ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 30-31, 1995

Agenda

Introductory Items

1. Approval of minutes of September 1994 and December 1994 meetings.

2. Report on January 1995 meeting of the Committee on Rules of Practice and Procedure, including action on Advisory Committee's request that it be authorized to communicate directly with the National Bankruptcy Review Commission. [Oral report.]

Rules

3. Consideration of comments received on proposed amendments published in 1994, (Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006). [Materials: Reporter's memorandum dated February 28, 1995.]

4. Proposal to delay discharge if $15 trustee surcharge fee has not been paid in a case converted to chapter 7. [Materials: letter of Francis F. Szczebak to Peter G. McCabe dated February 23, 1995, commenting on the published draft of Rule 4004(c).]

5. Proposed amendments approved at previous meetings and ready for publication, (Rules 1020, 2002(a), 2002(n), 2007.1, 3002, 3018, 3021, 8001(a), 8001(e), 8020, 9015, and 9035). [Materials: Reporter's memorandum dated February 23, 1995.]

6. Proposed amendments to Rule 2007.1 on election of chapter 11 trustee. [Materials: Reporter's memorandum dated 3/1/95; memorandum of Marvin E. Jacob and Una M. O'Boyle dated 1/18/95.]

7. Proposed amendments to Rules 3017, 3018, 3014, and new rule 3017.1 concerning approval of disclosure statements. [Materials Reporter's memorandum dated January 11, 1995.]

8. Proposed amendments to Rule 9011 concerning sanctions. [Materials: Reporter's memorandum dated February 10, 1995.]

9. Proposed amendments to Rule 1019 regarding conversion. [Materials: Reporter's memorandum dated February 18, 1995.]

10. Proposed amendments to Rule 8002(c) concerning extension of time to appeal. [Materials: Reporter's memorandum dated February 24, 1995.]

11. Consideration of comments received concerning proposed uniform local rules numbering system. [Materials: Proposed Uniform Local Bankruptcy Rules Numbering System. Copies of comments to be circulated after comment deadline, 3/15/95.]

12. Proposed amendments to Rules 2002(j)(4) and 6007(a) proposed by the Attorney General. [Materials: Reporter's memorandum dated February 28, 1995; letter from Attorney General Janet Reno dated September 6, 1994.]

13. Rule 2014(a) and disclosure requirements. [Materials: Reporter's memorandum dated February 18, 1995; letter from Harvey R. Miller, Esq., dated September 22, 1994; decision of Hon. Tina L. Brozman in the Leslie Fay case; ABA Report on Resolution 119A; Reporter's memorandum on ABA Report dated February 13, 1992; and minutes of Advisory Committee meeting of March 26, 1992.]

14. Proposed amendments to Rule 9006(b)(1) concerning enlargement of time. [Materials: Reporter's memorandum dated February 26, 1995; Ninth Circuit BAP decision in Village Green Associates case.]

Subcommittee and Liaison Representative Reports

15. Forms Subcommittee. Report on forms revision project.

16. Long Range Planning Subcommittee. Preliminary report on survey results.

17. Local Rules Subcommittee. See # 10, above.

18. Alternative Dispute Resolution Subcommittee.

19. Technology Subcommittee.

20. Civil Rules Liaison. Report by Judge Restani on recent meetings of the Advisory Committee on Civil Rules.

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21. Information Items

Status list of rules amendments.
Status chart of rules amendments.

22. Next Meeting

The date and place of the next meeting are:

September 7-8, 1995
Portland, OR

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 22-23, 1994

New York City

DRAFT

Minutes

The Advisory Committee met at the headquarters of the Association of the Bar of the City of New York. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge James J. Barta
Bankruptcy Judge James W. Meyers
Professor Charles J. Tabb
Henry J. Sommer, Esquire
Kenneth N. Klee, Esquire
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
R. Neal Batson, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Adrian G. Duplantier was unable to attend.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair
District Judge Thomas S. Ellis, III, liaison to the Advisory Committee
Professor Daniel R. Coquillette, Reporter
Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, Secretary

The following additional persons attended all or part of the meeting: District Judge Paul A. Magnuson, Chair, Committee on the Administration of the Bankruptcy System; William F. Baity, Acting Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mark D. Shapiro, Rules Committee Support Office, Administrative Office of the United States Courts; and Elizabeth C. Wiggins and Robert Niemic, Federal Judicial Center.

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. Unless otherwise indicated, all memoranda referred to are included in the agenda book for the meeting.

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

INTRODUCTORY MATTERS

The Chairman introduced J. Christoper Kohn, Esquire, of the Department of Justice, who had recently been designated by the Attorney General to serve on the Committee. **The Chairman appointed Mr. Kohn to the local rules subcommittee.** The Chairman also welcomed to the meeting Judge Stotler, Judge Magnuson, and Professor Coquillette.

Minutes of the February 1994 Meeting. The Committee approved the minutes of the February 1994 with a change in wording concerning the Committee's having taken no action on the issue of the status of a late-filed proof of claim and the developing case law on that subject.

Report on the June 1994 Meeting of the Committee on Rules of Practice and Procedure (the "Standing Committee"). The Reporter noted that the Committee's recommended substitution of "nonwillful" for the originally proposed "negligent" as the standard for excusing non-compliance with a local rule imposing a requirment of form had been adopted by the Standing Committee. Accordingly, the proposed civil, criminal, appellate, and bankruptcy rules dealing with local rules all prescribe "nonwillful" as the standard. Judge Stotler confirmed that the Judicial Conference had approved these proposed rules earlier in

the week. Professor Resnick reported that the proposed technical amendments rule, however, was not approved by the Standing Committee.

The Standing Committee did approve for publication the package of amendments requested by the Committee. In addition, the advisory committees on the appellate, civil, and criminal rules had adopted conforming amendments to permit electronic filing, which will be published for comment. Most importantly, all of the advisory committees had adopted the Committee's recommendation that any Judicial Conference standards on the subject be limited to "technical standards."

The Reporter said that the Standing Committee's consultant on style, Bryan Garner, had circulated among the reporters an interim draft of "Guidelines for Drafting Court Rules. Professor Resnick noted that the Advisory Committee on Bankruptcy Rules has a style subcommittee and that it is the only advisory committee which does. He also said that Mr. Garner had provided some style suggestions on the amendments that are being published for comment. These suggestions reached the Reporter too late for incorporation into the submission to the Standing Committee. Accordingly, they will be treated as public comments and considered with the other comments on the amendments package.

The Reporter thanked Judge Stotler for her letter to the chairman of the House Judiciary Committee opposing the provision in the pending bankruptcy bill that would amend Rule 7004 to require service of process on an insured depository institution to be made by certified mail in certain circumstances.

Judge Stotler called the Committee's attention to the new brochure summarizing the proposed amendments to the rules and to the new format of the pamphlet in which the full texts are published. Judge Stotler said the Standing Committee hopes to

receive feedback on both the brochure and the new format of the pamphlet, which shows on the cover those rules subject to proposed amendments. Mr. McCabe said that he and the Standing Committee think they need more comment on proposed rules and from a broader spectrum of persons. To help achieve that, he said, the Standing Committee contacted all of the state bars and asked that these organizations name coordinators to read all proposed amendments, publicize them, and then assemble, digest, and transmit comments to the Standing Committee.

Report on Publication of Minutes via "Online" Computer Services. Mr. Shapiro stated that to date only Lexis and Westlaw have requested copies of minutes for such publication. The question was raised whether, in light of this wider availability of the minutes, the speakers at meetings should continue to be identified. The consensus was to continue the current practice.

RULES

Rule 9014. The Reporter's memorandum discussed Rule 9014 governing contested matters in light of the 1993 amendments to Federal Rule of Civil Procedure 26 and the applicability of certain other time periods in the civil rules. The Reporter had drafted a proposed amendment to Rule 9014 to make parts of Rule 26 (Rule 26(a)(1)-(4) and (f)) inapplicable to contested matters unless otherwise ordered by the court. The Reporter stated that he would add to the draft a clause expressly permitting discovery to proceed under the first sentence of Fed. R. Civ. P. 26(d). An alternative draft would make these amendments and, in addition, would shorten time periods prescribed in other civil rules relating to discovery and summary judgment motions.

The representatives of the Federal Judicial Center distributed copies of the Center's most recent compilation concerning districts that have locally opted-out of all or part of Rule

26(a) in contested matters. This report shows that 42 districts have clearly opted-out of Rule 26(a) entirely. An additional 21 districts have opted-out of at least Rule 26(a)(1) and most have opted-out of a little more than that. Another group, 11 districts, have opted-out at least temporarily. Six more districts are studying the matter, which means that, while the rule is officially in effect there, it is not clear how thoroughly it is being enforced. In summary, approximately two-thirds of the districts have exercised their option to opt out of all or part of Rule 26(a) in contested matters. With respect to Rule 26(f), the Federal Judicial Center's compilation showed that 58 districts had clearly opted-out and 11 had temporarily opted-out, approximately the same two-thirds proportion as had opted-out of all or part of Rule 26(a).

The Reporter noted that any national rule amendment would not take effect until 1997. By then, courts may be settled with their local rules and a national rule may not be necessary. Yet, he said, it seems important for the national rules to lead the way, to establish what should be the "default mode" on discovery in contested matters. He said it is his view, as a general proposition, that the discovery provisions in question should not apply in contested matters. On the other hand, he noted, Mr. Smith had taken the opposing view in a memorandum circulated to Advisory Committee members.

Mr. Smith said he thinks the issue should not be left so much to local rule. Without a national rule, there will be proliferation of rules with no consistency. He also said he thinks the opt-out statistics indicate that districts simply do not know how to make the new discovery rules work. Professor Coquillette said that the Standing Committee and the Advisory Committee on Civil Rules both are concerned about how the Civil Justice Reform Act (CJRA) and the amendments to Rule 26 (with its opt-out provision) have led to a "balkanizing" of federal procedure. He noted that in

the district courts some of the opt-outs are attributable to the fact that the district has a CJRA plan which contains an almost identical rule.

Several participants favored giving longer thought to the question of whether there should be a distinction between adversary proceedings and contested matters with respect to discovery. Judge Magnuson reported that under the new Rule 26 he has only had one Fed. R. Civ. P. 12 motion (on whether the statute of limitations had run) and cautioned against discarding the new provisions just over the time issue in contested matters. A consensus began to emerge that the Advisory Committee should take the time to consider what really would make sense in contested matters and perhaps draft a provision tailored to this special motion practice. **A motion to table the matter carried by a vote of 9-4.**

Rule 8002(c). The Advisory Committee previously had voted to amend this rule to clarify that a motion for an extension of time to file an appeal must be "filed" rather than "made" within the 10-day period prescribed. Before the amendment was presented to the Standing Committee, however, the Ninth Circuit issued a decision that the Reporter believed justified bringing the rule back for consideration of further proposals for amendments. That case is In re Mouradick, 13 F.3d 326 (9th Cir. 1994), in which a party filed a motion for an extension of time in which to file a notice of appeal. The filing of the motion, however, occurred during the 20-day period following the initial 10-day appeal period, a time during which such a motion may be granted upon a finding of excusable neglect. The court did grant the motion but not until after the 20-day period had expired. The Ninth Circuit held to be untimely the notice of appeal filed within the time specified in the order granting the extension. The Reporter's memorandum noted that Federal Rule of Appellate Procedure 4, in the wake of a similar decision, had been amended to allow a

notice of appeal to be filed within the time prescribed in the rule or ten days from the entry of the order granting the motion for extension, whichever occurs later.

The Reporter presented three options: 1) provide for early finality by requiring that the order granting an extension be entered within the additional 20-day period already provided in the rule, 2) protect a party that files a timely motion by permitting the notice to be filed within a specified period after entry of the order granting the motion, or 3) permit filing of the notice of appeal within a specified time after entry of the order granting the motion but also require the court to rule on the motion within a specified time. Although one member expressed concern about encouraging "games designed to prevent finality," discussion of a motion to adopt alternative #3 indicated substantial resistance to the tying of a party's rights to action by a judge within a specified time period. **A substitute motion to adopt the Reporter's Draft No. 2 - giving the party that has filed a timely motion 10 days from entry of the order granting the extension, regardless of when the court acts - carried by a vote of 10-3.** After this vote, however, further discussion raised the idea of excluding certain matters from any extension of time for filing a notice of appeal. If approved, some members said, these exclusions or "carve outs" should be listed at the beginning of the rule. **A motion to defer action on this rule to the next (3/95) meeting carried by a vote of 7 - 1.**

Rule 4003(b). Recent court decisions have raised questions about the interpretation of this rule and whether the time to object to a debtor's claim of exemption can properly be extended by the granting of a timely filed motion if the court does not act until after the period provided in the rule has expired. The Reporter presented three alternatives: 1) rewriting the rule to more clearly prohibit the court from acting after the deadline, 2)

allowing an extension if the motion was timely filed, and 3) allowing the court up to ten days after the end of the period provided in the rule to act on a timely filed motion. One member questioned the wisdom of responding to every conflict in the cases with an amendment to resolve the issue. Mr. Smith observed that there always will be tension between a perceived institutional distaste for too many "little" amendments and a desire to reduce the number of "litigation points." **A motion to adopt alternative #2 failed by a vote of 5 - 8. A motion to amend both Rules 4003(b) and 9006(b) to forbid extensions altogether failed by a vote of 3 - 9. A motion to adopt alternative #3 failed for want of a second.**

Rule 3021. At a prior meeting, the Committee had approved for publication an amendment to this rule to permit the plan or order confirming the plan to fix a record date for equity security holders purposes of distribution. In working on the rule after that meeting, however, the Reporter had noted some problems with the terminology used in the rule with respect to holders of bonds and debentures. Accordingly, he suggested correcting these also before submitting any amendment to the Standing Committee. **A motion to adopt the Reporter's revised draft, with the substitution of "that" for "who" on line 6, carried by a vote of 12 - 0.**

Rules 3017(d) and 3018(a). At the February 1994 meeting, the Reporter presented proposed drafts to amend these rules to provide for flexibility in fixing a record date for determing the creditors and equity security holders who will receive a copy of the plan, the disclosure statement, and a ballot, and who have the right to vote on the plan. Alternative drafts were proposed, but consideration was postponed until the September 1994 meeting. **A motion to adopt in principle Alternative B, which would allow the court to set the record date, passed by a vote of 8 - 2. The vote included a directive to add to the rule that any fixing of a**

date by the court should be "after notice and a hearing." The Reporter will present a revised draft at the February 1995 meeting.

Rule 9011. The Committee discussed conforming the rule to Fed. R. Civ. P. 11 as amended December 1, 1993. The Reporter presented a draft for discussion. He noted that he inadvertently had omitted the petition from the list of documents to which a signatory certifies. **A motion to add the word "petition" on line 35 of the draft passed unanimously.** The Reporter also inquired whether the petition should be protected by the 21-day "safe harbor" provision of Rule 11 under which a challenged pleading can be withdrawn without penalty. There appeared to be a consensus that because a petition acts as a self-executing, ex parte injunction, it should not be protected. Additionally, in chapters 7 and 11 the debtor cannot dismiss a case, and the court can do so only for "cause" and after notice and a hearing. One member wanted to carve out a notice of appeal as well. Another, however, said there appears to be a fundamental difference between a matter of business judgment, such as a notice of appeal, and the injunctive effect of a petition. **A motion to adopt the Reporter's draft, as amended above and with the petition carved out of the "safe harbor," carried by a vote of 8-1. A further motion not to tinker further with the rule also carried with one opposed. The Reporter is to re-draft the rule.** [See below.]

[New] Rule 8020. The proposed new rule would authorize the district court or bankruptcy appellate panel to impose sanctions for filing a frivolous appeal. It is similar to Rule 38 of the Federal Rules of Appellate Procedure. **A motion to adopt the Reporter's draft carried unanimously.**

Rule 9006(f). The Standing Committee had requested that the Advisory Committees study whether the additional three days

provided when service is made by mail should be enlarged to five days because of slower mail deliveries. The Reporter stated that the Postal Service standard for first class mail delivery is a maximum of three days within the contiguous United States and that the Postal Service's studies indicate that this standard actually is met for 80 percent of the mail, on average. Judge Robreno said the problem really is with attorneys who do not mail documents until the last day. Professor Coquillette stated that there will be an overall study undertaken of time periods in the rules, probably in 1996, and that mail service conditions then can not be predicted now. **There was a consensus that the Committee should recommend no action at this time.**

Rule 3002. The Committee discussed the developing case law on the deadline for filing proofs of claim. The published cases still are unsettled on whether the deadline prescribed in Rule 3002 is effective in chapter 13 cases. None of the cases so far is inconsistent with the amendments to Rule 3002 approved by the Committee for publication. The Reporter will continue to monitor new cases.

SUBCOMMITTEES

Subcommittee on Technology. Judge Barta said the written report on technology and the rules will be presented at the March 1995 meeting. He said the draft guidelines for routine filing of papers with the court by facsimile that were proposed by another committee had been withdrawn, and the Judicial Conference, accordingly, had taken no action to expand the availability of "fax" filing. (An existing Judicial Conference guideline permits a court to accept a facsimile filing in an emergency.)

Subcommittee on Forms. Mr. Sommer reported that the subcommittee is working on rewriting several forms and on creating one or more new forms for giving notice of a motion. The subcommittee's goal

is to maximize the use of "plain English" in notices that are sent to the public in large numbers. He said that, before any formal presentation of revised forms to the Committee, the subcommittee plans to circulate its final drafts for preliminary comment from the members.

Subcommittee on Alternative Dispute Resolution. Professor Tabb said the subcommittee presently is gathering information on how the various local programs are working. If the subcommittee believes a national rule is needed to cover such matters as controls, ethics, and confidentiality, it will return to the Committee with a recommendation and draft. Mr. Niemic said the Federal Judicial Study is conducting a study of ADR that includes both mandatory programs and voluntary ones, but the results are not yet available.

Subcommittee on Local Rules. Ms. Channon reported that preliminary comment on the uniform numbering system for local rules that the Committee had approved at the February 1994 meeting indicated that it might not be as workable or "user friendly" as the Committee had hoped. Accordingly, the subcommittee brought the matter back to the committee along with several alternative numbering systems that it had developed in response to the preliminary comments. Under any of the alternatives, the citation would be "(District name) L.B.R._____-_____." One of these systems would simply use the existing related national rule number (where there is one) followed by a dash and another numeral. Local rules topics unrelated to any national rule would have a four-digit number created for them, which also would be followed by a dash and another numeral. After discussion, the Committee voted unanimously to adopt this alternative, provided the use of the dash would not slow down the ability to conduct a topical search in a computer data base. If the dash would slow a search, the dash is to be replaced with a decimal point. The proposed numbering system is to be published

and comment sought from the bankruptcy community, as directed at the February 1994 meeting.

Subcommittee on Long Range Planning. Mr. Klee led the discussion. The first issue to be decided, he said, is whether the rules need only a "cosmetic fix" or a fundamental overhaul and restructuring. Judge Robreno said it would be best to obtain empirical data through an FJC study on how the current rules are working and whether the users perceive a need for change. Others suggested that the subcommittee give the Committee an outline of an ideal organization or a framework for a proposed organizational revision, so the Committee would have something specific to discuss. It was suggested that the subcommittee should also identify areas for change and areas where the rules seem not to work well with the statute. Several members recommended that work on two well known troublespots --- motions and discovery --- receive prompt attention. **The consensus was that a survey should be conducted, that the subcommittee should present specific ideas for areas the Committee should work on, and that once these have been done, the Committee can make an informed decision concerning the direction of its work.** With respect to the philosophical question of whether the rules are mandatory or simply guidelines, Judge Stotler suggested that the Committee might cull any rules that seem to be more hortatory and retain only what is essential.

There was further consensus that the Advisory Committee would want to be heard by any bankruptcy commission that might be formed if the pending bankruptcy legislation --- which provides for such a commission --- is enacted. At Judge Stotler's suggestion, **the Advisory Committee will present to the Standing Committee a request that the Judicial Conference authorize the Advisory Committee to communicate directly with a bankruptcy commission, if one is created.**

LIAISON WITH ADVISORY COMMITTEE ON CIVIL RULES

Judge Restani reported that she expects to attend a special symposium on Fed. R. Civ. P. 23 to be held in Philadelphia under the auspices of the Advisory Committee on Civil Rules. Mr. McCabe said another "hot" issue emerging for the civil rules is the granting of protective orders under Fed. R. Civ. P. 26(c) and when such orders can or should be lifted.

Respectfully submitted,

Patricia S. Channon

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of December 8-9, 1994

Washington, D.C.

DRAFT

Minutes

The Advisory Committee on Bankruptcy Rules met in the Thurgood Marshall Federal Judiciary Building in Washington, D.C., December 8-9, 1994. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge James W. Meyers
R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Alan N. Resnick, Reporter

Circuit Judge Alice M. Batchelder was unable to attend. Joseph Patchan, Director Designee, represented the Executive Office for United States Trustees.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair
District Judge Thomas S. Ellis, III, liaison to the Advisory Committee
Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, Secretary

The following additional persons attended all or part of the meeting: Perry Apelbaum, counsel, House Subcommittee on Economic and Commercial Law; James G. Whiddon, counsel, Senate Subcommittee on Courts and Administrative Practice; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Mark Van Allsburg, Clerk, United States Bankruptcy Court for the Western District of Michigan; Francis F. Szczebak, Patricia S. Channon, James H. Wannamaker, and John D. Howard, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mary Louise Mitterhoff, Bankruptcy Court

Administration Division, Administrative Office of the United States Courts; John K. Rabiej, Joseph F. Spaniol, Jr., Mark D. Shapiro, and Judith W. Krivit, Rules Committee Support Office, Administrative Office of the United States Courts; Elizabeth C. Wiggins, Federal Judicial Center; and several members of the public.

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. Unless otherwise indicated, all memoranda referred to were included in the agenda book for the meeting.

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

INTRODUCTORY MATTERS

The Chairman introduced Bankruptcy Judges Cordova and Kressel, new members of the Committee, and Mr. Patchan, who has been designated to head the Executive Office for United States Trustees. (Mr. Patchan was a bankruptcy judge from 1969 to 1975 and a member of the Committee from 1978 to 1991.) The Chairman also welcomed to the meeting Judge Stotler, Judge Ellis, Mr. Apelbaum, and Mr. Whiddon.

The Chairman said he called the special meeting for the purpose of considering what immediate action is required as to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms as a result of the enactment of the Bankruptcy Reform Act of 1994.

The Reporter stated that two provisions in the Reform Act affect the Bankruptcy Rules but do not require action by the committee. First, 28 U.S.C. § 2075 has been amended to make amendments to the Bankruptcy Rules effective on December 1 of the

year in which they are promulgated by the Supreme Court. Second, Rule 7004 was amended to require, with certain exceptions, service by certified mail on insured depository institutions.

The Reporter suggested that, in view of the time required for completing the rules amendment process, the Committee consider proposing "suggested interim rules" for adoption as local court rules pending the promulgation of amendments to the Bankruptcy Rules. The same process was used when chapter 12 was added to the Bankruptcy Code in 1986. **A motion to request that the Standing Committee on Rules of Practice and Procedure expedite the consideration and approval of the amendments required by the Reform Act failed for lack of a second.** Mr. Rosen said the experience gained from using interim rules might assist in the formation of permanent rules. **The consensus of the Committee was to propose interim rules and to complete the full rules amendment process for permanent rules.**

RULES AMENDMENTS

Notices to Creditors. The Reporter stated that section 225 of the Reform Act amended section 342 of the Bankruptcy Code to provide that notices required to be given by a debtor to creditors must contain the name, address, and taxpayer identification number of the debtor, although failure to do so does not invalidate the notice. The Reporter discussed three alternative responses to the statutory change: 1) do nothing and let the statute speak for itself; 2) amend rule 2002(n) only to the extent required by section 342(c); or 3) amend Rule 1005 to require the information specified in section 342(c) in the caption of every notice, regardless of who gives the notice.

Mr. Klee outlined the history of the provision, which he said was prompted by creditors' desires to identify debtors in their databases more readily. Because it was argued that

requiring the use of account numbers would be too burdensome, creditors agreed to the use of the debtor's name, address, and taxpayer identification number. Mr. Klee said the reference to invalidity of the notice was included in response to a court decision that a debt was not discharged because two digits in the debtor's Social Security were transposed in a notice. The amendment was restricted to notices by debtors because they have the necessary information. Mr. Klee said notices given by bankruptcy clerks were not considered.

