and the Congress will thus be relieved of the burden of considering the large number of complex forms used in bankruptcy practice." (1983 Committee Note to Rule 9009.) Rule 9009 also provided, and continues to provide, that the Director of the Administrative Office "may issue additional forms for use under the Code." (Rule 9009.) The Committee Note states that purpose of these additional forms is "for the guidance of the bar."

Developments Under the Bankruptcy Code

Throughout the 1980s, the first decade under the Bankruptcy Code, the official forms remained mostly the same as they had been under the Bankruptcy Act of 1898, with only the most basic modifications to accommodate statutory changes enacted as part of the Code. There were 35 official forms, including three statements of financial affairs: one for a debtor not engaged in business, one for a debtor engaged in business, and one for a chapter 13 debtor which included schedules of assets and liabilities (not required to be filed separately under chapter 13). There also were three kinds of proofs of claim: proof of claim, proof of claim for wages, and proofs of multiple claims for wages. And that was just the official forms.

There also was a profusion of other forms used by the public and by the bankruptcy courts. These were paper forms, printed under the auspices of the Administrative Office and distributed by it to the courts. The 1978 Code had changed the way bankruptcy cases moved through the courts and it also had changed the roles of bankruptcy judges and bankruptcy clerks. Judges, for example, no longer advised trustees on actions to take in a case, nor were they responsible any longer for the accuracy of the trustees' accountings in the estates under their administration. After the judges and clerks had a few years to get used to their new roles, they realized that many of the forms with which they were so familiar were no longer needed. In addition, the forms in general had begun to look rather antiquated and several bankruptcy clerks reported to the Administrative Office that a number of the forms were confusing to users. Accordingly, the Administrative Office formed a task force of bankruptcy judges and clerks to review all the forms then in use – both official and unofficial – and make recommendations for deleting those no longer useful and for revising those that were to be retained. During this period, the Administrative Office eliminated many forms – particularly those relating to judicial supervision of trustees and the bankruptcy estates under their administration.

While the task force was engaged in this process, the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 was enacted, further altering the processing of bankruptcy cases and delaying completion of the task force's work. One of the members of this task force later became a member and a chair of this Committee, Judge Paul Mannes.

Among the official forms, the proof of claim attracted the particular interest of the task force. This form seemed to be very confusing to the public, based on the number of questions that clerks' offices received. Accordingly, the task force designed a simplified form in a box format, similar to the one in use today, and in the spring of 1987 tested its effectiveness in 10 volunteer courts. The test form proved successful. It was rated well both by the clerks' offices that received and processed the form and by the trustees in the test districts.

The mid-1980s also was a time of surging bankruptcy caseloads and frequent requests from districts for more bankruptcy judges. The Administrative Office surveys, however, were impeded in some districts by a lack of relevant information about the nature of the bankruptcy cases being filed. The teams conducting the on-site reviews of these courts reported that these districts refused to require debtors' attorneys to complete the cover sheet form that clerks' offices used to collect the information necessary for compiling the statistics to support a request for a new judgeship. The task force decided to recommend merging the petition cover sheet into the petition form, in effect making the cover sheet an official form, as a means of assuring that the courts and the Administrative Office would receive the statistical data they needed.

Revising the Official Bankruptcy Forms

When in late 1987 the task force completed its work and made its recommendations concerning the official forms to the Advisory Committee on Bankruptcy Rules, chief among

them were the merging of the then-unofficial statistical cover sheet with the petition and the prescribing of a new proof of claim form in a box format. The Advisory Committee met in January 1988 to initiate the process of revising the rules to incorporate the functions of the United States trustees, and it decided to combine the revision of the official forms with the revision of the rules. A subcommittee which included Judge Mannes was formed somewhat later and, using the task force's recommendations as a starting point, considered all 35 official forms with a view toward modernizing, simplifying where appropriate, and making the forms accessible to and understandable by the lay public.

Several forms were dropped from the list of official forms. Others, including the three proofs of claim, were combined into a single form, as were the two statements of financial affairs and the chapter 13 statement. The task force's proposals for the petition and proof of claim were accepted and further refined. The Advisory Committee published its proposals for revised official forms in 1990, and they took effect in 1991, simultaneously with the amended rules. With these amendments, the judiciary for the first time prescribed both the content and format of many of the Official Bankruptcy Forms, including but not limited to the petition and the proof of claim.

1991 to 2005

Since 1991, four new official forms have been created: Form 19, Certification and Signature of Non-Attorney Bankruptcy Petition Preparer (1995); Form 20A, Notice of Motion or Objection (1997); Form 20B, Notice of Objection to Claim (1997); and Form 21, Statement of Social Security Number (2003). In addition, in 1993 two further versions were added to the multi-part Form 9, Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates, Form 9E(Alt.) and Form 9F(Alt.), to accommodate districts that set a bar date for filing proofs of claim in a chapter 11 case.

In addition, the multiple versions of Form 9 were substantially revised and reformatted in 1997 as a result of the Supreme Court's ruling in Pioneer Investment Services Co. v. Brunswick Associates, Ltd., 507 U.S. 380 (1993), 113 S.Ct. 1489, 123 L.Ed 2d 74 (1993), affirming the Sixth Circuit's ruling in Pioneer Investment Services Co. v. Brunswick Associates, Ltd., 943 F.2d 673 (6th Cir., 1991) which had held that the creditor's late filing of its proof of claim was due to excusable neglect. The Sixth Circuit severely criticized the form used in that case, a debtor-modified version of the predecessor to current Official Form 9, to inform creditors of the filing of the case and of the deadline for filing claims. The court noted that the claims filing deadline in 'the notice was simply and inconspicuously labeled "Bar date" without any reference to its significance as a deadline for the filing of proof of claims.' 973 F.2d at 678. Official Form 9 now displays all relevant deadlines conspicuously. The introduction of a central noticing facility for the courts, the Bankruptcy Noticing Center, has further assured almost universal usage of the official form.

Since 1991, six new Director's procedural forms have been created. Four of these were developed in response to bankruptcy amendments enacted in 1994. Those forms are the B 280, Disclosure of Compensation of Bankruptcy Petition Preparer, the B 281, Appearance of Child Support Creditor or Representative, and two forms that implement the "small business chapter 11" provisions of § 1125(f) of the Code (11 U.S.C. § 1125(f)), the B 13S, Order Conditionally Approving Disclosure Statement, etc., and the B 15S, Order Finally Approving Disclosure Statement and Confirming Plan. The fifth new form is the B 210, Notice of Transfer of Claim form requested by the CM/ECF Working Group and reviewed by the Committee at the September 2004 meeting. A sixth form related to legislative action will take effect shortly; it is the B 202, Statement of Military Service, which will implement the provisions of the Servicemembers Civil Relief Act of 2003.

Criteria Used by the Committee in 1988-91 in Reviewing Forms

During the review of all official forms in the late 1980s the Committee deleted several official forms entirely. Five of these forms, such as Form No. 22 "Order Appointing Interim Trustee and Fixing Amount of Bond," concerned responsibilities that had been reassigned to the United States trustees by the 1986 legislation. Other official forms were converted to Director's procedural forms.

In deciding whether to recommend to the Committee that other forms be converted to procedural status, the Forms Subcommittee applied certain criteria. These criteria were

- The need for uniformity when certain documents, such as schedules of assets and liabilities, are filed with the court;
- Whether the document is one used or filed by the public (rather than the court);
- Whether the document is one issued by the court, making official status unnecessary;
- Whether the need for uniformity overrides the fact of issuance by the court in order to assure the public of its authenticity and of the accuracy of the information contained in it, even if the form is one issued by the court;
- Because Rule 2002 permits the court to delegate certain noticing functions and to send notices in the name of the court, the subcommittee and, ultimately, the Committee believed some forms needed to be "official" to keep their use mandatory, an important safeguard when noticing has been delegated.

Among the formerly official forms that the Forms Subcommittee recommended be converted to Director's procedural forms were the current B 206, Certificate of Commencement of Case, and the B 207, Certificate of Retention of Debtor in Possession. These certificates would be issued only by the clerk upon application by the party, and the Committee saw no need to keep them official. On the other hand, because certain chapter 11 forms are drafted by counsel with many special provisions tailored to the specific case, the Forms Subcommittee recommended that they be retained as official as a reminder to counsel of the minimum

requirements.

The only form that was converted from "Director's procedural" status to "official" was the bankruptcy petition cover sheet. This was done to insure the collection of the information necessary to support court and judicial workload statistics, as noted above.

The Nature of Procedural Forms "Issued by the Director"

One factor that did not govern the choice of forms to be designated as "official" was widespread usage. The Director's procedural forms for use in bankruptcy cases can be grouped into three basic categories. One group is bankruptcy-specific and includes variations on the basic official form of discharge order, a form order for confirming a chapter 13 plan, a form for a final decree, and the form for disclosure of compensation by a bankruptcy petition preparer. A second group is chiefly statistical in nature and includes the bankruptcy index card (probably now obsolete) and the adversary proceeding cover sheet. The third category comprises the bankruptcy versions of various civil litigation forms: summonses, subpoenas, default judgment forms, a bill of costs, a writ of execution, and a certificate of judgment for registration in another district.

Once a form is designated as "official," it must be prescribed by the Judicial Conference. Any amendments to such a form also must be prescribed by the Judicial Conference. The Director's procedural forms, however, are issued and revised under Rule 9009 and may be made available in a more expeditious manner.

Although the Federal Rules of Civil Procedure includes an Appendix of Forms, the 39 official forms in the appendix "are intended for illustration only." The illustrative forms include summons, complaints, answers, certain motions, and judgments. The Federal Rules of Criminal Procedure does not include an Appendix of Forms. The appendix was abrogated in 1983 as unnecessary because forms are made available to the United States attorneys by the Department of Justice and to the courts by the Administrative Office.

In addition to the illustrative forms included in the civil rules, an Administrative Office task force which includes AO attorneys, judges, and district court clerks has drafted civil and criminal forms. The task force is guided in its work by the models in the Appendix of Forms. AO National Forms include subpoenas, summonses, judgments, a petition for writ of habeas corpus, a certification of judgment for registration in another district, criminal complaints, search warrants, arrest and seizure warrants, a bill of cost, verdicts, exhibit and witness lists, jury forms, and administrative forms. AO National Forms are posted on the "uscourts.gov" website and are offered to the courts and the public for use in civil and criminal litigation.

Widely Used Director's Forms

Now that the Administrative Office no longer stocks printed forms but supplies only electronic versions that can be downloaded by a court, an attorney, or a member of the public, it is not as easy to track usage as it was in the paper world. Nevertheless, based on the nature of the majority of the Director's procedural forms and the widespread posting of many of them on local court's websites (in addition to the posting on the uscourts.gov website), it is reasonable to assume that the summons and subpoena forms are universally used. Other forms, such as the variations of the discharge order, the default judgment series, the bill of costs, the writ of execution, and the certificate of judgment for registration in a foreign district are well known to the clerks of court and are downloaded and used whenever needed.

If these forms are so widely used, why not make them "official," along with the petition, schedules, statement of financial affairs, and the other official forms? When a local rule gains such wide acceptance that a substantial majority of districts adopt identical or nearly identical rules, that local rule may be a strong candidate to become a national rule. One stumbling block with the Director's procedural forms may be the approval process that makes a particular form an "official" one. All of the Official Bankruptcy Forms are prescribed by the Judicial Conference.

If the Committee were to recommend making the civil litigation group of forms official, its action would create a lack of uniformity between the procedure for issuing the bankruptcy form and the procedure for issuing the almost identical forms issued by the Administrative Office for use in civil cases in the district courts. The Committee would have to persuade the Committee on Rules of Practice and Procedure (the Standing Committee) that there is some bankruptcy-related reason for involving the Judicial Conference when no such involvement is required for the almost-identical forms issued for use in civil cases in the district courts. Both the district court forms and the bankruptcy forms are modeled on the illustrative forms appended to the Federal Rules of Civil Procedure; accordingly, the substance of both groups has been reviewed by the Judicial Conference, the Supreme Court, and the Congress.

Similarly, the Director's procedural forms for discharges under chapters 12 and 13 and under chapter 7 in jointly filed cases are modeled on Official Form 18, Discharge of Debtor. These orders are issued by the court and they fit the criteria for Director's procedural forms used by the Committee in 1991 to assign forms to that category.

Two forms, although they are not in the official category, regularly are included in bankruptcy forms packages sold by bankruptcy software vendors and paper forms publishers. These are the B 201, Notice to Individual Consumer Debtor, and the B 203, Disclosure of Compensation of Attorney for the Debtor. The B 201 by statute must be provided to the debtor, and the B 203, pursuant to Rule 2016(b), must be filed by every debtor's attorney. Forms and software vendors typically are very responsive to the needs of their customers and this responsiveness includes making sure their products are not only acceptable in the courts in which their customer-attorneys file cases but also desired over the products of competing suppliers.

Access to Forms

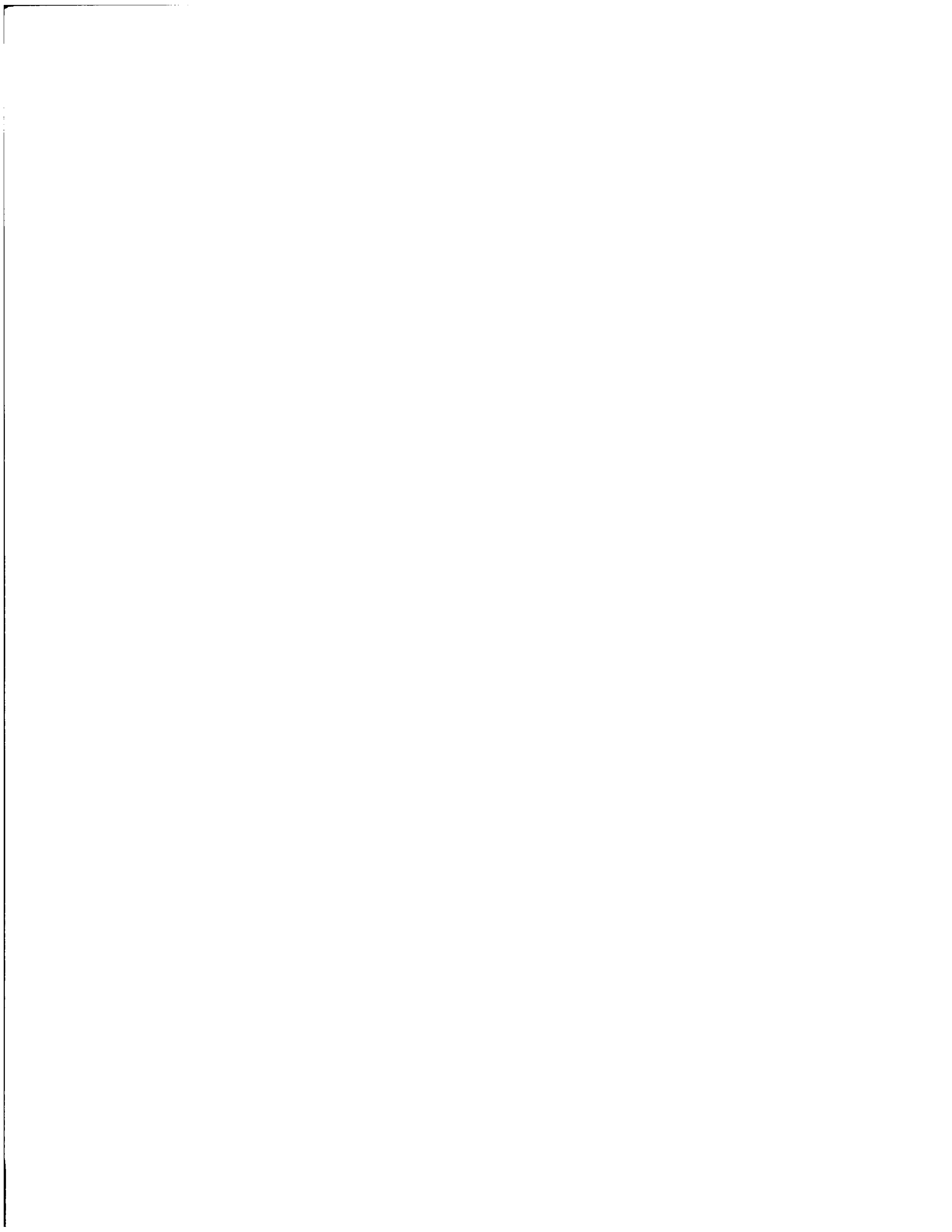
It has been suggested that converting some Director's procedural form to official status would increase their availability. In addition to raising the difficult issues noted above, there is no clear evidence that access to these forms really is a problem. The question of whether judges were aware of any reports of problems with access was put to the Bankruptcy Judges Advisory Group in November 2004; there were no such reports.

