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December 16, 2009

TO: Honorable John G. Roberts
Chief Justice of the United States

RE: Summary of Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are intended to have the following consequences.

APPELLATE RULES

The proposed amendments to Rule 1 clarify that the word “state,” when used in the Appellate Rules, includes the District of Columbia and any United States commonwealth or territory.

The proposed amendment to Rule 4 is a technical change to correct the cross-reference to Fed. R. Civ. P. 58(a), which was renumbered as part of the recent restyling of the Civil Rules.

The proposed amendments to Rule 29 require an amicus curiae to disclose whether a party’s counsel authored the amicus brief in whole or in part and whether a party or a party’s counsel contributed money with the intention of funding the preparation or submission of the brief, and to identify every person (other than the amicus, its members, and its counsel) who contributed money that was intended to fund the brief’s preparation or submission.

The proposed amendments to Form 4 limit the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).

BANKRUPTCY RULES

The proposed amendments to Rule 1007 shorten the time for a debtor in an involuntary case to file the list of creditors that must be included on schedules filed in the case. The proposed amendments also give individual debtors in a chapter 7 case additional time to file a statement of completion of the mandatory course in personal financial management.

The proposed amendments to Rule 1014 authorize a court to determine the district in which a case should proceed when multiple petitions – including a chapter 15 cross-border petition – involving the same debtor are pending in different districts.

The proposed amendments to Rule 1015 explicitly recognize a court’s authority to consolidate or jointly administer cases when one or more of the petitions – including a cross-border petition under chapter 15 – is filed by, against, or regarding the same debtor.

The proposed amendments to Rule 1018 apply selected provisions from Part VII of the Bankruptcy Rules – governing proceedings contesting an involuntary petition – to proceedings contesting a chapter 15 cross-border petition for recognition. The amendments also clarify that Rule 1018 does not apply to matters that are “merely related” to a contested involuntary petition.

The proposed amendments to Rule 1019 provide a new time period to object to a claim of exemptions when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not apply, however, if the conversion occurs more than one year after the entry of the first order confirming a plan, or if the case was previously pending under chapter 7 and the objection period had expired in the original chapter 7 case.

The proposed amendments to Rule 4001 are technical changes that adjust the time deadlines in the rule consistent with the amendments to Rule 9006(a) that became effective in December 2009.

The proposed amendments to Rule 4004 clarify that the time deadline governing the filing of a *complaint* objecting to a debtor’s discharge in a chapter 7 case also applies to a *motion* objecting to the discharge. The amendments also set a deadline to file a motion in a chapter 13 case objecting to the debtor’s discharge, and provide that in chapter 11 and 13 cases, a court must withhold entering the discharge if the individual debtor fails to file a statement attesting to the completion of a mandatory personal financial management course.

The proposed amendments to Rule 5009 require a foreign representative to file a final report – with notice to interested parties, who have 30 days to file objections to the report – describing the nature and results of that representative’s activities in the court. The amendments also require the clerk to notify individual chapter 7 and chapter 13 debtors that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial management course.

Proposed new Rule 5012 sets out notice provisions and establishes procedures in chapter 15 cross-border cases for obtaining court approval of an agreement or protocol coordinating insolvency proceedings in another country involving the debtor.

The proposed amendments to Rule 7001 provide that specified objections to a discharge in chapter 7 and 13 cases are not treated as adversary proceedings.

The proposed amendments to Rule 9001 apply to the Bankruptcy Rules the definitions of words and phrases listed in § 1502 of the Bankruptcy Code, governing cross-border insolvencies.

The proposed amendments to Exhibit D to Official Form 1 are technical changes to modify the debtor's statement of compliance with the Bankruptcy Code's credit-counseling requirement, consistent with similar statutory changes.

The proposed amendments to Official Form 23 are technical changes to adjust the deadline to file a statement of completion of a personal financial management course, consistent with the proposed amendments to Rule 1007.

CIVIL RULES

The proposed amendments to Rule 8 delete the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading.

The proposed amendments to Rule 26 extend work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, to the discovery of communications between testifying expert witnesses and retaining counsel. The amendments also provide that a lawyer relying on a witness who will provide expert testimony but is not required to provide a Rule 26(a)(2)(B) report – because the witness is not retained or specially employed to provide expert testimony and is not an employee who regularly gives expert testimony – must disclose the subject matter of the witness's testimony and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The amendments are not intended to change the summary judgment standard or burdens. The amendments include (1) requiring that a party asserting a fact that cannot be genuinely disputed provide a "pinpoint citation" to the record supporting its fact position; (2) recognizing that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary judgment motion; (3) setting out the court's options when an assertion of fact has not been properly supported by the party or responded to by the other party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; (4) setting a time deadline, subject to variation by local rule or court order in a case, for the filing of a summary judgment motion; (5) explicitly recognizing that "partial summary judgment" may be entered; and (6) clarifying the procedure for challenging the admissibility of summary judgment evidence.

CRIMINAL RULES

The proposed amendments to Rule 12.3 provide that, when a public-authority defense is raised, a victim's address and telephone number should be disclosed to the defense only if the defendant establishes a need for the information. This change parallels a similar change made in 2008 to Rule 12.1.

The proposed amendments to Rule 15 authorize a deposition taken outside the United States to occur without the defendant's presence only if the court makes case-specific findings that: (1) the witness's testimony could provide substantial proof of a material fact in a felony

prosecution; (2) there is a substantial likelihood that the witness's attendance at trial cannot be obtained; (3) the defendant cannot be present at the deposition because it is not possible to transport the defendant to the witness's location; and (4) the defendant can meaningfully participate in the deposition through reasonable means. The amendments do not address the admissibility of the testimony produced by such a deposition.

The proposed amendments to Rule 21 require a court, when a defendant moves to transfer a case to another district for trial on grounds of convenience, to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceedings.

The proposed amendments to Rule 32.1 make clear that only paragraph (a)(1) of 18 U.S.C. § 3143(a), and not paragraph (a)(2), applies to proceedings involving the pretrial release or detention of a person charged with violating a condition of probation or supervised release. The amendments also clarify the burden in such proceedings, which, under the case law, requires clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community.

EVIDENCE RULES

The proposed amendments to Rule 804 require the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The current rule requires only the defendant to make such a showing.