Professor Tabb moved to accept the Reporter's draft amendment for the second alternative as set out in his memorandum of November 7, 1994. Several committee members questioned the need for putting the debtor's address in every caption. Professor Tabb agreed to a request to delete the phrase "The caption of" from the Reporter's draft. Mr. Sommer said the easiest place to put section 342(c) information is in the caption. The Reporter said including the information in the caption would recognize the legislative history, which stated that Congress intended for the caption of every bankruptcy notice to include the information. Professor Tabb returned to his original motion, without the deletion. **The motion to approve the original text of the Reporter's draft amendment carried by a vote of 13-0.**

Election of Chapter 11 Trustee. The Reporter stated that section 211 of the Reform Act amended section 1104 of the Bankruptcy Code to permit creditors to elect a disinterested person to serve as trustee in a chapter 11 case if a timely request is made for an election. The Reporter said he assumed that the person elected must be approved by the court as "disinterested" and that the U.S. trustee should apply for the approval with full disclosure of the person's connections. Further, the Reporter said he believed the U.S. trustee should appoint a trustee under section 1104(d) (after consultation) as

soon as practicable after the court orders the appointment of a chapter 11 trustee and that this trustee will serve unless and until another person is elected under new section 1104(b). Accordingly, the Reporter offered draft amendments to Rules 2007.1 and 2002(a).

The Committee discussed whether an elected trustee is subject to appointment by the U.S. trustee and court approval under section 1104(d). Several members said the U.S. trustee should not be required to appoint an elected trustee which the U.S. trustee believes is unqualified. Other members said the appointment is automatic but the U.S. trustee should inform the court of any factors (positive or negative) relative to the appointment. Mr. Klee noted that the debtor's exclusive right to file a plan and several other chapter 11 provisions are tied to the appointment of a trustee, not to the election of a trustee. Mr. Rosen said a court order approving the trustee is particularly important because millions of dollars may be turned over to a chapter 11 trustee. The Committee agreed by a straw vote that the person elected should be appointed by the U.S. trustee and approved by the court.

Judge Restani moved to approve the draft revision of Rule 2007.1 in the Reporter's memorandum of November 7, 1994, with the addition of the words "approval of" after the word "for" in lines 24 and 28. **The motion carried on a vote of 9-2.** Mr. Sommer moved to require notice of the request for election. The Reporter said this is unnecessary because creditors will get notice of the meeting of creditors (called for the election) within a few days. **The motion failed. The Committee agreed by consensus to delete the brackets and retain the bracketed language in section (b)(1) of the Reporter's draft.** Mr. Klee moved to insert the phrase "appoint the person elected to be trustee" after the word promptly in line 28. Mr. Smith said that if the Committee believes the U.S. trustee must appoint the

person elected, then the rule should say so. The motion carried with one dissenting vote.

Mr. Klee moved to amend line 27 by inserting the phrase "or, for cause shown, any party in interest," after the word "trustee". The Reporter stated that, under the current rule, only the U.S. trustee can apply for court approval of an appointment of a chapter 11 trustee, but, if the U.S. trustee fails to act, a party could seek redress under Rule 2020. The Committee agreed that the U.S. trustee should make the application. Judge Restani said the word "only" in line 43 was too strong. After a discussion of whether the word created a inference that Rule 2020 was inapplicable, the Committee voted unanimously to delete "only." A motion to insert the phrase "approved in accordance with" after the word "and" in line 37 was approved unanimously.

The Committee approved the draft amendment to Rule 2002(a) in the Reporter's memorandum of November 7, 1994, by consensus.

Filing Proofs of Claim. Section 213(a) of the Reform Act amended section 502(b)(9) of the Bankruptcy Code to specify that claims filed by governmental units are timely if they are filed within 180 days after the order for relief. The Reporter stated that the statutory change made the proposed amendment to Rule 3002(d), which has been published for comment by the bench, bar, and public, unnecessary.

The Committee discussed whether the 180-day limit was intended to apply to just chapter 7 cases or to cases in all chapters. Mr. Klee said the understanding in the proponents' negotiations with Congress was that the amendment would apply to all chapters. The Reporter stated that he prepared the draft amendment to Rule 3002 set out in his memorandum of November 7, 1994, on that assumption although the time for filing by

governmental units could be fixed by the rule as long as it did not conflict with the statute.

Mr. Klee stated that all governmental units should be treated the same way in order to avoid discriminating against foreign governments. **A motion to delete the phrase "of the United States, a state, or a subdivision thereof" from lines 17-18 of the Reporter's draft and to substitute "of a governmental unit made" carried unanimously.**

Mr. Sommer moved to add the following language: "If the claim is tardily filed, the party filing the claim shall serve copies on the trustee and the debtor." He said chapter 13 trustees should be served so that they do not have to constantly check the claims dockets in thousands of cases which may remain pending for several years. Several Committee members questioned whether checking the dockets is an unreasonable burden. The Committee discussed whether the amendment should include sanctions for not serving the trustee and whether it is proper for the rules to impose such sanctions. **Professor Tabb's motion to table the matter until the next Committee meeting carried without dissent. Professor Tabb's motion to approve the remaining changes in Rule 3002 was passed unanimously.**

Small Business Cases. Section 217 of the Reform Act amended the Bankruptcy Code by adding a new definition of "small business" and making special provisions for chapter 11 cases in which the debtor is a small business. The Reporter presented drafts of a new Rule 1020, Election to be Considered a Small Business in a Chapter 11 Reorganization Case, and amendments to Rule 3017.

Judge Kressel suggested that all parties should receive notice if the court orders that no creditors' committee be appointed under section 1102(a)(3) in a small business case. Mr.

Batson stated that the statute did not require notice and that new Rule 1020 should not do so, either. **His motion not to require the notice carried without dissent.**

The Committee discussed the form and timing of the debtor's election to be considered as a small business and the potential for abuse if the debtor made the election shortly before the 160-day deadline for any party to file a plan. The Reporter said he used a 100-day deadline for the election in his draft because that coincides with the end of a small business debtor's exclusivity period.

The Reporter stated that his draft would permit, but not require, the debtor to make the election on the petition. Mr. Kohn stated that making the election on the petition would allow the parties to proceed in a more informed manner and would avoid any mischief in the timing of the election. The Reporter said the debtor and its counsel might be unaware of the possibility of making the election at the time of filing but that the judge could raise it at a status conference. Mr. Klee asked why the Reporter had not drafted a rule for chapter 11 status conferences. The Reporter stated that the statute was detailed and that no rule appeared to be needed.

Judge Restani moved to approve the Reporter's draft Rule 1020 after substituting "60 days" for "100 days" in line 4, substituting "a later" for "another" in line 5, and adding "for good cause shown" to the end of line 6. **The motion carried with one dissenting vote.** Mr. Klee proposed adding the following: "For cause shown, the court may allow the debtor to withdraw the election." **His motion failed by a vote of 4-8.**

Judge Kressel said the amendment to Rule 3017 should preserve the court's right to disapprove a conditionally-approved disclosure statement, even if no party objects. The Reporter

agreed. **A motion to delete the last sentence of the draft carried with one dissenting vote.** Judge Duplantier suggested a separate Rule 3017.1 for small business cases. **The Committee agreed in a straw vote.**

Mr. Klee suggested deleting the word "unimpaired" on line 45 of the Reporter's draft or adding a reference to a convenience class of claims under section 1122(b) of the Bankruptcy Code. The Reporter said deleting the requirement for sending copies of the plan and disclosure statement to unimpaired classes was very controversial and indicated that not sending the documents to some impaired creditors would be more controversial. The Committee discussed whether a plan proponent can go directly to cramdown for a class when the debtor is insolvent. **Professor Tabb's motion to table the matter until the March meeting passed with one dissenting vote.**

Mr. Smith asked whether the Reporter referred to the debtor's "application" for conditional approval of the disclosure statement in line 109 in order to avoid the requirement of notice. The Reporter stated that he used "application" in an effort to be consistent with Rule 9013 and the streamlined process used for matters such as "first day" orders. Judge Duplantier asked why he did not refer to "ex parte motions" as in civil practice before the district court.

In response to a question about the use of "application" in the bankruptcy rules, Mr. Patchan said the drafters of the 1983 rules tried to restrict use of the word to administrative matters in an effort to be as consistent as possible with civil practice. He said the drafters avoided use of the phrase "ex parte" whenever possible because of its bad connotation in past bankruptcy practice and the policy against ex parte meetings.

The Reporter said he could substitute "ex parte motion" for

the word "application" in the draft but that the change could lead to confusion until the Committee considers the use of "application" throughout the bankruptcy rules. **A motion to make the substitution in the draft and require notice pursuant to Rule 9013 failed for lack of a second.** Mr. Batson said requiring notice would defeat the goal of "fast tracking" small business cases. Judge Robreno said the rule should acknowledge that Congress permitted an ex parte process.

Judge Kressel moved to delete the phrase ", on application of the plan proponent," from line 109. **The Chairman ruled the motion out of order.** In response to a question about a deadline for a secured creditor's section 1111(b) election in a small business case, the Reporter agreed to add a reference to Rule 3014 to the Committee Note. He said the creditor could not make the election by the time of the conditional approval of the disclosure statement because the creditor would not get a copy of the plan until later. **The Committee agreed that the Reporter would include the substance of his draft Rule 3017(f) in a separate small business rule.**

Appeals. The Reporter recommended that the Committee consider amending subsections (a), (b), and (e) of Rule 8001 to conform to the Reform Act's provisions for appeals as a matter of right from exclusivity orders and for the creation of Bankruptcy Appellate Panel (BAP) Services. The Reform Act reversed the statutory presumption that bankruptcy appeals will go to the district court and provided that, if a BAP is available in the district, bankruptcy appeals will go to it unless one of the parties elects to go to the district court.

The Reporter said it seems logical for the appellant to make the election in the Notice of Appeal. Judge Meyers stated, however, that the Notice of Appeals printed by some publishers contain references to the district court which could be viewed as

an election -- albeit inadvertent -- to take the appeal to the district court. He said requiring that the election be made in a separate writing would avoid the potential problem. Judge Restani moved to approve the Reporter's draft revision to Rule 8001 after deleting the bracketed language on lines 38-40. **The motion carried on a vote of 12-0.**

After discussing whether Rule 8007 should be amended to provide in more detail for the transmittal of the record on appeal, the Committee agreed that the circuits could handle the matter or leave it to the bankruptcy clerks to resolve.

Jury Trials. The Reporter stated that former Rule 9015 was abrogated in 1987 to avoid any inference that the rule conferred a right to a jury trial in a bankruptcy case. Since then, the Supreme Court held in Granfinanciera, S.A. v. Norberg that a person who has not filed a proof of claim in the bankruptcy case is entitled to a jury trial under the Seventh Amendment in certain proceedings, such as fraudulent conveyances or preference actions. Further, the Reform Act provides that a bankruptcy judge may conduct a jury trial if specially designated by the district court to do so and if the parties expressly consent.

The Reporter presented a draft of a new Rule 9015 and an alternative which included issues arising in involuntary petitions and specified that the bankruptcy judge may determine whether there is a right to a jury trial when one is demanded. The Committee discussed whether the district court should give the bankruptcy judges a blanket designation to conduct jury trials or do so on a case-by-case basis and whether the bankruptcy judge may determine whether there is a right to a jury trial.

Judge Duplantier said there was no need for a separate, detailed bankruptcy rule on jury trials. He said the bankruptcy

rule could state that when a right to a jury trial exists, the following civil rules apply: Civil Rule 38, part of Rule 39, and Rules 47-51. Consent to the bankruptcy judge's conducting the jury trial could be patterned on the procedure in Civil Rule 73(b) for the parties' filing a joint consent to a jury trial before a magistrate judge. Mr. Sommer said incorporating the civil rules to the maximum extent possible would permit use of the extensive body of case law developed under those rules.

Judge Meyers said a bankruptcy rule is needed on the form and timing of the demand for a jury trial. The Chairman stated that a bankruptcy rule is needed because the Civil Rule 81(a) provides that the Civil Rules do not apply to proceedings in bankruptcy unless specifically incorporated. **The Reporter agreed to present another draft of a rule on jury trials.**

Applicability of Rules in Alabama and North Carolina. Rule 9035 provides that the bankruptcy rules apply to cases in Alabama and North Carolina only to the extent that the rules are not inconsistent with the provisions of title 11 and title 28 effective in the case. The Reporter stated that the Reform Act contained provisions relating to bankruptcy administrators in those two states which will not be codified in either title 11 or title 28. For that reason he recommended amending Rule 9035 to apply the rules to the extent that they are not inconsistent with any federal statute effective in the case.

Mr. Klee questioned whether the amendment would constitute a substantive position on the constitutionality of the bankruptcy administrator program. The Reporter said the amendment made a change required by statute. **The proposed amendment was approved by an unanimous vote.**

LONG RANGE PLANNING COMMITTEE

Mr. Klee presented the report from the Long Range Planning Subcommittee. He distributed draft copies of two surveys developed with the help of Elizabeth Wiggins of the Federal Judicial Center to ascertain the views of the bankruptcy community on the scope, format, and organization of the Bankruptcy Rules. One version is to be mailed to a sample of bankruptcy attorneys and the other is to be sent to bankruptcy judges, bankruptcy clerks, U.S. trustees and their assistants, chapter 7 trustees, and chapter 13 trustees.

At Judge Ellis' request, Mr. Klee agreed to send the survey to chief district judges. At Mr. Kohn's suggestion, he agreed to include references to the bankruptcy rules and forms. At Judge Meyers' suggestion, Ms. Wiggins agreed to include questions on the scope, format, and organization of local bankruptcy rules. The two authors also agreed to send the survey to bankruptcy law professors and to delete the phrase "In your opinion" from the questions. **The Committee voted to continue the project.**

CHANGES TO OFFICIAL FORMS

Mr. Sommer presented the amendments to the Official Bankruptcy Forms approved by the Forms Subcommittee on December 7, 1994, and set out in the subcommittee's memorandum of December 8, 1994.

Official Form 1. Voluntary Petition. The Committee discussed the difference between being a small business and electing to be considered one, and whether there should be a check box for the election on the petition. **A motion was approved unanimously to have two "check box" lines on the petition worded as follows:**

[ ] Debtor is a small business as defined in 11 U.S.C. § 101.

[ ] Debtor is and elects to be considered a small business. (11 U.S.C. § 1121) (Optional)

At Mr. Klee's request, the Committee agreed to substitute the phrase "I have been authorized to file this petition on behalf of the debtor" for the phrase "the filing of this petition on behalf of the debtor has been authorized" in the first sentence of the corporate or partnership debtor declaration on page two. In order to make space for the Certification and Signature by Non-Attorney Bankruptcy Petition Preparer, the Committee agreed to move the reference to Exhibit "A" to the corporate or partnership debtor declaration by adding the following sentence: "If debtor is a corporation filing under chapter 11, Exhibit "A" is attached and made part of this petition."

In order to clarify a chapter 9 debtor's eligibility for relief, the Committee agreed, at Mr. Klee's request, to revise the Request for Relief on page two by inserting the phrase "is eligible for and" after the word "Debtor". The Committee also agreed to the following changes on page one of the Petition:

-- Move the Small Business section to the right-hand column on page one.

-- Insert the phrase "check one" after the phrases "TYPE OF DEBTOR" and "NATURE OF DEBT" in the left-hand column on page one.

Official Form 19. Certification and Signature of Non-Attorney Bankruptcy Petition Preparer. The Committee discussed at some length the Certification and Signature and its completion by preparers. The Committee agreed to move the signature line and date to the bottom of the form. The Committee agreed to add the following warning below the signature: "A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result

in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156".

Although the statute requires the disclosure of only the Social Security numbers of other individuals who prepared or assisted in preparing the document, the Committee agreed to require the disclosure of their names as well. The Committee agreed to add the phrase "of Bankruptcy Petition Preparer" under the line for the preparer's printed or typed name and to move the line above the preparer's Social Security number.

By acclamation, the Committee approved the Certification and Signature, as revised, as a new Official Form 19 and as a block on the second page of the Petition. The Committee also approved the Petition as revised.

Official Form 3. Application and Order to Pay Filing Fee in Installment. The Committee approved the addition of the Certification and Signature of Non-Attorney Bankruptcy Petition Preparer to the Application and Order.

Official Form 6. Schedules. The Subcommittee proposed a number of amendments to Schedule E - Creditors Holding Unsecured Priority Claims. In order to reduce the need for future changes in the form, the Subcommittee recommended deleting the dollar amount of priorities because the amounts are subject to adjustment every three years under section 104 of the Bankruptcy Code, as amended by the Reform Act. The Subcommittee suggested deleting the references to subsections of section 507(a) of the Bankruptcy Code because the subsections are renumbered frequently by Congress.

In order to make it easier for debtors to complete the form accurately, the Committee decided to retain the dollar amounts, as amended by the Reform Act, in Schedule E but to include a

footnote as follows: "Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced on or after the date of adjustment." The Committee deleted the reference to omitting dollar amounts from the Committee Note. The Committee also decided to retain the references to subsections of section 507(a). Including the references will make it easier to complete the form and the subsections usually are renumbered only when Congress adds a new priority, which requires revising the form anyway. The Committee agreed to add a reference to commissions owing to qualifying independent sales representatives to Schedule E and a Certification and Signature of Non-Attorney Bankruptcy Petition Preparer at the end of Form 6. The Committee approved the Schedules, as amended.

Official Form 7. Statement of Financial Affairs. Mr. Sommer said the Subcommittee considered adding a question concerning single asset real estate but decided not to do so because secured creditors have other ways to determine the information. The only change recommended by the Subcommittee was the addition of a Certification and Signature of Non-Attorney Bankruptcy Petition Preparer. Mr. Klee suggested that the cover sheet state that municipalities need not complete the form. Ms. Channon said Rule 1007(b) clearly provides that chapter 9 debtors are not required to prepare and file the statement. The Committee approved the revised Statement of Financial Affairs as proposed by the Subcommittee.

Official Form 8. Individual Debtor's Statement of Intention. The only change recommended by the Subcommittee was the addition of a Certification and Signature of Non-Attorney Bankruptcy Petition Preparer. The Committee approved the revision.

Official Form 9. Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates. The

Committee approved the Subcommittee's recommendation to add references to dischargeability actions under section 523(a)(15) to Forms 9(A), 9(C), 9(E), 9(E)(Alt.), 9(G), and 9(H). The Subcommittee recommended including separate deadlines for filing claims for governmental units and all other creditors on Forms 9(C), 9(D), 9(E)(Alt.), 9(F)(Alt.), 9(G), 9(H), and 9(I). The Committee agreed that the claims deadline box would read as follows:

DEADLINE TO FILE A PROOF OF CLAIM

For all creditors (other than governmental units): For governmental units:

The Committee approved Official Form 9, as revised.

Official Form 10. Proof of Claim. The Committee agreed to add the following footnote to the dollar amounts in the priority section: "Amounts are subject to adjustment on 4/1/98 and every three years thereafter with respect to cases commenced on or after the date of adjustment." The Committee agreed to the conforming changes recommended by the Subcommittee.

Official Form 16. Captions. The Subcommittee recommended:

-- Revising Form 16A to include the debtor's address in furtherance of the debtor's duty under section 342(c) of the Code to include this information in every notice given by the debtor;

-- Noting on Form 16B that it may be used if section 342(c) is not applicable;

-- Revising Form 16C for use as the caption of a complaint in an adversary proceeding filed by the debtor; and

-- Redesignating former Form 16C as Form 16D for use as a caption in an adversary proceeding other than for a complaint filed by the debtor. The Committee approved the four forms as recommended.

Form 17. Notice of Appeal. Mr. Sommer said the draft

Notice of Appeal approved by the Forms Subcommittee is consistent with the Committee's vote to require a separate Statement of Election. The Committee discussed whether the warning concerning the appellant's election to proceed in the district court should be included in the Notice of Appeal; if so, in what form; and whether a similar warning should be included for the appellee. The Committee agreed to move the warning below the appellant's signature and revise it to read as follows: "If a Bankruptcy Appellate Panel is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement at the time of the filing of this notice of appeal." The Committee approved the Notice of Appeal as revised.

Form 18. Discharge of Debtor. The Committee approved the addition of a reference to dischargeability actions under section 523(a)(15).

CHANGES TO DIRECTOR'S FORMS

The Committee approved conforming changes to the following forms issued by the Director of the Administrative Office under Rule 9009:

18J	Discharge of Joint Debtors
18JO	Discharge of Joint Debtor
242A	Order Discharging Debtor After Completion of Chapter 13 Plan
200	Required Lists, Schedules, Statements and Fees
201	Notice to Individual Consumer Debtor

The Committee approved the following new Director's Forms:

280	Disclosure of Compensation of Bankruptcy Petition Preparer

13S	Order and Notice with Respect to Conditionally Approving Disclosure Statement and Plan in a Small Business Case
15S	Order Finally Approving Disclosure Statement and Confirming Plan
281	Appearance of Child Support Creditor or Representative

After discussing the new Form 281, the Committee directed the Chairman to write the chairman of the Committee on the Administration of the Bankruptcy System to request that the Bankruptcy Committee consider whether section 304(g) of the Reform Act exempted child support creditors from payment of fees for filing motions for relief from the automatic stay and adversary proceedings.

INTERIM RULES

The Committee considered the interim rules drafted by the Reporter as both suggested interim local rules and, with appropriate stylistic changes, as proposed amendments to the national Bankruptcy Rules. (These drafts were not contained in the agenda materials.) The final draft of the proposed amendments covered by the interim rules will not be submitted until after the March 1995 meeting.

Interim Rule 1. Election of Trustee in Chapter 11 Reorganization Case. The Committee approved the interim rule as presented by the Reporter.

Interim Rule 2. Small Business Chapter 11 Reorganization Case. The Committee approved the interim rule as presented and deleted the second paragraph of the draft Committee Note.

Interim Rule 3. Appeals to the District Court [or Bankruptcy Appellate Panel]. The Committee concluded that, to the extent a rule is needed, the districts and circuits can

develop their own. The Chairman will write the Ninth Circuit to suggest that it adopt an interim rule.

Interim Rule 3. Jury Trials. The Reporter presented a draft containing the alternative language he prepared that morning in response to the Committee's request on the previous day. Judge Kressel questioned the need for an interim rule on jury trials. The Chairman said he has received requests for such a rule from a number of bankruptcy judges.

The Reporter stated that, as requested by the Committee, he attempted to incorporate by reference the Civil Rules as much as possible. He also informed the Committee that Judge Stotler was unable to attend the meeting on that day, but had given him comments concerning his prior draft. The Reporter stated Judge Stotler's concerns that his prior draft, which combined the form and timing of the parties' consent into one provision, (and which required filing a written statement of consent before a deadline fixed by the court as the "only" method of giving consent), possibly should be changed so that: (1) parties would not be barred from making an oral stipulation on the record consenting to have the bankruptcy judge conduct the jury trial, (the statute does not require written consent), provided consent is given before the time deadline, and (2) the court would have flexibility to set the consent deadline by local rule (rather than by court order in the particular case). This flexibility is needed to enable the court to deal with logistics problems related to jury trials.

In response to Judge Stotler's comments, the Committee agreed to delete the word "only" from the consent subsection of the Reporter's draft. The Committee also agreed to leave the time period to local rule. The Reporter stated that leaving the period to local rule would enable the local courts, if they so desire, to provide by local rule that a judge may fix a different

date in a particular case.

After a discussion focusing on the Reporter's draft, the Committee agreed to delete the separate paragraph on removed actions, to delete a separate sentence on removed actions, and to make several other stylistic changes. The Committee approved the following text by unanimous vote:

Interim Rule 3. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38(b) F.R.Civ.P. shall be filed in accordance with Bankruptcy Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed under Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157(e) by jointly or separately filing a statement of consent no later than [insert period specified by local rule].

NOTE

This rule provides procedures relating to jury trials. The rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Judge Ellis asked whether the Advisory Committee would issue the suggested interim rules immediately. The Reporter stated that the original plan was to do so but that, since the standing committee is meeting in four weeks, Judge Mannes and Judge Stotler had agreed that the interim rules would be referred to the Standing Committee with a request for that committee's concurrence. He said the interim rules would be accompanied by a cover letter from Judge Mannes which states that the interim

rules are provided for consideration for use as local rules pending the adoption of national bankruptcy rules.

Respectfully submitted,

James H. Wannamaker, III

ORAL PRESENTATION

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS PUBLISHED IN 1994

DATE: FEBRUARY 28, 1995

Item #3

In September 1994, a package of proposed amendments to the Bankruptcy Rules was published for comment by the bench and bar. The package includes proposed amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008 and 9006. The public comment period ends February 28, 1995. As of this date, six comments have been received. A public hearing scheduled for February 24th was canceled for lack of witnesses. It appears that none of the proposed amendments are controversial.

The following comments (copies of which are attached in Appendix B) have been received:

(1) Robert L. Jones III, President, Arkansas Bar Association, in his letter on behalf of the Arkansas Bar Association dated October 7, 1994, commented that "[w]e agree with the proposed amendments to the Federal Rules of Bankruptcy Procedure."

(2) Lee Ann Huntington, Chair, Committee on Federal Courts, State Bar of California, in her letter dated February 10, 1995, stated that the California State Bar Committee on Federal Courts "enthusiastically support the proposed amendments."

(3) Susan J. Lewis, Legal Editor at Matthew Bender & Company, Inc., in her letter of January 23, 1995, pointed out a

typographical error in the committee note to Rule 2002(h) ("3003(c)(2)" should read "3002(c)(2)"). This typographical error will be corrected.