What is the current state of access to Director's procedural forms? In addition to the electronic versions of the official and Director's procedural forms on the "uscourts.gov" website, hard copy versions are available in the West Publishing's "Bankruptcy Code, Rules and Forms" pamphlet. West Publishing does not include the Director's procedural forms, however, in its "Bankruptcy Code, Rules & Official Forms" pamphlet. Other major publishers most likely would include at least some of the Director's procedural forms if the Administrative Office requested them to do so. In addition, most bankruptcy courts' websites offer a electronic versions of the most commonly used forms[1], and these can be downloaded and printed by the user at no charge. As of April 16, 2005, the E-Government Act requires all bankruptcy courts to maintain websites and to offer on them, at no charge and in a format suitable for downloading, forms that the court determines are useful to the public. All of the bankruptcy courts except one seem to have made a determination about what forms to make available. Some courts, rather than select forms themselves, simply provide a link to the national bankruptcy forms page, http://www.uscourts.gov/bkforms/bankruptcy_forms.html.

Unquestionably, it is easier to find the forms on some sites than it is on others. Downloading either a local form or one from the national page requires the user to install Adobe Acrobat Reader software, but this tool is available free of charge from Adobe. Anyone who needs a paper set of the official forms for filing a bankruptcy case can still purchase one at an office supply store, as always. In addition, some bankruptcy courts offer electronic versions of the official forms, either locally or through the link to the national bankruptcy forms page. Anyone also can obtain a free paper copy of a proof of claim form any bankruptcy clerk's office and can obtain a paper copy of a summons or other needed form upon payment of the copy fee.

Patricia S. Ketchum, Esq.
Consultant to the Advisory Committee
on Bankruptcy Rules
February 3, 2005

[1]Results of checking all bankruptcy court websites: almost all bankruptcy court websites offer at least some of the Director's forms, sometimes through a link to the "uscourts.gov" posting. The only court that does not is the Virgin Islands. Two court sites were not available for checking on 02/03/05 because of technical problems, IA-S and OK-W; in all likelihood both of these court offer forms.



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: CIVIL RULES RESTYLING PROJECT

DATE: FEBRUARY 11, 2005

As you may know, the Civil Rules Committee has been engaged for over a year in a project to restyle the Civil Rules from beginning to end. At its most recent meeting, the Standing Committee approved restyled rules for publication and comment. The comment period is almost a full year and will conclude on December 30, 2005. Thereafter, the final version will be recommended to the Standing Committee at its June 2006 meeting. Absent any problems with the proposal, it would be sent to the Judicial Conference in September 2006 followed by promulgation of the restyled rules package by the Supreme Court in April, 2007. Unless Congress acts to the contrary, these rules would become effective on December 1, 2007.

The Bankruptcy Rules adopt a substantial portion of the Civil Rules both for adversary proceedings and contested matters. The civil rules restyling project has attempted to limit the number of changes to the subdivision identifiers (i.e., subdivision (d) of a rule continues as subdivision (d) of the rule as restyled) so that continuing research on the rules is not unduly complicated. To that end, the cross references in the Bankruptcy Rules to the Civil Rules generally should be unaffected. Nevertheless, there will be a few changes that may create a need for amendments to the Bankruptcy Rules, but these Bankruptcy Rules amendments would be solely to conform to the new version of the Civil Rules and should not require publication and a comment period to become effective. Therefore, under the timing scenario set out above, we

would need to make recommendations to the Standing Committee for conforming amendments to the Bankruptcy Rules in June, 2006.

Given this time line, the Style Subcommittee could consider any changes that might be necessary and could make a report and recommendation to the Advisory Committee at our March 2006 meeting. The recommendations would be somewhat premature in that the restyled civil rules would not be final at that time, but we should have reliable information about the status of the project upon which we can rely in preparing any necessary bankruptcy rules amendments. The Style Subcommittee could meet early in 2006 to prepare its report in time for consideration at the March 2006 Advisory Committee meeting followed by a recommendation to the Standing Committee in June 2006 contemporaneous with the recommendations of the Civil Rules Committee.

BANKRUPTCY LEGISLATION INTRODUCED IN THE 109th CONGRESS

As of February 16, 2005, the following bills have been introduced in Congress.

1. H.R. 684, A bill to amend title 28, United States Code, to provide an additional bankruptcy judge for the eastern district of California, and for other purposes. Introduced by Representative William M. Thomas [R-CA-22] on 2/9/2005. Latest Major Action: 2/9/2005--Referred to the House Committee on the Judiciary.

2. S. 314, The Fairness in Bankruptcy Litigation Act of 2005; A bill to protect consumers, creditors, workers, pensioners, shareholders, and small businesses, by reforming the rules governing venue in bankruptcy cases to combat forum shopping by corporate debtors. Introduced in Senate by Senator John Cornyn [R-TX] on 2/8/2005. Latest Major Action: 2/8/2005 Referred to Senate Committee on the Judiciary.

3. S. 329, The Bankruptcy Fairness Act; A bill to amend title 11, United States Code, to increase the amount of unsecured claims for salaries and wages given priority in bankruptcy, to provide for cash payments to retirees to compensate for lost health insurance benefits resulting from the bankruptcy of their former employer, and for other purposes. Introduced in Senate by Senator John D. Rockefeller, IV [D-WV] on 2/9/2005. Latest Major Action: 2/9/2005 Referred to Senate Committee on the Judiciary.

4. S. 256, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Introduced in Senate by Senator Charles E. Grassley, [R-IA] on 2/1/2005. Latest Major Action: 2/10/2005 Committee on the Judiciary - Hearings held.

5. H.R. 685, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Introduced in House by Representative F. James Sensenbrenner, Jr., [R-WI-5] on 2/9/2005. Latest Major Action: 2/9/2005: Referred to the Committee on the Judiciary, and in addition to the Committee on Financial Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

6. H.R. 89, The Airline Consumer Protection Act of 2005; A bill to require air carriers to honor tickets for bankrupt air service. Introduced by Representative Rodney P. Frelinghuysen, [R-NJ-11] on 1/4/2005. Latest Major Action: 1/4/2005 Referred to House Committee on Transportation and Infrastructure.

7. H.R. 317, The Judicial District of the Virgin Islands Act of 2005; A bill to establish the District Court of the Virgin Islands as a court under article III of the United States Constitution. Introduced by Representative Donna M. Christensen, [D-VI] on 1/25/2005. Latest Major Action: 1/25/2005 Referred to House Committee on the Judiciary.

8. H.R.299, A bill to clarify that certain coal industry health benefits may not be modified or

terminated. Introduced by Representative Nick J. Rahall, II, [D-WV-3] on 1/25/2005.
Latest Major Action: 1/25/2005 Referred to House Committee on Ways and Means.

Companion Bill: S. 162, a bill to amend chapter 99 of the Internal Revenue code of 1986 to clarify that certain coal industry health benefits may not be modified or terminated. Introduced by Senator John D. Rockefeller, IV, [R-WV] on 1/25/2005).
Latest Major Action: 1/25/2005 Referred to Senate Committee on Finance.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 3002(c)(5) AND NOTICE OF POSSIBLE DIVIDEND

DATE: FEBRUARY 2, 2005

The Committee received a letter from Bankruptcy Judge Dana L. Rasure (N.D. Okla.), on behalf of the Bankruptcy Judges Advisory Group, regarding the operation of Rule 3002(c)(5). Under Rule 2002(e), creditors may be notified that there appear to be no assets in a case and that there will likely be no distribution to them. Consequently, they are informed under Rule 2002(e) that they need not file a proof of claim in the case. Notices of this type are quite common. If, however, it later appears that a distribution may be possible, Rule 3002(c)(5) requires the clerk to notify the creditors that they may file proofs of claim in the case. The problematic aspect of Rule 3002(c)(5) is that the rule directs the notice to state that creditors must file their proofs of claim "within 90 days after the mailing of the notice." Moreover, as Judge Rasure notes, the court is not authorized to shorten or lengthen this period. See Bankruptcy Rule 9006(b)(3) and (c)(2) (subdivision (c)(2) bars reduction of the period, and subdivision (b)(3) allows enlargement, but only to the extent permitted under Rule 3002(c) which has no provision for enlarging the period set by that rule). Restricting the court's ability to set a specific time for filing claims in this circumstance leaves Rule 3002(c)(5) as the only deadline for filing.

The problem with this deadline is its imprecision. The rule states that the filing period expires 90 days after the **mailing** of the notice. The problem is that these notices are typically sent out by the Bankruptcy Noticing Center (BNC), and the clerk of the court from which the

notice is issuing does not know at the time the notice is prepared exactly when the notices will be mailed. Furthermore, the creditors do not receive any certificate of service from the BNC, so they are not able to determine the date of mailing (other than by retaining the envelope that may include a postage date) so that they know when the starting point for counting the 90 day period set out in the Rule. It also appears that the BNC may "mail" the notices at different times depending on whether the notice is being sent my regular mail or electronically. This would arguably create different deadlines for the filing of claims even though the language of the notices would be identical. The potential for confusion and inconsistent treatment of similar matters should not be allowed to persist if a solution is available. Judge Rasure's letter also suggests that the rule is ambiguous in that it refers to "mailing" although the BNC sends a substantial number of notices electronically. I believe that Rule 9036 sufficiently addresses that issue by authorizing the electronic noticing, but significant issues remain.

Judge Rasure also notes in her letter that the rule as written seems to require the application of Rule 9006(f) to the notice period thereby providing at least three extra days notice. She suggests that this additional time period exacerbates the indefiniteness of the timing as set out above. Her letter offers several scenarios in which creditors trying to ascertain the deadline for filing their claim will face difficult decisions in the application of that rule. These examples, in my opinion, are not significantly different than any other situation in which Rule 9006(f) applies. Thus, I do not believe that the counting issues created by Rule 9006(f) (which the Committee has recently addressed) do not provide a persuasive ground for amending Rule 3002(c).

That is not to say, however, that Rule 3002(c) cannot be clarified and improved by Judge

Rasure's suggested solution. She suggests that the rule be amended so that it requires the clerk to "give 90 days notice by mail" rather than the current formulation that seems to set a requirement that cannot be met with precision. Judge Rasure offers Rule 2002(a) as an example of a rule that employs a more appropriate timing mechanism. With such a formulation, the clerk can set a date for filing claims under Rule 3002(c)(5) that would safely be more than 90 days from the date on which the notice is likely to be received. This would permit compliance with the rule in a way that she argues is not currently possible. I think that the change is a relatively minor one, yet it is one that will improve the rule. Several judges on the Bankruptcy Judges Advisory Group indicated that they have had a problem with the rule in the past. I have not been able to identify any reasons not to make the amendment other than that I am not aware of any problems that have arisen in the case law on the matter so that there is no pressing need for the change. If the Committee favors amending the rule, I think that Judge Rasure's language addresses the problem. It is set out below.

RULE 3002. Filing Proof of Claim or Interest

* * * * * *

(c) Time for Filing.

* * * * * *

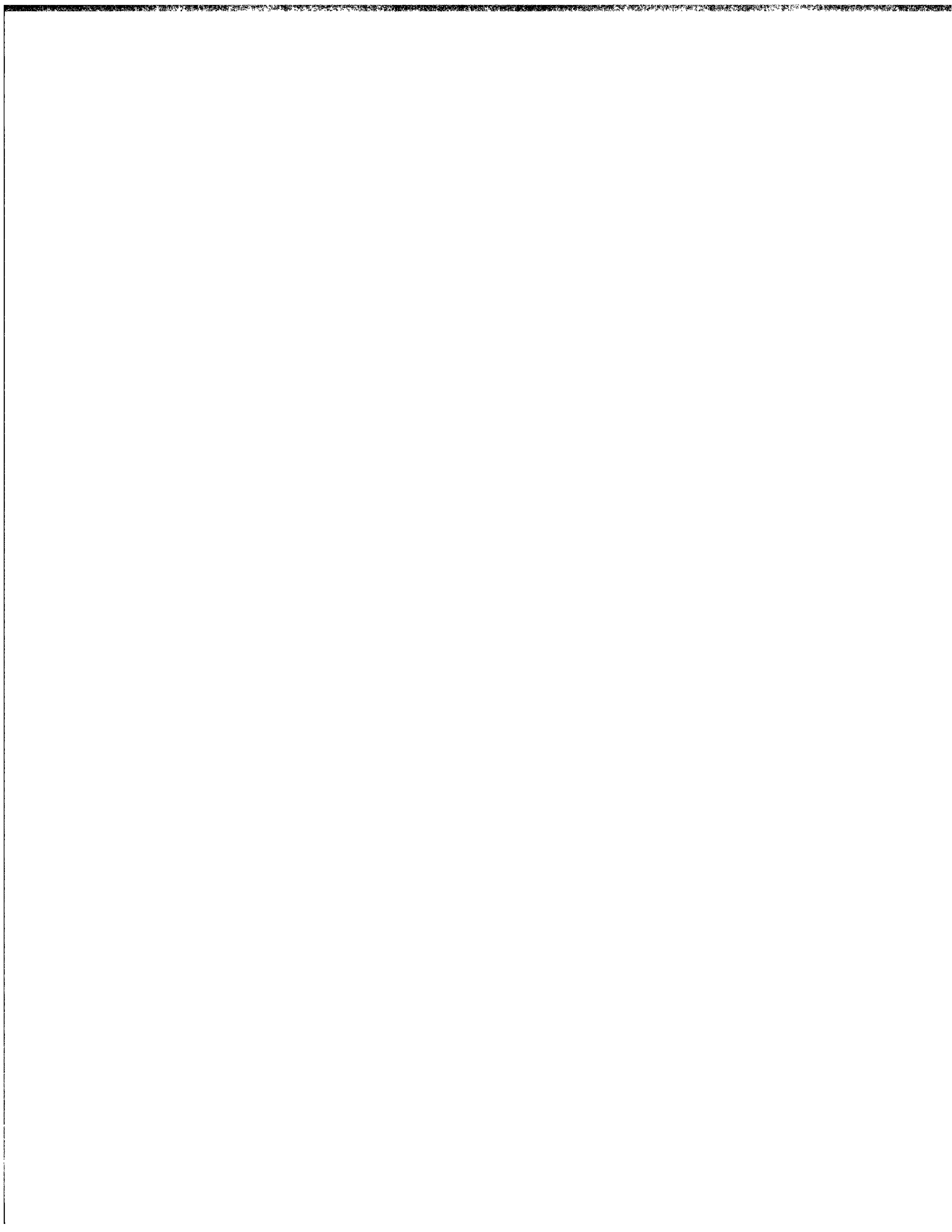
(5) If notice of insufficient assets to pay a dividend was given to creditors ~~pursuant to~~ under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall ~~notify~~ give at least 90 days notice by mail to the creditors of that fact and that they may file proofs of claim

9 ~~within 90 days after the mailing of the notice~~ by the date set out in

10 the notice.

COMMITTEE NOTE

The rule is amended to set a new period for providing notice to creditors that they may file a proof of claim in a case in which they were previously informed that there was no need to file a claim. Under Rule 2002(e), if it appears that there will be no distribution to creditors, the creditors are notified of this fact and are informed that if assets are later discovered and a distribution is likely that a new notice will be given to the creditors. This second notice is prescribed by Rule 3002(c)(5). The rule is amended to direct the clerk to give at least 90 days notice of the time within which creditors may file a proof of claim. Setting the deadline in this manner allows the notices being sent to creditor to be more accurate as regards the deadline than was possible under the prior rule. The rule previously began the 90 day notice period from the time of the mailing of the notice, and that date could vary and generally would not even be known to the creditor. Under the amended rule, the notice will identify a specific bar date for filing proofs of claim thereby being more helpful to the creditors.



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA
THE FEDERAL BUILDING
224 SOUTH BOULDER AVENUE
TULSA, OKLAHOMA 74103-3015

04-BK-E

DANA L. RASURE
U.S. BANKRUPTCY JUDGE

VOICE (918) 699-4085
FAX (918) 699-4090

November 15, 2004

Mr. Peter G. McCabe
Secretary to the Rules Committee
Rules Committee Support Office
OJP-RCSO
Administrative Office of the United States Courts
Washington, DC 20544-0001

via facsimile and U.S. Mail

Re: Bankruptcy Rule 3002(c)(5)

Dear Mr. McCabe:

During the recent meeting of the Bankruptcy Judges Advisory Group to the Administrative Office held on November 4-5, 2004, the members discussed Bankruptcy Rule 3002(c)(5).

Pursuant to Rule 3002(c)(5):

> If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within **90 days after mailing of the notice**.

