ADVISORY COMMITTEE
ON
BANKRUPTCY RULES
New Orleans, LA
April 29-30, 2010

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 29 - 30, 2010
New Orleans, Louisiana

Introductory Items

1. Greetings and Introduction of new subcommittee chairs (Judge Wizmur and Mr. Rao) and new committee members (Judge Ikuta and Judge Harris). (Judge Swain)

2. Approval of minutes of Boston meeting of October 1 - 2, 2010. (Judge Swain)

   - Draft minutes.

3. Oral reports on meetings of other committees:

   (A) January 2010 meeting of the Committee on Rules of Practice and Procedure. (Judge Swain and Professor Gibson)

   - Draft minutes of the Standing Committee will be distributed separately.

   (B) January 2010 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Conti and Judge Coar)

   (C) March 2010 and October 2009 meetings of the Advisory Committee on Civil Rules. (Judge Wedoff)

   (D) April 2010 meeting of the Advisory Committee on Evidence. (Judge Wizmur)

   (E) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project. (Judge Perris)

   (F) Progress report from the Sealing Committee. (Judge Coar and Professor Gibson)

   (G) Progress report from the Privacy Committee. (Judge Coar and Professor Gibson)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues. (Judge Wedoff and Professor Gibson)

   (A) Recommendation concerning comments submitted on the proposed amendment to Rule 3001 and proposed new Rule 3002.1. (Judge Wedoff and Professor Gibson)

(1) Comments on the mortgage provisions.

- Memo of April 7, 2010, by Professor Gibson.

(2) Comments on the bulk claim and revolving credit provisions.

- Memo of April 12, 2010, by Professor Gibson.

(B) Recommendations concerning comments submitted on

(1) Proposed amendment to Rule 2003. (Judge Wedoff and Professor Gibson)

- Memo of March 26, 2010, by Professor Gibson.

(2) Proposed amendment to Rule 4004. (Judge Wedoff and Professor Gibson)

- Memo of March 26, 2010, by Professor Gibson.

(3) Proposed amendment to Official Forms 22A, 22B, and 22C. (Judge Wedoff and Professor Gibson)

- Memo of March 26, 2010, by Professor Gibson.

(C) Recommendation concerning Suggestion 09-BK-H by Judge Margaret Dee McGarrity (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 3007(a) to provide for disposition of objections to claims by negative notice, rather than requiring a hearing. (Judge Wedoff and Professor Gibson).

- Memo of March 17, 2010, by Professor Gibson.

(D) Recommendation concerning Suggestion 09-BK-K by the National Association of Chapter 13 Trustees and Wells Fargo Corporation to add a claims identifier to Official Form 10, the proof of claim. (Judge Wedoff and Professor Gibson).

- Memo of March 19, 2010, by Professor Gibson.

(E) Oral report concerning possible revision of Schedule C to deal with the extent of a claimed exemption; issues that the Supreme Court will be considering in Schwab v. Reilly (08-538). (Agenda item 4(B) for the October 2009 meeting.) (Judge Wedoff)

- Memo of August 26, 2009, by Judge Wedoff.

(F) Recommendation concerning proposed amendment to Rule 7056 to provide an exception to the time for filing a motion for summary judgment set out in Civil Rule 56, as amended effective December 1, 2009. (March 2009 agenda item 13 and October 2009 agenda item 10) (Judge Wedoff)

- Memo of March 16, 2010, by Judge Wedoff.
- Page 1 of the February 2010 issue of Core Proceedings, a newsletter published by the Administrative Office for bankruptcy judges, which includes an article on the amendment to Civil Rule 56 and the amendment's impact on the timing of summary judgment motions in bankruptcy matters.

5. Report of the Subcommittee on Forms. (Judge Perris, Professor Gibson, Mr. Myers)

(A) Recommendations on proposed forms to address problems related to claims secured by a debtor's home. (Suggestion 08-BK-K by Judges Marvin Isgur, Elizabeth Magner, and Jeff Bohm; Agenda item 5(B) for the October 2009 meeting.) (Judge Perris and Professor Gibson)

- Memo of April 6, 2010, by Professor Gibson.
- Draft Mortgage Proof of Claim Attachment, Official Form 10 (Attachment A)
- Draft Notice of Payment Change, Official Form 10 (Supplement 1)
- Draft Notice of Postpetition Fees, Charges and Expenses, Official Form 10 (Supplement 2)

(B) Recommendations on proposed amendments to Form 10, the Proof of Claim, including the wording of a creditor certification; the statement about attachment of a summary; inconsistent use of the pronoun "you" and whether some parts of the form should be worded in the first person; and Suggestion (10-BK-B) by Rena M. Myers to provide additional space for the "filed" stamp. (Judge Wedoff, Judge Perris, Professor Gibson, Mr. Myers)

- Memo of April 6, 2010, by Professor Gibson.
- Draft of Official Form 10 illustrating the recommended amendments and Committee Note.

(C) Oral report on recommendation (by email vote) that the Director of the Administrative Office amend Director's Form B240A, the Reaffirmation Agreement; issue Instructions for Form B240A; and continue to make available the former reaffirmation form (now designated as Form 240A/B(alt.)). (Judge Perris, Professor Gibson, Mr. Myers)

- Memo of February 14, 2010, by Professor Gibson.

- Copy of Form 240A as amended, with Instructions.

(D) Recommendations and reports on other amendments to the bankruptcy forms:

(1) Recommendation on Suggestion (09-BK-G) by Kathleen Crosser to create a separate petition for use in chapter 15 cases.

- Memo of March 17, 2010, by Professor Gibson.

(2) Recommendation on revision of the captions of Official Forms 20A and 20B.
- Memo of February 3, 2010, by Mr. Myers.
- Copies of Official Forms 20A and 20B illustrating the proposed amendments.

(3) Oral report on amendments to Official Forms 1, 6C, 6E, 7, 10, 22A, and 22C, and Director's Forms 200 and 283, to conform to the dollar adjustments to the Bankruptcy Code on April 1, 2010, as provided in section 104(a) of the Code. (Mr. Wannamaker)

- Memo of March 12, 2010, by the Director of the Administrative Office which announced the adjustments.
- Memo of January 12, 2010, by Mr. Wannamaker

6. Report of the Subcommittee on Business Issues. (Judge Wizmur and Professor Gibson)

(A) Recommendation concerning comments submitted on the proposed amendments to Rule 2019. (Judge Wizmur and Professor Gibson)

- Memo by Professor Gibson will be distributed separately.

(B) Recommendation concerning whether the time limits in Rule 7054(b) should be amended to conform to Civil Rule 54 and the new time computation provisions. (Judge Wizmur and Professor Gibson)

- Memo of March 17, 2010, by Professor Gibson.

(C) Recommendation concerning whether Article VIII of Official Form 25A, the model chapter 11 plan for a small business debtor, should be amended to provide that the plan is effective at some time other than the current provision – "the eleventh business day following the date of the entry of the order of confirmation." (Judge Wizmur and Professor Gibson)

- Memo of March 19, 2010, by Professor Gibson.

(D) Recommendation concerning Suggestion 09-BK-H by Judge Margaret Dee McGarrity (on behalf of the Bankruptcy Judges Advisory Group) to adopt a rule which provides for closing individual chapter 11 cases after confirmation of a plan and reopening the cases as necessary. (Judge Wizmur and Professor Gibson).

- Memo of March 31, 2010, by Professor Gibson.

(E) Recommendation concerning Suggestion 09-BK-M by Judge Colleen A. Brown and Judge Robert E. Littlefield, Jr. to amend Rule 7004(h) to clarify the service requirements set forth in the rule. (Judge Wizmur and Professor Gibson).

- Memo of March 19, 2010, by Professor Gibson.

7. Report of the Subcommittee on Privacy, Public Access, and Appeals. (Judge Pauley and Professor Gibson)

(A) Oral report on the status of revision of the Part VIII rules, including incorporation of comments at the special open subcommittee meeting held on September 30, 2009. (Judge Pauley, Professor Gibson, and Mr. Brunstad)

- A working draft of the proposed revision will be distributed separately.

(B) Discussion of the underlying goals of the revision of the Part VIII bankruptcy appellate rules. (Judge Pauley, Professor Gibson)

- Memo of March 25, 2010, by Professor Gibson.

8. Oral report on status of the Bankruptcy Forms Modernization Project. (Judge Perris)

9. Oral Report by the Subcommittee on Technology and Cross Border Insolvency concerning comments submitted on proposed new Rule 1004.2. (Judge Coar and Professor Gibson)

10. Oral Report of the Subcommittee on Attorney Conduct and Health Care concerning comments submitted on the proposed amendment to Rule 6003. (Mr. Rao and Professor Gibson).

Discussion Items

11. Discussion of Suggestion (09-BK-J) by Judge William F. Stone, Jr., (1) to amend Rules

9013 and 9014 to require that the caption of a motion initiating a contested matter set forth the name of any party whose special interest would be affected, and (2) to adopt a rule consider to provide for applications for the allowance of administrative expenses. (Professor Gibson)

- Memo of March 24, 2010, by Mr. Wannamaker

12. Oral report on Hamilton v. Lanning (08-998), in which the Supreme Court is considering projected disposable income calculations in chapter 13 cases, and its implications for Form 22C. (Professor Gibson)

13. Discussion of Suggestion (09-BK-I) by Dana C. McWay (on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group) to amend Rule 1007(b)(7) to allow the course provider to file Official Form 23 (the statement that an individual chapter 7 or chapter 13 debtor has completed the required personal financial management course). (Professor Gibson)

- Memo of March 15, 2010, by Mr. Wannamaker

14. Oral report on the results of the email poll of the Committee on possible responses to a proposal to amend the three-day rule in Civil Rule 6(d). (Professor Gibson)

- Agenda item on the proposed amendment from the Civil Committee's October 2009 meeting.
- Excerpt concerning Rule 6(b) from the minutes of the Civil Committee's October 2009 meeting.

Information Items

15. Oral report on the status of pending bankruptcy-related legislation, including

- Senator Dodd's proposal to create a new regulatory procedure for financial firms which pose a systemic risk to the nation's financial system;
- Senator Durbin and Congressman Conyers' proposal to increase the maximum amount entitled to priority for wage claims and contributions to employee benefit plans, prohibit the payment of bonuses to senior officers, and require court approval of executive compensation for firms in bankruptcy;
- H.R.901 and S.1624, to liberalize exemptions for "medically distressed debtors" and exempt them from the means test;
- S.1490, to exempt victims of identity theft from the means test;
- H.R.1106 and S.896, to authorize modification of certain home mortgages in chapter 13 cases;

- The National Bankruptcy Conference's proposal to allow small businesses – which now file chapter 11 cases – to reorganize in chapter 12;
- H.R. 4677, to amend the Bankruptcy Code to protect workers' pay and pensions; and
- H.R. 4950, to provide additional compensation for chapter 7 trustees.

(Mr. Wannamaker, Judge Swain, Professor Gibson)

16. Memo of January 19, 2010, by the Director of the Administrative Office on the Standing Order Guidelines approved by the Judicial Conference. (Judge Swain)

- Director's memo of January 19, 2010.

17. Letter of September 30, 2009, by Judge Bernice B. Donald on behalf of the American Bar Association concerning the restrictions on attorneys in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. 109-8); response by Judge Carl E. Stewart; and syllabus, Milavetz v. United States, No. 08-1119. (Judge Swain)

- Judge Donald's letter of September 30, 2009.
- Judge Stewart's letter of November 24, 2009.
- Syllabus, Milavetz, Gallop & Milavetz, P. A., et. al. v. United States, No. 08-1119

18. Oral update on opinions interpreting section 521(i). (Prof Gibson)

19. *Bull Pen*: Proposed amendments to Official Form 10, approved at March 2009 and October 2009 meetings.

Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting.

Proposed amendment to Rule 7054(b) approved at October 2009 meeting.

20. Rules Docket.

21. Oral report on posting a definitive set of Bankruptcy Rules. (Mr. Ishida)

22. Future meetings:

Fall 2010 meeting, September 30 - October 1, 2010, at the at the Bishop's Lodge in Santa Fe, New Mexico. Possible locations for the spring 2011 meeting.

23. New business.

24 Adjourn.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

Effective October 1, 2009

Chairs:	**Reporters:**
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	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall Univ. of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Court of Appeals 902 William Kenzo Nakamura United States Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:	**Reporter:**
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel P. Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall Univ. of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Members:	
Michael St. Patrick Baxter Covington & Burling LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004	Honorable Karen K. Caldwell United States District Court United States Courthouse and Post Office 101 Barr Street Lexington, KY 40507
Honorable David H. Coar United States District Court 1478 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Arthur I. Harris United States Bankruptcy Court Howard M. Metzenbaum United States Courthouse 201 Superior Avenue, Room 148 Cleveland, OH 44114-1238
Honorable Sandra Segal Ikuta United States Court of Appeals Richard H. Chambers Court of Appeals Building 125 South Grand Avenue, Room 305 Pasadena, CA 91105-1621	J. Christopher Kohn, Esquire Director, Commercial Litigation Branch Civil, U.S. Dept. of Justice (ex officio) 1100 L Street, N.W., 10th Flr, Rm 10036 Washington, DC 20005
J. Michael Lamberth, Esquire Lamberth, Cifelli, Stokes & Stout, P.A. 3343 Peachtree Road, N.E., Suite 550 Atlanta, GA 30326	David A. Lander Thompson Coburn LLP One US Bank Plaza St. Louis, MO 63101
Honorable William H. Pauley III United States District Judge United States District Court 2210 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1581	Honorable Elizabeth L. Perris Chief Judge United States Bankruptcy Court 700 Congress Center 1001 Southwest Fifth Avenue Portland, OR 97204-1145

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONT'D.)

Dean Lawrence Ponoroff The University of Arizona James E. Rogers College of Law 1201 E. Speedway Blvd. – Bldg. #176 PO Box 210176 Tucson, AZ 85721-0176	John Rao, Esquire National Consumer Law Center 7 Winthrop Square, 4th Floor Boston, MA 02110-1245
Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Judith H. Wizmur Chief Judge United States Bankruptcy Court Mitchell H. Cohen U. S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
Advisors and Consultants: Patricia S. Ketchum, Esquire 113 Richdale Avenue #35 Cambridge, MA 02140	 Mark A. Redmiles, Deputy Director Executive Office for U.S. Trustees 20 Massachusetts Ave., N.W., Suite 8000 Washington, DC 20530
  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	**Liaison Member:** Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
Liaison from Committee on the Administration of the Bankruptcy System: Honorable Joy Flowers Conti United States District Court 5250 United States Post Office and Courthouse 700 Grant Street Pittsburgh, PA 15219-1906	**Secretary:** Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

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Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej

Chief

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

James N. Ishida

Senior Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Jeffrey N. Barr

Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Henry Wigglesworth

Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

James H. Wannamaker III

Senior Attorney

Bankruptcy Judges Division

Administrative Office of the U.S. Courts

Washington, DC 20544

Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Rachel Kessinger Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

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Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Members	Position	District/Circuit	Start Date	End Date
Laura Taylor Swain	D	New York (Southern)	Member: 2002	----
Chair			Chair: 2007	2010
Michael St. Patrick Baxter	ESQ	Washington, DC	2008	2011
Karen K. Caldwell	D	Kentucky (Eastern)	2009	2012
David H. Coar	D	Illinois (Northern)	2007	2010
Arthur I. Harris	B	Ohio (Northern)	2010	2012
Sandra Segal Ikuta	C	Ninth Circuit	2010	2012
J. Christopher Kohn*	DOJ	Washington, DC	----	Open
J. Michael Lamberth	ESQ	Georgia	2005	2011
David A. Lander	ESQ	Missouri	2008	2011
William H. Pauley III	D	New York (Southern)	2005	2011
Elizabeth L. Perris	B	Oregon	2007	2010
Lawrence Ponoroff	ACAD	Arizona	2004	2010
John Rao	ESQ	Massachusetts	2006	2012
Eugene R. Wedoff	B	Illinois (Northern)	2004	2010
Judith H. Wizmur	B	New Jersey	2008	2011
S. Elizabeth Gibson	ACAD	North Carolina	2008	Open
Reporter				

Principal Staff:

Peter G. McCabe	(202) 502-1800
John K. Rabiej	(202) 502-1820
Jim H. Wannamaker	(202) 502-1900

***Ex-Officio**

Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective May 1, 2010

Subcommittee on Consumer Issues Judge Eugene R. Wedoff, Chair Judge Sandra Segal Ikuta Judge William H. Pauley III Judge Karen K. Caldwell Judge Judith H. Wizmur Judge Arthur I. Harris John Rao, Esq. David A. Lander, Esq. James J. Waldron, *ex officio* Mark A. Redmiles, Esq., *EOUST liaison*	**Subcommittee on Business Issues** Judge Judith H. Wizmur, Chair Judge David H. Coar Judge Eugene R. Wedoff J. Christopher Kohn, Esq. J. Michael Lamberth, Esq. Michael St. Patrick Baxter, Esq. David A. Lander, Esq. James J. Waldron, *ex officio* Mark A. Redmiles, Esq., *EOUST liaison*
Subcommittee on Forms Judge Elizabeth L. Perris, Chair Judge Judith H. Wizmur Judge Arthur I. Harris J. Christopher Kohn, Esq. John Rao, Esq. J. Michael Lamberth, Esq. David A. Lander, Esq. James J. Waldron, *ex officio* Mark A. Redmiles, Esq., *EOUST liaison* Patricia S. Ketchum, Esq., *Consultant*	**Forms Modernization Project** Judge Elizabeth L. Perris, Chair Judge Judith H. Wizmur Judge Arthur I. Harris J. Christopher Kohn, Esq. John Rao, Esq. J. Michael Lamberth, Esq. James J. Waldron, *ex officio* Mark A. Redmiles, Esq., *EOUST liaison* Patricia S. Ketchum, Esq., *Consultant*
Subcommittee on Privacy, Public Access and Appeals Judge William H. Pauley, III, Chair Judge Sandra Segal Ikuta Judge Karen K. Caldwell Judge Elizabeth L. Perris Judge Eugene R. Wedoff J. Christopher Kohn, Esq. Michael St. Patrick Baxter, Esq. David A. Lander, Esq. Dean Lawrence Ponoroff Mark A. Redmiles, Esq., *EOUST liaison*	**Subcommittee on Style** Dean Lawrence Ponoroff, Chair Judge Sandra Segal Ikuta Judge David H. Coar Judge Karen K. Caldwell Judge Judith H. Wizmur Judge Eugene R. Wedoff J. Michael Lamberth, Esq. David A. Lander, Esq. Michael St. Patrick Baxter, Esq.

Subcommittee on Attorney Conduct and Healthcare John Rao, Esq., Chair, Chair Judge William H. Pauley, III Judge Karen K. Caldwell Judge David H. Coar Judge Arthur I. Harris J. Michael Lamberth, Esq. Mark A. Redmiles, Esq., *EOUST liaison*	**Subcommittee on Technology and Cross Border Insolvency** Judge David H. Coar, Chair Judge Sandra Segal Ikuta Judge William H. Pauley III Judge Arthur I. Harris Dean Lawrence Ponoroff Michael St. Patrick Baxter, Esq. Mark A. Redmiles, Esq., *EOUST liaison*
Civil Rules Liaison: Judge Eugene R. Wedoff --- **Evidence Rules Liaison:** Judge Judith H. Wizmur --- **Sealing Committee Liaison:** Judge David H. Coar	**CM/ECF Working Group and CM/ECF Next Gen Liaison:** Judge Elizabeth L. Perris --- **Privacy Committee Liaison:** Judge David H. Coar

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Item 1 will be an oral report.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 1 - 2, 2009
Boston, Massachusetts
(DRAFT MINUTES)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Guy Cole, Jr.
District Judge Karen Caldwell
District Judge David H. Coar
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff (telephonically)
Bankruptcy Judge Judith H. Wizmur
Dean Lawrence Ponoroff
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Jeffrey W. Morris, former reporter
G. Eric Brunstad, Jr., Esquire, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Administrative Office
Stephen "Scott" Myers, Administrative Office
Robert J. Niemic, Federal Judicial Center

Phillip S. Corwin, Butera & Andrews

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda was published, is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new members. (Judge Swain)

The Chair welcomed the members, former reporter Jeffrey Morris, and other guests to the meeting. She noted this meeting was in part a celebration of members Judge R. Guy Cole, Jr. and Judge Richard A. Schell, whose terms were ending, and also a welcome to incoming member Judge Karen Caldwell. The Chair said that Mr. Rao had been appointed to a second three-year term and thanked him for his willingness to continue serving.

The Chair also welcomed Judge Rosenthal and Professor Coquillette, chair and reporter of the Standing Committee, and extended special thanks to Professor Coquillette for hosting and coordinating the special open meeting of the Subcommittee on Privacy, Public Access, and Appeals at Harvard Law School on the previous day.

The Chair said that during their terms both Judge Cole and Judge Schell had been valued members and leaders of the Committee. She thanked Judge Cole for his service on the Subcommittee on Attorney Conduct and Health Care, the Subcommittee on Privacy, Public Access, and Appeals, and the Subcommittee on Technology and Cross Border Insolvency; and she thanked Judge Schell for serving on and chairing the Subcommittee on Attorney Conduct and Health Care, as well as serving on the Subcommittee on Privacy, Public Access, and Appeals, and the Subcommittee on Technology and Cross Border Insolvency.

2. Approval of minutes of San Diego meeting of March 26 - 27, 2009.

The minutes were approved without objection.

3. Oral reports on meetings of other committees:

(A) June 2009 meeting of the Standing Committee.

The Chair reported that the Standing Committee had approved the Committee's recommendation that proposed amendments to Rules 2003, 2019, 3001, and 4004, new Rules 1004.2 and 3002.1, and Official Forms 22A, 22B, and 22C be published for comment in August 2009. (At an earlier meeting, the Standing Committee approved publishing for comment in August 2009, the Committee's proposed amendment to Rule 6003).

The Chair also reported that the Standing Committee had approved the Committee's recommendation that proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, new Rule 5012, and Official Form 23 be transmitted to the Judicial Conference for final approval. She said the rule changes were scheduled to go into effect December 2010.

Mr. Wannamaker added that although the Form 23 change was meant to conform to a pending 2010 change to a time period in Rule 1007, an error in the report to the Judicial Conference resulted in the effective date of the form being a year too early. He said that staff had consulted with the Chair and Reporter of this Committee and the Chair of the Standing Committee, and had decided to add a footnote to the form explaining that although the time period change to the form had been approved by the Judicial Conference in September 2009, it would not become effective until December 1, 2010, when the rule is scheduled to take effect.

Further consultations after the meeting resulted in a decision to leave the Form 23 text unchanged until the December 1, 2010, the effective date of the Rule 1007 amendment, in order to avoid potential confusion.

Mr. Wannamaker also explained the need for courts to readopt Interim Rule 1007-I, to incorporate the time amendment changes that had been made to Rule 1007.

The Chair further reported that the Standing Committee had approved the Committee's recommendation of a technical change to a time period (five to seven days) in Exhibit D to Official Form 1 to conform it to the time amendment changes. Mr. Wannamaker added that in the course of updating Exhibit D, staff had discovered another time amendment change (15 to 14 days) that needed to be made to the form. He said that the 15- to 14-days change was added to the version of the form that will go into effect this December, and that an explanation had been added to the forms website.

Mr. Wannamaker said that, just prior to the meeting, he, along with Mr. Scott Myers, Ms. Vanessa A. Lantin and Ms. Camden Burton, reviewed the time periods in all the Official Forms and Director's Forms for conformity with the time amendments to the rules and statutes scheduled to go into effect this December. He said most of the needed changes had been discovered during Ms. Burton's review of the Director's Forms, and would be considered by this Committee at Agenda Item 4(I). He said that, other than the time periods on Exhibit D to Form 1, the only time period in an Official Form that may need to be changed was a provision stating

that the effective date of the form "Plan of Reorganization in a Small Business Case under Chapter 11" was the "eleventh business day" following confirmation of the plan (Official Form 25A, § 8.02).

The Chair thanked Mr. Wannamaker and the staff for their efforts in reviewing all the forms on short notice. **She asked the Business Subcommittee to review the time period in Official Form 25A and make a recommendation at the next meeting of whether it should be changed to conform to the time amendments.**

Finally, the Chair reported that the Standing Committee had accepted the Committee's recommendation that Civil Rule 8(c) be amended to delete the requirement that a bankruptcy discharge be pleaded as an affirmative defense.

Judge Rosenthal added that the Standing Committee and the Civil Rules Committee will be conducting a conference next May at Duke Law School focusing on the costs of civil litigation, including issues and costs related to e-discovery. She said that much of the available information on e-discovery is anecdotal and said that the FJC would therefore be conducting a study in advance of the conference to determine how e-discovery is affecting federal civil litigation. She also said that, in light of the Supreme Court's decision in *Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009),* the issue of pleading and its relationship to discovery would be a central theme at the conference.

Draft minutes of the Standing Committee meeting were circulated separately at the meeting.

(B) June 2009 meeting of the Bankruptcy Committee, including status of proposed BAPCPA technical amendments.

Judge Conti reported that the Bankruptcy Committee had discussed two significant issues at its last meeting. She said that the Bankruptcy Committee Chair requested that the FJC perform a study of existing practices of pro se litigants to aid in consideration of a proposed pro se law clerk program. She said that there were many requests for such clerks, and that the study would aid in the proposed next step of establishing a pilot pro se law clerk program.

She said the second issue was a potential "pay-go" issue concerning any the current request of the Judicial Conference for the appointment of new bankruptcy judges. She said the Bankruptcy Committee was concerned that the judiciary might be asked to consider an increase in filing fees to pay for any new appointments. She said the Bankruptcy Committee had discussed the matter and opposed the idea of increasing fees to pay for new judgeships because of the burden it puts on debtors.

Finally, Judge Conti said that the long range planning subcommittee had a long list of topics under consideration but was focusing on four topics: (1) inter-court relations and court

governance; (2) judicial resource issues (including recall, inter-circuit assignments, venue, law clerks, and judicial retirements); (3) bankruptcy appeals; and (4) administrative resource issues (including pro se issues, translation and interpretation issues, technology issues, the fee structure, and shared administrative services).

(C) April 2009 meeting of the Advisory Committee on Civil Rules.

Judge Wedoff reported that Civil Rules Committee approved changes to three rules that had been out for comments. It approved a change to Rule 8(c), removing the requirement to plead discharge in bankruptcy as an affirmative defense, and that it approved the proposed amendments to Rule 26 with minor changes.

Judge Wedoff said that the proposed amendments to Rule 56 were also approved, but with the following changes: (i) removing point-counterpoint; and (ii) changing to wording so that the judge "shall" rather than "should" grant the motion. He added that this Committee would discuss in a later agenda item the need in bankruptcy for a possible variance in the default deadline for filing a motion for summary judgment under revised Rule 56.

Judge Wedoff said the Civil Rules Committee had also formed a subcommittee to look into possible amendments to Rule 45. Judge Rosenthal added that the Committee would also be considering whether, in light of wide-spread use of electronic filing and notice, the provision of Civil Rule 6 that adds three days to deadlines when service is other than personal should be eliminated.

(D) April 2009 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that the restyled evidence rules had been published for comment. She noted that a later agenda item would address whether any of the proposed changes merited special consideration in the bankruptcy context such that the Committee should comment.

(E) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris said she would provide a status report on the CM/ECF working group and the CM/ECF NextGen project later in the meeting in the context of Agenda Item 5(C).

(F) Progress report from the Sealing Committee.

Judge Hopkins said that the FJC was still conducting its study of sealed cases. The Reporter added that, in an initial study, no bankruptcy case had been found that had been entirely sealed. She said that, going forward, the committee would be considering procedures for sealing a case.

(G) Progress report from the Privacy Committee.

The Reporter said the Privacy Committee is a new subcommittee of the Standing Committee. She said that it has met twice and that it is looking at a number of things, including, possible privacy-related amendments to the e-government rules; limiting access to parts of the docket, including plea agreements, in criminal cases; issues related to public access to transcripts and procedures for redacting transcripts; and implementation of privacy policies. She said the Privacy Committee has drafted a survey that will be administered by the FJC, and that there will be a conference at Fordham Law School on April 12, 2010.

Judge Coar noted that an issue of identifiers has come up with respect to claims, and the use of account numbers or social security numbers in the creation of such identifiers. He said the FJC survey may reveal how such identifiers are being used by creditors. **The Chair asked AO staff to make sure that the Privacy Committee and its staff support was aware of recent requests to this Committee by chapter 13 trustees to place a claims identifier directly on the claims form.**

(H) Report on the outcome of the subcommittee best practices review.

Judge Rosenthal said that a best practices guide concerning the use of subcommittees was developed and approved by the Executive Committee of the Judicial Conference after receiving input from all of the committees. She said the guide, included in the agenda materials, was created based on a concern that some committees were relying too heavily on subcommittees. She said that concern was not significant with respect to the rules committees, and that the guidelines developed were consistent with how subcommittees have been used by the rules committees in the past.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Judge Mund's suggestion for a mini Form 22C for debtors who convert from chapter 7 to chapter 13 (Suggestion 09-BK-C)

Judge Wedoff said that the Subcommittee carefully considered Judge Mund's suggestion and that the Reporter had developed a model of what a short version of Form 22 might look like. In the end, he said, the Subcommittee recommended against adopting such a form. He said that some subcommittee members were concerned about the additional complexity the form would introduce in some cases, and that none of the members was aware of any problems that have been presented by requiring debtors in converted cases to complete existing Form 22C.

Judge Wedoff said that subcommittee members also concluded that transferring information from the previously filed Form 22A to Form 22C is relatively simple, and doing so

would prevent the trustee and others from having to refer back to another form to see how the totals were calculated.

After discussing the Subcommittee's recommendation, **the Committee voted against developing a special version of Form 22 for use in conversions from chapter 7 to chapter 13.**

(B) Recommendation concerning possible revision of Schedule C to deal with the extent of a claimed exemption; issues that the Supreme Court will be considering in Schwab v. Reilly (08-538).

Judge Wedoff said the Subcommittee considered, and recommended tabling, a possible revision to the wording in Form 6C to address the extent of an exemption claim by the debtor in light of *In re Reilly*, 534 F.3d 173 (3d Cir. 2008). He said that the primary reason to defer was that the outcome of the Supreme Court's ruling in Schwab could affect the need for a change to the form, and because any proposal made now could be viewed as attempting to influence the Supreme Court's decision. He said that deferral was also appropriate because some subcommittee members were concerned that the proposed language changes would not fix the problem, and because considering the issue during the Advisory Committee's April 2010, meeting (which would likely be after the Supreme Court's decision), would not delay implementation of any proposed change to the form. **The Committee agreed without objection to defer consideration of the proposed change to Form 6C until the April 2010, meeting.**

(C) Recommendations concerning addition of creditor certification to Form 10, the Proof of Claim, prompted by Judge Small's suggestion regarding claims filed by bulk claims purchasers (San Diego Agenda Item 4(D)), and other Proof of Claim issues.

Judge Wedoff said that Consumer Subcommittee had considered several proposed changes to Form 10.

Creditor Certification. Judge Wedoff said that, although the Subcommittee and Committee had previously rejected a suggestion by Bankruptcy Judge Tom Small (E.D.N.C.) to require the creditor to affirmatively assert the timeliness of its claim, there was Subcommittee support for further emphasizing the creditor's duty to carefully review the validity of the claim before filing it. He said that the Subcommittee thought this could best be done by adding a creditor's certification to the form similar to the debtor's certification on Form 1, and he moved to add to the form the underlined language shown in the "Date" box on page 48 of the agenda materials.

Mr. Kohn said that he thought the proposed language imposes a higher standard on the filer than Rule 9011. Other members asked whether the "person" making the affirmation should be the one who files the form, or the one who completes it, and whether the affirmation was

meant to include both the individual signing and the corporate creditor.

Judge Wizmur said there are two sides to the issue: how to get the creditor to exercise due diligence, versus what the individual signing personally knows has been done. She suggested inserting a qualifier like "upon reasonable inquiry" or "to the best of my information and belief," into the certification. Ms. Ketchum suggested "upon information and belief" as a qualifier. Judge Wedoff said that changing from "under penalty of perjury" to "upon information and belief" would bring the certification closer to Rule 11. Mr. Rao favored using some type of oath, rather than the currently proposed "under penalty of perjury."

Some speakers noted that claims are often signed by the creditor's bankruptcy attorney or by a low level employee and suggested that the certification ought to be more focused on the creditor entity, maybe by adding a qualifier such as "the person on whose behalf this claim is filed ...". On the other hand, Mr. Lander noted, in a world where it is uncertain who the creditor is, the individual actually signing should be held to have a responsibility of inquiry before filing.

After additional discussion, the Chair said that there seemed to be general support for a certification, but no consensus on the precise language. **The Committee supported the Chair's suggestion that the Subcommittee consider the suggestions made, and that it submit a revised proposed certification in the spring.**

Use of Summaries rather than attaching all writings that support the claim. On the next Form 10 issue, Judge Wedoff noted that there is a conflict between the form and Rule 3001(c) as to whether a summary of the writings upon which a claim is based is a substitute for, or is simply in addition to, the writing itself. As currently drafted, the form indicates that a summary of the writings could substitute for the writings. Rule 3001(c), however, explicitly requires attachment of the writing (the original or a duplicate) and does not address use of a summary at all. Judge Wedoff said that the sense of the Subcommittee was that the complete supporting documents should be supplied, as required by the rule, and that the summary is merely optional. He said the Subcommittee asked for sense of the Committee on the issue and instruction on whether the Subcommittee should review and suggest any changes to the rule or the form.

Dean Ponoroff asked whether the attachment of voluminous documents presented any sort of technical problem. Judge Wedoff said that the Subcommittee had investigated this question and, while there may have been storage problems when CM/ECF was first introduced, that issue no longer seemed to exist.

After additional discussion, a motion was made, and the sense of the Committee (with one member opposing) was that complete supporting documents should be attached to all claims with an option of providing a summary in addition to the required attachments. The Chair suggested that, in reviewing whether any clarifying language on Form 10 was needed to convey the sense of the Committee, the Subcommittee consider whether there should be exceptions for "voluminous" attachments, and if so, under what circumstances a

summary would suffice.

Inconsistent use of pronouns. Judge Wedoff said that in attempting to draft the creditor certification, the Subcommittee noted an inconsistent use of pronouns throughout the form, and it questioned how to draft the certification to deal with claims that are filed by the debtor or trustee on behalf of the holder rather than by the holder itself. **After a short discussion, the Committee referred the matter of pronoun use on Form 10 to the Forms Subcommittee to consider possible revisions.**

Following the meeting the Chair, in consultation with the Reporter and Committee staff, determined that the Forms Subcommittee should address all three of the foregoing issues in advance of the April 2010 meeting.

5. Report of the Subcommittee on Forms.

(A) Recommendations on proposed changes to Form 10, the Proof of Claim, concerning annual interest rate.

Judge Perris said that the Subcommittee recommends a change to the interest rate line at box 4, as shown on page 51 of the agenda materials. She said the proposed change would be to add the phrase "(at time case filed)" under the annual interest rate line, and to provide boxes to indicate whether the interest rate is fixed or variable. She said that the Subcommittee had discussed whether the filer should also provide information about how the rate was determined, but decided that such a request would make the form too complicated, and the additional information was unnecessary because it would be available from the attachments or, in the case of certain tax claims, the applicable statute.

Mr. Kohn said the form still presented a problem for tax claims, at least in chapter 13 cases, because the rate due under the statute varies daily, and the relevant calculation date is the plan confirmation date, not the case filing date. Judge Perris responded that, by checking the "variable" box, the claimant signals that the amount must be calculated in some manner and puts the trustee and debtor on notice in a chapter 13 case that the amount must be calculated.

A motion was made to approve the change, as set forth on page 51, along with the corresponding change to instruction 4 on the back of the form, to be held in the bullpen with other pending changes to Form 10. **The motion was approved with one objection.** However, the Forms Subcommittee was asked to revisit placement of the phrase "(at time filed)" when it considered other proposed changes to Form 10 before the next meeting. One suggestion was to center the phrase under "Annual Interest Rate", while another suggestion was to place "Annual Interest Rate_____% (at time case filed) __ Fixed or __ Variable" under the "Value of the Property" line.

(B) Recommendation on Suggestion 08-BK-K by Judges Isgur, Magner, and Bohm to

create two new forms to address problems related to claims secured by a debtor's home – an addendum to the proof of claim which sets out the full loan history and a calculation of the mortgage arrearage and a second form which serves as a payment change notice; Judge Shea-Stonum's alternative approach.

Judge Perris said that, in anticipation of the adoption of new bankruptcy rules pertaining to mortgage claims that currently are out for comment, the Subcommittee had developed a drafting committee (consisting of Mr. Rao, Judge Wizmur, Mark Redmiles and Professor Gibson) to propose complementary forms to be used with the rules. She said the drafting committee had only recently been formed and did not have a proposal for this meeting, but that it was evaluating forms currently in use throughout the country, some of which were included at pages 58 to 67 of the agenda materials. Committee members supported the Subcommittee's endeavor and the Chair said she looked forward to a proposal in the spring.

(C) Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris said that since the last rules meeting, the Forms Modernization Project had hired a forms revision expert, Ms. Carolyn Bagin, who was assisting the membership in revising the initial package of forms to be used by an individual debtor to file a bankruptcy case. She said a very preliminary draft of the revised petition and a combined schedule A&B was included in the agenda materials.

Judge Perris said that the Ms. Bagin has proven very helpful in forcing the group to think about how the project will progress. Ms. Bagin spent an initial period of time interviewing project members and other forms users (i.e., clerks, trustees, judges lawyers, U.S. trustees and petition preparers), and compiled a list of concerns about the existing forms, such as users not completing questions with a sufficient level of detail, confusion about terminology, and confusion about what to do when a form does not provide enough room to respond to the question.

Judge Perris said that Ms. Bagin was also working with Beth Wiggins and other staff from the FJC to develop targeted surveys for specific forms users groups to get additional information about problems with the existing forms and to help understand how they are used. She said the surveys should be complete soon and should be going out in time for the results to be considered by the Project group in January 2010 at its next meeting.

Judge Perris said that subgroups were reviewing the draft petition and the combined schedule A/B, and that those forms had already been considerably revised from the versions included in the agenda materials. She said that an initial concern of some project members was striking a balance between making the material on the form more understandable, and still conveying the idea that expert advice is needed. She said that the tone of the draft forms was becoming more formal in the revision process in part because of this concern.

Professor Coquillette said he thought the draft forms were a great improvement and he encouraged the project membership to strive for more understandable language. He commented that, for many debtors, a lawyer is simply not an option, so the forms may be all the explanation they will get.

Judge Perris said another concern was that the introduction of more white space, and more explanatory language, was making the forms longer. She said this doesn't present an electronic storage problem, but bigger petition packages filed "over the counter" in the clerk's office would take longer to scan and to review for information that has to be keyed in. A related problem is that redesigning and reorganizing the forms, to make them more logical to the person filling them out, may make them less well organized and useful for end users.

Judge Perris said that concerns about form length and organization of the information in the forms for different users would be much less significant if technology allows the extraction of information from the forms. To that end, she said the project had been communicating closely with the NextGen working group to develop a list of functional requirements that it believed would be needed to accommodate the modernization project in the next generation of CM/ECF. She noted that the Project's NextGen requirements memo was at page 85 of the materials.

After discussing the requirements memo, the Committee voted without objection to endorse the principles set forth on page 88 at of the materials with slight modifications, as follows:

a. Reduce the need for the bankruptcy clerk to manually extract data from forms filed by pro se and other parties not using electronic case upload.

b. Allow judiciary users (e.g. courts, AO, FJC) to easily prepare customized reports for internal purposes, extracting some information from multiple forms.

c. Increase ease of search for and retrieval of information contained in multiple forms.

d. Allow flexibility for expansion of the types and quantity of data collected.

e. Include in NextGen a system that is capable of creating different levels of access to the information from the forms. For example, to the extent that the system allows accessing selected data or reconfiguring the data into custom reports, the system would be capable of limiting who could have such access or reconfiguration capacity, both within the judiciary and as to outside users.

The Committee also voted to join with the NextGen project in seeking relevant committee approvals for data extraction from the forms, so long as appropriate safeguards are in place to restrict access to the extracted information.

(D) Oral status report on the revision of Director's Form B240, the Reaffirmation Agreement, and the development of an electronic version.

Judge Perris noted that this project grew out of forms modernization because the existing version of Director's Form B240 was the form most frequently viewed as needing revision. She said that a draft revision has been developed as set forth at page 97 of the materials, and that Mr. Waldron had been working on an electronic version as a pilot for collecting forms information electronically. She said that Waldron/electronic version began with a questionnaire (shown at page 91 of the materials) that, when completed online, would automatically fill in the blanks of both new Official Form 27 and the new Director's Form B240A.

Mr. Waldron explained that some feedback on the proposed electronic version indicated that many vendors have developed software that already automatically completes the form, and their users didn't see a need for his version. He said another difficulty is that much of the information is filled out by multiple parties at various times, making a model that requires completion all at once problematic.

Judge Perris said that the new B240 itself is complete and she recommended asking the director to post it on the public website for immediate use. She said that, because many courts require the use of the existing version, that version should remain on the website for a transitional period. **A motion recommending that the director post the form on the internet, while leaving the older version available for six months after posting, was approved without objection.**

(E) Oral report on proposed new summons form B250F to be used in a foreign non-main proceeding prepared in response to a suggestion by staff attorney Mark Diamond of the Bankruptcy Court for the Southern District of New York that a Director's Form be issued in conformity with Rule 1010(a).

Mr. Wannamaker explained that the form was developed to address the clerk's need for a form summons at the beginning of a chapter 15 case. **Motion to recommend that the Director promulgate the form approved without objection.**

(F) Report on proposed revision of the Certificates of Service on the bankruptcy summons, Director's Forms B250A, B250B, B250C, B250D, and B250E, to conform to Rule 7004 and Fed. R. Civ. P. 4 regarding who may serve process.

Mr. Wannamaker said that the forms were updated to conform the service representations to the Federal Rules to Civil Procedure and Bankruptcy Procedure. **Motion to recommend that the Director promulgate the forms approved without objection.**

(G) Oral report on proposed new discharge form B18RI for individual chapter

11 debtors prepared in response to court requests.