(4) Glenn Gregorcy, Chief Deputy Clerk, United States Bankruptcy Court for the District of Utah, in his letter of December 5, 1994, commented that the proposed amendment to Rule 2002(f)(8) (deleting the words "and account" from the requirement that the trustee send creditors "a summary of the trustee's final report ~~and account~~ in a chapter 7 case if the net proceeds realized exceed $1,500") "does nothing whatsoever" because "in a vast majority of the districts" only one notice (not two) are being sent under the present rule. That is, in most districts, the final report and the final account are the same document. The purpose for the proposed amendment is to avoid the necessity of sending both a final report and a final account.

If Mr. Gregorcy is correct, the amendment will not have any effects, whether positive or negative, in most districts. In the minority of districts in which the final report and final account are two separate documents, the amendment makes it clear that only one must be sent to creditors. It is interesting to note that the statute seems to treat these as two separate documents. Section 704(9) of the Code provides that the trustee must "make a final report and file a final account of the administration of the estate with the court and with the United States trustee."

Mr. Gregorcy also repeats his recommendation -- previously considered by the Committee -- that Rule 2002(f)(8) be amended to

provide that the summary of the trustee's final report be sent only to creditors who have previously filed claims in the case. The Advisory Committee did not support that recommendation.

(5) James T. Watkins, Esq., of Becket & Watkins, Malvern, Pa., which represents "ten of the top twenty-five national issuers of credit cards in their bankruptcy cases nationwide," in his letter dated February 28, 1995, urges the Committee to abandon the proposed amendments to Rule 2002(f)(8). His firm regularly reviews the trustee's final reports and accounts to verify that distributions stated have been received. "In this process, we occasionally identify cases where Proofs of Claim were timely filed but not reflected in the trustee's account, or, far less often, the amounts of the claims, and thus the distributions, are incorrect." If the proposed amendment is not abandoned, he suggests that the summary of the trustee's final report should include the creditor's allowed claim amount and address.

Whereas Mr. Gregorcy's letter assumes that the trustee's final report and final account are one document in most districts, Mr. Watkins comments appear to indicate that these are two separate documents -- both of which may be helpful to creditors. Perhaps this accounts for Mr. Watkins' statement that "[w]e do not appear to be receiving summaries of trustees' final reports and accounts uniformly from all jurisdictions." In any event, I think that the comments of Mr. Gregorcy and Mr. Watkins are worthy of discussion at the March meeting.

(6) Richard M. Kremen, on behalf of the Maryland Bar Association Committee on Creditors' Rights, Bankruptcy and Insolvency, in his letter dated February 23, 1995, offered a re-draft of the proposed amendments to Rule 2002(h). I urge the Committee to focus on the draft in his letter and compare it to the draft included in Appendix A to this memorandum). The suggested draft does not make any substantive changes -- it is offered only as a better style (and it probably is).

Mr. Kremen's letter also suggests a change to the published draft of proposed amendments to Rule 3002. The suggestion is designed to implement the Reform Act of 1994 which amended § 502(b)(9). Although such a suggestion is warranted, I do not think that the way to accomplish the change is by adding the language suggested by Mr. Kremen's letter. I drafted an alternative approach to the Rule 3002 problem that will be discussed at the meeting (see draft of Rule 3002 set forth in Appendix A to this memorandum).

Stylistic Suggestions

In May 1994, Bryan A. Garner (Consultant to the Style Subcommittee of the Standing Committee) submitted a number of suggestions for stylistic changes. Since Mr. Garner's suggestions were received too late for action by the Advisory Committee before publication, the Standing Committee asked the Advisory Committee to treat Mr. Garner's comments in the same way that the Committee treats other comments received from the

public. The Advisory Committee should consider -- but is not compelled to adopt -- Mr. Garner's suggestions. A copy of Mr. Garner's mark-up of a pre-publication copy of most of the proposed amendments is attached as Appendix C.

Most of Mr. Garner's suggestions are consistent with his "Guidelines for Drafting Court Rules" (copy attached as Appendix D). These guidelines are being used in connection with the re-styling of the Civil Rules and Appellate Rules projects. It is worth noting the introduction of these Guidelines (page 1):

> "The following guidelines are phrased as a black-letter restatement of the principles of modern rule-drafting. Few, if any of these principles are absolute -- hence the word "guidelines." In most instances, though, they make rules clearer and more readable."

I reviewed Mr. Garner's suggested changes and I agree that most of them should be implemented. For example, Mr. Garner suggests that the phrase "under Rule 7004" or "under § 341" should be used instead of "pursuant to Rule 7004" or "pursuant to § 341." Although I have a slight personal preference for "pursuant to" and I am confident that nobody could be misled with either phrase, the Bankruptcy Rules should use "under" for the sake of uniformity with the other bodies of federal rules. The Standing Committee does not suggest that "pursuant to" phrases be replaced with "under" in <u>all</u> rules at this time (that will be done if and when a complete re-writing of the Bankruptcy Rules occur) -- but this and other stylistic improvements should be made in those rules (or subdivisions of rules) that are being amended for other reasons.

Despite my agreement with most of Mr. Garner's suggestions, I believe that the following suggestions should not be implemented (and, therefore, the following suggestions are not included in the draft set forth in Appendix A):

(1) Mr. Garner suggests that the words "debt adjustment" be hyphenated in Rule 2002(a). This is inconsistent with the style in the remainder of the Rules.

(2) Mr. Garner suggests restructuring Rule 2002(h) by breaking it into more sentences. See his markings in Appendix C, page 5. Although I did not do that, in the attached draft (Appendix A) I added double dashes (rather than commas) to the existing sentence to make it easier to read. Mr. Garner suggests the use of double dashes instead of commas to separate interruptive phrases in the middle of a sentence (see page 9 of his Guidelines). The changes I am suggesting would make the sentence read as follows:

> "In a chapter 7 case -- after 90 days following the first date set for the meeting of creditors under § 341 of the Code or, if a notice of insufficient assets to pay a dividend has been given to creditors under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims under Rule 3002(c)(5) -- the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors who hold claims for which proofs of claim have been filed, and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(1) or (c)(2)."

An alternative draft is offered by the Maryland Bar Association (see Richard M. Kremen's letter of February 23, 1995, in Appendix B), which breaks the paragraph into two

sentences. I suggest that the Committee focus on Mr. Kremen's letter and decide which draft is preferable. I am on the fence on this one.

(3) Mr. Garner suggests changing "equity security holder" to "equity-security holder" in Rule 3002(c). This would be inconsistent with the Code and the Rules which use "equity security holder."

(4) In Rule 3002(c), Mr. Garner suggested changing "In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim ..." to "In a chapter 7 liquidation, family farmer's debt-adjustment case under chapter 12, or individual's debt-adjustment case under chapter 13, a proof of claim ...." First, "debt adjustment" is not hyphenated anywhere else in the Rules. Second, I do not think that the suggestion improves the ease of reading. If any change to this opening phrase of Rule 3002(c) is made, perhaps the Committee may want to change it to "In a chapter 7, chapter 12, or chapter 13 case, ..." or "In a case under chapter 7, chapter 12, or chapter 13, a proof of claim ..."

(5) In Rule 7004(b)(5), Mr. Garner suggests that the words "civil process clerk" be hyphenated ("civil-process clerk"). This rule is being amended to conform to Civil Rule 4, which contains these words without a hyphen.

(6) In Rule 7004, Mr. Garner suggests changing the form of reference to Rule 4 of the Civil Rules. Instead of "Rule

4(e)-(j) F.R.Civ.P.", he suggests "F.R.Civ.P. 4(e)-(j)." I do not disagree that the suggested style may be an improvement. However, the Bankruptcy Rules should be consistent and the form now used in numerous other Bankruptcy Rules (for example, see most of the Part VII Rules) is the same form now used in Rule 7004. Until the Bankruptcy Rules undergo a complete re-writing, I suggest this form of reference not be changed in Rule 7004.

(7) In the new Rule 5005(a)(2), Mr. Garner suggests the following changes to the published version: "A court by local rule may permit documents to be filed, signed, or verified by electronic means, ~~provided such~~ if those means are consistent with any technical standards~~, if any, established by~~ the Judicial Conference of the United States may establish." The language of this rule was carefully considered by the Subcommittee on Technology and was deliberately worded to make it clear that courts do not have to wait for Judicial Conference standards before implementing electronic filing systems. I am concerned that Mr. Garner's change removes that clarity and could be construed to mean that electronic filing is permitted only if the Judicial Conference decides, in its discretion, to adopt technical standards. I would leave the published version of this rule as is.

(8) Mr. Garner suggests the following change in the existing text of Rule 5005(a): "The clerk shall not refuse

to accept for filing any petition or other paper presented for ~~the purpose of~~ filing solely because it is not presented in proper form as required by these rules or any local rules or practices." I think that the current version is clear and is similar to the language in Civil Rule 5 ("The clerk shall not refuse to accept for filing any paper presented for that purpose solely because...."). Several years ago, the Advisory Committee departed from the exact language of Civil Rule 5 because of reference to "petition" in Rule 5005 -- to avoid a construction that "for that purpose" may mean for the purpose of filing a petition. I would keep this language as is.

(9) With respect to the first sentence of Rule 5005(a)(1), Mr. Garner refers to page 22 of the guidelines which suggests that enumeration should occur at the end, rather than at the beginning, of a sentence. I did not implement this change in the attached draft because (1) I believe the sentence is clear and easy to read as is, (2) these enumerations are merely illustrations, with the last one being a catch-all ("other papers required to be filed"), (3) if these are enumerated at the end, each one should be separately indented with bullets (see Guidelines, page 25). In viewing how it would look, I thought that the re-styled version made it appear that these enumerations were more significant than they are (again, they are merely illustrations and probably could be deleted altogether). In

sum, I think that changing this sentence to conform to the Guideline on page 22 would not accomplish the goal of making it clearer or easier to read. Nonetheless, since the Committee may wish to implement Mr. Garner's suggestion, I drafted the following so that you can see what Rule 5005(a)(1) might look like with this stylistic change (I put the phrase "required to be filed by these rules" in brackets in two places because I was unsure as to where it would belong).

* * * *

(1) Place of Filing. Except as provided in 28 U.S.C. § 1409, the following papers [required to be filed by these rules] shall be filed with the clerk in the district where the case under the Code is pending:

* lists;
* schedules;
* statements;
* proofs of claim or interest;
* complaints;
* motions;
* applications;
* objections;
* other papers [required to be filed by these rules].

The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for ~~the purpose of~~ filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

* * * *

Amendments to Rule 3002 and the Committee Note to Rule 1019

At its December 1994 meeting, the Advisory Committee approved amendments to Rule 3002 for the purpose of conforming

the rule to recent amendments to § 502(b)(9) and § 726 of the Code made by the Bankruptcy Reform Act of 1994. The amendments approved in December were intended to replace those amendments to Rule 3002 that were published in 1994.

A question for the Committee to consider is whether the amendments approved in December 1994 should be included in the package of rule amendments to be presented to the Standing Committee for final approval in July 1995, or whether they should be included in the package of proposed amendments to be published for comment in 1995. Are the December 1994 amendments so different than the published version that re-publication is required? Since the December 1994 version is (1) necessary to conform to the statute, and (2) not substantially different than the published version, it is my view that the newer version should be presented for final approval in July. However, this is a close question and should be discussed at the March meeting.

An additional consequence of the proposed amendments approved at the December 1994 meeting is that the committee note to Rule 1019 must be changed. I made these changes in the draft set forth in Appendix A.

Rule 7004 - Service by Certified Mail

You may recall that the Bankruptcy Reform Act of 1994 amended Rule 7004(b) and (h) to require service by certified mail on federal depository institutions. I added a brief reference to the statutory change in the committee note.

Unfortunately, the Reform Act requires that the new

provision on certified mail be subdivision (h). Since subdivision (g) is being abrogated, Rule 7004 will have a subdivision (h), but no (g). In order to prevent confusion (maybe even panic) when a practitioner looks for the elusive Rule 7004(g), I suggest that "(g) [abrogated]" be inserted where subdivision (g) used to be.

Reporter's Suggestions for Further Changes to the Published Amendments

Appendix A contains a copy of the proposed amendments as published in 1994, together with my suggestions for further changes. I put in ***bold italics*** the new post-publication suggested changes. Other amendments (shown by stricken language and underlined language) that are not in bold italics indicate the proposed amendments as published last year.

The majority of post-publication suggestions are stylistic and follow Mr. Garner's recommendations. Where appropriate, I inserted in the committee notes an indication that stylistic changes were being made. The only substantive post-publication changes are in Rule 3002 and the committee note to Rule 1019. Rule 7004(b) and (h) reflect the changes made by statute and, as indicated above, I inserted "(g) [abrogated]" in the appropriate place in that rule.

Attachments:

Appendix A - Reporter's Suggested Post-Publication Changes
Appendix B - Letters Received from the Bench and Bar
Appendix C - Bryan Garner's Suggested Style Changes
Appendix D - Guidelines for Drafting Court Rules

APPENDIX A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE PUBLISHED IN 1994 (TOGETHER WITH POST-PUBLICATION SUGGESTIONS FOR FURTHER CHANGES)

NOTE: ***Bold italicized*** language indicates new post-publication suggested changes. Other changes (stricken language and underlined language) that are not in bold italics indicate the proposed amendments as published last year.

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the ~~prescribed~~ filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States ~~***pursuant to***~~ ***under*** 28 U.S.C. § 1930(b) ~~***that is to***~~ ***be*** payable to the clerk upon the commencement of a case under the Code.

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) Application for Permission to Pay Filing Fee in Installments. A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) Action on Application. Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in

installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3) Postponement of Attorney's Fees. The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the debtor in connection with the case.

COMMITTEE NOTE

The Judicial Conference prescribes miscellaneous fees pursuant to 28 U.S.C. § 1930(b). In 1992, a $30 miscellaneous administrative fee was prescribed for

all chapter 7 and chapter 13 cases. The Judicial Conference fee schedule was amended in 1993 to provide that an individual debtor may pay this fee in installments.

Subdivision (a) of this rule is amended to clarify that every petition must be accompanied by any fee prescribed under 28 U.S.C. 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a). By defining "filing fee" to include Judicial Conference fees, the procedures set forth in subdivision (b) for paying the filing fee in installments will also apply with respect to any Judicial Conference fee required to be paid at the commencement of the case.

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(c) TIME LIMITS. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter,

except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements ~~previously~~ filed prior to the conversion of a case to another chapter ~~in a pending chapter 7 case~~ shall be deemed filed in ~~a superseding~~ the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code, trustee, examiner,

or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

COMMITTEE NOTE

Subdivision (c) is amended to provide that schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case, whether or not the case was a chapter 7 case prior to conversion. This amendment is in recognition of the 1991 amendments to the Official Forms that abrogated the Chapter 13 Statement and made the same forms for schedules and statements applicable in all cases.

This subdivision also contains a technical correction. The phrase "superseded case" creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. The effect of conversion of a case is governed by § 348 of the Code.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * * *

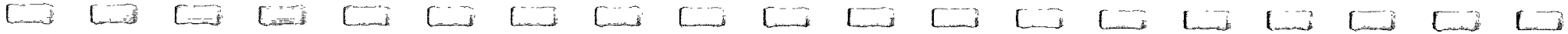
~~(7) EXTENSION OF TIME TO FILE CLAIMS AGAINST SURPLUS. Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (6) of this rule, and notice shall be given as provided in Rule 2002.~~

COMMITTEE NOTE

Subdivision (7) is abrogated to conform to the abrogation of Rule 3002(c)(6) ~~and the addition of Rule 3002(d). If a proof of claim is tardily filed after a case is converted to a chapter 7 case, the claim may be allowed to the extent that the creditor, as the holder of an unsecured claim proof of which is tardily filed, is entitled to receive a distribution under section 726 of the Code~~.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person ~~*as the court may direct*~~ ***whom the court directs***, shall give the debtor, the trustee, all creditors and indenture trustees ~~*not less than 20 days*~~ *at least 20 days'* notice by mail of:



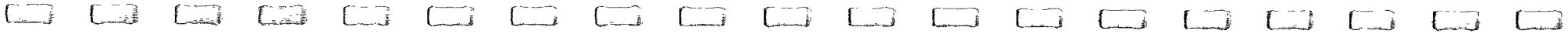
(1) the meeting of creditors ~~pursuant to~~ under § 341 of the Code;

(2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice;

(3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement ~~pursuant to~~ under to Rule 4001(d), unless the court for cause shown directs that notice not be sent;

~~(4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6),~~

~~(5)~~ (4) in a chapter 7 liquidation, a



chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case, unless the hearing is ~~***pursuant to***~~ ***under*** § 707(b) of the Code, or the conversion of the case to another chapter;

~~(6)~~ (5) the time fixed to accept or reject a proposed modification of a plan;

~~(7)~~ (6) hearings on all applications for compensation or reimbursement of expenses ~~***totalling***~~ ***totaling*** in excess of $500;

~~(8)~~ (7) the time fixed for filing proofs of claims ~~***pursuant to***~~ ***under*** Rule 3003(c); and

~~(9)~~ (8) the time fixed for filing objections and the hearing to

consider confirmation of a chapter 12 plan.

* * * * *

(c) CONTENT OF NOTICE.

* * * * *

(2) Notice of Hearing on Compensation. The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision ~~(a)(7)~~ (a)(6) of this rule shall identify the applicant and the amounts requested.

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person ~~as the court may direct~~ ***whom the court directs***, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(8) a summary of the trustee's final report ~~and account~~ in a chapter 7 case if the net proceeds realized exceed $1,500.

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case~~,~~ ~~the court may,~~ -- after 90 days following the first date set for the meeting of creditors ~~***pursuant to***~~ ***under*** § 341 of the Code or, if a notice of insufficient assets to pay a dividend has been given to creditors ~~***pursuant to***~~ ***under*** subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims ~~***pursuant to***~~ ***under*** Rule 3002(c)(5)~~,~~ -- the court may~~,~~ direct that all notices required by subdivision (a) of this

rule~~, except clause (4) thereof,~~ be mailed only to the debtor, the trustee, all indenture trustees, creditors ~~whose claims~~ who hold claims for which proofs of claim have been filed, and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule ~~3002(c)(6)~~ 3002(c)(1) or (c)(2).

(i) NOTICES TO COMMITTEES. Copies of all notices required to be mailed under this rule shall be mailed to the committees elected ~~*pursuant to*~~ ***under*** § 705 or appointed ~~*pursuant to*~~ ***under*** § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and ~~(7)~~ (6) of this rule be transmitted to the United

States trustee and be mailed only to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed ~~pursuant to~~ under § 1114 shall receive copies of all notices required by subdivisions (a)(1), ~~(a)(6)~~ (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee ~~otherwise~~ requests otherwise, the clerk, or some other

person ~~as the court may direct~~ ***whom the court directs***, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), ~~(a)(5)~~ (a)(4), ~~(a)(9)~~ (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules ~~shall require~~ ***requires*** the clerk or any other person to transmit to the United States trustee

any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq.

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is abrogated to conform to the abrogation of Rule 3002(c)(6). The remaining paragraphs of subdivision (a) are renumbered, and references to these paragraphs contained in other subdivisions of this rule are amended accordingly.

Paragraph (f)(8) is amended so that a summary of the trustee's final account, which is prepared after distribution of property, does not have to be mailed to the debtor, all creditors, and indenture trustees in a chapter 7 case. Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property.

Subdivision (h) is amended (1) to provide that an order under this subdivision may not be issued if a notice of no dividend is given under Rule 2002(e) and the time for filing claims has not expired as provided in Rule 3002(c)(5); (2) to clarify that notices required to be mailed by

subdivision (a) to parties other than creditors must be mailed to those entities despite an order issued under subdivision (h); (3) to provide that if the court, ~~***pursuant to***~~ ***under*** Rule 3002(c)(1) or 3003(c)(2), has granted an extension of time to file a proof of claim, the creditor for whom the extension has been granted must continue to receive notices despite an order issued under subdivision (h); and (4) to delete references to subdivision (a)(4) and Rule 3002(c)(6), which have been abrogated.

Other amendments to this rule are stylistic.

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

* * * * *

(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses ~~(1) (4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States

trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(c) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) Business Cases. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses ~~(1) (4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.

* * * * *

COMMITTEE NOTE

Under subdivision (a)(1), the trustee in a chapter 7 case and, if the court directs, the trustee or debtor in possession in a chapter 11 case is required to file and transmit to the United States trustee a complete inventory of the debtor's property within 30 days after qualifying as trustee or debtor in possession, unless such an inventory has already been filed. Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business, are not required to file and transmit to the United States trustee a complete inventory of the property of the debtor unless the court so directs. If the court so directs, the court also fixes the time limit for filing and transmitting the inventory.

NOTE: PROPOSED AMENDMENTS TO RULE 3002 WERE PUBLISHED IN 1994. AT THE DECEMBER 1994 MEETING, HOWEVER, THE PUBLISHED VERSION WAS REPLACED WITH A NEWER VERSION TO CONFORM TO THE BANKRUPTCY REFORM ACT OF 1994. THE FOLLOWING IS THE NEWER VERSION AND ADDITIONAL STYLISTIC CHANGES.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest ~~in accordance with this rule~~ for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.

* * * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim ~~shall be filed within~~ is timely filed if it is filed no later than 90 days after the first date set for the meeting of creditors called ***under*** ~~***pursuant to***~~ § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed

if it is filed before 180 days after the date of the order for relief. On motion of ~~the United States, a state, or subdivision thereof~~ a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the ~~United States, state or subdivision thereof~~ governmental unit.

* * * *

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

COMMITTEE NOTE

The amendments are designed to conform to §§ 502(b)(9) and 726(a) of the Code as amended by the Bankruptcy Reform Act of 1994.

The Reform Act amended § 726(a)(1) and added § 502(b)(9) to the Code to govern the effects of a tardily filed claim. Under § 502(b)(9), a tardily filed claim must be disallowed if an objection to the proof of claim is filed, except to the extent that holder of a tardily filed claim is entitled to distribution under § 726(a)(1), (2), or (3).

The phrase "in accordance with this rule" is deleted from Rule 3002(a) to clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code, rather than by this rule.

References to "the United States, a state, or subdivision thereof" in paragraph (1) of subdivision (c) are changed to "governmental units" to avoid different treatment among foreign and domestic governments.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

~~(a) TIME FOR FILING PLAN. A party~~

~~in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.~~

~~(b)~~ (a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

~~(c)~~ (b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement ~~***pursuant to***~~ ***under*** § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by

the court.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed.

The amendments to subdivision (c) are stylistic.

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on

expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case ~~pursuant to~~ *under* Rule 1017(e), the court shall forthwith grant the discharge unless:

~~(1)~~ *(a)* the debtor is not an individual,

~~(2)~~ *(b)* a complaint objecting to the discharge has been filed,

~~(3)~~ *(c)* the debtor has filed a waiver under § 727(a)(10), ~~or~~

~~(4)~~ *(d)* a motion to dismiss the case under Rule 1017(e) is pending,

(e) a motion to extend the



time for filing a complaint objecting to discharge is pending, or

(f) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any fee prescribed by the Judicial Conference of the United States ~~***pursuant to***~~ ***under*** 28 U.S.C. § 1930(b) ~~***that is***~~ ***to be*** payable to the clerk upon the commencement of a case under the Code.

(2) Notwithstanding ~~***the foregoing***~~ ***Rule 4004(c)(1)***, on motion of the debtor, the court may defer the entry of

an order granting a discharge for 30 days and, on motion within ~~such~~ ***that*** period, the court may defer entry of the order to a date certain.

* * * * *

COMMITTEE NOTE

Subsection (c) is amended to delay entry of the order of discharge if a motion under Rule 4004(b) to extend the time for filing a complaint objecting to discharge is pending. This subdivision ~~also~~ is amended ***also*** to delay entry of the discharge order if the debtor has not paid in full the filing fee and the administrative fee required to be paid upon the commencement of the case. If the debtor is authorized to pay the fees in installments in accordance with Rule 1006, the discharge order will not be entered until the final installment has been paid.

The other amendments to this Rule are stylistic.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

(1) Place of Filing. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by

these rules or any local rules or practices.

(2) Filing by Electronic Means. A court by local rule may permit documents to be filed, signed, or verified by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. A document filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

COMMITTEE NOTE

The rule is amended to permit, but not require, courts to adopt local

rules that allow filing, signing, or verifying of documents by electronic means. However, such local rules must be consistent with technical standards, if any, promulgated by the Judicial Conference of the United States.

An important benefit to be derived by permitting filing by electronic means is that the extensive volume of paper received and maintained as records in the clerk's office will be reduced substantially. With the receipt of electronic data transmissions by computer, the clerk may maintain records electronically without the need to reproduce them in tangible paper form.

