

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the Meeting of March 16 - 17, 1989

The Advisory Committee on Bankruptcy Rules met in Phoenix, Arizona, in the Pointe at Squaw Peak hotel. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edith Hollan Jones
Circuit Judge Edward Leavy
District Judge Thomas A. Wiseman, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Ralph R. Mabey, Esquire
Joseph G. Patchan, Esquire
Herbert P. Minkel, Jr., Esquire
Bernard Shapiro, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

The following additional persons also attended the meeting:

W. Reece Bader, Esquire, Committee on Rules of Practice
and Procedure
Peter G. McCabe, Assistant Director, Administrative Office
Patricia S. Channon, Attorney, Bankruptcy Division,
Administrative Office
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern
District of California
Gordon Bermant, Research Division, Federal Judicial Center

The Chairman announced that no representative of the Executive Office for United States Trustees would be present at the meeting. The Executive Office had scheduled a national program for the United States trustees, he said, an activity which had pre-empted Mr. Stanton's calendar. Barbara O'Connor had planned to attend the meeting, but had become ill. Ms. O'Connor had informed the Chairman, however, that she had reviewed the materials for the meeting and approved of everything which had been sent to her.

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

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

Approval of Minutes of January 1989 Meeting

The Advisory Committee approved the minutes of the January 1989 meeting. Herbert Minkel requested an amendment on page 19 to clarify the statement made by Judge Leavy concerning the action taken by the Committee on class proofs of claim. With Judge Leavy's consent the minutes were amended as requested by Mr. Minkel.

Consideration of Further Comments Received from the Public

The Committee continues to receive detailed comments on the rules from bankruptcy judges and practitioners. One recent letter contained 27 recommendations, and another contained 18. All recommendations will continue to be circulated to the entire Committee as they are received, but the Reporter requested the Committee's consent to his suspension of writing responsive comments in order to concentrate on preparation of the complete preliminary draft. If any member thinks a particular recommendation is significant, the member can contact the Reporter and request that it be addressed by the full Committee. With only one further meeting remaining before the preliminary draft must be ready for publication, however, the consensus of the Committee was that all further comments will be treated as if they had come in during the period of public comment on the published draft.

Transmittal Letters, Publication of Draft

The Committee discussed whether to publish only the rules to which changes are being proposed or all of the rules. The consensus was that with changes being proposed to approximately one third of the rules, publication of all would assist the public to review the Committee's proposals in context. A motion to publish all of the rules passed unanimously.

The Committee will consider draft transmittal letters for the publication package at the Seattle meeting.

Amendment to Bankruptcy Rule 9006(a)

Professor Resnick reported that the proposed amendment which will reduce from eleven days to eight days the period from which intervening weekends and holidays may be excluded in computing the time was approved by the Judicial Conference on March 14. He said that James E. Macklin, Jr., Secretary to the Committee on Rules of Practice and Procedure, had indicated that the transmittal letters to the Supreme Court and Congress would provide for an effective date of December 1, 1989, for all the rules changes being submitted.

The December 1, 1989, date was being used pursuant to the new Rules Enabling Act, Pub. L. No. 100-702. Several members pointed out that the change to a December 1 effective date in the Rules Enabling Act did not apply to Bankruptcy Rules, because Congress had retained 28 U.S.C. § 2075 for bankruptcy rules. Section 2075 states that bankruptcy rules become effective 90 days after transmittal to Congress.

The Committee approved a resolution noting the statutory provision prescribing an effective date for bankruptcy rules of 90 days following submission of rules to Congress, (August 1), and requesting that Mr. Macklin be directed to revise the transmittal letter for the amendment to Rule 9006(a) to reflect the effective date provided by § 2075. The consensus for the long term, however, was that the effective dates for all rules should be uniform. Accordingly, the Committee approved a resolution authorizing the Chairman to consult with Judge Weis on this matter and to seek the necessary legislative changes to achieve uniformity with the procedures prescribed for the other bodies of federal rules.