Mr. Wannamaker explained that the form was developed because individual chapter 11 cases were becoming more common. **Motion to recommend that the Director promulgate the form approved without objection.**

(H) Oral report on proposed bankruptcy judgment form B261C, prepared in response to Judge Benjamin Goldgar's suggestion.

Mr. Myers explained that the proposed form was developed at the suggestion of Judge Benjamin Goldgar, and was to be used by the clerk in situations limited to those described in Rule 7054(b)(1). He added that the form was based on the existing district court version (AO 450), with a modification to the caption to indicate it was to be used in the bankruptcy court for adversary proceedings. He said that the Forms Subcommittee had considered creating a multipurpose form that could be used by the clerk under 7054(b)(1) or the court under 7054(b)(2), and that could also address the clerk's duties under Rule 5003(b). Ultimately, the Subcommittee concluded that a multipurpose form was too complex, and recommended that the Director instead promulgate the simpler version in the agenda materials at page 121. **Motion to recommend that the Director promulgate the form approved without objection.**

(I) Oral report on proposed amendments to Director's Forms B200, B210, B231A, B231B, and B250E, to conform to the December 1, 2009, time-computation amendments to the Bankruptcy Rules.

Mr. Wannamaker explained that the listed forms had been revised to incorporate the upcoming time period changes due to go into effect on December 1, 2009. **Motion to recommend that the Director promulgate the forms as set forth in the materials at pages 122 to 130 approved without objection.**

6. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning Judge Kressel's comments on the last sentence of Rule 1007(k).

Judge Hopkins said that the Subcommittee had carefully considered Judge Kressel's suggestion that the final sentence of Rule 1007(k) be deleted as either substantive or unnecessary. He said the Subcommittee had concluded that while the sentence may be unnecessary, it should be retained, noting that it has been part of the rule for 27 years without objection or litigation. The Subcommittee also thought that the sentence may serve to indicate more succinctly and clearly than does 11 U.S.C. § 503 that the costs of complying with the court's order under Rule 1007(k) may be treated as an administrative expense. **Motion to not eliminate the final sentence of Rule 1007(k) approved without objection.**

(B) Recommendation concerning the suggestions by Judge Mund and Judge Kennedy that Rule 9031 be amended to remove the prohibition on special masters.

The Reporter said that Judge Geraldine Mund (Bankr. C.D. Cal.) and Judge David Kennedy (Bankr. W.D. Tenn.) had submitted suggestions that Rule 9031 be amended or deleted so that special masters could be appointed in bankruptcy cases. In their comments, both judges said that special masters could be a useful resource in some complex chapter 11 cases and adversary proceedings.

The Subcommittee considered the comments, as well as prior deliberations by the Committee on this topic recounted by the Reporter in her August 7 memo in the agenda materials. After discussing the matter, the Subcommittee concluded that no change should be made to Rule 9031.

The Reporter explained that the Committee has previously considered requests to allow the appointment of special masters several times since Rule 9031 was adopted in 1983. Each time it decided not to change the rule. The Reporter said that the initial purpose of the rule may have been reflected in the minutes to the Standing Committee meeting in August 1982, at which time the Committee decided not to permit "bankruptcy judges to appoints special masters" because "this would eliminate an area in which charges of 'cronyism' had previously been leveled at the bankruptcy system." She said the chair of the Committee at that time, Judge Aldisert, also explained that the Committee "felt that bankruptcy judges should be directly involved in cases and should not delegate to masters."

The Reporter added that, although the focus during the promulgation of the rule seemed to be on whether bankruptcy judges should appoint masters, the rule concerns "cases under the Code" and therefore it applies (as do the bankruptcy rules generally) in district courts and bankruptcy appellate panels.

The Reporter said the Committee had addressed the purpose of Rule 9031 at several meetings in the 1990s. While some members suggested that special masters could be useful in appropriate bankruptcy cases and the rule could be amended to authorize their use in limited circumstances, the majority of members recommended no change. The majority noted the history of patronage in bankruptcy system, and concluded that the Bankruptcy Code and Rules had been designed to avoid that problem in part through the prohibition on receivers (under the Code) and special masters (in the Rules). Committee members also questioned whether there was really any need for special masters in bankruptcy cases and whether the Code allows for their compensation out of the estate. Professor Resnick, Reporter to the Committee when the matter was considered in September 1996, raised the further issue of the inefficiency of adding another layer of review to bankruptcy proceedings if findings of fact or conclusions of law were made by a special master.

In response to a letter from Judge Kennedy suggesting that the size of recent bankruptcy cases justified revisiting the matter, and the publication of two law review articles in favor of amending Rule 9031 to permit special masters, the Committee discussed the issue once again at its September 2002 meeting. The Committee again decided to take no action

The Reporter said that the Subcommittee considered Judge Mund's and Judge Kennedy's suggestions in the context of the past action and reasoning of the Committee, and concluded that the rule should not be amended. First, the Subcommittee noted that the matter has been fully considered by the Committee several times, and that it is sound policy to decline to revisit issues previously decided unless circumstances have changed so as to cast doubt on the prior decision. The Subcommittee did not think there had been any such changes in circumstances since 2002.

The Subcommittee also concluded that, even if Rule 9031 were to be reconsidered, its prohibition on the use of special masters should be retained. Although concerns about "cronyism" may have abated since the rule was adopted in 1983, the bankruptcy judge members of the Subcommittee indicated they did not want the appointment power, and some Subcommittee members worried about the possible return of cronyism if judges were given the authority to appoint special masters. The Subcommittee was also persuaded by concerns noted by the Committee that using special masters would create greater complexity and expense in cases and add another level of decision-making and review to a judicial scheme in which there are already multiple levels of review. One member also questioned the constitutional legitimacy of a delegation of authority twice removed from an Article III judge.

Finally, the Subcommittee doubted whether there is a need for the appointment of special masters in bankruptcy cases. No member was aware of any bankruptcy case in which a court has expressed frustration about the inability to appoint a special master, and the Subcommittee concluded that the use of examiners is a sufficient alternative.

After discussing the matter the Committee approved a motion to take no further action on the suggestion.

7. Report of the Subcommittee on Privacy, Public Access, and Appeals.

(A) Oral report on the special open subcommittee meeting on revision of the Part VIII rules held September 30, and plans for further work.

Judge Pauley said that the Subcommittee held its second open subcommittee meeting at Harvard Law School just before this full Committee meeting. He said the meeting was attended by judges from the First and Eighth Circuits' Bankruptcy Appellate Panels, other First Circuit bankruptcy judges, clerks of court, bankruptcy practitioners, and academics. The chair and reporter of the Standing Committee and the reporter for the Appellate Rules Committee also participated.

Judge Pauley said the attendees engaged in a robust discussion of the proposed changes to the bankruptcy appellate rules both as to the initial set of rules presented in San Diego, and as to the revised version attendees had been asked to review. He added that the general response to a change along the lines of the draft was very positive

Mr. Brunstad gave an overview of the nearly 600 changes he had made to the draft since the spring meeting in San Diego. He said that, while many of the changes were mechanical, such as moving statutory cross references, there were also changes that had required significant thought. Among the changes were additional explanation in the annotations; an attempt to orient the rules more toward electronic filing as the default, with an allowance for paper filing or paper copies of the filings; incorporating rules on direct appeals from the bankruptcy court to the court of appeals; incorporating rules on indicative rulings (previously approved by the Committee, but not yet published for comment); service issues; forms of brief issues; and addressing how to handle and dispose of appeals that settle.

Mr. Brunstad agreed with Judge Pauley that attendees at the open subcommittee meeting were engaged and supported the idea of revising the bankruptcy appellate rules. He said there seemed to be plenty of suggestions for improvements to the current draft, but his sense was that the suggestions would require less complicated revision than those he made to the San Diego version. He noted, however, that the reviewing subgroups still had time to submit written comments.

Judge Pauley said the Subcommittee recommended that the project continue going forward, and requested approval to do so from the full Committee. The Reporter added that if such approval is given, she anticipated drafting a summary of the written subgroup comments for consideration by the Subcommittee, and that she and Mr. Brunstad (who volunteered to continue working with the draft for one more round), would incorporate those comments recommended by the Subcommittee.

Judge Rosenthal said that in considering revisions in anticipation of electronic filing, it would be important to provide a functional rather than prescriptive description of what is needed. She noted that all of the federal rules will have to be adjusted to account for electronic filing, and that this project will likely be the model. The Reporter added that the Committee was working to keep the other rules committees informed, and that coordination with the other committees will continue as the project goes forward. She said that the Subcommittee anticipates that there will be a further report next spring and possibly a written product for the Committee to consider next fall.

A motion that Judge Pauley's request that the Subcommittee be authorized to continue along the projected timeline as outlined was approved without objection.

(B) Discussion of whether to continue the indicative ruling amendments

(proposed new Rule 8007.1 and the amendment to Rule 9024 as approved at the September 2008 meeting), in the *Bull Pen* and/or to incorporate the amendments into the revised Part VIII rules. (March 2009 agenda item 7(B))

Motion that Rule 8007.1 and the amendment to Rule 9024 stay in bullpen and be included in the eventual Part VIII package, approved without objection.

(C) Recommended response to the Appellate Rules Committee's request for views on potential amendment to Appellate Rule 6(b)(2)(A) regarding timing of notice of appeal following ruling of District Court or BAP on motion for rehearing.

The Reporter reviewed the memo and the Subcommittee's recommendation. She said that the Subcommittee agreed with the proposed change as set out on pages 203 and 204 of the materials, but suggested that an additional change as noted on page 205 be considered by the appellate rules committee. **Motion to support the Subcommittee's recommendation to the Appellate Rules Committee approved without objection.**

8. Report by the Subcommittee on Technology and Cross Border Insolvency.

No matters assigned.

9. Report of the Subcommittee on Attorney Conduct and Health Care.

No matters assigned.

10. Report concerning the proposed amendment to Civil Rule 56 and the possible need for a Bankruptcy Rule amendment in light of the Civil Rule amendment's impact on the timing of summary judgment motions in contested matters and adversary proceedings. (March 2009 agenda item 7(B))

Judge Wedoff said that the Standing Committee approved an amendment to Civil Rule 56 that is scheduled to go into effect December 1, 2010. He noted that Rule 56 is currently incorporated in whole in bankruptcy adversary proceedings and contested matters, and the Committee should consider whether a modification is needed for bankruptcy once the new civil rule goes into effect.

Judge Wedoff explained that subsection (b) of proposed Rule 56 establishes a default deadline for filing summary judgment motions at 30 days after the close of discovery. Because of the speed with which bankruptcy issues are heard -- including contested matters such as motions for relief from stay -- the default deadline in the proposed rule would not come into effect in many situations, allowing a timely summary judgment motions to be filed shortly before a scheduled evidentiary hearing. Because subsection (a) of the proposed rule again states that the

court "shall grant summary judgment" if the motion is meritorious, a bankruptcy court could consider itself bound to continue a scheduled evidentiary hearing to allow consideration of any timely filed summary judgment motion.

Judge Wedoff said a more meaningful default deadline for bankruptcy purposes might be based on the date set for the evidentiary hearing rather than the close of discovery, and he recommended that the Consumer Subcommittee consider such a revision and provide a recommendation at the next meeting.

Judge Perris noted that, whatever the Committee ultimately decides to do, since Rule 56 is scheduled to go into effect before a change to 7056 could be made, a memo should be distributed to all bankruptcy courts highlighting how the new rule works in bankruptcy so that the courts can take steps to modify local rules or judges can create scheduling orders to prevent summary judgment motions from being filed on the eve of a hearing.

The Chair referred the matter to the Consumer Subcommittee for further consideration and for a recommendation at the spring meeting.

11. Discussion of whether the time limits in Rule 7054(b) should be changed to conform to Civil Rule 54 and the new time computation provisions.

The Reporter said that Rule 7054(b) had been overlooked during the review of bankruptcy time periods with respect to the time amendments that will go into effect this December. She said a five-day period and a one-day period were possibly affected. She recommended changing the five-day time period to seven days, as was done to all other five-day time periods.

The Reporter said the existing one-day time period in the rule was for the clerk to provide notice of taxing costs. She said that period could remain the same, or be changed to seven or 14 days. The Reporter explained that the Committee had deliberately not changed the one-day period in Rule 9006(d), and that prior actions might be a basis for not changing the one-day period in 7054(b), particularly since there has never been a request to change the period in the past. On the other hand, the Civil Rules Committee did change the parallel period in Rule 54(d) from one day to 14 days, because it concluded that the one-day period "was unrealistically short."

Judge Rosenthal said she thought that the bankruptcy rule ought to continue to parallel the civil rule unless there was bankruptcy reason for a different time period. Judge Wizmur agreed. After additional discussion, the Chair suggested that the question of whether the one-day period is too short in bankruptcy could be referred to the Bankruptcy Clerk's Advisory Group and the Bankruptcy Judges Advisory Group, and the Committee could decide whether to recommend the change at it next meeting. Mr. Waldron said that he could also survey the clerks on the issue.

A motion was made, seconded and approved without objection to: recommend changing the five-day period to seven days, and to defer consideration of changing the one-day period to 14 days until the spring meeting, so that the views of the BCAG, the BJAG and Mr. Waldron's survey of the clerks could be considered. The proposed changes will remain in the bullpen until the spring, and the Committee agreed that publishing any proposed changes for comment in the fall would be necessary only if it decides to recommend changing the one-day period to 14 days.

12. Guidelines for the use of standing orders.

The Reporter said the Committee assembled an ad hoc group of bankruptcy judges to consider whether the guidelines proposed for use of local rules presented any special problems in bankruptcy cases. She said the only issue the judges thought might need further clarification in bankruptcy would be the use of a standing order instead of a local rule in situations where a statutory or rule provision applies "unless the court orders otherwise." She said the initial question before the Committee is whether a local rule would amount to an order in such a situation.

Judge Rosenthal said all circuit courts that have looked at the issue have concluded that a local rule *does* satisfy an "unless the court orders otherwise" provision. Because the case law seems to support use of a local rule to satisfy the "unless the court orders otherwise," she said it would be preferable to use local rules in such situations across all the federal courts. She also said that the transmittal letter that would accompany the guidelines could specifically state that a local rule satisfies the "unless the court orders otherwise" situation.

Judge Wedoff asked how many circuits have adopted the principle that a local rule has the same effect as a court order, and he noted that the language in Rule 56 provides for *either* a court order or local rule, so he questioned whether they were really the same. Judge Rosenthal said the Seventh, Third and Fifth Circuits had all considered the issue and concluded that a local rule satisfies the "unless the court orders otherwise" provision. She noted that there was a dissent in one of the Fifth Circuit cases, based on the Rule 56 language raised by Judge Wedoff. The majority in that case, however, concluded that while it is true that local rules and orders are different, in the context of "unless the court orders otherwise" a local rule suffices because all local rules are adopted by court order.

The Chair asked for a vote on the "Sense of the Committee" that the "guidelines for the use of standing orders should be disseminated as proposed so long as the transmittal letter contains a statement clarifying that a local rule satisfies the unless the court orders otherwise situation." The Committee approved the "Sense of the Committee" statement without objection.

Discussion Items

13. Discussion of impact of the restyled Evidence Rules on bankruptcy matters and recommendation on a response to the restyling.

The Reporter said that the Evidence Rules Committee had finished its restyling project and that the proposed rules were now out for comment. She asked whether any member thought that there was a need for the Committee as a whole to comment on the changes.

Judge Wedoff said he believed that the Committee should only comment "as the Committee" on changes that affect bankruptcy. He thought individual members could and should make any general comments individually. The Committee agreed with this approach.

The Reporter said that the only issue she identified that might work differently in bankruptcy dealt with admissions by an "opposing party." Judge Perris suggested the possibility of substituting "adverse party," but Professor Ponoroff said that "party opponent" (the phrase currently used in the evidence rules) has not seemed to cause problems in bankruptcy and he questioned whether the restyled phrase "opposing party" would be any more likely to do so. **A motion to make no comment on the restyled evidence rules carried without objection.** The Chair added that she would report back to the Evidence Committee that this Committee was grateful for the opportunity to comment, but that it found no bankruptcy-specific issues.

14. Oral report on the status of pending legislation, including authorizing modification of certain home mortgages in chapter 13 cases and legislation liberalizing exemptions for debtors with medical problems.

Mr. Wannamaker reported that he spoke with the AO's Office of Legislative Affairs and that none of pending bankruptcy legislation, including a bill for technical amendments, appeared likely to pass or even be considered soon.

15. 11 U.S.C. § 521(i) update.

The Reporter said that although the circuit courts are starting to address § 521(i), the cases are breaking toward not enforcing automatic dismissal and finding that the bankruptcy court has discretion to retain the case after the 45th day. She said that courts seemed most likely to invoke this type of discretion in cases where the debtor is attempting to use the statute as a sword to escape the hardships of bankruptcy. She added that so long as the courts seemed to breaking in favor of finding the that statute allows discretion, and concluding that "automatically dismissed" is not really automatic, it would be hard to develop a rule to implement automatic dismissal.

After a short discussion, **a motion was made and the Committee voted without opposition to continue monitoring the case law on 11 U.S.C. § 521(i).**

Information Items

16. Rules Docket.

Mr. Wannamaker explained that the Rules Docket was meant to help the membership keep track of ongoing comments and suggestions to the rules and asked members to email him with any suggestions for changes or updates.

17. Notice to local courts concerning reviewing Interim Rule 1007-I in light of the upcoming time computation amendments to Rule 1007.

Discussed by Mr. Wannamaker at Item 3(A).

18. Bull Pen.

The proposed amendments to Official Form 10, approved at the March 2009 meeting, remain in the bull pen pending incorporation of additional proposed changes to Form 10 discussed at Items 4(C) and 5(A).

Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at the September 2008 meeting and recopied at Item 7(b), remain in the bull pen, but will be incorporated into the rewrite of Part VIII rules.

The decision to recommend changing the five-day period in Rule 7054(b) to seven days (discussed at Item 11) was added to the bull pen pending a decision in the spring about the one-day period in the same rule.

19. Oral report on the preparation of a definitive set of Bankruptcy Rules.

Mr. Ishida explained that for a number of historical reasons, there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Office of the Law Revision Counsel of the House of Representatives, which prepares and publishes the other federal rules of practice, procedure, and evidence, has never compiled and published the Bankruptcy Rules. The bench, bar, and public have adapted to this anomaly by consulting the bankruptcy rules published by commercial and nonprofit organizations. Mr. Ishida said that this has been a workable solution, but is not ideal and has created problems over the years.

This past summer, Mr. Ishida said, at the request of the Committee and with considerable help from a group of summer interns over months of intense effort, the Administrative Office compiled an authoritative version of the Bankruptcy Rules. He said the project was accomplished by painstakingly comparing five commercial and nonprofit versions of the

bankruptcy rules using the electronic comparison tools in Word and WordPerfect. He said that whenever a discrepancy arose in the rules being compared, the official source documents were checked -- either the orders of the Supreme Court or Congressional legislation -- to resolve the discrepancy. Each step in the process was verified and documented, and the final product underwent a stringent editorial, proofreading, and legal review process by AO staff.

Mr. Ishida said that most of the work was done by, and credit goes to, the interns that were involved in the project. On behalf of AO staff, he extended his heartfelt gratitude and thanks to: Ms. Katie Mize (lead intern), Ms. Heather Williams and Ms. Danielle White. On behalf of the Committee, the Chair added her thanks for the work of the interns and AO staff.

Mr. Ishida said the review process was nearly done, and that upon completion, the rules would be transmitted to the Office of the Law Revision Counsel with a request that they be published as the official version of the Federal Rules of Bankruptcy Procedure. He said they would also be published on the court's public website.

20. Future meetings.

The spring 2010 meeting will be at the Windsor Court Hotel, New Orleans, April 29 - 30, 2010. Suggestions for possible locations for the fall 2010 meeting were solicited.

21. New business.

None.

22. Adjourn.

Respectfully submitted,

Stephen "Scott" Myers

Item 3 will be oral reports.

4-A1

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: HOME MORTGAGE CLAIMS: COMMENTS ON PROPOSED AMENDMENTS TO RULE 3001(c) AND PROPOSED NEW RULE 3002.1

DATE: APRIL 7, 2010

This memorandum addresses the comments and testimony provided in response to proposed amendments to Rule 3001(c) and proposed new Rule 3002.1 as they relate to claims secured by a security interest in the debtor's principal residence. Because the proposed amendments to Rule 3001(c) raise an additional set of issues with respect to unsecured claims, those issues are addressed in a separate memorandum (agenda item 4(A)(2)). After reviewing the provisions of the published rule amendments, this memorandum discusses the comments that were submitted on each provision and states the Subcommittee's recommendation in response.

I. Summary of the Relevant Proposed Rule Provisions

As published in August 2009, Rule 3001(c) would be amended to add a new paragraph (2) that would apply to individual debtor cases. Among the provisions that would be added are the following requirements:

- the filing of an itemized statement with the proof of claim ("POC") that specifies prepetition interest, fees, expenses, and charges included in the claim ((c)(2)(A));
- inclusion in the POC of the amount necessary to cure any default as of the petition date with respect to a claim secured by a security interest in the debtor's property ((c)(2)(B));

- with respect to a claim secured by a security interest in the debtor's principal residence for which an escrow account has been established, the filing with the POC of an escrow account statement prepared as of the petition date ((c)(2)(C)).

Proposed Rule 3001(c)(2)(D) would authorize sanctions for the failure of a creditor in an individual debtor case to provide any of the information required by subdivision (c). Under this provision, a creditor would be precluded from presenting any of the omitted information in a contested matter or adversary proceeding, unless the court found that the failure was substantially justified or harmless. Other appropriate sanctions, including the award of reasonable expenses and attorney's fees, would also be authorized.

Proposed Rule 3002.1, which was also published for comment in August 2009, would require the filing in chapter 13 cases of several notices regarding claims secured by a security interest in the debtor's principal residence. The rule would provide for three types of notice:

- Notice of payment changes with respect to home mortgages that are being cured and maintained pursuant to § 1322(b)(5). This notice would have to be filed by the holder of the claim and served on the debtor, debtor's counsel, and the trustee at least 30 days before the new mortgage payment amount was due ((a)-(b)).
- Notice of fees, expenses, and charges incurred after the petition was filed. This notice, which would be a supplement to the POC, would have to be filed no later than 180 days after the fees, expenses, and charges were incurred. The Rule 3001(f) provision of prima facie validity would not be applicable. The debtor or trustee could seek a determination of the validity of the fees, expenses, and charges by motion filed within a year after service of the notice ((c)).

- Notice of final cure payment. This notice would be filed by the trustee no later than 30 days after the final mortgage cure payment was made, or by the debtor if the trustee failed to do so. The trustee would be required to serve the notice on the holder of the claim, the debtor, and the debtor's counsel. The holder of the claim would then have 21 days to respond to the notice by filing and serving a statement indicating (a) whether it agreed that the default had been cured, and also (b) whether the debtor was otherwise current on all mortgage payment and, if not, the amounts that remained unpaid. The mortgagee's statement would be filed as a supplement to the POC and would not be entitled to prima facie validity ((d)-(e)). Subdivision (f) of the proposed rule would provide a procedure for the judicial resolution of any disputes over the debtor's cure of the default or payment of all postpetition amounts.

Finally, proposed Rule 3002.1(g) is a sanction provision similar to the proposed sanction provision of Rule 3001(c)(2)(D).

II. Comments and Testimony Regarding the Proposed Amendments and New Rule

Attached to this memorandum are two sets of summaries – (1) the comments and testimony submitted on the proposed amendments to Rule 3001(c)[1] and (2) those submitted on proposed Rule 3002.1. This part of the memorandum discusses the main issues raised by these comments regarding the proposed home mortgage amendments, and it states the Subcommittee's

[1] The comments on the proposed amendments to Rule 3001(c) did not always specify whether they were addressing the application of the amendments to mortgage claims or to unsecured claims or both, and the issues raised may apply to both types of claims. As a result, the attached summary of comments on the proposed amendments to Rule 3001(c) overlaps with the comment summaries attached to the memorandum for agenda item 4(A)(2).

recommendations concerning each provision.

A. Rule 3001(c)(2)

1. Requirement in subparagraph (A) for itemized statement of interest, fees, expenses, or charges. Most of the comments concerning this provision related to unsecured claims, particularly those based on credit card debt, and they are addressed in the memorandum for agenda item 4(A)(2). Two comments, however, addressed this requirement as it applies to mortgage claims. John Cannizzaro, an attorney in Marysville, Ohio, suggested that this provision should require more detail (09-BK-070). Specifically, he proposed that the following sentence be added to subparagraph (A): "The itemized statement shall include evidence of the expenditure, the identity of the entity to whom the payment was made and the reason for the expenditure." The other comment was submitted by Judge Marvin Isgur (09-BK-004), and it is discussed below in connection with the requirement of subparagraph (B).

The reason for the proposed addition of this subparagraph to Rule 3001(c) is to have the rule reflect the current and longstanding requirement in Form 10 that if the "claim includes interest or other charges in addition to the principal amount of claim," an "itemized statement of interest or other charges" must be attached. The proposed Mortgage Proof of Claim Attachment form would require specification of the nature of any prepetition fees, expenses, and charges; the dates they were incurred; and their amount. Should an objection be made and additional information be needed, disclosure of that information could be sought through discovery. **The Subcommittee therefore recommends that, insofar as home mortgage claims are concerned, this provision of the rule be approved as published.**

2. Requirement in subparagraph (B) for a statement of the amount necessary to cure any

default as of the date of the petition. Two comments addressed this requirement. The written comments submitted on behalf of the American Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association (09-BK-146) raised two objections to this requirement. First, they noted that in the case of a judgment lien, the cure amount would be the entire indebtedness. Second, they questioned the need for the inclusion of this requirement in the rule, since Form 10 already requires this information to be provided.

As proposed, Rule 3001(c)(2)(B) only applies to a "security interest," which under § 101(51) of the Code means a lien created by agreement. Thus the provision would not apply to judgment liens. Regarding the second objection, as with subparagraph (A), the purpose of this amendment is to create consistency between the rule and the form.

The other comment on this paragraph was submitted by Bankruptcy Judge Marvin Isgur (S.D. Tex.) in his written comments (09-BK-004). While supporting the purpose behind this provision and subparagraph (A), Judge Isgur questioned the effectiveness of the two provisions in addressing the problems that he has encountered with home mortgage proofs of claim. He said that a full loan history, which provides more detailed information about the assessment of fees, expenses, charges, and the application of payments, is needed.[2] Judge Isgur expressed particular concern that, without the submission of a full loan history, it may not be evident when payments were actually made by the debtor (as opposed to the months for which payments were applied by the mortgagee). He advocated the use of a form similar to the local form that has been adopted

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[2] Although attorney Henry Sommer was primarily addressing claims for credit card obligations in this part of his comments, he also urged that a complete loan history be required (09-BK-129). He stated that "[w]ithout such documents, a trustee cannot know how much of the amount claimed is for penalties, such as late charges and overbalance fees, that are classified differently in bankruptcy."

by his district.

As is discussed in the memorandum under agenda item 5(A), the Forms Subcommittee reached a different conclusion about the degree of detail that should be required in the Mortgage Proof of Claim Attachment. It was that Subcommittee's judgment that a form that is shorter and easier to complete and read is preferable to a more detailed loan history.

This Subcommittee agrees with that conclusion and thus recommends that proposed Rule 3001(c)(2)(B) be approved as published. In response to the comment about judgment liens, it proposes revising the Committee Note to draw attention to the fact that the provision is limited to security interests.

3. Requirement in subparagraph (C) for an escrow account statement. Three comments specifically addressed this provision. First, the written comments of the American Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association (09-BK-146) noted that an escrow statement is already required to be provided by local rules in many jurisdictions. They expressed the need for a uniform national form to provide this information and suggested that the proposal be withdrawn until such a form is developed.

The proposed rule permits the escrow statement to be submitted "in a form consistent with applicable nonbankruptcy law," and the Committee Note refers to the Real Estate Settlement Procedure Act as an example of the nonbankruptcy law that might be applied. The reason for deferring to nonbankruptcy law and not requiring a new form of reporting is to make it easier for claimants to comply with this requirement. If promulgated, this rule would, of course, supercede any conflicting local rule requirements.

Second, chapter 13 trustee Debra Miller, on behalf of the National Association of Chapter

Thirteen Trustees' ("NACTT") Mortgage Liaison Committee, raised concerns about this provision (09-BK-157). She explained that some smaller servicers lack the capacity to run an escrow analysis as of a particular date (such as the date of the filing of the petition).

The Subcommittee concluded that determination of the status of the escrow account as of the date of the filing of the bankruptcy petition is a necessary step in the calculation of a mortgage claim and thus all servicers need to find a way to accomplish this task. Making them provide that information as part of their POC is not unreasonable.

Finally, Judge Isgur, in both his testimony on December 22, 2009, and his written comments (09-BK-004), raised two concerns about subparagraph (C). First, he stated that the requirement of an escrow account statement prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law might conflict with the Fifth Circuit's decision in Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (2008). He described that decision as holding that the prepetition arrearage includes all amounts that the home mortgage lender could have demanded to be paid into an escrow account prior to the petition date. He was concerned that an escrow account statement prepared according to applicable nonbankruptcy law would result in a smaller prepetition escrow arrearage, which could be cured over the life of the plan, and would lead to a larger postpetition escrow adjustment, which would have to be paid as part of the monthly payments.

Members of the Committee who participated in the telephone hearing with Judge Isgur explored with him the impact of *Campbell* on the proposed requirement of subparagraph (C). While the Fifth Circuit did hold that missed prepetition escrow payments constitute part of the mortgagee's claim, even though the mortgagee was not required prior to the petition to make tax

and insurance payments from those funds, the court stressed the narrowness of its holding: "We determine only that unpaid escrow payments that accumulate pre-petition in the year that a bankruptcy petition is filed, and which the creditor had a right to collect under the loan documents, constitute a "claim" under the Bankruptcy Code. *We do not address a right to recalculate the amount of escrow payments in subsequent years.*" 545 F.3d at 354 (emphasis added). Judge Isgur agreed that the court did not spell out the precise method for calculating the amount of the prepetition escrow arrearage, but he urged that the rule provide a clear resolution that would support the debtor's fresh start.

The Subcommittee concluded that nothing in proposed subparagraph (C) conflicts with the *Campbell* decision. The proposed rule does not dictate how the escrow balance as of the petition date is to be calculated. It merely requires that an escrow account statement be prepared as of that date and that it be submitted in a *form* consistent with nonbankruptcy law. Because there is not yet a well developed body of appellate case law governing the allocation of escrow payment obligations between pre- and post-petition periods, the Subcommittee believes that it is appropriate for the rule not to take a position on the issue.

Judge Isgur's second concern was based on his belief that a loan history needs to be provided. He stated that the escrow report as a stand-alone document will not resolve how mortgage payments were applied by the lender. As noted above, that issue is one on which the Forms Subcommittee reached a contrary conclusion, and this Subcommittee concurs with that conclusion.

The Subcommittee therefore recommends that the Committee approve proposed Rule 3001(c)(2)(C) as published.

4. Sanctions under subparagraph (D). This is the part of the proposed Rule 3001(c)(2) that attracted the most attention and opposition. Several of the comments submitted by persons other than members of the consumer bankruptcy bar raised concerns about this provision. (See comments 09-BK-034, -114, -130, -135, -140, -146, -148.) The overall theme of these comments was that the proposed sanctions are overly harsh, are inconsistent with the Code, exceed the authority under the Rules Enabling Act, and are attempting to address a problem that has not been shown to exist. The sanctions in proposed Rule 3001(c)(2)(D) can be imposed on all types of claimants in cases of individual debtors, and the comments generally did not distinguish between the impact of the provision on inadequately documented home mortgage POCs, as opposed to unsecured or other types of secured claims.

The most detailed critique of this provision is the one submitted by Professor Bernadette Bollas Genetin of the University of Akron School of Law (09-BK-130). She argued that the provision sweeps too broadly and that by requiring the attachment of additional supporting documentation in every case, even when there is no demonstrated need for the information, the proposed amendments to Rule 3001(c), including its sanction provision, would abridge creditors' substantive rights in violation of the Rules Enabling Act. Viewing the sanction in subparagraph (D) as being tantamount to claim disallowance, she contended that it is inconsistent with § 502 of the Code, as well as disproportionate to the violation in most cases. In support of the latter argument, she quoted from Judge Posner's opinion in *In re* Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993): "Forfeitures of valuable claims, and other heavy sanctions, should be reserved for consequential or easily concealed wrongs. A creditor should therefore be allowed to amend his incomplete proof of claim. . . . to comply with the requirements of Rule 3001, provided that other

creditors are not harmed by the belated completion of the filing."

Representatives Lamar Smith (09-BK-135) and James Langevin (09-BK-034) also expressed concerns about the sanctions, although they both appeared to focus primarily on the impact of the rule on unsecured creditors. Both congressmen questioned whether there was evidence of a significant problem of unsupported claims being filed in consumer cases, and Rep. Smith noted the potential for litigation over compliance and the imposition of new sanctions and attorney's fees for failure to abide by the requirements. He further questioned the authority to provide for the disallowance of claims for failure to comply with the requirements of a rule, as opposed to the grounds for disallowance listed in § 502(b) of the Code.

Likewise, Patti H. Bass, an attorney in Tucson, Arizona, contended that subparagraph (D) in effect provides a new basis for the disallowance of a claim, one that is not authorized by the Code. She argued that the provision is therefore in conflict with the Supreme Court's decision in Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co., 549 U.S. 443 (2007), which holds that the grounds for disallowance are limited to the ones statutorily specified. She further submitted that the sanction provision would create an incentive for debtors to refrain from scheduling debts that they knew they owed if they believed that the creditor lacked all of the documentation that would be required under the rule. The debtor would just object to the creditor's insufficiently supported POC, and the creditor would be prevented by the sanction provision from presenting its proof of the validity of the claim in response to the objection.

The comments of John McMickle on behalf of the Housing Policy Council, Financial Services Roundtable, American Bankers Association, and the Mortgage Bankers Association (09-BK-140) argued that the sanction provision "runs afoul of the Rules Enabling Act by

'modifying' and 'diminishing' a mortgage servicer's statutory right to rely on a presumption of validity for timely-filed proofs of claim." Pointing out that the Committee Note says that the amendments provide greater specificity about the documents required to *accompany* a POC, he contended that the proposed amendments do not change what constitutes a POC. Thus, he argued, the sanction provision is inconsistent with § 502, which entitles all timely filed POCs to a presumption of validity since they are deemed allowed unless an objection is made. The comments made by Phil Corwin on behalf of several of the same organizations (09-BK-146) were similar.

Finally, the Insolvency Law Committee for the Business Law Section of the California State Bar commented that the proposed sanctions are too harsh (09-BK-114). This group suggested that instead of precluding the creditor from using any omitted information to prove its claim, an insufficiently supported POC should be temporarily disallowed and the claimant should be given an opportunity to provide the missing documentation.

Section 502(a) says that a "claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." If there is an objection, § 502(b) provides that the court shall allow the claim except to the extent one of the specified grounds for disallowance applies. The Code leaves it up to the rules to prescribe the requirements for a POC, and Rule 3001 has long required supporting documentation for claims based on a writing and claims for which a perfected security interest is asserted. The Subcommittee concluded that it is not beyond the scope of rulemaking authority to add to or change the type of supporting documentation that is required for a POC. The Subcommittee also rejected the contention that the required documentation is distinct from the POC itself, such that

a creditor need only file Form 10 without required attachments in order for its claim to be entitled to a presumption of validity.

The primary question raised by the comments is the extent to which the rules may prescribe an enforcement mechanism for the documentation requirement. Currently, loss of the evidentiary effect of prima facie validity is the only sanction included in Rule 3001 for the failure to execute and file a POC in accordance with the rules. The proposed addition of Rule 3001(c)(2)(D) was based on the Advisory Committee's belief that stronger sanctions are required to ensure greater compliance with the rule's requirements.

The proposed sanctions most closely resemble the sanction available under Civil Rule 37(c)(1) for the failure to provide information required under the disclosure provisions of Rule 26(a).[3] Professor Genetin (09-BK-130) commented that the justification for that civil sanction is greater, because it arises in the context of a bilateral disclosure requirement, whereas Rule 3001(c)(2)(D)'s sanction applies to a one-sided disclosure obligation. The Subcommittee noted, however, that a creditor's obligation to supply information supporting a proof of claim follows the disclosure by the debtor of detailed information in the petition and accompanying schedules. Moreover, unlike in the civil disclosure context, proper disclosure with respect to a proof of claim gives a creditor's claim the benefit of prima facie validity.

The Subcommittee disagreed with the argument that the sanction provision in effect provides a ground for objecting to a claim that is not specified by § 502. Proposed Rule

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[3] Rule 37(c)(1) provides in part that "[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless."

3001(c)(2)(D) does not create a new ground for objecting to a claim. Instead it provides that, if there is a basis under § 502 for objecting to a claim or otherwise litigating the validity of the treatment of a claim, a creditor who has not complied with the requirements of Rule 3001(c) generally may not introduce in that adversary proceeding or contested matter information that should have been, but was not, provided with the POC. Moreover, the proposed rule provides the court some flexibility regarding the imposition of sanctions. Under proposed Rule 3001(c)(2)(D), the court may decline to impose a sanction if it determines that the failure to comply with the rule was substantially justified or is harmless. It may also impose a sanction other than the preclusion of the introduction of evidence. Finally, the court may allow amendment of a POC that failed to comply with Rule 3001(c).

After carefully considering the comments made, the Subcommittee recommends that proposed Rule 3001(c)(2)(D) be approved as published.

A majority of the Subcommittee preferred the published proposal to an alternative sanction provision that was proposed by two Committee members. The alternative proposal, which is set forth below, is based on the view that creditors should be given an opportunity to cure any deficiencies in their proofs of claim before sanctions are imposed. It would allow a party in interest to point out the deficiency of a proof of claim and require the creditor to remedy the deficiency. Attorneys' fees and costs could be awarded to the interested party.

Alternative sanction proposal:

> (D) If the holder of a claim fails to provide any information required by this subdivision (c), a party in interest may serve on the holder of the claim, with a copy to the trustee if the trustee is not

the party, a Request to Amend Claim that specifies the deficiency and the amount of expenses, including attorney fees and costs, reasonably incurred in seeking a cure of the deficiency.

(i) The holder of the claim shall, within 14 days after the Request to Amend Claim is served, either amend the claim to cure the deficiency and pay the expenses reasonably incurred because of the deficiency, or respond in writing why the holder will not amend the claim or pay the expenses.

(ii) If the holder of the claim fails to pay the expenses reasonably incurred because of the deficiency, the party serving the Request to Amend Claim may file a Motion to Compel Payment of Reasonable Expenses. After notice and opportunity for a hearing, the court shall require the holder of the claim whose conduct necessitated the filing of the motion to pay the movant's reasonable expenses, including attorney fees and costs, incurred in making the Request to Amend Claim and Motion to Compel Payment of Reasonable Expenses, unless:

(I) the holder of the claim provided a timely written response to the Request to Amend Claim that reasonably explains why the holder of the claim did not pay the expenses; or

(II) the holder of the claim's failure to pay the expenses was otherwise substantially justified; or

(III) other circumstances make an award of expenses unjust.

(iii) If the holder of the claim fails to amend the claim within 14 days after service of the Request to Amend Claim, or amends the claim but the amendment does not adequately correct the deficiencies identified, and the party in interest who requested the amendment files an objection to the claim,

(I) the court shall require the holder of the claim to pay the objector's unpaid reasonable expenses, including attorney fees and costs, incurred because of the deficiency, including expenses because of the holder's failure to respond properly to the Request to Amend Claim, unless:

(aa) the holder of the claim provided a timely written response to the Request to Amend Claim that reasonably explains why the claimant did not amend the claim to provide the information; or

(bb) the holder of the claim's failure to cure the deficiency was substantially justified; or

(cc) other circumstances make an award of expenses unjust.

(II) The court may provide other relief for failure to adequately respond to the Request to Amend Claim, which may

include one or more of the following:

(aa) entry of an order requiring the holder of the claim to provide the information required by subdivision (c) by a specific date and, if the holder of the claim fails to provide the information by the specified date, precluding the holder from presenting evidence of the omitted information, in any form, in support of the disputed portion of the claim;

(bb) any other appropriate relief.

5. Comments advocating the need for proof of ownership. Comments from a number of members of the consumer bar and the National Association of Consumer Bankruptcy Attorneys ("NACBA") suggested additional documentation that should be required for POCs. David Shaev's comment for NACBA (09-BK-016) said that a creditor should have to submit proof of ownership of the claim, a suggestion that was echoed by several others (09-BK-129, -027, -029, -033, -064, -069). Henry Sommer, also commenting on behalf of NACBA (09-BK-129), stated that, although creditors would complain that this requirement would be burdensome, it was the only way to ensure that a claimant is actually entitled to be paid through the bankruptcy process. Two comments (09-BK-029 and -069) suggested that the following requirement be added to Rule 3001: "If the claim (or any part thereof) has been transferred from the original creditor to another entity prior to the date the debtor filed a petition in bankruptcy, the proof of claim shall provide proof that the entity filing the proof of claim is the owner of the claim at the time it is filed. Proof by affidavit is insufficient."

Rule 3001(e)(1) requires that if a claim is transferred before the filing of a POC, the

transferee must file the POC. Unlike (e)(2), however, which applies to claims transferred after the filing of a POC, subdivision (e)(1) does not require the filing of evidence of the transfer. As a result, mortgage servicers who file POCs do not have to document that they are the owners or properly designated agents for the owners of the claims they file.

Unlike the other information that would be required by proposed Rule 3001(c)(2) – itemization of interest, fees, expenses, and charges; the amount necessary to cure a default; and an escrow account statement – the information sought by these comments does not affect determination of the valid amount of a claim. Instead, it relates to the standing of a claimant to seek payment of a debt – one that in many cases the debtor acknowledges owing to someone. Generally, payments collected in bankruptcy eventually reach the proper hands, even if the claim filer was not the actual owner of the claim. Nevertheless, the comments stressed that this issue implicates the integrity of the bankruptcy system.