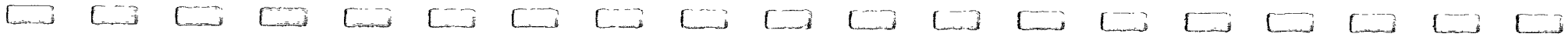
Judicial Conference standards governing the technological aspects of electronic filing will result in uniformity among judicial districts to accommodate an increasingly national bar. By delegating to the Judicial Conference the establishment and future amendment of national standards for electronic filing, the Supreme Court and Congress will be relieved of the burden of reviewing and promulgating detailed rules dealing with complex technological standards. Another reason for leaving to the Judicial Conference the formulation of technological standards for electronic filing is that advances in computer technology occur often, and changes in the technological standards may have to be implemented more frequently than would be feasible by rule amendment

under the Rules Enabling Act process.

It is anticipated that standards established by the Judicial Conference will govern technical specifications for electronic data transmission, such as requirements relating to the formatting of data, speed of transmission, means to transmit copies of supporting documentation, and security of communication procedures. In addition, before procedures for electronic filing are implemented, standards must be established to assure the proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. These matters will be governed by local rules until system-wide standards are adopted by the Judicial Conference.

Rule 9009 requires that the Official Forms shall be observed and used "with alterations as may be appropriate." Compliance with local rules and any Judicial Conference standards with respect to the formatting or presentation of electronically transmitted data, to the extent that they do not conform to the Official Forms, would be an appropriate alteration within the meaning of Rule 9009.

These rules require that certain documents be in writing. For example, Rule 3001 states that a proof of claim is a "written statement." Similarly, Rule 3007 provides that an objection to a claim "shall be in writing."



Pursuant to the new subdivision (a)(2), any requirement under these rules that a paper be written may be satisfied by filing the document by electronic means, notwithstanding the fact that the clerk neither receives nor prints a paper reproduction of the electronic data.

Section 107(a) of the Code provides that a "paper" filed in a case is a public record open to examination by an entity at reasonable times without charge, except as provided in § 107(b). The amendment to subdivision (a)(2) provides that an electronically filed document is to be treated as such a public record.

Although under subdivision (a)(2) electronically filed documents may be treated as written papers or as signed or verified writings, it is important to emphasize that such treatment is only for the purpose of applying these rules. In addition, local rules and Judicial Conference standards regarding verification must satisfy the requirements of 28 U.S.C. § 1746.

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE. Rule ~~4(a), (b), (c)(2)(C)(i), (d), (e) and (g)-(j)~~ 4(a), (b), (c)(1),

(d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service ~~pursuant to~~ under Rule ~~4(d)~~ 4(e)-(j) F.R.Civ.P. may be made by any person ~~not less than~~ at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(b) SERVICE BY FIRST CLASS MAIL. Except as provided in subdivision (h), in ~~In~~ addition to the methods of service authorized by Rule ~~4(e)(2)(C)(i) and (d)~~ 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual

place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such **a** defendant in the courts of general jurisdiction of that state. The summons and complaint in ***that*** ~~***such***~~ case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or

other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to ~~also~~ the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an

order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to ***that*** ~~***such***~~ officer or agency. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of

this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as

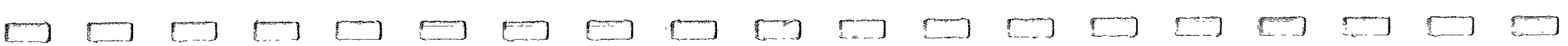
prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons

and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.



(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing ~~***copies***~~ ***a copy*** of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States

trustee in the district where the case under the Code is pending.

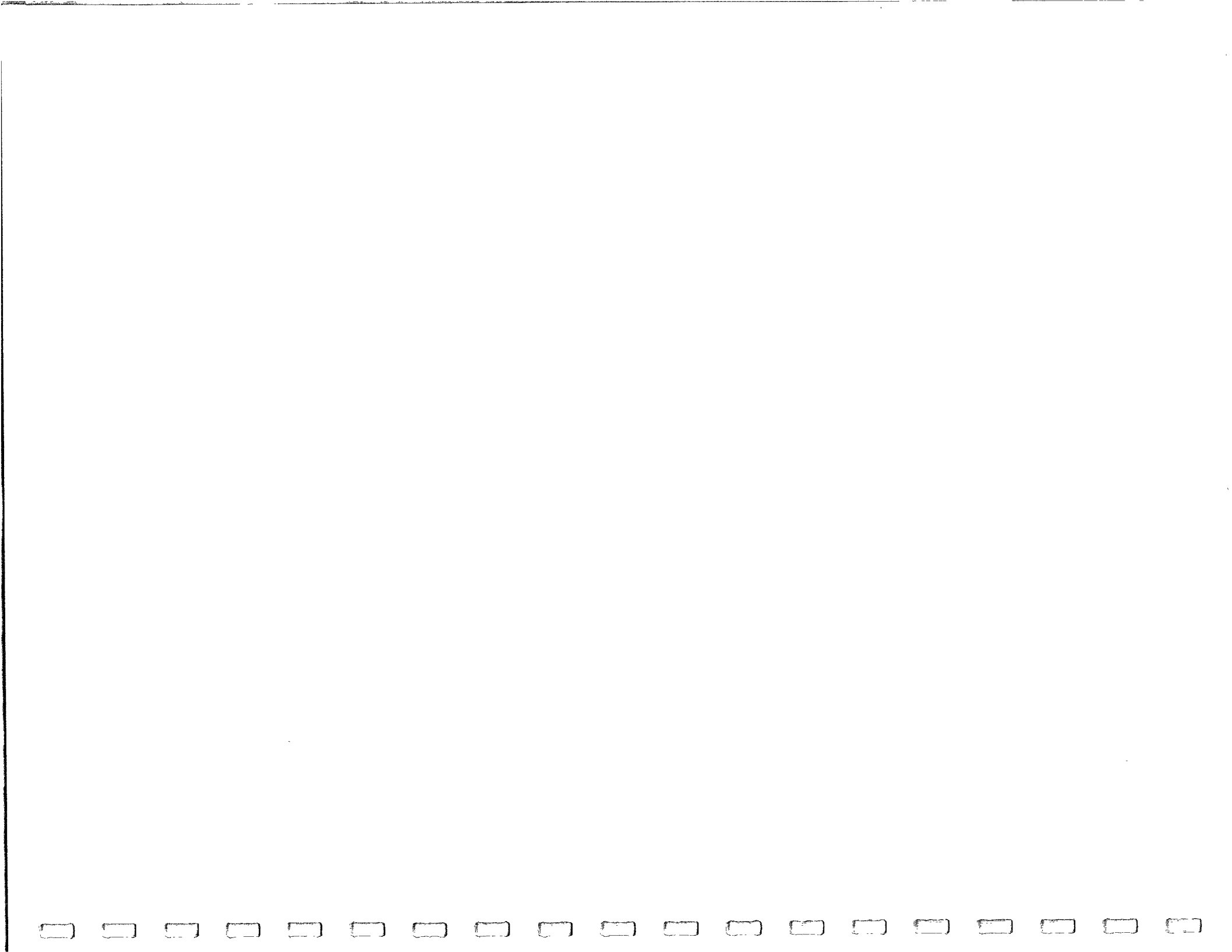
(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule ~~4(d) or (i)~~ 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

~~(e) SERVICE ON DEBTOR AND OTHERS IN~~

~~FOREIGN COUNTRY. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(e)(2)(C)(i) or (e) F.R.Civ.P.~~

~~(f)~~ (e) SUMMONS: TIME LIMIT FOR SERVICE. If service is made ***~~pursuant to~~ under*** Rule ~~4(d)(1) (6)~~ 4(e)-(j)



F.R.Civ.P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case

under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

~~(g) EFFECT OF AMENDMENT TO RULE 4 F.R.CIV.P. The subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules shall be the subdivisions of Rule 4 F.R.Civ.P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto.~~ *[abrogated].*

(h) Service of Process on an Insured Depository Institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless --

(1) the institution has appeared by

its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

COMMITTEE NOTE

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. ***and to make stylistic improvements.*** Rule 7004, as amended, continues to provide for service by first class mail as an

alternative to the methods of personal service provided under Rule 4 F.R.Civ.P.***, except as provided in the new subdivision (h).***

Rule 4(d)(2) F.R.Civ.P. provides a procedure by which the plaintiff may request by first class mail that the defendant waive service of the summons. This procedure is not applicable in adversary proceedings because it is not necessary in view of the availability of service by mail under Rule 7004(b). However, if a written waiver of service of a summons is made in an adversary proceeding, Rule 4(d)(1) F.R.Civ.P. applies so that the defendant does not thereby waive any objection to the venue or the jurisdiction of the court over the person of the defendant.

Subdivisions (b)(4) and (b)(5) are amended to conform to the 1993 amendments to Rule 4(i)(3) F.R.Civ.P., which protect the plaintiff from the hazard of losing a substantive right because of failure to comply with the requirements of multiple service when the United States or an officer, agency, or corporation of the United States is a defendant. These subdivisions also are amended to require that the summons and complaint be addressed to the civil process clerk at the office of the United States attorney.

Subdivision (e), which has governed service in a foreign country, is abrogated and Rule 4(f) and (h)(2) F.R.Civ.P., as substantially revised in

1993, are made applicable in adversary proceedings.

The new subdivision (f) is consistent with the 1993 amendments to F.R.Civ.P. 4(k)(2). It clarifies that service or filing a waiver of service in accordance with this rule or the applicable subdivisions of F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant. See the committee note to the 1993 amendments to Rule 4 F.R.Civ.P.

Subdivision (g) is abrogated. This subdivision was promulgated in 1991 so that anticipated revisions to Rule 4 F.R.Civ.P. would not affect service of process in adversary proceedings until further amendment to Rule 7004.

Subdivision (h) and the first phrase of subdivision (b) were added by § 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

Rule 8008. Filing and Service

(a) FILING. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but

filing ~~shall not be~~ ***is not*** timely unless the papers are received by the clerk within the time fixed for filing, except that briefs ~~shall be~~ ***are*** deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated ~~pursuant to~~ ***under*** Rule 8018.

* * * * *

COMMITTEE NOTE

This rule is amended to permit, but not require, district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules that allow filing of documents by electronic means, subject to the limitations contained in Rule 5005(a)(2). See the committee note to the amendments to Rule 5005. ***Other amendments to this rule are stylistic.***

Rule 9006. Time

* * * * *

(c) REDUCTION.

* * * * *

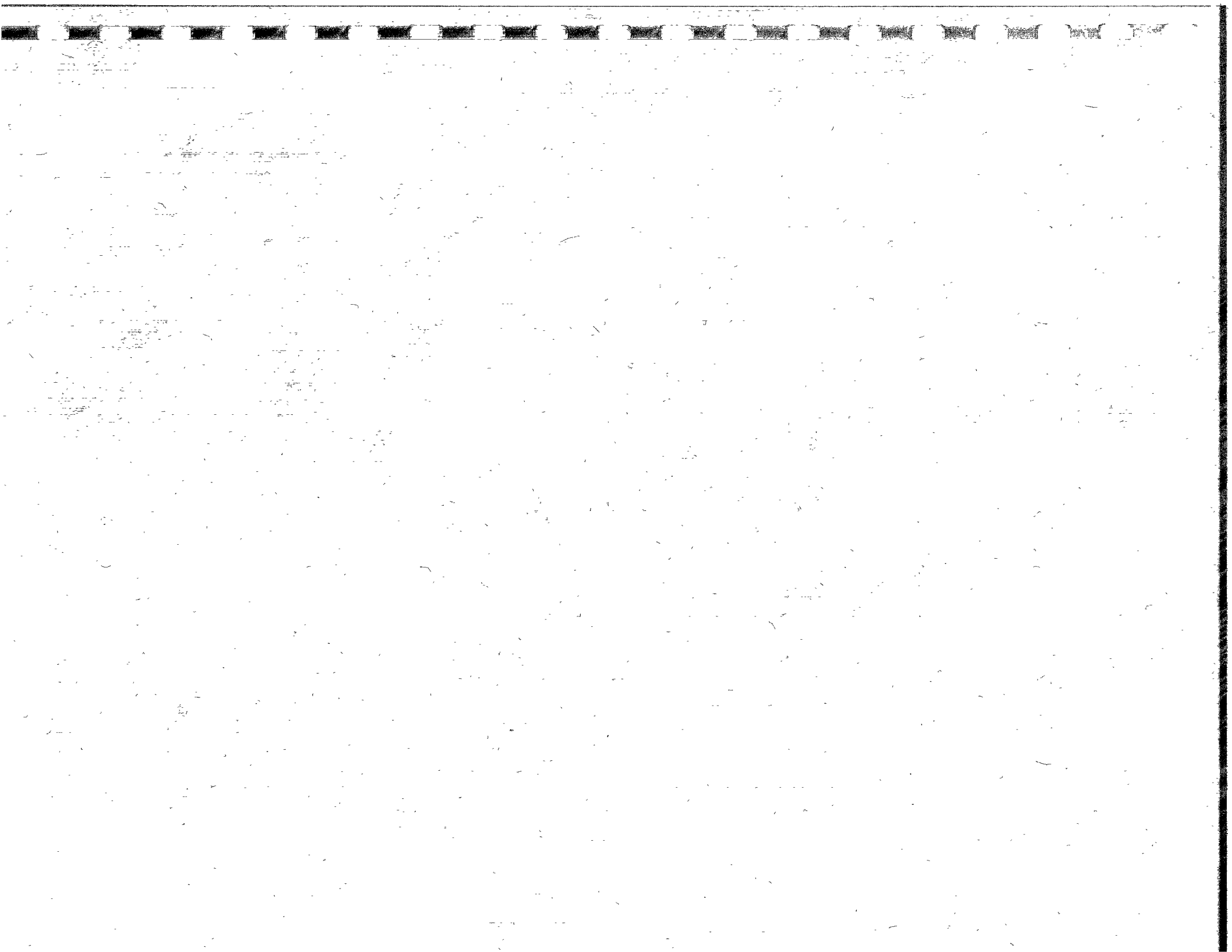
(2) Reduction Not Permitted. The court ~~may~~ ***shall*** not reduce the time for taking action under Rules ~~2002(a)(4) and (a)(8)~~ 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to conform to the abrogation of Rule

2002(a)(4) and the renumbering of Rule 2002(a)(8) to Rule 2002(a)(7). ***Substituting the word "shall" for "may" is stylistic and is not intended to make any substantive change.***



APPENDIX B

COMMENTS RECEIVED FROM THE BENCH AND BAR

94-AP -07
94-BK -01
94-CV -01
94-CR -02

94-EV -66

RECEIVED 10/12/94

ROBERT L. JONES III
OFFICE OF THE PRESIDENT
ARKANSAS BAR ASSOCIATION
P. O. Box 2023
Fort Smith, Arkansas 72902
(501) 782-7203 FAX (501) 782-9460

October 7, 1994

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of
the United States Courts
Washington, D.C. 20544

TO WHOM IT MAY CONCERN:

This letter is written on behalf of the Arkansas Bar Association in response to Ralph K. Winter, Jr.'s letter to the Bench, Bar and Public dated September 9, 1994.

Proposed new Federal Rules of Evidence 413-415. The Arkansas Bar Association opposes the adoption of proposed Federal Rules of Evidence 413-415. These proposed new rules of evidence would allow a trial court in sexual assault and child molestation cases to admit "evidence" of defendant's prior sexual assaults or molestations of children to prove that a defendant is guilty of charged sexual assault or child molestation. This "evidence" can consist of mere accusations of uncharged similar prior conduct. Obviously, the offenses of child molestation and sexual assault scrape the very bottom of the criminal barrel and constitute the most extreme forms of criminally reprehensible behavior. They are disgusting, and we all deplore them. However, regardless of the heinous nature of those crimes "evidence" of prior similar misconduct should never be admitted into evidence to prove that a defendant committed the charged act. Therefore, proposed Rule 413 should be rejected. We believe that Rule 404(b) adequately and properly addresses the narrow circumstances under which evidence of "other crimes" should be admitted into evidence. Therefore, proposed Rule 414 should also be rejected. The same reasoning applies to proposed Rule 415 which would allow proof of similar acts to be admitted into evidence in civil cases concerning sexual assault or child molestation.

Neither criminal prosecutions nor civil actions face

problems presented by child molestation and sexual assault cases that justify, let alone compel, the use of circumstantial character evidence in order to prove a conviction.

We agree with the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure.

We agree with the proposed amendments to the Federal Rules of Civil Procedure.

We agree with the proposed amendment to the Federal Rules of Appellate Procedure.

We agree with the proposed amendments to the Federal Rules of Bankruptcy Procedure.

Thank you for your consideration of our position.

Yours very truly,

Robert L. Jones, III
President, Arkansas Bar Association

cp
cc: Legislative Committee
Robert M. Cearley, Jr.
William Martin
Carolyn Witherspoon
Thomas Ray
Wendell Griffin

THE COMMITTEE ON FEDERAL COURTS
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

RECEIVED 2/27/95

February 10, 1995

94-BK -11

Committee on Rules of Practice and Procedure
Attn: Peter G. McCabe
Assistant Director, Judges Programs
Judicial Conference of the United States
c/o Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Gentlemen:

Pursuant to the request of the Advisory Committee on Bankruptcy Rules that all written comments to the proposed changes to the Federal Rules of Bankruptcy Procedure be submitted before February 28, the California State Bar Committee on Federal courts is pleased to present the following statement of position in support of the proposed amendments.

The proposed amendments to Rules 1006(a), 1007(c), 1019(7), 2002, 2015(b), 3002(c), 3016(a), 4004(c), 5005(a), 7004, 8008 and 9006 appear to be procedural rather than substantive in nature with the goal of providing more cost efficient and expeditious procedures in bankruptcy proceedings. The rules both clarify these procedures and conform them to recent amendments in the Bankruptcy Code.

We enthusiastically support the proposed amendments to these Bankruptcy Rules and we thank you for the opportunity to comment on them. We look forward to providing you with our comments on other proposed amendments.

Very truly yours,

Lee Ann Huntington

Lee Ann Huntington
Chair, State Bar Committee on Federal Courts

cc: David Pimentel
Susan Lee

RECEIVED
2/1/95

Matthew Bender

94-BK-06

Matthew Bender
& Company, Inc.
11 Penn Plaza
New York, NY 10001
212-967-7707

January 23, 1995

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Bankruptcy Rule 2002(h)

Dear Mr. McCabe:

Upon reviewing a draft of the Proposed Rules, I have discovered a discrepancy between the amendments to Rule 2002(h) and its Committee Note. When I told Mark Shapiro of this discrepancy, he asked that I bring it to your attention.

Rule 2002(h) refers to extensions granted under "Rule 3002(c)(1) or (c)(2)." The Committee Note refers to "Rule 3002(c)(1) or 3003(c)(2)." Upon further reading I would surmise that it is the text of the Rule itself which is correct and the Committee Note which is in error. I reached this conclusion because Rule 3002(c) relates to the granting of extensions and Rule 3003(c)(2) does not.

Should you have any further questions, you may reach me at (212) 216-8295.

Sincerely,

Susan J. Lewis
Legal Editor

United States Bankruptcy Court
District of Utah
United States Courthouse, Room 361
350 South Main Street
Salt Lake City, Utah 84101

William C. Stillgebauer
Clerk of Court

TELEPHONE:
(801) 524-5157
FTS 588-5157

RECEIVED 12/8/94

94-BK -02

December 5, 1994

94-BK - E

Peter G. McCabe
Secretary of the Committee of
Rules of Practice and Procedure
Administrative Office of the US Courts
Washington, D.C. 20544

Dear Mr. McCabe,

I would like to take this opportunity to address the proposed bankruptcy rule change in Bankruptcy Rule 2002(f)(8) deleting the words "and account" from the rule. The explanation in the committee note states that the "Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property." This leads me to believe that when addressing the 2002(f)(8) issue, somewhere along the process there evolved a misconception that two notices are sent to creditors. I firmly believe that is not the case in the vast majority of districts. When the clerk's office, or the trustee, sends the summary of the final report and account, a notice is not sent before distribution, and another after distribution; I would venture to guess that all noticing parties are interpreting that compliance with the present 2002(f)(8) rule is accomplished through one notice, and one notice only.

If we can assume I am correct (for the moment), this means that the proposed amendment does nothing whatsoever. The requirement to send the summary still exists. The amendment is moot and does not save administrative expenses.

Some time ago I suggested a rule change in this area, and I would once again reiterate that my suggestion should be studied. I am of the opinion that the summary of the trustee's final should be sent to only those creditors who have previously filed claims in the case.

There are several reasons for this proposed amendment: First, the party responsible for the noticing would not have to notice all creditors, thus saving the estate, not to mention manhours. This process is facilitated greatly by the fact that most (if not all) bankruptcy clerk's offices can readily supply a list of creditors (a/k/a a matrix) for those creditors who filed claims. Secondly, since the notice is really not pertinent to those creditors who did not choose to file a proof of claim, what is accomplished by noticing those parties? Is the notice going to demonstrate how much money they would have recovered had they been a bit more diligent? Thirdly, there are several other notices that are now authorized to be sent to only those creditors that have filed claims. This notice could simply be added to those already listed in Bankruptcy Rule 2002(h).

In closing, the proposed amendment in regard to 2002(f)(8) accomplishes nothing because I am theorizing a misinterpretation has occurred. Two notices are not involved, only one. The final report and the final account are realistically one and the same.

I would like to state again that I believe a notice of the trustee's summary and account of the trustee's final should only be mailed to creditors who have filed claims. A previous letter that I forwarded to the Rules Committee is attached for your review. Thank you.

Respectfully,

Glenn Gregorcy
Chief Depury Clerk
U.S. Bankruptcy Court
District of Utah

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RECEIVED 2/28/95

February 28, 1995

VIA FACSIMILE TRANSMISSION
FAX # (202) 273-1808

94-BK -16

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

RE: Proposed Change to Bankruptcy Rule 2002(f)(8)

Dear Mr. McCabe:

My law firm represents ten of the top twenty-five national issuers of credit cards in their bankruptcy cases nationwide. Our clients file tens of thousands of Proofs of Claim annually in bankruptcy cases throughout the country. A proportionate share of those claims are filed in chapter 7 cases.

It is our firm's practice to review on a regular and routine basis all final reports and accounts received in chapter 7 cases. This review consists of verifying that the distribution stated has been received by our clients and that the claim amounts and addresses have been properly recorded on the trustee's records. In this process, we occasionally identify cases where Proofs of Claim were timely filed but not reflected in the trustee's account, or, far less often, the amounts of the claims, and thus the distributions, are incorrect.

Because we have not tracked these matters separately, I am not able at this time to present you with specific case examples. While we do not believe that the number of discrepancies identified during our review process is large, those that we do uncover are often welcome news to our clients. This is because our firm typically undertakes representation on a contingency fee basis and we do not charge our clients directly for review of trustees' final reports and accounts in routine consumer cases.

We do not appear to be receiving summaries of trustees' final reports and accounts uniformly from all jurisdictions. But, for the reasons mentioned above, we would like to continue to receive these summaries.

We would appreciate the Committee's consideration of our position and request that the proposed change to Rule 2002(f)(8) be abandoned. Alternatively, we would suggest that a summary of the trustee's final report, if that is all that is to be sent to creditors, should include the creditor's allowed claim amount and address.

We are grateful to the Committee for its anticipated consideration of our concerns.

Very truly yours,

BECKET & WATKINS

BY: _____
James T. Watkins

JTW/alf

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2/28/95

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February 23, 1995

94-BK-15

Frank Szcyebak
Committee of Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Sir:

The Maryland Bar Association Committee on Creditors' Rights, Bankruptcy and Insolvency has reviewed the Preliminary Draft of the Proposed Amendments to Bankruptcy Rules and would like to offer the following comments:

1. Federal Rule of Bankruptcy Procedure 2002(h) should be redrafted as follows:

> (h) Notices To Creditors Whose Claims Are Filed. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors who hold claims for which proofs of claim have been filed, and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, the court may, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), direct that notices be limited as set forth above.

2. Federal Rules of Bankruptcy Procedure 3002(c) should be amended to read as follows:

(c) Time for Filing. Except as is provided in § 502(b)(9), in a chapter 7 liquidation. . .

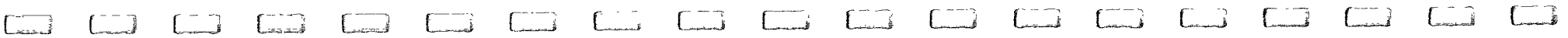
This amendment conforms Federal Rule of Bankruptcy Procedure 3002(c) to the Bankruptcy Code as amended by the Bankruptcy Reform Act of 1994.

Thank you for your consideration of the above comments.

Sincerely yours,

Richard M. Kremen

RMK/ksb



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Facsimile Transmission

TO: Alan N. Resnick

FROM: Bryan A. Garner

FAX #: 212-820-8583

DATE: 14 May 1994

PAGES: 25

? 13750

Alan —

I'm sorry for the delay in responding to your request, and I hope that these suggestions will reach you in time to consider them before the June meeting.