Next Meeting

The next meeting will be a three day meeting, May 17 through May 19, in Seattle, Washington. The meeting will take place in the Stouffer Madison Hotel, 515 Madison Street.

The Chairman said he expects the Committee will need to work full days throughout the scheduled meeting in order to complete the preliminary draft of the rules for transmittal to the Standing Committee in time for consideration at its summer meeting on July 17. He cautioned the members against making return air travel reservations for Friday, May 19, and said that members should plan on travelling home on Saturday.

On Wednesday evening (May 17), the Committee will take a packet steamer excursion boat to an island in Puget Sound for a salmon dinner prepared by local Indians. On Thursday (May 18), the Committee will visit the bankruptcy court, where the clerk's office will demonstrate the BANCAP automated docketing and case control system and also the experimental automated telephone case inquiry system being tested under the auspices of the Federal Judicial Center.

Official Forms

Petitions, Schedules, and Statements. Joseph Patchan introduced the proposals for revising the forms of the petitions, schedules, and statements. The present proposals are based on those made in 1988 by a task force of judges and clerks. The forms subcommittee has reviewed all of this earlier work and made substantial revisions as well as many changes that are more in the nature of refinements of the original proposals. Mr. Patchan noted that some aspects of the revised forms initially may appear radical, especially the departure from the traditional format of a pleading in the petition, but directed the Committee to the memorandum and notes prepared by Patricia Channon which provide the subcommittee's reasons for the recommended changes. He requested the Committee to pay particular attention to the policy statement beginning on page 1 of the memorandum. This statement, drafted primarily by Judge Mannes, who is a subcommittee member and also was a member of the task force, expresses the philosophy which guided the revision process.

The Committee gave preliminary approval to the draft forms of the petitions, schedules, and statement of affairs with several changes. Revised forms, which also will include the addition of penalty language as described below, will be considered at the next meeting.

Official Forms No. 16 and No. 19. Patricia Channon reviewed the history of the proposed revisions to these forms. Form No. 16, the notice of the meeting of creditors, has been reformatted with a separate notice prescribed for each of the relief chapters, and for no-asset and asset cases and various types of debtors within each chapter. Prescribing the form of the notice for each type of case separately in a block or box design serves two purposes. It establishes the elements of notice required in each type of case for purposes of programming the courts' computers, enabling notices to be produced electronically. Further, the prescribing of all authorized variations combined with centralized programming of computers curtails the ability of any court to utilize a local form which conflicts with the Bankruptcy Code and national Bankruptcy Rules.

The Advisory Committee gave preliminary approval to the revised Form No. 16 in 1987. Although there is no requirement that forms be published for public comment, the Advisory Committee determined that some form of public exposure would be both appropriate and helpful before the revisions were officially prescribed. In lieu of publication, the Advisory Committee authorized testing of these forms together with the revised proof of claim form. Eleven courts agreed to participate and used the revised forms during July - December, 1988. Some adjustments were made during the test, the most significant being the addi-

tion of two lines that can be used for local information at the option of the court.

Bernard Shapiro noted that the Northern District of Texas routinely imposes a claims filing deadline in chapter 11 cases and inquired whether the proposed forms of notice would make it impossible for a court to continue such a practice. Ms. Channon said that if notices are generated electronically, a court could impose a claims deadline in a chapter 11 case only by using the two optional lines at the bottom.

The response to the revised forms was extremely favorable, overall, and the test courts have requested permission to continue using the revised forms. The test courts also have forwarded several suggestions for changes based on their experience in using the forms. These suggestions, and the recommendations of the subcommittee concerning them, were considered by the committee and the following changes approved:

- * the form will require the telephone numbers of both the trustee and the debtor's attorney;
- * if the case has been converted from another chapter, information concerning the original chapter and filing date will be disclosed, and the information highlighted to enhance its visibility;
- * the first sentence of the paragraph labelled "LIQUIDATION OF THE DEBTOR'S PROPERTY" will be amended to state that the trustee "will collect the debtor's property and turn any *that is not exempt into money,*" (new wording shown in italics); the words "has been appointed" also will be deleted from this sentence.