The Subcommittee recommends that documentation of ownership not be required by Rule 3001(c)(2) and that, when needed, disclosure of this information be obtained through discovery.

6. Support for the proposed amendments to Rule 3001(c)(2). In considering the comments that are critical of portions of the published amendments, the long list of consumer attorneys included in the summary of comments who expressed their strong support for the proposed Rule 3001(c)(2) should not be overlooked. Many of their comments expressed frustration with the failure of mortgage claimants to comply with the existing rule requirements and noted their gratitude for the Committee's efforts to address the problems. Representatives Conyers and Cohen also submitted a comment (10-BK-159) that expressed the need for "more

enforcement tools" to "polic[e] creditor abuses in consumer bankruptcy cases." They noted testimony given at a congressional hearing that asserted that the filing of false proofs of claim in bankruptcy cases had led families to lose their homes.

B. Rule 3002.1

1. Timing of notice of payment changes. Three comments raised questions about the proposed requirement of Rule 3002.1(a) that a mortgagee file a notice of payment change "no later than 30 days before a payment at the new amount is due." Chapter 13 trustee Debra Miller, writing on behalf of the NACTT Mortgage Liaison Committee (09-BK-157), noted that holders of home equity lines of credit and daily simple interest ("DSI") loans would have difficulty complying with the rule as proposed. She said that some of these types of loan payments adjust every 30 days and in the case of a DSI loan may have interest rate changes on a daily basis. Bankruptcy Judge Howard R. Tallman (D. Colo.), who submitted comments on behalf of a group of consumer debtor and creditor attorneys (09-BK-115), also expressed concern about the application of this provision to home equity lines of credit. Finally, John McMickle's comment for the Housing Policy Council, Financial Services Roundtable, American Bankers Association, and Mortgage Bankers Association (09-BK-140) stated that the requirement of Rule 3002.1(a) "should not apply to loans where the interest rate adjusts more frequently than once every six months." He noted that a variable rate mortgage will sometimes adjust according to a published rate (such as *The Wall Street Journal* prime rate), and the servicer itself does not receive 30 days' notice of the change.

The purpose of this provision of the proposed rule is to allow debtors to maintain their mortgage payments in the required amount, and they (and in conduit districts the trustees) need to

know what that amount is. The Colorado group for whom Judge Tallman commented drafted a proposed General Procedure Order for their district that provides that confirmation of a plan imposes a duty on the holder or servicer of a mortgage to "notify the debtor(s) of any changes in the interest rate for an adjustable rate mortgage which result in changes in the monthly payment and the effective date of the adjustment." It does not specify how much notice must be given. Mr. McMickle proposed that Rule 3002.1(a) be revised to allow notice as soon as possible when rate adjustments are based on published rates. He also suggested that to be consistent with the Truth in Lending Act adjustable rate mortgage rate change notice, the notice required should be "at least 25, but no more than 120, calendar days prior to the due date of the new payment amount."

The Subcommittee considered the concerns that had been raised and the fact that outside of bankruptcy, notice must be given to the debtor of changes in payment amounts. A Subcommittee member emphasized that the notice provision specifies the minimum amount of time that notice must be given before a payment at the new rate must be made, not before the effective date of the rate change. This provision is intended to provide a practical means for ensuring maintenance of mortgage payments in the correct amount, and compliance with it should not be unduly difficult. In order to make the requirement less burdensome for creditors, **the Subcommittee recommends that the notice period in proposed Rule 3002.1(a) be reduced from "no later than 30 days before a payment at a new amount is due" to "no later than 21 days before a payment at a new amount is due."** This time period, which is expressed as a multiple of seven in accordance with the rules' new time provisions, would not preclude compliance with a longer notice period if required by applicable nonbankruptcy law.

2. Filing of notice of payment changes. Subdivision (b) of the proposed rule requires these notices to be "filed as a supplement to the holder's proof of claim." This provision resulted from discussions with representatives of the Bankruptcy Judges Advisory Group ("BJAG") and the Bankruptcy Clerks Advisory Group ("BCAG") about whether the notices should be placed on the docket or the claims register. The latter was selected in order to avoid overburdening the docket and so that the filings could be made by creditors themselves without the need to involve a lawyer.

The comments submitted following publication of the rule reflect a division of opinion about this decision. BJAG continues to support the filing of the notice as a supplement to the POC. See comment submitted by Judge Michael Romero on BJAG's behalf (09-BK-023). On the other hand, Glen Palman of the Bankruptcy Court Administration Division at the Administrative Office, submitted a comment (09-BK-124) that described a recent survey of bankruptcy clerks in which 74% (43 of 58) indicated a preference for payment change notices to be filed on the docket.

The Subcommittee concluded that it is not critical to the success of the rule which choice is made about the filing destination. It rejected, however, the idea of specifying a default rule but allowing individual districts to deviate from it by local rule. Uniformity of practice throughout the bankruptcy courts was thought to be sufficiently important that it should not be compromised. Upon further inquiry concerning the views of BJAG and BCAG, the Subcommittee reaffirmed its initial conclusion about the filing of the postpetition mortgage notices as supplements to POCs. **It therefore recommends that the provisions of proposed Rule 3001.2(b) regarding the filing of notices of payment changes as supplements to POCs be approved as published.**

3. Inapplicability of Rule 3001(f)'s provision of prima facie validity. During his testimony at the New York hearing, Mr. Corwin raised objections to the provisions of subdivisions (b) and (c) that render Rule 3001(f) inapplicable to notices of payment changes and notices of fees, expenses, and charges. He did not elaborate on this objection either in his testimony or his written comments. The Committee included these provisions in order to place the burden of proving the validity of these postpetition changes and assessments on the mortgagee if there is an objection. **The Subcommittee recommends that the provisions of proposed Rule 3002.1(b) and (c) that state that Rule 3001(f) does not apply be approved as published.**

4. Timing of notice of fees, expenses, and charges and of motion for court determination of validity. Three comments expressed concern about the requirements of subdivision (c) that the mortgagee serve a notice of fees, expenses, and charges "no later than 180 days after the date when the fees, expenses, or charges are incurred" or that the debtor or trustee file a motion "no later than one year after service of the notice" to obtain a court determination of the validity of the fees, expenses, and charges. During his testimony at the New York hearing, Mr. Corwin stated that compliance with the 180-day requirement may not be feasible in a significant number of cases. His later-submitted written comments did not elaborate on this point. Mr. McMickle, on behalf of the Housing Policy Council and other groups (09-BK-140), suggested without explanation that the 180-day provision be changed to one year and that the provision for filing a motion to seek a judicial determination be changed from one year to 90 days. Finally, Judge Tallman (09-BK-115) stated that the 180-day notice requirement could result in unnecessary supplementation in chapter 13 cases that are never successfully completed. He also noted that

both debtors' and creditors' lawyers expressed concern about the costly prospect of annual litigation over potentially small amounts of fees and charges.

In proposing these timing provisions, the Committee attempted to avoid imposing an unreasonable burden on either the debtor or the mortgagee, while at the same time allowing a judicial determination that would permit the debtor to make necessary adjustments in his payments. **The Subcommittee continue to support the time periods in proposed Rule 3002.1(c) and recommends that they be approved as published.**

5. Procedure for determining the status of the debtor's payments at the end of the case. Several comments raised issues about the procedure provided in subdivisions (d) - (f) regarding the debtor's successful cure of any default and completion of all payments due after the petition. The most serious concern relates to the timing of the notice provision. Subdivision (d) would require the trustee to file a notice of final cure payment no later than 30 days after the amount required to cure a mortgage default has been paid in full. This notice then triggers the mortgagee's obligation to state whether it agrees that the default has been cured and also to indicate whether the debtor is "otherwise current on all payments." The procedure was proposed in order to permit a determination at the end of the case of whether the debtor is current on all mortgage payments.

Marie-Ann Greenberg, a standing trustee in the District of New Jersey, pointed out in her comments (09-BK-037) that mortgage defaults, especially when the amounts are relatively small, are sometimes cured early in the case. In such cases the procedure specified in subdivisions (d) - (f) would not result in a determination upon the conclusion of the case that the debtor was current on all payments. Debra Miller, in her personal comments (09-BK-151), expressed the same

concern, as did Henry Hildebrand on behalf of NACTT (09-BK-041). Ms. Miller suggested that the trustee's filing of a Notice of Plan Completion, rather than or in addition to the final cure payment, should trigger the procedure for verifying that the mortgage is current.

The Subcommittee concluded that subdivision (d) should be revised in response to these comments. Because the goal of the procedure is to obtain a determination of the status of the mortgage at the end of the chapter 13 case, the Subcommittee proposes changing the triggering event in subdivision (d) from the making of the final cure payment to the making of the final plan payment. **The Subcommittee therefore recommends that Rule 3002.1(d) be approved with the first sentence revised to read as follows: "No later than 30 days after completion by the debtor of all payments under the plan, the trustee in a chapter 13 case shall file and serve upon the holder of the claim, the debtor, and the debtor's counsel a notice stating that the amount required to cure the default has been paid in full."**

Judge Isgur in his written comments (09-BK-004) suggested that, in place of the proposed procedure, the rule should authorize a motion at the end of the case for a determination that the debtor is current on all on-going mortgage payments and has paid all arrearages. The court's ruling on this motion would have a preclusive effect on both parties. Thus if the mortgage were determined to be current at the end of the case, the mortgagee would be precluded from declaring a default and initiating foreclosure proceedings in state court once the bankruptcy case was closed.

The Subcommittee concluded that the proposed procedure should be retained. Subdivision (f) allows for the possibility of a binding determination by the court of whether the debtor has cured the default and paid all required postpetition amounts in full. However, in order

to avoid the modification of a mortgage contrary to the requirements of § 1322(b)(2), the proposed procedure does not force such a determination on a mortgagee who chooses not to provide the statement required by subdivision (e). The mortgagee would nevertheless face the prospect of sanctions under subdivision (g) as a result of the failure to provide the required statement.

Because of the consequences of failing to comply with the rule, the Subcommittee recommends that a statement be added to subdivision (d) that requires the trustee's notice to inform the mortgagee of the need to provide a response under subdivision (e). With the exception of that change and the change of the triggering event in subdivision (d) discussed above, the Subcommittee recommends that subdivisions (d) through (f) of proposed Rule 3002.1 be approved as published.

6. Sanction provision. Although some of the same issues that were raised concerning the sanction provision of Rule 3001(c)(2)(D) apply to the parallel provision of Rule 3002.1(g), this provision was not addressed by any comments. **With the exception of the minor change noted below under 8., the Subcommittee recommends that this provision be approved as published.**

7. Appropriateness of the rule in non-conduit districts. Several comments suggested that proposed Rule 3002.1 is designed for or will work only in districts in which the chapter 13 trustees make all mortgage payments. See 09-BK-035, -037, -140. These comments are based on the fact that subdivisions (a) and (c) require notices to be filed on the claims docket and service to be made on the trustee and that subdivision (d) provides for notice to be given by the trustee.

The rule was drafted, however, with both types of districts in mind. If the debtor makes postpetition mortgage payments directly, she and her counsel will receive the required notices, as will the trustee. And it is because the debtor may be making payments directly that subdivision (d) provides that the trustee will only file a notice regarding the completion of cure payments (which are made by the trustee), rather than any notice regarding the postpetition mortgage payments. **In response to these comments, the Subcommittee recommends that a statement be added to the Committee Note that clarifies the rule's applicability in all districts, regardless of the identity of the disbursing agent.**

8. Specific wording changes. Henry Sommer (09-BK-129) suggested two wording changes to Rule 3002.1. In the last sentence of subdivision (c), he would insert "the chapter 13 plan and" after "maintain payments in accordance with" because the plan may contain terms that are binding on the parties under § 1327(a). **The Subcommittee recommends that this change not be made.** The point of the provision is to underscore the authority for the rule. The disclosure of postpetition fees and charges is required in order for the debtor to take advantage of the cure and maintain provision of § 1322(b)(5).

Mr. Sommer also suggested that the wording of the first sentence of subdivision (g) ("fails to provide any information required by subdivision (a), (c), or (e)") leaves open the possibility that a mortgagee could avoid sanctions by belatedly including previously omitted information in its response under subdivision (e). **In order to eliminate this possible reading, the Subcommittee recommends that "as" be inserted before "required."**

John McMickle (09-BK-140) suggested that in the last sentence of subdivision (c), the word "required" should be replaced by "allowed" because fees, expenses, or charges that are

permitted to be assessed by the underlying agreement or nonbankruptcy law should not be prohibited just because the mortgagee has authority to waive them (but chooses not to). Although fees, expenses, and charges that are authorized (but not required) to be assessed by the underlying agreement or nonbankruptcy law can be charged postpetition, the sentence in question concerns, not the assessment of the fees, but whether the payment of them is required in order to cure a default or maintain payments. If they have been properly assessed, then the payment of them would be required in order for the debtor to cure and maintain. **The Subcommittee therefore recommends that this change not be made.**

9. Empirical and anecdotal support for the rules. Although the comments of a number of consumer lawyers described the difficulty they have encountered with inadequately documented mortgage POCs and the misapplication of payments during the pendency of a bankruptcy case, two comments in particular document the need for these rule changes. In her comments Professor Katherine Porter (09-BK-040) recounted some of the findings from her empirical study of more than 1700 POCs filed by mortgage creditors. Among other findings, she noted that more than half of the claims did not comply with the documentation requirements of existing Rule 3001 and Form 10. Attorney Annabelle Patterson (09-BK-136) described at length problems she has encountered with inadequate and inaccurate mortgage POCs and lack of information about postpetition mortgage payment changes and the assessment of charges. As a result of these practices, she has had clients successfully emerge from chapter 13, believing that they were current on their mortgage payments, only to be immediately confronted with a notice of delinquency. Both comments expressed strong support for the proposed rule changes.

Rule 3001. Proof of Claim

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply.* In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in property of the debtor, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, an attachment prepared as prescribed by the appropriate Official Form shall be filed with the

proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the holder shall be precluded from presenting the omitted information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless. In addition to or in lieu of this sanction, the court may, after notice and hearing, award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany certain proofs of claim and, in cases in which the debtor is an individual, the consequences of failing to provide the required information.

Existing subdivision (c) is redesignated as (c)(1).

Subdivision (c)(2) is added to require additional information to accompany proofs of claim filed in cases in which the debtor is an individual. When the holder of a claim seeks to recover -- in

addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim shall be accompanied by a statement itemizing these additional amounts with sufficient specificity to make clear the basis for the claimed amount.

If a claim is secured by a security interest in the property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim shall be accompanied by a statement of the amount required to cure the prepetition default.

If the claim is secured by a security interest in the debtor's principal residence, the proof of claim shall be accompanied by an attachment prepared as prescribed by the appropriate Official Form. In that attachment, the holder of the claim shall provide the information required by subparagraphs (A) and (B) of this paragraph (2). In addition, if an escrow account has been established in connection with the claim, an escrow account statement showing the account balance, and any amount owed, as of the date the petition was filed shall be submitted in accordance with subparagraph (C). The statement shall be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.,* 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose.

Paragraph (D) of subdivision (c)(2) sets forth the sanctions that apply to, or that may be imposed by the court against, a creditor in an individual debtor case that fails to provide information required by subdivision (c). Failure to provide the required information does not itself constitute a ground for disallowance of a claim. See § 502(b) of the Code. But when an objection to the allowance of a claim is made or other litigation arises concerning the status or treatment of a claim, if the holder of that claim has not complied with the requirements of this subdivision, the court may preclude it from presenting as evidence any of the omitted information. The court retains discretion to allow an amendment to a proof of claim under appropriate circumstances, determine that the failure to comply with this subdivision was substantially justified or harmless, or impose a sanction different from or in addition to the preclusion of the introduction of evidence.

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) NOTICE OF PAYMENT CHANGES. In a chapter 13 case, if a claim secured by a security interest in the debtor's principal residence is provided for under the debtor's plan pursuant to § 1322(b)(5) of the Code, the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment at a new amount is due.

(b) FORM AND CONTENT. A notice filed and served pursuant to subdivision (a) of this rule shall: (1) be prepared as prescribed by the appropriate Official Form, (2) be filed as a supplement to the holder's proof of claim, and (3) not be subject to Rule 3001(f).

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. In a chapter 13 case, if a claim secured by a security interest in the debtor's principal residence is provided for under the debtor's plan pursuant to § 1322(b)(5) of the Code, the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice that itemizes all fees, expenses, or charges incurred in connection with the claim after the bankruptcy case was filed, and

that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be: (1) prepared as prescribed by the appropriate Official Form, (2) filed as a supplement to the holder's proof of claim, and (3) served no later than 180 days after the date when the fees, expenses, or charges are incurred. The notice shall not be subject to Rule 3001(f). On motion of the debtor or trustee filed no later than one year after service of the notice, the court shall, after notice and hearing, determine whether payment of the fees, expenses, or charges is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(d) NOTICE OF FINAL CURE PAYMENT. No later than 30 days after completion by the debtor of all payments under the plan, the trustee in a chapter 13 case shall file and serve upon the holder of a claim secured by a security interest in the debtor's principal residence, the debtor, and debtor's counsel a notice stating that the amount required to cure any default on the claim has been paid in full. The notice shall also inform that holder of the claim of its obligation to file and serve a response under subdivision (e). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely

file and serve the notice required by this subdivision, the debtor may file and serve upon the holder of the claim and the trustee a notice stating that the amount required to cure the default has been paid in full.

(e) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. No later than 21 days after service of the notice under subdivision (d) of this rule, the holder of a claim secured by a security interest in the debtor's principal residence shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default, and (2) whether, consistent with § 1322(b)(5) of the Code, the debtor is otherwise current on all payments. If applicable, the statement shall itemize any required cure or postpetition amounts that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and shall not be subject to Rule 3001(f).

(f) MOTION AND HEARING. On motion of the debtor or trustee filed no later than 21 days after service of the statement under subdivision (e) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts in full.

(g) FAILURE TO NOTIFY. If the holder of a claim secured by a security interest in the debtor's principal residence fails to provide any information as required by subdivision (a), (c), or (e) of this rule, the holder shall be precluded from presenting the omitted information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless. In addition to or in lieu of this sanction, the court may, after notice and hearing, award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies in all districts, regardless of whether the trustee or the debtor is the disbursing agent of postpetition mortgage payments.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the

part of the holder of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to notify the debtor, debtor's counsel, and the trustee of any postpetition change in the mortgage payment amount. Notice shall be provided at least 21 days before the new payment amount is due.

Subdivision (b) provides the method of giving the notice of a payment change. The holder of the claim shall give notice of the change in substantially the same form that would be used according to the underlying agreement and nonbankruptcy law if the debtor were not a debtor in bankruptcy. In addition to serving the debtor, debtor's counsel, and the trustee, as required by subdivision (a), the holder of the claim shall also file the notice of payment change on the claims register in the case as a supplement to its proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the payment change.

Subdivision (c) requires an itemized notice to be given, within 180 days of incurrence, of any postpetition fees, expenses, or charges that the holder of the claim asserts are recoverable in connection with a claim secured by the debtor's principal residence. This amount might include, for example, inspection fees, late charges, or attorney's fees. Filing and service requirements for this notice are the same as for the notice required under subdivision (a).

Within a year after service of a notice under subdivision (c), the debtor or trustee may move for a court determination of whether the fees, expenses, or charges set forth in the notice are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (d) requires the trustee to issue a notice to the holder of the claim, the debtor, and the debtor's attorney within 30 days after completion of payments under the plan. The notice shall (1) indicate that all amounts required to cure a default on a claim secured by the debtor's principal residence have been made and (2) direct the holder to comply with subdivision (e). If the trustee fails to file this notice within the required time, this subdivision permits

the debtor to file and serve the notice on the trustee and the holder of the claim.

Subdivision (e) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (d). Within 21 days after service of notice of the final cure payment, the holder of the claim shall file and serve a statement indicating whether the prepetition default has been fully cured and also whether the debtor is current on all payments in accordance with § 1322(b)(5) of the Code. If the holder of the claim contends that all cure payments have not been made or that the debtor is not current on other payments required by § 1322(b)(5), the response shall itemize all amounts, other than regular future installment payments, that the holder contends are due.

Subdivision (f) provides the procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence. The trustee or debtor may move no later than 21 days after the service of the statement under (e) for a determination by the court of whether the default has been cured and whether any other non-current obligations remain outstanding.

Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information as required by subdivisions (a), (c), or (e).

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (g).

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: COMMENTS ON PROPOSED AMENDMENTS TO RULE 3001(c): BULK CLAIMS AND REVOLVING CREDIT PROVISIONS

DATE: APRIL 12, 2010

This memorandum addresses the proposed amendments to Rule 3001(c), which were published for comment in August 2009, insofar as they apply to claims based on an open-end or revolving consumer credit agreement (generally referred to in this memo as "credit card debt"). These proposals provoked a vigorous response by both sides of the issue – bulk purchasers of credit card debt and consumer debtor attorneys. The comments that were submitted, which are summarized in the attachment, present two starkly conflicting viewpoints about the need for and the appropriateness of the proposed amendments. This memorandum first reviews the content of the proposed amendments and the Advisory Committee's reasons for proposing them. Next it summarizes the comments and testimony submitted on both sides. Because there was a general consistency among the comments submitted on behalf of the bulk purchasers and also among those submitted by consumer debtors, the comments are discussed generally, rather than in specific comment-by-comment detail. Finally the memorandum sets forth the Subcommittee's recommendations regarding the action it believes the Advisory Committee should take in response to the comments.

I. Overview of the Proposed Amendments to Rule 3001(c)

Currently Rule 3001(c) provides that when a claim or a lien securing the claim is based

on a writing, "the original or a duplicate [of that writing] shall be filed with the proof of claim." If the writing is no longer available, the claimant must file with the proof of claim a statement of the circumstances of the writing's loss or destruction. The proposed amendment to this subdivision would create two paragraphs. Paragraph (1) would retain the current language of subdivision (c) and would add the following sentence after it: "When a claim is based on an open-end or revolving consumer credit agreement, the last account statement sent to the debtor prior to the filing of the petition shall also be filed with the proof of claim."

The proposed new paragraph (2) would apply to cases involving individual debtors. The content of this paragraph is discussed in the memorandum concerning home mortgage claims, which appears at item 4(A)(1) of the agenda materials. Of particular significance for credit card (and other unsecured) claims are both the requirement in subparagraph (A) for the filing of a statement itemizing any interest, fees, expenses, or charges included in the claim and the sanction provision of subparagraph (D).

The issue of amending the rules to address claims filed by bulk purchasers of consumer debt was first raised by Bankruptcy Judge Tom Small (E.D.N.C.) (suggestion 08-BK-J). He suggested that the Advisory Committee consider possible rule or form amendments to address the problem of inadequately documented and sometimes time-barred credit card claims filed by bulk debt purchasers. The Subcommittee first discussed the issues and then appointed a working group to consider in greater detail whether any rule or form changes should be proposed. The group presented its report at the spring 2009 meeting of the Advisory Committee, and the Committee voted to recommend for publication the amendment to subparagraph (c)(1) that requires the filing of the last account statement for credit card claims. (The provisions of (c)(2)

had already been approved by the Advisory Committee at the fall 2008 meeting.)

The Advisory Committee discussed several reasons for proposing the addition of the credit card provision to paragraph (c)(1). Some members noted that the attachment of the last account statement to the proof of claim ("POC") would enable the debtor to identify more easily the debt being pursued. The account statement would likely bear the name of a creditor with whom the debtor was familiar, thereby assisting in situations in which the debt had been sold and the claim was filed by an entity whose name the debtor did not recognize. In addition, members of the Committee noted that the date of the last statement might provide the debtor and her lawyer with some indication of whether the claim might be barred by the statute of limitations and that further investigation should be undertaken. Finally, it was suggested that the fact that the claimant was able to produce the last account statement would provide some assurance that the claim had been validly assigned to it.

The Committee had voted at the prior meeting to propose the addition of (c)(2)(A) – requiring an itemized statement of interest, fees, expenses, or other charges – to harmonize the rule with Form 10. For years the proof of claim form has required the claimant to "[a]ttach itemized statement of interest or charges" if the claim includes those amounts in addition to the principal amount. Because creditors do not always follow this instruction, the proposal was made in order to reenforce the requirement by including it in the rule as well as in the form.

The Committee had also voted at the fall 2008 meeting to add a sanction provision to Rule 3001(c). Numerous court decisions had addressed the consequences of a failure to provide the documentation required by Rule 3001 and Form 10 for a POC and had reached conflicting conclusions. As a result, the Committee proposed that the rule authorize sanctions for

noncompliance with its provisions that fall between loss of the evidentiary effect of prima facie validity (already provided for under Rule 3001(f)) and disallowance (which is probably not permitted by § 502(b)).

II. Comments on the Proposed Amendments

Committee members who were present at the New York hearing heard directly the reasons that bulk claim purchasers vigorously oppose the amendments to Rule 3001(c). As expressed in testimony there and in written comments, they objected on several grounds to the proposed requirement in paragraph (c)(1) that the last account statement be attached. Their arguments included the following assertions:

- The statement will often not be available when the POC is filed. Under federal record retention policies for financial institutions, credit card account records generally need to be retained for only two years. Furthermore, account information is usually stored in an electronic format, and it may not be practicable to produce a duplicate of an account statement.
- Providing account statements will reveal private information about the debtor, including where purchases were made and in some cases the nature of medical treatment that was obtained.
- The amendments are addressed to a problem that has not been shown to exist, as demonstrated by the low objection rate to claims filed by bulk claims purchasers. Furthermore, enforcement provisions – such as Rule 9011 and criminal sanctions – are already are available to police fraudulent claims. The additional documentation proposed to be required by Rule 3001(c)(1) would not provide any

significant benefit to debtors.

- The threat of the imposition of sanctions for the failure to produce information in a specific form will have a devastating impact on the debt purchasing market, which provides important benefits to the U.S. economy.
- The Advisory Committee failed to consult with the debt purchasing industry (unlike its consultation with the mortgage servicing industry). As a result, the Committee arrived at a proposal that is unduly burdensome and in some cases impossible to satisfy.

Comments submitted on behalf of the purchasers of credit card debt also opposed the proposed requirement of Rule 3001(c)(2)(A) that an itemized statement of interest, fees, expenses, and other charges be submitted with the POC. The opposition to this requirement was based primarily on the assertion that it is often not possible to break out the components of credit card debt because, depending upon the terms of the applicable credit agreement, unpaid interest and fees may be folded into the principal balance. The debt purchasers further contended that in most bankruptcy cases the debtor has no need for this information. While they acknowledged that mortgage lenders may have a history of including inflated or unnecessary fees and charges in their claims, they argued that this problem does not generally exist with respect to unsecured credit card claims.

Finally, opponents of the proposed amendments objected to the sanction provision of Rule 3001(c)(2)(D) for the same reasons asserted in the comments submitted on behalf of home mortgage creditors. They argued that the sanctions are unnecessary, unduly harsh, inconsistent with § 502 of the Code, and in violation of the Rules Enabling Act.

On the other side of the issue, numerous comments filed by consumer bankruptcy lawyers and trustees strongly supported the proposed amendments. They recounted their frustrating experiences in dealing with bare POCs filed by bulk claims purchasers. They said that claims failed to comply with existing documentation requirements and that it was impossible to determine how the claim amounts were calculated. Furthermore, they argued, when additional information was sought, claimants frequently failed to respond until an objection was filed, at which point they either withdrew their claims or belatedly provided information that should have been attached to the POC.

Debtors' lawyers explained the disincentives to challenging inadequately documented claims. The lawyer often would receive no additional compensation for the effort, and any money freed up from payment to the creditor whose claim was challenged would just go to other unsecured creditors. In some cases, they said, the cost of objecting would exceed the payment that would be made to the creditor. Nevertheless, some lawyers or trustees said that they did pursue challenges to claims filed by bulk purchasers and discovered claims that were time-barred, filed against the wrong debtor, or excessive in amount.

Supporters of the amendments applauded the proposal to provide sanctions for the failure of claimants to comply with the rules. They noted the burdens placed on debtors seeking bankruptcy relief and expressed the view that bulk purchasers should not be free to ignore rule requirements based on assertions that compliance would be unduly burdensome.

Some members of the consumer bar advocated strengthening the proposed requirements and sanctions. Some desired a requirement that a credit card claimant provide not only the last account statement, but also the dates of the last payment and of the last actual charge on the

account. Others wanted the original credit agreement with the debtor's signature to be attached to the POC. Several argued that POCs that fail to comply with the documentation requirements should be disallowed.

III. The Subcommittee's Recommendations

A. Last account statement

Existing Rule 3001(c) requires more than a bare statement that a creditor is owed money by the debtor. If the claim is based on a writing, the original or a duplicate of it must be attached. In the case of credit card claims, especially those that have been bought and sold in bulk multiple times, this requirement is often not complied with. Instead, brief account summaries are usually attached to the POC, with the justification that they are summaries permitted by Form 10.[1]

The proposal for the attachment of the last account statement for credit card claims arose from a desire to require the provision of information allowing the validity of a credit card claim to be assessed. When little supporting information is provided with a POC, the burden is placed on a debtor or trustee to seek, through informal means or by discovery, information that Rule 3001(c) or Form 10 required the claimant to provide in support of its claim. The Subcommittee concluded that noncompliance with the rule is not necessarily justified by the fact that an industry dependent on the bankruptcy system for much of its profits has developed a business model that does not permit compliance with the procedural rules for the assertion of claims in bankruptcy.

The Subcommittee continues to believe that more supporting information than is

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[1] As is discussed under agenda item 5(B), the Subcommittee on Forms is recommending that Form 10 be amended to delete the reference on the face of the form to the attachment of summaries of supporting writings. The instructions to the form would also be amended to clarify that summaries may only be submitted in addition to, not in lieu of, the underlying documents.

currently being provided should be required for bulk purchasers' POCs. On the other hand, it does not believe that the rule should require the attachment of information that is frequently unavailable or impracticable to obtain. Likewise, it concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of a claim, the rule should not insist on the provision of that information in a more costly or difficult manner.

The Subcommittee noted that a few comments by bulk claims purchasers suggested alternatives to the last account statement requirement. Kevin Peck on behalf of HSBC Bank USA (09-BK-145) suggested that claimants be permitted to provide the relevant information that would be revealed by the account statement either on the POC form itself or by an attachment to the POC. Carol Moore on behalf of Resurgent Capital Services LP (09-BK-141) submitted an account summary with her comments that she offered as an alternative. Among other things, it reveals the redacted account number, the amount due as of the bankruptcy petition date, the charge-off date, the last transaction date, and the names of both the current creditor and the entity from whom that creditor purchased the account.

Based on its thorough discussion of the matter, the Subcommittee recommends that the original proposal for the attachment of the last account statement be withdrawn and that in its place a new subdivision (c)(3) be proposed that specifies information that must be provided for a claim based on an open-end or revolving consumer credit agreement. The proposed text of (c)(3) is shown in the attached preliminary draft of the amendment. It requires provision of the following information, to the extent applicable: (1) the name of the entity from whom the creditor purchased the account; (2) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder; (3) the date of

the last transaction on the account by an account holder; (4) the date of the last payment on the account; and (5) the date on which the account was charged to profit and loss.

If the Committee accepts the recommendations for the withdrawal of the last-account-statement requirement in Rule 3001(c)(1) and the proposal of subdivision (c)(3) in its place, the Committee will need to decide what the relationship should be between the requirements of (c)(1) and (c)(3). The Subcommittee was divided on this issue. A majority favored requiring holders of claims based on an open-end or revolving consumer credit agreement to comply with subdivision (c)(3) rather than with subdivision (c)(1). The members who took this view believe that, in the case of credit card debt, it is often unclear what document constitutes the writing on which the claim is based and that, furthermore, it is better to impose a requirement for providing the desired information that will be more feasible for bulk claims purchasers to satisfy. Some members of the Subcommittee, however, thought that the (c)(3) requirements should be imposed in addition to the requirements of (c)(1). They did not find a justification for imposing a lesser documentation requirement on holders of credit card debt than is applicable to all other creditors.

The attached preliminary draft of the proposed amendment to Rule 3001(c)(1) reflects the majority viewpoint by adding an exception at the beginning of the provision. **The Subcommittee recommends the approval for publication of this amendment to Rule 3001(c)(1).**

B. Itemized statement of interest, fees, expenses, and other charges

As is noted above, this proposed requirement is not really new. Form 10 already requires an itemized statement to be attached if the claim amount includes interest or other charges. It is therefore puzzling that the claims purchasers, who assert their compliance with existing claims

procedures, complain that they will be unable to comply with this "new" requirement in Rule 3001(c)(2)(A) since it is a requirement they are already subject to. Their argument cannot properly be based on the fact that the current requirement is in the form rather than in the rule. Rule 3001(a) says that a "proof of claim shall conform substantially to the appropriate Official Form."[2] Their actual basis of complaint regarding this proposed amendment must therefore be that there will now be sanctions to back up the requirement.

The Subcommittee did not find any reason to reconsider the addition of this provision to Rule 3001(c). The itemization provides information about interest and other charges being claimed that the debtor may have a basis for challenging. For example, the debtor or trustee may conclude that interest was calculated at an inappropriate rate, that certain charges were not authorized by the underlying agreement, or that the claim includes penalties that should be subordinated under § 726(a)(4). A statement of only the total claim amount, by contrast, would not reveal the components of the claim amount or provide a basis for determining how that amount was calculated. If it is truly the case that nonbankruptcy law permits classifying as principal certain amounts that were initially incurred as interest and fees, then the creditor can take the position that it does not need to either attach an itemized statement or check the box on Form 10 that says "the claim includes interest or other charges in addition to the principal amount."

The Subcommittee therefore recommends that Rule 3001(c)(2)(A) be approved as published.

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[2] Indeed, the bulk claim purchasers themselves rely on the fact that the *form* authorizes the use of a summary, in arguing that they currently comply with the rule's requirement for attachment of the writing on which the claim is based.

C. Sanctions

The Subcommittee's recommendation regarding the proposed sanctions in subparagraph (D) – in connection with mortgage claims – applies equally to bulk purchasers' claims. The rule does not authorize disallowance for failure to comply with the rule, and it provides the court flexibility in deciding whether to impose a sanction, to allow an amendment of a POC, or to impose a sanction other than exclusion of evidence.

Rule 3001. Proof of Claim

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing.* Except for claims governed by paragraph (3) of this subdivision, w~~W~~hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

* * * * *

(3) *Claim Based on Open-End or Revolving Consumer Credit Agreement.* When a claim is based on an open-end or revolving consumer credit agreement, a statement shall be filed with the proof of claim that includes the following information, to the extent applicable:

(A) the name of the entity from whom the creditor purchased the account;

(B) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder;

(C) the date of the last transaction on the account by an account holder;

(D) the date of the last payment on the account;

(E) the date on which the account was charged to profit and loss.

COMMITTEE NOTE

Subdivision (c) is amended to add paragraph (3), which specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) should be determined in accordance with applicable standards for the classification and account management of consumer credit.

To the extent that paragraph (3) applies to a claim, paragraph (1) of this subdivision (c) is inapplicable.

4-B1

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: COMMENTS ON PROPOSED AMENDMENT TO RULE 2003(e) – NOTICE OF ADJOURNMENT OF MEETING OF CREDITORS

DATE: MARCH 26, 2010

Among the rules amendments published for comment in August 2009 was an amendment to Rule 2003(e). As published, it provides as follows:

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(e) ADJOURNMENT. The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time ~~without further written notice~~. The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended to require the presiding official to file a statement after the adjournment of a meeting of creditors or equity security holders designating the period of the adjournment. The presiding official is the United States trustee or the United States trustee's designee. This requirement will provide notice to parties in interest not present at the initial meeting of the date and time to which the meeting has been continued. When a meeting is adjourned or "held open" as permitted by § 1308(b)(1) of the Code in order to allow a debtor additional time in which to file a tax return with taxing authorities, the filing of this statement

will also discourage premature motions to dismiss or convert the case under § 1307(e).

Nine comments were submitted regarding this proposed amendment. (See the summary of those comments, which is attached.) Eight of the comments expressed support for the amended rule as proposed. These comments were submitted by six individual members of the consumer bar, by Judge Marvin Isgur, and by David Shaev on behalf of the National Association of Consumer Bankruptcy Attorneys.

The ninth comment (09-BK-139) was submitted by Deborah A. Butler, Associate Chief Counsel of the IRS on behalf of the Office of Chief Counsel. She suggested that several changes should be made to the text of the rule and to the Committee Note. Her comments are based on the view that § 1308(b)(1) requires the trustee to declare specifically that the meeting is being held open for the purpose of allowing the debtor additional time in which to file his or her tax returns.[1] She distinguished that authority from the broader and more general authority of the officer presiding at a meeting of creditors to adjourn the meeting as necessary. Ms. Butler argued that the rule as proposed "could lead debtors to believe that any adjournment of the section 341 meeting would qualify as holding the meeting open for purposes of section 1308."

Ms. Butler's proposal is that the published version of Rule 2003(e) and the Committee Note be revised as indicated:

(e) ADJOURN~~MENT~~ING AND HOLDING OPEN MEETINGS.

The meeting may be adjourned from time to time by announcement

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[1] Under § 1308(a) the debtor is otherwise required to file with the appropriate taxing authorities all tax returns for the 4-year period preceding bankruptcy no later than the day before the date on which the meeting of creditors is first scheduled. Failure to comply with § 1308 is a ground for dismissal or conversion of the case under § 1307(e).

at the meeting of the adjourned date and time. The presiding official shall promptly file a statement specifying the date and time to which the meeting is adjourned. In chapter 13 cases, if a meeting is being held open pursuant to section1308(b), the statement shall so specify and state the date and time to which the meeting is held open for that purpose.

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COMMITTEE NOTE

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Subdivision (e). Subdivision (e) is amended to require the presiding official to file a statement ~~after the adjournment of a meeting of creditors or equity security holders designating the period of the adjournment~~ when the meeting is being adjourned or being held open for purposes of section1308(b). ~~The presiding official is the United States trustee or the United States trustee's designee.~~ This requirement will provide notice to parties in interest not present at the initial meeting of the date and time to which the meeting has been continued. ~~When a meeting is adjourned or "held open" as permitted by 1308(b)(1) of the Code in order to allow a debtor additional time in which to file a tax return with taxing authorities, t~~ The filing of this statement when a meeting is held open will also discourage premature motions to dismiss or convert ~~the case~~ under ~~§~~ section 1307(e).

The text of § 1308(b) reads that "the trustee may hold open [the § 341] meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns." The provision then goes on to set a limit on the additional period of time that may be

allowed.[2]

No reported decisions impose the requirement that Ms. Butler suggested be added to the rule. Most of the decisions concerning § 1308(b)(1) have involved a determination of whether the § 341 meeting had in fact been held open. In answering the question, none of the courts examined whether the trustee had stated that the meeting was being adjourned pursuant to § 1308 in order to give the debtor time to file tax returns. They just looked to see whether it appeared that the meeting had been concluded or continued. One decision, that of the First Circuit BAP in U.S. v. Cushing (*In re* Cushing), 401 B.R. 528 (2009), did state that Congress, in using the term "hold open," must have meant something different than adjourn, *id.* at 536, but its holding was that § 1308(b) requires the trustee to take an affirmative step to hold the § 341 meeting open for a finite period of time. The court said it would not be sufficient that the meeting was adjourned indefinitely or that the trustee merely failed to state that the meeting was concluded. The proposed amendment of § 1308(b) would, of course, require affirmative notice of the fact that the meeting had been adjourned and of the specific date to which it was adjourned.

The wording of the published amendment proposal was based on the Committee's decision that holding open a meeting is the same as adjourning it. Both Black's Law Dictionary and the Merriam-Webster Collegiate Dictionary support that conclusion. Black's defines "adjourn" as "to postpone action of a convened court or body until another time specified, or

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[2] If the return is past due when the bankruptcy petition is filed, the additional time allowed for filing the return may not exceed 120 days from the date of the § 341 meeting. § 1308(b)(1)(A). If the return is not past due as of the petition date, the additional time may not extend beyond 120 days from the date of the meeting or the date when the return is due, whichever is later. § 1308(b)(1)(B). Under § 1308(b)(2) the court has authority to further extend the time period under limited circumstances.

indefinitely." Merriam-Webster defines it as "to suspend indefinitely or until a later stated time." Both definitions seem equivalent to holding open a meeting until a specified date. The Subcommittee therefore concluded that the proposed amendment of Rule 2003(e) does not need to be revised to use the term "hold open" in addition to the term "adjourn."

As for Ms. Butler's concern that debtors may believe that any adjournment of the meeting of creditors will qualify as holding open the meeting for purposes of § 1308(b)(1), the Subcommittee was of the view that such an interpretation would be correct, so long as the date to which the meeting is adjourned does not exceed the time limits of § 1308(b)(1)(A) and (B). Several courts have relied on the legislative history of the provision to conclude that its purpose was to give taxing authorities sufficient opportunity to determine whether they have claims against the debtor for delinquent taxes. *See, e.g., In re* Broussard, 2009 WL 1531817 (Bankr. W.D. La. May 29, 2009); *In re* Kuhar, 391 B.R. 733 (Bankr. E.D. Pa. 2008); *In re* French, 354 B.R. 258 (Bankr. E.D. Wis. 2006). Rule 3002(c)(1), as amended in 2008, allows a governmental unit at least 60 days from the debtor's filing of a tax return under § 1308 to file any proof of claim resulting from that tax return. Thus, even if any adjournment of the § 341 meeting – for no longer than 120 days – gives the debtor additional time to file her tax returns with the taxing authority, the government will still have at least 60 more days from that point to file its proof of claim.

The Subcommittee therefore recommends that the Committee approve the proposed amendments of Rule 2003(e) and the accompanying Committee Note as published.

Attachment

Comments on Rule 2003 Amendment

09-BK-004, Honorable Marvin Isgur

The proposed change will be very helpful and I fully support the change, as written.

09-BK-016, David B. Shaev for the National Association of Consumer Bankruptcy Attorneys

Supports the proposed amendment which would prevent Chapter 13 Trustees from holding creditors' meetings open indefinitely to avoid the deadline for filing objections to exemptions. This has become an abusive process against debtors and should be limited.

