MINUTES OF THE SEPTEMBER 1972 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The twenty-seventh meeting of the Advisory Committee on Bankruptcy Rules convened in the 6th Floor Conference Room of the Administrative Office of the United States Courts, 811 Vermont Avenue, N. W., Washington, D. C., on Wednesday, September 13, 1972 and adjourned on Saturday, September 16, 1972. The following members and reporters were present during the sessions:

Phillip Forman, Chairman, presiding
Edward T. Gignoux
Asa S. Herzog
Charles A. Horksy
G. Stanley Joslin
Stefan A. Riesenfeld
Charles Seligson
Morris G. Shanker
Estes Snedecor
George M. Treister
Elmore Whitehurst
Frank R. Kennedy
Vern Countryman
Lawrence P. King

Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. William E. Foley, Deputy Director of the Administrative Office of the United States Courts, and Messrs. Thomas A. Beitelman, Jr. and Milner Benedict, members of the Bankruptcy Division.

The meeting opened with a discussion of revised draft of proposed bankruptcy rules under Chapters I to VII of the Bankruptcy Act based upon the comments received from the bench and bar. Judge Forman pointed out that all the criticisms had been screened by the Style Subcommittee. Professor Kennedy outlined the procedure for submission of these rules to the Standing Committee, the Judicial Conference, and the Supreme Court.

Rule 208. Solicitation and Voting of Proxies

Professor Kennedy stated although the referees are in support of this rule, there was criticism from the bar. The Style Subcommittee suggested alleviating the objections to the requirement of written notice by explaining in the Advisory Committee's Note that this includes telegrams. However, upon his recommendation to leave the rule as written since telegrams are sometimes sent by telephone, the Committee agreed to make no changes.

Rule 215. Employment of Attorneys and Accountants

Professor Kennedy called attention to a suggestion to add "employee" to line 74 of subdivision (f) because many law firms are now incorporated. Mr. Treister pointed out that if they were referred to as "employees," it would be difficult to distinguish the lawyers from the secretaries. It was agreed to leave the language of subdivision (f) as written. Judge Maris, however, pointed out that the heading was rather odd. Judge Gignoux suggested adding "Firm of", and the Committee approved the heading of subdivision (f) as follows, "Services Rendered by Member or Associate of Firm if Attorneys or Accountants."

Rule 219, Compensation for Services Rendered and Reimbursement of Expenses Incurred in a Bankruptcy Case

Professor Kennedy called attention to a related problem in line 25 of subdivision (a). Mr. Treister moved to leave the rule as written but Professor Riesenfeld suggested "or regular associate" should be added to line 25 in order that this be consistent with the previous change. After a brief discussion Mr. Treister changed his motion to include this phrase on line 25 of page 97, on line 50 of page 98, and on lines 92 and 94 of page 99. The motion carried and the Reporter indicated he would make minor changes in the note.

Rule 914. Procedure in Contested Matters Not Otherwise Provided For

Mr. Treister felt a reference to Rules 764 and 769 should be included in this rule so that there would be an ordinary way in which to enforce the judgment entered in a contested matter rather than by a special court order "as specified in Rules 764 and 769." His motion to include this reference at line 9 was carried.

Rule 917. Evidence

Mr. Horsky moved approval of the rule as written if the Rules of Evidence are approved and, if they are not, he moved approval of alternative language as suggested by the Reporter. His motion carried.

Rule 921. Entry of Judgment; District Court Record of Referee's Judgment

Professor Kennedy stated there had been recommendations made by various clerks of courts. A referee in Portland, Oregon, who had been a clerk suggested the deletion of the last three lines because he felt the entry could be made by the referee in his docket. He also felt lines 9-10 regarding

the effect of a referee's judgment were inconsistent with lines 28-30. Professor Kennedy suggested that the inconsistency could be mimimized by striking "shall have the same effect" and adding "may be enforced" to the last clause of the rule, but Professor Countryman felt the stricken language should be put back into the rule. Mr. Treister moved approval of Professor Countryman's suggestion. After discussion the last clause of Rule 921(b) was approved as follows: "the referee's judgment shall have the same effect and may be enforced as a judgment of the district court so indexed." Professor Riesenfeld requested that further explanation be added to the note. Judge Maris then questioned the modification of line 16. He pointed out that "keep the copy and an index thereof" gives no direction that the clerk make an index of the judgment. Judge Gignoux suggested the inserted language be changed to, "keep and index the copy." His motion carried.