The Committee also voted not to add the word "interim" to the title of the box "Name and Address of Trustee" on the chapter 7 notices, accepting the recommendation of the subcommittee that technical correctness on this point probably would confuse the public unnecessarily in view of the small number cases in which creditors elect a trustee at the meeting of creditors. Potential contradiction with the paragraph entitled "MEETING OF CREDITORS" will be resolved by inserting the word "different" before "trustee" in the third sentence, which states that creditors may elect a trustee.

One comment on the proposed form asserted that the information section gives "too much legal advice." This information is not materially different from that provided in the current form, however. Richard Heltzel observed that if the form does not provide any information, recipients simply will call the clerk's office, which is prohibited from giving legal advice. Chairman

George said the issue is one of balance in achieving the appropriate amount of information to be provided.

Herbert Minkel observed that the statements concerning the effect of the discharge omit two "material" exceptions: 1) the discharge may be revoked, a event which would revive the creditor's right to collect a debt; and 2) a secured creditor may not collect any deficiency from a discharged debtor but may foreclose on the lien (and thus collect the secured portion). Ralph Mabey said he was not troubled by the failure to mention a right to foreclose as the sentence says only that the creditor "may never take action to collect the discharged debts." (Emphasis added.) The consensus was that this paragraph should be left as it is.

Herbert Minkel also raised several matters concerning the accuracy of the information provided in the chapter 11 notices. He observed that in the notice for a chapter 11 case filed by individual or joint debtors, the paragraph titled "Purpose of a Chapter 11 Filing" states that the chapter allows a debtor to "reorganize a business or liquidate assets." Mr. Minkel said this language amounts to taking the position that chapter 11 relief is restricted to business debtors. Although the courts are split on this issue, the Bankruptcy Code does not expressly require a chapter 11 debtor to have a business. Mr. Minkel suggested substituting the phrase "restructure the debtor's obligations," but Peter McCabe said the meaning might not be clear to lay people. The Committee also considered substituting "reorganize financial affairs," but voted simply to delete the words "a business." By consensus, this change also will be made in the notice concerning a corporation or partnership. Although corporations and partnerships filing chapter 11 cases probably are businesses, no "mischief" results from making the deletion.

In the final sentence of the same paragraph, the Committee voted to delete the word "all" and to add at the end the phrase "or the court orders otherwise."

By consensus, the Committee agreed to Mr. Minkel's request to substitute "may seek a discharge" for the "is seeking a discharge" in the chapter 11 individual/joint, and the chapter 12 notices.

Mr. Minkel's motion to delete the final sentence of the form, ["YOU WILL BE NOTIFIED OF THE DEADLINE FOR FILING PROOF OF CLAIM"], on the ground that in some cases no deadline ever is set, was not seconded.

The Committee approved a number of changes in Form No. 19, the Proof of Claim:

* The request for the "number by which creditor identifies debtor will be clarified by inserting the words "account or other" before the word "number";

* Taxes will be added as a category of claim;

* A box will be added for claims based on post-petition judgments;

* Retiree benefits as defined in § 1114(a) will be added as a category of claim;

* The words "compensation for" will be inserted in the category labelled "unpaid services performed" to eliminate any ambiguity concerning whether the creditor intended to provide services without compensation;

* "(Describe briefly)" will be used throughout the form to request descriptions by the claimant;

* The plus [+] and equals [=] signs will be deleted from block no. 4;

* The check box for alerting the trustee that a claim includes interest or other charges will be placed in block 4;

* Item no. 6 will be revised as follows: "This form should not be used to make a claim for an administrative expense incurred after the filing of the bankruptcy petition. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503." See discussion of Rule 2016, infra;

* Item no. 8 will be revised as follows: "To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and a copy of your claim."