09-BK-139, Deborah A. Butler for the Internal Revenue Service

Recommends revising the proposed amendments to require the presiding official to specify whether the meeting of the creditors is being held open pursuant to section 1308(b) to allow a taxpayer additional time to file a tax return, or adjourned for some other purpose.

By the members of the consumer bar, **endorsing** the proposed amendment:
09-BK-057, Pamela Simmons-Beasley
09-BK-075, Charles Farrell
09-BK-087, Jim Green
09-BK-100, Mark Cornell
09-BK-118, John Francis Murphy
09-BK-121, Stephen M. Goldberg

4-B2

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: COMMENTS ON PROPOSED AMENDMENT TO RULE 4004(b)

DATE: MARCH 26, 2010

The Advisory Committee proposed an amendment to Rule 4004(b) that was published for comment in August 2009. The amendment is intended to address the situation in which there is a gap between the deadline under Rule 4004(a) for objecting to a debtor's discharge and the court's entry of the discharge order. If during that period the trustee or a creditor should discover that the debtor had engaged in conduct that would provide a basis for denial of the discharge, it would be too late at that point for an objection to be made. Moreover, even if the conduct would otherwise provide a basis for revocation of the discharge once the order was entered, revocation would not be available if § 727(d) required that the party seeking revocation not have knowledge of the conduct until after the granting of the discharge.

The proposed rule, as published, provides as follows:

Rule 4004. Grant or Denial of Discharge

* * * * *

(b) EXTENSION OF TIME.

(1) On motion of any party in interest, after notice and hearing ~~on notice~~, the court may for cause extend the time to ~~file a complaint~~ objecting to discharge. Except as provided in subdivision (b)(2), ~~T~~the motion shall be filed before the time has

expired.

(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, provided that the movant did not have knowledge of those facts in time to permit a timely filed objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.

* * * * *

COMMITTEE NOTE

Subdivision (b). Subdivision (b) is amended to allow, under certain specified circumstances, a party to seek an extension of time to object to discharge after the time for filing has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If, during that period, a party discovers facts that would provide grounds for revocation of discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. In that situation, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

Three comments were submitted on this rule. (See attached summary of the comments.) Bankruptcy Judge Wesley Steen (S.D. Tex.) suggested that the proposed amendment does not go far enough (09-BK-01). According to him, it fails to address the situation in which a debtor during the gap period engages in conduct of a type that would provide a basis for denial of the

discharge under § 727(a) but is not a ground for revocation of the discharge under § 727(d). In a recent opinion that he attached to his comment, *In re* Shankman, 2009 WL 2855731 (Bankr. S.D. Tex. Sept. 1, 2009), Judge Steen argued that Rule 4004 is invalid because it imposes a deadline that prevents parties from objecting to discharge based on misconduct by the debtor that occurs during the gap period. The proposed amendment, he says, does not fully address this problem because it is limited to conduct that would provide a basis for discharge revocation, and § 727(a) and (d) are not coextensive.

Bankruptcy Judge Marvin Isgur (S.D. Tex.) concurred in Judge Steen's comment (09-BK-004). While stating that the proposed amendment "is an excellent change to this Rule," Judge Isgur suggested that the language of the amendment be broadened to address the concerns raised in the *Shankman* opinion.

The third comment was submitted by Elizabeth Berke-Dreyfuss on behalf of the Insolvency Law Committee ("ILC") of the Business Law Section of the California State Bar (09-BK-114). This comment noted that, while the explanation for the amendment in the Committee Note seems to be addressed only to facts supporting revocation under § 727(d)(1) (discharge obtained through the fraud of the debtor), the rule itself refers more broadly to "a basis for revocation under § 727(d)." The ILC expressed support for the reference to subsection (d) in its entirety because that would allow an extension of time to object to discharge based on acts of the type specified in § 727(d)(2), (3), or (4) that are committed by the debtor after the objection period has expired. The ILC suggested that either the Committee Note or the rule itself should be revised to clarify its intended applicability to any ground for revocation under § 727(d). It did not support Judge Steen's suggestion, however. Ms. Berke-Dreyfuss stated that the proposals

expressed in *Shankman* "extend beyond the purview of the proposed harmonization of the Bankruptcy Rule 4004 and the Bankruptcy Code" and are not appropriately raised by comments to the proposed rule amendment.

Reference to § 727(d) verus (d)(1)

The amendment to Rule 4004(b) was proposed directly in response to the Seventh Circuit's decision in Zedan v. Habash, 529 F.3d 398 (2008), which held that if a trustee or creditor learns during the gap period of fraud committed by the debtor, current Rule 4004 and § 727(d)(1) of the Code prevent both an objection to discharge (because it would be untimely) and the revocation of the discharge once it is entered (because knowledge of the fraud would have been obtained *before* the entry of the discharge). The focus of the proposed amendment was therefore on § 727(d)(1).[1]

The proposed rule, however, was worded more broadly because some courts have read into other provisions of subsection (d) the requirement that a party seeking revocation not have knowledge of the conduct in question until after the granting of the discharge. *See, e.g., In re* Dietz, 914 F.2d 161, 164 (9th Cir. 1990) (holding that under § 727(d)(2) "the trustee must have learned of the debtor's fraud after discharge had been granted"); *In re* Puente, 49 B.R. 966, 969 (Bankr. W.D.N.Y. 1985) (same); *In re* Lyons, 23 B.R. 123 (Bankr. E.D. Va. 1982) ("The fact that subparagraphs 727(d)(2) and 727(d)(3) contain no language requiring the knowledge of any fraudulent conduct to be received after the discharge is granted does not give a party in interest,

[1] That provision allows for revocation of a discharge if it "was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of the discharge." § 727(d)(1). None of the other grounds for revocation under subsection (d) contains an express restriction on the timing of the requesting party's knowledge.

who has the knowledge of the probable wrongdoing, the privilege to wait until after a discharge is granted to ask the court to revoke the discharge."). Courts are divided on this issue, however. *See, e.g., In re* Silver, 367 B.R. 795, 823-24 (Bankr. D.N.M. 2007) (holding that under § 727(d)(2) it does not matter when the trustee learned of the facts giving rise to the action for revocation); *In re* Barnes, 348 B.R. 613, 616 (Bankr. D.D.C. 2006) (contrasting the language of § 727(d)(1) and (d)(3) and concluding that the latter provision does not restrict the basis for revocation to facts learned after the granting of the discharge). To the extent that courts do impose the requirement of lack of knowledge prior to the discharge under paragraphs of § 727(d)(2) - (4), the same issue can arise as was presented in *Zedan*, and the solution of the proposed amendment should be equally applicable.

The comment of ILC raises the possibility of an additional and perhaps unintended consequence of the reference to all of subsection (d). That organization supported the broader reference because the rule would then allow in some circumstances an extension of time to object to discharge when the debtor – after the Rule 4004(a) deadline had passed – commits an act that constitutes a ground for denial of discharge. (To come within the proposed rule, the debtor's act would also have to provide a ground for discharge revocation.)

The situation that ILC raises, however, is one for which there is less need for a rule amendment than the one with which the Committee was concerned. For example, suppose a debtor, after the expiration of the deadline for objecting to discharge but before the discharge is entered, refuses to obey a lawful court order. That disobedience would constitute a ground for denial of the discharge under § 727(a)(6), but because the deadline for objecting had already passed when the act was committed, in the absence of the amendment, no one could bring an

action for denial of the discharge. Under § 727(d)(3), however, the trustee or a creditor could later seek revocation of the discharge on that basis, assuming the court does not require a lack of knowledge of the facts prior to discharge. Unlike the creditor in *Zedan*, therefore, the trustee or creditor would not be without a remedy.

The Subcommittee was not troubled by ILC's interpretation, however. As discussed above, the reference to § 727(d) takes account of the lack-of-predischarge-knowledge requirement imposed by some courts for several of the paragraphs of that subdivision. Moreover, even in courts that would allow revocation of the discharge under the circumstances envisioned by ILC, this rule would permit an action for denial of the discharge once the act was committed by the debtor, rather than requiring the trustee or creditor to wait until the discharge was entered in order to seek its revocation.

The Subcommittee considered ILC's suggestion of the need for a further clarification of the rule or Committee Note. It does not recommend changing the language of the rule. Subdivision (b)(2) refers to "§ 727(d)," and that is what is intended. Likewise, the Committee Note, as currently worded, accurately refers to the situation in which a party "may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge." The Subcommittee does, however, agree with ILC that the Committee Note should be revised to also refer to the situation in which the debtor, after the expiration of the time for objecting to discharge, commits an act that would have provided a ground for denying the discharge and still provides a basis for revocation of the discharge. It would then read as follows (with the new language indicated by underlining):

Subdivision (b). Subdivision (b) is amended to allow, under certain specified circumstances, a party to seek an extension

of time to object to discharge after the time for filing has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If, during that period, a party discovers facts that would provide grounds for revocation of discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. Furthermore, during that period the debtor may commit an act that provides a basis for both denial and revocation of the discharge. In ~~that~~those situations, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

Acts during the Gap Period that do not Provide a Basis for Revocation

Judge Steen proposed that the rule go further than it is currently drafted or as it would be clarified by the added language in the Committee Note above. He suggested that Rule 4004 is inconsistent with § 727 because it bars actions for denial of the discharge when the acts in question do not occur until after the deadline for objecting has passed. Because § 727(a) and (d) are not coextensive, a debtor is free to commit certain acts listed in subsection (a) without the risk of either denial of discharge (because the time to object has expired) or revocation of discharge (because the act is not one listed in subsection (d)).

It seems reasonable to assume that Congress, in enacting § 727, anticipated that the rules would set a deadline for objecting to discharge and that some of the acts specified in subsection (a) might occur after that date. This situation can arise whether the discharge is entered immediately after the deadline expires or a gap occurs before its entry. For the most part, the solution to that problem lies in the right of a trustee or creditor to seek revocation of the discharge under subsection (d). The fact that Congress did not include in (d) every basis for

discharge denial under (a) suggests a legislative willingness to allow some post-deadline or post-discharge acts to go unremedied. To a large degree, therefore, it seems that Judge Steen's real complaint is with the lack of congruence between subsections (a) and (d) of § 727, rather than with Rule 4004.

The lack of congruence between the two subsections is also less extensive than might appear from just a quick comparison of their provisions. Section 727(d)(1) – the "discharge was obtained through the fraud of the debtor" – covers many of the acts listed in subsection (a), although Judge Steen in the *Shankman* opinion pointed out a few examples of acts covered by (a) that may not constitute fraud.

Perhaps the most serious issue for the Committee's consideration is presented by § 727(a)(5). That provision allows the denial of discharge if "the debtor has failed to explain satisfactorily, *before determination of denial of discharge under this paragraph*, any loss of assets or deficiency of assets to meet the debtor's liabilities" (emphasis added). If that failure should occur during the gap period, the time for objecting would have expired, yet the statutory cutoff – the determination of denial of the discharge – would not have occurred. Arguably, the application of Rule 4004 would prevent the denial of discharge under circumstances in which the statute authorizes such denial. Furthermore, it is not apparent that the debtor's inadequate explanation provides a basis for revocation of discharge under subsection (d).

In order for Rule 4004(b) to address that situation or others in which revocation would not be available, the alternative amendment that was rejected by the Advisory Committee at the spring 2009 meeting could be revived. Under that option, Rule 4004(b) would read as follows:

(b) EXTENSION OF TIME. On motion of any party in interest,

after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired, except that the motion may be filed after the time has expired and before the granting of the discharge if the movant did not have knowledge of the facts giving rise to the objection in time to permit the timely filing of the complaint. If a party in interest seeks an extension of time after the time has expired, the motion must be filed promptly after the movant discovers the facts on which the objection is based.

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to allow, under certain specified circumstances, a party to seek an extension of time to file a complaint objecting to discharge after the time has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If a party during that period discovers previously unknown grounds for objecting to the debtor's discharge, it may seek an extension of time to file its complaint, so long as it files its motion promptly.

That solution has the disadvantage of prolonging the possibility of discharge litigation in cases in which the discharge is not entered promptly after the time for objecting expires. It also does not provide a solution for the situation in which the debtor engages in conduct after entry of the discharge that would have been a ground for denial of the discharge but is not a ground for revocation – although no rule with a deadline prior to the closing of the case could do that.

Having carefully weighed the competing considerations, **the Subcommittee**

recommends that Advisory Committee approve the proposed amendment of Rule 4004(b) as published, with the additional language in the Committee Note set out on page 7. The proposed amended rule seeks to arrive at the same result that would occur if the discharge were entered promptly after the expiration of the Rule 4004(a) deadline and thus no gap existed. Section 727(d) would determine whether acts that were either committed or discovered after the discharge provide a basis for revocation of the discharge. Under the statute not all acts that might have resulted in denial of the discharge will qualify as grounds for revocation. The proposed Rule 4004(b)(2) likewise limits the authority to seek an extension of time to object during the gap period to acts that would provide a basis for revocation. The Subcommittee concluded that the rule does not need to go further and apply to acts that, had they occurred after the discharge, would not have permitted revocation.

Attachment

Comments on Rule 4004 Amendment

(All suggest changes in the rule and/or the Committee Note)

09-BK-001, Honorable Wesley Steen

The statute clearly allows denial of discharge if the act occurs after the deadline for objecting to discharge, provided that the discharge has not yet been entered. I believe that the Rule (even with the proposed change) is more restrictive that the statute and denies relief that the statute authorizes. Therefore, unless the rule is amended even further, it is my view that the rule is invalid.

09-BK-004, Honorable Marvin Isgur

This is an excellent change to this Rule to address the current "gap period" discharge problem. I will note that my colleague, Wesley Steen, recently confronted a related problem that could also be addressed by this rule. See *In re Shankman*, 2009 WL 2855731 (Bankr. S.D. Tex. 2009). For the reasons set forth by Judge Steen, I suggest that the language be broadened to include the concerns raised in *Shankman*.

09-BK-021, Robert Harris for the Insolvency Law Committee of the State Bar of California

Asks for clarification about the intent of the amendment.

09-BK-114, Elizabeth Berke-Dreyfuss for the Insolvency Law Committee of the Business Law Section of the State Bar of California

Proposed changes to Federal Rule of Bankruptcy Procedure 4004 would enhance the ability of creditors to extend the time to file a complaint objecting to a debtor's discharge through (a) a straightforward procedural change to the method of requesting the extension, and (b) a substantive modification.

The ILC has confirmed that the proposed amendment of Rule 4004 was drafted to address grounds for revocation of discharge beyond Bankruptcy Code section 727(d)(1) - that the discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge. The proposed comment of the Rules Committee note, however, seems to refer only to section 727(d)(1). The ILC respectfully submits that the comment should be amended to explain the full extent of the expansion of actionable grounds for revocation of discharge . . . .

The ILC supports the proposed Rule's referral to section 727(d) generally without specifying a sub-section as it will then include limited conduct in the gap period between

the time to file a complaint under section 727(a) and entry of discharge that would, were it to occur after a discharge had entered, be grounds for revocation of discharge. Thus, a debtor's acquisition of property in the gap period that is knowingly and fraudulently not reported or not delivered or surrendered (11 U.S.C. section 727(d)(2)) will now form the basis for a motion to extend the time to seek denial of discharge (if the discharge hasn't yet been entered by the time the creditor discovers the conduct in question and seeks relief) or a complaint to revoke the discharge (if the discharge has been entered by then).

Similarly, failure in the gap period to obey a lawful order of the court or to answer a material question approved by the court or invoking the privilege against self-incrimination in response to material approved by the court after a grant of immunity will form the basis for a complaint under Rule 4004 as amended (11 U.S.C. section 727(d)(3)). Finally, a debtor who, in the gap period, makes a material misstatement in connection with or failure to produce records or information in connection with an audit by the United States Trustee under 28 U.S.C. section 586(f) will form the basis for a complaint under Rule 4004 as amended (I11 U.S.C. section 727(d)(4)).

The ILC notes the authority and analysis set forth by Judge Wesley Steen in *In re Shankman*, 2009 WL 2855731 (Bankr. S.D. Tex. 2009), as to other conduct which the Bankruptcy Code and the concern expressed therein that the proposed change in Rule 4004 is not sufficiently broad.

The ILC believes that the proposals in *In re Shankman* extend beyond the purview of the proposed harmonization of the Bankruptcy Rule 4004 and the Bankruptcy Code and cannot be addressed in the scope of a comment on revisions to the Rule. While many of the above issues might be capable of resolution by litigation, it would seem to be far more efficient to revise the Rules Committee comment to clarify the intent of the change. An explicit reference to sections 727(d)(1) through (d)(4) in the Rule itself would be an acceptable alternative.

4-B3

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: COMMENTS ON PROPOSED AMENDMENTS TO FORMS 22 A-C

DATE: MARCH 26, 2010

Proposed amendments to the current monthly income and means test forms – Forms 22A, 22B, and 22C – were published for comment in August 2009. The proposed amendments address several issues and would, among other things, substitute in several places the terms "number of persons" or "family size" for "household" or "household size." As shown on the attached summary of comments, only one comment was submitted regarding these amendments. That comment (09-BK-032) was made by attorney William J. Neild. While he stated that he does not oppose the proposed amendments to the forms, he suggested that an additional change needs to be made to Form 22A. Mr. Neild proposed that the form be revised to allow chapter 7 debtors to deduct from income any expenses incurred in the production of income. He contended that deductions of this type are allowed by the IRS and thus are required to be deducted by § 707(b)(2)(A)(ii) of the Code.

To a large extent this issue was considered and rejected by the Committee in its initial adoption of the means test form. The basis for the argument was also considered and rejected by the Committee in 2008 when it was proposed that Form 22C should require the calculation of current monthly income based on gross, not net, income.

Section 707(b)(2)(A)(ii) provides for the monthly expenses that are permitted to be deducted from current monthly income under the means test. Among other deductions are "the

debtor's actual monthly expenses for the categories specified as Other Necessary Expenses" by the IRS. Those categories of expenses are set out in § 5.15.1.10 of the IRS Financial Analysis Handbook. See http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1381. The general instructions of that section state that to be considered as permissible, expenses must meet a necessity test: "they must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income." That section of the handbook then goes on to list fifteen specific expense items, such as taxes, child care, and involuntary deductions. Those listed expenses that do not constitute the repayment of debt are included in lines 25-32 of Form 22A.

Although the IRS Handbook's explanation of the necessary expense test refers to expenses for the production of income, there is not a listed category of other necessary expenses that covers all expenses incurred in the production of income. Because § 707(b)(2)(A)(ii) only allows the deduction of "the debtor's actual monthly expenses for the *categories specified* as Other Necessary Expenses" (emphasis added), Form 22A limits deductions for other necessary expenses to the expense items specifically listed in the Handbook. For that reason all expenses incurred in the production of income are not allowed to be deducted under this part of the means test.

A comparison of Form 22A to the IRS list of other necessary expenses does reveal one respect in which the allowed deductions on the form are narrower than the IRS categories. The deduction on line 32 for telecommunication services allows for the monthly cost of pagers, call waiting, internet service, etc. "to the extent necessary for your health and welfare or that of your dependents." The IRS, on the other hand, includes as other necessary expenses the cost of

optional telephones, telephone services, and internet provider/email "if it meets the necessary expense test." For internet and email services, the explanation goes on to say, "generally for the production of income." It therefore appears that the IRS necessary expense test does not limit these types of expenses to those necessary for the debtor's health and welfare but considers as well their necessity for the production of income.

The reason that Form 22A limits this deduction as it does is that the calculation of monthly income in Part II of the form already permits the deduction of ordinary and necessary business expenses from the gross receipts from the operation of a business, profession, or farm. For a self-employed debtor, therefore, expenses necessary for the production of income will have already been taken into account. Mr. Neild, however, addressed possible unreimbursed business expenses of an employee (such as the cost of a cell phone for a trucker who is employed by someone else). To the extent that an expense of this type would qualify as an "other necessary expense" according to the IRS but, because the debtor is not self-employed, it would not be deductible anywhere on Form 22A, there may be an unintended gap on the form (and on Form 22C).

The Subcommittee concluded that Mr. Neild's comment does not require any changes to Forms 22A, 22B, and 22C as they were published for comment in August. **It therefore recommends that the Committee approve the amendments to these forms as published.** If the Committee wants to consider further whether there is any need to pursue a possible revision of the description on Form 22A (line 32) and Form 22C (line 37) of "Other Necessary Expenses: telecommunication services" as applied to debtors who are employed by others, the issue might be referred to the Subcommittee with a request for a recommendation at the fall 2010 meeting.

Attachment

Comment on Forms 22A, 22B, and 22C Amendments

09-BK-032, William J. Neild

The writer "has no objection" to the amendments, but he argues for amending Form 22A to include "expenses incurred in the production of income."

4-C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: SUGGESTION REGARDING THE USE OF "NEGATIVE NOTICE" UNDER RULE 3007(a)

DATE: MARCH 17, 2010

On behalf of the Bankruptcy Judges Advisory Group ("BJAG"), Judge Margaret D. McGarity (Bankr. E.D. Wis.) has submitted a suggestion (09-BK-H) concerning the procedure in Rule 3007(a) for making an objection to the allowance of a claim. The rule currently provides that an objection shall be made in writing and filed and that a copy of the objection "with notice of the hearing thereon" shall be provided the claimant and others "at least 30 days prior to the hearing." Judge McGarity questions the need for a hearing on all objections to claims. Because the requirement can result in clogged court calendars, she says that some courts ignore the requirement altogether, and others schedule the hearing but cancel it if the claimant does not respond by a specified date before the hearing.[1] BJAG asks the Advisory Committee to consider an amendment to Rule 3007(a) that would place the burden on an interested party to request a hearing after receiving notice of the objection (i.e. allow negative notice).

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[1] *See, e.g.,* Local Bankr. Rule 3007(b) (Bankr. E.D. Tex.) ("A party filing an objection to claim, other than an objection for which the filing of an adversary proceeding is required, may utilize the 21-day negative notice language described in LBR 9007(a)."); Local Bankr. Rule B-3007-1(e) (Bankr. N.D. Ind.) ("Unless a response to the objection is filed within thirty (30) days following service of the notice of objection, the court may disallow or modify the claim in accordance with the objection, without further hearing."); Local Bankr. R. 3007-1(b)(3) (Bankr. C.D. Cal.) (requiring objection to claim to indicate date, time, and place of hearing, but allowing court to grant the requested relief without a hearing unless the claimant files and serves a response no later than 14 days before the hearing date).

During its conference call on January 21, 2010, the Subcommittee on Consumer Issues carefully considered this suggestion. As discussed below, **it recommends that Rule 3007(a) be amended to permit a negative notice procedure for objections to claims.**

Discussion

Section 502(b) of the Code provides that if an objection to a claim is made, "the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim" except to the extent that one of the specified grounds for disallowance applies. As used in the Code and Rules, the phrase "after notice and a hearing," or similar wording, allows action to be taken without a hearing if notice is properly given and a hearing is not timely requested by a party in interest. *See* § 102(1); Rule 9001. The Code, therefore, does not mandate that a hearing actually be conducted on every objection to a claim. Rule 3007(a), however, by not using the phrase "after notice and a hearing" and by affirmatively requiring a hearing date to be noticed along with the objection, appears to require that a hearing be calendared for all objections to claims.

Because an objection to a claim that does not seek other relief gives rise to a contested matter, it might be argued that Rule 9014(a) governs in all respects the procedure for resolving the objection. Indeed, the Committee Note accompanying Rule 3007 states that the "contested matter initiated by an objection to a claim is governed by rule 9014." The latter rule provides for "reasonable notice and opportunity for hearing." It thus allows for negative notice. Rule 9014(a), however, applies only to contested matters "not otherwise governed by these rules." Rule 3007(a)'s more specific requirement for giving notice of the hearing date on an objection to a claim appears to override the more general notice requirement of Rule 9014.

The Subcommittee concluded that the BJAG suggestion is well taken. As Judge McGarity notes, some objections to claims – such as ones based on untimely filing or the incorrect designation of a priority category – may be sufficiently straight-forward that a hearing is not needed. If a negative notice procedure were permitted, the scheduling of hearings on objections could be limited to situations in which the claimant or another party in interest requests one. Moreover, because courts now are not uniformly adhering to the procedure required by Rule 3007(a), an amendment to the rule allowing negative notice would facilitate uniformity.

Recommendation

The Subcommittee recommends that Rule 3007(a) be amended to read as follows:

Rule 3007. Objections to Claims

(a) OBJECTIONS TO CLAIMS. An objection to the allowance of a claim shall be in writing and filed. Reasonable notice and opportunity for hearing shall be afforded ~~A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to~~ the claimant, the debtor or debtor in possession, and the trustee ~~at least 30 days prior to the hearing~~.

* * * * *

COMMITTEE NOTE

Subsection (a) is amended to eliminate the requirement that an objection to the allowance of a claim provide notice of the scheduled date of a hearing on the objection. An objection to a claim gives rise to a contested matter unless it is joined with a demand for relief of the type specified in Rule 7001. Rule 9014(a)

generally allows the court in contested matters to act without a hearing if notice is properly given and a hearing is not requested. See § 102(1) of the Code; Rule 9001. As amended, subsection (a) similarly allows the use of a negative notice procedure for objections to claims.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: SUGGESTION FOR USE OF UNIFORM CLAIM IDENTIFIER ON PROOF OF CLAIM FORM

DATE: MARCH 19, 2010

George W. Stevenson, a chapter 13 trustee in Memphis, Tennessee, submitted a suggestion (09-BK-K) for the addition of a uniform claim identifier to Form 10. This 24-character identifier is intended to facilitate the making of chapter 13 payments by means of electronic fund transfers and to ensure that payments are posted to the proper account. The proposal was developed by the National Association of Chapter 13 Trustees and Wells Fargo Corp. As proposed, its use would be optional for creditors.

This suggestion was referred to the Subcommittee on Consumer Issues. It considered the proposal carefully during its January 21, 2010, conference call and recommended its approval. The matter was then referred to the Subcommittee on Forms for its consideration. During its conference call on March 19, 2010, the Forms Subcommittee voted to recommend that the proof of claim form provide space for the specification of a uniform claim identifier and that accompanying instructions be approved. The placement of this item on the proof of claim form, along with other proposed changes to that form, is addressed in a memorandum from the Forms Subcommittee (agenda item 5(B)). This memorandum provides background information and the reasons for the Consumer Subcommittee's recommendation of approval of Mr. Stevenson's suggestion.

Reasons Given in Support of the Proposal

Mr. Stevenson explained that the required redaction of account numbers under Rule 9037(a) has resulted in increased difficulties in ensuring that chapter 13 payments made by trustees to creditors are properly identified and credited. An identifier that provides information in a consistent format about the bankruptcy case, the debtor and the debtor's account, and the intended recipient of the payment would allow for automation of the payment process. As a result, the need for a chapter 13 trustee to write and mail checks to multiple addresses for a single, large creditor could be eliminated, replaced by a system that would allow electronic transmission of multiple payments to a single payment address for each participating creditor. Inquiries from creditors to trustees about the status of payments should be greatly reduced. Mr. Stevenson further stated that, by introducing consistency to the payment process, the use of a uniform claim identifier would reduce creditor mistakes in crediting payments and in failing to ensure debtor privacy. Large creditors other than Wells Fargo, which helped develop the proposal, have reacted positively to the idea, he said.

How the Uniform Claim Identifier Proposal Would Work

The 24 characters of the claim identifier would consist of the following elements:

- a 3-character creditor designation (NYSE symbol or other abbreviation) to be maintained by the National Data Center ("NDC");
- a 3-character internal designation that would identify the proper division within the creditor organization to receive payment;
- a 7-character bankruptcy case number;
- a 3-character bankruptcy court identifier (such as NCE [Eastern District of North

Carolina] or for states with only one district, M for "main" would be added after the 2-letter state abbreviation);

- the last 4 digits of the debtor's social security number; and
- the last 4 digits of the debtor's account number.

Implementation of the uniform claim identifier proposal would also require modification of the ECF template to permit the inclusion of the identifier during electronic filing of the proof of claim. That matter is not one that the Advisory Committee has to deal with.

Even with the modification of Form 10 and the ECF template, Mr. Stevenson did not propose that use of the uniform claim identifier be made mandatory. A creditor could still choose to leave blank the line for the identifier and just continue to provide account identification information in block 3 of the proof of claim form.

Recommendation

The Subcommittee concluded that the proposed uniform claim identifier could assist chapter 13 trustees in getting payments more easily to the correct creditor and having them accurately credited to the correct account. Moreover, the Subcommittee identified no privacy problems under current laws, rules, and policies that would be presented by the use of this 24-character identifier. **It therefore recommends the designation of space for this item in Form 10.**

To ensure that creditors understand that the use of a uniform claim identifier is optional, the Subcommittee also recommends that the space where the identifier information is sought in Form 10 indicate that the information is not required to be provided. For example, "(optional)" could be inserted either after or under "Uniform Claim Identifier."

4-E

MEMORANDUM

To: Advisory Committee on Bankruptcy Rules

From: Consumer Subcommittee (ERW)

Re: Schedule C and *Schwab v. Reilly*: the extent of a claimed exemption

Date: August 26, 2009

On April 27, the Supreme Court granted certiorari in *Schwab v. Reilly,* 129 S.Ct. 2049, to review the decision of the Third Circuit in *In re Reilly*, 534 F.3d 173 (3d Cir. 2008). That decision arose from a Chapter 7 case in which the debtor, claiming an exemption in catering equipment, listed in Schedule C the same dollar amount for both the value of the equipment and the amount claimed exempt. The Third Circuit held by completing the schedule in this way, the debtor "indicates the intent to exempt her entire interest in a given property," so that, if there is not a timely objection, "the debtor is entitled to the property in its entirety." *Reilly*, 524 F.3d at 174. The Supreme Court limited its grant of certiorari to two issues:

1. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to "fully exempt" the asset, regardless of its true value?

2. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemptions within the thirty day period of Rule 4003

even though the amount claimed as exempt and the type of property are within the exemption statute?

The issues that the Supreme Court will address in *Schwab* result from an ambiguity in Schedule C (Official Form 6C). The current form of the schedule requires only four statements regarding each exemption: (1) a description of the property claimed exempt, (2) a specification of the law providing the exemption, (3) the value of the claimed exemption, and (4) the current value of the property without deducting the exemption. The third category is ambiguous: when the debtor places a dollar amount in this category that is equal to the "current value" of the property listed in the fourth category, it is unclear whether the debtor intends to exempt the full value of the property—even if the actual property value is greater than the "current value" listed in the fourth category—or whether the debtor intends to limit the exemption claim to the amount stated in the third category. Courts have divided over this question, as the Third Circuit recognized, citing conflicting decisions. *Reilly,* 524 F.3d at 178-79.

Regardless of how the Supreme Court rules, it may be appropriate to resolve the ambiguity in the form. One way of doing so would be by providing check boxes in the third category of Schedule C, requiring the debtor to choose to exempt either (1) the debtor's entire interest in the property, even if that interest has a value greater than the "current value" set out in the fourth category or (2) an exemption limited to an amount stated in the third category. As amended, the relevant portion of the form might appear as follows:

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	EXTENT OF CLAIMED EXEMPTION	CURRENT VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION
		☐ Debtor's entire interest in the property ☐ Debtor's interest in the property to the extent of $_____	
		☐ Debtor's entire interest in the property ☐ Debtor's interest in the property to the extent of $_____	
		☐ Debtor's entire interest in the property ☐ Debtor's interest in the property to the extent of $_____	

An amendment such as this should be able to eliminate the possibility that the specification of a dollar amount could "signal [an] intent to exempt the property in its entirety," as the Third Circuit held in *Reilly*, 534 F.3d at 180. An exemption claim of the debtor's entire interest in the property would be unambiguous, and a specification of a dollar amount would clearly be a limit on the exemption claimed. With the ambiguity removed, debtors who believe that the exemption to which they are entitled equals or exceeds the value of the property would be free to claim their entire interest in the property as exempt, but the trustee would know that this is the debtor's claim and would be able to decide whether to object in light of that knowledge. With an unambiguous form, there would be no need to change the deadline for objections.

In the Consumer Subcommittee's consideration of this issue, questions were raised about the wording of any change to Form 6C, and the subcommittee determined that it would be appropriate to defer consideration of the issue until after the Supreme Court issues its ruling in *Schwab*, both because the outcome in that case could have an effect on the need for a change to the form and because any proposal made now could be viewed as attempting to influence the Supreme Court's decision. Finally, considering this issue during the Advisory Committee's April 2010 meeting (which would likely be after the Supreme Court's decision) would not delay implementation of any proposed change to the form.

Accordingly, the Consumer Subcommittee recommends that consideration of this issue be deferred until the Advisory Committee's April 2010 meeting.

4-F

MEMORANDUM

To: Advisory Committee on Bankruptcy Rules

From: Consumer Subcommittee

Re: Filing deadline in Fed. R. Civ. P. 56(b)

Date: March 16, 2010

On December 1, 2009, a new version of Fed. R. Civ. P. 56 went into effect. A copy of that rule is attached.

Under Bankruptcy Rule 7056, Rule 56 of the Civil Rules applies to adversary proceedings in bankruptcy and, under Bankruptcy Rule 9014(c), it applies to contested matters unless the court orders otherwise.

One aspect of Rule 56, subdivision (c), establishes a default deadline for filing summary judgment motions at 30 days after the close of discovery.[1] Because of the speed with which bankruptcy issues are heard—including contested matters such as motions for relief from stay—the default deadline in the rule would not come into effect in many situations, allowing a timely summary judgment motions to be filed shortly before a scheduled evidentiary hearing. Moreover, because subdivision (c)(2) of the rule states that summary judgment "should be rendered" if the motion is meritorious, a bankruptcy court could consider itself bound to con-

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1 Rule 56(c)(1)(A) states that "unless a different time is set by local rule or the court orders otherwise . . . a party may move for summary judgment at any time until 30 days after the close of all discovery."

tinue a scheduled evidentiary hearing to allow consideration of any timely filed summary judgment motion.

A more meaningful default deadline for bankruptcy purposes would be based on the date set for the evidentiary hearing rather than the close of discovery. The Consumer Subcommittee recommends the following amendment to Rule 7056, designed to accomplish this result.

Rule 7056. Summary Judgment

Rule 56 FED. R. CIV. P. applies in adversary proceedings~~.~~ except that, unless a different time is set by local rule or the court orders otherwise, a party may only move for summary judgment until 30 days before the initial date set for a scheduled evidentiary hearing on an issue for which summary judgment is sought.

Committee Note

The only exception to complete adoption of Rule 56 of the Federal Rules of Civil Procedure involves the default deadline for filing summary judgment motions. Rule 56(c)(1)(A) makes the default deadline 30 days after the close of all discovery. Because litigation in bankruptcy cases often takes place with hearings shortly after the close of discovery, a default deadline based on the scheduled hearing date is adopted for bankruptcy proceedings. As with Rule 56(c)(1), the deadline can be altered either by local rule or court order.

CORE PROCEEDINGS

A Bankruptcy Newsletter Published by the Bankruptcy Judges Division

Volume 7, Number 1 February 2010

JUDGE ROSEMARY GAMBARDELLA SELECTED AS THE NEXT BANKRUPTCY JUDGE OBSERVER AT THE JUDICIAL CONFERENCE

Chief Justice John Roberts has selected Judge Rosemary Gambardella of the District of New Jersey to serve as the next non-voting bankruptcy judge observer at the Judicial Conference. Judge Gambardella succeeds Chief Judge David S. Kennedy of the Western District of Tennessee. Judge Gambardella's two-year term will expire on October 1, 2011.

NEWS FROM THE BANKRUPTCY RULES COMMITTEE

Federal Rule of Civil Procedure 56 – New Deadline for Summary Judgment Motions

Effective December 1, 2009, Rule 56 of the Federal Rules of Civil Procedure was amended to provide that, in the absence of a local rule or court order to the contrary, a summary judgment motion may be made at any time until 30 days after the close of all discovery. Rule 56 applies to adversary proceedings in bankruptcy cases through Bankruptcy Rule 7056 and to contested matters, unless the court orders otherwise, through Bankruptcy Rule 9014(c).

Due to the speed with which bankruptcy matters often proceed, the new Rule 56 default deadline could coincide with a scheduled evidentiary hearing, which could then be delayed for briefing and resolution of the motion.

The Advisory Committee on Bankruptcy Rules is considering whether a different default timing provision, such as one calculating the motion deadline by reference to the first date set for an evidentiary hearing, may be more appropriate for bankruptcy. Pending the committee's deliberations and the effective date of any amendment to Rules 7056 and 9014, bankruptcy courts should bear in mind their authority to set summary judgment deadlines by local rule or court order.

BANKRUPTCY JUDGES ADVISORY GROUP

The Administrative Office's Bankruptcy Judges Advisory Group (BJAG) met on November 5-6, 2009. The BJAG comprises one bankruptcy judge member from each circuit. Bankruptcy Judge Michael E. Romero (CO) chaired the meeting.

Please direct all inquiries regarding Core Proceedings to Daniel A. Hawtof at (202) 502-1925; Daniel_Hawtof@ao.uscourts.gov

5-A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: PROPOSED MORTGAGE FORMS TO IMPLEMENT PROPOSED AMENDMENTS TO RULE 3001(c) AND NEW RULE 3002.1

DATE: APRIL 6, 2010

A suggestion (08-BK-K) was submitted by Bankruptcy Judges Marvin Isgur (S.D. Tex.), Elizabeth Magner (E.D. La.), and Jeff Bohm (S.D. Tex.) that proposed the adoption of two new official forms relating to home mortgages in chapter 13 cases. One form was an addendum to the proof of claim ("POC") for debts secured by home mortgages, and the other was a mortgage payment change notice. The forms were designed to provide a detailed history of the application of past payments, the assessment of charges, the placement of payments in suspense, and the handling of any escrow account.

The Committee discussed this proposal at the March 2009 meeting and referred it to this Subcommittee for further consideration. At the October 2009 meeting, the Subcommittee reported that it favored the creation of national forms to provide a uniform format for reporting the mortgage information that would be required in chapter 13 cases under proposed Rules 3001(c)(2) and 3002.1. The Subcommittee chair stated that a drafting group had been formed for this purpose and that the Subcommittee would report its proposals at the spring 2010 meeting. The Committee expressed its support for this endeavor.

Accompanying this memo are **three new forms the Subcommittee recommends that the Committee propose for publication in August 2010: a Mortgage Proof of Claim**

Attachment; a Notice of Payment Change; and a Notice of Postpetition Fees, Expenses and Charges. The first form would be designated as an attachment to Form 10, and the other two (which would be filed after the initial POC) as supplements to Form 10. This memorandum discusses the content of each form and the issues considered by the Subcommittee in arriving at its recommendation.

Mortgage Proof of Claim Attachment (Form 10, Attachment A)[1]

Proposed amendments to Rule 3001(c) would impose the requirements listed below with respect to claims secured by the debtor's principal residence. Some of these requirements also apply to other types of claims, but proposed Attachment A is directed only to claims secured by a security interest in the debtor's principal residence.

- An itemized statement of interest, fees, expenses, or other charges included in the claim. Form 10 currently directs the filer to attach this itemization, but the proposed rule amendment would incorporate this requirement into Rule 3001 (c)(2)(A).
- A statement of the amount required to cure any default as of the date of the petition. Rule 3001(c)(2)(B). This amendment also would include within the rule a requirement already imposed by Form 10.
- An escrow account statement prepared as of the petition date, if an escrow account has been established. Rule 3001(c)(2)(C).

[1]The agenda materials contain two versions of Attachment A (designated as Alternative 1 and Alternative 2 in the materials). The substance of the two versions is the same, but the format and style are different. The documents were finalized too late for Subcommittee review, so both versions have been included for the Committee's consideration.

The proposed Mortgage Proof of Claim Attachment provides a uniform format for a mortgagee to provide the required information. Section I requests information about the principal and interest due as of the petition date. Section II requests an itemization of prepetition fees, expenses, and charges incurred in connection with the claim. In order to increase the likelihood of full and informative disclosure, the form lists common categories of fees, expenses, and charges, and then provides blanks for "other" types of charges.

Section III requests information about the amount necessary to cure a prepetition default. The Subcommittee made the decision to seek this information in a relatively brief format, as opposed to requiring a full loan history for a period of years as the local form adopted by the Bankruptcy Court for the Southern District of Texas does. The Subcommittee concluded that requiring the mortgagee to state the date it last received a payment from the debtor, the number of installment payments due, and the amount of the installments that are due would provide the debtor with sufficient information to determine whether the amount claimed was consistent with the debtor's records. If there are discrepancies, more detailed information can be sought by means of discovery.

Section III also includes a check box for mortgages that include an escrow deposit in the installment payment amount. It is followed by an instruction to attach the required escrow account statement. In conformity with the requirement of proposed Rule 3001(c)(2)(C) that the escrow account statement be "prepared . . . in a form consistent with applicable nonbankruptcy law," proposed Supplement A does not specify a format for the escrow account statement.

Section III ends with a calculation of the total amount necessary to cure any default as of the petition date. Because this form is an attachment to the proof of claim, a separate signature

line is not included.

Notice of Payment Change (Form 10, Supplement 1)

This form would implement the requirements of proposed new Rule 3002.1(a) and (b). Subdivision (a) would require a mortgagee to provide notice of a payment change in a chapter 13 case no later than 21 days before the new payment amount is due. Subdivision (b) would require the notice to be filed as a supplement to the proof of claim, and it would require the notice to "conform substantially to the form of notice under applicable nonbankruptcy law and the underlying agreement that would be given if the debtor were not a debtor in bankruptcy."

The proposed Notice of Payment Change form provides for the reporting of payment changes of three types: escrow account adjustments (for which an escrow account statement must be attached); mortgage payment adjustments (for which a rate change notice must be attached); and any other payment change, such as one due to a mortgage modification (for which documents describing the basis for the change must be attached). The form is designed to allow the debtor and the trustee to see in a clear format the amount of and reason for a payment change in advance of its effective date and to have access to the supporting documentation.

Notice of Postpetition Fees, Expenses and Charges (Form 10, Supplement 2)

This form implements proposed Rule 3002.1(c), which would require a mortgagee in a chapter 13 case to file a notice of all postpetition fees, expenses, and charges no later than 180 days after they are incurred. The notice is to be filed as a supplement to the proof of claim, and the debtor and trustee may challenge any of the fees, expenses, and charges within a year after the notice is served.