Rule 701. Scope of Rules of Part VII

Professor Kennedy suggested that the language of Chapter XIII Rule 13-701 be incorporated here by reference. After discussion it was decided that this matter should be left to the Reporters. When Judge Maris indicated that changes could be made later, the Reporters decided to leave the rule as written.

Rule 913. Habeas Corpus

Professor Kennedy pointed out that this new subdivision (b) involves reconsideration of an earlier decision of the Committee not to have this kind of provision in the straight bankruptcy rules, but after adoption of the comparable Chapter XIII rule, it did not seem justifiable for there to be such a discrepancy. Professor Countryman stated that when the proposal was approved in the Chapter XIII Rules, it was not limited to relief from imprisonment for collection of a dischargeable debt, but of any debt which is or will be provided for by the plan; therefore, if this subdivision (b) was approved, he would propose adding another paragraph to Rule 13-901 to say that the reference to Rule 913(b) to "a dischargeable debt" shall be read as "a debt which is or will be provided for by the plan." Mr. Horsky moved approval of the new subdivision (b) of Rule 913 as well as the suggested amendment to Rule 13-901. Because subdivision (b) had not been sent to the bench and bar, Professor Riesenfeld felt it should not be added. Professor Kennedy pointed out that it merely stated present law, that is, the substance of General Order 30 which would be repealed. Mr. Horsky accepted Professor Joslin's suggested amendment to his motion which

would eliminate "dischargeable debt" so the debtor could be released regardless. This proposed amendment caused concern among the members that the rule might have to be resubmitted to the bench and bar. Professor Kennedy suggested that if the motion was approved thereby eliminating the last clause of Rule 913(b), the change could be presented to the bar in the submission of the Chapter XI rules. Mr. Horsky restated his motion as two separate motions: (1) that subdivision (b) be approved as written only for submission to the Supreme Court, and (2) that, with the submission of the Chapter XI rules to the bench and bar it be proposed that subdivision (b) be amended by striking the last clause. His first motion carried. Before voting on the second motion, Judge Maris expressed disagreement with the procedure of sending a rule to the Court at the same time the Committee was proposing that it be amended. Professor Seligson suggested that action be deferred on the second motion since there may be fewer nondischargeable claims in the future than there are at present. Mr. Horsky's second motion was withdrawn for the time being.

Professor Riesenfeld moved for an amendment to subdivision (b) which would grant more flexibility to the authority of the court to issue a writ of habeas corpus, but his motion lost. He then suggested the note be more explicit that the court should abide by the policy of the Bankruptcy Act. Professor Seligson felt that it would be enough merely to delete the sentence referring to the Damon case, and the Committee agreed.

Form No. 24. Discharge of Bankrupt

Professor Kennedy stated that there were discrepancies between this form and the comparable Chapter XIII Form. He suggested "the date of bankruptcy" be added to line 6 and to correct awkward language, "on the date of bankruptcy" should be added to the insert at line 22 in place of "when the petition was filed." Blanks for insertion of the date would then not be necessary. Since "Order of" had been deleted from the title of the comparable Chapter XIII Form, it was suggested that these words be deleted here. The members agreed. Professor King felt the date of bankruptcy should be indicated, and Mr. Treister suggested it appear between lines 3 and 4. The members agreed to leave this matter to the discretion of the Reporter.

Form No. 28. Notice of Appeal to a District Court from a Judgment or Order of a Referee Entered in Adversary Proceeding

Since Rule 801 had been modified to conform to a local rule of the Central District of California, Mr. Treister suggested the following be added: "The parties to the judgment [or order] appealed from and the names and addresses of their respective attorneys are as follows." The members agreed to the addition of this language between lines 19 and 20.

Rule 119. Bankrupt Involved in Foreign Proceeding

Professor Riesenfeld pointed out that the reference in lines 1-3 to the adjudication was unnecessary and confusing. He moved to begin the rule with the insert by changing the first word to "When" and deleting lines 1-3. His motion carried.

CHAPTER XIII RULES

Professor Countryman explained the combining of former Parts II and III into one Part II so that these rules would correspond to the ten parts of the bankruptcy rules. He also stated that he changed the order of the forms to follow the Chapter XIII case more chronologically and he combined two sets of forms, regarding confirmation of a plan and the Chapter XIII statement.