Several courts had requested that wage claimants be required to disclose any vacation, severance, or sick leave pay which is included in their claims. The Committee, however, believes adding this would require claimants to swear to something that in most cases is beyond their ability to determine correctly. Accordingly, the consensus was that it should not be added.

Judge Leavy questioned the inclusion of the warning concerning criminal penalties at the bottom of this form, which is filed by creditors, when no similar notice appears on the forms completed by debtors. Bernard Shapiro said that at one time there was a perceived problem of debtors and creditors acting in

collusion to file false claims. A motion to delete the warning, however, failed. A motion to amend the language to make the warning more general by omitting the specifics of the maximum sentence, also failed. A motion to add the warning to the schedules and statements carried, with four opposed. Patricia Channon will verify the correct amount of the maximum fines and the statutory citations.

Official Form No. 2. Bankruptcy Rule 1006(b) requires an application to pay the filing fee installments to include a statement that the debtor is unable to pay the fee except in installments. The Committee approved an amendment to the form inserting this statement.

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The Committee will give a final review to Official Form No. 16 (§ 341 notices) and Official Form No. 19 (proof of claim) at the May 1989 meeting. The Committee approved immediate transmittal of amended Official Form No. 2 (installment fees) to the standing Committee for recommendation to the September 1989 meeting of the Judicial Conference.

Revisions to the Bankruptcy Rules

All Rules - Use of Word "File." The Committee adopted the Reporter's recommendation made in a memorandum dated 2/21/89 that the rules adhere to a uniform style with respect to the use of the word "file." Accordingly, the word "file" will be used to indicate that a document is to be delivered to the clerk for inclusion in the official court record of the case. Variants, such as "file with the clerk" or "file with the court" will be changed to simply "file." If a document or copy is destined for the United States trustee or a party, other words such as "transmit" and "serve" will be used.

Rule 2011. The Code was amended in 1986 to replace the court with the United States trustee as the appointing authority for trustees. As a result there no longer is any appointing order which the trustee can display as proof of appointment. The United States trustee issues a notice of appointment only. Moreover, in order to qualify, a trustee also must post a bond within five days of being appointed. The bond must be filed with the court. (11 U.S.C. § 322(a).) A panel trustee who is covered by a blanket bond qualifies automatically, but a trustee appointed specially, as in the case of an elected trustee, must post a separate bond. A motion to amend the rules to require the clerk to notify the court and the United States trustee when a trustee fails to qualify within the time prescribed by § 322(a) passed with two opposed. The Committee agreed that legislative action

should be sought to have the trustee's bond filed with the United States trustee rather than the court.

Rule 2016. The Committee considered whether to amend the rule to provide specific direction on the filing of a request for payment of an administrative expense as authorized by § 503(a) of the Code. A motion to leave the rule alone, as recommended by the Reporter, carried.

Rule 3001(e). Mr. Minkel stated that the present rule, which requires the judge to approve every transfer of a claim other than one based on a bond or debenture, if the transfer occurs after a proof of claim has been filed, has led to inconsistent treatment of transferred claims. He said some judges look only to ascertain that the transfer is a bona fide one while others examine the transaction for the level of disclosure (concerning value) to the transferor, fairness of the price, etc., regardless of whether the transferor is satisfied with the terms of the transfer. Mr. Minkel said that the inconsistent treatment was a problem itself but that an even greater potential problem is that the postpetition market in claims could be stifled, and creditors who need to liquidate their claims will be unable to do so. Judge Wiseman said amending the rule so that the judge would be involved only if there were a dispute would be acceptable as long as there would be no preclusion from raising issues of fraud. Mr. Patchan expressed concern about transfers to an insider and wanted the transfer documents to disclose what inducements had been offered to the transferor. A motion to amend the rule to delete court approval of a transfer of a claim in the absence of objection passed with one opposed.