The proposed form includes a listing of categories of fees, expenses, and charges that is

similar, but not identical, to the one included in the proposed Mortgage Proof of Claim Attachment form. Also included in the form is a brief statement concerning the right of a debtor or trustee to seek a determination regarding whether a listed fee, expense, or charge is required to be made. This statement provides notice to the mortgagee of the possibility of a challenge and a reminder to the debtor and the trustee of their right to seek such a determination.

For the sake of clarity, the form states that escrow account disbursements are not to be listed, nor any amounts included in a prior notice filed in the case or previously ruled on by the bankruptcy court.

If the Committee forwards these proposed forms to the Standing Committee and it approves them for publication in August 2010, they would be on track to take effect in December 2011. That date is the same as the effective date of the proposed rule amendments the forms would be implementing.

Name of Creditor:_____ Last four digits of any number by which creditor identifies debtor's account: _____

MORTGAGE PROOF OF CLAIM ATTACHMENT

This form must be filed by the holder of a claim secured by a security interest in the debtor's principal residence as an attachment to the proof of claim. *See* Bankruptcy Rule 3001(c)(2).

I. Statement of Principal and Interest Due as of Petition Date

Itemize principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your proof of claim).

A. Principal due as of petition date: $ _____

B. Interest due as of petition date:

Interest at _____% from _____, [date] to _____, [date] $ _____
Interest at _____% from _____, [date] to _____, [date] $ _____
Interest at _____% from _____, [date] to _____, [date] $ _____

Total interest due as of the petition date: $ _____

Total of Principal and Interest Due as of Petition Date. Add A and B and enter result here. $

II. Statement of Prepetition Fees, Expenses and Charges

Itemize fees, expenses and charges incurred in connection with the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the proof of claim).

Description	*Date(s) Incurred*	*Amount*
Late Charges		$
Non-Sufficient Funds (NSF) Fees		$
Attorney Fees		$
Filing Fees and Court Costs		$
Advertisement Costs		$
Sheriff/Auctioneer Fees		$
Title Costs		$
Recording Fees		$
Appraisal/Broker's Price Opinion Fees		$
Property Inspection Fees		$
Tax Advances (non-escrow)		$
Insurance Advances (non-escrow)		$
Escrow Shortage or Deficiency (not		$

Description	*Date(s) Incurred*	*Amount*
included in payments due)		
Property Preservation Expenses *(specify)*:		$
Other *(specify)*:		$
Other *(specify)*:		$
Other *(specify)*:		$

Total of Prepetition Fees, Expenses and Charges. Add all amounts listed in above itemization and enter result here and in Item III(B) below. **$**

III. Statement of Amount Necessary to Cure Default as of Petition Date

☐ Check this box if the installment payment amount includes an escrow deposit. If so, attach to the proof of claim an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

A. Installment Payments Due as of Petition Date:

Date last payment received by creditor: _____

Number of installment payments due: _____

Amount of installment payments due:

_____ **installments @ $** _____
_____ **installments @ $** _____
_____ **installments @ $** _____

Total of Installment Payments Due: **$** _____

B. Total of Prepetition Fees, Expenses and Charges (from Item II above): **$** _____

C. Total of Unapplied Funds (funds paid but not credited to account): **$ (**_____**)**

Total Amount Necessary to Cure Default as of Petition Date. Add A and B, subtract C, and enter the result here and in Item 4 on Proof of Claim. **$**

Name of Creditor: _____ Last four digits of any number by which creditor identifies debtor's account: _____

MORTGAGE PROOF OF CLAIM ATTACHMENT

This form must be filed by the holder of a claim secured by a security interest in the debtor's principal residence as an attachment to the proof of claim. *See* Bankruptcy Rule 3001(c)(2).

I. Statement of Principal and Interest Due as of Petition Date

Itemize principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your proof of claim).

A.	**Principal due as of petition date.**	$
B.	**Interest due as of petition date.**	

Interest rate	From (mm/dd/yyyy)	To (mm/dd/yyyy)	
%			$
%			$
%			$

	Total interest due as of the petition date. Add amounts listed above and enter result here.	$
C.	**Total of Principal and Interest Due as of the Petition Date.** Add A and B and enter the result here.	$

II. Statement of Prepetition Fees, Expenses and Charges

Itemize fees, expenses and charges incurred in connection with the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the proof of claim).

Description	*Date(s) Incurred*	*Amount*
Late Charges		$
Non-Sufficient Funds (NSF) Fees		$
Attorney Fees		$
Filing Fees and Court Costs		$
Advertisement Costs		$
Sheriff/Auctioneer Fees		$
Title Costs		$
Recording Fees		$
Appraisal/Broker's Price Opinion Fees		$
Property Inspection Fees		$
Tax Advances (non-escrow)		$
Insurance Advances (non-escrow)		$
Escrow Shortage or Deficiency (not included in payments due)		$
Property Preservation Expenses *(specify)*		$

II. Statement of Prepetition Fees, Expenses and Charges (cont'd)

Itemize fees, expenses and charges incurred in connection with the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the proof of claim).

Description	*Date(s) Incurred*	*Amount*
Other *(specify)*		$
Other *(specify)*		$
Other *(specify)*		$
Total of Prepetition Fees, Expenses and Charges. Add all amounts listed in above itemization and enter result here **and** in Item III(B) below.		$

III. Statement of Amount Necessary to Cure Default as of Petition Date

☐ Check this box if the installment payment amount includes an escrow deposit. If so, attach to the proof of claim an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

A.	**Installment Payments Due as of Petition Date.**			
	Date last payment received by creditor.			
	Number of installment payments due.			
	Amount of installment payments due.			
		_____installments @	$	
		_____installments @	$	
		_____installments @	$	
	Total of Installment Payments Due. Add all installment amounts listed above and enter result here.			$
B.	**Total of Prepetition Fees, Expenses and Charges** (from Item II above).			$
C.	**Total of Unapplied Funds** (funds paid but not credited to account).			$ ( )
D.	**Total Amount Necessary to Cure Default as of Petition Date.** Add A and B, subtract C, and enter the result here and in Item 4 on Proof of Claim.			$

United States Bankruptcy Court

_____ District of _____

In re _____,
Debtor

Case No. _____
Chapter _____

NOTICE OF PAYMENT CHANGE

This form must be filed by the holder of a claim secured by a security interest in the debtor's principal residence to provide notice of any change in the installment payment amount for a claim provided for under the debtor's plan pursuant to 11 U.S.C. § 1322(b)(5). It must be filed as a supplement to the creditor's proof of claim at least 21 days before the new payment amount is due. ***See*** **Bankruptcy Rule 3002.1.**

Name of Creditor: _____ Court Claim No. (if known): _____

Last four digits of any number by which creditor identifies debtor's account: _____

DATE OF PAYMENT CHANGE: _____
(effective date must be at least 21 days after date of this notice)

NEW TOTAL PAYMENT: $ _____
(principal, interest and escrow, if any)

I. ESCROW ACCOUNT PAYMENT ADJUSTMENT

☐ Check this box if there will be a change in the debtor's escrow account payment.

Attach a copy of the escrow account statement, prepared pursuant to applicable nonbankruptcy law, describing the basis for the change.

If not attached, explain why:

_____.

Current Escrow Payment: $ _____

New Escrow Payment: $ _____

II. MORTGAGE PAYMENT ADJUSTMENT

☐ Check this box if the debtor has a variable-rate mortgage and there will be a change in the debtor's principal and interest payment based on an adjustment to the interest rate.

Attach a copy of the rate change notice, prepared pursuant to applicable nonbankruptcy law, describing the basis for the change.
If not attached, explain why:

_____.

Current Interest Rate: _____%

Current Principal and Interest Payment: $ _____

New Interest Rate: _____%

New Principal and Interest Payment: $ _____

III. OTHER PAYMENT CHANGE

☐ Check this box if there will be a change in the debtor's mortgage payment for a reason not listed above.
State reason for change: _____

Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect*).

Current Mortgage Payment: $ _____

New Mortgage Payment: $ _____

The person completing this Notice must sign it. Sign and print the name and title, if any, of the creditor or other person authorized to file this Notice and state the address and telephone number if different from the notice address listed on the creditor's proof of claim.

Print Name: _____

Company: _____

Title: _____

Address: _____
_____
_____

Phone: _____

Email: _____

_____
(Signature)

_____
(Date)

United States Bankruptcy Court

_____ District of _____

In re _____,
Debtor

Case No. _____
Chapter _____

NOTICE OF POSTPETITION FEES, EXPENSES AND CHARGES

This form must be filed by the holder of a claim secured by a security interest in the debtor's principal residence to provide notice of any postpetition fees, expenses and charges which the holder asserts are recoverable against the debtor or against the debtor's principal residence. It must be filed as a supplement to the creditor's proof of claim. *See* Bankruptcy Rule 3002.1.

Name of Creditor: _____ Court Claim No. (if known): _____

Last four digits of any number by which creditor identifies debtor's account: _____

☐ Check this box if this notice supplements a prior notice of postpetition fees, expenses, and charges. If so, state the date of the last such notice.

_____
(date of last notice)

Itemization of Postpetition Fees, Expenses and Charges

Itemize fees, expenses and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	*Date(s) Incurred*	*Amount*
Late Charges		$
Non-Sufficient Funds (NSF) Fees		$
Attorney Fees		$
Filing Fees and Court Costs		$
Bankruptcy/Proof of Claim Fees		$
Appraisal/Broker's Price Opinion Fees		$
Property Inspection Fees		$
Tax Advances (non-escrow)		$
Insurance Advances (non-escrow)		$

Description	***Date(s) Incurred***	***Amount***
Property Preservation Expenses *(specify)*:		$
Other *(specify)*:		$
Other *(specify)*:		$
Other *(specify)*:		$
Other *(specify)*:		$

A debtor or trustee may timely seek a determination of whether payment of the postpetition fees, expenses, or charges listed above is required. *See* 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

The person completing this notice must sign it. Sign and print the name and title, if any, of the creditor or other person authorized to file this notice and state the address and telephone number if different from the notice address listed on the creditor's proof of claim.

Print Name: _____

Company: _____

Title: _____

Address: _____
_____
_____

Phone: _____

Email: _____

_____
(Signature)

_____
(Date)

5-B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: PROPOSED AMENDMENTS TO OFFICIAL FORM 10

DATE: APRIL 6, 2010

At the fall 2009 meeting in Boston, the Advisory Committee discussed possible amendments to the proof of claim form (Official Form 10) that were proposed by this Subcommittee and the Subcommittee on Consumer Issues. The Committee approved this Subcommittee's recommendation concerning the interest rate information in Item 4 of the form. The amendment consists of adding "(at time case filed)" under "Annual Interest Rate _____%" and adding check boxes to indicate whether that rate is fixed or variable. Additional suggestions for amendments to Form 10 were discussed at the Committee meeting and referred to the Subcommittee for further consideration and the presentation of a recommendation at this meeting.[1]

The matters that were referred to the Subcommittee relate to the following: (1) the wording of a creditor declaration in the date and signature block; (2) the statement in Item 7 about the attachment of a summary of any documents that support the claim; and (3) ambiguity in

[1] At the spring 2009 meeting, the Committee approved a proposed amendment to Item 7 of Form 10 regarding Documents. That change, intended to implement a proposed amendment to Rule 3001(c)(1), states: "If the claim is based on an open end or revolving consumer credit agreement, you must attach a redacted copy of the last account statement sent to the debtor prior to the filing of the bankruptcy petition." That proposed amendment to the form remains in the bull pen, but due to the Consumer Subcommittee's recommendation that the proposed amendment to Rule 3001(c)(1) be withdrawn, the approved language does not appear in the attached mock-up of Form 10.

the references to "your claim" throughout the form. After the fall 2009 meeting, three suggestions relating to Form 10 were also referred to the Subcommittee. They relate to the addition of spaces on the form for a date-stamp and for a uniform claim identifier and the placement of greater emphasis on the need to redact attached documents. All of these issues are discussed below.

Creditor Declaration

The Consumer Subcommittee initially recommended that the following declaration be added to the date and signature block of Form 10: "By signing, the person filing the claim declares under penalty of perjury the information provided above is true and correct." During discussion of this proposal at the fall meeting, questions were raised about whether the declaration imposed too high a standard on the creditor. Support was expressed for allowing the statement to be made "upon information and belief" or "after reasonable inquiry." Another issue raised was whether the declaration should be in the name of someone other than the person filing the claim, such as "the person on whose behalf this claim is filed."

Upon referral to this Subcommittee, the matter was carefully considered. The Subcommittee concluded that a declaration similar to ones used in other forms is appropriate for a proof of claim. *See, e.g.,* Official Form 2 – Declaration Under Penalty of Perjury on Behalf of a Corporation ("it is true and correct to the best of my information and belief"); Official Form 6 – Declaration Concerning Debtor's Schedules ("they are true and correct to the best of my knowledge, information, and belief"). Because some concerns were raised that the person filing a proof of claim might later assert total reliance on someone else regarding the validity of the information, the Subcommittee concluded that the declarant should be held to a standard of

reasonableness. **The Subcommittee therefore recommends that the following declaration be added to the signature block of Form 10: "I declare under penalty of perjury that the information provided above is true and correct to the best of my knowledge, information, and reasonable belief."**

The issue of who should make the declaration was also raised. At the fall meeting, some Committee members noted that the person filing the claim on behalf of a creditor may be a lawyer or a low-level company employee with relatively little direct knowledge of the creditor's accounts. That prompted the suggestion of requiring the certification to be made by "the person on whose behalf this claim is filed," although another member responded that the person actually filing the proof of claim should be required to engage in a reasonable inquiry before doing so. Another issue raised was whether the declaration should be made by a "person" (including a corporation) or an "individual."

Currently the signature provision of Form 10 applies to the "person filing this claim." That is who must sign it, yet it also requires the filer to "sign and print the name and title, if any, of the creditor or other person authorized to file this claim." According to Rule 3001(b), a proof of claim "shall be executed by the creditor or the creditor's authorized agent."

The Subcommittee concluded that a real, live person should have to take responsibility for assuring the accuracy of a proof of claim. **Thus it recommends requiring the signature of an individual – either the creditor or other individual entitled to file a proof of claim or the creditor's authorized agent.** To simplify the wording of the date and signature box, the Subcommittee recommends that check boxes be added to designate the role of the individual signing the form – creditor; authorized agent; trustee or debtor; or guarantor, surety, indorser, or

other codebtor. The Subcommittee further recommends that the instruction for Item 8 state that the form must be signed by an individual and that it emphasize the significance of the signature as a declaration. Finally, the Subcommittee recommends that the instructions state that when a proof of claim is filed by a servicing agent for a creditor, both the name of the individual filing the claim and the name of the servicing agent be provided. The name of the individual filing the claim will be indicated in the signature block beside "Print name," and the name of the servicing agent will be listed in the signature block beside "Company." (The name of the creditor will be listed at the top of page 1 of the form.)

All of the recommended amendments to Item 8 and to the related instructions are highlighted on the attached mock-up of Form 10.

The Use of a Summary of the Writings Supporting a Claim

Rule 3001(c) requires that when a claim is based on a writing, "the original or a duplicate shall be filed with the proof of claim." If it has been lost or destroyed, an explanation must be filed with the claim. The current version of Form 10 instructs the filer in Item 7 to attach "redacted copies of any documents that support the claim." It goes on to state: "You may also attach a summary." The meaning of the second sentence is not clear. It could either mean "you also have permission to attach a summary, rather than the documents themselves" or "you may also attach a summary in addition to the supporting documents." The first meaning is not consistent with the Rule 3001(c); the second one is.

During discussion of this issue at the fall Committee meeting, the sense of the Committee was that the supporting documents should be attached to the proof of claim, as Rule 3001(c) requires, and that in addition a summary may be provided if the creditor believes it would be

useful to do so. In referring this matter to the Subcommittee, the chair asked it to consider whether an exception allowing the filing of only a summary should be created for the situation in which the supporting documents are voluminous and, if so, how that exceptional circumstance should be defined.

The Subcommittee recommends that Form 10 be amended to conform to Rule 3001(c) and that the submission of a summary not be permitted in lieu of attaching the supporting documents themselves. It does not appear that there is any technological barrier to filing lengthy documents under the current CM/ECF system. Furthermore, the Subcommittee concluded that because a proof of claim executed and filed in accordance with the rules constitutes prima facie evidence of the validity of the claim, it is appropriate to require the submission of supporting documentation. Omission of the ambiguous statement about the attachment of summaries will also eliminate disputes over what constitutes an adequate summary.

As shown on the attached Form 10, the Subcommittee recommends amending Item 7 to require the attachment of redacted copies of documents that support the claim or that provide evidence of the perfection of any security interests and to eliminate any reference to summaries. It is further recommended that the instructions for this part of the form be amended to provide that a summary may also be attached in addition to redacted copies of the document.

Proposed Wording Changes in the Form

The Consumer Subcommittee previously pointed out that an inconsistency exists in the current form with respect to the meaning of "your." In most places "your" refers to the creditor. But a proof of claim may be filed by a debtor or trustee, and there is a check box to indicate such

a filing. When someone other than the creditor files the proof of claim, the references to "your claim" are inaccurate.

The Subcommittee concluded that this issue can be resolved fairly easily by eliminating the word "your" before "claim" and substituting "the" or "this." **The Subcommittee recommends that Form 10 be amended in this manner, as indicated on the attached mock-up of the form.**

Amendments in Response to Suggestions

Three suggestions have been submitted regarding Form 10, and the Subcommittee recommends that amendments be made to the form in response to each of these suggestions.

The first suggestion (09-BK-K) is the one submitted by George Stevenson, which proposes that Form 10 be amended to provide space for a uniform claim identifier. Discussion of this suggestion is included as agenda item 4(D). In response to the Consumer Subcommittee's endorsement of this suggestion and the referral of the matter to this Subcommittee, **the Forms Subcommittee recommends that Form 10 be amended to add space for this optional information as Item 3b and that instructions be provided regarding this item as indicated on the attached form.**

The second suggestion (10-BK-B) was submitted by Rena Myers, case administrator in the Bankruptcy Court for the Eastern District of Tennessee. She suggested that there is a need for more space on the form to allow for a legible date-stamp. **The Subcommittee recommends that Form 10 be modified as indicated on the attachment to provide such space in the top right-hand corner.**

The final suggestion (10-BK-C) was submitted by Therese Buthod, clerk of court for the

Bankruptcy Court for the Eastern District of Oklahoma. She noted that filers often fail to redact personal identifier information from documents attached to proofs of claim. She suggested that the need to redact documents be emphasized in Item 7 of Form 10. **The Subcommittee agreed with this suggestion and recommends that the word "redacted" be written in bold type in Item 7 and that the reference to the instructions for this item and to the definition of "redacted" be moved to a more prominent position just following the statement in Item 7.**

As a result of the proposed changes, Official Form 10 would expand to three pages. Accordingly, references to instructions on the "reverse side" would need to be changed. **The Subcommittee recommends that the references be amended to specify the page (2 or 3) on which the appropriate instruction appears.**

B 10 (Official Form 10) (12/11)

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):		COURT USE ONLY
Name and address where notices should be sent: Telephone number:		❒ Check this box if 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 this 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 Date Case Filed: $_____

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

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

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

2. Basis for Claim: _____

(See instruction #2 on page 2)

3. Last four digits of any number by which creditor identifies debtor:	**3a. Debtor may have scheduled account as:** _____ (See instruction #3a on page 2)	**3b. Uniform Claim Identifier (optional):** (See instruction #3b on page 2)

4. Secured Claim (See instruction #4 on page 2)
Check the appropriate box if the 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 ❒Other
Describe:

Value of Property:$_____

Annual Interest Rate_____**%** ❒Fixed or ❒Variable
(at time case filed)

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

$_____

Basis for perfection: _____

Amount of Secured Claim: $_____

Amount Unsecured: $_____

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

❒ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

Amount entitled to priority:

$_____

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11U.S.C. §507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

**Amounts are subject to adjustment on 4/1/13 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. See instruction #6 on page 2

7. **Documents:** Redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements are attached. If the claim is secured, box 4 has been completed and redacted copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7 on page 2, and the definition of "redacted" on page 3.)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8 on page 2.)

Check the appropriate box.

☐ I am the creditor. ☐ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ☐ I am the trustee, or the debtor. (See Bankruptcy Rule 3004.) ☐ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided above is true and correct to the best of my knowledge, information and reasonable belief.

Print Name:
Title:
Company:
Address and telephone number (if different from notice address above):

(Signature) (Date)

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 Date 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. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if the trustee or another party in interest files an objection to the claim.

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.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, it should be reported in this space. A uniform claim identifier is an optional 24 character identifier used by certain large creditors to facilitate electronic payment in Chapter 13 cases.

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, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).
If any portion of the 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:
You must attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on the delivery of health care goods or services, see instruction 2. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. If the claim is filed electronically, it must be signed under penalty of perjury, that the information provided is true and correct to the best of the declarant's knowledge, information and reasonable belief. Whether the claim is filed electronically or in person, the declarant's name appears in the signature line is responsible for the declaration. 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. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of his or her employer or agency. Attach a power of attorney, if any. If the claim is filed by a guarantor, surety, indorser, or other codebtor, identify the debtor. If the claim is filed by a trustee, debtor, or their authorized agent, identify the corporate servicer as the company. 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 a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. §101 (10)

Claim
A claim is the creditor's right to receive payment on a debt owed by the debtor that arose on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). 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 to 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 and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection
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.

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 FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

The form is amended in several respects. A new section – 3b – is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Check boxes for indicating whether the interest rate is fixed or variable are also added.

Section 7 of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8 – the date and signature box – is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided "is true and correct to the best of my knowledge, information and reasonable belief." That individual must also provide identifying information – name, title, company, address, and telephone number (if not already provided) – and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are made to the form and instructions.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: REVISION OF FORM 240A AND ADDITION OF INSTRUCTIONS

DATE: FEBRUARY 14, 2010

At its fall 2009 meeting, the Advisory Committee considered a revised reaffirmation agreement form (Director's Form 240A) and recommended that the Director promulgate it and post it on the internet, while continuing to post the older version for a six-month transition period. After the posting of the new form in December, the Administrative Office ("AO") began to receive directly and indirectly some expressions of concern from creditors' attorneys regarding the newly revised form.[1] The comments focused primarily on the differences in wording of the revised form from the language of § 524(k). They suggested that the changed language and organization could render unenforceable any agreements that utilize the new form. One of the attorneys, Bradley Halberstadt, also raised some concerns about provisions of the revised form that he believes are inconsistent with the substantive requirements of § 524(k).

Because Mr. Halberstadt requested the immediate correction or withdrawal of revised Form 240A, a group consisting of Judge Swain, Judge Perris, Mr. Rabiej, Mr. Wannamaker, Mr. Myers, and the reporter conferred on January 4, 2010, regarding what action, if any, should be taken in response. This group concluded that the comments did not raise issues sufficiently

[1] The comments that were submitted directly to the AO are posted on the suggestions page of the website. *See* Suggestion 09-BK-L (suggestion of Bradley Halberstadt) and Suggestion 10-BK-A (suggestion of Richardo I. Kilpatrick). http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm .

serious to require any immediate action, but that the comments should be referred to the Forms Subcommittee for consideration during its January 13 conference call.

During that conference call, the Subcommittee engaged in a lengthy discussion of the concerns that had been raised about the revised form, both regarding its departure from statutory language and organization and the contentions that the new form was inconsistent with certain substantive requirements of § 524(k). The Subcommittee reaffirmed its prior conclusion that § 524(k)(2) allows form drafters flexibility in wording and organization of the mandated disclosures. That provision authorizes the disclosures to be made "in a different order and . . . [to] use terminology different from that set forth in paragraphs (2) through (8)," with the exception of two terms – "Amount Reaffirmed" and "Annual Percentage Rate" – whose use is required. Because paragraphs (2) through (8) comprise all of the statutory disclosure requirements – including language that is contained in quotation marks – the Subcommittee again concluded that no particular language, other than the two specified terms, is statutorily mandated.

The Subcommittee did conclude that in order to ensure compliance with the substance of § 524(k) and (m), additional revisions to Form 240A should be made with respect to the following:

- the specification of fees and costs included in the amount reaffirmed,
- description of the repayment terms, and
- information about the effective date of agreements for which there is a presumption of undue hardship.

The Subcommittee also discussed ways of communicating to courts and parties the purpose and

authority for the revisions.

Following the January 13 conference call, a drafting group prepared a revision of the new Form 240A that addresses the three substantive issues noted above and makes some additional stylistic and format changes. The group also drafted a set of instructions to accompany the form. The revised draft and instructions were thoroughly discussed during the Subcommittee's February 8 conference call and were approved with some minor additional changes. They are being circulated to the Advisory Committee with this memorandum.

Overview of the Newly Revised Form and Instructions

Amount Reaffirmed. Part I.2. of the Reaffirmation Agreement and the definition in Part V.C.1. previously explained the Amount Reaffirmed as including any unpaid fees and costs "arising on or before the date you sign this Reaffirmation Agreement." Section 524(k)(3)(C)(ii), by contrast, refers to such fees and costs "accrued as of the date of the disclosure statement." Because the date of the disclosure statement may differ from the date the reaffirmation agreement is signed by the debtor, the Subcommittee agreed with the comment that these provisions of the originally revised form might be inconsistent with the Code.

The newly revised form responds to this concern by modifying the explanation about the Amount Reaffirmed in Part I to include a space for a date that is the termination point for the accrual of fees and costs. The date to be inserted is specified as "the date of the Disclosure Statement portion of this form (Part V)." A corresponding change was made to the definition of "Amount Reaffirmed" in Part V, Section C.

Repayment Terms. The portion of the form that requires information about the Reaffirmation Agreement Repayment Terms (Part I, Section D) was revised to eliminate

restrictions on the description option that may be used. The Subcommittee was concerned about two potential problems resulting from the revised form's original wording in this section.[2] First, fixed term loans with variable interest rates were not covered by either option. Second, neither choice included the option in § 524(k)(3)(H)(I) of stating the amount of the first payment and when it is due, and then indicating that "the future payment amount may be different." In order to address these concerns, the phrases "If fixed term" and "If not fixed term" were omitted, thereby allowing either option to be used regardless of the type of loan. In addition, the second option now requires disclosure of whether future payment amounts may be different from the initial payment. The Subcommittee concluded that the proposed wording now complies with the requirements of § 524(k)(3)(H).

Effective Date. Item 6 a.i. of the Disclosure Statement (Part V, Section A) previously stated that the "reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship *in which case the agreement becomes effective only after the court approves it*" (emphasis added). The italicized clause provoked two concerns. First, the Code does not affirmatively require approval of agreements for which a presumption of undue hardship arises, but instead it just requires court review of such agreements and provides for the possibility of court disapproval after notice and hearing if the court determines that the presumption has not been rebutted. Second, the Code does not specify when such an agreement becomes effective.

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[2] As posted in December 2009, Part I. 4 provided two options for describing the repayment terms of the reaffirmation agreement:
☐ If fixed term, $_____ per month for _____ months starting on _____.
☐ If not fixed term, describe repayment terms: _____.

In response to these concerns, the Subcommittee revised this part of the Disclosure Statement to eliminate the statement about the effective date of an agreement that is presumed to be an undue hardship. Instead the disclosure now indicates, consistent with § 524(k)(3)(J)(I), that the court will have to review the agreement and may hold a hearing to determine if the presumption has been rebutted. Because § 524 does not state when such an agreement takes effect, the proposed revised form takes no position on that issue.

Instructions. The format of the instructions that accompany the form is modeled on ones accompanying many official forms (such as Form 17) and director's forms (such as Form 203). This document sets out the purpose of the form, the legal authority governing reaffirmation agreements, and the reasons for the revision, as well as basic directions for completing the form. These instructions provide an opportunity to explain the authority under § 524(k)(2) for using a different order and language from that set out in the statute. They also emphasize that the form is not appropriate for attachment to a stand-alone reaffirmation agreement and that the Code authorizes parties to use their own agreement. In order to provide a uniform set of disclosures for separate reaffirmation agreements, the original Form 240A, which will be re-labeled as Form 240A/B(alt), will remain on the website indefinitely. If attached to a separate reaffirmation agreement, Form 240A/B(alt) will provide the disclosures required by § 524(k).

Format and Appearance

At Peter McCabe's suggestion, the proposed form and instructions were given to our forms consultant – Carolyn Bagin – for her comments. She made a number of suggestions about how the form might be reformatted and worded differently to make it easier to read and understand. The Subcommittee, however, concluded that because revised Form 240A has

already been issued, additional revisions at this stage should be kept to a minimum. A modest number of her suggestions were incorporated, however, when it was determined that they would improve the form without changing its overall appearance.

The instructions, however, do incorporate most of Ms. Bagin's format suggestions. Because this document is new and is not connected to any statutory mandates, the Subcommittee concluded that it had more freedom with respect to its appearance.

Check one.
☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
See Debtor's Statement in Support of Reaffirmation, Part II below, to determine which box to check.

UNITED STATES BANKRUPTCY COURT

In re _____, *Debtor*

Case No. _____

Chapter _____

REAFFIRMATION DOCUMENTS

Name of Creditor: _____

☐ Check this box if Creditor is a Credit Union

PART I. REAFFIRMATION AGREEMENT

Reaffirming a debt is a serious financial decision. Before entering into this Reaffirmation Agreement, you must review the important disclosures, instructions, and definitions found in Part V of this form.

A. Brief description of the original agreement being reaffirmed: _____
For example, auto loan

B. ***AMOUNT REAFFIRMED***: $_____

The Amount Reaffirmed is the entire amount that you are agreeing to pay. This may include unpaid principal, interest, and fees and costs (if any) arising on or before _____, which is the date of the Disclosure Statement portion of this form (Part V).

See the definition of "Amount Reaffirmed" in Part V, Section C below.

C. The ***ANNUAL PERCENTAGE RATE*** applicable to the Amount Reaffirmed is _____%.

See definition of "Annual Percentage Rate" in Part V, Section C below.

This is a *(check one)* ☐ Fixed rate ☐ Variable rate

If the loan has a variable rate, the future interest rate may increase or decrease from the Annual Percentage Rate disclosed here.

D. Reaffirmation Agreement Repayment Terms *(check and complete one)*:

☐ $_____ per month for _____ months starting on_____.

☐ Describe repayment terms, including whether future payment amount(s) may be different from the initial payment amount.

E. Describe the collateral, if any, securing the debt:

Description: _____
Current Market Value $_____

F. Did the debt that is being reaffirmed arise from the purchase of the collateral described above?

☐ Yes. What was the purchase price for the collateral? $_____

☐ No. What was the amount of the original loan? $_____

G. Specify the changes made by this Reaffirmation Agreement to the most recent credit terms on the reaffirmed debt and any related agreement:

	Terms as of the Date of Bankruptcy	Terms After Reaffirmation
Balance due *(including fees and costs)*	$_____	$_____
Annual Percentage Rate	_____%	_____%
Monthly Payment	$_____	$_____

H. ☐ Check this box if the creditor is agreeing to provide you with additional future credit in connection with this Reaffirmation Agreement. Describe the credit limit, the Annual Percentage Rate that applies to future credit and any other terms on future purchases and advances using such credit:

PART II. DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

A. Were you represented by an attorney during the course of negotiating this agreement?

Check one. ☐ Yes ☐ No

B. Is the creditor a credit union?

Check one. ☐ Yes ☐ No

C. If your answer to EITHER question A. or B. above is "No," complete 1. and 2. below.

1. Your present monthly income and expenses are:

   a. Monthly income from all sources after payroll deductions (take-home pay plus any other income) $_____

   b. Monthly expenses (including all reaffirmed debts except this one) $_____

   c. Amount available to pay this reaffirmed debt (subtract b. from a.) $_____

   d. Amount of monthly payment required for this reaffirmed debt $_____

   If the monthly payment on this reaffirmed debt (line d.) ***is greater than*** *the amount you have available to pay this reaffirmed debt (line c.), you must check the box at the top of page one that says "Presumption of Undue Hardship." Otherwise, you must check the box at the top of page one that says "No Presumption of Undue Hardship."*

2. You believe that this reaffirmation agreement will not impose an undue hardship on you or your dependents because:

   Check one of the two statements below, if applicable:

   ☐ You can afford to make the payments on the reaffirmed debt because your monthly income is greater than your monthly expenses even after you include in your expenses the monthly payments on all debts you are reaffirming, including this one.

   ☐ You can afford to make the payments on the reaffirmed debt even though your monthly income is less than your monthly expenses after you include in your expenses the monthly payments on all debts you are reaffirming, including this one, because:

   Use an additional page if needed for a full explanation.

D. If your answers to BOTH questions A. and B. above were "Yes," check the following statement, if applicable:

☐ You believe this Reaffirmation Agreement is in your financial interest and you can afford to make the payments on the reaffirmed debt.

Also, check the box at the top of page one that says "No Presumption of Undue Hardship."

PART III. CERTIFICATION BY DEBTOR(S) AND SIGNATURES OF PARTIES

I hereby certify that:

(1) I agree to reaffirm the debt described above.

(2) Before signing this Reaffirmation Agreement, I read the terms disclosed in this Reaffirmation Agreement (Part I) and the Disclosure Statement, Instructions and Definitions included in Part V below;

(3) The Debtor's Statement in Support of Reaffirmation Agreement (Part II above) is true and complete;

(4) I am entering into this agreement voluntarily and am fully informed of my rights and responsibilities; and

(5) I have received a copy of this completed and signed Reaffirmation Documents form.

SIGNATURE(S) (If this is a joint Reaffirmation Agreement, both debtors must sign.):

Date _____ Signature _____
Debtor

Date _____ Signature _____
Joint Debtor, if any

Reaffirmation Agreement Terms Accepted by Creditor:

Creditor _____ _____
Print Name *Address*

_____ _____ _____
Print Name of Representative *Signature* *Date*

PART IV. CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY)

To be filed only if the attorney represented the debtor during the course of negotiating this agreement.

I hereby certify that: (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Check box, if the presumption of undue hardship box is checked on page 1 and the creditor is not a Credit Union.

Date _____ Signature of Debtor's Attorney_____

Print Name of Debtor's Attorney _____

PART V. DISCLOSURE STATEMENT AND INSTRUCTIONS TO DEBTOR(S)

Before agreeing to reaffirm a debt, review the terms disclosed in the Reaffirmation Agreement (Part I above) and these additional important disclosures and instructions.

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps, which are detailed in the Instructions provided in Part V, Section B below, are not completed, the Reaffirmation Agreement is not effective, even though you have signed it.

A. DISCLOSURE STATEMENT

1. **What are your obligations if you reaffirm a debt?** A reaffirmed debt remains your personal legal obligation to pay. Your reaffirmed debt is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Your obligations will be determined by the Reaffirmation Agreement, which may have changed the terms of the original agreement. If you are reaffirming an open end credit agreement, that agreement or applicable law may permit the creditor to change the terms of that agreement in the future under certain conditions.

2. **Are you required to enter into a reaffirmation agreement by any law?** No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments that you agree to make.

3. **What if your creditor has a security interest or lien?** Your bankruptcy discharge does not eliminate any lien on your property. A "lien" is often referred to as a security interest, deed of trust, mortgage, or security deed. The property subject to a lien is often referred to as collateral. Even if you do not reaffirm and your personal liability on the debt is discharged, your creditor may still have a right under the lien to take the collateral if you do not pay or default on the debt. If the collateral is personal property that is exempt or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the collateral, as the parties agree or the court determines.

4. **How soon do you need to enter into and file a reaffirmation agreement?** If you decide to enter into a reaffirmation agreement, you must do so before you receive your discharge. After you have entered into a reaffirmation agreement and all parts of this form that require a signature have been signed, either you or the creditor should file it as soon as possible. The signed agreement must be filed with the court no later than 60 days after the first date set for the meeting of creditors, so that the court will have time to schedule a hearing to approve the agreement if approval is required. However, the court may extend the time for filing, even after the 60-day period has ended.

5. **Can you cancel the agreement?** You may rescind (cancel) your Reaffirmation Agreement at any time before the bankruptcy court enters your discharge, or during the 60-day period that begins on the date your Reaffirmation Agreement is filed with the court, whichever occurs later. To rescind (cancel) your Reaffirmation Agreement, you must notify the creditor that your Reaffirmation Agreement is rescinded (or canceled). Remember that you can rescind the agreement, even if the court approves it, as long as you rescind within the time allowed.

6. **When will this Reaffirmation Agreement be effective?**

a. **If you *were* represented by an attorney during the negotiation of your Reaffirmation Agreement and**

i. **if the creditor is not a Credit Union**, your Reaffirmation Agreement becomes effective when it is filed with the court unless the reaffirmation is presumed to be an undue hardship. If the Reaffirmation Agreement is presumed to be an undue hardship, the court must review it and may set a hearing to determine whether you have rebutted the presumption of undue hardship.

ii. **if the creditor is a Credit Union**, your Reaffirmation Agreement becomes effective when it is filed with the court.

b. **If you *were not* represented by an attorney during the negotiation of your Reaffirmation Agreement**, the Reaffirmation Agreement will not be effective unless the court approves it. To have the court approve your agreement, you must file a motion. See Instruction 5, below. The court will notify you and the creditor of the hearing on your Reaffirmation Agreement. You must attend this hearing, at which time the judge will review your Reaffirmation Agreement. If the judge decides that the Reaffirmation Agreement is in your best interest, the agreement will be approved and will become effective. However, if your Reaffirmation Agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home, you do not need to file a motion or get court approval of your Reaffirmation Agreement.

7. **What if you have questions about what a creditor can do?** If you have questions about reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement. If you do not have an attorney helping you, you may ask the judge to explain the effect of this agreement to you at the hearing to approve the Reaffirmation Agreement. When this disclosure refers to what a creditor "may" do, it is not giving any creditor permission to do anything. The word "may" is used to tell you what might occur if the law permits the creditor to take the action.

B. INSTRUCTIONS

1. Review these Disclosures and carefully consider your decision to reaffirm. If you want to reaffirm, review and complete the information contained in the Reaffirmation Agreement (Part I above). If your case is a joint case, both spouses must sign the agreement if both are reaffirming the debt.

2. Complete the Debtor's Statement in Support of Reaffirmation Agreement (Part II above). Be sure that you can afford to make the payments that you are agreeing to make and that you have received a copy of the Disclosure Statement and a completed and signed Reaffirmation Agreement.

3. If you were represented by an attorney during the negotiation of your Reaffirmation Agreement, your attorney must sign and date the Certification By Debtor's Attorney (Part IV above).

4. You or your creditor must file with the court the original of this Reaffirmation Documents packet and a completed Reaffirmation Agreement Cover Sheet (Official Bankruptcy Form 27).

5. *If you are not represented by an attorney, you must also complete and file with the court a separate document entitled "Motion for Court Approval of Reaffirmation Agreement" unless your Reaffirmation Agreement is for a consumer debt secured by a lien on your real property, such as your home.* You can use Form B240B to do this.

C. DEFINITIONS

1. **"Amount Reaffirmed"** means the total amount of debt that you are agreeing to pay (reaffirm) by entering into this agreement. The total amount of debt includes any unpaid fees and costs that you are agreeing to pay that arose on or before the date of disclosure, which is the date specified in the Reaffirmation Agreement (Part I, Section B above). Your credit agreement may obligate you to pay additional amounts that arise after the date of this disclosure. You should consult your credit agreement to determine whether you are obligated to pay additional amounts that may arise after the date of this disclosure.

2. **"Annual Percentage Rate"** means the interest rate on a loan expressed under the rules required by federal law. The annual percentage rate (as opposed to the "stated interest rate") tells you the full cost of your credit including many of the creditor's fees and charges. You will find the annual percentage rate for your original agreement on the disclosure statement that was given to you when the loan papers were signed or on the monthly statements sent to you for an open end credit account such as a credit card.

3. "**Credit Union**" means a financial institution as defined in 12 U.S.C. § 461(b)(1)(A)(iv). It is owned and controlled by and provides financial services to its members and typically uses words like "Credit Union" or initials like "C.U." or "F.C.U." in its name.

Reaffirmation Documents

Introduction

A debtor in a bankruptcy case may decide to remain legally obligated to pay a debt that would otherwise be discharged in bankruptcy. This is called *reaffirming a debt.* Reaffirming a debt is voluntary; debtors are not required to reaffirm any debt.

The Bankruptcy Code allows debtors to reaffirm debts, but an agreement to reaffirm a debt will be enforceable despite the bankruptcy discharge only if it complies with specific procedures. Director's Form B240A (Reaffirmation Documents) includes the Reaffirmation Agreement, disclosures, and other documents necessary for a debtor to reaffirm a debt.

This form cannot be used with a separate, attached Reaffirmation Agreement because some of the required disclosures are contained in the Reaffirmation Agreement portion of the form, rather than in the Disclosure Statement portion of the form. Because § 524(k)(3)(J)(i) contemplates that a separate Reaffirmation Agreement may be used as long as the proper disclosures have been made, parties should draft their own documents, use Director's Form B240A/B ALT, or use other forms authorized by local courts if they want to use a separate attached Reaffirmation Agreement.

Applicable Law

The reaffirmation of debt is governed by 11 U.S.C. § 524(c), (d), and (k). A Reaffirmation Agreement is enforceable only if it complies with these Bankruptcy Code provisions. 11 U.S.C. § 524(c). For example, any agreement to reaffirm a dischargeable debt must be entered into before the debtor receives a discharge. 11 U.S.C. § 524(c)(1).

In addition, § 524(k) sets out extensive specific and detailed descriptions of the disclosures that a debtor must receive before or at the time the debtor signs the Reaffirmation Agreement. 11 U.S.C. § 524(c)(2). The required disclosures consist of the Reaffirmation Agreement, the Disclosure Statement, and other documents described in § 524(k). 11 U.S.C. § 524(k)(1). Disclosures may be "made in a different order and may use terminology different from that set forth in paragraphs (2) through (8)," with the exception of two terms - "Amount Reaffirmed" and "Annual Percentage Rate" – that must be used where indicated. 11 U.S.C. § 524(k)(2).

The January 2007 version of Director's Form B240A (now designed as B240A/B ALT) which implemented the reaffirmation disclosures and form requirements of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, carefully tracked the statutory language and organization. As a result, the form was quite long and some of the most significant information needed for court review followed many pages of preliminary disclosures and information.