Rule 13-110. Venue and Transfer

Professor Countryman called attention to objections by a committee of the Referees Conference. First of all, they felt the district of a former place of business was not very appropriate for a Chapter XIII case. Secondly, they preferred to authorize venue in a district where the employer is located only if the debtor is located there but instead of making this alternative available if the debtor could not qualify on the basis of his residence, etc., they would make this a free option in every case. The Style Subcommittee agreed that the district of a former place of business should be eliminated but a district of former residence or domicile was not very appropriate either and suggested an amendment to subparagraph (a)(1). Professor Countryman agreed that it is more important to have the case where the debtor is rather than where the creditors are residing. As suggested, Referee Whitehurst moved approval of a motion to change "business" on line 5 to "employment" and strike lines 6 through 12. His motion carried.

Rule 13-202. Acceptance or Rejection of Plan

(c) Acceptance or Rejection by Partially Secured Creditor. Professor Countryman indicated that many commentators felt this took away substantive rights. The Style Subcommittee, however, concluded that the rule merely indicates that a secured creditor who approves the plan has two votes for approval and they suggested deleting, "only as a secured creditor" from lines 25-26 and adding "in both capacities." Mr. Treister moved approval and his motion carried.

Rule 13-203. Notices to Creditors and the United States

Professor Countryman stated that at the suggestion of Professor Riesenfeld he added a paragraph to the note indicating all the other rules which provided for notice that might go to creditors. He recommended deletion of this unnecessary information. Judge Gignoux moved approval of the deletion and his motion carried. Professor Riesenfeld requested that a sentence referring to the fact that there are other rules providing for notice be added and the members agreed.

Rule 13-214. Modification of Plan After Confirmation; Revocation of Confirmation

Professor Countryman stated that the rule originally tracked on the statute in authorizing only modifications of the provisions of the plan dealing with the payments to be made by or on behalf of the debtor. The commentators, however, pointed out that sometimes one may want to modifiy the distribution made under the plan. Therefore, the Style Subcommittee suggested adding at the end of subdivision (a), "or may alter the amount of the distribution to any creditor provided for by the plan to the extent necessary to take account of any payment to or satisfaction of such creditor outside the plan. Mr. Treister felt the time of distribution might need to be modified also and he preferred the original language. After discussion, Mr. Horsky moved approval of the additional language and his motion carried.

Rule 13-305. Post-Petition Claims

Professor Countryman raised a question whether they should cover a post-claim filing period, in other words, the rejection would have to occur more than 6 months after

the first meeting of creditors, but after discussion, Mr. Treister moved approval of the rule as written, and his motion carried.

Rule 13-403. Exemptions

Professor Countryman pointed out that this rule tracks the bankruptcy rule, however, they received criticism from referees and attorneys that either the debtor waives his exemptions for purposes of the Chapter XIII case or he claims them and nobody pays any attention to the claim and no action is taken. The Style Subcommittee solved this problem by striking all but the first paragraph and pointed out in the note that the exemptions should be claimed in a Chapter XIII statement because if the case is converted to bankruptcy that statement serves in lieu of schedules. However, this left two forms which after discussion were recommended for deletion. Mr. Treister moved approval adding that the note should be changed so that it does not deal with the debtor waiving his exemptions but indicates that they should be claimed and states the reasons. His motion carried.

Professor Countryman stated that comments of the Los Angeles Bar Association were received after the meeting of the Style Subcommittee and he called attention to those points which he felt needed consideration as follows:

Rule 13-213. Confirmation of Plan; Payment Order; Evidence of Title

Professor Countryman stated the Association felt the sentence beginning on line 10-12 was not explicit enough and suggested it be changed to "Objections to confirmation of the plan must be in writing and may be filed at any time prior to confirmation." Referee Herzog moved approval of their suggestion and his motion carried.

The Association objected to the mandatory evaluation of subdivision (d) and they felt the language on line 33 violates the Constitution. Professor Countryman stated this was taken from antideficiency legislation, and if anything violates the Constitution it is the legislation. He further indicated that they proposed to change the first sentence and he felt their proposal did not solve their problem. Professor Seligson also recommended no change and the Committee agreed.