Only the pages on which I had some comment are being sent. I've edited rather lightly, suggesting changes only in the provisions in which changes are easily workable. I assume that's what you wanted. Of course, I haven't touched the word *shall* except where it was used as a future-tense modal verb and probably ought to be *is* or *are* (as in Rule 8008).

See you next month!

Best wishes,

BAG

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the ~~prescribed~~ filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States ~~pursuant to~~ under 28 U.S.C. § 1930(b) ~~that is~~ to be payable to the clerk upon the commencement of a case under the Code.

On pursuant see Guided. p. 32

* * *

COMMITTEE NOTE

The Judicial Conference prescribes miscellaneous fees pursuant to 28 U.S.C. § 1930(b). In 1992, a $30 miscellaneous administrative fee was prescribed for all chapter 7 and chapter 13 cases. The Judicial Conference fee schedule was amended in 1993 to provide that an individual debtor may pay this fee in installments.

Subdivision (a) of this rule is amended to clarify that every petition must be accompanied by any fee prescribed under 28 U.S.C. 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a). By defining "filing fee" to include Judicial Conference fees, the procedures set forth in subdivision (b) for paying the filing fee in installments will also apply with respect to any Judicial Conference fee required to be paid at the commencement of the case.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * *

~~(7) EXTENSION OF TIME TO FILE CLAIMS AGAINST SURPLUS. Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (6) of this rule, and notice shall be given as provided in Rule 2002.~~

COMMITTEE NOTE

Subdivision (7) is abrogated to conform to the abrogation of Rule 3002(c)(6) and the addition of Rule 3002(d). If a proof of claim is tardily filed after a case is converted to a chapter 7 case, the claim may be allowed to the extent that the creditor, as the holder of an unsecured claim, proof of which is tardily filed, is entitled to receive a distribution under section 726 of the Code.

the

This will prevent a misuse.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person ~~as~~ than the court ~~may~~ direct, shall give the debtor, the trustee, all creditors and indenture trustees ~~not less than~~ at least 20 days notice by mail of (1) the meeting of creditors ~~pursuant to~~ under § 341 of the Code; (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement ~~pursuant to~~ under Rule 4001(d), unless the court for cause shown directs that notice not be sent; ~~(4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6);~~ ~~(5)~~ (4) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case, unless the hearing is ~~pursuant to~~ under § 707(b) of the Code, or the conversion of the case to another chapter; ~~(6)~~ (5) the time fixed to accept or reject a proposed modification of a plan; ~~(7)~~ (6) hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500; ~~(8)~~

Set off and delete these enumerated items.

See Guidelines p. 21.

In American English, totaling has one -l-.

(7) the time fixed for filing proofs of claims ~~pursuant to~~ under Rule 3003(c); and ~~(9)~~ (8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

* * * *

(c) CONTENT OF NOTICE.

* * * *

(2) Notice of Hearing on Compensation. The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision ~~(a)(7)~~ (a)(6) of this rule shall identify the applicant and the amounts requested.

* * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person ~~as~~ whom the court ~~may~~ direct, shall give the debtor, all creditors, and indenture trustees notice by mail of

* * * *

(8) a summary of the trustee's final report and ~~account~~ in a chapter 7 case if the net proceeds realized exceed $1,500.

* * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, ~~the court may,~~ after 90 days following the first date set for the meeting of creditors ~~pursuant to~~ under § 341 of the Code or, if a notice of insufficient assets to

See Guidelines p. 5.

To avoid the left-branching sentence, I'd recommend restructuring: "In a chapter 7 case, the court may direct . . . The mailings shall be sent . . . But if a notice of insufficient assets . . . "

pay a dividend has been given to creditors ~~pursuant to~~ under subdivision (e) of this rule, after 90 days following the mailing of the notice of the time for filing claims ~~pursuant to~~ under Rule 3002(c)(5), the court may direct that all notices required by subdivision (a) of this rule~~, except clause (4) thereof,~~ be mailed only to the debtor, the trustee, all indenture trustees, creditors ~~whose claims~~ who hold claims for which proofs of claim have been filed, and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule ~~3002(c)(6)~~ 3002(c)(1) or (c)(2).

Wonderful!

(i) NOTICES TO COMMITTEES. Copies of all notices required to be mailed under this rule shall be mailed to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and ~~(7)~~ (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed ~~pursuant to~~ under § 1114 shall receive copies of all notices required by subdivisions (a)(1), ~~(a)(6)~~ (a)(5), (b), (f)(2), and (f)(7), and such

other notices as the court may direct.

* * * *

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee otherwise requests, the clerk, or some other person whom the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), ~~(a)(6)~~ (a)(4), ~~(a)(7)~~ (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules ~~shall~~ require the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq.

* * * *

COMMITTEE NOTE

Paragraph (a)(4) is abrogated to conform to the abrogation of Rule 3002(c)(6). The remaining paragraphs of subdivision (a) are renumbered, and references to these paragraphs contained in other subdivisions of this rule are amended accordingly.

Paragraph (f)(8) is amended so that a summary of the trustee's final account, which is prepared after



distribution of property, does not have to be mailed to the debtor, all creditors, and indenture trustees in a chapter 7 case. Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property.

Subdivision (h) is amended (1) to provide that an order under this subdivision may not be issued if a notice of no dividend is given under Rule 2002(e) and the time for filing claims has not expired as provided in Rule 3002(c)(5); (2) to clarify that notices required to be mailed by subdivision (a) to parties other than creditors must be mailed to those entities despite an order issued under subdivision (h); (3) to provide that if the court, ~~pursuant to~~ Rule 3002(c)(1) or 3003(c)(2), has granted an extension of time to file a proof of claim, the creditor for whom the extension has been granted must continue to receive notices despite an order issued under subdivision (h); and (4) to delete references to subdivision (a)(4) and Rule 3002(c)(6), which have been abrogated.

case is required to file and transmit to the United States trustee a complete inventory of the debtor's property within 30 days after qualifying as trustee or debtor in possession, unless such an inventory has already been filed. Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business, is not required to file and transmit to the United States trustee a complete inventory of the property of the debtor unless the court so directs. If the court so directs, the court also fixes the time limit for filing and transmitting the inventory.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.

* * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called ~~pursuant to~~ under § 341(a) of the Code, except as follows:

* * *

~~(c) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

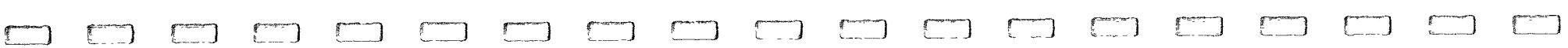
(d) TARDILY FILED CLAIM IN CHAPTER 7 CASE. Notwithstanding subdivision (a) of this rule, if a creditor files a proof of claim in a chapter 7 case after the expiration of the time for filing the proof of claim prescribed in subdivision (c) of this rule, the creditor, as the holder of an unsecured claim, the proof of which is tardily

filed, is entitled to receive a distribution to the extent provided under section 726 of the Code.

COMMITTEE NOTE

The abrogation of subdivision (c)(6) and the addition of subdivision (d) are designed to make this rule consistent with § 726 of the Code. Section 726(a)(2)(C) and § 726(a)(3) recognize that in a chapter 7 case a creditor holding a claim that has been tardily filed may be entitled to receive a distribution.

This amendment is not intended to resolve the issue of whether a claim of the kind entitled to priority under § 507 of the Code has the right to priority in distribution under § 726(a)(1) if the proof of claim is tardily filed. Compare, e.g., In re Century Boat Co., 986 F2d 154 (6th Cir. 1993), with In re Mantz, 151 BR 928 (9th Cir. BAP 1993). The resolution of this issue and any other issues regarding priority in distribution are left to the courts as matters of substantive law and statutory interpretation.



Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

~~(a) TIME FOR FILING PLAN. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.~~

~~(b)~~ (a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

~~(c)~~ (b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement ~~pursuant to~~ § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed.

Who makes the distribution? I'd recommend active voice if possible

Rule 3021. Distribution Under Plan

After ~~confirmation of~~ a plan (is confirmed), distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record ~~at the time of commencement of distribution~~ whose claims or equity security interests have not been disallowed, and to indenture trustees who have filed claims ~~pursuant to~~ under Rule 3003(c)(5) and which have been allowed. For the purpose of this subdivision, except as otherwise provided in the plan or the order confirming the plan, holders of securities of record are the holders of record ~~at the time of commencement of~~ when distribution begins.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date ~~for distributions~~ that is earlier than the date ~~on which~~ distributions ~~commence~~.

when

begin

If this phrase isn't deleted, we have a "remote relative" problem. See Guidelines.

Rule 4004. Grant or Denial of Discharge

* * * *

(c) GRANT OF DISCHARGE. In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case ~~pursuant to~~ under Rule 1017(e), the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, (3) the debtor has filed a waiver under § 727(a)(10), or (4) a motion to dismiss the case under Rule 1017(e) is pending. (5) a motion to extend the time for filing a complaint objecting to discharge is pending, or (6) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any fee prescribed by the Judicial Conference of the United States ~~pursuant to~~ under 28 U.S.C. § 1930(b) ~~that is~~ to be payable to the clerk upon the commencement of a case under the Code. Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within ~~such~~ that period, the court may defer entry of the order to a date certain.

Set off this connection. See Guideline 21.

* * * *

COMMITTEE NOTE

Subsection (c) is amended to delay entry of the order of discharge if a motion under Rule 4004(b) to extend the time for filing a complaint objecting to discharge is pending. This subdivision also is amended

Rule 5005. Filing and Transmittal of Papers

(A) FILING.

(1) Place of Filing. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for ~~the purpose of~~ filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

(2) Filing by Electronic Means. A court by local rule may permit documents to be filed, signed, or verified by electronic means, ~~provided such means~~ if those means are consistent with any technical standards ~~, if any, established by~~ that may be established by the Judicial Conference of the United States. A document filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * *

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE. ~~Rules 4 (a), (b), (c) (2) (C) (i), (d), (e) and (g) (j)~~ 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service ~~pursuant to~~ under Rule ~~4 (d)~~ 4(e)-(j) F.R.Civ.P. may be made by any person ~~not less than~~ at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(b) SERVICE BY FIRST CLASS MAIL. In addition to the methods of service authorized by ~~Rule 4 (c) (2) (C) (i) and (d)~~ 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in ~~such~~ that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the

person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to ~~also~~ the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to ~~that~~ officer or agency. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either

hyphen

see Guide p. 15.

to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be

served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint ~~is~~ mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing ~~copies~~ a copy of the

summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in ~~Rule 4(d) or (i)~~ 4(e)-(i) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

~~(e) SERVICE ON DEBTOR AND OTHERS IN FOREIGN COUNTRY. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017, or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court, or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(e)(2)(C)(i) or (e) F.R.Civ.P.~~

~~(f)~~ (a) SUMMONS: TIME LIMIT FOR SERVICE. If service is made ~~pursuant to~~ under ~~Rule 4(d)(1) (6)~~ 4(e)-(j) F.R.Civ.P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of ~~Rule~~ 4 F.R.Civ.P. made applicable by these rules is

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period ~~not to exceed~~ no longer than 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made by written motion and must be filed before the time for filing a notice of appeal has expired, except that such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

Rule 8008. Filing and Service

(a) FILING. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing ~~shall~~ is not ~~be~~ timely unless the papers are received by the clerk within the time fixed for filing, except that briefs ~~shall be~~ are deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated ~~pursuant to~~ under Rule 8018.

* * * *

COMMITTEE NOTE

This rule is amended to permit, but not require, district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules that allow filing of documents by electronic means, subject to the limitations contained in Rule 5005(a)(2). See the committee note to the 199__ amendments to Rule 5005.

Rule 9006. Time

* * * * *

(c) REDUCTION.

* * * * *

(2) Reduction Not Permitted. The court ~~may~~ [shall] [must] not reduce the time for taking action under Rules ~~2002(a)(4) and (a)(8)~~ 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) to Rule 2002(a)(7).

The Style Subcommittee does not use the phrase may not because it is sometimes taken to mean "might not." That's not a serious possibility here, but I've flagged it anyway.

Guidelines for Drafting Court Rules

prepared by

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Standing Committee on Federal Practice and Procedure

Draft of March 1994

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Contents

I. Basic Principles 1
A. Be clear. 1
B. Make the draft readable. 1
C. Be as brief as clarity and readability permit 1
D. Organize the rule to serve clarity, readability, and brevity 1

II. General Conventions 2
A. Number — draft in the singular 2
B. Tense — use present tense 2
C. Voice 3
1. Use active voice 3
2. Rephrase passive voice by using an adjective 3
3. When to use passive voice 3
D. Syntax 3
1. Conditions — in general 3
a. Short condition 4
b. Long condition and short main clause 4
c. Long condition and long main clause 5
d. Condition as definitional test 6
e. Hidden condition 7
2. Exceptions 7
a. When to state first 7
b. When to state last 8
3. Interruptive phrases 8
a. Where to place 8
b. Using a double-dash construction 9
c. Placing an adverbial interruptive phrase 9
4. Modifiers 10
a. Putting related words together 10
b. Rephrasing sentence to cure ambiguity 10
5. Prepositional phrases 10
a. Minimizing *of*-phrases 10
b. Changing prepositional phrases to adjectives 11
c. Changing prepositional phrases to possessives 11
6. Antecedents 12
a. Preceding the referent 12
b. Agreement in number 12
7. Sentence length 13

a. Breaking up long sentences 13
b. Computing average sentence length 13
8. Punctuation 14
a. Ending each subpart with a semicolon 14
b. Placing a comma after introductory phrase 14
c. Using the serial comma 15
d. Preferring dashes over parentheses 15
e. Eliminating hyphens from prefixed words 15
f. Hyphenating phrasal adjectives 15
9. Ending sentences emphatically 16

III. Structure
A. Organization of rules 16
1. Logical organization 16
2. Grouping similar items together 17
B. Structural divisions 18
1. Parts defined 18
2. Requirement of two parts 18
3. Using headings 19
4. Retaining existing numbers for well-known subparts 20
5. Using "hanging indents" 20
C. Enumerations 21
1. Setting off enumerations 21
2. Putting enumerations at end of sentence 22
3. Using an appositive to foreshadow 23
4. Putting parallel requirements in parallel form 23
5. Avoiding unnumbered "dangling" sections 24
6. Using bullets 25

IV. Words and Phrases 26
A. Verbose phrasing 26
1. Omitting superfluous word 26
2. Uncovering buried verbs 27
3. Collapsing clauses into phrases 27
B. Words of authority 28
1. Definitions 28
2. Replacing *shall* with *must* 28
3. Avoiding roundabout wordings 28
4. Alternative to #2 (*shall*) 28
5. Changing *may not* to *must not* 28
C. Relative pronouns 29
1. Using *that* as a restrictive relative pronoun 29

2. Using *which* as a nonrestrictive relative pronoun 29
3. Avoiding so-called "remote relatives" 29
D. Conjunctions 30
1. Using *but* to introduce a contrasting idea 30
2. Using *But* in preference to *However* to begin a sentence . . . 30
E. Ambiguity and undesirable vagueness 31
F. Specific words and forms to avoid 31
• *every* 31
• *except as* 31
• *except that* 31
• *except when* 31
• *except with [+ noun]* 32
• *following* 32
• *hereof, herein, thereof, therein*, etc. 32
• *if any* 32
• *in the event that* 32
• *limitation* 32
• *not later than* 32
• *partially* 32
• *portion* 32
• *prior to* 32
• *provided that, provided however that* 32
• *pursuant to* 32
• *said*, adj.. 33
• *so [verb +ed] as to* 33
• *subsequent to* 33
• *such*, adj. 33
• *such [noun +s] as* 33
• *therefor* 33
• *there is, there are* 33
• *transmit* 33
• *upon* 33
• *whenever* 33
G. Other stylistic preferences 34
1. Cross-references 34
2. Particular words 34
• *may . . . only* 34
• *only* 34
• *otherwise* 34
• *will* 34

Guidelines for Drafting Court Rules

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Consultant to the Style Subcommittee

The following guidelines are phrased as a black-letter restatement of the principles of modern rule-drafting. Few if any of these principles are absolute — hence the word "guidelines." In most instances, though, they make rules clearer and more readable.

I. Basic Principles

A. Be clear.

1. Identify instances of vagueness and ambiguity and sharpen the wording.

2. If you need substantive directions, consider alternative wordings and set them out as possibilities for the decision-maker.

B. Make the draft readable.

1. Prefer short sentences. The average sentence length in good drafting is no more than 30 words.

2. Use the simplest possible words to express the idea clearly. Avoid legal jargon.

3. Use a word or phrase consistently to express a single idea. Do not vary your terminology for the sake of "elegant variation."

C. Be as brief as clarity and readability permit.

D. Organize the rule to serve clarity, readability, and brevity.

1. Organize the draft so that the reader has bearings.

2. Use structure to enhance readability and reinforce meaning.

II. General Conventions

A. Number. Draft in the singular number unless the sense is undeniably plural, as when the sentence refers to a habitual practice that is often repeated.

Before	After
When *issues* not raised by the pleadings *are* tried by express or implied consent of the parties, *they* shall be treated in all respects as if they had been raised in the pleadings. Fed. R. Civ. P. 15(b).	When *an issue* not raised by the pleadings *is* tried by the parties' express or implied consent, *it* must be treated in all respects as if raised in the pleadings.
In *all cases* in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion . . . . In *cases* in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct. Fed. R. Evid. 405(a), (b).	In *a case* in which evidence of a person's character or a trait of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion . . . . In *a case* in which a person's character or a trait of character is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.
Papers filed by an inmate confined in an institution *are* timely filed if . . . . Fed. R. App. P. 25(a).	*A paper* filed by an inmate confined in an institution *is* timely filed if . . . . (Rule as published for comment in Oct. 1993.)

B. Tense. Draft in the present tense unless the past or future tense clarifies the idea.

Before	After
No additional fees will be required for filing an amended notice. Fed. R. App. P. 4(a)(4).	No additional fees are necessary for filing an amended notice.

C. **Voice.** Prefer the active over the passive voice.

1. When feasible, rephrase a passive-voice verb by putting it in active voice.

Before	After
. . . costs *must be taxed* by the clerk against the losing party . . . . Fed. R. Civ. P. 76(c) (intermediate draft).	. . . the clerk *must tax* costs against the losing party . . . .

2. When feasible, rephrase a passive-voice verb by using an adjective.

Before	After
. . . the parties may . . . file a joint statement that shows how the issues *presented by the appeal* arose . . . . Fed. R. Civ. P. 75(b)(1) (intermediate draft).	. . . the parties may . . . file a joint statement that shows how the *appellate* issues arose . . . .

3. Use passive voice primarily in two circumstances: (1) when naming the actor would unduly narrow the meaning or impede the flow of the sentence; or (2) when changing to active voice would undesirably shift the emphasis from one subject to another.

Example
When the constitutionality of a statute affecting the public interest *is questioned* in any action, the court must . . . . Fed. R. Civ. P. 24(c)(2) (as revised for style).

D. **Syntax.** Use a syntactic arrangement that enhances clarity, logic, and readability.

1. *Conditions.* Place conditions where they can be read most easily, preferably using the word *if*. Use *when* (not *where*) if the sentence needs an *if* to introduce another unrelated clause or if the condition is something that may occur with regularity.

a. If a condition is just a few words, and seeing it first would help the reader avoid a miscue, then put it at the beginning of the sentence.

Before	After
In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case *on application of a party or on its own motion.* Fed. R. App. P. 2.	*On its own motion or if a party so requests*, a court of appeals may — to expedite its decision or for other good cause — suspend the requirements or provisions of any of these rules in a particular case, except as otherwise provided in Rule 26(b).

b. If a condition is long and the main clause is short, put the main clause first and move directly into the condition.

Before	After
When without the parties consent, either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense is referred to a magistrate judge, the magistrate judge must promptly conduct the required proceedings. Fed. R. Civ. P. 72(b) (intermediate draft).	A magistrate judge must promptly conduct required proceedings *when assigned, without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense.*

c. If a condition is long and so is the main clause, foreshadow the condition and put it at the end of the sentence. If there are several conditions, a phrase such as *in the following circumstances* will serve to foreshadow the conditions at the end.

Before	After
(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.	(2) *Interlocutory Sales.* (A) In any of the following circumstances, the court may — on application of a party or some other warrant-holder — order the property or any part of it sold: (1) if the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action; (2) if the expense of keeping the property is excessive or disproportionate; or (3) if there is an unreasonable delay in securing the release of property. (B) The proceeds, or as much of them as will satisfy the judgment, may be ordered brought into court to await the disposition. Alternatively, the court may, upon motion, order the property delivered to a party who gives security under these rules.
Supp. R. Adm. & Mar. Claims E(9)(b)	

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Fed. R. Civ. P. 58.	(a) Subject to Rule 54(b), *the following rules* govern entry of judgment: (1) When the jury returns a general verdict or the court decides that a party may recover only a sum certain or costs, or that all relief should be denied, the clerk shall, unless the court orders otherwise, promptly prepare, sign, and enter the judgment without awaiting the court's direction. (2) When the court grants other relief or the jury returns a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, which the clerk shall enter.

d. If a condition states a definitional test to be met — not a standard of applicability — put it at the end of the sentence.

Example

A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing, except that a brief is timely filed *if it is mailed to the clerk by first-class mail, postage prepaid and bears a postmark showing that the document was mailed on or before the last day for filing.*

Fed. R. App. P. 25(a) (as revised and published for comment in October 1993).

e. Unearth hidden conditions to make them explicit, using the word *if*.

Before	After
A party must make advance arrangements with the clerk for the transportation and receipt of exhibits *of unusual bulk or weight.* Fed. R. App. P. 6(b)(2)(iii).	*If the exhibits are unusually bulky or heavy*, the party must arrange with the clerk in advance for their transportation and receipt.
The defenses specifically enumerated (1)–(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial *on application of any party*, unless the court order that the hearing and determination thereof be deferred until trial. Fed. R. Civ. P. 12(d).	*If a party so requests*, the defenses listed in Rule 12(b)(1)–(7) — whether made in a pleading or by motion — and any motion for judgment on the pleadings under Rule 12(c)(1) must be heard and determined before trial unless the court orders that the hearing and determination be deferred until trial.

2. *Exceptions.* Place exceptions where they can be read most easily.

a. If an exception needs to be generally alluded to before the sentence can be read without a miscue, allude to or state it briefly at the beginning of the sentence.

Before	After
(a) It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, *except to the extent required to show the jurisdiction of the court.* . . . Fed. R. Civ. P. 9(a).	**(a) Capacity.** (1) *Except when necessary to show that the court has jurisdiction*, a pleading need not aver: (1) a party's capacity to sue or be sued; (2) a party's authority to sue or be sued in a representative capacity; (3) the legal existence of a named party. (2) . . . .

b. If an exception cannot be stated briefly, put it at the end.

Example
(a) **Compulsory Counterclaim.** A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party, if the claim arises from the transaction or occurrence that is the subject matter of the opposing party's claim and does not require, for adjudication, the presence of a third party over whom the court cannot acquire jurisdiction. *But the pleader need not state the claim:* *(1) if, when the action began, the claim was the subject of another pending action; or* *(2) if the opposing party sued upon its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.* Fed. R. Civ. P. 13(a) (revised for style).
Hearsay is not admissible *except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.* Fed. R. Evid. 802.

3. *Interruptive Phrases*

a. Avoid interruptive phrases in midsentence by moving them to the beginning or end.

Before	After
The court, *on motion of the Government made within one year after the imposition of the sentence,* may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense . . . . Fed. R. Crim. P. 35(b).	*If the Government so moves within a year after sentence is imposed,* the court may reduce a sentence to reflect a defendant's later substantial help in investigating or prosecuting another person who has committed an offense . . . .

The court *at every stage of the proceeding* must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.	*At every stage of the proceeding*, the court must disregard all errors or defects that do not affect a substantial right of any party.

b. For interruptive phrases that must appear in midsentence — because of what they modify — use a double-dash construction instead of commas.

Before	After
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. Fed. R. Civ. P. 1.	These rules govern procedure in the United States district courts in all civil actions — whether arising at law, in equity, or in admiralty — except as stated in Rule 81.

c. Put adverbial interruptive phrases in the midst of the verb phrase, not before it.

Before	After
If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule *may allow* the action to be continued by or against the party's representative. Fed. R. Civ. P. 25(b).	If a party becomes incompetent, the district court *may*, on motion served according to (a)(3), *allow* the action to be continued by or against the party's representative.

4. *Modifiers*

a. To avoid ambiguity, place a modifier right beside the word or phrase it modifies.

Before	After
The notice shall be published in such newspaper or newspapers as the court may direct *once a week for four successive weeks* prior to the date fixed for the filing of claims. Supp. R. Adm. & Mar. Claims F(4).	Before the date fixed for the filing of claims, the notice must be published *once a week for four successive weeks* in a court-designated newspaper or newspapers.

b. If moving a misplaced modifier will not cure the ambiguity, rephrase the sentence.

Before	After
In an action begun by seizure of property, *in which no person need be or is named as a defendant*, any service . . . . Fed. R. Civ. P. 5(a).	If an action is begun by seizing property *and* no person is named as a defendant, service . . . .