Based on the authority provided by 11 U.S.C. § 524(k)(2), this revised form organizes the required information in a different order, bringing information important to the court to the beginning of the document while directing the debtor's attention to pertinent disclosures and definitions that must be reviewed before entering into the Reaffirmation Agreement. It also

streamlines the documents and uses language that is easier to understand. To avoid redundancy, some of the required disclosures are included in the Reaffirmation Agreement and are simply referred to in the Disclosure Statement.

The *Amount Reaffirmed* in Part I.B., includes a blank in which to insert the date of the disclosures to provide a definite, identifiable termination point for the accrual of fees and costs. *See* 11 U.S.C. § 524(k)(3)(C)(ii).

Section 524(k)(3)(E) provides for the disclosure of the "Annual Percentage Rate" that applies to the reaffirmed debt, and the statutory provision includes great detail about how to compute that rate. The form contains a space to fill in the Annual Percentage Rate (which the creditor must calculate according to the detailed statutory instructions) and requires disclosure as to whether the rate is fixed or variable. *Annual Percentage Rate* is defined in Part V.C. of the form as the "interest rate on a loan expressed under the rules required by federal law." The revised form omits the statutory detail about how the rate is determined.

Directions

This Director's form is optional. Do not use it with a separate, attached Reaffirmation Agreement.

This form does not replace the Reaffirmation Cover Sheet required by Fed. R. Bankr. P. 4008(a), even though some of the required information is the same.

Fill in the blanks at the top of the form, entering the district in which the bankruptcy case is filed, the debtor or co-debtors' names, case number, and chapter number. Fill in the name of the creditor, and check the box if the creditor is a credit union. If the creditor is not a credit union, leave the box blank.

All blanks should be filled in and all appropriate boxes checked. If two boxes appear in an answer, check one.

Part I: Reaffirmation Agreement

A. Describe the original agreement being reaffirmed.

B. Fill in the total amount of the debt being reaffirmed. Fill in the date the disclosure was prepared.

C. Fill in the Annual Percentage Rate, as determined under the appropriate method set out in 11 U.S.C. § 524(k)(3)(E). If more than one interest rate applies to the reaffirmed debt, the creditor may write in more than one rate. Check the appropriate type of rate for the loan.

D. Indicate the repayment terms. The creditor may include additional lines if multiple balances are to be paid at different rates or if the form categories do not adequately cover the terms of this Reaffirmation Agreement. The court needs this information to review the Reaffirmation Agreement.

Part II: Your Statement in Support of Reaffirmation Agreement

A and B. If an attorney did not represent the debtor or if the creditor is not a credit union, fill out C.1. and C.2.

C.1.a-d. Fill in information about present income and expenses. Do not use income and expense information from the bankruptcy schedules unless it is identical to the present income and expenses. *Calculate the amount available to pay the reaffirmed debt.* Then check the appropriate box at the top of page 1.

C.2. Check whether the payments on the reaffirmed debt will impose an undue hardship on debtor or debtor's dependents. If the monthly income is less than the monthly expenses, the debtor must explain why reaffirming the debt will not cause an undue hardship. The debtor should identify any additional sources of funds to make the payments.

D. If the debtor is represented by an attorney and the creditor is a credit union, indicate whether the debtor believes that the reaffirmation agreement is in the debtor's financial interest and the debtor can afford to make the payments. Then check the box on page 1 that says, "No Presumption of Undue Hardship."

Part III: Certification by Debtors and Signatures of Parties

Any debtor (including any joint debtor) who agrees to reaffirm a debt must sign and date the certification. Fill in the creditor's name and address, along with the printed name of the creditor's representative who negotiated the Reaffirmation Agreement. The representative must sign and date the Reaffirmation Agreement.

Part IV: Certification by Debtor's Attorney (if any)

Fill out this certification if the debtor was represented by an attorney in negotiating the Reaffirmation Agreement. *See* 11 U.S.C. § 524(c)(3) and (k)(5).

Part V: Disclosure Statement and Instructions to Debtors

This part of the Reaffirmation Documents contains definitions, the additional required disclosures that are not included in the Reaffirmation Agreement itself, and instructions to the debtor.

5-D1

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: SUGGESTION FOR A SEPARATE CHAPTER 15 PETITION FORM

DATE: MARCH 17, 2009

During its January 13, 2010, conference call, the Subcommittee on Forms considered a suggestion (09-BK-G) by Kathleen Crosser, Operations Manager of the Bankruptcy Court for the Western District of Washington, that a separate petition form be created for chapter 15 cases. She argues that the voluntary petition form (Official Form 1) appears cluttered by the inclusion of spaces for designating whether the petition is a chapter 15 petition for recognition of a foreign main proceeding or a foreign non-main proceeding. She also says that the signature box for a foreign representative is confusing and that it fails to include space for the representative's address (although that information can usually be found on accompanying documents after some searching). Finally, Ms. Crosser suggests more broadly that using the same petition form for all chapters does not work well.

The Advisory Committee considered and declined to act at the October 2008 meeting on a similar suggestion submitted by Judge Laurel Myerson Isicoff (Bankr. S.D. Fla.). Based on credit difficulties that had been encountered by an individual foreign debtor when a chapter 15 petition was filed in the United States, Judge Isicoff suggested that a separate chapter 15 petition be created that would avoid the potential adverse effects for the debtor of having a bankruptcy case commenced. Among the reasons that the Advisory Committee declined to accept this suggestion was the relatively small number of chapter 15 petitions that are filed annually and the

especially small number of those involving individual debtors.

At that time Professor Morris noted that 42 chapter 15 cases were filed in 2007, and 31 of those were filed in the Southern District of New York. Since then the number of chapter 15 petitions has remained fairly low and concentrated in a few districts. In 2008, 51 chapter 15 cases were filed; of those 26 were filed in the Southern District of New York. A more recent report shows that the number of chapter 15 filings increased to 140 in 2009. Of those, 70 were filed in the Southern District of New York, the District of New Jersey, and the District of Delaware. Eighteen chapter 15 cases were filed in Ms. Crosser's district, the Western District of Washington.

The Subcommittee concluded that the problems with the petition cited by Ms. Crosser are not sufficiently serious to require immediate action. The space for indicating the chapter in which the petition is filed and, for chapter 15 cases, whether recognition is being sought of a main or non-main foreign proceeding, has a clear format. Members of the Subcommittee also did not think that the foreign representative signature box is especially confusing.

The Subcommittee therefore recommends that any adjustments to the petition form await developments of the Forms Modernization Project. If that group proceeds with the project of creating separate petitions for individuals and corporations or other entities, consideration will have to be given to how to treat chapter 15 petitions. Some of Ms. Crosser's concerns may be addressed through that process.

5-D2

MEMORANDUM

TO: BANKRUPTCY RULES COMMITTEE

FROM: SUBCOMMITTEE ON FORMS - SCOTT MYERS

RE: REVISION OF FORMS 20A AND 20B

DATE: FEBRUARY 3, 2010

During its January 13, 2010, conference call, the Forms Subcommittee considered proposed changes to Official Forms 20A and 20B that would conform the forms to recent changes in the Bankruptcy Code and Bankruptcy Rules 1005 and 9037. Currently, Forms 20A and 20B direct the filer to "Set forth all names ... used by the debtor in the last **6 years.**" The time period should be changed to 8 years. The forms also direct the filer to redact only the debtor's "social-security number." The redaction requirement should be expanded to include redaction of an individual's taxpayer identification number.

In 2008, Rule 1005 was amended to require disclosure of all names used by the debtor in the past eight years. This was a change from six years and was made because amendments to Section 728(a) of the Code in 2005 extended the time between chapter 7 discharges from six to eight years. Although Rule 1005 only governs captions on the petition, Rule 2002(n) incorporates Rule 1005-type captions into the notices that go out under that rule. Consequently, many of the bankruptcy forms reflect Rule 1005-type captions. Most of the forms that incorporate the "other names" requirement of Rule 1005 were updated in 2007 (a year before the change to Rule 1005 went into effect). Forms 20A and 20B, however, were overlooked at that

time, and should be updated now.[1]

Rule 9037 was also promulgated in 2008. The rule incorporated and expanded somewhat privacy protections covered by the Judicial Conference's privacy policy. Among other things, Rule 9037(a)(1) requires that any electronic or paper filing made with the court that contains an individual's social-security number or taxpayer identification number show only the last four digits of those numbers. (An individual taxpayer identification number - ITIN - might be issued to a non-citizen instead of a social-security number).

Like the Rule 1005 changes, most of the forms that include the redaction requirements of Rule 9037 were updated in 2007 (again, a year in advance of the rule changes). Forms 20A and 20B, however, were overlooked in 2007, and should be updated at this time.

Recommendation

Update the captions for Official Forms 20A and 20B in the style of the Official Form 16A (i.e., the "full" caption), changing the six-year periods to eight years and expanding the redaction requirement to include individual taxpayer identification numbers.

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[1]Although OF 20A is clearly governed by Rule 2002(n) and, therefore Rule 1005, OF 20B is the notice of a motion for objection to claim, which is governed by Rule 3007. Rule 3007(a) explains when notice of the hearing on an objection to claim must given, but it doesn't reference Rule 1005. So, use of the Rule 1005-style caption on OF 20B does not appear to be compelled by the rules. The form has included a full caption since it was created in 1997, however, and there has never been a suggestion to change to a short caption. Given the long use of a full caption on OF 20B, the Subcommittee recommends no change to caption style.

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____ _____	Case No. _____ Chapter _____

NOTICE OF [MOTION TO] [OBJECTION TO]

_____has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date) , you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response*, an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request} {response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also mail a copy to:

{movant's attorney's name and address}

{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on (date) , (year) , at ____ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____

Signature: _____
Name:
Address

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____ _____	Case No. _____ Chapter _____

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before (date), you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.

You must also mail a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

Attend the hearing on the objection, scheduled to be held on (date), (year), at ___ a.m./p.m. in Courtroom ____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name:
Address

5-D3

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

March 12, 2010

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Chief Judges, United States District Courts
Judges, United States Bankruptcy Courts
Clerks, United States Bankruptcy Courts
Bankruptcy Administrators

From: James C. Duff

RE: ADJUSTMENTS TO CERTAIN DOLLAR AMOUNTS IN THE BANKRUPTCY CODE AND OFFICIAL FORMS **(INFORMATION)**

On April 1, 2010, automatic adjustments to the dollar amounts stated in various provisions of the Bankruptcy Code and one provision in Title 28 of the United States Code will become effective. The amended dollar amounts will apply to cases filed on or after April 1, 2010.

The amended dollar amounts will affect, among other matters, the eligibility of a debtor to file under chapters 12 and 13 of the Bankruptcy Code, certain maximum values of property that a debtor may claim as exempt, the maximum amount of certain claims entitled to priority, the calculation of the "means test" for chapter 7 debtors, the duration of a chapter 13 plan, the definition of a small business debtor, the minimum aggregate value of claims needed to commence an involuntary bankruptcy, the value of "luxury goods and services" deemed to be nondischargeable, and where the trustee may commence certain proceedings to recover a money judgment or property. In the Bankruptcy Reform Act of 1994, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and Pub. L. No. 110-406, (2008), Congress provided for the automatic adjustment of these dollar amounts at three-year intervals. The relevant provisions are codified in 11 U.S.C. § 104(a).

The adjustments reflect the change in the *Consumer Price Index for All Urban Consumers* published by the United States Department of Labor for the three-year period ending December 31, 2009, and rounded to the nearest $25. Use of this formula to adjust specified dollar amounts in the Bankruptcy Code is prescribed by 11 U.S.C. § 104(a). On February 25, 2010, the Judicial Conference published the revised dollar amounts in volume 75, number 37, of the *Federal Register*, at page 8747, as required under 11 U.S.C. § 104(c). The next three-year automatic adjustments of these dollar amounts will be published before March 1, 2013, and take effect April 1, 2013. Attached is a chart showing the affected sections of the Bankruptcy Code and Title 28 and both the current and the revised dollar amounts in those sections.

Seven of the Official Bankruptcy Forms and two of the Director's Forms contain references to several of the affected dollar amounts.

- Official Form 1, Voluntary Petition
- Official Form 6C, Schedule of Property Claimed as Exempt
- Official Form 6E, Schedule of Creditors Holding Claims Entitled to Priority
- Official Form 7, Statement of Financial Affairs
- Official Form 10, Proof of Claim
- Official Form 22A, Statement of Current Monthly Income and Means Test Calculation (Chapter 7)
- Official Form 22C, Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)
- Director's Form 200, Required Lists, Schedules, Statements and Fees
- Director's Form 283, Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)

These forms will be amended April 1, 2010, and will apply to cases filed on or after that date. The revised forms incorporating the changes will be posted on the bankruptcy forms pending amendment page of the Judiciary's website at http://www.uscourts.gov/bankform/index.html.

Questions concerning the revised dollar amounts in the Bankruptcy Code, Title 28, and Official Bankruptcy Forms may be directed to Francis F. Szczebak, Chief, Bankruptcy Judges Division, at (202) 502-1900 or via e-mail at Bankruptcy_Judges_Division@ao.uscourts.gov.

Attachment

ATTACHMENT

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
28 U.S.C.		
1409(b) - a trustee may commence a proceeding arising in or related to a case to recover (1) - money judgment of or property worth less than (2) - a consumer debt less than (3) - a non consumer debt against a non insider less than	$1,100 $16,425 $10,950	$1,175 $17,575 $11,725
11 U.S.C.		
Section 101(3) - definition of assisted person	$164,250	$175,750
Section 101(18) - definition of family farmer	$3,544,525 (each time it appears)	$3,792,650 (each time it appears)
101(19A) - definition of family fisherman	$1,642,500 (each time it appears)	$1,757,475 (each time it appears)
101(51D) - definition of small business debtor	$2,190,000 (each time it appears)	$2,343,300 (each time it appears)
Section 109(e) - allowable debt limits for individual filing bankruptcy under chapter 13	$336,900 (each time it appears) $1,010,650 (each time it appears)	$360,475 (each time it appears) $1,081,400 (each time it appears)

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
11 U.S.C. ***(Continued)***		
Section 303(b) - minimum aggregate claims needed for the commencement of involuntary chapter 7 or chapter 11 bankruptcy		
(1) - in paragraph (1)	$13,475	$14,425
(2) - in paragraph (2)	$13,475	$14,425
Section 507(a) - priority expenses and claims		
(1) - in paragraph (4)	$10,950	$11,725
(2) - in paragraph (5)	$10,950	$11,725
(3) - in paragraph (6)	$5,400	$5,775
(4) - in paragraph (7)	$2,425	$2,600
Section 522(d) - value of property exemptions allowed to the debtor		
(1) - in paragraph (1)	$20,200	$21,625
(2) - in paragraph (2)	$3,225	$3,450
(3) - in paragraph (3)	$525 $10,775	$550 $11,525
(4) - in paragraph (4)	$1,350	$1,450
(5) - in paragraph (5)	$1,075 $10,125	$1,150 $10,825
(6) - in paragraph (6)	$2,025	$2,175
(7) - in paragraph (8)	$10,775	$11,525
(8) - in paragraph (11)(D)	$20,200	$21,625

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
11 U.S.C. ***(Continued)***		
522(f)(3) - exception to lien avoidance under certain state laws	$5,475	$5,850
522(f)(4)- items excluded from definition of household goods for lien avoidance purposes	$550 (each time it appears)	$600 (each time it appears)
522(n) - maximum aggregate value of assets in individual retirement accounts exempted	$1,095,000	$1,171,650
522(p) - qualified homestead exemption	$136,875	$146,450
522(q) - state homestead exemption	$136,875	$146,450
523(a)(2)(C) - exceptions to discharge		
in subclause (i)(I) - consumer debts, incurred $\leq$ 90 days before filing owed to a single creditor in the aggregate	$550	$600
in subclause (i)(II) - cash advances incurred $\leq$ 70 days before filing in the aggregate	$825	$875
541(b)- property of the estate exclusions		
(1) - in paragraph (5)(C) - education IRA funds in the aggregate	$5,475	$5,850
(2) - in paragraph (6)(C) - pre-purchased tuition credits in the aggregate	$5,475	$5,850
547(c)(9) - preferences, trustee may not avoid a transfer if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of property is less than	$5,475	$5,850

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
11 U.S.C. ***(Continued)***		
707(b) - dismissal of a case or conversion to a case under chapter 11 or 13 (means test)		
(1) - in paragraph (2)(A)(i)(I)	$6,575	$7,025
(2) - in paragraph (2)(A)(i)(II)	$10,950	$11,725
(3) - in paragraph (2)(A)(ii)(IV)	$1,650	$1,775
(4) - in paragraph (2)(B)(iv)(I)	$6,575	$7,025
(5) - in paragraph (2)(B)(iv)(II)	$10,950	$11,725
(6) - in paragraph (5)(B)	$1,100	$1,175
(7) - in paragraph 6(C)	$575	$625
(8) - in paragraph 7(A)	$575	$625
1322(d) - contents of chapter 13 plan, monthly income	$575 (each time it appears)	$625 (each time it appears)
1325(b) - chapter 13 confirmation of plan, disposable income	$575 (each time it appears)	$625 (each time it appears)
1326(b)(3) - payments to former chapter 7 trustee	$25	$25

MEMORANDUM

TO: SUBCOMMITTEE ON FORMS

FROM: JIM WANNAMAKER

RE: DOLLAR ADJUSTMENTS ON OFFICIAL FORMS

DATE: JANUARY 12, 2010

On April 1, 2010, automatic adjustments will be made to dollar amounts stated in various provisions of the Bankruptcy Code, one provision in Title 28, seven Official Bankruptcy Forms which contain references to the affected dollar amounts, and two Director's Forms. The adjustments will apply to cases filed on or after April 1, 2010.[1]

Section 104 of the Code provides for the Judicial Conference to make the statutory adjustments, which are calculated at three-year intervals on the basis of the change in the Consumer Price Index for the most recent three-year period ending immediately before the year in which the adjustment is made and rounded to the nearest $25. The Conference has delegated that authority to the Administrative Office.

The specified dollar amounts in the following Forms will be adjusted.

Official Form 1
Page 1, chapter 11 debtors, definition of small business debtor in § 101(51D)
Official Form 6C
Page 1, amount of homestead exemption in § 522(p),(q)
Official Form 6E
Pages 1-2, certain types of priority claims
Wages, salaries, and commissions
Certain farmers and fishermen
Deposits by individuals

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[1] The revised dollar amounts were published in volume 75, number 37, of the *Federal Register*, at page 8747. In addition, the dollar adjustments were set out in a memo by the Director of the Administrative Office dated March 12, 2010.

Official Form 7

Page 2, Question 3(b), transfers by non-consumer debtors

Official Form 10

Page 1, Question 5, Amount of Claim Entitled to Priority

Wages, salaries, or commissions

Deposits toward purchase, lease, or rental of property or services for personal, family, or household use

Official Form 22A

Pages 6 and 8, Questions 38 and 52

Official Form 22C

Page 6, Question 43

Director's Form 200

Pages 2, 3, and 4, section 522(q)(1) statement on state exemptions in chapter 11, 12, and 13 cases

Director's Form 283

Page 1, section 522(p) statement on state exemptions in a chapter 13 case

The sections of the Bankruptcy Code which will be adjusted are:

Section 101(3) - definition of an assisted person

Section 101(18) - definition of a family farmer

Section 101(19A) - definition of a family fisherman

Section 101(51D) - definition of a small business debtor

Section 109(e) - allowable debt limits for an individual filing bankruptcy under chapter 13

Section 303(b)(1),(2) - minimum aggregate claims needed for the commencement of involuntary chapter 7 or chapter 11 bankruptcy

Section 507(a)(4),(5),(6),(7) - priority expenses and claims

Section 522(d)(1),(2),(3),(4),(5)(6),(8),(11)(D) - value of property exemptions allowed to the debtor

Section 522(f)(3) - exception to lien avoidance under certain state laws

Section 522(f)(4)- items excluded from definition of household goods for lien avoidance purposes

Section 522(n) - maximum aggregate value of assets in individual retirement accounts exempted

Section 522(p) - qualified homestead exemption

Section 522(q) - state homestead exemption

Section 523(a)(2)(C)(i)(I), (i)(II) - exceptions to discharge

Section 541(b)(5)(C),(6)(C) - property of the estate exclusions

Section 547(c)(9) - preferences, trustee may not avoid a transfer if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of property is less than

Section 707(b)(2)(A)(i)(I), (2)(A)(i)(II), (2)(A)(ii)(IV), (5)(B), 6(C), 7(A) - dismissal or conversion of a chapter 7 case (means test)

Section 1322(d) - contents of chapter 13 plan, monthly income

Section 1325(b)(3) - chapter 13 confirmation of plan, disposable income

Section 1326(b)(3) - payments to former chapter 7 trustee

The section of title 28 which will be adjusted is:

Section 1409(b)(1),(2),(3) - venue for trustee avoidance actions

6-A

Item 6(A) will be distributed separately.

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

(a) DEFINITIONS. In this rule the following terms have the meanings indicated:

(1) "disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest;

(2) "represent" or "represents" means to take a position before the court, or to engage in the solicitation of votes regarding the confirmation of a plan, on behalf of another entity.

(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.

(1) In a chapter 9 or 11 case:

(A) every group or committee that consists of or represents multiple creditors or equity security holders that are (i) acting in concert to advance their common interests and (ii) not composed entirely of affiliates or insiders of one another; and

(B) every entity that represents multiple creditors or equity security holders that are (i) acting in concert to advance their common interests and (ii) not composed entirely of affiliates or insiders of one another;

shall file a verified statement setting forth the information specified in subdivision (c) of this rule.

(2) Notwithstanding paragraph (1) of this subdivision, unless the court orders otherwise, an entity is not required to file a verified statement under this rule solely because of its status as:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative;

(D) a governmental unit that is not a person; or

(E) an investment advisor that represents individual funds.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) with respect to a group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was

formed or for whom the group or committee has agreed to act; or

(B) with respect to an entity, the employment of the entity, including the name of each entity at whose instance the employment was arranged;

(2) if not disclosed under subdivision (c)(1), with respect to the entity and with respect to each member of the group or committee:

(A) name and address;

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and

(C) with respect to each member of a group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, that claims to represent any entity in addition to the members of the group or committee, the quarter and year in which each disclosable economic interest was acquired, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by the entity, the group, or the committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code:

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. A supplemental verified statement shall be filed whenever an entity, group, or committee takes a position before the court, or solicits votes on the confirmation of a plan, if there has been a material change in the facts disclosed in its last previous statement filed under this rule. The supplemental statement shall set forth the material changes in the facts that are required by subdivision (c) of this rule to be disclosed, including information about any acquisition, sale, or other disposition of a disclosable economic interest by the entity, members of the group or the committee, or creditors or equity security holders that are represented by the entity, group, or committee.

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.

(1) On motion of any party in interest, or on its own

motion, the court may determine whether there has been a failure to comply with the provisions of this rule.

(2) If the court determines that there has been a failure to comply with the provisions of this rule, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or

(C) grant other appropriate relief.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

The content of subdivision (a) is new. It sets forth two definitions. The first is the definition of the term "disclosable economic interest," which is used in subdivisions (c)(2), (c)(3), and (d). The definition of the term is intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps, and total return swaps.

The second definition is of "represent" or "represents." The definition is intended to limit the ambiguity in the term by providing that representation requires active participation in the case or a proceeding on behalf of another entity – either by taking a position on a matter before the court or by soliciting votes on the confirmation of a plan. Thus, for example, an attorney who is retained and consulted by a creditor or equity security holder to monitor the case, but who does not advocate any position before the court or engage in solicitation activities on behalf of that client, does not represent the creditor or equity security holder for purposes of this rule..

Subdivision (b)(1) specifies who is covered by the rule's disclosure requirements. In addition to an entity or committee that *represents* more than one creditor or equity security holder, the amendment extends the rule's coverage to committees that *consist of* more than one creditor or equity security holder. Official committees are no longer excluded from the rule's coverage, except as specifically indicated. The rule also applies to a group of creditors or equity security holders that act in concert to advance common interests (except when the group consists exclusively of affiliates or insiders of each other), even if the group does not call itself a committee.

Subdivision (b)(2) excludes certain entities from the rule's coverage. Even though these entities may represent multiple creditors or equity security holders, they do so under formal legal arrangements of trust or contract law that preclude them from acting on the basis of conflicting economic interests. For example, an indenture trustee's responsibilities are defined by the indenture, and individual interests of bondholders would not affect the trustee's representation.

Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require disclosure concerning the formation of a committee or group, other than an official committee, and the employment of an entity.

Subdivision (c)(2) specifies information that must be disclosed with respect to the entity and each member of the committee and group filing the statement. In the case of a committee or group, the information about the nature and amount

of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate. The quarter and year in which disclosable economic interests were acquired by each member of a committee or group (other than an official committee) that claims to represent others must also be specifically provided, except for a disclosable economic interest acquired more than a year before the filing of the petition. Although the rule no longer requires the disclosure of the precise date of acquisition or the amount paid for disclosable economic interests, nothing in this rule precludes the discovery of that information when it is relevant or its disclosure when ordered by the court pursuant to its authority outside this rule.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, or committee. This provision does not apply with respect to those represented by official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under subdivision (c)(2)(A) and (B). The amendment also clarifies that under (c)(3) the nature and amount of each disclosable economic interest of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (c)(4) requires the attachment of any instrument authorizing the filer of the verified statement to act on behalf of creditors or equity security holders.

Subdivision (d) requires the filing of a supplemental statement at the time an entity, group, or committee takes a position before the court or solicits votes on a plan if there has been a material change in any of the information contained in its last filed statement. The supplemental verified statement must set forth the material changes that have occurred regarding the information required to be disclosed by subdivision (c) of this rule.

Subdivision (e) addresses the court's authority to determine whether there has been a violation of this rule and to impose a sanction for any violation. It no longer addresses the court's authority to determine violations of other applicable laws regulating the activities and personnel of an entity, group, or committee.

Comments and Testimony on Rule 2019

09-BK-010 – Thomas E. Lauria, Esq. – In his testimony he advocated the repeal of Rule 2019. In support of this position, he argued that the rule chills creditor participation and may violate due process. Furthermore, he contended, the rule applies in a discriminatory fashion to distressed debt investors, who add value to a reorganization case, and it is used tactically by parties. He advocated the use of customized discovery in place of Rule 2019 to identify conflicts.

09-BK-152 – Thomas Lauria, Esq. – In his written comments he continues to advocate the repeal of Rule 2019.

09-BK-013 – Richards, Kibbe & Orbe LLP (Jon Kibbe and Michael Friedman) – In their testimony they supported the proposed amendments to the rule with the exception of the requirement of disclosure of the date of purchase of disclosable economic interests and, upon court order, the purchase price. They argued that disclosure of the date of purchase is tantamount to disclosure of the purchase price, which information is rarely relevant. Imposing this requirement will discourage the participation of *ad hoc* groups in chapter 11 cases.

09-BK-028 – Richards, Kibbe & Orbe LLP – As in their testimony, their written comments state their opposition to the disclosure of pricing and purchase date information.

09-BK-015 – The Loan Syndications and Trading Association ("LSTA") (Elliot Ganz) – Mr. Ganz testified that LSTA and the Securities Industry and Financial Markets Association ("SIFMA") no longer advocate the repeal of Rule 2019. He stated, however, that the organizations oppose the amendments to the extent they "would compel public disclosure of an investor's most confidential and proprietary information: the date and price at which that investor purchased (and/or sold) its bankruptcy claims." He argued that, should a court question the bona fides of a party and desire the disclosure of pricing information, it would have inherent authority to require the party to reveal that information.

09-BK-026 – LSTA and SIFMA – The written comments elaborate on Mr. Ganz's testimony urging the elimination of pricing and purchase date disclosures. They also make several suggestions about changes in the wording of the rule

- The definition of "disclosable economic interest" should take account of the creation of ethical walls within an organization and should define "derivative" to eliminate the need for disclosure "when an entity's derivative positions have no material bearing on the entity's voice in the restructuring process."
- Agents and affiliated entities should not be subject to disclosure requirements

under the rule that apply to entities representing multiple creditors or equity security holders.

- Under (c)(2) the verified statement should provide information as of the date the disclosing entity appeared in the case, rather than when the group or committee was formed or the entity was employed.
- Supplemental statements should be required only when the disclosing entity seeks to participate in matters before the court.
- Subdivision (e) should only refer to the court's authority to determine failure to comply with Rule 2019, not to other applicable law or improprieties in connection with a solicitation; (e)(2), which refers to the materials the court may examine in making its determination, should be deleted; and the provision regarding the court's authority to hold invalid any authority, acceptance, rejection, or objection should be deleted.

09-BK-017 – Bankruptcy Judge Kathryn Ferguson (D.N.J.) – She is critical of proposed Rule 2019(d), which requires supplemental statements to be filed "monthly, or as the court otherwise orders." She argues that the term "monthly" is ambiguous and the requirement is unduly burdensome and wasteful.

09-BK-018 – Angelo, Gordon & Co., LP (Forest Wolfe) – Mr. Wolfe testified that price information and trade data are extremely sensitive and should generally not have to be revealed. He also argued that the term "group" should not apply to the situation in which various funds are represented by one investment advisor.

09-BK-019 – Bankruptcy Judge Robert Gerber (S.D.N.Y.) – Judge Gerber testified in support of the proposed amendments. He stated that the date of acquisition and the price paid for a disclosable economic interest is sometimes relevant, but that the rule could still be effective if it required only disclosure of the general period of time in which such an interest was acquired. He said that, if the rule were so revised, the Committee Note should state that the court retains authority to order the disclosure of date and price information upon a showing of relevancy or other cause. He also urged the expansion of the definition of "disclosable economic interest" to include short positions, credit default swaps, and total return swaps.

09-BK-020 – Akin Gump Strauss Hauer & Feld LLP (Abid Qureshi) – In Mr. Qureshi's testimony, the firm opposed the disclosure of price and date information. He argued that the price at which an interest was purchased is irrelevant and that these requirements will contribute to the strategic and abusive use of the rule. He further urged the Committee to make the rule as clear as possible so that compliance with it becomes routine and motion practice is reduced.

09-BK-024 – National Bankruptcy Conference ("NBC") – NBC supports the proposed rule but suggests that revisions or clarifications are needed to address three aspects of the rule:

- *Disclosure by law firms representing multiple holders of claims or interests.* NBC argues that disclosure should not be required when two or more clients are not acting in concert to advance a common interest; when affiliated entities are jointly represented; or when the firm does not appear in court on behalf of a client to seek or oppose the granting of relief.
- *Application of the rule to indenture trustees and agent banks.* NBC urges revision of the rule to make it clear that indenture trustees and agents banks are not required to make disclosures under the rule, except, with respect to agents, when they take positions in court.
- *Price and purchase date information.* NBC argues that the rule as proposed appears to authorize a court to require disclosure of price information without any showing of relevance and, even when the disclosure of price information is not required, that information can be determined from the required disclosure of the date of purchase. NBC recommends that the rule's authorization for the disclosure of price information be applicable only to those who claim to act on behalf of or in the interest of creditors or equity security holders other than themselves.

09-BK-025 and 09-BK-104 – Martin Bienenstock, Esq. – He proposes that parties covered by Rule 2019 be allowed to make three certifications in lieu of the verified statement of disclosures. These certifications would address:

- the aggregate dollar amount of prepetition claims held against the debtor and the aggregate dollar amount of such postpetition claims;
- whether the party holds other disclosable economic interests that may increase in value if the debtor's estate declines in value; and
- whether the party holds claims or other disclosable economic interests in an affiliate of the debtor that may increase in value if the debtor's estate declines in value.

Alternatively, Mr. Bienenstock suggests that any pleading that asserts that the party holds claims against the estate must also disclose whether the party holds any economic interests that may increase in value if claims against any of the debtors' estates or their affiliates' estates decrease in value. He argues that the rule should apply to official committees. Finally, he urges that any comment in the Committee Note referring to the court's authority to order the disclosure of pricing and acquisition date information make clear that current standards of materiality and relevance are not being altered, nor are new rights of discovery being created.

09-BK-036 – Regiment Capital Advisors LP – It endorses LSTA's comments and opposes the

disclosure of pricing and purchase date information.

09-BK-094 – Bankruptcy Judge D. Michael Lynn (N.D. Tex.) – He suggests that the definition of "disclosable economic interest" should turn on the value of the debtor or its estate. He would not require disclosure by members of official committees, and he would limit the parties that would be permitted to move under (b) for disclosure by entities who are seeking or opposing relief. He questions whether the rule applies to collective bargaining agents and class action representatives. He expresses concerns about the possibility of (c)(3) being applied too broadly or too narrowly to unofficial committees. He would not require members of official committees to file supplemental statements because doing so might create holes in ethical walls. Finally, he worries generally that making the rule applicable to official committees intrudes on the U.S. trustee's authority.

09-BK-114 – Insolvency Law Committee of the Business Law Section of the Cal. State Bar – The Committee opposes the provisions in (e)(1)(B) and (C) that authorize the court to determine violations of rules and laws other than Rule 2019, as well as the sanction provisions of (e)(3). Although it recognizes that current Rule 2019 has similar provisions, it contends that, read broadly, these provisions are constitutionally questionable. The Committee asserts that the disclosure requirements are overly burdensome, both with respect to the initial disclosures regarding each committee member and monthly supplements. It questions what constitutes a group, and it expresses concern that the rule does not apply to official committee members.

09-BK-116 – The Clearing House Association LLC – It seeks clarification that the rule does not require disclosure by an administrative agent of the economic interests of syndicate lenders or its own holdings (merely because it is participating in the case as an agent). It would delete the provision in (b) that authorizes the court to order disclosure by parties in interest that seek or oppose the granting of relief, and it does not believe the rule should apply to official committees. Finally, it would limit the economic interests that must be disclosed in several respects.

09-BK-127 – Prof. Adam Levitin (Georgetown Law School) – He opposes the disclosure of purchase price and purchase date information.

09-BK-131 – Managed Funds Association – It opposes the disclosure of purchase price and purchase date information.

09-BK-133 – State Bar of California Committee on Federal Courts – It endorses the views of the Insolvency Law Committee (09-BK-114). It also believes that the rule should only apply to an

entity, group, or committee that participates in the case as a representative of multiple creditors or equity security holders, as opposed to a standing organization with purposes beyond the scope of the case that participates in other ways (such as by filing an amicus brief). Furthermore, the rule should not apply to separate creditors or equity security holders that by way of shorthand are referred to by a collective name (such as "the Equipment Lessors").

09-BK-144 – Commercial Finance Association – It urges a clarification that the rule is not intended to apply to an agent for a group of lenders in a syndicated credit facility, to funds represented by the same investment manager, or to affiliated creditors.

09-BK-153 – n/a, transmittal message for comment 09-BK-152

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: NOTICE REQUIRED FOR THE TAXING OF COSTS UNDER RULE 7054(b)

DATE: MARCH 17, 2010

At the fall 2009 Advisory Committee meeting, the Committee considered the need to amend the time periods in Rule 7054(b) to bring them into conformity with the new time computation rules. Apparently overlooked during the Committee's comprehensive review of rule time periods shorter than 30 days, Rule 7054(b) currently provides for the taxing of costs by the clerk "on one day's notice," and service of a motion for court review "within five days thereafter."

The Advisory Committee voted at the fall meeting to recommend changing the five-day period to seven days. The question whether to change the one-day period was referred to the Subcommittee with the request for a recommendation at the spring 2010 meeting. The Subcommittee considered the issue during its February 18, 2010, conference call.

Rule 7054(b) is the counterpart to Civil Rule 54(d). As part of the time computation amendments, the one-day notice period in Rule 54(d) was extended to fourteen days because the one-day period was thought to provide an "unrealistically short" amount of time in which to prepare and present a response to the prevailing party's bill of costs. At the fall meeting the Advisory Committee discussed whether there is a similar need to extend the period in bankruptcy cases, and it requested Jim Waldron to survey clerks about their views.

Mr. Waldron sent out a query to the clerks in January. In response to the question

"Should Rule 7054(b) be amended to allow the clerk to tax costs on 14 days notice instead of the currently authorized one day period?", 75.4% of the 65 respondents answered yes. Of the respondents who commented, several stated that one day was too short, and a number of them indicated that their local practice was to provide more time. Several of the clerks also noted that confusion would be reduced by having the notice period in Rule 7054(b) be the same as in Rule 54(d).

In order to maintain uniformity with the civil rule and to meet a perceived need for additional time to respond to a bill of costs, the Subcommittee recommends that Rule 7054(b) be amended to read as follows (including the proposed change previously approved by the Advisory Committee):

Rule 7054. Judgments; Costs

* * * * *

(b) COSTS. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on ~~one day's~~ fourteen days' notice; on motion served within ~~five~~ seven days thereafter, the action of the clerk may be reviewed by the court.

COMMITTEE NOTE

Subdivision (b) is amended to provide more time for a party to respond to the prevailing party's bill of costs. The former rule's provision of one day's notice was unrealistically short. The change

to fourteen days conforms to the change made to Civil Rule 54(d). Extension from five to seven days of the time for serving a motion for court review of the clerk's action implements changes in connection with the December 1, 2009, amendment to Rule 9006(a) and the manner by which time is computed under the rules. Throughout the rules, deadlines have been amended in the following manner:

- 5-day periods became 7-day periods
- 10-day periods became 14-day periods
- 15-day periods became 14-day periods
- 20-day periods became 21-day periods
- 25-day periods became 28-day periods

6-C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: CHANGE OF PLAN EFFECTIVE DATE IN FORM 25A

DATE: MARCH 19, 2010

At the end of last summer, the Administrative Office reviewed all of the bankruptcy forms to ensure that they were consistent with the new time periods and the time computation method that would go into effect on December 1, 2009. In the course of this review, it was noted that Official Form 25A – the model small business plan of reorganization – states the effective date of the plan as being "the eleventh business day following the date of the entry of the order of confirmation" (provision 8.02). This wording raises two problems. First, it is incompatible with the new fourteen-day appeal period in Rule 8002(a), and second, the counting of only business days is inconsistent with the new days-are-days approach to time computation.[1] The Chair referred this matter to the Subcommittee, and it considered the wording of the effective date provision during its conference call on February 18, 2010.

The Subcommittee concluded that the first issue can be dealt with by lengthening the period between confirmation and the effective date of the plan. The intent underlying the selection of eleven days was to coordinate the plan's effective date with the appeal period and the period during which the confirmation order is stayed under Rule 3020(e). Those periods were previously ten days and are now fourteen. The Subcommittee decided that, to accommodate the

[1] The second sentence of section 8.02 also uses the term "business day" and thus potentially presents the same problem.

change in those time periods, the effective date should be similarly extended.

Resolution of the second issue depends on the reason that the term "business days" was selected for specifying the effective date. Before December 1, 2009, just as now, the ten-day periods for appeal and stay of the confirmation order were expressed in "days," not "business days." Thus, as written, the model plan resulted in a gap between the expiration of those time periods and the plan's effective date, since calculation of the effective date would exclude intermediate weekends and holidays, and the time for appeal and the stay would not.

Declaring the effective date to be the fifteenth day following the confirmation order, however, would allow that date in some cases to fall on an official holiday, a possibility the Committee had sought to avoid with the existing wording of the provision. The Subcommittee therefore recommends that the date be left to be filled in by the plan proponent, with a parenthetical statement that it be "no fewer than 14 days following the date of the entry of the order of confirmation." In order to avoid the same problem of an effective date falling on a holiday, the Subcommittee recommends that the current wording – "the first business day" – be retained in the second sentence of the provision. Finally, the Subcommittee recommends a minor stylistic change to the second sentence.

As recommended by the Subcommittee, section 8.02 of Official Form 25A would be amended to read as follows:

8.02 Effective Date of Plan. The effective date of this Plan is ~~the eleventh business following the date of the entry of the order of confirmation~~ _____ (specify date no fewer than 14 days following the date of the entry of the order of confirmation).

~~But if~~ If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the ~~that~~ date on which ~~no~~ any stay of the confirmation order expires or is otherwise terminated ~~is in effect~~, provided that the confirmation order has not been vacated.

COMMITTEE NOTE

Provision 8.02 of Article VIII of the form, which specifies the plan's effective date, is amended to reflect the change in the time periods of Rules 3020(e) and 8002(a) for a stay of the confirmation order and the filing of a notice of appeal. As of December 1, 2009, both time periods were increased from ten to fourteen days. Ordinarily, a date should be specified in provision 8.02 of the plan that allows the plan to take effect the day after the expiration of those time periods. If, however, the fifteenth day following the entry of the confirmation order falls on an official holiday, the parties may choose to designate the next business day after the fifteenth day as the plan's effective date.

6-D

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTION REGARDING CLOSING OF INDIVIDUAL CHAPTER 11 CASES

DATE: MARCH 31, 2010

Bankruptcy Judge Margaret Dee McGarity (E.D. Wis.) submitted a suggestion (09-BK-H) on behalf of the Bankruptcy Judges Advisory Group ("BJAG") regarding the timing of the closing of individual chapter 11 bankruptcy cases. BJAG has discussed the fact that, as a result of the 2005 BAPCPA amendments, a discharge in an individual chapter 11 case is usually not entered until the completion of payments under the plan. If the case remains open until the discharge is entered, the debtor is obligated to make quarterly payments to the U.S. trustee for several years. In order to avoid paying those fees, some debtors have sought to have their case closed shortly after confirmation, to be reopened upon completion of the plan payments in order to receive a discharge. Courts have disagreed over whether to allow the case to be closed at that point.

Judge McGarity noted some of the problems presented by the pre-discharge closing of an individual chapter 11 case: no stay is in effect while the plan is being carried out; enforcement of the plan may be sought by creditors in separate state court actions; and the payment of a fee for reopening will be required in order to seek a plan modification, conversion or dismissal, or discharge. While BJAG did not propose any specific rule amendments, Judge McGarity suggested that the group felt that some guidance would be helpful, "such as a streamlined

procedure for reopening for enforcement of an individual chapter 11 plan, reopening for discharge, or automatic reopening linked to the terms of the plan, with noticing provisions."

After careful consideration of the suggestion, the Subcommittee recommends that no rule change be proposed. It does recommend, however, that the Bankruptcy Administration Committee be advised of possible problems presented by an instruction in the current fee schedule regarding the fee for reopening a chapter 11 case.