Rule 3018. A motion to adopt the Reporter's draft amendments carried.

Rule 5009. A motion carried to amend the Committee Note to state that the United States trustee should not certify that the case trustee is entitled to be paid the fee provided in § 330(b) of the Code until after the time for filing a complaint objecting to discharge under Rule 4004 has expired and, in the case of an individual, the disposition of any complaint.

Rule 5011(b). The Committee concurred with the recommendation of the Reporter that this rule, which limits a bankruptcy judge to submitting a report and recommendation to the district court on an issue of abstention from a proceeding, should remain as is. A motion to make no change carried.

Rule 6006. Upon motion, the Committee voted to delete from the rule all references to "time share" interests. Time share interests are simply one of the many forms of executory contracts. The rule applies to all executory contracts and unexpired leases, and the Committee believes that mentioning only one type may be

misleading. The Committee Note will state that the reference to time share interests is deleted as unnecessary.

Rule 7062. Upon motion, the Committee voted (with two opposed) to add to the rule language that would include among the matters that are exceptions to the 10-day stay of execution on a judgment provided by Fed.R.Civ.P. 62(a) the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code. As these actions arise by motion rather than by adversary proceeding, the Committee directed that the amendment should mention that these are contested matters. Professor King agreed to research the definition of the word "judgment" and advise the Committee at the next meeting.

Rule 8002(a). Upon motion, the Committee voted to adopt the Reporter's recommendation to amend the rule by adding, after the second sentence: "A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof." This amendment will conform the rule to Rule 4(a)(2) of the Federal Rules of Appellate Procedure.

Rule 8006. The Committee approved amending the rule to require any party filing a designation of record to provide the clerk with a copy of the items designated and, if a party fails to do so, authorizing the clerk to provide a copy at the party's expense.

Rule 8007. The Committee approved related amendments that would direct the clerk to forward to the appellate court a copy of the record. These amendments include deleting existing subdivision (c) of the rule, which permits the parties to stipulate parts of the record to be retained in the bankruptcy court with copies to be forwarded. This subdivision would be unnecessary under the amendments proposed.

Rule 9027(a). The Committee discussed amending the rule to conform it to recent amendments to the statute governing removal of civil actions, (28 U.S.C. § 1446). These amendments changed the procedure from one requiring a "petition" on which the district court would rule to a simple notice procedure. A motion to replace the word "application" with the word "notice" in subdivision (a) and wherever else in the rule "application" appears carried with one opposed. The Committee also approved the Reporter's recommendation that the rule be amended to require the removing party to include in the notice of removal a statement concerning whether the action, upon its removal, is core or non-core and, if non-core, whether the removing party consents to final determination by the bankruptcy judge. The Committee considered whether to retain the requirement that the notice of removal be filed in the same division of the district in which the action originally was brought. It was noted that in some

districts the bankruptcy court may have a division at a location where there is no district court division, while in others the district court may have a division located where there is no bankruptcy court division. A motion to leave the rule unchanged in this respect passed with several members abstaining. The Committee also approved adding a requirement that the notice of removal contain a statement concerning the core or non-core nature of the proceeding and whether the removing party consents to final determination by the bankruptcy judge.

Rule 9027(b). A motion to abrogate Rule 9027(b), in keeping with the spirit of the repeal by Congress of 28 U.S.C. § 1446(d), to which the rule is similar, passed unanimously. The Committee Note will say that abrogation, which has the effect of deleting any requirement for a removal bond, is consistent with the repeal of 28 U.S.C. § 1446(d).

Rule 9027(e). The Committee concurred in the recommendation of the Reporter that this rule, which limits a bankruptcy judge to submitting a report and recommendation to the district court concerning any motion to remand a removed proceeding, should remain as is. A motion to make no change in the rule carried.