5. *Prepositional Phrases*

a. Minimize *of*-phrases. They encumber a sentence.

Before	After
The content *of* the notice *of* appeal, the manner *of* its service, and the effect *of* the filing *of* the notice and *of* its service shall be as prescribed in Rule 3. Fed. R. App. P. 13(c).	Rule 3 prescribes what a notice *of* appeal must contain, how it should be served, the effect *of* its filing, and the effect *of* its service.

If a notice *of* appeal is mistakenly filed in the court *of* appeals, the clerk *of* the court *of* appeals shall note thereon the date on which it was received and transmit it to the clerk *of* the district court and it shall be deemed filed in the district court on the date so noted. Fed. R. App. P. 4(a)(1) — (five *of*s).	If a notice *of* appeal is mistakenly filed in the court *of* appeals, the clerk *of* that court must note thereon the date when it was received and send it to the district clerk. It is then considered filed in the district court on the date so noted. (Three *of*s.)

b. When feasible, change prepositional phrases to adjectives.

Before	After
. . . violation of a statute *of the United States* . . . . Supp. R. Adm. & Mar. Claims E(9)(a)	. . . violation of a *federal* statute . . . .
Unless provided otherwise by statute or order *of the court*, ... Fed. R. Civ. P. 54(d)(2)(B).	Unless a statute or *court order* provides otherwise, ...
The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties *to the action in the district court.* Fed. R. App. 5.1(a).	The petition must be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties *to the district-court action.*

c. When feasible, change prepositional phrases to possessives.

Before	After
Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . . Fed. R. App. P. 3(a).	*An appellant's failure* to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . .

6. *Antecedents*

a. Ensure that an antecedent precedes a referent, not vice-versa; use a noun twice rather than having a referent precede its antecedent.

Before	After
The pendency of an appeal *therefrom* does not render evidence of a conviction inadmissible. Fed. R. Evid. 609(e).	The pendency of an appeal from a conviction does not render evidence of that conviction inadmissible.

b. Ensure that an antecedent agrees in number with its referent.

Before	After
[T]he court may, on motion, order any person having possession or control of such *property or its proceeds* to show cause why *it* should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment . . . . Supp. R. Adm. & Mar. Claims C(5).	[T]he court may, on motion, order any person possessing or controlling the property or its proceeds to show cause: (A) if the property has not been sold, why a marshal or other person or organization having an arrest warrant should not take the property into custody; or (B) if the property has been sold or consists of U.S. currency, why the proceeds should not be paid into court pending judgment.

7. *Sentence Length.* Strive for an average sentence length of fewer than 25 words — 30 words at most.

   a. Break long compound sentences into two or more sentences.

Before	After
Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Fed. R. Crim. P. 23(a)(1).	Sentence must be imposed without unnecessary delay. But if some factor important to sentencing cannot be resolved promptly, the court may postpone sentencing for a reasonable time until that factor becomes resolvable.
A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. Fed. R. Civ. P. 23(e) (in full).	A class action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to all class members as the court directs.

   b. For purposes of computing sentence length, count a set-off subpart as a separate sentence.

8. *Punctuation*

a. End each subpart with a semicolon (with the next to last followed by a conjunction — *and* or *or*).

Before	After
Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant (A) who could be subjected to the jurisdiction in the state in which the district is located, or (B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or (D) when authorized by a statute of the United States. Fed. R. Civ. P. 4(k)(1).	Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; (B) who is a party under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons issues; (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335; or (D) when authorized by a federal statute.

b. Place a comma after an introductory phrase or subordinate clause.

Before	After
When a transfer is ordered the clerk shall transmit . . . . Fed. R. Crim. P. 21(c).	When a transfer is ordered, the clerk must send . . . .

c. In an enumerated series, use the serial comma before the conjunction.

Before	After
books, documents or tangible things possession, custody or control Fed. R. Civ. P. 45(a)(1).	books, documents, or tangible things possession, custody, or control [Commas inserted after *documents* and *custody*.]

d. Prefer dashes to parentheses.

Before	After
All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if . . . . Fed. R. Civ. P. 20(a).	Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in the same action as defendants if . . . .

e. Eliminate hyphens separating a prefix from a root word: *nonparty* and *pretrial*, not *non-party* and *pre-trial*.

f. Hyphenate phrasal adjectives.

Before	After
civil process clerk district court order trial preparation material	civil-process clerk district-court order trial-preparation material

9. End sentences emphatically — with a word or phrase that can receive stress.

Before	After
Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise. Fed. R. App. P. 15.1.	Unless the court orders otherwise, a party adverse to the National Labor Relations Board in an enforcement or a review proceeding must, in briefing and at oral argument, proceed first.

III. Structure

A. Organization of Rules

1. Organize rules logically and clearly so that referring to them is relatively easy. Do this by adhering as much as possible to these organizational principles:

   - broadly applicable before narrowly applicable.
   - general before specific.
   - more important before less important.
   - rules before exceptions.
   - chronological order of contemplated events.

2. Group similar items together, preferably introducing them with parallel headings and subheadings.

Before	After
(9) Disposition of Property; Sales. (a) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute. (b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules. (c) *Sales, Proceeds.* All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law. Supp. R. Adm. & Mar. Claims E(9) (in full).	**(9) Disposition of Property; Sales.** [Reorganize section as follows:] (a) Action for Forfeiture. (b) Sale. (1) *Generally.* (2) *Interlocutory Sale.* (c) Proceeds. (d) Alternative Interlocutory Remedies.

B. Structural Divisions

1. The parts of a rule are as follows:

Fed. R. Crim. P. 6(e)(3)(A)(ii)

Rule 6

(e) [subdivision]

(3) [paragraph]

(A) [subparagraph]

(ii) [item]

2. At any level, use a subpart only if there is at least one corresponding subpart.

3. Preface a subdivision with a brief descriptive heading. Headings are optional with paragraphs and subparagraphs. Add headings when they will help orient readers.

Before	After
Rule 23.1. Derivative Actions by Shareholders	**Rule 23.1. Derivative Actions by Shareholders**
In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court desires. Fed. R. Civ. P. 23.1 (in full).	(a) **Prerequisites.** One or more shareholders of a corporation or members of an unincorporated association may, on behalf of the corporation or association, bring a derivative action to assert and enforce a right that the corporation or association has failed to enforce. A derivative action may be maintained only if the plaintiff fairly and adequately represents the interests of similarly situated shareholders or members. (b) **Pleading Requirements.** The complaint must be verified and must allege: (1) that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership devolved on it after that time by operation of law; (2) that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and (3) the particular efforts, if any, made by the plaintiff to obtain the desired action from the directors or similar authority and, if necessary, from the shareholders or members, and the reasons for not obtaining the action or not making the effort. (c) **Dismissal and Compromise.** A derivative action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to shareholders or members as the court directs.

4. If redrafting results in new subparts, ensure that the numbering of oft-cited rules — such as Rule 12(b)(6) of the Civil Rules — does not change.

5. As part of the official format, use so-called "hanging indents," which reveal structure cleanly.

Before	After
(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . . Fed. R. Civ. P. 15(c).	**(c) Relation Back of Amendments.** (1) An amendment of a pleading relates back to the date of the original pleading when: (A) the applicable statute of limitations permits relation back; (B) the amendment asserts a claim or defense that arose from the conduct, transaction, or occurrence set forth . . . .

C. Enumerations

1. Set off enumerations whenever possible. Make new paragraphs, subparagraphs, and items in the order in which they naturally occur.

Before	After
Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written question; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admissions. Fed. R. Civ. P. 26(a)(5).	Parties may obtain discovery by one or more of the following methods: (A) depositions upon oral examination or written question; (B) interrogatories; (C) production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(A)(iii), for inspection and other purposes; (D) physical or mental examinations; and (E) requests for admissions.
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Fed. R. Evid. 1003.	A duplicate is admissible to the same extent as an original unless: (a) a genuine question is raised as to the authenticity of the original; or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

2. Enumerate at the end — not at the beginning — of a sentence.

Before	After
(a) The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court, shall constitute the record on appeal in all cases. Fed. R. App. P. 10.	(a) The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. *or* (a) The record on appeal consists of the following: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district court.

3. When introducing an enumeration, consider using an appositive such as *the following* to foreshadow what will follow.

Before	After
Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. Fed. R. Civ. P. 5(a).	Except as these rules provide otherwise, *any of the following papers* must be served on every party: (A) an order required by its terms to be served; (B) a pleading filed after the original complaint, unless the court orders otherwise because of numerous defendants; (C) a discovery paper required to be served upon a party, unless the court orders otherwise; (D) a written motion, other than one that may be heard ex parte; and (E) a written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper.

4. When stating more than one requirement — and the requirements can be stated in parallel form — put them in parallel enumerations.

Before	After
A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. Fed. R. Civ. P. 8(b).	In pleading, a party must: (A) state in short and plain terms the party's defenses to each claim asserted; and (B) admit or deny the averments on which the adverse party relies.

5. Avoid unnumbered "dangling" sections — that is, flush-left text that, following an enumeration, has no numbered designation.

Before	After
(1) Every subpoena shall (A) state the name of the court from which it is issued; and (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and (D) set forth the text of subdivisions (c) and (d) of this rule. *A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.* Fed. R. Civ. P. 45(a)(1).	(1) (A) Every subpoena must: (i) state the court in whose name it is issued; (ii) state the title of the action, the name of the court in which it is pending, and its civil action number; (iii) command the person to whom it is directed to attend and testify, or to produce and permit inspection and copying of designated books, documents, or tangible things in that person's possession, custody, or control, or to permit inspection of premises at a specified time and place; and (iv) set forth the text of Rule 45(c) and (d). (B) A command to produce evidence or to permit inspection may be included in a subpoena commanding appearance at a trial, hearing, or deposition, or may be issued by a separate subpoena.

6. Use bullets to ease the reading of a list when no citation to any individual item is likely. "Dangling" text is unobjectionable after a list of bulleted items.

Before	After
In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. Fed R. Civ. P. 8(c).	In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • discharge in bankruptcy; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver. If a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court must — if justice requires — treat the pleading as if the party had used the correct description.

IV. Words and Phrases

A. Verbose Phrasing

1. Omit every superfluous word.

Before	After
Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to *the provisions of* Rules 26 through 37. Fed. R. Civ. P. 11(d).	This rule does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 26 through 37.
Each court of appeals *by action of* a majority of *the circuit judges* in regular active service may . . . . Fed. R. App. P. 47(a).	Each court of appeals acting by a majority of its judges in regular active service may . . . . (Rule as published for comment in Oct. 1993.)
. . . a judgment for a sum of money . . . . Fed. R. Civ. P. 67. . . . a judgment for the payment of money . . . . Fed. R. Civ. P. 69.	. . . a money judgment . . . . a money judgment . . . .
The forms *contained* in the Appendix *of Forms* are sufficient under these rules and *are intended to* indicate the simplicity and brevity *of statement* which the rules contemplate. Fed. R. Civ. P. 84(a).	The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate. (Rule as published for comment in Oct. 1993.)
When the owner complies with *the requirements of* Rule F(1), ... Supp. R. Adm. & Mar. Claims F(2) (intermediate draft).	When the owner complies with Rule F(a), ...

2. Uncover so-called "buried verbs" — i.e., abstract nouns usually ending in the suffixes *-tion, -sion, -ment, -ence, -ance, -ity* — and make them into verbs. Doing so has several advantages:

   - it saves words by helping eliminate prepositional phrases;
   - it increases readability by forcing the writer to be explicit about implied actors; and
   - it makes the style more lively by substituting action verbs in place of stagnant *be*-verbs.

Before	After
Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on all parties to the action in the trial court. Fed. R. App. P. 21(a).	*A party applying* for a writ of mandamus or of prohibition must file a petition with the clerk of the court of appeals with proof of service on all parties to the action in the trial court. (Rule as revised and published for comment in Oct. 1993.)
Upon *receipt of* the record, the clerk . . . . Fed. R. App. P. 6(b)(2)(iv). Upon *receipt of* such notice, the clerk . . . . Fed. R. App. P. 6(d).	Upon *receiving* the record, the clerk . . . . Upon *receiving* that notice, the clerk . . . .
If without substantial justification a certification *is made in violation of* this rule . . . . Fed. R. Civ. P. 26(g)(2).	If a certification *violates* this rule without substantial justification . . . .
The complaint shall contain a short and plain *statement* of . . . . Fed. R. Civ. P. 71A(c)(2).	The complaint must briefly and plainly *state* . . . .

3. Collapse clauses into phrases when possible. Instead of *case to be tried without a jury*, use *nonjury trial* or *nonjury case.*

B. Words of Authority

1. Use words of authority in accordance with the following glossary:

must	=	is required to
may	=	has discretion to is permitted to has a right to
is entitled to	=	has a right to
will	=	(expresses a future contingency)

2. Replace *shall* with *must* or some other, more appropriate term. [For an alternative, see #4.]

3. Avoid roundabout wordings to create a duty.

Before	After
A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *is under a duty to* supplement or correct . . . . Fed. R. Civ. P. 26(e) (intermediate draft).	A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *must* supplement or correct . . . .

4. In the alternative to #2, use *shall* exclusively to mean "has a duty to." Avoid it when it does not impose a duty on the subject of the clause. [Note: Either the convention in #2 or this convention #4 should appear consistently in one set of revisions: the two should not be mixed.]

5. Change *may not* to *must not*.

Before	After
The judge presiding at the trial *may not* testify in that trial as a witness. Fed. R. Evid. 605.	The judge presiding at the trial *must not* testify in that trial as a witness.

C. Relative Pronouns

1. Use *that*, not *which*, as a restrictive relative pronoun.

Before	After
Any such motion *which* is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Fed. R. App. P. 4(a)(5).	Any such motion *that* is filed before the prescribed time expires may be *ex parte* unless the court requires otherwise.
Statements *which* are not hearsay. Fed. R. Evid. 802(d) (heading).	Statements *that* are not hearsay.

2. Use *which* as a nonrestrictive relative pronoun.

3. To avoid the problem of the so-called "remote relative," place the relative pronoun *that* or *which* directly after the word it modifies.

Before	After
[A] party shall, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible things in the possession, custody, or control of the *party that* are relevant . . . . Fed. R. Civ. P. 26(a)(1)(B).	[A] party must, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible things *that are* in the possession, custody, or control of the party *and* are relevant . . . .

D. Conjunctions

1. Use *but* instead of *and* to introduce a contrasting idea.

Before	After
The remedy herein provided is in addition to *and* in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. Fed. R. Civ. P. 22(2).	This rule . . . supplements — *but* does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361, and these rules govern actions under those statutes.

2. Use *But* to begin a sentence instead of *However.*

Before	After
Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction . . . . *However,* evidence of a conviction more than 10 [sic] years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice . . . . Fed. R. Evid. 609(b).	Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . . ***But even*** evidence of an older conviction is not admissible unless the proponent gives the adverse party sufficient advance written notice . . . .

E. Ambiguity and Undesirable Vagueness. Sharpen the wording when doing so achieves the same result more clearly.

Before	After
Demurrers, pleas, and exceptions for insufficiency of a pleading *shall not be used.* Fed. R. Civ. P. 7(c).	Demurrers, pleas, and exceptions for insufficiency of a pleading *are abolished.*
The discovery plan must *indicate* the parties' views . . . . Fed. R. Civ. P. 26(f) (intermediate draft).	The discovery plan must *state* the parties' views . . . .
The plaintiff *shall* also give security for costs and, *if the plaintiff elects* to give security, for interest at the rate of 6 percent per annum from the date of the security. Supp. R. Adm. & Mar. Claims F(1).	An owner *must* give security for costs and, when doing so, must include 6 percent annual interest from the date of the security.

F. Specific Words and Forms to Avoid

- *every*: use *a* or *an*.

- *except as*: use *unless* when referring to some future action by the court or by the parties. E.g., "*Except as* [read *Unless*] otherwise stipulated or directed by the court, ..." Fed. R. Civ. P. 26(a)(2)(B).

  Except as is appropriate when referring to something that an existing rule does. E.g., "*Except as* otherwise provided in Rule 26(b), ..."

- *except that*: use *but* or some other, more pointed term. E.g., "[T]he parties may by written stipulation . . . modify other procedures . . . , *except that* [read *but*] stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may . . . be made only with the approval of the court." Fed. R. Civ. P. 29.

- *except when*: use *unless*. E.g., "*Except when* [read *Unless*] a federal statute or these rules provide otherwise, ..."

- ***except with [+ noun]***: use *unless [+ verb]*. E.g., "*Except with the written consent of the defendant,* [read *Unless the defendant consents in writing,*] the report *shall* [read *must*] not be submitted to the court . . . ." Fed. R. Crim. App. 32(b)(1).

- ***following***: if it means "after," write *after*.

- ***hereof, herein, thereof, therein,* and the like**: use everyday words instead — especially demonstrative pronouns such as *that, this, these,* and *those.*

- ***if any***: try placing *any* before the noun. E.g., "[T]he complaint must further show . . . *what voyages or trips, if any,* [read *any voyages or trips*] *she* [read *the ship*] has made since the voyage or trip on which the claims sought to be limited arose." Supp. R. Adm. & Mar. Claims F(2).

- ***in the event that***: use *if*.

- ***limitation***: unless referring to a statute of limitations, use *limit*.

- ***not later than***: use *no later than* or *within*. "*Within* 10 days after entry of judgment" is usually better than "*no later than* 10 days after entry of judgment," but the latter may be needed if you want to allow the act to be done before the entry of judgment as well as in the following 10 days.

- ***partially***: use *partly*.

- ***portion***: use *part*.

- ***prior to***: use *before*. E.g., "The court shall inform counsel of its proposed action upon the requests *prior to* [read *before*] their arguments to the jury." Fed. R. Crim. P. 30.

- ***provided that, provided however that***: reword.

- ***pursuant to***: use *under Rule 3*, not *pursuant to Rule 3*; *in accordance with 26 U.S.C. § 1333*, not *pursuant to 26 U.S.C. § 1333*. E.g., "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court *pursuant to* [read *in accordance with*] statutory authority or by Act of Congress." Fed. R. Evid. 802./ "Depositions may

be taken in a foreign country . . . *pursuant to* [read *under*] any applicable treaty or convention . . . ." Fed. R. Civ. P. 28(b).

- ***said*, adj.:** use *the, this,* or *that.*

- ***so [verb +ed] as to*:** use *[verb +ed] to.*

- ***subsequent to*:** use *after.* E.g., "Immediately upon the entry of an order made on a written motion *subsequent to* [read *after*] arraignment[,] the clerk . . . ." Fed. R. Crim. P. 49(c).

- ***such*, adj.:** use *the, this,* or *that.*

- ***such [noun +s] as*:** use *any [noun +s] that* or *a [noun +s] that.* E.g., "At the close of the evidence or at *such earlier time during the trial as the court reasonably directs* [read *an earlier time during the trial, as the court reasonably directs,*] any party may file written requests . . . ." Fed. R. Crim. P. 30./ "[T]he court may, on *such terms and conditions as are just* [read *on just terms*], order . . . ." Fed. R. Civ. P. 26(c)(2).

- ***therefor*:** avoid altogether, often merely by deleting it, sometimes by writing *for it* or *for them.*

- ***there is, there are*:** use only if you are referring to the existence of something.

- ***transmit*:** use *send.* E.g., "The clerk *shall transmit* [read *must send*] the notice to the chief judge . . . ." Fed. R. Crim. P. 49(e).

- ***upon*:** prefer *on.* Thus, *service on a defendant*, not *service upon a defendant.* But use *upon* when introducing a condition or event — e.g.: "*Upon* being served with a request, a party must . . . ."

- ***whenever*:** use *when.* E.g., "*Whenever* [read *When*] a deposition is taken at the instance of the government, or *whenever* [read *when*] a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct . . . ." Fed. R. Crim. P. 15(b).

G. Other Stylistic Preferences

1. *Cross-References.* Omit the full reference to a rule number when not needed for clarity. For example, typically when referring to a provision on the same level within the same rule, subdivision, or paragraph, you might state:

    (a) Except as provided otherwise in (b), a party must . . . .

    But include an appropriate reference when needed for clarity — particularly if the other provision is on a different level or is not near the reference. Repeating the rule number — *subject to Rule 4(h)* — is shorter and better for courts' and practitioners' quotations than *subject to subdivision (h) of this rule.*

2. *Particular Words*

    - *may . . . only*: this is an alternative to *must not . . . except* for a conditional prohibition. E.g., "A request *may* be served *only* after . . . ."

    - *only*: place this word carefully before the correct word.

    - *otherwise*: For emphasis, this adverb should usually end a clause — e.g., "Unless this court *directs otherwise* . . . ," not "Unless this court *otherwise directs.*" But sometimes, for the sake of parallel phrasing, this term should precede the verb — e.g.: "Unless *otherwise* directed by the court or stipulated by the parties . . . ."

    - *will*: use for the future tense, not as an imperative.

L. RALPH MECHAM
DIRECTOR

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ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

February 23, 1995

FRANCIS F. SZCZEBAK
CHIEF
BANKRUPTCY JUDGES DIVISION

Item #4

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

RE: Proposed Amendment to Rule 4004(c)

Dear Mr. McCabe:

The Committee on the Administration of the Bankruptcy System at its January 1995 meeting approved the imposition of a new $15.00 fee to fund an additional payment in that amount to a trustee who serves in a bankruptcy case. The new fee will implement 11 U.S.C. § 330(b)(2), as added to the Bankruptcy Code by section 117 of the Bankruptcy Reform Act of 1994.

The new #15.00 trustee surcharge fee will be payable in a chapter 7 case at the time of filing and may be paid in installments. The fee also will be payable by the moving party or the debtor on notice when a case under another chapter converts to chapter 7.

The Committee on the Administration of the Bankruptcy System has transmitted its recommendations concerning this fee to the Committee on Court Administration and Case Management, which has authority over miscellaneous fees charged in all federal courts. It is expected that the new fee will commence August 1, 1995. The fee will be charged in all chapter 7 cases filed on or after that day and all cases converted to chapter 7 on or after that date. It will be payable to trustees serving in cases filed on or after October 1, 1995. A copy of the proposed language to amend the miscellaneous fee schedule for bankruptcy courts is attached.

The preliminary draft of amendments to Federal Rule of Bankruptcy Procedure 4004(c), as proposed by the Advisory Committee on Bankruptcy Rules, would permit a court to delay issuing a discharge to a chapter 7 debtor if the debtor has not paid in full any filing fee or other fee payable at the commencement of a case. The Committee on the Administration

of the Bankruptcy System supports the proposed amendment, but requests that the final draft be further amended to include the trustee surcharge fee that will be payable when a case under another chapter converts to chapter 7. This further amendment could be accomplished by inserting on line 23 of the preliminary draft after the word "Code," the words "or the conversion of a case to chapter 7."

Thank you for the opportunity to comment.

Sincerely,

Francis F. Szczebak
Chief
Bankruptcy Judges Division

cc: Hon. Paul A, Magnuson
Hon. Paul Mannes
Prof. Alan N. Resnick

Attachment

ATTACHMENT A

TRUSTEE FEE SURCHARGE

[Follows notice/administrative fee, Item (8), in the Judicial Conference Schedule of Fees following 28 U.S.C. § 1930.]

(8.1) Upon filing of a petition under chapter 7 of the Bankruptcy Code, the petitioner shall pay $15 to the clerk of the court for payment to the trustee serving in the case as provided in 11 U.S.C. § 330(b)(2). An application to pay the fee in installments may be filed in the manner set forth in Federal Rules of Bankruptcy Procedures 1006(b).

(8.2) Upon granting a motion to convert a case to chapter 7 of the Bankruptcy Code or a notice of conversion pursuant to section 1208(a) or section 1307(a) of the Code, $15 shall be paid to the clerk of the court for payment to the trustee serving in the chapter 7 case as provided in 11 U.S. C. § 330(b)(2). If the trustee serving in the case before the conversion is the movant, the fee shall be payable from the estate in the superseded case and only to the extent that there is such an estate.

Item #5

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS READY FOR PUBLICATION

DATE: FEBRUARY 23, 1995

At the meetings of the Advisory Committee held in September and December of 1994, proposed amendments to the following Bankruptcy Rules were approved and (subject to further stylistic improvements) are ready to be presented to the Standing Committee with a request for publication:

(1) Rule 1020 (New) (election to be considered a small business in a chapter 11 case);

(2) Rule 2002(a) (notice of meeting called for the purpose of electing a chapter 11 trustee);

(3) Rule 2002(n) (caption of notice);

(4) Rule 2007.1 (election of chapter 11 trustee);

(5) Rule 3002 (filing claims in chapter 7, 12, and 13 cases);

(6) Rule 3018 (fixing record date for voting purposes);

(7) Rule 3021 (record date for distribution purposes);

(8) Rule 8001(a) (appeals from orders regarding exclusivity period);

(9) Rule 8001(e) (elections to have appeal heard by the district court);

(10) Rule 8020 (damages and costs for frivolous appeal);

(11) Rule 9015 (jury trials);

(12) Rule 9035 (applicability of rules in Alabama and North Carolina)

The proposed amendments to these rules are attached for your information.