Fed. R. Bankr. P. 3002(c)(5) (emphasis added). The court has no discretion to shorten the time during which creditors may file proofs of claim. See Fed. R. Bankr. P. 9006(c)(2). The court may enlarge the time for taking action under Rule 3002(c) "only to the extent and under the conditions" stated in that rule. Fed. R. Bankr. P. 9006(b)(3). Rule 3002(c)(5) sets forth no conditions permitting the notice to set forth a period of more than the prescribed "90 days after mailing of the notice."[1]

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[1] Although the other paragraphs of Rule 3002(c) set forth exceptions to Rule 3002(c)'s bar date rules, those exceptions, if they can be invoked to override a bar date set by a Rule 3002(c) notice, apply to only special types of claims, and operate independent of, or pursuant to a motion seeking an exception to, the date set forth in a Rule 3002(c)(5) notice. They thus are irrelevant to the topic this letter addresses: the bar date to be set forth in a Rule 3002(c)(5) notice.

(continued...)

Thus, the court has no discretion to set forth in the notice a period larger than "90 days after mailing of the notice."

Currently, notices issued by the clerk under Rule 3002(c)(5) are transmitted to the Bankruptcy Noticing Center (the "BNC") for transmission to creditors, rather than being mailed by the clerk to the creditors. Typically, notices are mailed by the BNC two or three days after the notices are transmitted to the BNC by the clerk. If the clerk calculates the ninety day period from the date the notice is issued by the clerk, the creditors will not be afforded the full ninety-day claims-filing period to which they are entitled under Rule 3002(c)(5). Because it is difficult for the clerk to determine with any degree of certainty the date on which the BNC will transmit the notice to creditors, the clerk cannot ascertain which date will be the 90th day after mailing of the notice. A creditor does not receive a certificate of mailing of the notice; thus, a creditor does not have sufficient information to independently calculate the day that is "90 days after mailing of the notice."

Although the time during which creditors may file proofs of claim under Rule 3002(c)(5) commences after the notice is mailed, the BNC transmits certain notices electronically. Therefore, unless "mailing" is defined to include electronic transmission, tying the claims-filing deadline to the date of "mailing" creates additional difficulties in interpreting the rule.

Rule 9006(f) instructs that if a rule directs a party to take certain action within a time period "after service of a notice" and the notice is served by mail, then three days must be added to the specified time. If Rule 9006(f) is applicable to the notice described in Rule 3002(c)(5), the issue is further complicated because it is our understanding that the BNC serves notice to parties receiving electronic notice on the day the notice is received by the BNC, prior to the date that notice is served by conventional mail. Thus, for any particular notice issued by the clerk, the date of service by the BNC will vary depending on whether the notice is served by conventional mail or electronically.

Finally, putting aside the foregoing issues that arise from the use of the BNC, there is a basic issue of whether it is desirable to tie the bar date to a number of days "after the mailing of the

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[1](...continued)

The special types of claims to which the exceptions of paragraphs (1) through (4) of Rule 3002(c) apply are claims of governmental units (Rule 3002(c)(1)); claims by an infant or incompentent person or the representative of either (Rule 3002(c)(2)); claims arising or becoming allowable as a result of a judgment (Rule 3002(c)(3)); and claims arising from the rejection of an executory contract or lease (Rule 3002(c)(4)). It is unclear whether a Rule 3002(c)(5) notice's bar date (when the notice does not specify that it applies to rejection claims) is to be treated as setting forth a bar date for rejection claims that arose prior to the issuance of the notice, but that is of no moment in deciding what bar date a Rule 3002(c)(5) notice must set forth.

notice," thereby possibly invoking Rule 9006(f) and complicating the calculation of the actual bar date based on Rule 9006(f)'s requirement to add three additional days.[2] It would be much simpler to direct the clerk to give "90 days' notice by mail" of the bar date, thereby eliminating the possible applicability of Rule 9006(f).[3]

The members of the Bankruptcy Judges Advisory Group concluded that it may be appropriate for the Rules Committee to review Rules 3002(c)(5) and 9006 to address the issue regarding the calculation of the claims-filing deadline when the notice is served by the BNC.[4] We believe the

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[2] Regardless of how the extra three days are required to be added under Rule 9006(f), it is easy to make mistakes in calculating the resultant deadline. Moreover, by making Rule 9006(f) applicable, an extra layer of uncertainties regarding the proper interpretation of Rule 9006(f) is injected.

Finally, if Rule 9006(f) applies, and if Rule 9006(f) is interpreted as adding on the three days only after the bar date is hypothetically determined without adding the three days (as set forth in pending proposed amendments to Rule 9006(f) that are awaiting Supreme Court approval), this would make it difficult to tell creditors the precise date on which their claims are due. For example, assume the 90th day expires on Monday January 5. Ordinarily, by adding three days under Rule 9006(f), the bar date would be Thursday January 8, and it would be desirable to tell creditors that January 8 is the bar date (unless that date is a day on which weather or other conditions make the clerk's office inaccessible). However, intervening events may prevent January 8 from being the actual bar date. Assume that on Tuesday January 6 the court and the clerk's office are closed due to an extreme blizzard, and that they reopen on Wednesday January 7. If the three extra days required by Rule 9006(f) are added starting on Wednesday January 7, the bar date would then be Friday January 9, not Thursday January 8.

[3] In this regard, Rule 2002(a)(7) requires the giving of "at least 20 days' notice by mail" of the bar date set in chapter 9 and chapter 11 cases for the filing of proofs of claim, thereby making Rule 9006(f) inapplicable to bar date notices in chapters 9 and 11. Similarly, other notice requirements in Rules 2002(a) and 2002(b) are not tied to a date "after the mailing of the notice," such that Rule 9006(f) does not apply.

[4] The Rules Committee should be aware of an additional and related issue raised by the clerk's use of the BNC that arises when the clerk transmits judgments or orders to the affected parties through the BNC. The issue (previously brought to the Rules Committee's attention at least informally) is whether the use of the BNC for that purpose complies with Rule 9022(a)'s requirement that "[i]mmediately on the entry of a judgment or order the clerk shall serve a notice of

(continued...)

answer to this question could have an impact on both substantive due process rights and policy decisions regarding what benefits, if any, a party should enjoy if it agrees to accept service by electronic means.

The Bankruptcy Judges Advisory Group authorized me (in consultation with other members of a subcommittee formed to address the issue) to write this letter on the Advisory Group's behalf. Thank you for your assistance in bringing these concerns of the Advisory Group to the attention of the Rules Committee. Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

Dana L. Rasure
United States Bankruptcy Judge

DLR/bn

cc: Rule 3002(c)(5) Subcommittee:
Honorable Colleen A. Brown
Honorable S. Martin Teel, Jr.

---

[4](...continued)
the entry in the manner provided in Rule 5(b) F. R. Civ. P. on the contesting parties . . . ." That issue has budgetary implications because using the BNC for transmissions is much more cost-effective than having the clerk manually mail out orders and judgments, but in light of Rule 9006(b)(1) (restricting the court's ability to enlarge the ten-day period for filing a notice of appeal from certain orders) there are concerns as well regarding fairness (to those parties who rely on regular mail to receive orders) when the mailing of the order or judgment occurs often three days after entry of the order or judgment.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: SUGGESTION FOR INTERNET PUBLICATION OF SALE NOTICES

DATE: JANUARY 29, 2005

The Committee received a suggestion from Bankruptcy Judge Vincent P. Zurzolo (C.D. Cal.) to amend several rules to require that all notices of sales of property valued in excess of $2,500 be posted on a website maintained by the Administrative Office of the U.S. Courts. The proposal essentially mirrors a local rule in the Central District of California that provides for the posting of these notices. Judge Zurzolo argues that a nationwide publication of these sales will increase dramatically the number of persons who will become aware of the sale and that such increased publicity will likely lead to higher sale prices for the property thus increasing the funds in bankruptcy estates. In particular, Judge Zurzolo proposes amendments to Rules 6004(a), 2002 (c)(1), and a new subdivision (p) for Rule 2002. A copy of his proposal is attached.

The proposal presents an interesting possibility for the nationwide sale of property of bankruptcy estates. It seems to anticipate a sort of "bankruptcy e-bay" website that would be maintained by the Administrative Office. If that is the case, the proposal would appear to have significant funding aspects beyond the scope of the Committee's expertise. Moreover, it would seem to be a rule directed at the Administrative Office rather than a procedure to be followed in a particular bankruptcy case.

The apparent value of such a system and its success in Judge Zurzolo's district makes one wonder why such a website does not already exist. Trustees, in particular have a strong incentive

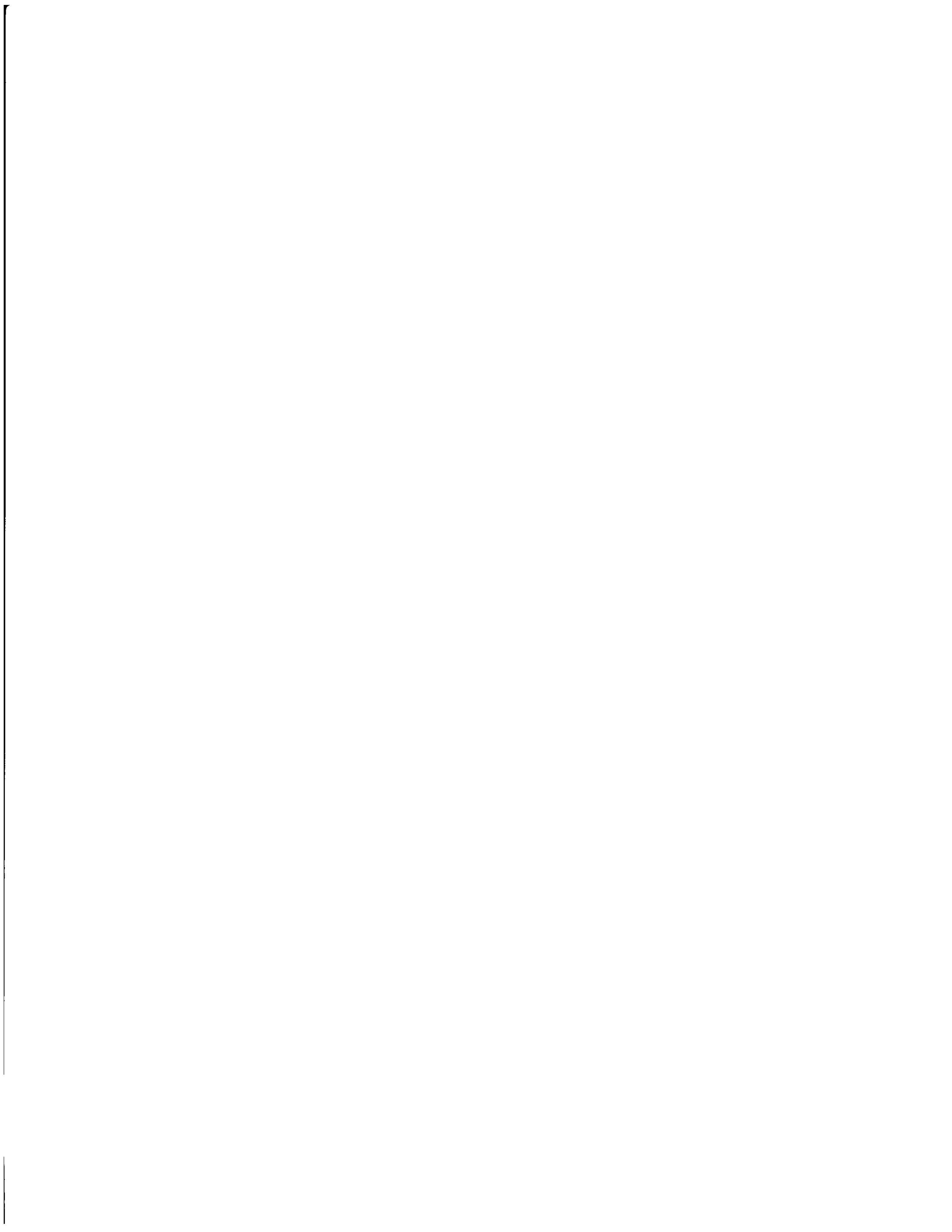
to increase recoveries because their fees are tied directly to those recoveries. In fact, the Winter 2005 issue of NABTalk, the quarterly journal of the National Association of Bankruptcy Trustees includes an article describing such a website that is maintained by the NABT, <www.nabt.com>. The website includes a list of property being sold in cases across the country. The article, a copy of which is attached, described the trustee's use of the website to sell a note and mortgage. The bankruptcy case was pending in Michigan, and the bidders on the property were located in New York, New Jersey, and California. The author noted that the method of sale was especially appropriate for the "paper" asset that did not require the bidders to be in any specific location. The author was convinced that the "national marketing" of the note and mortgage via the website significantly increased the amount that he received for the asset.

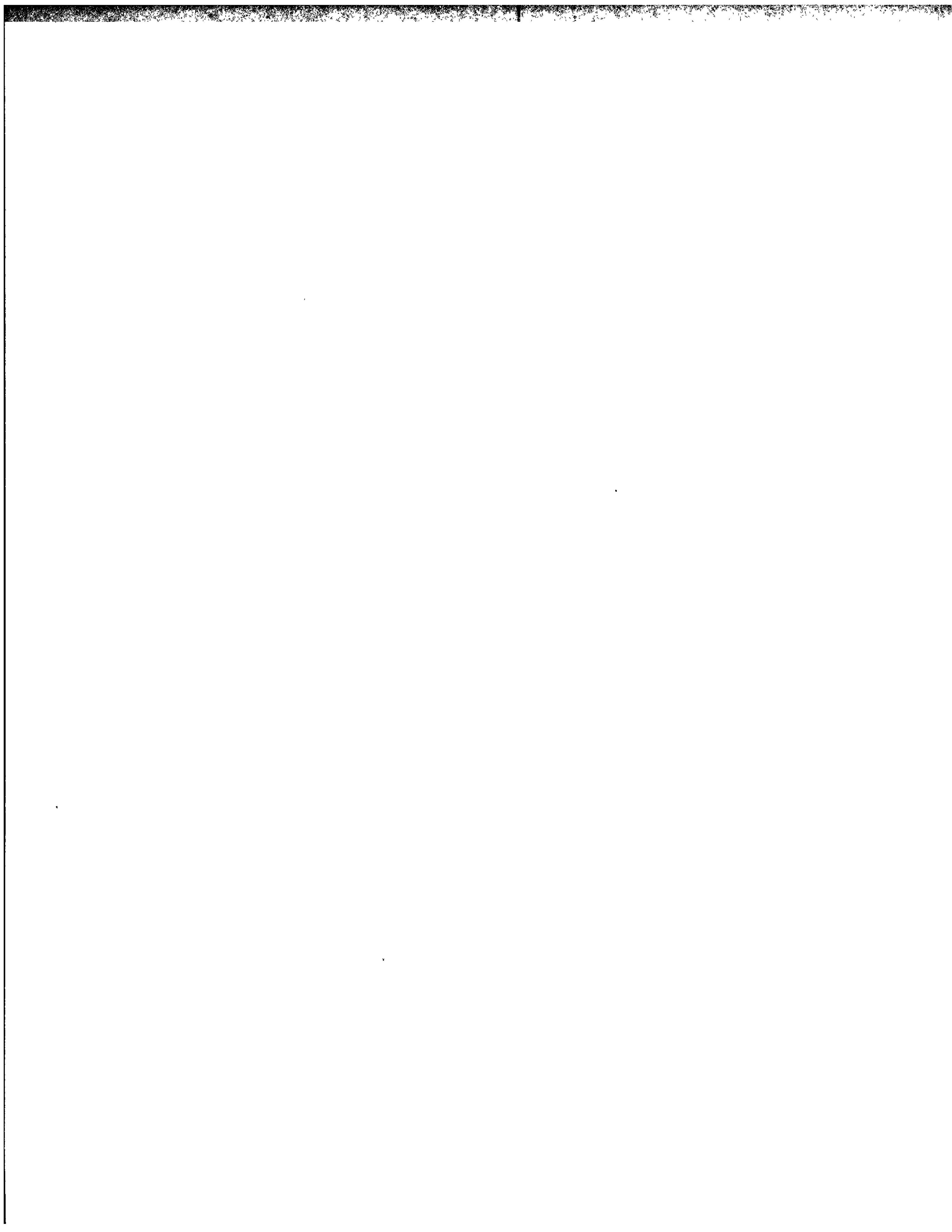
The NABT website certainly sounds like it meets the needs that Judge Zurzolo has identified in his letter. It also permits the trustee to make the decision about how to market the property being sold. If the estate consists of eleven pieces of furniture that may be worth $3,000, it would not seem likely that there would be national interest in bidding on the items. On the other hand if the trustee wants to pursue the matter by placing the items on a website, that choice seems to be squarely within the province of the trustee. Forcing the issue by requiring notices to be placed on the website might be viewed as micromanaging the trustee's operations.