Rule 9027(g). This subdivision would be redesignated as subdivision (f) as a result of the abrogation of subdivision (b). A new subpart (3) would require any party to the proceeding other than the removing party to file within 10 days after the filing of the notice of removal a statement admitting or denying the removing party's allegations concerning whether the proceeding is core or non-core and stating whether the party filing the statement consents to final determination by the bankruptcy judge. The Committee approved the addition of a new subdivision (3) of the rule that would require other parties to the removed action to file a statement responding to the removing party's allegations concerning the core or non-core nature of the proceeding and whether the party consents to final determination by the bankruptcy judge.

Committees of Retired Employees Appointed under § 1114 of the Code. The Committee approved with minor changes amendments proposed by the Reporter to Rules 1007(a)(4), 2002(i), 2019(a), 3006, and 6007(a) to provide for treatment of § 1114 committees and to specify which committee or committees are to receive notices or copies of documents when not all need to receive the notice or copy in question. The Committee also reviewed and approved a list prepared by the Reporter of rules that make general reference to committees and need not be amended.

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Mr. Minkel raised the problem that is created when the list of 20 largest unsecured creditors filed with the petition under

Rule 1007(d) has been amended or when the creditors listed therein have subsequently assigned their claims to others. An outdated list is a problem, he said, because other rules require notice to be given to the creditors on the "list filed pursuant to Rule 1007(d)." Mr. Minkel said he had no solution concerning how to make sure notice goes to those who actually are the 20 largest unsecured creditors at the time any specific notice may be sent, but he wanted the Committee to be aware of the problem.

* * * *

The Reporter's memorandum on the proposals of the American Bankruptcy Institute ["ABI"] and Bankruptcy Judge Paskay [Docket No. 43-B] and the Reporter's memorandum on miscellaneous suggestions from the public concerning Parts V through IX [Docket No. 34-E] were discussed under the Committee's procedure of considering suggestions not recommended by the Reporter only when raised by a member. The Committee took the following action concerning matters brought up under this procedure:

1. Ralph Mabey raised the suggestion of the ABI that Rule 3002 provide that an undersecured creditor that recovers its collateral be required to file an amended proof of claim (to notify the trustee of the value of the collateral). The consensus of the Committee, however, was that no change in the rule is needed.

2. Ralph Mabey also noted the ABI's suggestion that Rule 4007(c) be amended to extend the deadline for filing a § 523(c) complaint in chapter 11 cases. He said this suggestion had put him in mind of earlier Committee discussions about running this time period from the date the § 341 meeting actually occurs, rather than from the date the meeting is scheduled as the present rule provides. The Reporter said the subject of this deadline is still active and work on it only has been deferred. Judge Jones indicated that she also continues to have an interest in the subject. The issue will be placed on the agenda for the May 1989 meeting.

3. Harry Dixon raised the suggestion of the ABI that the Committee consider amending Rule 6004 or adopting a rule establishing uniform title standards or other approaches to eliminate requests by title companies for "comfort orders" approving sales of estate property. The Committee, however, declined to take any action.

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The Committee deferred to the next meeting consideration of the Reporter's memorandum concerning documents to be filed in a chapter 12 case and deletion of the chapter 13 statement from the Official Forms. This subject affects Rules 1007 and 1008 and

several others in which the existing chapter 13 statement is mentioned. (Agenda Item 9.)

Automation Study Group

The American Bankruptcy Institute has suggested that the Committee establish a study group on computerization and the need for rules relating thereto. Chairman George said this appeared to be an area in which better results might be obtained from a joint study group composed of members of the Advisory Committee and the Committee on Administration of the Bankruptcy System. The consensus supported Judge George's recommendation, with a proviso that nothing should be undertaken until after the presentation of the preliminary draft to the standing Committee on July 17, 1989.

Respectfully submitted,


Patricia S. Channon
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Division of Bankruptcy