You may recall that proposed amendments to Rule 3002 approved by the Committee before the Bankruptcy Reform Act of 1994 were published for comment in September 1994. In view of the Reform Act, the Advisory Committee approved different amendments to Rule 3002 at the December 1994 meeting. I included the amendments approved at the December meeting in the attached list of proposed amendments ready for publication. However, the Committee may decide at the March 1995 meeting that these proposed amendments to Rule 3002 be included in the package of proposals that will be presented to the Standing Committee for final approval in July 1995 (rather than presented for publication only). If the attached draft is included in the package of amendments presented to the Standing Committee for final approval in July, it will be deleted for the package to be presented for publication.

Rule 3017. Several amendments to Rule 3017 (Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases) were approved by the Advisory Committee and should be included in the package to be published in 1995. At the September 1994 meeting, amendments to Rule 3017(d) were approved to give the court flexibility in determining the record date for the purpose of distribution of vote solicitation materials. Other amendments were tentatively approved at the December 1994 meeting to provide for small business cases under the 1994 Reform Act -- but the Committee asked me to move the "small business" provisions to a new Rule.

A separate memorandum and agenda item will focus on all proposed amendments to Rule 3017 and a new proposed Rule 3017.1 (small businesses) for the March 1995 meeting. In any event, it is important that proposed amendments to Rule 3017(d) dealing with the record date for solicitation purposes be published at the same time that the proposed amendments to Rule 3018 (record date for voting purposes) are published.

PROPOSED AMENDMENTS APPROVED BY THE ADVISORY COMMITTEE IN SEPTEMBER AND DECEMBER 1994 AND READY FOR PUBLICATION
[Subject to Stylistic Improvements by the Style Subcommittee]

Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case

In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election no later than 60 days after the date of the order for relief or by a later date as the court, for cause, may fix.

COMMITTEE NOTE

This rule is designed to implement §§ 1121(e) and 1125(f) that were added to the Code by the Bankruptcy Reform Act of 1994.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court ~~may direct~~ directs, shall give the debtor, the trustee, all creditors and indenture trustees at least ~~not less than~~ 20 days' ~~days~~ notice by mail of:

(1) the meeting of creditors under ~~pursuant to~~ § 341 or § 1104(b) of the Code;

* * * *

(n) CAPTION. The caption of every notice given under this rule shall comply with Rule 1005. The caption of every notice required to be given by the debtor to a creditor shall include the information required to be in the notice by § 342(c) of the Code.

COMMITTEE NOTE

Paragraph (a)(1) is amended to include notice of a meeting of creditors convened under § 1104(b) of the Code for the purpose of electing a trustee in a chapter 11 case. The court for cause shown may order the 20-day period reduced under Rule 9006(c)(1).

Subdivision (n) is amended to conform to the 1994 amendment to § 342 of the Code. As provided in § 342(c), the failure of a notice given by the debtor to a creditor to contain the information required by § 342(c) does not invalidate the legal effect of the notice.

[Reporter's Note: Unrelated changes to Rule 2002 are included in the package of proposed amendments that will be presented to the Standing Committee in July 1995 for final approval -- any stylistic changes in the first paragraph of Rule 2002(a) finally approved by the Standing Committee will be made to the above draft prior to publication]

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner pursuant to § 1104(a) or § ~~1104(b)~~ 1104(c) of the Code shall be made in accordance with Rule 9014.

(b) ELECTION OF TRUSTEE.

(1) Request for an Election. A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, a person appointed trustee under § 1104(d) shall serve as trustee.

(2) Manner of Election and Notice. An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. A proxy for the purpose of

voting in the election may be solicited by a committee appointed under § 1102 of the Code and by any other party entitled to solicit a proxy under Rule 2006.

(3) Application For Approval of Appointment and Resolution of Disputes. If it is not necessary to resolve a dispute regarding the election or if all disputes have been resolved by the court, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment of the elected person under subdivision (c) of this rule. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. If no motion for the resolution of the dispute is filed within 10 days after the date of the creditors' meeting called under § 1104(b) of the Code, a person appointed by the United States trustee in accordance with § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.

~~(b)~~ (c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee elected

under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner ~~pursuant to § 1104(c)~~ under § 1104(d) of the Code, shall be made ~~only~~ on application of the United States trustee~~,~~. The application shall state ~~stating~~ the name of the person appointed~~, the names of the parties in interest with whom the United States trustee consulted regarding the appointment,~~ and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

COMMITTEE NOTE

This rule is added to implement the 1994 amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case.

The procedures for reporting disputes to the court and the time limit for filing a motion to resolve any disputes derive from similar provisions Rule 2003(d) applicable in chapter 7 cases. Because the person elected must be "disinterested," the United States trustee must file an application for court approval of the elected person in accordance with Rule 2007.1(c).

The word "only" is deleted from subdivision (b), redesignated as subdivision (c), to avoid any negative inference with respect to the availability of procedures for obtaining review of the United States trustee's acts or failure to act under Rule 2020.

[Reporter's Note: Proposed amendments to Rule 3002 were published for comment in 1994. The following draft was approved in December 1994 to substitute for the published draft. If the following draft is included in the package of amendments presented to the Standing Committee for final approval in July 1995, it will be deleted for the package to be presented for publication in 1995]

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest ~~in accordance with this rule~~ for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

****

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim ~~shall be filed within~~ is timely filed if it is filed no later than 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed before 180 days after the date

of the order for relief. On motion of ~~the United States, a state, or subdivision thereof~~ a governmental unit made before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the ~~United States, state or subdivision thereof~~ governmental unit.

****

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

COMMITTEE NOTE

The amendments are designed to conform to §§ 502(b)(9) and 726(a)of the Code as amended by the Bankruptcy Reform Act of 1994.

The Reform Act amended § 726(a)(1) and added § 502(b)(9) to the Code to govern the effects of a tardily filed claim. Under § 502(b)(9), a tardily filed claim must be disallowed if an objection to the proof of claim is filed, except to the extent that holder of a tardily filed claim is entitled to distribution under § 726(a)(1), (2), or (3).

The phrase "in accordance with this rule" is deleted from Rule 3002(a) to clarify that the effect of filing a proof of claim after the expiration of the time prescribed in Rule 3002(c) is governed by § 502(b)(9) of the Code,

rather than by this rule.

References to "the United States, a state, or subdivision thereof" in paragraph (1) of subdivision (c) are changed to "governmental units" to avoid different treatment among foreign and domestic governments.

[Reporter's Note: The following amendments to Rule 3018 should be published for comment only together with proposed amendments to Rule 3017 relating to the record date for vote solicitation purposes]

Rule 3018. Acceptance or Rejection of Plans

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or another date as the court may, after notice and a hearing, for cause fix. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a

delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

The court may set a record date under subdivision (a) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed under Rule 2002(b).

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed under Rule 3017(d).

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders ~~of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security~~ whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) ~~and which~~ that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

This rule also is amended to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by providing that they shall receive a distribution only if their claims have been allowed. Finally, the amendments clarify that distributions are to be made to all interest holders -- not only those that are within the definition of "equity security holders" under section 101 of the Code -- whose interests have not been disallowed.

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal

(a) APPEAL AS OF RIGHT; HOW TAKEN. An appeal from a ~~final~~ judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An Appellant's failure ~~Failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~ a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) ~~shall~~ contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) APPEAL BY LEAVE; HOW TAKEN. An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof

of service in accordance with Rule 8008.

* * * *

(e) ELECTION TO HAVE APPEAL HEARD BY THE DISTRICT COURT ~~CONSENT TO APPEAL TO BANKRUPTCY APPELLATE PANEL. Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b) or within 30 days of the filing of the notice of appeal, whichever is later.~~ An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the Bankruptcy Reform Act of 1994 which amended 28 U.S.C. § 158. As amended, a party may -- without obtaining leave of the court -- appeal from an interlocutory order or decree of the bankruptcy court issued under § 1121(d) of the Code increasing or reducing the time periods referred to in § 1121.

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court.

Rule 8020. Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

COMMITTEE NOTE

This rule is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, has the authority to award damages and costs to an appellee if it finds that the appeal is frivolous. By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.

Rule 9015. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R.Civ.P., and Rule 81(c) F.R.Civ.P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38(b) F.R.Civ.P. shall be filed in accordance with Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed under Rule 38(b) F.R.Civ.P., and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 USC § 157(e) by jointly or separately filing a statement of consent within any applicable time limits specified by local rule.

COMMITTEE NOTE

This rule provides procedures relating to jury trials. This rule is not intended to expand or create any right to trial by jury where such right does not otherwise exist.

Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with any federal statute ~~the provisions of title 11 and title 28 of the United States Code~~ effective in the case.

COMMITTEE NOTE

Certain statutes that are not codified in title 11 or title 28 of the United States Code, such as § 105 of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, relate to bankruptcy administrators in the judicial districts of North Carolina and Alabama. This amendment makes it clear that the Bankruptcy Rules do not apply to the extent that they are inconsistent with these federal statutes.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULE 2007.1 (ELECTION OF CHAPTER 11 TRUSTEE)

DATE: MARCH 1, 1995

Marvin E. Jacob, Esq., and Una M. O'Boyle, Esq., submitted a memorandum dated January 18, 1995, (copy attached) regarding Suggested Interim Bankruptcy Rule No. 1 (Election of a Trustee in a Chapter 11 Reorganization Case) that was approved by the Advisory Committee at the December 1994 meeting. Their memorandum makes several suggestions for changing the suggested interim rule.

The interim rule has been approved by the Advisory Committee and the Standing Committee and was sent to district and bankruptcy courts with a recommendation that they be adopted as local rule until a national rule is promulgated. However, the comments of Mr. Jacob and Ms. O'Boyle should be treated as comments to the proposed amendments to Bankruptcy Rule 2007.1 on the same subject. The suggested interim rule and the proposed amendments to Rule 2007.1 are substantially the same. The proposed amendments to Rule 2007.1 are included in the package of proposed amendments that are expected to be presented to the Standing Committee in July 1995.

Several of the comments in the memorandum of Mr. Jacob and Ms. O'Boyle were raised and discussed at the Advisory Committee meeting in December. For example, rather than the U.S. trustee

appointing the person elected to serve as trustee (subject to court approval), they prefer that the U.S. trustee merely submit to the court the name of the person elected. Then the person elected should file the application for appointment, followed by the court making the appointment. Again, the Committee discussed these alternatives and concluded that the U.S. trustee should make the appointment subject to the court's approval. I do not suggest that the Committee revisit these issues.

However, Mr. Jacob and Ms. O'Boyle make two recommendations that I think are worth considering -- these were not discussed at the December meeting. First, they suggest that notice of, or a copy of the U.S. trustee's report on, a disputed election should be sent to the party who requested the election and to the creditor's committee so that they could respond by filing a motion to resolve the dispute. Second, they suggest that the ten-day period in which a party may move to resolve a disputed election should not run from the meeting at which the election was held, but should run from the date the trustee gives notice of the filing of a report on the disputed election. I agree with both of these suggestions.

If the Committee agrees with these two suggestions, it should consider the following draft. Those amendments shown in ***bold italics*** (contained only in Rule 2007.1(b)(3)) are those that were not previously approved by the Committee and which conform to these two suggested changes proposed by Mr. Jacob and Ms. O'Boyle.

Rule 2007. 1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

(a) ORDER TO APPOINT TRUSTEE OR EXAMINER. In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner pursuant to § 1104(a) or § ~~1104(b)~~ 1104(c) of the Code shall be made in accordance with Rule 9014.

(b) ELECTION OF TRUSTEE.

(1) Request for an Election. A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Rule 5005 within the time prescribed by § 1104(b) of the Code. Pending court approval of the person elected, a person appointed trustee under § 1104(d) shall serve as trustee.

(2) Manner of Election and Notice. An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. A proxy for the purpose of voting in the election may be solicited by a committee appointed under § 1102 of the Code and by any other party entitled to solicit a proxy under Rule 2006.

(3) Application For Approval of Appointment and Resolution of Disputes. If it is not necessary to

resolve a dispute regarding the election or if all disputes have been resolved by the court, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment of the elected person under subdivision (c) of this rule. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. ***The United States trustee, no later than the date on which the report is filed, shall mail a copy of the report to any party in interest that made a request under § 1104(b) and to any committee appointed under § 1102 of the Code***. If no motion for the resolution of the dispute is filed within 10 days after the ***United States trustee files the report*** ~~***date of the creditors' meeting called under § 1104(b) of the Code***~~, a person appointed by the United States trustee in accordance with § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee.

~~(b)~~ (c) APPROVAL OF APPOINTMENT. An order approving the appointment of a trustee elected under § 1104(b) or appointed under § 1104(d), or the appointment of an examiner ~~pursuant to § 1104(c)~~ under § 1104(d) of the Code, shall be made ~~only~~ on application of the United States trustee~~,~~. The application shall state ~~stating~~ the name of the person

appointed~~, the names of the parties in interest with whom the United States trustee consulted regarding the appointment,~~ and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. Unless the person has been elected under § 1104(b), the application shall state the names of the parties in interest with whom the United States trustee consulted regarding the appointment. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

COMMITTEE NOTE

This rule is added to implement the 1994 amendments to § 1104 of the Code regarding the election of a trustee in a chapter 11 case.

The procedures for reporting disputes to the court and the time limit for filing a motion to resolve any disputes derive from similar provisions Rule 2003(d) applicable in chapter 7 cases. Because the person elected must be "disinterested," the United States trustee must file an application for court approval of the elected person in accordance with Rule 2007.1(c).

The word "only" is deleted from subdivision (b), redesignated as subdivision (c), to avoid any negative inference with respect to the availability of procedures for obtaining review of the United States trustee's acts or failure to act under Rule 2020.

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January 18, 1995

Professor Alan Resnick
Hofstra Law School
121 Hofstra University
Hempstead, New York 11550

Dear Professor Resnick:

I submit herewith for your consideration several comments on Rule 1 of the Suggested Interim Bankruptcy Rules. I hope you find these comments helpful.

I also take this opportunity to enclose our recent monograph on the *Bankruptcy Reform Act of 1994.*

Should you have any questions, please do not hesitate to call me.

Sincerely,

Marvin E. Jacob

MEJ:ls
Enclosures

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Weil, Gotshal & Manges
M E M O R A N D U M

January 18, 1995

TO: Professor Alan Resnick

FROM: Marvin E. Jacob
Una M. O'Boyle

RE: Local Rules for Implementation of Certain Provisions of the Bankruptcy Reform Act of 1994

I. Comments to Rule 1 (the "Rule") of Suggested Interim Bankruptcy Rules.

Section 1104(b) of the Bankruptcy Code was amended by section 211 of the Bankruptcy Reform Act of 1994 to allow "creditors in a chapter 11 case to elect their own trustee." The suggested Rule relating to the implementation of section 1104(b), as amended, however, does not appropriately implement legislative intent.

The suggested Rule provides that if there is no dispute regarding the election of the chapter 11 trustee, the United States Trustee ("US Trustee") shall promptly appoint the person elected as trustee. This "appointment" by the US Trustee seems at odds with the intent of Congress to remove the US Trustee from the process where creditors have elected a trustee. In fact, under the proposed Rule the election would be followed by two appointments: one by the US Trustee and another by the Court. A better procedure, it seems, would be to require the US Trustee simply "to transmit to the court the name and address of [the]

person elected trustee..." as set forth in Bankruptcy Rule 2003(d), and then have the bankruptcy court appoint the chapter 11 trustee subject to court approval of the trustee's application. Similar to the procedure under former Bankruptcy Rule 10-202, the court should be required to notify the elected trustee of his appointment and inform him of how he may qualify.

Further, the Rule provides that the US Trustee is required to file the application for approval of the appointment of the elected trustee. The Rule should require, instead, that the application be filed by the elected party. Since the US Trustee is no longer selecting the trustee, there is no reason to impose upon the US Trustee the responsibility of filing the approval application.

Moreover, the US Trustee should not be required to file the application for approval of the appointment of the trustee because the elected person may not have the support of the US Trustee. On the contrary, the US Trustee may object to the approval of the appointment once the elected trustee has filed the requisite application setting forth the person's connections with the debtor, creditors and other parties in interest, etc.

Finally, if a dispute regarding the election exists, the suggested Rule requires the US Trustee to file promptly a report informing the court of the dispute. The Rule further provides that if no motion for the resolution of the dispute is

filed within 10 days after the date the creditors' meeting was called, the US Trustee shall appoint a person to serve as chapter 11 trustee. The Rule should provide, but does not, that creditors or others who moved for the appointment and the creditors' committee, be served with a notice of the dispute and/or the US Trustee's report, in order to allow them to respond. In light of the fact that the failure to file a motion for the resolution of the dispute within ten days, results in the frustration of the election, adequate notice to affected parties is imperative In any event the ten day period should run from the date the U.S. Trustee's report is filed, not the date the creditors' meeting was called.

II. Proposed Changes to Suggested Interim Bankruptcy Rule 1

Rule 1. Election of Trustee in a Chapter 11 Reorganization Case.

(c) APPLICATION FOR APPROVAL OF APPOINTMENT AND RESOLUTION OF DISPUTES. If it is not necessary to resolve a dispute regarding the election of the trustee or if all disputes have been resolved by the court, the United States trustee shall promptly transmit to the court the name and address of the person elected to be trustee. The court shall immediately notify the person elected of the election results, inform him of how he may qualify, and shall require him forthwith to notify the court of his acceptance or rejection of the office. A trustee shall

qualify as provided in § 322 of the Code. An order approving the election of a trustee pursuant to § 1104(b) of the Code shall be made only on application of the elected trustee accompanied by a verified statement setting forth the trustee's connections with the debtor, creditors, any other party in interest, and their respective attorneys and accountants. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute and give notice of the report in the manner provided for notice under Bankruptcy Rule 2002(f) and to all parties who moved for the appointment of a trustee. If no motion for the resolution of the dispute is filed within 10 days after the date notice of the filing of such report is given, a person appointed by the United States trustee in accordance with § 1104(d) of the Code and approved in accordance with Bankruptcy Rule 2007.1(b) shall serve as trustee.

M.E.J.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULES 3017 and 3018; NEW RULE 3017.1

DATE: JANUARY 11, 1995

At the September 1994 meeting, the Advisory Committee approved proposed amendments to Rules 3017(d) and 3018(a) to provide flexibility in fixing the record date for the purpose of determining the parties entitled to receive solicitation materials and to vote on a chapter 11 plan.

At the December 1994 meeting, the Advisory Committee approved a suggested interim rule governing conditional and final approval of a disclosure statement in a "small business case." The Advisory Committee also approved similar language to be added to the national rules to govern the same topic. My recommendation to amend the national rules would have added a new subdivision (f) to Rule 3017 to deal with small business cases. Although the Committee approved my recommendation, it asked me to draft a separate new rule governing this topic, rather than to add it to Rule 3017.

Consistent with the Committee's request, I drafted a new rule (Rule 3017.1) on disclosure statements in small business cases. I also added a phrase in Rule 3017(a) to make it clear that it does not apply in small business cases.

At the December meeting, a suggestion was made that the committee note to Rule 3017.1 indicate that conditional approval of a disclosure statement in a small business case does not

constitute the hearing on the disclosure statement for the purpose of applying the deadline for secured creditors to make an election under § 1111(b). Rule 3014 provides that a § 1111(b) election must be made before the conclusion of the hearing on the disclosure statement. In drafting the note, I realized that Rule 3014 would have a gap in small business cases if it is not amended. If a disclosure statement is conditionally approved in a small business case, and there are no objections to the disclosure statement, there will never be a hearing on the disclosure statement. Therefore, there will be no deadline for secured creditors to make a § 1111(b) election. I therefore drafted a proposed amendment to Rule 3014 to provide for this situation.

Attached are drafts of Rules 3017, 3017.1, 3018, and 3014 for your consideration at the March 1995 meeting.

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) HEARING ON DISCLOSURE STATEMENT AND OBJECTIONS ~~THERETO~~. Except as provided in Rule 3017.1, after a disclosure statement is filed in accordance with Rule 3016(b) ~~Following the filing of a disclosure statement as provided in Rule 3016(c)~~, the court shall hold a hearing on ~~not less than~~ at least 25 ~~days~~ days' notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider ~~such~~ the disclosure statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission, and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code and any ~~such~~ other entity ~~as may be~~ designated by the court, at any time before the disclosure statement is approved ~~prior to approval of the disclosure statement~~ or by ~~such~~ an earlier date as the court may fix. In a chapter 11

reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed ~~pursuant to~~ under this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) DETERMINATION ON DISCLOSURE STATEMENT. Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) DATES FIXED FOR VOTING ON PLAN AND CONFIRMATION. On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS AND EQUITY SECURITY HOLDERS. On approval of a disclosure statement, ~~unless~~ -- except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders~~,~~ -- the debtor in possession, trustee, proponent of the plan, or clerk as ~~ordered by~~ the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case

shall transmit to the United States trustee,

(1) the plan~~,~~ or a court approved summary of the plan;

(2) the disclosure statement approved by the court;

(3) notice of the time within which acceptances and rejections of ~~such~~ the plan may be filed; and

(4) any ~~such~~ other information as the court may direct including any court opinion ~~of the court~~ approving the disclosure statement or a court approved summary of the opinion.

In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders in accordance with ~~pursuant to~~ Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the ~~opinion of the~~ court opinion is not transmitted or only a summary of the plan is transmitted, the ~~opinion of the~~ court opinion or the plan shall be provided on request of a party in interest at the plan proponent's expense ~~of the proponent of the plan~~. If the court orders that the disclosure statement

and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense ~~of the proponent of the plan~~, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record on ~~at~~ the date the order approving the disclosure statement is ~~was~~ entered or another date as the court may, after notice and a hearing, for cause fix.

(e) TRANSMISSION TO BENEFICIAL HOLDERS OF SECURITIES. At the hearing held under ~~pursuant to~~ subdivision (a) of this rule, the court shall consider the procedures for transmitting the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes and other securities, ~~and~~ determine the adequacy of the ~~such~~ procedures, and enter any ~~such~~ orders ~~as~~ the court deems

appropriate.

COMMITTEE NOTE

Subdivision (a) is amended to provide that it does not apply to the extent provided in new Rule 3017.1, which applies in small business cases.

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents under this subdivision. For example, if there may be a delay between the oral announcement of the judge's order approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

The court may set a record date under subdivision (d) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed under Rule 2002(b).

If the court fixes a record date under subdivision (d) with respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date applies for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Other amendments to this rule are stylistic.

Rule 3017.1 Court Consideration of Disclosure Statement in a Small Business Case

(a) CONDITIONAL APPROVAL OF DISCLOSURE STATEMENT. If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Rule 3016(b). On or before conditional approval of the disclosure statement, the court shall

(1) fix a time within which the holders of claims and interests may accept or reject the plan;

(2) fix a time for filing objections to the disclosure statement;

(3) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(4) fix a date for the hearing on confirmation.

(b) APPLICATION OF RULE 3017. Rule 3017(a), (b), (c), and (e) do not apply to a conditionally approved disclosure statement. Rule 3017(d) applies to a conditionally approved disclosure statement, except that conditional approval is considered approval of the disclosure statement

for the purpose of applying Rule 3017(d).

(c) FINAL APPROVAL.

(1) NOTICE. Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 and may be combined with notice of the hearing on confirmation of the plan.

(2) OBJECTIONS. Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix.

(3) HEARING. If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

COMMITTEE NOTE

This rule is new. It is added to implement § 1125(f) that was added to the Code by the Bankruptcy Reform Act of 1994.

The procedures for electing to be considered a small business are set forth in Rule 1020. If the debtor is a small business and has elected to be considered a small business, § 1125(f) permits the

court to conditionally approve a disclosure statement subject to final approval after notice and a hearing. If a disclosure statement is conditionally approved, and no timely objection to the disclosure statement is filed, it is not necessary for the court to hold a hearing on final approval.

Rule 3014. Election ~~Pursuant to~~ Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or ~~and~~ Chapter 11 Reorganization Case ~~Cases~~

An election of application of § 1111(b)(2) of the Code by a class of secured creditors in a chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix. If the disclosure statement is conditionally approved under Rule 3017.1, and a final hearing on the disclosure statement is not held, the election of application of § 1111(b) may be made no later than the first date set for a final hearing under Rule 3017.1(a)(3) or another date the court may fix. The election shall be in writing and signed unless made at the hearing on the disclosure statement. The election, if made by the majorities required by § 1111(b)(1)(A)(i), shall be binding on all members of the class with respect to the plan.

COMMITTEE NOTE

This amendment provides a deadline for electing application of § 1111(b) in a small

business case in which a conditionally approved disclosure statement is finally approved without a hearing.

Rule 3018. Acceptance or Rejection of Plans

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or another date as the court may, after notice and a hearing, for cause fix. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled

to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

The court may set a record date under subdivision (a) only after notice and a hearing as provided in § 102(1) of the Code. Notice of a request for an order fixing the record date may be included in the notice of the hearing to consider approval of the disclosure statement mailed under Rule 2002(b).