The idea of a national website is such a good idea that one already exists. The NABT is the group that logically should and has created the sale notice website, and there is at least some indication that the website is operating successfully. The website is a voluntary one. Trustees can choose whether they want to offer property for sale on the site, and that decision will vary according to the type of property involved and the trustee appointed to the case. Adopting a rule

that would require the use of a website may not be necessary, particularly if the existing site is successful in generating higher sale prices. I think it would be prudent to wait for the current practices to mature before initiating such a rule. Moreover, given the existence of the site, it does not seem economically wise to add the burden of creating and operating a similar site to the Administrative Office. Consequently, I believe the Committee should either table Judge Zurzolo's suggestion, or specifically decline to proceed with a consideration of any rules amendments to require the creation and use of such a website.

ATTACHMENT: "An Example of the Benefits of Selling Assets on NABT Website," 20 NABTalk 48 (Winter 2005)





United States Bankruptcy Court
Central District of California
Roybal Federal Building & Courthouse
255 East Temple Street, Suite 1360
Los Angeles, California 90012

Vincent P. Zurzolo
Bankruptcy Judge

September 15, 2004

Honorable Thomas S. Zilly
United States District Judge
United States District Court
Chair, Advisory Committee on Bankruptcy Rules
700 Stewart Street, Suite 15229
Seattle, WA 98101

Re: Proposed Amendments: Sales of Property
Federal Rules of Bankruptcy Procedure 6004(a), 2002(c)(1), 2002(p)

Dear Judge Zilly:

I request that the Advisory Committee on Bankruptcy Rules (the "Committee") consider amending Federal Rules of Bankruptcy 6004(a) and 2002(c)(1), and adding subdivision 2002(p), regarding sales of property under 11 U.S.C. 363. Specifically, I propose that notice of all sales of property valued above $2,500.00 be published on a website maintained by the Administrative Office of U.S. Courts, and that parties requesting approval of a sale be required to electronically submit a form notice for such publication. The internet provides an excellent opportunity for widespread notice of sales, which may then lead to an increase in overbids and proceeds available to bankruptcy estates. In the Central District of California, our clerk maintains a website which provides notice of sales proposed in bankruptcy cases pending in our court. Parties outside of our district may not be aware of our site or of the published sales notices. Thus, having a federal rule will not only improve publicity and estate gain from sales, but also create a national awareness that there is one location containing information about all bankruptcy sales.

In the Central District of California, our Local Bankruptcy Rule 6004-2, a copy of which is attached, requires that a movant requesting an order approving a sale of property of the estate prepare, serve and file a form notice (F 6004-2, enclosed), and submit an additional copy for publication. Public Notice 01-003 (enclosed) clarifies the purpose, providing that a copy of the F 6004-2 Notice will be posted on the website for the Central District of California at www.cacb.uscourts.gov. Posting of an image of the additional copy is accomplished by the Communications Department of our Bankruptcy Court Clerk's Office.

I propose an amendment to Bankruptcy Rule 6004 as follows:

6004(a) " ... shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), ***(k) and (p)*** and, if applicable ..."

I propose adding a new subdivision to Bankruptcy Rule 2002 titled "2002(p)" and a sentence to the end of subdivision (c)(1) as follows:

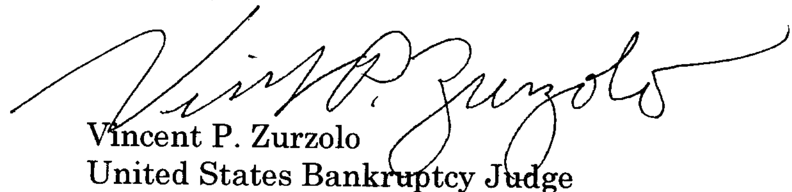
2002(p) *Website Publication of Sale Notice*
"At the same time that notice is required to other parties under this Rule, whether as an initial or subsequent notice, notice of a proposed sale pursuant to Rule 6004(a) shall also be prepared in a form acceptable under this Rule, shall contain the content required by subdivision (c)(1) of this Rule, and shall be electronically submitted for publication on a website maintained by the Administrative Office of United States Courts."

2002(c)(1) At the end of the current language, add the following sentence.

"For purposes of publication under subdivision (p) of this Rule, if there is no date certain for the proposed sale, the notice shall so state, and shall include a closing date on the notice, no longer than six months from the initial date of publication."

Thank you for your consideration of this matter. Please do not hesitate to contact me to discuss this further.

Sincerely,



Vincent P. Zurzolo
United States Bankruptcy Judge

Enclosure
VPZ:jrc

LOCAL BANKRUPTCY RULE 6004-2

NOTICES OF SALE OF ESTATE PROPERTY

Whenever the debtor in possession or the trustee is required to give notice of a sale or of a motion to sell property of the estate pursuant to F.R.B.P. 6004 and 2002(c), an additional copy of such notice and a document entitled "Notice of Sale of Estate Property," in the form of F 6004-2, must be submitted to the clerk at the time of filing for purposes of publication.

Court's Comment

2000 Revision

New Rule.

Former Rule 118.1: *Notices of the Sale of Personal or Real Property.*

Title changed to *Notices of Sale of Estate Property* from *Notices of the Sale of Personal or Real Property.*

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: Debtor(s).	CASE NO.:

NOTICE OF SALE OF ESTATE PROPERTY

Sale Date:	**Time:**
Location:	

Type of Sale: ☐ Public ☐ Private Last date to file objections: ______________________

Description of Property to be Sold: ______________________

____

____

____

Terms and Conditions of Sale: ______________________

____

____

____

____

Proposed Sale Price: ______________________

Overbid Procedure (If Any): ______________________

____

If property is to be sold free and clear of liens or other interests, list date, time and location of hearing:

Contact Person for Potential Bidders (include name, address, telephone, fax and/or e:mail address):

____

____

____

____

____

Date: ______________________

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK

JON D. CERETTO
Executive Officer
Clerk of Court

PUBLIC NOTICE

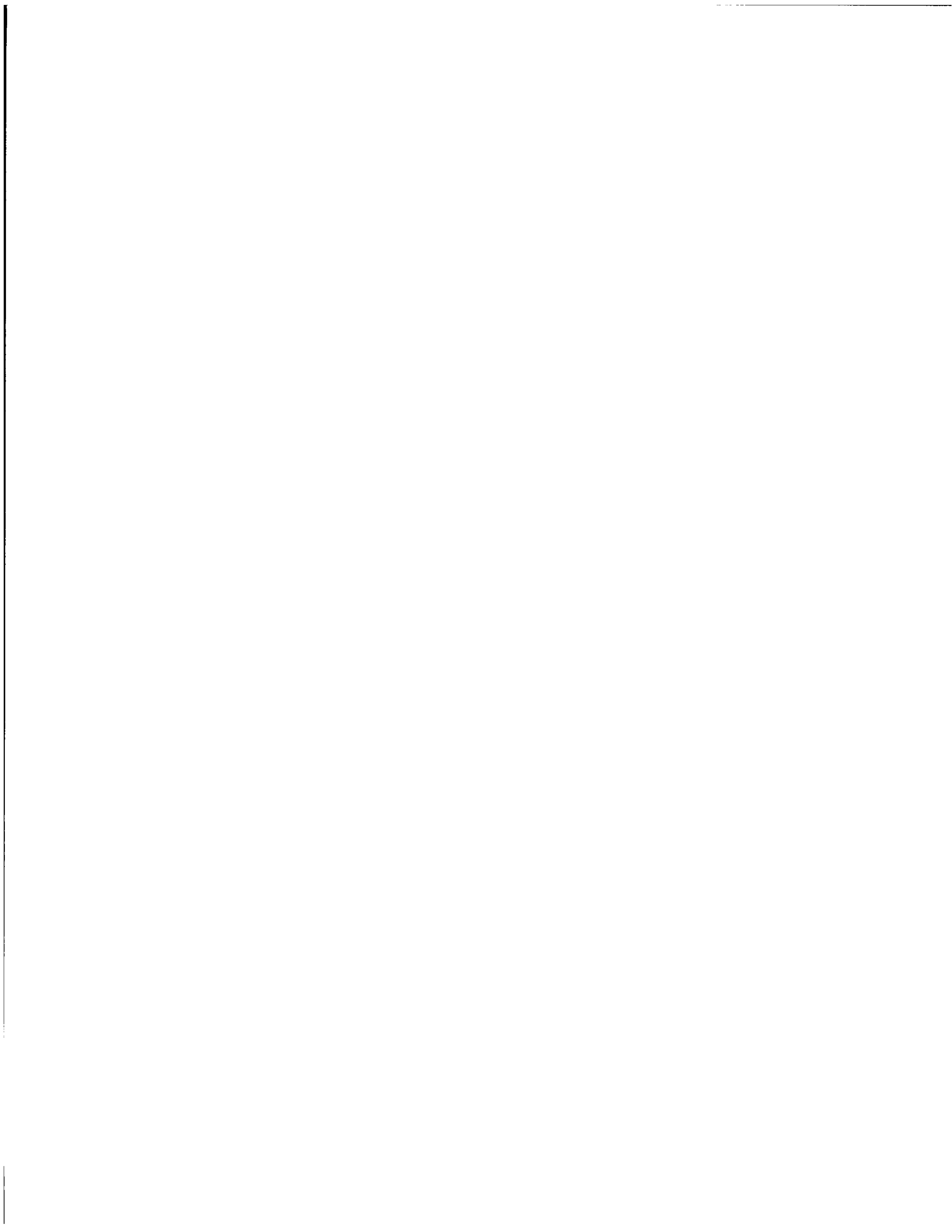
RE: NOTICE OF SALE OF ESTATE PROPERTY

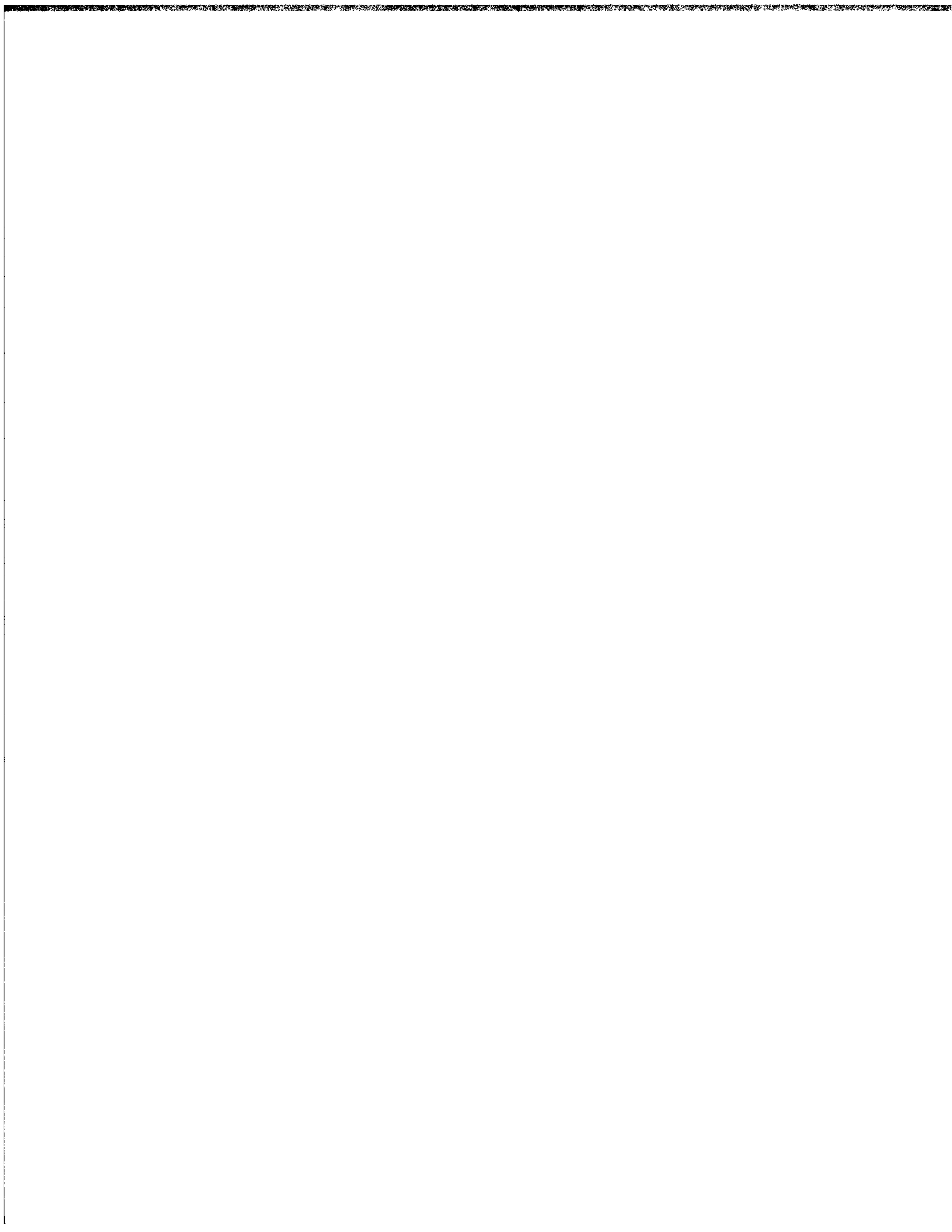
Pursuant to Local Bankruptcy Rule 6004-2, whenever the debtor in possession or the trustee is required to give notice of a sale or of a motion to sell property of the estate, an additional copy of such notice and a document entitled "Notice of Sale of Estate Property," in the form of F 6004-2, must be submitted to the Clerk at the time of filing for purposes of publication.

This rule and form are effective January 2, 2001. The Court will post Notices of Sale of Estate Property to its web site at ***www.cacb.uscourts.gov***.

JON D. CERETTO
CLERK OF COURT

01-003 (1/2/01)





James W. Boyd

An Example of the Benefits of Selling Assets on NABT Website

I've been writing this column and working to improve the NABT web site for a long time. Columns have focused on the new NABT/ABI joint sales site, how to list properties on the site in order to pique the interest of buyers, web-site links that can help trustees, the number of site visits and "hits" the web site gets on a monthly basis, and the use of the web to sell intellectual property interests. Along with David Birdsell, the creator of www.nabt.com, President Paul Swanson, and our staff expert Nancy Cooper, we've spent hundreds of hours holed up in rooms designing and redesigning the various web site pages. These efforts have had one simple theme: how NABT, as your organization, can provide a valuable resource to members.

So last week I was really struck by an experience I had in selling property, not as a board member of NABT, but as a Ch. 7 panel trustee in northwest lower Michigan. This experience provides a great example of the web site and its benefit to a trustee.

This case was a simple Ch. 7 case which appeared to be a no asset case at first blush. The debtor was a married woman, and co-owned her home with her husband, who did not file for Ch. 7 protection Here, according to the debtor's schedules, her husband co-owned the property, and given the value, mortgage lien and the exemptions claimed by the debtor, there was no equity for the trustee to administer. However, a quick review of the documents revealed two problems. First, the house was worth more than scheduled on the debtor's Schedule A. More importantly, the non-filing spouse did not have an ownership interest in the home. The result of this analysis was that the value of the debtor's home now exceeded the lien against it and her exemptions by approximately $25,000.

Upon discovering this information, I approached the debtor's attorney, who is a well-respected attorney in town. It was obvious that the claim of co-ownership by the husband was something that was just missed by the attorney and his client, and not an attempt to deceive. However, when confronted with me selling the home, the attorney suggested conversion to Ch. 13 was imminent.