The Bar Association felt that explanatory language should be added to the note accompanying Form No. 13-1 stating that additional allegations beyond those indicated in the form may be included in the original petition.

Professor Countryman recommended the following sentence be added at the end of the Note: "As provided in Bankruptcy Rule 909 made applicable by Rule 13-901 these official forms shall be observed and used with such alterations as may be necessary to suit the circumstances." Mr. Horsky felt this is important enough to be placed after the heading for the forms and before the first form. Judge Maris pointed out that "necessary" was too strong and suggested the substitution of "appropriate." Professor Seligson moved approval of the amendment to the sentence read by Professor Countryman for inclusion after the heading and also in Rule 909. His motion carried.

Bankruptcy Rule 122. Conversion of a Chapter Case to Bankruptcy

Professor Kennedy distributed a revised draft of Rule 122, which incorporated suggestions of Professor Countryman and Mr. Treister. He explained that it had been written with the view that it will be submitted to the Judicial Conference and the Supreme Court with the straight bankruptcy rules and the Chapter XIII Rules for approval. However, it assumed with regard to Chapters X, XI, and XII that the statute is still effective. Mr. Treister pointed out that the important application of this rule is in Chapters XIII and XI, and he would recommend assuming future approval of the other chapter rules while drafting this rather than amending the rule later. The members agreed.

When Professor Kennedy began reading the draft, Judge Gignoux indicated that "chapter case" on line 1 should be spelled out. It was agreed to include "Chapter X, XI, XII, or XIII case." Professor Shanker felt that "bankruptcy" should be added to "case" on line 4 for clarification, but the other members disagreed.

Upon reading paragraph (2), Referee Herzog pointed out that "lists" and "inventories" should be added to line 8. Mr. Tresiter felt the original language, "and in full compliance therewith" should be restored to line 11 after "Rules 108 and 403(4)." Professor Countryman questioned whether the Chapter XIII case should be dealt with separately, and Professor Kennedy felt it should not. In revising the second part of paragraph (2) to comply with the listing of the papers under all the chapters, Judge Gignoux suggested that line 14 be changed to read, "but if no such documents have been previously filed." Professor Countryman then suggested "he" be substituted for "the debtor" in line 17. Paragraph (2) as amended was read as follows: "Unless otherwise directed by the court, lists, inventories, schedules, and statements filed in a superseded Chapter X, XI, XII, or

XIII case shall be deemed to be the schedules and statements of affairs filed in the bankruptcy case pursuant to Rules 108 and 403(4) and in full compliance therewith; but if no such documents have been previously filed in a superseded case, the bankrupt shall comply with Rule 108 as if he had been adjudicated an involuntary bankrupt on the date of the entry of the order directing the case to continue as a bankruptcy case." Mr. Horsky moved approval and his motion carried.

Paragraph (3) was read and approved as written.

There was discussion regarding paragraph (4) covering the various situations. Judge Gignoux suggested it be broken into divisions covering (1) a trustee who is already qualified, (2) a standby trustee, and (3) neither. Referee Herzog suggested that paragraph (4) begin, "In a superseded case the court shall appoint the trustee unless (A) the trustee has previously been selected under Rule 209, or (B) in a superseded Chapter XI, a trustee is being nominated and is qualified, or (C) the court pursuant to Rule 211 orders that no trustee be appointed." Mr. Treister suggested the Reporter redraft paragraph (4) along those lines, referring to a standby trustee in (B) thereby covering both Chapters XI and XII.

Adjournment at 5:00p.m.

The meeting reconvened on September 14, 1973 at 9:30 a.m. Professor Kennedy read the revised paragraph (4) as suggested by Referee Herzog. Professor Seligson felt "shall" should be substituted for "required to" on line 31 and the Reporter agreed. Professor King observed that "as if elected on the date of the entry of the order directing that the case continue as a bankruptcy case" was unnecessary. Judge Maris suggested it would be clearer to provide, "and within 5 days after receipt of notice." Mr. Treister suggested the last paragraph to be added to the note should be a part of paragraph (4) at the end. Referee Herzog moved approval as amended and his motion carried.

Professor Kennedy read paragraph (5), stating that it was an attempt to deal with an unanswered problem under the present statute. He stated, "in the superseded chapter case" on line 60 was unnecessary and Professor Countryman suggested "such" be substituted for "the" on line 59. Professors Riesenfeld and Shanker raised the question whether to include the substance of Rule 201(i) regarding duties of receivers. The Committee approved the inclusion of language which would require the receiver to turn over to the trustee all the records and property of the estate subject to his control as receiver.