Background

In 2005 Congress amended chapter 11 in several ways to make individual chapter 11 cases operate more like chapter 13 cases. Among the changes were the inclusion of postpetition income in the property of the estate (§ 1115(a)), the addition of a disposable income test for confirmation (§ 1129(a)(15)), the delay of the discharge until completion of all payments under the plan (§ 1141(d)(5)), and the granting of authority to various parties in interest to seek modification of the plan prior to the discharge (§ 1127(e)). Of most significance for the issue raised by Judge McGarity is the delayed entry of the discharge.

Under 28 U.S.C. § 1930(a)(6), a quarterly fee must be paid to the United States trustee in each chapter 11 case until it is "converted or dismissed" – or, as is implicit, closed. The amount of the fee is based on the total disbursements during the quarter. In a couple of cases in which the amount was discussed, the fees for a five-year individual chapter 11 plan were projected to total $13,000. *See In re* Belcher, 410 B.R. 206, 219 (Bankr. W.D. Va. 2009); *In re* Johnson, 402 B.R. 851, 857 (Bankr. N.D. Ind. 2009).

Because payment of the quarterly fees would often reduce the payments to unsecured creditors or make the plan infeasible, some courts have granted the debtor's motion to close the

case when fully administered, a point determined to have been reached not long after confirmation and well before discharge. *See, e.g., In re* Hilburger, 2009 WL 1515125 (Bankr. W.D.N.Y. 2009); *In re* Johnson, 402 B.R. 851 (Bankr. N.D. Ind. 2009); *see also In re* Sheridan, 391 B.R. 287, 291 n.2 (Bankr. E.D.N.C. 2008) (granting discharge upon confirmation "for cause," and noting that typically in that district individual chapter 11 cases are closed "when there has been a commencement of distribution under the plan"). Other courts, however, have declined to close the case before all payments have been made. *See, e.g., In re* Shotkoski, 420 B.R. 479 (8th Cir. B.A.P. 2009) (finding no abuse of discretion in the bankruptcy court's failure to enter a final decree prior to completion of plan payments, but also noting no "disagree[ment] with those courts choosing, for purposes of convenience and efficiency, to close individual Chapter 11 cases prior to completion of payments and entry of discharge"); *In re* Belcher, 410 B.R. 206 (Bankr. W.D. Va. 2009); *In re* Ball, 2008 WL 2223865 (Bankr. N.D.W. Va. 2008).

In several of the cited cases, the U.S. trustee objected to the debtor's request for the entry of a final decree prior to completion of payments. Recently, however, the U.S. Trustee Program has announced that it "will not object to an individual chapter 11 debtor's request to close the case before discharge, subject to reopening for the entry of a discharge upon completion of plan payments, if the estate has been fully administered and any trustee has been discharged." Walter W. Theus, Jr., *Individual Chapter 11s: Case Closing Reconsidered*, XXIX ABI JOURNAL 1, 62-63 (Feb. 2010). According to Mr. Theus, this change in position was based on an analysis of § 350(a) of the Code and Rule 3022 and its Committee Note.

Is a Rule Amendment Needed?

Section 350(a) governs the closing of bankruptcy cases. It requires the court to close a

case after "an estate is fully administered and the court has discharged the trustee." For chapter 11 cases this provision is implemented by Rule 3022, which similarly provides that the court, on its own motion or that of a party in interest, shall enter a final decree closing a chapter 11 case "[a]fter an estate is fully administered." The rule's 1991 Committee Note explains that entry of a final decree does not need to await the completion of payments under the plan. Instead, the court should consider a variety of factors in determining whether the estate has been fully administered. The Committee Note lists six such factors, including whether the confirmation order has become final and whether payments under the plan have commenced. The Note further advises that the "court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future." The closing of the case does not prevent the court from enforcing or interpreting its own orders or from reopening the case for cause.

Courts that have granted an individual chapter 11 debtor's request to close a case prior to completion of plan payments have relied on the explanation in the Committee Note in determining that the case has been fully administered, even though most payments remain to be paid and the discharge has not been entered. Some of the courts taking the opposite view have questioned the applicability of the Committee Note's guidance to a chapter 11 case in which a discharge is not granted upon confirmation, future earnings will become property of the estate, and parties can still seek modification of the plan. *See, e.g., In re* Belcher, 410 B.R. at 219 ("such authority and prior practice are not appropriate to the new post-BAPCPA world of chapter 11 plans funded by post-filing and post-confirmation earnings by individual debtors").

The Subcommittee concluded that no rule amendment is required. Rule 3022 is consistent with § 350(a), and the guidance of the Committee Note remains applicable to all

chapter 11, including individual, cases. Furthermore, a new Committee Note clarifying its continued applicability cannot be added without an amendment to the rule. Even though some aspects of individual chapter 11 cases have been statutorily modified, the rule does not need to be amended to state that it still applies. Nor did the Subcommittee believe that the rule should be amended to state when an individual chapter 11 case is fully administered. Instead, it believes that the interpretation of § 350(a) should remain a matter for the courts' resolution.

Waiver of Fees for Reopening the Case

A related issue raised by some of the cases cited above and suggested by Judge McGarity concerns the procedure for reopening an individual chapter 11 case that has been closed following confirmation and commencement of plan payments. When plan payments are completed, the debtor will need to have the case reopened to get an order of discharge. Creditors may also seek to have the case reopened either to seek modification or upon the debtor's default. Judge McGarity has suggested the possibility of creating a streamlined procedure for reopening under these circumstances, and some courts have provided for the waiver of the reopening fee. *See, e.g., In re* Hilburger, 2009 WL 1515125 at * 2 ("Both cases shall be closed, subject to reopening without a filing fee."); *In re* Johnson, 402 B.R. at 857 ("The court can apparently mitigate the burden somewhat by allowing creditors to reopen the case without paying the fee that might otherwise be required."); *In re* Sheridan, 391 B.R. at 291 n.2 ("'[T]he case will be automatically re-opened pursuant to § 350 without the payment of a fee.'").

Section 350(b) provides that a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." There is no rule that governs reopening, and it is a relatively straight-forward ministerial act. The Subcommittee therefore does not believe that

there is a need to streamline the procedure.

The real concern is likely the fee charged for reopening the case. Under the current Bankruptcy Court Miscellaneous Fee Schedule, issued by the Judicial Conference under 28 U.S.C. § 1930(b) and effective on October 1, 2008, the fee for filing a motion to reopen a chapter 11 case is $1,000. Although the schedule states that the "court may waive this fee under appropriate circumstances," it also states that the "reopening fee must be charged when a case has been closed without a discharge being entered." Courts that have allowed for reopening without payment of the fee have not discussed the latter requirement.

Waiver of the reopening fee seems to be a matter outside the scope of the rules. The Subcommittee, however, recommends that the Committee call this issue to the attention of the Bankruptcy Administration Committee and ask it to consider whether fee waivers should be authorized for reopening individual chapter 11 cases in order for the debtor to obtain a discharge or at the request of a creditor.

6-E

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTION REGARDING RULE 7004(h)

DATE: MARCH 19, 2010

During its conference call on February 18, 2010, the Subcommittee on Business Issues considered the suggestion (09-BK-M) of Bankruptcy Judge Colleen Brown (D. Vt.), which she submitted on behalf of herself and Bankruptcy Judge Bob Littlefield (N.D.N.Y.). The suggestion concerns the service requirement of Rule 7004(h). That provision governs service on insured depository institutions in contested matters and adversary proceedings. As a general matter, the rule requires service by certified mail "addressed to an officer of the institution." The rule allows other methods of service when (1) the institution has already appeared by its attorney, in which case the attorney must be served by first class mail; (2) the court orders service by first class mail to be sent to an officer designated by the institution after the institution is given notice by certified mail of an application to permit service in this manner; or (3) the institution executes a waiver in writing of its entitlement to service by certified mail by designating an officer to receive service. This subdivision of Rule 7004 was added by § 114 of the Bankruptcy Reform Act of 1994, 108 Stat. 4106. The statute declares that "Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended . . . by adding" the language now set out in subdivision (h).

Judge Brown requests the Advisory Committee to consider clarifying the meaning of service by certified mail "addressed to an officer of the institution." She says that the language is unclear and is subject to several interpretations. For example, she questions whether the

envelope must be addressed to an officer by name and title; to an officer by name; to "Officer"; or to a designated official position, such as "President." She seeks clarification of the rule because there is no definitive case law on the question and bankruptcy courts face the dilemma of "determining whether service is sufficient to warrant the granting of a motion when there have been no objections filed and any one of these variations could reasonably be construed to comply with Rule 7004(h)."

After consideration of this suggestion, the Subcommittee concluded that the Advisory Committee lacks authority to recommend an amendment to this subdivision of the rule. Congress enacted Rule 7004(h) by statute, and the legislation prescribed the language of the subdivision. As a result, the Subcommittee believes that there is no authority to supercede the language through the bankruptcy rule-making process.[1] Furthermore, without making a change to the rule itself, there is no authority for the Committee to change the Committee Note to clarify the rule's meaning.

It is true that courts are divided over whether a service rule requiring a mailed summons or other document to be "addressed to an officer" of a corporation is satisfied by referring to the office held or whether the individual holding an office must be specifically named. *Compare, e.g., In re* Schoon, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993) (service addressed to "Attn: President" was improper); *and* Addison v. Gibson Equipment Co. (*In re* Pittman Mechanical Contractors, Inc.), 180 B.R. 453 (Bankr. E.D. Va. 1995) (service on "President or Corporate

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[1] 28 U.S.C. § 2075, the bankruptcy rules enabling act, does not allow bankruptcy rules to supercede statutory provisions, unlike 28 U.S.C. § 2072(b), which provides with respect to all other federal rules that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Officer" failed to satisfy the rule and did not satisfy due process); *with* Fleet Credit Card Servs., L.P. v. Tudor (*In re* Tudor), 282 B.R. 546 (Bankr. S.D. Ga. 2002) (service on "Managing Agent" was sufficient); *and* Schwab v. Associates Commercial Corp. (*In re* C.V.H. Transport, Inc.), 254 B.R. 331, 332 (Bankr. M.D. Pa. 2000) (service on "officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process" for corporation complied with the rule).

The requirement in Rule 7004(h) that the service be "addressed to an officer of the institution" is not unique. Rule 7004(b)(3) similarly requires the mailing of a summons and complaint "to the attention of an officer" or others, and Civil Rule 4(d)(1)(A)(ii) provides that a mailed request for the waiver of formal service by a corporation be "addressed . . . to an officer" or others. Despite the lack of clarity about how these requirements must be carried out, Congress mandated the wording of Rule 7004(h), so resolution of its meaning will have to continue to be worked out through the case law.

The Subcommittee recommends that the Advisory Committee take no affirmative action on this suggestion.

Item 7(A) will be an oral report.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: GOALS OF THE REVISION OF PART VIII OF THE BANKRUPTCY RULES

DATE: MARCH 25, 2010

At the fall 2009 meeting, the Advisory Committee authorized the Subcommittee on Privacy, Public Access, and Appeals to continue with its project of revising Part VIII of the Bankruptcy Rules. The purpose of this memorandum is to identify the goals that the Subcommittee seeks to achieve in revising the bankruptcy appellate rules. After reviewing the origins and progress of the project to date, the memorandum discusses the project's goals, which it asks the Committee to endorse.

The Project Thus Far

At the spring 2008 meeting of the Advisory Committee, member Eric Brunstad proposed that the Committee undertake a thorough revision of Part VIII of the Bankruptcy Rules (Appeals to District Court or Bankruptcy Appellate Panel) to bring them into closer alignment with the Federal Rules of Appellate Procedure ("FRAP"). The Chair referred the matter to this Subcommittee for further consideration. During the Subcommittee's initial discussion of the matter, Mr. Brunstad offered to begin the process of reviewing the Part VIII rules and comparing them to FRAP to determine whether and to what extent the bankruptcy appellate rules should be revised to address some issues covered by FRAP that are not currently addressed by the bankruptcy rules, to bring the organization of the Part VIII rules into closer alignment with

FRAP, and to incorporate FRAP's more user-friendly style. Mr. Brunstad worked diligently on this project over the summer of 2008, and he produced a draft of a complete revision of the Part VIII rules, along with annotations indicating the source of each rule and the differences from the existing Part VIII rules.

Because of the relatively specialized nature of bankruptcy appeals, the Advisory Committee decided at the fall 2008 meeting to hold two special subcommittee meetings to which judges, lawyers, professors, and court personnel with experience with bankruptcy appeals and the current Part VIII rules would be invited. The purpose of the meetings was to provide a forum for discussion of the current operation of the rules and the desirability of revising Part VIII, as well as to obtain feedback on the Brunstad draft revision.

The meetings were held in March 2009 in San Diego and September 2009 in Boston. Participants at both meetings expressed support for a revision of Part VIII. After each meeting, the reporter received written reports from groups appointed to review certain sections of the draft, and she summarized their comments and suggestions. Mr. Brunstad then incorporated the suggested changes into the draft as appropriate.

The Subcommittee conducted a conference call with Mr. Brunstad on February 9, 2010. During that meeting he reviewed the changes that he had made to the draft following the Boston meeting, discussed the overall goals for the project that he had pursued, and answered the questions of the Subcommittee's members. Having by this point rotated off the Advisory Committee, Mr. Brunstad relinquished his role with the revision project. The Subcommittee, assisted by the reporter, now begins the process of turning the Brunstad draft into proposed rule amendments with committee notes that can be considered and reviewed by the Committee.

Goals Underlying a Revision of Part VIII

The following goals for the project are generally ones that Mr. Brunstad identified as having guided his drafting of a revised Part VIII. They also reflect comments made at the two special subcommittee meetings and during prior discussions of the Subcommittee and the Advisory Committee. The Subcommittee discussed these goals during its conference call on March 25, 2010, and unanimously endorsed them. It now requests the Committee to give its approval of them.

1. Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of FRAP.

Part VIII of the Bankruptcy Rules has not been significantly altered since its promulgation in 1983. Many of its provisions contain long subdivisions or paragraphs that extend for multiple lines without a break. *See, e.g.,* Rules 8005 and 8006. For a practitioner or judge who only occasionally is involved with a bankruptcy appeal, the style in which the Part VIII rules are written likely makes it difficult to find and comprehend a relevant provision within a rule. Indeed, an assistant United States Attorney who attended the San Diego meeting stated a need for the appellate rules to be revised so that they can be understood – not by pro se litigants – but by well trained lawyers who currently struggle when on occasion they have consult the Part VIII rules.

FRAP were restyled in 1998. In contrast to the Part VIII rules, those rules are written in a style that uses shorter sentences, clearer language, more subdivisions and paragraphs with useful headings, and lists of items in outline format with bullet points. This style enables a reader to

more quickly locate desired information and to understand the organization of rules and the relationship of their various parts.

The prospect of revising Part VIII to incorporate the more user-friendly style of FRAP presents the issue of the appropriateness of a partial restyling of the Bankruptcy Rules. If the Advisory Committee decides to pursue restyling as a goal of the Part VIII revision, the result will be that one part of the Bankruptcy Rules will look and feel different from the rest. Not only could that result be aesthetically jarring, it could also potentially introduce some ambiguities into the meaning of words (for example if Part VIII uses "must" and the rest of the rules use "shall"). Moreover, for those who do not favor an overall restyling of the Bankruptcy Rules, the introduction of a new style in Part VIII will raise the fear that more restyling is to follow.

These concerns are outweighed by several factors, however. First, it is hard to argue against making rules easier to understand. That is especially true with respect to a set of rules that few people use on a frequent basis. Because of the relatively low percentage of bankruptcy cases that involve appeals, most users of the Part VIII rules do not start with a deep understanding of their meaning. It would therefore be helpful for these rules to be more accessible to even the occasional user. Second, the bankruptcy appellate rules apply in a discrete context, unlike Parts I through VII and IX of the rules, which apply throughout the course of a bankruptcy case. A different style for these rules, therefore, will be less discordant than would a restyled Part III, for example . Furthermore, because other parts of the Bankruptcy Rules have been the subject of more frequent revisions than the Part VIII rules, some of the stylistic features used by FRAP have already been introduced to the rest of the rules. *See, e.g.,* Rule 4004. Thus the stylistic differences between a restyled Part VIII and the other rules may not be so great after

all. Finally, if the reaction to restyling Part VIII is positive, this project may in fact pave the way for an overall restyling of the Bankruptcy Rules.

2. Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.

There are some rules in FRAP that do not have counterparts in Part VIII. For example, there are currently no bankruptcy appellate rules regarding amicus briefs, indicative rulings, corporate disclosure statements, and cross-appeals. Appellate practitioners accustomed to having rules addressing these issues may be frustrated by the absence of such rules for bankruptcy appeals. If there are FRAP procedures that have proven to be useful in the courts of appeals, they may be similarly useful for bankruptcy appeals in bankruptcy appellate panels or district courts.

The introduction of additional FRAP procedures to Part VIII must be done with care, however. Unnecessary complication of bankruptcy appeals and increased costs should be avoided. Likewise, the Bankruptcy Rules should not be cluttered with rules addressing issues that arise only rarely in bankruptcy appeals, even if they are included within FRAP. On the other hand, Part VIII was originally modeled on FRAP. To the extent that provisions have been added to those rules since the Part VIII rules were promulgated, their usefulness for bankruptcy appeals should be considered. Likewise, the omission of FRAP rules originally thought to be unnecessary for bankruptcy appeals might be reconsidered.

3. Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.

Bankruptcy appeals differ from appeals in civil and criminal cases in several important respects, and any revision of the Part VIII rules must take those differences into account. A

bankruptcy case can comprise numerous adversary proceedings and contested matters, unlike a single civil or criminal case. There can therefore be multiple occasions for appeals to be taken in a bankruptcy case, and the record in a bankruptcy case can be voluminous. Current bankruptcy-specific rules for designating and transmitting the record, seeking leave to appeal from interlocutory rulings, and governing stays pending appeal need to be retained in some form.

Bankruptcy appeals are also distinctive in that more than one appellate forum may be available. In some cases three courts could potentially hear an appeal from the bankruptcy court: a district court, a bankruptcy appellate panel, and a court of appeals. Part VIII therefore needs to continue to include provisions for election to have an appeal heard by a district court and for certifying appeals directly to a court of appeals. On a more technical level, the wording of rules in Part VIII needs to make clear which court is being referred to.

Finally, although not necessarily unique to bankruptcy appeals, time is of the essence with respect to certain bankruptcy orders. Part VIII's shorter time for filing a notice of appeal needs to be retained. Furthermore, any revision of the Part VIII rules should preserve procedures that have worked well in the bankruptcy context and that courts and practitioners have become accustomed to using.

4. Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners or that have produced differing judicial interpretations.

A revision of Part VIII provides an opportunity to clarify any rules that have produced uncertainty or differing interpretations due to unclear language or the absence of express provisions. For example, participants at the special subcommittee meetings identified stays pending appeal as an area in which clearer rules are needed. Further clarification might also be

provided regarding the procedures for certifying direct appeals to a court of appeals. As part of the Part VIII revision process, a survey of the case law should be undertaken to determine if there are any significant conflicts in the case law regarding the interpretation of the existing rules. If so, resolution of the conflicts should be attempted through the clarification of the rules. A review of local BAP rules and local district court rules for bankruptcy appeals should also be undertaken to identify any rules that have been adopted at the local level that might be usefully incorporated into Part VIII.

5. Modernize the Part VIII rules to take advantage of existing technology – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

This goal is the most challenging and likely the most significant. Participants at the special subcommittee meetings enthusiastically discussed the opportunity that a revision of the Part VIII rules provides for bringing appellate practice into the 21st century. Revised rules should take account of the fact that existing technology permits the electronic filing and storage of documents, which in turn impacts the ways in which records can be compiled and briefs, motions, notices, and records can be transmitted. Because of the ever-changing nature of technology, however, the rules must be not be specifically tied to the existing CM/ECF systems, but instead should be worded in sufficiently broad terms to remain relevant as further technological developments occur.

While embracing the electronic submission of documents, the rules must also recognize that we are still in a technological transition period. Some judges will continue to want parties to submit paper copies of briefs and other documents, and some parties will not have easy access to

computers. The rules therefore will have to be sufficiently flexible to allow for alternatives to electronic submissions.

As the Committee has previously discussed, the goal of embracing electronic technology in the rules is also being considered by other rules advisory committees. Because the bankruptcy courts led the way in implementing CM/ECF, it perhaps makes sense for the Part VIII revision project to take the lead in incorporating this technology into the federal rules. At the same time, it will be important for the Committee to confer with other advisory committees as the project proceeds. This coordination will provide the Committee with the benefit of thoughts that other committees have given to these issues, while also ensuring that the approach that is proposed for the Part VIII rules does not present problems for other committees' efforts to modernize their rules. Consultation with technology experts within the Administrative Office may also be useful as the Committee considers what is currently feasible and what advancements may arise in the future.

Item 8 will be an oral report.

Item 9 will be an oral report.

Item 10 will be an oral report.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JAMES WANNAMAKER

RE: SUGGESTIONS FOR MOTION CAPTION AND APPLICATIONS FOR ALLOWANCE OF ADMINISTRATIVE EXPENSES

DATE: MARCH 24, 2010

Bankruptcy Judge William F. Stone has submitted Suggestion (09-BK-J), which includes two proposals. The first is to amend Rule 9013 and/or Rule 9014 to require that the caption of a motion initiating a contested matter which affects the special interest of any creditor or other party in interest include the name of the creditor or party, as is done in the caption of a complaint initiating an adversary proceeding. Judge Stone's second proposal is for a rule and form for allowance of administrative expenses.

Caption for Contested Matters

Judge Stone stated that it has always struck him as inconsistent that the caption of a lien avoidance motion pursuant to Rule 4003(d) need not identify the party whose lien would be avoided, while any other challenge to a lien must be brought as an adversary proceeding, the caption of which includes the affected party's name. Judge Stone stated that motions to value collateral, motions to sell estate property free and clear of existing liens, and motions to assume or reject leases or other executory contracts are other common examples of motions specially affecting the rights of particular creditors.

Judge Stone stated that underlying rationale for his proposal is that "naming a person or entity as a respondent on the initial page(s) of the caption of a motion is the best simple and

inexpensive way to make such party aware that the motion seeks some manner of relief which affects the particular rights or interests of such party and therefore is a pleading which ought to be reviewed carefully and dealt with promptly."

Judge Stone stated that such a requirement is likely to reduce the number of instances in which parties fail to respond because they are not aware that the motion affected their property rights or other interests. A collateral benefit would be to compel practitioners, before filing the motion, to evaluate what parties have rights that would be affected.

The Advisory Committee addressed similar concerns about the effectiveness of notices when it proposed the 2007 amendments to Rule 3007(e) (omnibus objections to claims) and to Rule 6006(f) (omnibus motions for the rejection, assumption, or assignment of multiple executory contracts or unexpired contracts). Although the two rules do not require the inclusion of the affected parties' names in the caption, the rules do require that the affected parties be listed alphabetically and that the objection or motion include a conspicuous statement that recipients should locate the provisions dealing with their rights.

Judge Stone's court, the Western District of Virginia, has adopted a local rule setting out requirements for the caption of a motion initiating a contested matter. Local Rule 9013-1(I) provides:

> Caption: Names of Parties: Every motion initiating a contested matter pursuant to Bankruptcy Rule 9014 shall contain a caption which conforms with Official Form 16B and an additional caption setting forth the debtor's name as shown on the petition, the assigned motion number, and a designation showing the parties as "Movant", "Respondent" and "Trustee" (when applicable).

The local rule sets out an example of such a caption. The example includes a motion number and the names of the affected parties as respondents.

In the early 1980s, many bankruptcy courts required that motions be captioned in this manner with respondents' names and a motion number. The motions, responses, and subsequent papers were maintained in separate motions folders, rather in the case file. The practice largely disappeared after the courts' electronic docketing systems such as BANCAP and NIBS linked motions and related papers on the docket and many clerks' offices found it unduly burdensome to maintain separate motion numbers and files.

Judge Stone's concerns may be addressed, in part, by Official Form 20A, Notice of Motion or Objection. Use of the Official Form is mandatory pursuant to Rule 9009. Although the caption of Official Form 20A does not include the names of the affected party (or parties), the form states:

> _____has filed papers with the court to [relief sought in motion or objection].
>
> **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**
>
> If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date) , you or your attorney must:
>
> [File with the court a written request for a hearing {or, if the court requires a written response, an answer, explaining your position} . . .

Allowance of Administrative Expenses

Judge Stone stated that there are detailed provisions in the Bankruptcy Code and Rules which govern the employment and compensation of professionals, but the rules provide no guidance on whether applications for the allowance of other administrative expenses should be noticed to creditors generally or to some subset of creditors, such as the creditors' committee, and appear to leave this to local practice or individual judges' discretion. Similarly, while the Official Forms include a form for a proof of a creditor's claim, no form is provided for an application for allowance of an administrative expense.

Judge Stone's suggestion stated that the subject "is important enough that the Rules ought to provide for standardized procedures."

The procedure for seeking payment of administrative expenses is not set out in much detail in the Code or in the rules. Section 503(a) provides that an "entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." The legislative history of that provision indicates that Congress contemplated that the "Rules of Bankruptcy Procedure will specify the time, the form, and the method of such a filing."

Section 503(b) provides that administrative expenses, except section 502(f) claims in involuntary cases, shall be allowed after notice and a hearing. Rule 2016(a) prescribes the content of an application for compensation for services rendered or reimbursement of expenses, and Rule 1019(6) provides timing requirements for requesting payment of administrative expenses incurred in chapter 11, 12, or 13 cases before conversion of cases to chapter 7. Neither the rules nor forms otherwise specify the time, form, or method of filing a request for payment of

an administrative expense.

The Advisory Committee considered similar suggestions by Judge Wedoff and attorney Philip Martino at its October 2008 meeting in Denver and its March 2009 meeting in San Diego. Unlike Judge Stone's request for a rule and form to guide applications for allowance of administrative expenses generally, the earlier suggestions were to provide a streamlined procedure for allowance of certain administrative expenses, such as compensation for a chapter 7 trustee in a case that is converted to chapter 13.

The suggestions by Judge Wedoff and attorney Philip Martino were referred to the Business Subcommittee, which concluded that using a proof-of-claim-like process (along with deemed allowance) was not consistent with the Bankruptcy Code's requirement under § 503 of a request for payment and court authorization after notice and a hearing. After a short discussion at the San Diego meeting, the Committee accepted the Subcommittee's recommendation of no change.

Recommendations

If the Advisory Committee desires to consider the suggestion to include respondent's name in the caption of a motion initiating a contested matter further, I recommend that the suggestion be referred to the Subcommittee on Consumer Issues.

If the Advisory Committee desires to consider the suggestion to establish a procedure and form for applications for allowance of administrative expenses, I recommend that the suggestion be referred to the Subcommittee on Business Issues.

Item 12 will be an oral report.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JAMES WANNAMAKER

RE: SUGGESTION TO AUTHORIZE FINANCIAL MANAGEMENT COURSE PROVIDERS TO FILE CERTIFICATIONS

DATE: MARCH 15, 2010

Dana C. McWay (on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group) has submitted Suggestion (09-BK-I) to amend Rule 1007(b)(7) to allow an approved personal financial management course provider to file Official Form 23 (the certification by an individual chapter 7, chapter 11, or chapter 13 debtor that the debtor has completed the required course).

The current rule provides that the debtor shall file the certification, which includes a certificate number (if any) obtained from the course provider. Ms. McWay stated that debtors have reported occasional difficulty obtaining statements from course providers. Such difficulties or a debtor's failure to file the certificate in a timely fashion may result in the case being closed without entry of a discharge.

As part of their effort to plan for the Next Generation of Bankruptcy CM/ECF, the Functional Requirements Group recommended authorizing the course providers (who are approved by the United States trustee or the bankruptcy administrator) to file financial management course statements directly. The group indicated that should reduce the number of cases closed without entry of a discharge. Many of these cases are reopened later for the debtor to file the statement and the court to issue the discharge.

Approved personal financial management course providers would be given "limited user" logins/passwords for the CM/ECF filing system, as is done for the auditors who review debtors' statements of income, expenditures, and assets as provided in 28 U.S.C. § 586(f). Likewise, many creditors are allowed to file their proofs of claim directly in CM/ECF.

Recommendation

Reducing the number of cases closed without a discharge and subsequently reopened to file the statement and issue the discharge would benefit both the debtors involved and the courts by reducing costs and the time required to administer the cases. If, however, some course providers are not providing the information needed to complete the Official Form, authorizing course providers to file the Official Form themselves will not completely alleviate the problem.

The Suggestion does not specify whether the statement would continue to be a certification by the debtor or would become a certification by the course provider, which would require amending both the Official Form and Rule 1007(b)(7). In addition, the Suggestion states that course providers would be allowed to file the statement "as a computer transaction." The Suggestion does not specify whether the statement would be filed electronically as a document (i.e., the Official Form) or as just docket text, as is commonly done with trustee final reports in no-asset cases and some routine court orders.

If the Advisory Committee desires to consider the Suggestion further, I recommend that it be referred to the Subcommittee on Consumer Issues. The Subcommittee could request clarification from the Functional Requirements Group on who the group envisions would make the certification and whether the certification would be filed as a document or as docket text.

RULE 6(d): "3 DAYS ARE ADDED"

Some questions turn on high theory. Some do not. Experience is likely to prove the best guide in returning to the familiar questions posed by Civil Rule 6(d).

Rule 6(d) now reads:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F) — mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing.

Criminal Rule 45(c) is an almost-verbatim duplicate of Civil Rule 6(d). Appellate Rule 26(c) is similar, but adds a wrinkle. Bankruptcy Rule 9006(f) is a variation. The parallels are no accident — these rules were revised in 2005 to achieve rough uniformity in time calculations. So now, any actual recommendations for change must be coordinated with the other advisory committees, perhaps directly and perhaps through a joint subcommittee or similar device.

The wisdom of the "3-days-are-added" provision has been explored repeatedly. In 1994 it was decided, in response to a question raised at a Standing Committee meeting, that there was no reason to extend the added time to 5 days.

The question next arose in conjunction with the 2001 amendments that added service by electronic means. Discussion focused on the question whether the nearly instantaneous transmission of most e-messages obviates the need for additional time. The decision to treat electronic service the same as postal mail rested in part on doubt whether e-mail is always transmitted immediately. The doubts were most important with respect to attachments — several participants commented that it may take two or three days to establish a mutually compatible system of transmitting attachments. Doubts of this sort are subject to reconsideration as technology marches on. Additional questions were raised about strategic calculations, resting on the perception that some lawyers will select whatever method of service is calculated to minimize the actual time available to respond. Again, questions of this sort are subject to reconsideration in light of changing circumstances, particularly the pressures that may make e-service virtually compulsory in many courts.

The Style Project considered whether this subject should be advanced for more-than-style revision, but nothing has happened yet.

The most recent occasion for discussion arose with the Time Computation Project. One of the potential virtues of the 7, 14, 21, and occasional 28-day periods widely adopted in the Rules is closing the count on the same day of the week as opened the count. Seven days from Monday is Monday, and so on. The added 3 days messes up this calculation, and, when the 3d day lands on a weekend or legal holiday, requires an extension to the end of the weekend-holiday period. Some of the public comments pointed out that Rule 6(d) defeats the desired simplicity.

The questions do not go away.

The case for adding 3 days when service is made by postal mail seems strong, unless we believe that most of the time periods provided by the rules are longer than needed. Mail often is

delivered on the next day, but that ambitious goal is not always met. The problem of delivery time could be addressed by dropping the 3-day extension and also dropping the provision that service by mail is complete on mailing. But there are good reasons to avoid the likely alternative of making service complete on delivery.

Adding 3 days when service is made on the court clerk may be no more than a token gesture — if the person has no known address, an extra 3 days may not mean much in a busy clerk's office. Perhaps the best case for adding this time is the obvious analogy — if extra days are added for mail, surely they should be added here as well.

Service by e-mail continues to be the subject of most discussion. Practical judgment based on experience is called for. Experience, moreover, may indicate the need for considering three separate questions: How often is service still accomplished outside electronic communication? When service is electronic, how often is it accomplished through the court's facilities? How often is it accomplished by counsel to counsel?

Reliance on electronic service is probably pervasive in most courts. Some courts encourage it, and at least a few virtually mandate it. The most notable exceptions are for pro se litigants. The more nearly universal electronic service is, whether as a matter of preference or compulsion, the less reason there is to worry about the influence of denying 3 added days on strategic choices about the mode of service.

Is service through the court's electronic facilities so reliable and instantaneous that there is no plausible argument for adding 3 days to protect against delayed or garbled transmission?

Similarly, is e-mail addressed by counsel to counsel so regularly received soon after transmission, and received in such shape that it can be promptly opened, and tended to with the alacrity likely to be stimulated by personal delivery, that the 3 added days are no more than a windfall extension of time periods that generally do not deserve extension? Will strategic calculation be advanced, impeded, or merely different if 3 days are added for service by mail or leaving with the court clerk, but not otherwise?

One possible outcome of these questions would be to distinguish between e-service through the court's facilities and counsel-to-counsel service. Drafting would likely lead to some change in Rule 5(b)(3), which now describes service through the court's facilities as service "under 5(b)(2)(E)." That will surely provide an occasion for reopening the question whether Rule 5(b)(2)(E) should continue to require the party's consent to e-service, a question that likely will soon be ripe in any event.

Delivery by any other means consented to in writing does not stir obvious passions. A party concerned about adding 3 days under the present rule need not ask others to consent. A party asked to consent under an amended rule that does not add 3 days can refuse consent. But the analogy to mail may offer some support for retaining the 3-day extension, particularly under the Appellate Rule 25(c)(1)(C) provision for service "by third-party commercial carrier for delivery within 3 calendar days." Consent is not required under the Appellate Rule, and the speediest — and most expensive — mode of delivery also is not required.

One final observation. The notes following Rule 6 show that it has been amended in 1948, 1963, 1966, 1968, 1971, 1983, 1985, 1987, 1999, 2001, 2005, and 2007. The Time Computation Project amendments are almost upon us. The steady progression of changes may reflect a need for constant adjustments, large or small, to reflect changed circumstances or better understanding. The persistent fear of missed deadlines may stir lawyers' concerns and rulemaking sensitivity to those concerns. Whenever the Committee acts next, it will be optimistic to hope for long-term repose.

Rule 6(d) Three Days are Added

Judge Kravitz introduced the Rule 6(d) topic. Rule 6(d) adds three days to any time specified to act after service when service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. These other means include mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, and delivery by any other means the person consented to in writing. In the Time Computation Project the Subcommittee and several advisory committees decided to defer the question whether the three added days are appropriate in all the circumstances now provided. It is useful to reconsider the timing question now.

The most questionable instances are those where three days are added after e-service and after service by agreed means. When e-service was first authorized, the three days seemed useful. The CM/ECF system was still in its infancy — it was not clear whether it would work well, nor whether lawyers would seize the opportunity to effect service through the court's system. Lawyers said that it might take as long as three days to accomplish effective receipt of e-messages, particularly with attachments. The attachments to Rule 56 motions may run hundreds of pages, and there were problems with system compatibilities. Service by private carrier is not instantaneous, and only the most expensive means are likely to accomplish next-day delivery.

Despite these questions, lawyers will surely see any reduction of the categories that allow three added days as taking away something they count on. This seems particularly true for e-service, which ordinarily arrives the same day as transmitted. Moreover, the Time Computation Project amendments take effect this December 1. It might we wise to see how they work before undertaking further adjustments. The three-day addition "is a small thing; why not let the bar absorb the new rules" before looking toward further changes?

Laura Briggs has provided great help in explaining how e-service through the court's facilities works. She found that in her court approximately 5,000 notices of electronic filing are received each day. Of them, 20 to 30 are initially undeliverable. The clerks immediately investigate the undeliverable notices and are able to accomplish effective transmission of all but 2 or 3 within the next day. When delivery cannot be accomplished, notice is mailed — triggering the three extra days for mail delivery. In exploring the question with a bar group, however, she found great resistance to deletion of the three added days for e-service.

On an anecdotal level, lawyers still tell stories of as much as three days from docketing in the court to receipt of e-notice, and rather often.

On a more general level, it was observed that this question affects Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c). Criminal Rule 45(c) is virtually identical to Rule 6(d), but the others introduce variations. Any project to revise Rule 6(d) must be coordinated with the other advisory committees, perhaps directly or perhaps through a joint subcommittee.

The three added days for service by mail seems to make sense; if it were treated the same as direct delivery or e-service, lawyers would do everything possible to serve by mail so as to reduce the effective time available to respond. And pro se litigants, particularly prisoners, are likely to use mail service. When service is made on the court clerk because the person to be served has no known address, the three added days may be more symbolic than useful, but do no apparent harm. Service by other means consented to may not be a real problem, since consent might be conditioned on the most expeditious mode of delivery, and can be withheld in any event.

The question of e-service ties to the question of e-filing. Under Rule 5(d)(3), a local rule may require e-filing, although reasonable exceptions must be allowed. Many courts effectively require e-filing by lawyers. Rule 5(b)(2)(E) requires consent of the person served for e-service, and Rule 5(b)(3) allows e-service through the court's facilities if authorized by local rule. It may prove desirable to reconsider this package in tandem with the three-added day provision. Registering for

e-filing is obviously coupled with consent to receive e-notice of filing from the court. So in the Southern District of Indiana, the local rules require all cases to be e-filed, subject to exceptions. Signing in for e-filing includes consent to e-notice. That might be made mandatory for all e-filing cases, carrying forward the requirement that reasonable exceptions be allowed.

The lawyer members were asked whether the Committee should move promptly to reconsider the three-added days. One said: "Enough already. This is all some of us have left. It is too soon after the Time Computation Project to make further changes." Another agreed, and added that e-service "does not always work that smoothly." A third added that some of the "darndest things" wind up in his junk-mail box; there is a real risk that spam filters will divert an e-notice away from the in-box.

Emery Lee added that the recent discovery survey used e-mail transmission, and that a non-negligible number were bounced back and did not work. And sometimes the system has to try several times to get a good address to go through.

Laura Briggs added to the information about the success of her office in ensuring near-perfect e-transmission the results of a quick look at practices in other districts. Even a quick look showed at least two districts that explicitly refuse to monitor bouncebacks. That is cause for worry about eliminating the three added days.

Judges Kravitz and Rosenthal suggested that the other advisory committees are not likely to be disappointed if this Committee decides to postpone any reconsideration of the three added days. The Bankruptcy Rules Committee might have some regret — there is much greater pressure for fast action in many bankruptcy proceedings than in most civil proceedings. The Bankruptcy Rules Committee is working on the Part 8 appeal rules, seeking a model that approaches closer to the Appellate Rules. Their many conferences lead to questions that come back to e-filing: why is it necessary to adopt rules on the color of brief covers, when all is done electronically anyway? There is considerable pressure to make e-filing the norm. This affects service, filing, and more. E-records are upon us.

Two lawyer members observed that in the e-world they still print out copies, but limit the number and share the paper copies as different lawyers need them.

Judge Rosenthal suggested that it may be appropriate to undertake a project akin to the Style Project as a long-term reconsideration of every rule to remove vestiges of the bygone paper world. But the time has not yet come. E-filing must be allowed to become firmly settled first.

It was agreed that the question should remain on the agenda, and when it is taken up should be approached in a way that avoids any unnecessary differences among the different sets of rules.

Item 15 will be an oral report.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

January 19, 2010

MEMORANDUM

To: Judges, United States District Courts
Judges, United States Bankruptcy Courts

From: James C. Duff

RE: GUIDELINES FOR STANDING ORDERS, LOCAL RULES AND POSTING TO COURTS' WEBSITES **(INFORMATION)**

On September 15, 2009, the Judicial Conference of the United States approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Website* and agreed to transmit those guidelines, along with an explanatory report, to the courts. The report and the guidelines have been posted on the courts' Internet site at http://www.uscourts.gov/rules/jc09-2009/2009-09-Appendix-F.pdf.

After a study of district courts' standing orders and a survey of the chief district judges and chief bankruptcy judges, the Committee on Rules of Practice and Procedure concluded that courts have had difficulty in defining what subjects are appropriately addressed in standing orders on the one hand or in local rules on the other hand, primarily because there are no national standards and very few local standards. The study and survey also indicated that courts have had difficulty in ensuring that standing orders are readily accessible to lawyers and litigants.

The Committee decided that courts would find it useful to have guidelines on delineating between matters appropriately addressed in standing orders and those that should be addressed in local rules, and on the most effective and consistent way to post standing orders on court websites and make them searchable. To meet this need, the Committee has developed, and the Judicial Conference has approved, these specific guidelines. These are voluntary guidelines. They do not impose any requirements on the courts.

In general, under these guidelines, standing orders may be appropriate for internal administrative matters, emergency matters, transitory problems and issues, and rules of courtroom conduct that do not bear on substantive rules of practice. Local rules, on the other

hand, are more appropriate to address filing, pretrial practice, motion practice, and other requirements imposed on litigants and lawyers. The guidelines also suggest ways to make standing orders on specific topics easier to find.

Courts are encouraged to review their standing orders and local rules, and assess the way in which their standing orders are posted on their websites, in accordance with these guidelines. The Committee on Rules of Practice and Procedure can provide guidance, on request, for questions about the appropriate placement of subject matters in standing orders or local rules, or on posting standing orders on courts' websites and making it easier to find orders addressing specific topics.

cc: District Court Executives
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts

SECRETARY
Honorable Bernice B. Donald
U.S. District Court
Chambers Room 951
167 N. Main Street
Memphis, TN 38103-1875
bernice_donald@tnwd.uscourts.gov

AMERICAN BAR ASSOCIATION

Office of the Secretary
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5160
FAX: (312) 988-5153

Defending Liberty
Pursuing Justice

September 30, 2009

The Honorable Mark R. Kravitz
Chair
Advisory Committee on Civil Rules
U.S. District Court for the District of Connecticut
450 Main Street
Hartford, CT 06103

RE: BAPCPA Restrictions on Bankruptcy-Related Legal Advice to Clients

Dear Judge Kravitz:

At the meeting of the House of Delegates of the American Bar Association held August 3-4, 2009, the enclosed resolution was adopted upon recommendation of the Connecticut Bar Association and the General Practice, Solo and Small Firm Division. Thus, this resolution now states the official policy of the Association.