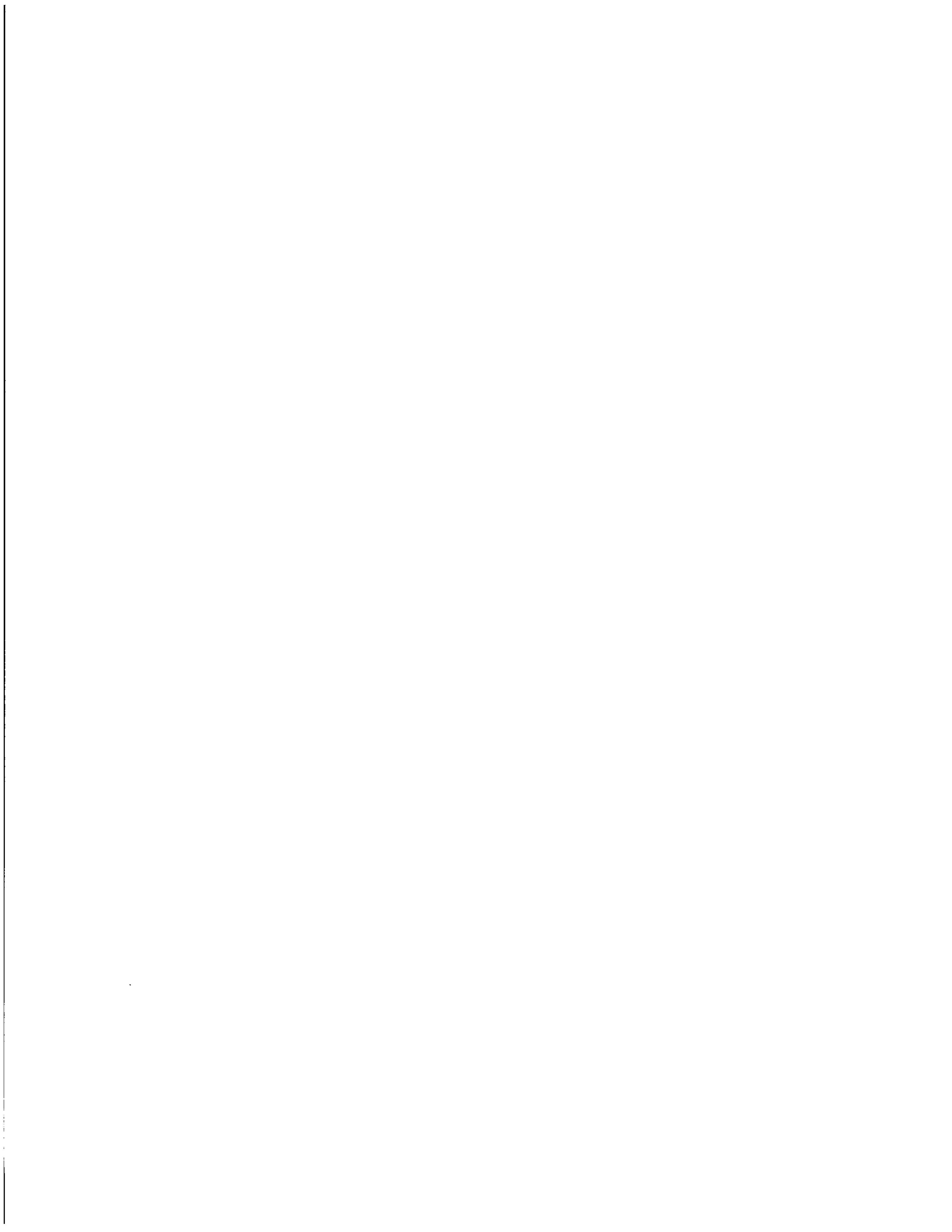
As an alternative, I reached an agreement with the debtor wherein the debtor gave the bankruptcy estate a note to pay the $25,575 over exemption over eight years, secured by a second mortgage on the debtor's home. The amortization of this amount at 8% interest resulted in a monthly payment requirement of $389.82.

As soon as I had this agreement approved by the Bankruptcy Court, I listed the note and mortgage for sale on www.nabt.com . I did so on October 19, 2004. As part of the posting, I included copies of the note and mortgage. Within days I had been contacted by approximately 10 parties interested in purchasing the note and mortgage. In just a couple of days after posting the asset, I received a cash offer of $13,500 to purchase the note. I noticed out a Sec. 363 sale of the note and mortgage, and used the $13,500 offer as a minimum amount which I would accept. On November 19, just one month after posting the asset, the Bankruptcy Court entered an order approving the sale for not less than $13,500, and also authorized me to solicit higher bids through a telephonic auction. I scheduled a telephonic auction for December 2, sent an email notice to everyone that had contacted me about the asset, and set up a toll-free conference call number and line for the auction. At the December 2 auction, three parties participated. One was in New York, one was in New Jersey, and one was in California. After spirited bidding, I sold the note and mortgage for $18,900, over $5,000 more than the initial bid!.

All three participants at the auction, and the initial bidder who did not participate in the auction, learned of the property I was selling through our web site. During a break just before we started the bidding, I asked the bidders about how they learned about the asset. One bidder pays the annual fee of $50.00 per year for automatic notification when assets are posted; the others simply surf www.bankruptcysales.com (our joint site with ABI) for assets in which they are interested.

When I asked the bidders about their reaction to the web site and the types of assets for sale listed on it, they said the site works great in notifying them of assets for sale but they questioned why more assets weren't listed, particularly assets like the one I sold. In short, they were quite clear that they and others are out there, and they are ready, willing and able to buy our assets.

In conclusion, if you have an asset to sell, consider using www.nabt.com to post the asset and solicit offers. Clearly, for "paper assets", such as notes, mortgages, and judgments, the web site gives you the ability to reach a national market with a click of the mouse. In my case, using the web site to sell the note and mortgage not only resulted in the initial offer of $13,500, but also in a final bid of $18,900. The higher bidding alone will increase my compensation in this case by over $500, which is more than enough to cover my NABT dues for the year! It was definitely worth it.



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: APPLICABILITY OF RULE 7007.1 IN INVOLUNTARY CASES

Rule 7007.1 was added to the rules effective December 1, 2003. It requires corporations that are parties in adversary proceedings to file a corporate ownership statement so that the court can be made aware of other parties related to the party by their ownership of stock of the party. The rule was one of a group of rules adopted first by the Appellate Rules, and thereafter for inclusion in the Bankruptcy, Civil, and Criminal Rules. Rule 7007.1 applies to adversary proceedings, but it does not apply to contested matters. The Committee concluded that the short time for contested matters to be resolved made the operation of the rule ineffective. The Committee did not consider, however, whether the disclosure rule should apply in the case of an involuntary proceeding.

Involuntary cases are commenced by the filing of Official Form 5, the involuntary petition. The form essentially permits the petitioners to check the appropriate boxes to allege the statutory grounds for the entry of an order for relief. In a sense, it is comparable to a complaint that sets out the factual predicates for relief and pray for the entry of an order for relief. Rule 1010 provides that service of the summons and involuntary petition is to be made in the manner of service of a summons and complaint under Rule 7004. Thus, an involuntary petition can be viewed as comparable to a compliant that initiates an adversary proceeding. Under Rule 1011, the alleged debtor may contest the petition and is directed to present defenses and objections under Civil Rule 12. In short, the process is essentially an adversary proceeding. Consequently,

the rules governing the filing of corporate ownership statements should apply in these matters just as they do in adversary proceedings. Amendments to accomplish this follow.

RULE 1010. Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case

1 (a) Service of Involuntary Petition and Summons; Service of
2 Ancillary Petition. On the filing of an involuntary petition or a
3 petition commencing a case ancillary to a foreign proceeding the
4 clerk shall forthwith issue a summons for service. When an
5 involuntary petition is filed, service shall be made on the debtor.
6 When a petition commencing an ancillary case is filed, service
7 shall be made on the parties against whom relief is sought ~~pursuant~~
8 ~~to~~ under § 304(b) of the Code and on any other parties as the court
9 may direct. The summons shall be served with a copy of the
10 petition in the manner provided for service of a summons and
11 complaint by Rule 7004(a) or (b). If service cannot be so made,
12 the court may order that the summons and petition be served by
13 mailing copies to the party's last known address, and by at least
14 one publication in a manner and form directed by the court. The
15 summons and petition may be served on the party anywhere. Rule
16 7004(e) and Rule 4(l) F.R.Civ.P. apply when service is made or
17 attempted under this rule.
18 (b) Corporate Ownership Statement. If the petitioner is a

19 corporation, the petitioner shall file with the involuntary petition a

20 corporate ownership statement containing the information

21 described in Rule 7007.1.

COMMITTEE NOTE

The rule is amended to require a corporate petitioner in an involuntary case to file a corporate ownership statement at the time of the filing of the petition. Just as in an adversary proceeding, corporate parties must provide this information to assist the courts in determining whether grounds for recusal exist for the judge to whom the matter is assigned.

Other changes are stylistic.

RULE 1011. Responsive Pleading of Motion in Involuntary and Ancillary Cases

1 * * * * *

2 (f) Corporate Ownership Statement. If the entity responding to the

3 involuntary petition or the petition commencing a case

4 ancillary to a foreign proceeding is a corporation, the entity

5 shall file with its first appearance, pleading, motion, response,

6 or other request addressed to the court a corporate ownership

7 statement containing the information described in Rule 7007.1.

COMMITTEE NOTE

The rule is amended in tandem with the amendment to Rule 1010 to require the parties to involuntary cases and cases ancillary to foreign proceedings to file corporate ownership statements to assist the court in determining whether recusal is necessary. These actions are in the nature of adversary proceedings, and it is both necessary and proper to have the parties inform the court about

related entities that may have an interest in the matter pending before the court.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WANNAMAKER

RE: TRACKING CLAIMS IN CM/ECF

DATE: FEBRUARY 3, 2005

In light of the Committee's consideration of the proposed amendment to Rule 3007 providing for omnibus objections to claims, Judge Small asked how omnibus objections to claims would be tracked in the court's CM/ECF system. A copy of his inquiry is attached. Staff of the CM/ECF project stated that the system currently does not track the status of the components of an omnibus objection to claims but that the claims module of Bankruptcy CM/ECF Release 3.0 would allow clerks to record the history of the claims included in an omnibus objection. Release 3.0 is to be made available to the courts in late summer 2005.

Currently, the CM/ECF claims register operates independently from the case docket and entries made on the docket affecting claims do not automatically update the claims register or vice versa. If the court also wants an omnibus objection to be reflected on the CM/ECF claims register, then the court must set up the "docket event" to permit this and the filer must electronically link the objection to each individual claim.

Judge Small asked if a number of objections are included in a single filing, would the system indicate that the filing is "closed" when the judge enters an order resolving some of the objections? As he surmised, because an omnibus objection is entered on the case docket, setting CM/ECF case deadlines and status "flags" is a function of how the court sets up the docket event. The system reports the objection as either "open" or "closed" on the open matters report because CM/ECF does not track the components of a multi-part motion separately. Bankruptcy CM/ECF Release 3.0 will include improved tracking for multi-part motions.

The current practice in the Southern District of New York and the District of Delaware,

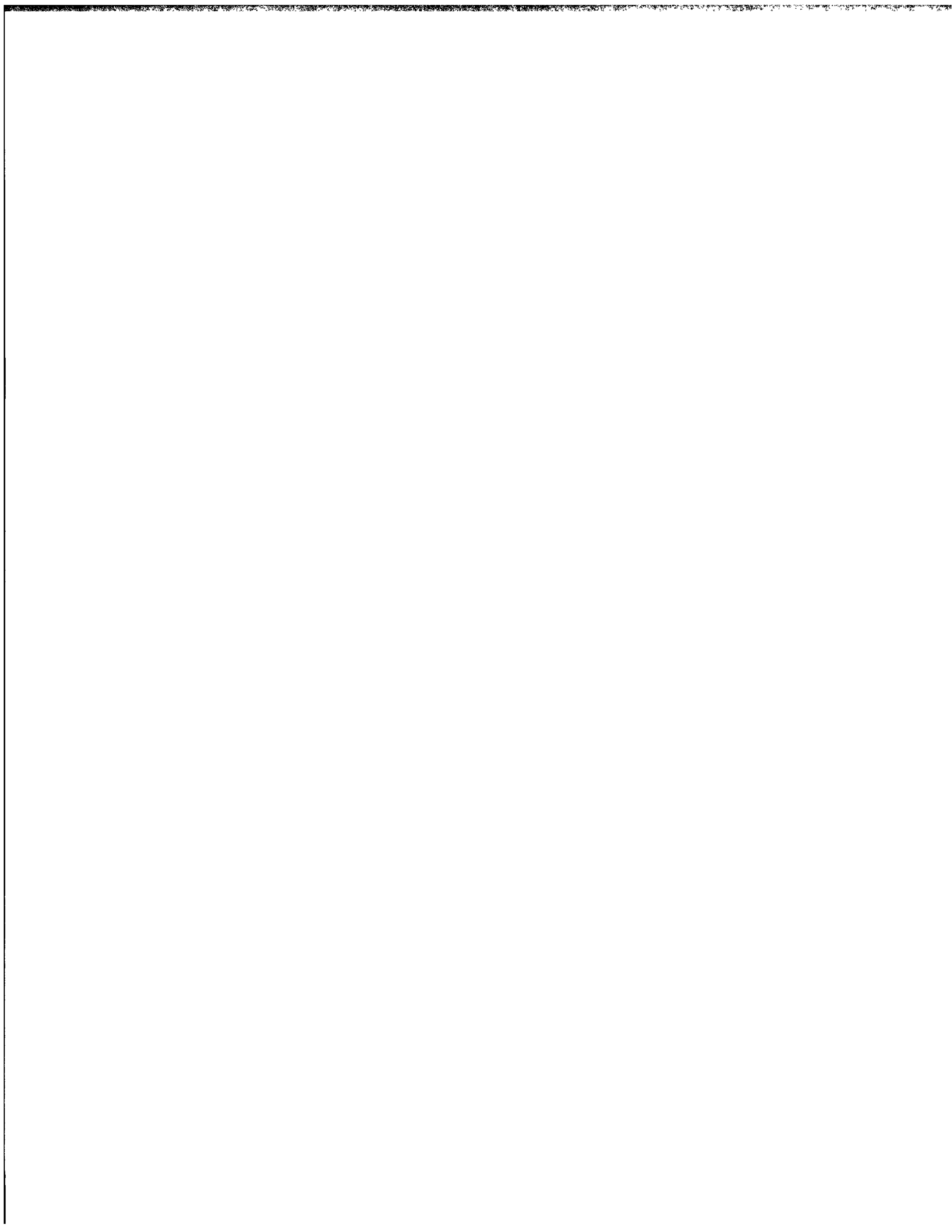
where many large chapter 11 cases are filed, is for the court to require the trustee, debtor in possession, or a claims agent appointed by the court to track the claims and objections to claims. (It is my understanding that the same practice was followed when the courts used BANCAP and NIBS.) In these large chapter 11 cases, the claims are not part of CM/ECF but are often available to the public through the claims agent's web page. For instance, claims agent BSI provides both claims tracking and access to images of claims through its website, http://www.bsillc.com/bankruptcy/claims.htm. Other claims agents, such as Poorman-Douglas, provide similar services, http://www.pddocs.com/BK/USERLIST.ASP?courtid=court5.

Before it implemented CM/ECF, the District of Delaware tracked multi-part motions in NIBS. Because CM/ECF does not allow the court to dispose of motions in part, the court now requires attorneys to file multi-part motions separately.

A number of claims management enhancements will be included in Bankruptcy CM/ECF Release 3.0. For example, the claims transfer screen will be revised to capture the transfer data in a way that can be displayed on the claims register. Also the claims register will be enhanced to display the history of the claim, claim actions such as transfers and objections, as well as history of the creditor. A hyperlink will be provided from the Query screen to the Claims Register and enhancements will also be made to the Claims Activity Report. A draft version of the new CM/ECF Claims Register is attached.

Electronic batch filing for claims will allow large creditors to electronically batch and file claims, transfer claims, amend claims and add creditors. Currently, most claims are scanned and manually docketed by court staff. This imposes a large burden on the clerks' offices because over five million claims a year are filed in the bankruptcy courts.

