

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

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February 17, 2006

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Proposed Additional Interim Rules Regarding Section 342(g)

Dear Mr. McCabe:

The National Bankruptcy Conference¹ has studied the changes made by BAPCPA to section 342 of the Bankruptcy Code, with special emphasis on new section 342(g). The Conference believes that inconsistencies and ambiguities in section 342(g) create a need for both technical and substantive statutory amendments. However, there are a number of areas that could be clarified by the Federal Rules of Bankruptcy Procedure.

The Conference understands that the Advisory Committee on Bankruptcy Rules expects to propose new and amended Bankruptcy Rules based substantially on the Interim Rules modified as appropriate after considering comments from the bench and the bar. We also understand that any proposed new and amended rules are expected to be published in August 2006 for public comment in accordance with the regular rulemaking process. The Conference further understands that the Advisory Committee is reviewing the experience of the bench and the bar and is seeking written comments or suggestions for changes or additions to the recently approved Interim Rules.

With the forgoing in mind, the Conference makes the following suggestions for additions to the Interim Rules and for the Advisory Committee to consider these suggestions in connection with its current deliberations before the publication of new and amended Bankruptcy Rules in August 2006.

1. *Require filing of both notice designees and the procedures established for delivering notices to the designees.* The second sentence of section 342(g)(1) provides that if a creditor has established reasonable procedures for routing non-compliant notices to a designee, any non-compliant notice to the creditor is ineffective until the designee receives it. But there is no guidance in

¹ See the attached for a description of the National Bankruptcy Conference.

the sentence as to how the creditor makes such a designation or makes known the procedures that it has established. It would be helpful to have a rule requiring that creditors file with the court both the identity of such designees and the procedures for the notices to be routed to the designees with a view to their actual receipt. Such a rule would both avert unnecessary discovery costs in the event of a dispute regarding effective notice and provide a means for debtors and the court to make effective service of notice. The rule could provide that notices of addresses under either section 342(e) or section 342(f), or both, may state the designee and procedures under section 342(g)(1). Finally, the rule should set forth a consequence if the creditor does not comply with the rule. We would suggest that a creditor receive the benefits of the second sentence of section 342(g)(1) only after the designee and procedures have been on file with the court for at least 10 days.

2. *Define minimum reasonable procedures for routing noncompliant notices to the person or organizational subdivision responsible for receiving bankruptcy notices.* Although section 342(g)(1) requires reasonable procedures for routing non-compliant notices to a designee, it does not indicate what procedures would be reasonable. It would be helpful for a rule to provide minimum standards of reasonableness, so as to promote uniformity of expectations of notice givers. These procedures might include (1) a requirement that some designee always be available to receive non-compliant notices, so as to avoid a situation where the only designee is ill, on vacation, or no longer employed, (2) a minimum time period by which the designee should actually receive the notice once the notice giver has complied with the procedures, and (3) a system for transmission to the designee, within a defined period of time, of misdirected notices (such as those sent to a payment address). We would suggest that such time periods be within 2 business days, for it would not seem reasonable for it to take longer.

3. *Define the relationship between proofs of claim that state a creditor's address and the specification of notice addresses under section 342(e).* Official Form B10, for proofs of claim, requires creditors to specify a "Name and address where notices should be sent." Subsection 342(e) does not make clear whether such a specification would be "a notice of address to be used to provide notice . . . to such creditor." To provide clarity on this point, a rule should be adopted that defines the effect of an address set out in the official proof of claim form. Since a proof of claim need not be served on the debtor, an address for notice in a proof of claim would not automatically comply with section 342(e). However, a rule could (1) give the creditor the option of complying with section 342(e) by serving the proof of claim form on the debtor, and (2) give the debtor the option of treating the address in a proof of claim as effective under section 342(e) even if the proof of claim was not served on the debtor. Such a rule would also have the additional benefit of having a proof of claim's specification of address take precedent over a general filing under section 342(f) and would also clarify an ambiguity in the Code concerning whether a proof of claim should be given priority as to how to address future notices.

Mr. Peter McCabe
February 17, 2006
Page 3

Please feel free to contact Robert A. Greenfield, the Chair of the Committee on the Court System and Bankruptcy Administration at (310) 228-5630, the Conference Chair Donald S. Bernstein at (212) 450-4092, or me at (212) 735-2800, should you have any additional questions regarding this matter.

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

Attachment

cc: Professor Jeffrey Morris

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formalized in the 1940s, at the request of Congress, from a nucleus of the nation's leading bankruptcy scholars, who gathered informally in the 1930s to assist Congress in the drafting of the Chandler Act of 1938, the first comprehensive revision of U.S. bankruptcy law since the Bankruptcy Act of 1898. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment in 1978 of the Bankruptcy Code, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC) whose 1997 report led to the legislation that overhauled our bankruptcy laws in 2005. The NBC has been active as a resource to Congress on every major piece of bankruptcy legislation since 1978.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 55 active members are leading bankruptcy scholars from major law schools, current and former judges from nine different judicial districts, and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC also includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members—who represent a broad spectrum of political and economic perspectives—based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the Conference's deliberations. The Conference also provides advisory services to policy makers on technical matters relating to bankruptcy law and practice.