We are transmitting it for your information and whatever action you think appropriate. Please advise if you need any further information, have any questions or if we can be of any assistance. Such inquiries should be directed to the Chicago office.

Sincerely yours,

Hon. Bernice B. Donald, Secretary

BBD/apb
Enclosure

cc: Roseanne C. Lucianek
Kimberly Anderson
James M. Durant III
Tim Hazen
Kathleen J. Hopkins

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 3-4, 2009

RECOMMENDATION

RESOLVED, That the American Bar Association opposes the provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act, P.L. 109-8, that impose restrictions upon the bankruptcy-related legal advice lawyers can provide to individual clients and that require lawyers who provide such advice to identify and advertise themselves as "debt relief agencies," as well as other similar future federal legislative or regulatory proposals, on the grounds that such provisions violate core First Amendment principles, undermine the confidential attorney-client relationship, and interfere and conflict with traditional state judicial regulation of the legal profession.

REPORT

I. INTRODUCTION

In April 2005, after more than eight years of debate, Congress enacted sweeping bankruptcy reform legislation, the Bankruptcy Abuse Prevention and Consumer Protection Act, P.L. 109-8 ("BAPCPA"), containing numerous significant changes to the federal bankruptcy laws.[1] Unfortunately, certain key provisions of BAPCPA requiring certain lawyers to identify and advertise themselves as "debt relief agencies" have had a strong negative impact on all lawyers who offer bankruptcy-related advice to individuals, not just those lawyers who specialize in representing debtors in bankruptcy. In addition to the serious and direct impact these provisions have had on the constitutional rights of lawyers who provide bankruptcy-related advice to both consumers and creditors, these provisions undermine both the fundamental tenets of the attorney-client relationship and traditional state judicial regulation of the bankruptcy legal profession.

On June 8, 2009, the U.S. Supreme Court granted review in *Milavetz, Gallop & Milavetz, P.A. v. United States,* No. 08-1119 & 1225. The case presents several key questions, including whether the "debt relief agency" provisions in BAPCPA violate lawyers' First Amendment rights to free speech or violate lawyers' or clients' Fifth Amendment rights to due process. In deciding the case, the Supreme Court will resolve a split between the Eighth and Fifth Circuits on these key issues. Although the ABA has existing policy generally opposing the "debt relief agency" provisions in legislation that was ultimately enacted as BAPCPA[2], the resolution would grant the ABA additional specific policy in support of an application to the Board of Governors for an ABA amicus brief to be filed

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[1] Although the ABA has expressed support for certain narrow provisions in BAPCPA that allow direct appeals of final bankruptcy orders to the courts of appeals and permit bankruptcy lawyers to pay referral fees to nonprofit lawyer referral services, the ABA strongly opposes three provisions in the law that require debtor bankruptcy lawyers to: (1) certify the accuracy of the debtor's schedules, under penalty of harsh court sanctions; (2) certify the debtor's ability to make future payments under reaffirmation agreements; and (3) identify and advertise themselves as "debt relief agencies" subject to new intrusive regulations. *See* ABA's May 1, 2007 letter to the House Judiciary Subcommittee on Commercial and Administrative Law, available on the ABA's website at http://www.abanet.org/poladv/letters/bankruptcy/2007may01_BAPCPAh_l.pdf

[2] *See* ABA Resolution 10C, adopted by the ABA House of Delegates at the 2001 Annual Meeting, opposing the "enhanced attorney liability provisions in S. 420/H.R. 333," legislation that was ultimately enacted as BAPCPA in 2005; *see also* ABA Fact Sheet titled "ABA Seeks Repeal of Harmful Provisions in BAPCPA," available at http://www.abanet.org/poladv/priorities/bankruptcy/brattyliabilityfactsheet_july2009_.pdf The ABA Board of Governors designated repeal of the attorney liability provisions in BAPCPA as an ABA Legislative and Governmental Priority several years ago (as part of the "Independence of the Legal Profession" priority) and the issue remains an ABA priority for 2009. *See* ABA priorities webpage at: http://www.abanet.org/poladv/priorities/

in the *Milavetz* case, which would address the constitutionality of the "debt relief agency" provisions in the statute. It would also support the ABA's continuing legislative efforts seeking repeal of these statutory provisions.

II. HARMFUL EFFECTS OF BAPCPA'S "DEBT RELIEF AGENCY" PROVISIONS

Under BAPCPA, any lawyer or law firm providing information or advice to, or representation of, an "assisted person" with respect to a bankruptcy case or proceeding is deemed a "debt relief agency" that: (1) is barred from advising the client "to incur more debt in contemplation" of a bankruptcy filing, even where such debt is legal and appropriate; (2) must provide a disclosure statement to every potential bankruptcy client explaining the duties of a debtor in bankruptcy, and maintain a copy of the statement for two years; (3) loses all fees charged in the case and is subject to additional penalties, if found negligent in failing to perform any agreed-upon service; and (4) is required to include a conspicuous notice in any advertising stating "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code," or a substantially similar statement. Defined as anyone "whose debts consist primarily of consumer debts," an "assisted person" is not limited to the debtor in the bankruptcy case; the person could be a creditor. Similarly, the lawyer need not be a bankruptcy specialist, nor be giving bankruptcy advice, so long as the advice is "with respect to" a bankruptcy case or proceeding.

In light of the broad definitions given to the terms "debt relief agency," "bankruptcy assistance," and "assisted persons" by the courts that have interpreted BAPCPA since its enactment in 2005, these provisions have had a broad, adverse impact on representation of individual debtors and creditors.

First, by mandating that a lawyer may not advise his client "to incur more debt in contemplation" of a bankruptcy filing, the "debt relief agency" provisions of BAPCPA infringes upon and undermines the confidential attorney-client relationship[3]. Because there are a number of situations where incurring such debt may be both appropriate and beneficial,[4] these provisions in BAPCPA prevent lawyers from fulfilling their duties to

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[3] The relevant provision in BAPCPA mandating that an attorney may not advise his client "to incur more debt in contemplation" of a bankruptcy filing is codified at 11 U.S.C. § 526(a)(4).

[4] "For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case." Erwin Chemerinksy, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 75 AM. BANKR. L.J. 571, 578 (2005), quoted in *Milavetz*, 541F.3d at 794 n. 9.

clients by advising them of their full range of options. Enforcement of this "gag rule" provision necessarily entails inquiry into the precise advice given by the lawyer to the individual client, and thus represents an inappropriate intrusion into the attorney-client privilege, a fundamental legal principle strongly supported by the ABA.[5] In addition, requiring lawyers to disclose such communications would directly violate Model Rule of Professional Conduct 1.6, or the equivalent binding rule adopted by the state in which the lawyer is licensed, which prohibits the lawyer from revealing confidential information relating to the representation of the client except in certain narrow circumstances.

Second, this content-based prohibition on speech violates the lawyer's First Amendment rights to free speech. Because incurring debt may be beneficial and entirely proper in certain circumstances, such a prohibition is not narrowly tailored to prevent a crime or fraud. As noted above, the United States Supreme Court recently granted certiorari in the case of *Milavetz, Gallop & Milavetz, P.A. v. United States* and will be considering the constitutionality of these provisions.

Third, other "debt relief agency" provisions in BAPCPA[6] are likely to compel factually incorrect statements in a significant number of lawyer advertisements, creating public confusion as to who provides bankruptcy assistance and who does not. A lawyer representing a creditor who technically meets the definition of an "assisted person" under BAPCPA would be required to add the mandatory disclosure language, even though the lawyer may not in fact represent consumer debtors. Similarly, a real estate lawyer who provides bankruptcy-related advice in a real estate transaction by a prospective consumer debtor may have to add the disclosure language, even though the lawyer does not provide general bankruptcy representation. Such mandatory disclosure statements in advertising by lawyers who do not represent consumer debtors as bankruptcy counsel would be false and misleading. These "debt relief agency" disclosure requirements[7] may also discourage lawyer advertising entirely, effectively narrowing the range of available representation.

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[5] *See, e.g.*, ABA Resolution 111, adopted by the ABA House of Delegates in August 2005, expressing the ABA's strong support for the preservation of the attorney-client privilege and opposition to governmental policies, practices, and procedures that have the effect of eroding the privilege. Resolution 111, the related background Report, and many other useful materials on the privilege prepared by the ABA Task Force on Attorney-Client Privilege are available on the Task Force's website at http://www.abanet.org/buslaw/attorneyclient/

[6] *See* 11 U.S.C. §§ 101(12A), 101(4A), 101(3), and 528(a) and (b).

[7] *See* 11 U.S.C. § 528.

Finally, the "debt relief agency" provisions in BAPCPA interfere with the traditional state-based judicial regulation of the legal profession that the ABA has long supported.[8] As applied to lawyers, these provisions purport to regulate the lawyer's conduct by:

- Prohibiting certain kinds of legal advice, even if the advice is appropriate and beneficial to the client;
- Attempting to regulate the discussions and agreements between lawyer and client about what services would be provided, including the voiding of any retention agreement if the lawyer fails to comply with the statutory requirements; and
- Imposing federal statutory liability for damages for any misrepresentation or material omission made by the lawyer with respect to the advice being given.

Furthermore, by making these provisions enforceable by the United States Trustee or state law enforcement agencies, the "debt relief agency" provisions improperly invade confidential attorney-client communications without the client's consent, or by coerced client consent. All of these provisions conflict with or flatly violate state rules of professional conduct that currently bind all lawyers. Piecemeal imposition of federal regulation on the practice of law will serve both to undermine state judicial authority and impose inconsistent requirements upon counsel.

Most courts considering the issue have held that the statutory definition of "debt relief agencies" is broad enough to apply to lawyers. Many lawyers have stopped providing advice or representing individuals in bankruptcy matters entirely rather than render legal advice under these restrictions and risk incurring the undue regulatory interference created by the statute, especially given the obligation to display the awkward and misleading notice that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code" or a substantially similar statement.

The "debt relief agency" provisions in BAPCPA have thus had a serious negative impact on the availability of legal counsel in bankruptcy-related matters. More importantly, it would set a troubling precedent if Congress is permitted to mandate different degrees of

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[8] The ABA has consistently taken the position that primary regulation and oversight of the legal profession should continue to be vested in the highest state court in which the lawyer is licensed. In February 1972, the ABA House of Delegates adopted a resolution stating that "discipline of the legal profession is the responsibility of the judicial branch of government and the American Bar Association is opposed to the adoption of disciplinary rules by the legislative branch of government". *See* Resolution of the Special Committee on National Coordination of Disciplinary Enforcement, adopted at the ABA Midwinter Meeting in 1972. The ABA reiterated and expanded this position in February 1992 by endorsing certain key lawyer disciplinary principles, including the position that "regulation of the legal profession should remain under the authority of the judicial branch of government." *See* ABA Resolution 119, adopted in February 1992.

professional responsibility, accountability, and liability simply because of the content of the advice, the area of practice, or the types of clients that the lawyer represents.

III. CONCLUSION

The "debt relief agency" provisions of BAPCPA have had a significant adverse effect on lawyers, debtors, courts, and the bankruptcy system as a whole. In addition to violating the core constitutional rights of both lawyers and their clients, the provisions have seriously undermined the confidential attorney-client relationship and interfered with the traditional and longstanding state judicial regulation of the legal profession. The Supreme Court's decision to review the Eighth Circuit's opinion in the *Milavetz* case presents the ABA with a unique opportunity to address these important issues directly. Therefore, the ABA should adopt the proposed resolution as ABA policy, to strengthen the ABA's voice as it addresses these important issues and, if necessary, opposes similar future legislative or regulatory proposals governing lawyers.

Respectfully submitted,

Francis J. Brady, President
Connecticut Bar Association

Robert A. Zupkus, Chair
General Practice, Solo and Small Firm Division

August 2009

UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT
300 Fannin Street, Suite 2299
Shreveport, Louisiana 71101-3074

CARL E. STEWART
CIRCUIT JUDGE

TELEPHONE: (318) 676-3765
FACSIMILE: (318) 676-3768

November 24, 2009

Honorable Bernice B. Donald
United States District Court
Chambers Room 951
167 North Main Street
Memphis, Tennessee 38103-1875

Dear Judge Donald:

Thank you for your good letter of September 30, 2009. I was pleased to learn of the American Bar Association resolution pertaining to the BAPCPA Restrictions on Bankruptcy-Related Legal Advice to Clients. I presented your letter and the resolution to the Advisory Committee on Appellate Rules during its meeting in Seattle, Washington, November 5-6, 2009. Your letter and the enclosure concerning BAPCPA have been shared with the Bankruptcy Rules Committee Chair, Judge Laura Swain, and the committee reporter, Professor S. Elizabeth Gibson.

My term as chair of the appellate rules committee ended on September 30, 2009. My successor is Judge Jeffrey Sutton of the United States Sixth Circuit Court of Appeals. I join him and our reporter, Professor Catherine Struve, in thanking you for informing the committee about this very important action taken by the American Bar Association during its most recent meeting.

I look forward to seeing you at the 2010 Just The Beginning Foundation meeting, if not sooner. In the meantime, have a Happy Thanksgiving.

Best regards,

Carl E. Stewart

Carl E. Stewart

cc: Judge Jeffrey Sutton
Judge Laura Taylor Swain
Mr. Peter McCabe
Mr. John Rabiej
Mr. James Ishida
Professor Catherine T. Struve

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MILAVETZ, GALLOP & MILAVETZ, P. A., ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08–1119. Argued December 1, 2009—Decided March 8, 2010*

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended the Bankruptcy Code to define a class of bankruptcy professionals termed "debt relief agenc[ies]." 11 U. S. C. §101(12A). That class includes, with limited exceptions, "any person who provides any bankruptcy assistance to an assisted person . . . for . . . payment . . . , or who is a bankruptcy petition preparer." *Ibid.* The BAPCPA prohibits such professionals from "advis[ing] an assisted person . . . to incur more debt in contemplation of [filing for bankruptcy] . . . ." §526(a)(4). It also requires them to disclose in their advertisements for certain services that the services are with respect to or may involve bankruptcy relief, §§528(a)(3), (b)(2)(A), and to identify themselves as debt relief agencies, §§528(a)(4), (b)(2)(B).

The plaintiffs in this litigation—a law firm and others (collectively Milavetz)—filed a preenforcement suit seeking declaratory relief, arguing that Milavetz is not bound by the BAPCPA's debt-relief-agency provisions and therefore can freely advise clients to incur additional debt and need not make the requisite disclosures in its advertisements. The District Court found that "debt relief agency" does not include attorneys and that §§526 and 528 are unconstitutional as applied to that class of professionals. The Eighth Circuit affirmed in part and reversed in part, rejecting the District Court's conclusion that attorneys are not "debt relief agenc[ies]"; upholding application of §528's disclosure requirements to attorneys; and finding §526(a)(4) unconstitutional because it broadly prohibits debt relief agencies

*Together with No. 08–1225, *United States* v. *Milavetz, Gallop & Milavetz, P. A., et al.*, also on certiorari to the same court.

from advising assisted persons to incur *any* additional debt in contemplation of bankruptcy even when the advice constitutes prudent prebankruptcy planning.

Held:

1. Attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the BAPCPA. By definition, "bankruptcy assistance" includes several services commonly performed by attorneys, *e.g.*, providing "advice, counsel, [or] document preparation," §101(4A). Moreover, in enumerating specific exceptions to the debt-relief-agency definition, Congress indicated no intent to exclude attorneys. See §§101(12A)(A)–(E). Milavetz relies on the fact that §101(12A) does not expressly include attorneys in advocating a narrower understanding. On that reading, only a bankruptcy petition preparer would qualify—an implausibility given that a "debt relief agency" is "any person who provides any bankruptcy assistance . . . or who is a bankruptcy petition preparer," *ibid.* Milavetz's other arguments for excluding attorneys are also unpersuasive. Pp. 5–9.

2. Section 526(a)(4) prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose. The statute's language, together with its purpose, makes a narrow reading of §526(a)(4) the natural one. *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472, supports this conclusion. The Court in that case read now-repealed §96(d), which authorized reexamination of a debtor's attorney's fees payment "in contemplation of the filing of a petition," to require that the portended bankruptcy have "induce[d]" the transfer at issue, *id.*, at 477, understanding inducement to engender suspicion of abuse. The Court identified the "controlling question" as "whether the thought of bankruptcy was the impelling cause of the transaction," *ibid.* Given the substantial similarities between §§96(d) and 526(a)(4), the controlling question under the latter is likewise whether the impelling reason for "advis[ing] an assisted person . . . to incur more debt" was the prospect of filing for bankruptcy. In practice, advice impelled by the prospect of filing will generally consist of advice to "load up" on debt with the expectation of obtaining its discharge. The statutory context supports the conclusion that §526(a)(4)'s prohibition primarily targets this type of conduct. The Court rejects Milavetz's arguments for a more expansive view of §526(a)(4) and its claim that the provision, narrowly construed, is impermissibly vague. Pp. 9–18.

3. Section 528's disclosure requirements are valid as applied to Milavetz. Consistent with Milavetz's characterization, the Court presumes that this is an as-applied challenge. Because §528 is directed at misleading commercial speech and imposes only a disclosure re-

Syllabus

quirement rather than an affirmative limitation on speech, the less exacting scrutiny set out in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, governs. There, the Court found that, while unjustified or unduly burdensome disclosure requirements offend the First Amendment, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*, at 651. Section 528's requirements share the essential features of the rule challenged in *Zauderer*. The disclosures are intended to combat the problem of inherently misleading commercial advertisements, and they entail only an accurate statement of the advertiser's legal status and the character of the assistance provided. Moreover, they do not prevent debt relief agencies from conveying any additional information through their advertisements. *In re R. M. J.*, 455 U. S. 191, distinguished. Because §528's requirements are "reasonably related" to the Government's interest in preventing consumer deception, the Court upholds those provisions as applied to Milavetz. Pp. 18–23.

541 F. 3d 785, affirmed in part, reversed in part, and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined, in which SCALIA, J., joined except for n. 3, and in which THOMAS, J., joined except for Part III–C. SCALIA, J., and THOMAS, J., filed opinions concurring in part and concurring in the judgment.

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Item 18 will be an oral report.

Item 19 will be an oral report.

Bankruptcy Rules Tracking Docket (By Rule or Form Number) 3/29/10

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1004.2 (new), Chapter 15 rule	Suggestion 05-BK-B Judge Samuel Bufford 1/20/06 Committee proposal	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/06 - Subcommittee discussed 6/06 - Subcommittee approved revised rule 9/06 - Committee approved for publication 3/07 - Publication deferred for further study 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 2/08 - Subcommittee discussed 3/08 - Committee approved for publication 6/08 - Standing Committee approved publication 8/08 - Published for public comment 1/09 - Subcommittee drafted revised rule 3/09 - Committee approved revised rule for republication 6/09 - Standing Committee approved republication 8/09 - Republished for public comment 4/10 - Committee agenda	12/1/11

Rule 1007(a)(2) Creditors list in involuntary case	Comment 06-BK-057 Chief Deputy Clerk Margaret Grammar Gay	3/07 - Referred to Subcommittee on Business Issues 6/07 - Subcommittee discussed 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 6/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10

Rules 1007(a), (c),(f),(h), 1011(b), 1019(5), 1020(a), 2002(a),(b),(o), (q), 2003(a),(d), 2006(c), 2007(b), 2007.2(a), 2008, 2015(a),(d), 2015.1(a),(b), 2015.2, 2015.3(b),(e), 2016(b),(c), 3001(e), 3015(b),(g), 3017(a),(f), 3019(b), 3020(e), 4001(a),(b),(c), 4002(b), 4004(a), 6003, 6004(b), (d),(g),(h), 6006(d), 6007(a), 7004(e), 7012(a), 8001(f), 8002(a),(b),(c), 8003(a),(c), 8006, 8009(a), 8015, 8017(a), 9006(d), 9027(e),(g), 9033(b),(c), Change deadlines of less than 30 days to multiples of 7	Committee proposal (Standing Committee's Time Computation Committee)	9/06 - Committee discussed time computation project, small groups to review deadlines in bankruptcy rules 12/06 - Ad hoc group of bankruptcy judges approved 3/07 - Committee approved for publication as revised 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee approved 6/08 - Standing Committee approved 9/08 - Judicial Conference Approved 3/09 - Related statutory changes transmitted to Congress 3/09 - Supreme Court approved 12/09 - Amendments took effect	12/1/09

Rule 1007(b)(7) Allow financial management course provider to file Form 23	Suggestion 09-BK-I Dana C. McWay on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group	4/10 - Committee agenda	
Rules 1007(c), 4004, 5009 Additional notice that case may be closed without discharge	Committee proposal	3/07 - Committee discussed, referred to Subcommittee on Consumer Issues 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Rule 1007(k) Delete as either unnecessary or substantive	Suggestion 09-BK-D Judge Robert J. Kressel	07/09 - Subcommittee on Business Issues considered 10/09 - Committee agenda 10/09 - Committee considered, no further action taken	
Interim Rule 1007-1 Conform Interim Rule to time amendments	Committee proposal	8/09 - Director's memo on revising the Interim Rule	12/09

Rules 1014, 1015 Chapter 15 amendments	Richard Broude	2/08 - Subcommittee on Technology and Cross Border Insolvency considered 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Rule 1018 Chapter 15 amendments; is injunctive relief under §§ 1519(e), 1521(e) governed by Rule 7065?	05-BR-037 Insolvency Law Committee of the Business Law Section of State Bar of California	3/07 - Referred to Subcommittee on Technology and Cross Border Insolvency 6/07 - Subcommittee considered 9/07 - Committee considered 2/08 - Subcommittee considered 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10

Rule 1019(2) New filing period for objection to exemptions in converted case	Comment 06-BK-054 Judge Dennis Montali Suggestion 07-BK-C Judge Paul Mannes	6/07 - Subcommittee on Consumer Issues discussed 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Rule 2003 Procedure for holding open § 341 meetings to give chapter 13 debtors more time to file tax returns	Suggestion 08-BK-L Judge Keith Lundin	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 2/10 - Consumer Subcommittee considered comments 4/10 - Committee agenda	12/1/11
Rule 2016(c) Conform to amendment to § 110(h)	Committee proposal (technical amendment)	9/07 - Committee approved 10/07 - Considered by Style Subcommittee 2/08 - Subcommittee on Consumer Issues considered 3/08 - Committee approved revised amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendment took effect	12/1/09

Rule 2019 Repeal the rule as unnecessary	Suggestion 07-BK-G Loan Syndication and Trading Association, Securities Industry and Financial Markets Association	3/08 - Committee discussed, Chair directed the Assistant Reporter to prepare a review of the case law on Rule 2019 10/08 - Committee discussed, referred to Subcommittee on Business Issues 12/08, 2/09 - Subcommittee prepared revised rule 3/09 - Committee approved revised rule for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 2/10 - Public hearing 2/10 - Business Subcommittee considered comments 4/10 - Committee agenda	12/1/11
Rules 3001(c), 3002.1 (new) Disclosure of postpetition mortgage fees	Committee proposal	5/08 - Subcommittee on Consumer Issues discussed 10/08 - Committee considered 12/08 - Consumer Subcommittee prepared revised rules 3/09 - Committee approved revised rules for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 2/10 - Public hearing 2/10 - Consumer Subcommittee considered comments 4/10 - Committee agenda	12/1/11

Rule 3001, Official Form 10 Facilitate identification of stale claims and inadequately documented claims filed after bulk transfer of consumer debts	Suggestion 08-BK-J Judge A. Thomas Small	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved amendment to Rule 3001(c)(1), added to mortgage amendments to Rules 3001, 3002.1 (see above); certification approved, added to pending amendments to Form 10	12/1/11
Rule 3007(a) Disposition of objections to claims by negative notice	Suggestion 09-BK-H Judge Margaret Dee McGarrity on behalf of the Bankruptcy Judges Advisory Group	1/10 - Subcommittee on Consumer Issues considered 4/10 - Committee agenda	
Rule 4001(d)(2), (3) Additional time computation changes	Chair	3/09 - Committee approved as technical amendment 6/09 - Standing Committee approved as technical amendment 9/09 - Judicial Conference approved	12/1/10

Rules 4004, 7001 Application of sections 1328(f), 727(a)(8),(9); objection to discharge by motion	Judge Neil Olack Committee proposal	9/06 - Referred to Subcommittee on Consumer Issues 12/06 - Subcommittee considered 2/07 - Subcommittee considered 3/07 - Committee considered, referred to Subcommittee 6/07 - Subcommittee considered 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved as revised 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Rules 4004(d), 7001(4) Classification of proceedings to object to or revoke discharge as adversary proceedings; objections to revoke discharge in gap period	Suggestion 08-BK-E Judge Frank Easterbrook Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008)	10/08 - Committee considered, no further action on classification, gap period issues referred to Subcommittee on Consumer Issues Matters 12/08, 1/09 - Subcommittee prepared revised gap period rule 3/09 - Committee approved revised rule for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 2/10 - Comments considered by Consumer Subcommittee 4/10 - Committee agenda	12/1/11

Rule 4008(a) Requires use of Official Form coversheet	Committee proposal	4/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Subcommittee on Consumer issues considered 3/08 - Committee approved 6/08 - Standing Committee approved 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendment took effect	12/1/09
Rule 5009(b) (new) Closing case without entry of discharge	Committee proposal	6/07 - Committee approved for publication, held for new Rule 5009(c) for chapter 15 cases 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10

Rules 5009(c), 9001, etc. Chapter 15 rules	Suggestion 05-BK-B Judge Samuel Bufford Committee proposal	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/06 - Subcommittee discussed 6/06 - Subcommittee approved revised amendments 9/06 - Committee approved Rules 5009, 9001 for publication 9/06 - Committee approved Rule 5012 for publication as revision of amendment published 08/06 3/07 - Publication deferred for further study 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 2/08 - Subcommittee discussed 3/08 - Committee approved for publication 6/08 - Standing Committee approved publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10

Rule 5012 (new) Communications with foreign courts	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee deferred for further study 6/07 - Subcommittee discussed 9/07 - Included in package of chapter 15 amendments approved for publication 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee approved 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Rule 6003 Issuance of orders during 20-day cooling off period	Suggestion 08-BK-D Bankruptcy Judges Advisory Group	3/08 - Committee discussed 8/08 - Subcommittee on Attorney Conduct and Health Care discussed 10/08 - Committee approved for publication 1/09 - Standing Committee approved for publication 8/09 - Published for public comment 9/10 - Committee agenda	
Rule 7004(h) Amend rule to clarify service requirements	Suggestion 09-BK-M Judge Colleen A. Brown and Judge Robert E. Littlefield, Jr.	2/10 - Subcommittee on Business Issues considered 4/10 - Committee agenda	

Rules 7052, (new) 7058, 9021 Separate document requirement for judgments in an adversary proceeding or contested matter	Judge David Adams Committee proposal	9/04 - Committee considered, referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee approved in principle for contested matters, referred to Subcommittee 9/05 - Referred to Subcommittee 3/06 - Referred to Subcommittee 7/06 - Subcommittee approved alternative amendments 9/06 - Committee approved revised amendment for publication 1/07 - Standing Committee approved in principle 3/07 - Committee approved for publication as submitted 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendments took effect	12/1/09

Rules 7052, 9015, 9023 "Decouple" time provisions in the rules from new 30-day periods in Civil Rules 50, 52, 59	Committee proposal	9/07 - Referred to Privacy, Public Access and Appeals Subcommittee 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendments took effect	12/1/09
Rule 7054(b) Time provisions	Committee proposal	10/09 - Committee approved changing 5 days to 7 days, deferred 1-day provision 11/09 - BJAG recommended changing 1 day to 7 days 2/10 - Subcommittee on Business Issues considered 4/10 - Committee agenda	
Rules 8001 - 8020 Revise Part VIII of the rules to more closely follow the Appellate Rules	Eric Brunstad	3/08 - Referred to Privacy, Public Access and Appeals Subcommittee 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee discussed 3/09 - Open meeting of Subcommittee on Privacy, Public Access, and Appeals 3/09 - Committee discussed 6/09 - Subcommittee discussed comments at open meeting 9/09 - Subcommittee discussed comments at 2nd open meeting 10/09 - Report to committee 12/09 - Revised draft incorporated comments at 2nd open meeting 2/10 - Subcommittee considered 4/10 - Committee agenda	

Rule 8006 Premature filing of appellant's designation of items in the record on appeal	John Shaffer	12/07 - Subcommittee on Privacy, Public Access, and Appeals discussed 2/08 - Considered by subcommittee 3/08 - Committee took no action with the understanding that the issue could be addressed as part of a comprehensive review of the Part VIII rules	
Rules 8007.1 (new), 9023, 9024 Indicative rulings	Committee proposal	8/08 - Subcommittee on Privacy, Public Access, and Appeals discussed 10/08 - Committee tentatively approved new Rule 8007.1 and Rule 9024 amendment for publication 3/09 - Rules 8007.1 and 9024 assigned to the Bull Pen	
Rule 9006(a) Template rule for time computation	Standing Committee's Time Computation Committee	9/06 - Committee discussed time computation project, small groups to review deadlines in bankruptcy rules 12/06 - Considered by ad hoc group of Committee members 1/07 - Discussed by Standing Committee 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 3/08 - Committee approved revised amendment 6/08 - Standing Committee approved revised amendment 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendments took effect	12/1/09

Rule 9006(a)(1) Exclude weekends, holidays from computing 5 days to send creditors a copy of UST's statement on presumption of abuse	Bankruptcy Clerk, Southern District of New York	2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee recommended statutory change of 5-day period in connection with time computation amendments 5/09 - Included in Pub. L. 111-16 signed by the President 12/09 - Amendment took effect	
Rule 9006(a)(3)(A) Correct reference to Rule 6(a)(1)	Committee proposal	2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee included in time amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendment took effect	
Rule 9006(f) Correct cross-reference to Civil Rule 5(b)(2)	Bankruptcy Clerk, Middle District of North Carolina	2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved 3/09 - Supreme Court approved 12/09 - Amendment took effect	
Rule 9006(f), Civil Rule 6(d) Delete additional 3 days for service		9/09 - Civil Committee discussed, took no further action 2/09 - Committee decided by email poll to take no action	

Rules 9013, 9014 Include the respondent's name in caption of certain types of motions	Suggestion 09-BK-J Judge William Stone, Jr.	4/10 – Committee agenda	
Rule 9031 Remove prohibition on special masters	Suggestion 09-BK-C Suggestion 09-BK-E Judge David Kennedy Judge Geraldine Mund	7/09 - Subcommittee on Business Issues considered 10/09 - Committee considered, no further action taken	
New Rule Automatic dismissal under § 521(i)	Suggestion 06-BK-011 Judge Marvin Isgur Suggestion 06-BK-020 National Association of Consumer Bankruptcy Attorneys	6/07 - Subcommittee on Consumer Issues discussed 9/07 - Committee discussed 2/08 - Considered by Consumer Subcommittee 3/08 - Committee discussed 10/08, 3/09, 10/09 - Committee discussed, Reporter to continue monitoring 4/10 - Committee agenda	
New Rule and Form Applications for allowance of administrative expenses	Suggestion 09-BK-J Judge William Stone, Jr.	4/10 - Committee agenda	
New Rule Closing chapter 11 individual cases after confirmation and reopening as necessary	Suggestion 09-BK-H Judge Margaret Dee McGarrity on behalf of Bankruptcy Judges Advisory Group	3/10 - Subcommittee on Business Issues considered 4/10 - Committee agenda	
Creation of a definitive set of Bankruptcy Rules		3/09 - Committee discussed 10/09 - Congratulations on success of the project 1/10 - Definitive rules posted	

Which statutory bankruptcy deadlines should be amended as a result of change in computing time under Rule 9006(a)	Request by Time Computation Subcommittee	02/08 - Discussed by bankruptcy judges on the committee 3/08 - Committee recommended that 5-day deadlines in 11 U.S.C. §§ 109(h)(3)(A)(ii); 322(a); 332(a); 342(e)(2); 521(e)(3)(B); 521(i)(2); 704(b)(1)(B); 764(b), and 749(b) be changed to 7 days 6/08 - Standing Committee included in proposed legislation 9/08 - Judicial Conference approved 4/09 - H.R.1626 introduced by Cong. "Hank" Johnson, Jr. 5/09 - Judge Rosenthal's letter to the courts on implementation 5/09 - Pub. L. 111-16 signed by the President 12/09 - Amendments took effect	12/1/09
Use of Standing Orders (Rule 9029)	Request of judges on circuit councils, concerns expressed by lawyers	1/07 - Standing Committee authorized study 1/09 - Standing Committee considered draft report and proposed guidelines 3/09 - Advisory Committee discussed 4/09 - Bankruptcy judges on committee discussed 5/09 - Response sent to Standing Committee 6/09 - Standing Committee approves proposed Guidelines 9/09 - Judicial Conference agenda 10/09 - Committee discusses a bankruptcy supplement 1/10 - Director's memo announces new guidelines	

Review of restyled evidence rules	Chair	10/08 - Committee discussed 3/09 - Committee discussed 6/09 - 3 ad hoc groups reviewed restyled rules 8/09 - Reporter consolidated comments in draft response 10/09 - Committee discussed, no bankruptcy-specific concerns	
Civil Rule 8(c) Deletion of bankruptcy discharge as affirmative defense	Judge Eugene Wedoff	4/08 - Civil Rules Committee discussed 10/08 - Committee discussed 3/09 - Committee approved deletion of affirmative defense 4/09 - Civil Rules Committee approved deletion 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Civil Rule 56 Amendment's impact on timing of summary judgment motions in contested matters and adversary proceedings	Judge Wedoff	3/09 - Committee discussed 10/09 - Committee considered, referred to Subcommittee on Consumer Issues 2/10 - Note in newsletters for bankruptcy judges and clerks 3/10 - Subcommittee considered 4/10 - Committee agenda	
Appellate Rule 6(b)(2)(A) Timing of notice of appeal after ruling on motion for rehearing	Advisory Committee on Appellate Rules	07/09 - Subcommittee on Privacy, Public Access, and Appeals discussed 10/09 - Committee approves suggested language	
Official Form 1 Separate chapter 15 petition	Suggestion 09-BK-G Kathleen Crosser Operations Manager, WAW Bankruptcy Court	1/10 - Subcommittee on Forms considered 4/10 - Committee agenda	

Exhibit D to Official Form 1 Time changes in Statements 2, 3		9/09 - Judicial Conference approved	12/1/09
Official Form 6C Extent of claimed exemption Schwab v. Reilly	Judge Eugene Wedoff	7/09 - Subcommittee on Consumer Issues considered 10/09 - Committee discussed 4/10 - Committee agenda	
Official Form 10, Rule 3001 Inconsistency on attachment of original papers	Committee proposal	7/09 - Subcommittee on Forms considered 10/09 - Committee considered 3/10 - Forms Subcommittee considered 4/10 - Committee agenda	
Official Form 10, Rule 3001 Revise Form 10 certification deter stale claims	Suggestion 08-BK-J Judge A. Thomas Small Committee proposal	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved revised certification, added to pending amendments to Form 10 (see above)	
Official Form 10 Use of pronouns	Committee proposal	10/09 - Referred to Subcommittee on Forms and included in pending amendments to Form 10 (see above)	
Official Form 10 Interest rate for secured tax claims	Christopher Kohn	7/09 - Subcommittee on Forms considered 10/09 - Committee approved variable interest rate language to be included in revised Form 10 (see above)	
Official Form 10 Space for claim identifier	Suggestion 09-BK-K George Stevenson, chapter 13 trustee	7/09 - Subcommittee on Forms considered 3/10 - Subcommittee on Consumer Issues considered revised suggestion 4/10 - Committee agenda	

Official Forms 20A, 20B Conform caption to Rule 1005 (technical amendment)	Committee proposal	1/10 - Subcommittee on Forms considered 4/10 - Committee agenda	
Official Forms 22A, 22C Use "family" size instead of "household" size for National Standard deduction on line 19A etc. on Form 22A, line 24A etc on Form 22C	Judge Eugene Wedoff 3/6/08	3/08 - Referred to Subcommittee on Forms 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee approved 1/09 - Standing Committee questioned wording 1/09 - Subcommittee considered 3/09 - Committee approved for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 2/10 – Subcommittee on Consumer Issues considered comments 4/10 - Committee agenda	12/1/10
Official Form 22A If one joint debtor is exempt from the means test, does the other debtor have to file the means test information?	Judge Eugene Wedoff	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 2/109 - Subcommittee on Consumer Issues discussed 4/10 - Committee agenda	12/1/10

Official Forms 22A, 22B, 22C revise instructions on reporting regular payments of household expenses by another person or entity	Judge Eugene Wedoff	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved for publication 6/09 - Standing Committee approved for publication 8/09 - Published for public comment 4/10 - Committee agenda	12/1/10
Mini Form 22C (new) Cases converted to chapter 13	Suggestion 09-BK-C Judge Geraldine Mund	7/09 - Subcommittee on Consumer Issues considered 10/09 - Committee considered, no further action taken	
Official Form 23 Revise instructions to conform to proposed amendment to Rule 1007(c)	Mark Diamond, NYS Bankruptcy Court	3/09 - Committee approved as technical amendment 6/09 - Standing Committee approved 9/09 - Judicial Conference approved	12/1/10
Official Form 25A Change effective date from 11 business days after entry of confirmation	Committee proposal	10/09 - Referred to Subcommittee on Business Issues 2/10 - Subcommittee considered 4/10 - Committee agenda	

Official Form 27 (new) Cover sheet for reaffirmation, Form 240 as Official Form	Committee proposal	3/06 - Designation as Official Form referred to Subcommittee on Forms 8/06 - Subcommittee discussed 9/06 - Committee tabled for 1 year 1/07 - Forms Subcommittee proposed cover sheet 3/07 - Committee approved for publication 6/07 - Standing Committee approved cover sheet for publication 8/07 - Published for comment 2/08 - Forms Subcommittee considered revised form 3/08 - Committee approved revised cover sheet 6/08 - Standing Committee approved 9/08 - Judicial Conference approved cover sheet form 12/09 - Form took effect	12/1/09
Official Form 27 (new) Include § 524(k), Rule 4008(b) statement in Official Form	Bankruptcy Judges Advisory Group Committee proposal	6/07 - Subcommittee on Forms discussed, included in version of new Form 27 for publication 8/07 - Chair approved inclusion in Form 27 published for comment 9/07 - Committee ratified chair's decision to include 12/09 - Form took effect	12/1/09

Official Forms Two new forms to address problems related to home mortgage claims	Suggestion 08-BK-K Judges Isgur, Magner, and Bohm	3/09 - Committee discussed, referred to Subcommittee on Forms 8/09 - Court posts revised forms after public comment 7/09 - Subcommittee considered 10/09 - Committee discussed, referred to Forms subcommittee 12/09 - Judge Isgur testified 3/10 - Subcommittee considered draft forms 4/10 - Committee agenda	
Official Forms, Director's Forms Review forms for consistency in certifications	Request by the Chair	3/08 - Request during discussion of new Form 283	
Official Forms Alternatives to paper-based format for forms; renumber Official Forms	Judge James D. Walker, Jr. Comment 06-BK-011 Judge Marvin Isgur Patricia Ketchum	9/06 - Committee will coordinate a study with the Administrative Office 8/07 - Discussion of how to organize the study 9/07 - Committee discussed and authorized chair to create group 1/08 - Organizational meeting for Forms Modernization Project 08 /09/10 - Forms Modernization Project and Subgroups continue work	
Director's Form 18RI (new) Individual chapter 11 discharge	Committee proposal	6/09 - Subcommittee on Forms considered 7/09 - Forms Subcommittee considered 10/09 - Committee endorsed 12/09 - New form took effect	12/1/09

Director's Forms 200, 210A, 231A, 231B, and 250E Update for time-computation amendments	Committee proposal	7/09 - Subcommittee on Forms considered 10/09 - Committee endorsed 12/09 - Amendments took effect	12/1/09
Director's Form 240A Revise reaffirmation agreement for accuracy and ease of use	Forms Subcommittee to implement BAPCPA Suggestion 06-BK-B Kelly Sweeney, CDC, CO bankruptcy court Suggestion 08-BK-A Judge Paul Mannes Judges Randall Newsome and Robert Kressel Suggestion 09-BK-L Bradley Halberstadt Suggestion 10-BK-A Richardo I. Kilpatrick	9/05 - Referred to Forms Subcommittee 10/05 - Amended form issued by Director of Administrative Office 8/06 - Issued by Director of Administrative Office 8/06 - Subcommittee approved further revision 9/06 - Committee approved revised form 12/06 - Issued by Director of Administrative Office 1/07 - Forms Subcommittee approved amendments 2/07 - Amendments deferred 10/08 - Committee discussed, referred to Subcommittee on Forms 12/08, 1/09 - Subcommittee considered revisions 3/09 - Committee discussed 6/09 - Subcommittee discussed 10/09 - Committee endorsed 12/09 - Amendments took effect 12/09, 1/10 - Additional Changes Suggested 1/10 - Forms Subcommittee considered 2/10 - Committee approved changes by email 4/10 - Amendment took effect	12/09 4/10

Director's Forms 250A, 250B, 250C, 250D, and 250E revise certificates of service	Committee proposal	6/09 - Subcommittee on Forms considered 7/09 - Subcommittee on Forms considered 10/09 - Committee endorsed 12/09 - Amendments took effect	12/1/09
Director's Form 250F (new) Foreign Nonmain Summons	Mark Diamond, NYS Bankruptcy Court	6/09 - Subcommittee on Forms considered 7/09 - Subcommittee on Forms considered 10/09 - Committee endorsed 12/09 - Amendments took effect	12/1/09
Director's Form 261C (new) Judgment form to implement new Rule 7058	Suggestion 09-BK-F Judge Benjamin Goldgar	7/09 - Subcommittee on Forms Considered 10/09 - Committee endorsed 12/09 - Amendments took effect	12/1/09

Items 21-24 will be oral reports.

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March 2011

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13 Daylight Savings Begins Spring Forward.	14	15	16	17 St. Patrick's Day	18	19
20 Spring Begins	21	22	23	24	25	26
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						U.S. Federal Holidays are in Red.