Attachment



Attachment

Claims Register DRAFT

1-03-00002-RB Newcastle Plumbing

Judge: Roy Bean

Office: Poughkeepsie

Trustee: Raymond Aabc

Chapter: 7

Last Date to file claims: 9/5/2004

Last Date to file (Govt): 11/6/2004

link appears when creditor has been edited

last status

Creditor: Big Credit Co. History 123 4th St St. Louis, MO 65802	*Claim No:* 1 *Filed:* 8/1/2004 *Entered:* 8/2/2004	*Status:* Withdrawn *Late:* N *Filed by:* Creditor *Entered by:* Parker, Barb *Modified:*
Secured claimed: $901.00 *Total claimed:* $901.00		

	Filing Date	Claims History
1-1	8/1/2004	Claim #1 filed by Wrenches N Things, total amount claimed: $900.00 (Parker,Barb)
12	8/7/2004	Motion to disallow claim 1, creditor Wrenches N Things (Some Body)
15	8/9/2004	Order denying motion to disallow claim 1, creditor Wrenches N Things (A. Bcdefg)
1-2	8/10/2004	Amended claim filed by Wrenches N Things, total amount claimed $901.00
17	8/11/2004	Reclassify claim (C. Defgh) *Status:* Allow
32	8/12/2004	Transfer of Claim. Transfer Agreement 300(3)1 Transferors: Wrenches N Things (Claim No. 1, Amount $901.00) to Big Credit Co. filed by Big Credit Co (Smith, Jane)
99	8/25/2004	Withdrawal of claim 1 filed by Big Credit Co (Smith, Jane) *Status:* Withdrawn

Description:

Address info of transferor

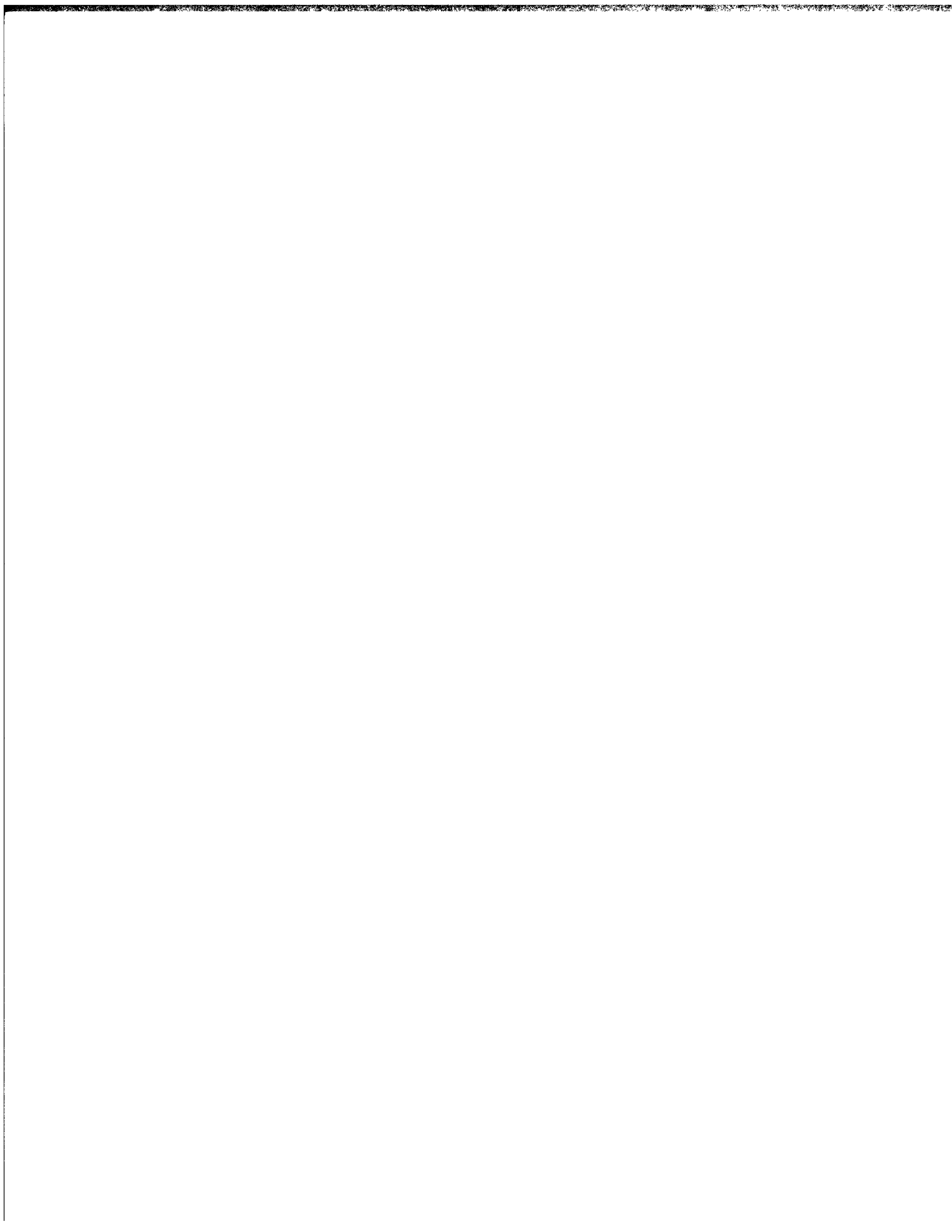
Remarks:

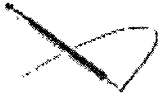
Creditor - shows creditor currently holding the claim. History link appears only if the creditor has been edited. This 'History' is edit history of the creditor, not claim history.

Filed by - this will be the latest filer.

Claim History - shows claim filed and any claim actions which would appear on the docket, objections, transfers etc. 1-1 is filing of claim. 1-2 is amendment. Other numbers are document links, same as on docket. Text shown for docketed claim actions is docket text. The name of the user who entered the claim (cl_created_by) will be appended to the text for claims.

Whatever dollar amounts are entered for an amended claim will replace those dollar amounts from original claim. The Claim Register will display the latest amount received for each type (priority, secured, unsecured). On the Claims Register, the filing of the amendment will show in the claim's history. That is, a new priority amount would replace the previous priority amount. The amounts shown in the money area will be the latest entered for any category (secured, priority, unsecured).





Thomas Small/NCEB/04/USCOURTS

11/04/2004 05:58 PM

To: jshaffer@stutman.com, Thomas Zilly/WAWD/09/USCOURTS@USCOURTS, James Wannamaker/DCA/AO/USCOURTS@USCOURTS, Dennis Montali/CANB/09/USCOURTS@USCOURTS, Morris@udayton.edu, Chambers of Judge Marjorie Rendell/CA03/03/USCOURTS@USCOURTS

cc

bcc

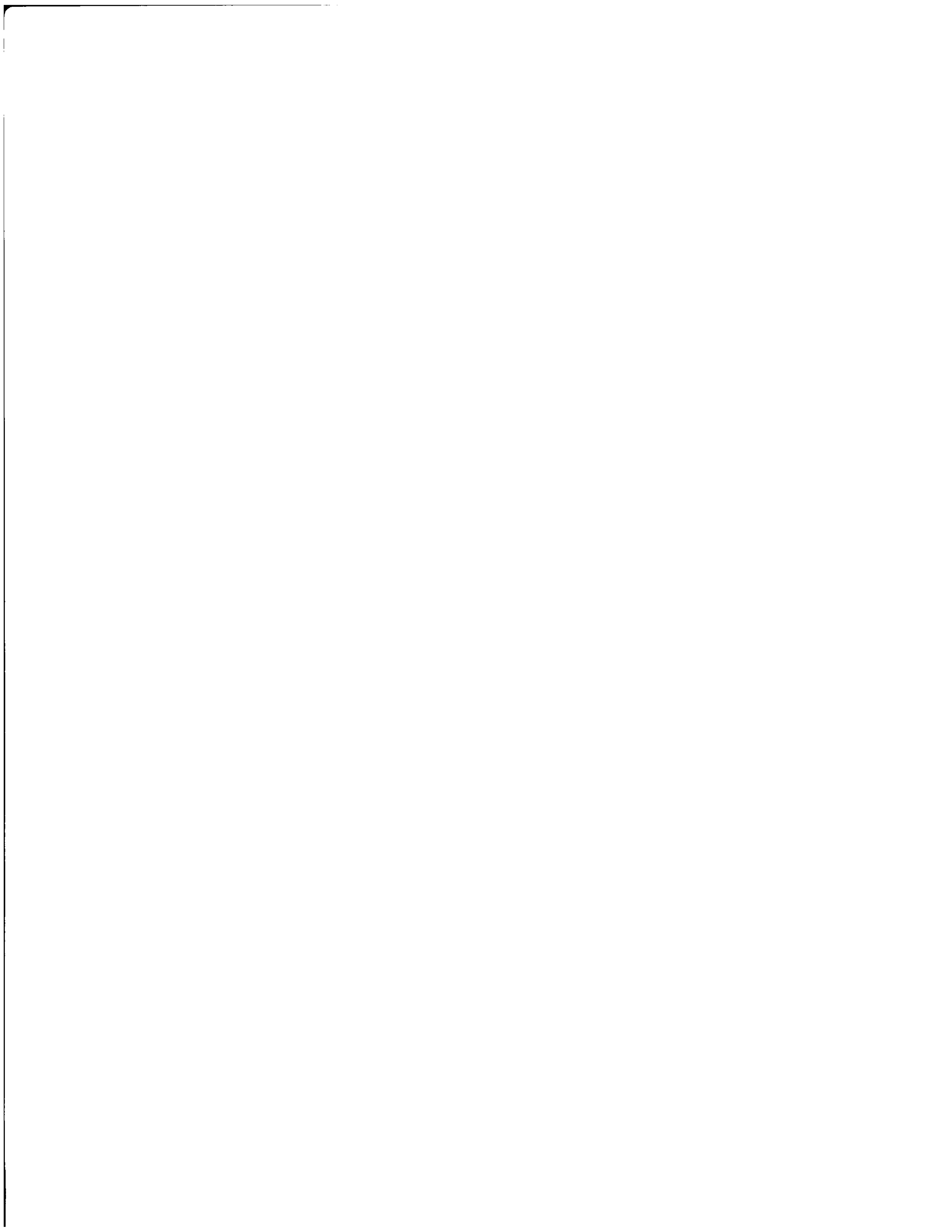
Subject: omnibus objections

John, Tom Z., Midge, Dennis, Jeff, and Jim,,

Our court recently went to CM/ECF and our clerk says that there is a problem tracking omnibus objections that are electronically filed. She contacted a number of courts to learn how they are dealing with this problem and heard back from Delaware (a court that has a rule regarding omnibus objections) and Iowa Southern. Both courts said that they could not track the individual claims that are part of an electronic omnibus objection. I certainly do not know the answer, but the technology experts should try to come up with a solution. Not allowing omnibus objections is not a good alternative. I think that the omnibus proposal that the full committee approved in principle is an excellent idea, and should not be delayed by this problem. But, if this practical issue is not addressed by the technology experts there may be a reluctance on the part of some courts to permit omnibus objections at all.

I hope everyone is doing well. Best wishes.

Tom S.



He suggests that the chapter 7 trustee also may have to go through the entire chapter 11 file to determine if some other action may have occurred in the case that would render the filed claim objectionable. Thus, he urges that the Committee put the burden back on the creditors who filed claims to file a new claim that would reflect the impact of the confirmation of plans.

A related problem exists as well in chapter 12 and 13 cases. Confirmation of those plans does not create a new debt as does confirmation of a chapter 11 plan. In chapters 12 and 13, on the other hand, the creditors may have received a number of payments on their allowed claims, and the filed proofs of claims would not reflect those payments. Consequently, the chapter 7 trustee would have to investigate the payment history in the cases prior to their conversion to determine whether to object to those claims.

There are several counter arguments to the request to amend the rule. First, when the case is converted to chapter 7 after confirmation of a chapter 11 plan, it is only the plan and the order of confirmation that the trustee should have to consult to determine if a filed proof of claim is objectionable. While this is some burden for the trustee, it does not seem to be any more burdensome than the burden clearly placed on trustees to examine proofs of claims generally under § 704(4) of the Code. The plan will include provisions both defining the classes of creditors and setting out the treatment of each class of claims under the plan. These documents will not set out the amount of payments that the creditor may have received under the plan, but they do establish the amount of the creditor's claim under that plan.

Another problem that the proposal would create is the duplication of proofs of claims in the clerk's office. Under the proposal, there could be two proofs of claim filed by each creditor in the case. This would be true even if the plan did not alter the creditors' claims. Even if the

plan did alter the claims, the duplicate proof of claim forms could create a number of problems for the clerk and creditors. The proofs of claims would be filed under the same case name and number. More importantly, while the effect of confirmation of the chapter 11 plan is that it creates a "new" debtor-creditor relationship, many if not most unsecured creditors will not be familiar with that concept and will probably file an exact duplicate of the first form. In fact, they should each file a copy of the confirmed chapter 11 plan and the order confirming the plan if they want to comply with Rule 3001 that requires the attachment of the writing on which the claim is based. There seems to be little benefit to having every single unsecured creditor filing a copy of the confirmed plan and the order confirming the plan when the case is thereafter converted to chapter 7.

As for cases converted after confirmation of plans in chapters 12 and 13, the problem is not that the creditors' claims have changed by operation of the plan and order of confirmation, but rather that the creditors may have received some payments on their claims during the course of those earlier proceedings. Here again, the payments would be paid through a trustee who would have the information that the chapter 7 trustee would need to evaluate the proofs claims filed in the case. Again, creditors may not understand that they must file a new proof of claim that would replicate the initial proof of claim but would set out a different total. To make sure that they have not done so, the trustee still would have to review the distribution records of the chapter 12 or chapter 13 trustee for the case prior to its conversion. Given that the trustee arguably would have to review all of this information to verify the accuracy of each creditor's "new" claim, there does not seem to be a significant benefit to the chapter 7 trustee.

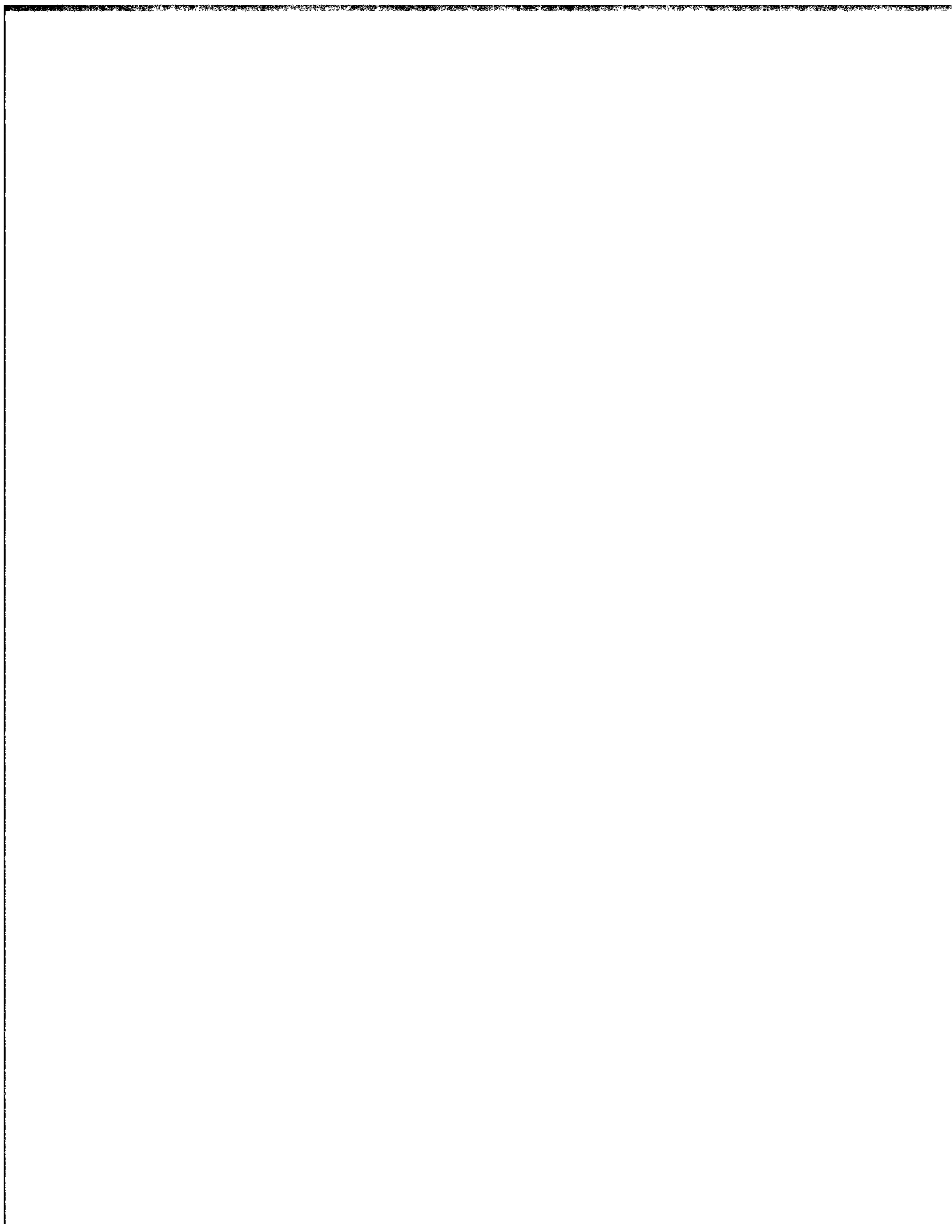
While there is some benefit to chapter 7 trustees in cases converted from other chapters

after confirmation of a plan to have each creditor file a new proof of claim in the chapter 7 case, I believe that the benefits are limited, and the burdens both on the clerk's office and the bankruptcy system would outweigh the limited benefits. The new claims would probably not be filed in the form that Mr. Yerbich's request anticipates. The chapter 7 trustee would still have to review the documents that governed the claims as well as the records of any distributions made on those claims until the date of the conversion to chapter 7.