Professor Kennedy read paragraph (6) regarding the filing of claims. He said that, "timely and properly" could be included. Mr. Treister felt, however, that it was substantively wrong. He also recommended deleting "chapter." Professor Seligson questioned the legal effect of the paragraph and requested an explanation in the Note. Mr. Treister suggested the addition of a sentence explaining that paragraph (6) does not insure that you have a timely claim. Mr. Horsky moved approval of the paragraph as amended including the additional sentence in the Note, and his motion carried. Mr. Treister then pointed out that paragraph (6) should be moved up to follow paragraph (3), and the Committee agreed.

Professor Kennedy read paragraph (7), stating that it is based on provisions of the statute. Professor Seligson suggested the addition of "unless the court otherwise directs, file with the court a final report and account." After discussion, Professor Countryman suggested deleting "Chapter X, XI, or XII" from line 66 and placing it on line 68. Then Judge Gignoux pointed out that "each" on lines 70 and 72 could be changed to "him." Professor Kennedy read the sentence as amended: "Each trustee, receiver, or debtor in possession acting in the superseded case shall, unless the court otherwise directs, file with the court a final report and account within 30 days after the entry of the order directing that the case continue as a bankruptcy case, including

in a superseded Chapter X, XI, or XII case, a separate schedule listing unpaid obligations incurred by him after the commencement of the chapter case and a statement of all contracts, executory in whole or in part, assumed or entered into by him after the commencement of the chapter case."

The discussion then led to whether there should be any further provision after line 73 dealing with a final accounting by the debtor or debtor in possession. Mr. Treister felt that "an arrangement under Chapter XI or XII or of a plan under Chapter XIII" should be deleted and "a plan" substituted. Professor Seligson felt there was a problem of duplication, and Professor Kennedy suggested adding, "not listed in the final report filed pursuant to this paragraph" after "property" on line 76. He read paragraph (7) as amended, and Mr. Horsky moved approval. His motion carried.

Professor Kennedy read paragraph (8) stating the Committee had decided to retain the following phrase on line 84, "including claims of the United States, any state, and any subdivision thereof." After a brief discussion, Referee Whitehurst moved approval as read, and his motion carried.

Professor Kennedy read paragraph (9), and Mr. Horsky expressed his view that it would be clearer to delete the first phrase. Judge Maris pointed out that technically one could not extend something that has expired. Professor Countryman pointed out that the two requirements of paragraph (8) that this be prescribed by the court and by the rule would have to be spelled out. Therefore, he suggested lines 95-96 be changed to read: "the extension shall apply to holders of claims who failed to file within the time prescribed by, or fixed by the court pursuant to, paragraph (8)." Mr. Horsky moved approval as amended, and the motion carried.

When Professor Kennedy read paragraph (10), Mr. Horsky called attention to a stylistic problem on line 110 in that the trustee does not actually qualify pursuant to paragraph (4). After discussion, Professor Kennedy read the following suggested language: "except that with respect to the trustee selected as provided in paragraph 4(A) of this rule, the time period prescribed by Rule 607 shall begin to run from the entry of such order." Referee Herzog moved approval of the language proposed to be substituted for lines 108-111, and his motion carried.

The members of the Committee agreed to leave the drafting of the Note to the Reporter.

PUBLISHER's NOTE:

Page(s) 12 could not be located

There was discussion of whether to send this Rule 122 to the Standing Committee for approval with the straight bankruptcy rules and the Chapter XIII Rules at the same time or to wait and include it in rules to be submitted to the bench and bar for consideration. Professor Kennedy pointed out that this rule would enable the court to appoint the trustee after Chapter X had been converted whereas the statute now allows creditors to make that appointment. Referee Herzog preferred to allow the creditors to elect the trustee because these cases are few and he felt this would not cause concern when sending Rule 122 to the Supreme Court now. Judge Maris expressed his view that the straight bankruptcy rules and Chapter XIII Rules as sent to the Court would be incomplete without Rule 122. Mr. Horsky made a motion to include Rule 122 with the rules being sent to the Standing Committee for approval at the October session of the Judicial Conference, and his motion carried.