If the Committee believes that it is appropriate to amend Rule 1019(3), then Mr. Yerbich has suggested the following language for the subdivision. New language is underlined.

> (3) **Claims Filed Before Conversion.** All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 cases, except in a case in which a plan has been confirmed under §§ 1129, 1225, or 1325 of the Code.

If the Committee believes that the amendment or some similar version should be adopted, I would suggest that the matter be sent to a subcommittee for a more complete study of the issue including a study of the impact of the duplicate filing requirement on clerks' offices.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
COURT RULES ATTORNEY
222 West Seventh Avenue, Stop 4
Anchorage, Alaska 99513-7564
e-mail: thomas_yerbich@akd.uscourts.gov

(907) 677-6136

Thomas J. Yerbich
Court Rules Attorney

November 8, 2004

Hon. Thomas S. Zilly, Chair
Advisory Committee on Bankruptcy Rules
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101-1271

Re: Federal Rule of Bankruptcy Procedure 1019(3)

Dear Judge Zilly:

One of our local trustees has invited my attention to a problem that exists with respect to Rule 1019(3). In its present form, Rule 1019(3) reads: "Claims Filed Before Conversion. All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case." In situations where a chapter 11 case is converted to chapter 7 prior to confirmation, the rule in its present form makes sense and promotes efficiency by avoiding unnecessary duplication. However, where a chapter 11 case is converted after confirmation of a plan of reorganization, application of the rule is problematical. The same is true to a lesser extent in chapter 12 and 13 cases.

As a rule, when a plan of reorganization is confirmed, claims filed in the chapter 11 proceeding are extinguished and replaced by a claim created by the confirmed plan, *i.e.*, the obligation owed the creditor is now defined by the confirmed plan. Thus, at least technically, confirmation of the plan of reorganization creates an entirely new and different claim. In many cases, the creditor's claim is modified and in some payments are made postconfirmation. If, as the broad language of 1019(3) suggests, the claim filed prior to conversion applies in cases where a plan has been confirmed, the chapter 7 trustee must review the plan to determine the treatment accorded to each claim under the plan and even comb the record to determine if any other action affecting the claim occurred during the pendency of the prior chapter proceeding. In addition, since under §502(a) of the Code, a filed claim is deemed allowed unless objected to, the trustee must file an objection to each claim actually filed in the prior chapter proceeding. This places a significant burden on the chapter 7 trustee in administering the case.

It is suggested that the burden of filing a new or superceding claim is more properly placed on the claimant. The claimant knows, or should know, the nature and amount of the claim as it existed at the time of conversion. The additional burden imposed on claimants to prepare and file new claims in cases converted postconfirmation is minimal, particularly compared to the burden imposed on trustees under the current provision.

This problem may be alleviated by adding the new language shown in brackets [] at the end of Rule 1019(3) as it presently reads and is submitted for consideration by the Committee.

> Claims Filed Before Conversion. All claims actually filed by a creditor before conversion of the case are deemed filed in the chapter 7 case[. except in a case in which a plan has been confirmed under §§ 1129, 1225 or 1325 of the Code].

Very truly yours,

Thomas J. Yerbich
Court Rules Attorney

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

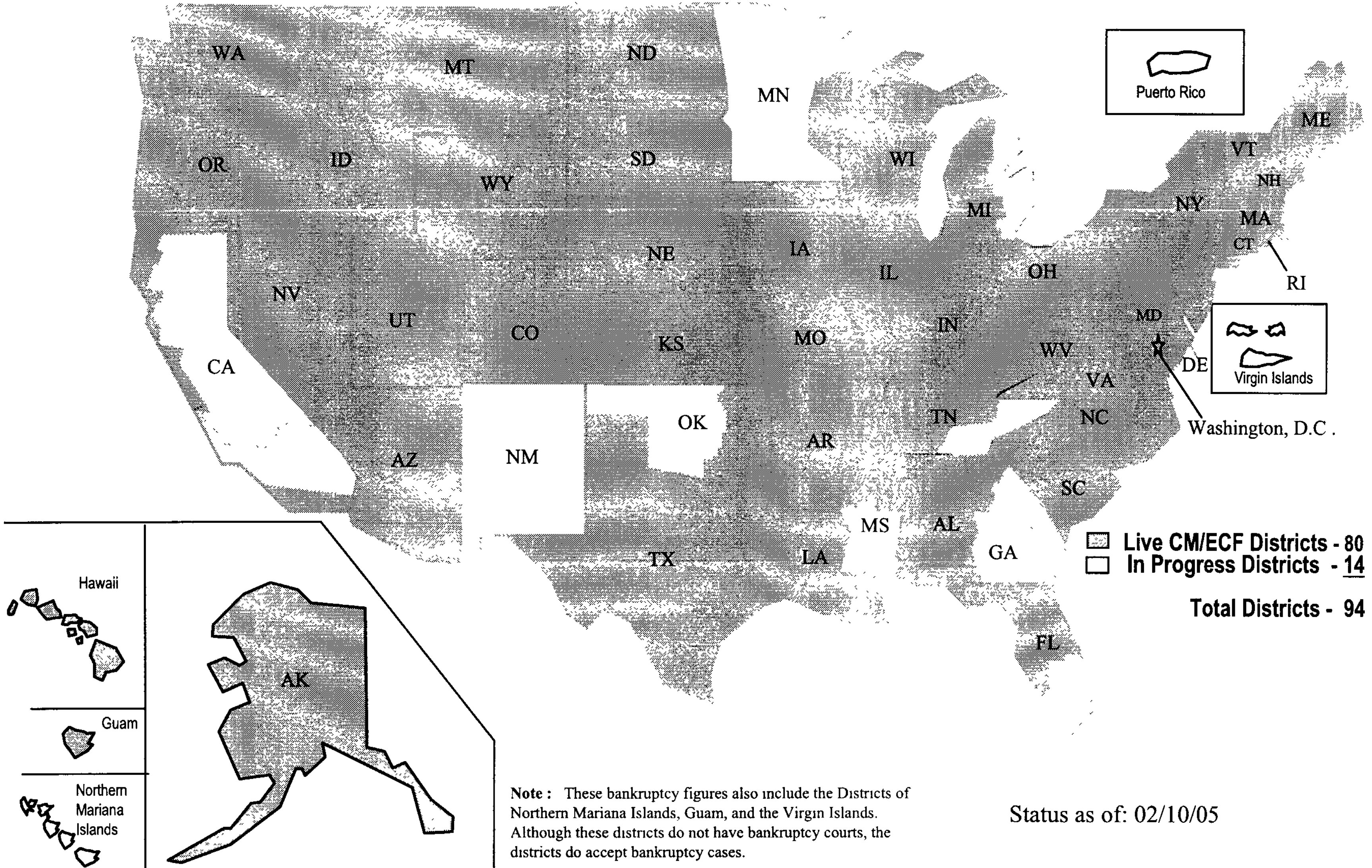
RE: RULE 1019(3) – FILED CLAIMS AND CONVERTED CASES

DATE: FEBRUARY 1, 2005

The Committee has received a request from Thomas J. Yerbich, Court Rules Attorney for the District of Alaska, to consider amending Rule 1019(3). The rule provides in its entirety that "All claims filed by a creditor before conversion of the case are deemed filed in the chapter 7 case." Under the rule, a creditor who has filed a proof of claim in a chapter 11, 12, or 13 case has no obligation to file another proof of claim in the same case once it is converted to chapter 7. The rule not only avoids the need to duplicate an existing filing, but it thereby relieves the clerk's office from maintaining two claims registries and dockets for a single case. Conversion of the case does constitute an order for relief in the new chapter, but it does not create a new case. See Bankruptcy Code § 348(a).

Mr. Yerbich's request points out that the rule works without incident if the conversion of the case occurs prior to the confirmation of a plan. After confirmation of a chapter 11 plan, however, the creditor's claim is no longer the claim that the creditor submitted in its proof of claim. Instead, the claim is set by the terms of the confirmed plan under § 1141(a) because those terms bind the creditor. Thus, the proof of claim arguably would be inaccurate unless the plan provided for the payment of the claim in full. Mr. Yerbich points out that in cases converted to chapter 7 after the confirmation of a chapter 11 plan the chapter 7 trustee must review each previously filed claim as well as the confirmed plan to determine whether to object to the claim.

Bankruptcy Court
CM/ECF Implementation



Note : These bankruptcy figures also include the Districts of Northern Mariana Islands, Guam, and the Virgin Islands. Although these districts do not have bankruptcy courts, the districts do accept bankruptcy cases.

Status as of: 02/10/05

Districts

In Progress (14)

CA-C, CA-E, FL-S, GA-M, GA-S, MI-E, MN,

MS-S, NMI, OK-W, NM, PR, TN-E, VI

Status as of: 02/10/05

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WANNAMAKER

RE: REVISION OF DIRECTOR'S FORM B 210, NOTICE OF TRANSFER OF CLAIM OTHER THAN FOR SECURITY

DATE: FEBRUARY 2, 2005

At the March and September 2004 meetings, the Committee considered a proposed new Director's Form titled "Notice of Transfer of Claim Other Than for Security," which was submitted by the CM/ECF Working Group's claims subgroup. The claims subgroup consisted of several judges and clerks and consulted with selected trustees and mass claims purchasers to develop a proposed form that would streamline the procedure for recording the transfer of a claim and, ultimately, facilitate the electronic filing, recording, and noticing of these transfers.

As a result of the discussions at the two Committee meetings and consultations between the Forms Subcommittee and the Working Group, the proposed Director's Form was modified extensively. As revised, the new Form B 210 was issued as a procedural form by the Director of the Administrative Office pursuant to Rule 9009 and was posted on the JNET and the Internet for use by creditors and the courts. A copy of the form is attached.

Form B 210 was intended to serve two purposes. The form can be used both as the notice required by Rule 3001(e)(2) and as evidence of the transfer. It was anticipated that the form would be incorporated in Bankruptcy CM/ECF Release 3.0, which is to be made available to the courts in late summer 2005. Release 3.0 will contain support for electronic batch filing of claims and claims transfers by large creditors. The CM/ECF project staff concluded, however, that certain features of the form could not be incorporated in CM/ECF. Forms B 210A and B 210B, which are attached, contain modifications proposed for the notice.

It was anticipated that the transferee would complete most of Form B 210, including the

verification of the transfer, and file the form electronically. The clerk would complete the rest of the form, including the clerk's (printed) signature, the date of mailing, and the alleged transferor's address in the court records. The clerk then would mail the completed form to the alleged transferor. If the alleged transferor's address in the court records differed from the "current address" supplied by the transferee on the form, it was anticipated that the clerk would send the notice to both addresses.

The CM/ECF project staff, however, stated that it would be difficult or impracticable for the clerk either to insert information in a notice filed electronically by the transferee or to automatically generate a notice which would be attached to the document filed by the transferee and mailed to the alleged transferor. The project staff also stated that the CM/ECF system only maintains a single address for each creditor, which would make sending the notice to two addresses problematic. Concerns were expressed that either checking the current address against the alleged transferor's record address or sending notices to both addresses would impose an unnecessary cost and burden on the clerk's office.

As a result of these concerns, Form B 210, was divided into two parts. The first part, Form B 210A, would be completed and filed by the transferee. The second part, Form B 210B, would be completed by the clerk and would be mailed to the alleged transferor's record address. If the alleged transferor wished to make further inquiries, the notice sent by the clerk would include sufficient information to identify the transferee's filing and other relevant documents in the court records. The clerk's notice would be sent to the alleged transferor's address in the court records since that is the address included in the mailing matrix filed by the debtor or supplied by the creditor pursuant to Rule 2002(g).

Attachments

B210
(12/04)

United States Bankruptcy Court

________________ District Of ________________

In re ______________________________, Case No. ________________

Court ID (Court use only)____________

NOTICE OF TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this notice.

____
Name of Transferee

Name and Address where notices to transferee should be sent

Phone: ____________________________
Last Four Digits of Acct #: ____________

Name and Address where transferee payments should be sent (if different from above)

Phone: ____________________________

Last Four Digits of Acct #: ____________

Court Claim # (if known): ____________
Date Claim Filed: ____________________

____
Name of Transferor

Court Record Address of Transferor
(Court Use Only)

Last Four Digits of Acct. #: __________

Name and Current Address of Transferor

Phone: ____________________________

Last Four Digits of Acct. #: __________

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By:______________________________ Date: ______________________
Transferee/Transferee's Agent

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571.

~~DEADLINE TO OBJECT TO TRANSFER~~

The transferor of claim named above is advised that this Notice of Transfer of Claim Other Than for Security has been filed in the clerk's office of this court as evidence of the transfer. Objections must be filed with the court within twenty (20) days of the mailing of this notice. If no objection is timely received by the court, the transferee will be substituted as the original claimant without further order of the court.

Date:__________

____
CLERK OF THE COURT

B210A (**DRAFT**)
(3/05)

United States Bankruptcy Court

_______________ District Of _______________

In re ______________________________, Case No. ______________

TRANSFER OF CLAIM OTHER THAN FOR SECURITY

A CLAIM HAS BEEN FILED IN THIS CASE or deemed filed under 11 U.S.C. § 1111(a). Transferee hereby gives evidence and notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this evidence and notice.

____
Name of Transferee

Name and Address where notices to transferee should be sent:

Phone: ______________________________
Last Four Digits of Acct #: ______________

Name and Address where transferee payments should be sent (if different from above):

Phone: ______________________________

Last Four Digits of Acct #:______________

____
Name of Transferor

Court Claim # (if known): __________

Date Claim Filed: ______________

Phone: ______________________________
Last Four Digits of Acct. #: __________

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By:______________________________
Transferee/Transferee's Agent

Date:______________________________

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571.

B210B (**DRAFT**)
(3/05)

United States Bankruptcy Court

_______________ District Of _______________

In re ______________________________, Case No. _______________

NOTICE OF TRANSFER OF CLAIM OTHER THAN FOR SECURITY

Claim No. _____ was filed or deemed filed under 11 U.S.C. § 1111(a) in this case by the alleged transferor. As evidence of the transfer of that claim, the transferee filed a Transfer of Claim Other than for Security in the clerk's office of this court on ______ (date).

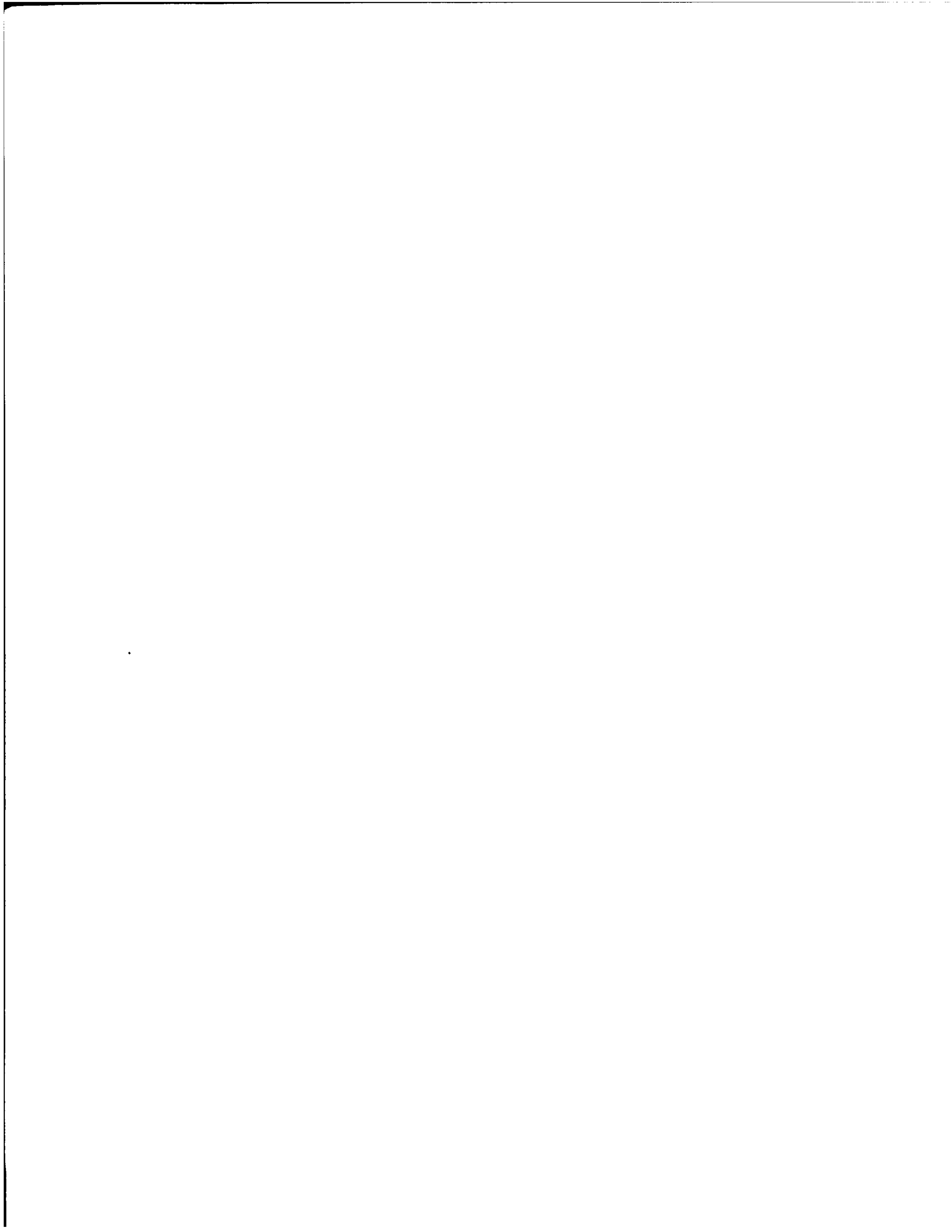
______________________	______________________
Name of Alleged Transferor	Name of Transferee
Address of Alleged Transferor:	Address of Transferee:

~~DEADLINE TO OBJECT TO TRANSFER~~

The alleged transferor of the claim is hereby notified that objections must be filed with the court within twenty (20) days of the mailing of this notice. If no objection is timely received by the court, the transferee will be substituted as the original claimant without further order of the court.

Date:_________

____
CLERK OF THE COURT



Bankruptcy Rules Tracking Docket (By Rule Number) 2/14/05

Approved Items - No Further Action by Committee Necessary

Suggestion	Effective Date
Rule 1007 Debtor to include matrix name/address persons for schedules D-H	12/1/05
Rule 1011 Technical amendment to conform to Rule 1004	12/1/04
Rule 2002(j) Technical amendment to correct reference to IRS	12/1/04
Rule 3004 Debtor or trustee may not file proof of claim until creditor time expires	12/1/05
Rule 3005 Conform to code	12/1/05
Rule 4008 Reaffirmation agreement to be filed within 30 days of discharge	12/1/05
Rule 7004 Clerk can sign, seal, and issue summons electronically	12/1/05
Rule 9006(f) Additional time after service by mail	12/1/05
Rule 9014 Opt out of mandatory discovery provisions of Rule 7026 for contested matters	12/1/04
Official Form 6, Schedule G Amend to delete statement re notice	12/1/05
Official Forms 16D and 17 Technical changes	12/1/04

Active Items

Suggestion	Docket No., Source & Date	Status Pending Further Action	Effective Date
Rule 1009 Social security number - amended statement		4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee consideration	12/1/06
Rules 1010 and 1011 Rule 7007.1 applied in involuntary cases	Committee proposal	9/04 - Committee considered and referred to Reporter 3/05 - Committee consideration	
Rule 1014 Clarifies that court may act *sua sponte* to dismiss or convert a case	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Approved by Joint Subcommittee 9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05	12/1/07
Rule 1019(3) Superceding claims required in cases converted chapter 7	04-BK-G Attorney Thomas Yerbich 11/8/04	3/05 - Committee consideration	
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 ________________ 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered 9/03 - Committee considered and approved in principle 3/04 - Committee approved for publication 6/04 - Standing committee approved for publication 8/04 - Published for public comment 2/05 - Committee consideration by e-mail	12/1/05 Fast Track

Rule 2021 Participation by telephonic means	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/04 - Discussed by Committee 1/05 - Considered by Joint Subcommittee 3/05 - Committee consideration	
Rule 3001 Procedure for filing excerpts supporting proof of claim	04-BK-A Glen K. Palman for Claims Subcomt. of CM/ECF Working Group 2/19/04	9/04 - Committee considered and referred to Subcommittee on Forms 3/05 - Committee consideration	
Rule 3002(c)(5) Timing issues for notice of newly discovered assets	04-BK-E Judge Dana L. Rasure for Bankruptcy Judges Advisory Group 11/15/04	3/05 - Committee consideration	
Rule 3007 Procedure for objection to claim - no affirmative relief at same time		9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05	12/1/07
Rule 3007 Omnibus objections to claims	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcommittee 9/04 - Approved in principle by Committee 1/05 - Revised by Joint Subcommittee 3/05 - Committee consideration	
Rule 4001 Requirements for cash collateral motions	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcommittee 3/05 - Committee consideration	

Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcomt. 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee consideration	12/1/06
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Committee considered and referred to Consumer Subcomt. 11/04 - Approved by Subcommittee 3/05 - Committee consideration	
Rule 5005(a)(2) Court may permit or require electronic filing	04-BK-D Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 9/04 - Committee approved for publication 11/04 - Publication on "Fast Track" (3 month comment period) 3/05 - Committee consideration	12/1/06 Fast Track
Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel and District Judge to entities already listed	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee approved for publication 1/04 - Standing Committee approved for publication 8/04 - Published for Public Comment 3/05- Committee consideration	12/1/06

Rule 6003 (new) First day orders	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcommittee 3/05 - Committee consideration	
Rules 6004(a) and 2002(c)(1) Sale of property	04-BK-F Judge Vincent Zurzolo 9/15/04	10/04 - Referred to reporter for review 3/05 - Committee consideration	
Rule 6006 Omnibus Motions to Assume or Reject	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcommittee 9/04 - Approved in principle by Committee 1/05 - Approved by Joint Subcommittee 3/05 - Committee consideration	
Rule 7004(b)(9) and (g) Service of summons and complaint on attorney for debtor	Committee proposal	3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee consideration	12/1/06
Rule 7005.1 (new) Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed Rule 5.1 1/05 - Standing Committee approved proposed Rule 5.1 3/05 - Committee consideration	12/1/07
Rule 7007.1 Corporate ownership statement with initial filing	Committee proposal	9/04 - Committee approval as technical amendment without publication 1/05 - Standing Committee approved publication 8/05	12/1/07

Rule 8002(a) Extending the appeal time	Committee proposal	8/04 - Referred to Committee 9/04 - Tab 16 Committee Notebook 10/04 - Referred to Technology Subcommittee for study 1/05 – Subcommittee recommended taking no action 3/05 - Committee consideration	
Rule 9001 Notice provider definition	Committee proposal (see 02-BK-A, Rule 2002(g))	3/04 - Committee approval 6/06 - Standing Committee approval 8/04 - Published for public comment 2/05 - Committee consideration by e-mail	12/1/05 Fast Track
Rule 9021 Separate Document Requirement	04-BK- Judge David Adams	8/04 - Referred to Committee 9/04 - Committee considered and referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee consideration	
Rule 9036 Notice by electronic means is complete upon transmission	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee 9/03 - Committee considered and approved in principle 1/04 - Standing Committee approved for publication 8/04 - Published for public comment 2/05 - Committee consideration by e-mail	12/1/05 Fast Track
Rule 9036 Notice by electronic means is ineffective if sender knows notice did not reach intended recipient	Committee proposal (see 02-BK-A)	9/04 - Committee considered and referred to Subcommittee on Technology 12/04 - Subcommittee discussion 3/05 - Committee consideration	
Rule 9037 (new) Template privacy rule	E-Government Act § 205(c)(3)	9/04 - Committee considered and referred to Reporter, Judge Swain 3/05 - Committee consideration	12/1/07

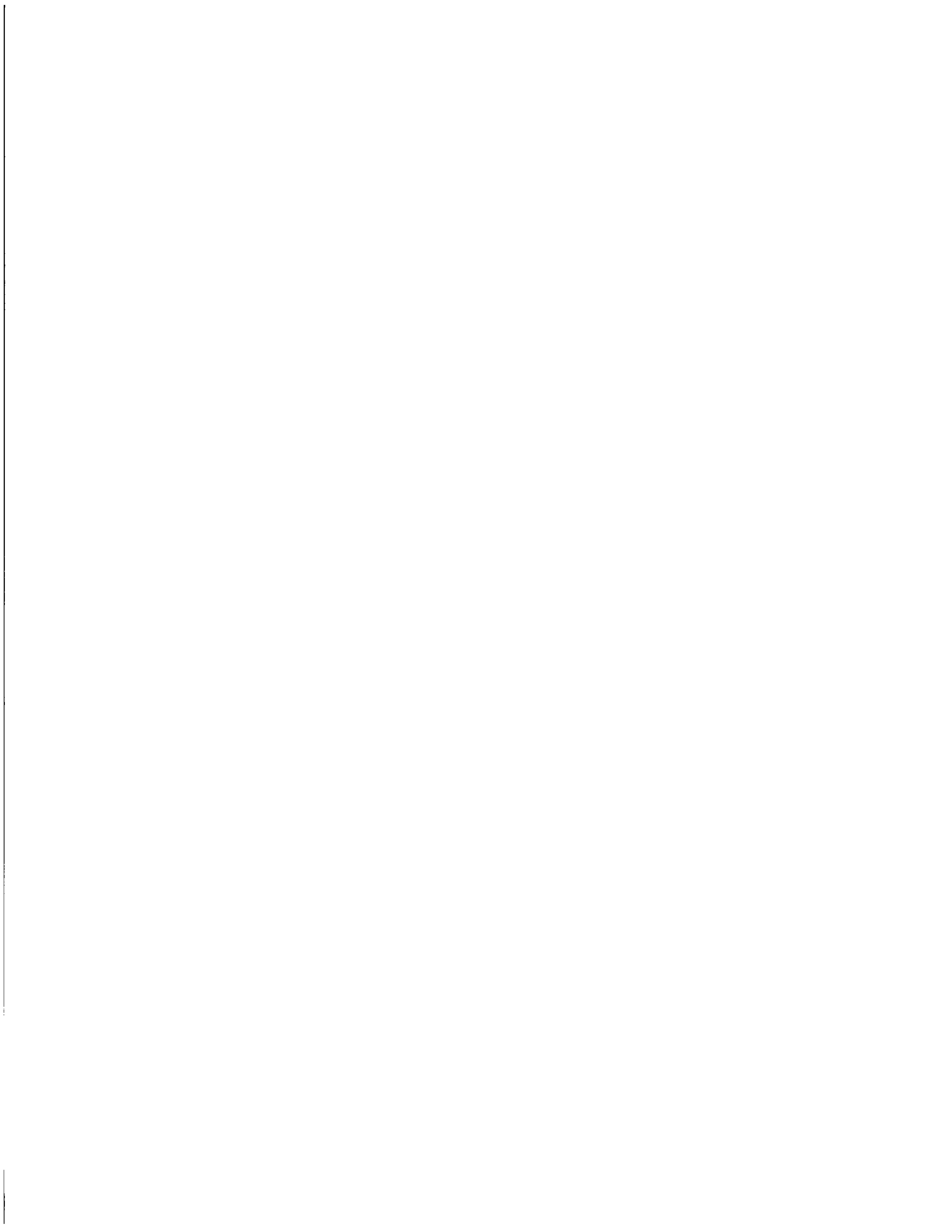
Official Form 6, Schedule I Income of non-filing spouse disclosure	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee consideration	12/1/05
Official Form 10 Amend Proof of Claim form (See Rule 3001)	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair and Subcommittee on Forms 9/04 - Discussed by Committee and Referred to Forms Subcommittee 12/05 - Approved by Subcommittee 3/05 - Committee consideration	

Inactive Items / Historical Information

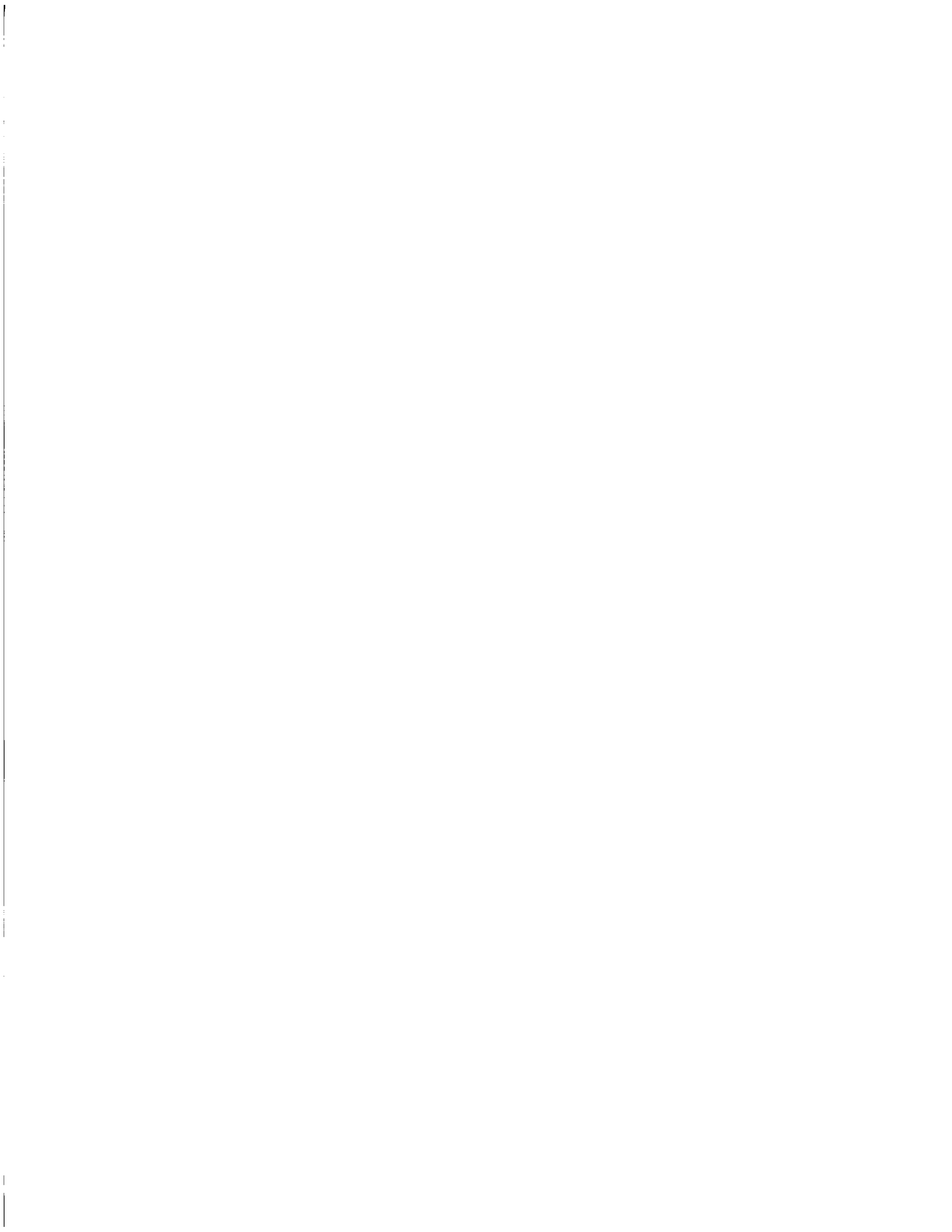
Suggestion	Docket No., Source & Date	Status
Rule 1019(5)(A) Deal with "nonexistence" of debtor-in-possession	04-BK-C R. Bradford Leggett, Esq. 5/21/04	5/04 - Referred to chair and reporter 9/04 - Tab 13 Discussed by Committee - Vote to take no action
Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 4/04 - Tabled motion carried
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **NO FURTHER ACTION REQUIRED**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **NO FURTHER ACTION REQUIRED**

Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **NO FURTHER ACTION REQUIRED**
Rule 7001 dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and referred to Attorney Conduct Subcommittee **NO FURTHER ACTION REQUIRED**
Rule 7023.1 Eliminate rule extension number	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **NO FURTHER ACTION REQUIRED**
Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01/BK-A Jay L. Welford, Esq. And Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 ______________________ 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **NO FURTHER ACTION REQUIRED**
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK-005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee 9/04 - Committee defers action **FURTHER ACTION MAY BE APPROPRIATE**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **NO FURTHER ACTION**
Official Form 1 Amend Exhibit C to the Voluntary Petition	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee

Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **NO FURTHER ACTION**
Official Form 9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **NO FURTHER ACTION**
Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION DENIED**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **NO FURTHER ACTION**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **NO FURTHER ACTION**



There are no amendments pending in the "bull pen" awaiting transmission to the Standing Committee



Item 26 will be an oral report.

The next meeting of the Committee will take place

September 29 - 30, 2005
at
Eldorado Hotel, Santa Fe, NM.

The Committee will discuss dates and locations for the spring 2006 meeting.