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed under Rule 3017(d).

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9011

DATE: FEBRUARY 10, 1995

8#-Wpt

At the September 1994 meeting in New York, the Advisory Committee discussed and approved a recommendation to amend Rule 9011 so that it conforms substantially to the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure.

Although almost all of the language of the proposed amendments has been approved, the Committee asked me to draft appropriate language for the rule and the committee note to provide, in essence, that the 21-day "safe harbor" provision will not apply to motions for sanctions for the improper filing of a petition.

I attach a draft of proposed amendments of Rule 9011. The only language that was changed since the committee approved the proposed amendments is contained in Rule 9011(c)(1)(A) [the phrase "If the conduct alleged is not the filing of a petition in violation of subdivision (b)," was inserted at the beginning of line 69) and a new second paragraph of the committee note.

I recommend that the Committee approve this draft and that it be included in the package of proposed amendments to be published for comment in 1995.

Rule 9011. Signing ~~and~~ of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion and other paper ~~served or filed in a case under the Code on behalf of a party represented by an attorney~~, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number.~~ Each paper shall state the signer's address and telephone number, if any. ~~The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it~~ An unsigned paper shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to

the attention of the ~~person whose signature is required~~ attorney or party. ~~If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.~~

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support

after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. If the conduct alleged is not the filing of a petition in violation of subdivision (b), the motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If

warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or , if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded

against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

~~(b)~~ (e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

~~(c)~~ (f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

COMMITTEE NOTE

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

The "safe harbor" provision contained in subdivision (c)(1)(A), which prohibits the filing of a motion for sanctions unless the challenged paper is not withdrawn or corrected within a prescribed time after service of the motion, does not apply if the challenged paper is a petition. The filing of a petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition. In addition, a petition for relief under chapter 7 or chapter 11 may not be withdraw unless the court orders dismissal of the case for cause after notice and a hearing.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 1019

DATE: FEBRUARY 18, 1995

6 #1 Feb

In February 1994, the Advisory Committee voted to delete the phrase "superseded case" in Rule 1007(c) and Rule 1019(3) and (4) because the use of this phrase gives the erroneous impression that conversion of a case results in a new case. These changes in Rule 1007(c) are part of the package of proposed rule amendments that were published for comment in September 1994.

I drafted proposed amendments to Rule 1019(3) and (4) to delete the use of "superseded" and to make other similar changes, but the Committee thought that Rule 1019(5) should be completely re-styled because it is difficult to follow. In particular, the Committee asked me to redraft Rule 1019(5) so that it is divided according to the applicable Code chapter. For example, the requirements of Rule 1019(5) that apply when a case is converted from chapter 11 should be separated from those requirements that apply when a case is converted from chapter 13.

In re-drafting Rule 1019(5), I found that it is best to group chapters 11 and 12 together, and to treat chapter 13 separately. I also found that it makes sense to treat all chapters together when setting forth the requirements for filing certain papers when any case is converted after conversion of a plan. Otherwise, the rule would be much longer and repetitive if all aspects applicable to chapter 11, all aspects applicable to chapter 12, and all

aspects applicable to chapter 13 were listed separately.

I attempted to re-style this rule without making any substantive changes. However, my experience in making purely "stylistic" changes has led me to appreciate the difficulty in avoiding inadvertent substantive changes. I invite Committee members to try to find substantive changes in my draft. Hopefully, you will not be able to find any.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

****

(3) CLAIMS FILED BEFORE CONVERSION ~~IN SUPERSEDED CASE~~. All claims actually filed by a creditor ~~in the superseded case~~ before conversion of the case are ~~shall be~~ deemed filed in the chapter 7 case.

****

(5) FILING FINAL REPORT AND SCHEDULE OF POSTPETITION DEBTS.

(A) Conversion of Chapter 11 or Chapter 12 Case. Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not in possession, the trustee serving at the time of conversion, shall:

(i) within 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each creditor; and

(ii) within 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

(B) Conversion of Chapter 13 Case. Unless the court directs otherwise , if a chapter 13 case is converted to chapter 7,

(i) the debtor, within 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each creditor; and

(ii) the trustee, within 30 days after conversion of the case, shall file and transmit to the United States trustee a final report and account;

(C) Conversion After Confirmation of a Plan. Unless the court orders otherwise, if the chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:

(i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion;

(ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and

(iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion.

(D) Transmission to United States Trustee. The clerk shall forthwith transmit to the United States Trustee a copy

of every schedule filed under Rule 1019(5).

~~Unless the court directs otherwise, each debtor in possession or trustee in the superseded case shall: (A) within 15 days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after commencement of the superseded case including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after the commencement of a chapter 12 case. If the conversion order is entered after confirmation of a plan, the debtor shall file (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory~~

~~contracts and unexpired leases entered into or assumed after the filing of the original petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.~~

COMMITTEE NOTE

The amendments to subdivisions (3) and (5) are technical corrections and stylistic changes. The phrase "superseded case" is deleted because it creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. Similarly, the phrase "original petition" is deleted because it erroneously implies that there is a second petition with respect to a converted case. See § 348 of the Code.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 8002(c)

DATE: FEBRUARY 24, 1995

Oct #4

Rule 8002 governs the time for filing a notice of appeal from an order, judgment or decree of the bankruptcy court. Although Rule 8002(a) gives a party only ten days from the entry of the order to file a notice of appeal, that period may be extended under Rule 8002(c) which reads as follows:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

In September of 1993, the Advisory Committee voted to amend this subdivision to clarify that a motion for an extension of time to file a notice of appeal must be "filed"-- rather than "made" -- within the ten-day period. This amendment was made at the suggestion of Judge Robert J. Kressel before he became a member of the Advisory Committee. Other stylistic changes were made by the style subcommittee shortly after that time. It was

expected that the proposed amendments would be presented to the Standing Committee in June of 1994 with a request for publication. However, in view of the Ninth Circuit's decision in In re Mouradick, 13 F.3d 326 (9th Cir. 1994) (holding that the court may not enter an order granting an extension of time to appeal more than 20 days after the original appeal time has expired, even if the motion for an extension was timely filed), Rule 8002(c) was withdrawn from the package of proposed amendments and was placed on the agenda for the September 1994 Advisory Committee meeting for further consideration.

At the September 1994 meeting, the Committee approved additional amendments designed to give a party that files a timely extension motion the benefit of an order granting the motion, regardless of when the extension motion is granted. All of the amendments approved by the Advisory Committee at the September 1993 and September 1994 meetings are reflected in the following draft:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~. A request to extend the time for filing a notice of appeal must be made by written motion and must be filed before the time for filing a notice of appeal has expired, except that

such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code. An extension of time for filing a notice of appeal must not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to overrule In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice

of appeal was not filed within the 20-day period specified in subdivision (c).

After the approval of the amendments at the September 1994 meeting, the Advisory Committee discussed a suggestion to amend the rule further to prohibit the extension of time to appeal for certain types of orders. Under the current rule, the time to appeal any order may be extended if the motion for extension is filed before the expiration of the original appeal time. If the request for an extension is filed within 20 days after the expiration of the appeal time, the court, based on excusable neglect, may extend the time to appeal unless the order is one of the listed types of orders that are not subject to this "excusable neglect" provision. At the September meeting, it was suggested that these listed types of orders (and perhaps some others) be rendered entirely non-appealable unless the notice of appeal is timely filed without any extension.

The Committee asked me to consider the list of orders in the last part of the final sentence of present Rule 8002(c), as well as the list of orders that are not stayed under Rule 7062, to compile an appropriate list of the types of orders with respect to which the time to appeal may not be extended at all. Henry Sommer suggested that an order dismissing or converting a case should not be included in the "no extension" list because individual debtors may need some flexibility in obtaining an extension to file an appeal from such orders.

In view of the Committee's request, I attempted to compile a list of orders with respect to which early finality is important

because of the high probability of reliance by a party in interest or a third party. That is, if an appeal will be taken from one of these orders, there is a special need for the parties to know sooner rather than later. For example, an order authorizing the sale of property under § 363 is one that is often relied upon by the purchaser soon after entry of the order. Although the mootness provision in § 363(m) protects good faith purchasers from reversal on appeal, a cautious buyer may nonetheless want the assurance of knowing that the order is final before closing the transaction (thus avoiding possible litigation over the issue of good faith).

In compiling this list, I began with the list of orders in the last sentence of the current rule. In considering Henry Sommer's suggestion, I did not include orders dismissing or converting a case to another chapter. An individual, especially one acting pro se, may need the benefit of an extension of time to appeal after the original appeal time has expired (based on excusable neglect).

I also considered the orders listed in Rule 7062 as exceptions to Civil Rule 62's ten-day automatic stay of enforcement or execution with respect to a judgment. The purpose of the exceptions in Rule 7062 is to permit the parties to seek enforcement of orders necessary to complete transactions without an automatic ten-day waiting period. Although there are similarities between the reasons for the exceptions in Rule 7062 and the reasons for the exceptions in Rule 8002(c) (avoidance of

delay in the enforcement of orders and early finality), I believe there are differences between the two rules that warrant some lack of uniformity between the lists of orders contained in them. The need to permit enforcement of a particular order immediately does not necessarily mean that the time to appeal must never be extended. For example, an order prohibiting the debtor in possession from selling certain property should be enforceable immediately -- with court assistance if necessary. There should be no need to wait ten-days to seek enforcement of the order. However, I can not think of any reason why an appeal of such an order prohibiting the sale of property should not be subject to the same time limits (and extension rules) applicable to most other court orders. [I realize this may be an interlocutory order that would require leave of court, but the same reasoning would apply]. Why must such an appeal be accelerated? Why is there a need for early finality? In contrast, an order authorizing the sale of property should be enforceable immediately (delay could upset the sales transaction) and also should become final and non-appealable as early as possible so that parties can rely on the order without unnecessary delay and without the need to face possible litigation over the good faith issue in § 363(m).

After reviewing Rule 7062, I believe that amendments to that rule, as well as to Rule 8002(c), are warranted at this time. I want to emphasize that I made several close judgment calls in determining whether to include certain orders in these rules and that reasonable people could differ on these calls. I also added

to the list of orders in Rule 7062 an order confirming a plan. I do not think that parties should have to wait ten days to seek enforcement of a confirmation order if no party has obtained a stay pending appeal. Although I do not think that Rule 7062, as it now reads, prohibits consummation of a chapter 11 plan within ten days after entry of the confirmation order (because consummation is not executing on the order and is not a proceeding to enforce the order), I have heard lawyers suggest that it does. For the sake of clarity, I suggest that confirmation orders be included.

I suggest that the Committee consider the following amendments (the following draft of Rule 8002(c) includes amendments previously approved, as well as additional substantive and style changes):

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~ , unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property

or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

(E) approves a disclosure statement under § 1125, or;

(F) confirms a plan under §§ 943, 1129, 1325, or 1225 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect ~~if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.~~ An extension of time for filing a notice of appeal must not exceed 20 days from the expiration of the

time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding 10 days after entry of the order extending the time. This amendment is designed to overrule In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

The subdivision is amended further to prohibit any extension of time to file a notice of appeal -- even if the motion for an extension is filed before the expiration of the original time to appeal -- if the order appealed from grants relief from the automatic stay, authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under § 365, or approves a disclosure statement or confirms a plan. These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original appeal period under Rule 8002(a) and (b).

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. The following orders are additional exceptions to Rule 62(a):

(a) An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code~~,~~ ;

(b) an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363~~,~~ ;

(c) an order authorizing ~~the trustee to obtain~~ the obtaining of credit ~~pursuant to~~ under § 364~~, and~~ ;

(d) an order authorizing the assumption or assignment of an executory contract or unexpired lease ~~pursuant to~~ under § 365; and

(e) an order confirming a plan under §§ 943, 1129, 1325, or 1225 of the Code ~~shall be additional exceptions to Rule 62(a)~~.

COMMITTEE NOTE

This rule is amended to include as an additional exception to Rule 62(a) an order confirming a plan. A plan may be consummated and a confirmation order may be enforced -- with the assistance of the court if necessary -- without the need to wait ten days under Rule 62(a).

The other amendments to this rule are stylistic.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 22, 1994

11 #WDPL

MEMORANDUM TO ALL: JUDGES, UNITED STATES BANKRUPTCY COURTS
CLERKS, UNITED STATES BANKRUPTCY COURTS
BANKRUPTCY ADMINISTRATORS

SUBJECT: Preliminary Draft of Proposed Uniform Numbering System for Local Bankruptcy Rules (ACTION REQUESTED)

RESPONSE DUE DATE: March 15, 1995

This memorandum transmits for your review and comments a draft of a proposed uniform numbering system for local bankruptcy Rules. Your comments are welcome, but not required. Should you choose to comment, please do so as soon as possible and no later than March 15, 1995.

At the direction of the Judicial Conference Committee on Rules of Practice and Procedure, the Advisory Committee on Bankruptcy Rules has drafted amendments to Federal Rule of Bankruptcy Procedure 9029 to require local bankruptcy rules to conform to a uniform numbering system. The amendments to Rule 9029 have been approved and forwarded to the Supreme Court.

In furtherance of the anticipated amendments, the Advisory Committee's subcommittee on local rules, with support from the Bankruptcy Judges Division, has developed a preliminary draft of a uniform numbering system for local bankruptcy rules that coordinates with the numbering system of the Federal Rules of Bankruptcy Procedure.

Enclosed for your review and comment is the "Preliminary Draft of Proposed Uniform Numbering System for Local Bankruptcy Rules." An accompanying memorandum that explains the proposed numbering system and a copy of the relevant portions of the amendments to Rule 9029 and its Committee Note are also enclosed.

Once comments are received, the Advisory Committee will make further appropriate revisions and present a final draft of the completed uniform numbering system to the Committee on Rules of Practice and Procedure at its June 1995 meeting. If approved, the numbering system will be presented to the Judicial Conference for promulgation at its September 1995 session. Please address your comments to:

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

L. Ralph Mecham

Attachments

MEMORANDUM TO ACCOMPANY PRELIMINARY DRAFT OF PROPOSED UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

Introduction and Background

The Judicial Conference Committee on Rules of Practice and Procedure in 1992 directed the various rules advisory committees to draft amendments requiring local rules to conform to a uniform numbering system prescribed by the Judicial Conference of the United States. Proposed amendments to Federal Rule of Bankruptcy Procedure 9029 establishing such a requirement have been approved and forwarded to the Supreme Court. A copy of Rule 9029, showing the proposed amendments and with its committee note, is attached. Unless blocked by the Supreme Court or by the Congress, the amendments will take effect December 1, 1995.

In addition to drafting amendments to Rule 9029, the Advisory Committee on Bankruptcy Rules ("Advisory Committee") has developed a preliminary draft of a uniform numbering system for local bankruptcy rules to recommend to the Judicial Conference. The proposed numbering system, which uses the national rule numbers followed by a dash and a further, one-digit, numeral, also is attached.

The goal of the Advisory Committee is to propose a uniform numbering system that both coordinates with the national rules and works for lawyers and judges in the practical sense. The Advisory Committee seeks comment on the proposal from the bankruptcy community --- bench, bar, trustees, and other interested persons.

One advantage to a uniform numbering system is that it will permit computerized topical searches of local rules. At present, although the legal computer services offer the texts of at least some local rules, the usefulness of the information is limited because no search mechanism exits. Utilization of a uniform numbering system for local rules will create the necessary means for conducting a topical search.

To develop the system, the Advisory Committee started with an index of local rules topics compiled by the Bankruptcy Judges Division of the Administrative Office of the United States Courts. This index was derived empirically from the actual local rules in effect in the bankruptcy courts. Those topics that related to a national rule were identified, and the related rule number noted.

Compilation of the topical index disclosed several districts that already had keyed their local rule numbers to the national rules. A few of these districts also had adopted a practice of using available numbers at the end of the various parts of the rules to assign numbers to local rules which did not have a specific "parent" national rule. For example, Part I of the

national bankruptcy rules contains rules numbered from 1001 through 1019, leaving the numbers 1020 through 1099 potentially available for use as local rule numbers.

The use of available, unused, numbers within a part of the national rules proved adaptable to a proposed uniform numbering system as well. For example, local rules on court calendars and scheduling will have uniform number 5070, indicating by the first digit a subject matter covered in Part V of the national rules (Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants), and by the use of a number higher than the last number used in that part of the national rules, that the local rule is not related to any specific rule within Part V. To allow for future expansion of the national rules, only numbers 1070, 2070, 3070, etc. and higher were used as uniform numbers for "unrelated" local rule topics.

The Proposed System

The proposed system uses the four-digit national bankruptcy rule numbers as a starting point. A local rule related to a specific national rule is numbered using the national rule number followed by a dash and the numeral 1, 2, and so forth depending on how many topics relate to that national rule. For example, Rule 9029 governs the prescribing of local bankruptcy rules, and many districts have local rules about local rules. Accordingly, the uniform numbering system includes numbers for both Local Rules-General, 9029-1, and Local Rules-General Orders, 9029-2.

The process of assigning numbers to unrelated local rules began with determining which part of the national rules seemed to cover the subject of a particular local rule. The first digit of the uniform number was assigned based on the Part (I - IX) of the rules to which a local rule seemed most closely related. For example, rules relating to attorney admissions and discipline were assigned the numbers 2090-1 and 2091-1 based on the title of Part II which is "Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants." For this topic, Part II was selected rather than Part IX because Rule 9011 addresses only written pleadings. For other rules topics, the choice of part number was more arbitrary. Local rules covering such subjects as the number of copies to be filed and payment of fees, for example, could have been assigned either to Part V, Courts and Clerks, or to Part IX, General Provisions. The proposal assigns payment of fees to Part V and number of copies to Part IX, but switching either topic also could be justified.

Preliminary Testing of the System

As a test, the proposed uniform numbering system was applied to two, randomly chosen, sets of local rules --- the Southern District of Texas and the Western District of Kentucky. The districts appeared to be representative, and both had a moderate number of local rules. The Southern District of Texas is a large district containing rural areas, small towns and cities, and one very large metropolitan center (Houston). The other, the Western District of Kentucky, is smaller and contains only one medium-sized city (Louisville). One district uses a four-digit numbering system that relates to the national rule numbers, and the other uses consecutive numbers, beginning with the numeral one (1).

The process of assigning uniform numbers to actual local rules proceeded smoothly, for the most part. Problems occurred only when a district grouped together actions or requirements from several different national rules. For example, Local Rule 9013 of the Southern District of Texas is titled "Motion requirements". It contains 13 subdivisions [(a) through (m)] which range over the following uniform numbers: Motion Practice, 9013-2, (four times, not consecutively); Hearings, 9075-1; Certificate of Service, 9078-1; Mailing List or Matrix, 1007(a)-1; Notice, 9007-1; Orders - Proposed, 9074-1, (twice, not consecutively); and Calendars and Scheduling, 5070-1. Two of these topics, Mailing List or Matrix and Orders - Proposed, appear also in another rule. The topic of Compensation of Professionals, Uniform Number 2016-1, appears in three other rules and in three subdivisions of one rule.

In the rules for the Western District of Kentucky, the problem of repetition of a uniform number occurred only in one rule. In Rule No. 3, titled "Attorneys," the topic Attorneys - Duties appears non-consecutively, due to interruptions for two other topics, Attorneys - Discipline and Disbarment, and Pro Se Parties.

There are two possible solutions to this problem. One would be for the district to reorganize its local rules to match the pattern of the Federal Rules of Bankruptcy Procedure. The other would be to adopt the approach used by the Southern District of Texas and assign the uniform number based only on the topic stated in the title to a rule, while ignoring subdivisions that introduce topics which are covered by other uniform numbers. Although this method simplifies the assignment of uniform numbers, topical searches of such local rules inevitably will be incomplete.

Further Issues

Neither the local rules index nor the uniform numbering system, as proposed, makes value judgments about specific local rules or rules topics. For example, some districts have local rules concerning investment of estate funds, a subject no longer treated in the national rules. The national rule on investment of estate funds was abrogated because the subject now comes under the authority of the United States trustee and is, accordingly, not one for the judiciary to regulate. The uniform rule number topic has been broadened to "estate administration," but otherwise has been left in place.

In addition, most districts have local rules on attorney admissions, photography in the courthouse, and courtroom decorum. Some, however, hold the view that these subjects should be treated only in local district court rules, which would apply to the bankruptcy court. Examined from the standpoint of this philosophy, these subjects should not appear separately in bankruptcy local rules but only in references to the district court rules.

The Bankruptcy Judges Division's index, on the other hand, was intended merely to record and categorize the existing universe of local rules and thereby facilitate access. This index makes no attempt to evaluate the content of any rule. Similarly, the proposed numbering system provides a number for every rule that exists, without regard to whether any particular rule should exist.

Section 332(d)(4) of title 28, United States Code, imposes on the judicial council of each circuit a duty to review periodically the local rules prescribed by courts within the circuit. Section 332(d)(4) also confers on the judicial council the authority to abrogate or modify any local rule "found inconsistent" with the national rules. Accordingly, the uniform numbering system, as proposed, would leave to the judicial councils the issue of the inconsistency of any local rule with national rules.

Citation Form and Call for Comments

The citation form for a local bankruptcy rule, using the uniform numbers, will be "LBR ------." An example, for a local rule describing responsibilities of the clerk of court, would be "LBR 5003-1," (Clerk-General/Authority). In a brief or other written document in which the district prescribing the rule must be identified, the form of the citation would be "E.D. Va. LBR 5003-1."

Adoption of a uniform numbering system will require bankruptcy lawyers, bankruptcy judges, bankruptcy clerks' offices, and the parties involved in bankruptcy cases to make adjustments. Those who practice in some districts may have to make greater or more difficult adjustments than those in other districts. The Advisory Committee wants, above all, to recommend a practical system that lawyers, judges, clerks, and parties can adopt and use without unnecessary complications. Please review the attached proposal and submit comments in writing by March 15, 1995.

Please address your comments to:

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Attachments

ATTACHMENT 1

[These amendments have been approved by the Judicial Conference of the United States and forwarded to the Supreme Court. They are expected to take effect on December 1, 1995.]

Rule 9029. Local Bankruptcy Rules; Procedure When There is No Controlling Law

(a) Local Bankruptcy Rules.

(1) Each district court ~~by action of~~ acting by a majority of ~~the~~ its district judges ~~thereof~~ may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

* * * * * *

[The remainder of the rule concerns matters not related to uniform local rule numbering.]

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with applicable national rules but also with Acts of Congress. The amendment also states that local rules should not repeat applicable national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

* * * * *

[The remainder of the Committee Note concerns amendments not related to uniform local rule numbering.]

ATTACHMENT 2

PRELIMINARY DRAFT OF

PROPOSED UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

PART I

National Rule Number	Topic	Uniform
1002	FILING PAPERS - REQUIREMENTS	1002-1
1004	PETITION - PARTNERSHIP	1004-1
1005	PETITION - CAPTION	1005-2
1005	FILING PAPERS - REQUIREMENTS	1005-1
1006(b)	FEES - INSTALLMENT PAYMENTS	1006(b)-1
1007	FILING PAPERS - REQUIREMENTS	1007-1
1007(a)	MAILING - LIST OR MATRIX	1007(a)-1
1007(b)	LISTS, SCHEDULES, STATEMENTS	1007(b)-1
1007(b)(2)	STATEMENT OF INTENTION	1007(b)(2)-1
1009	AMENDMENTS TO LISTS & SCHEDULES	1009-1
1010	PETITION-INVOLUNTARY	1010-1
1014	TRANSFER OF CASES	1014-1
1014	VENUE - CHANGE OF	1014-2
1015	JOINT ADMINISTRATION - CONSOLIDATION	1015-1
1015	RELATED CASES	1015-2
1017	CONVERSION	1017-1
1017	DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	1017-2
1019	CONVERSION	1019-1

No Related National Rules:	Topic	Uniform Number
[none]	JURISDICTION	1070-1
[none]	DIVISIONS - BANKRUPTCY COURT	1071-1
[none]	PLACES OF HOLDING COURT	1072-1
[none]	ASSIGNMENT OF CASES	1073-1
[none]	CORPORATIONS	1074-1

PART II

National Rule	Topic	Uniform Number
2002(a)-(o) (except (j))	NOTICE TO CREDITORS AND OTHER INTERESTED PARTIES	2002(a)-1 thru 2002(o)-1
2002(j)	NOTICE TO U.S. OR FEDERAL AGENCY	2002(j)-1
2002(j)	U.S. AS CREDITOR OR PARTY	2002(j)-2
2003	MEETING OF CREDITORS AND EQUITY SECURITY HOLDERS	2003-1
2004	DEPOSITIONS & EXAMINATIONS	2004-1
2004	WITNESSES	2004-2
2007	UNITED STATES TRUSTEE	2007-1
2010	BONDS/SURETY	2010-1
2014	EMPLOYMENT OF PROFESSIONALS	2014-1
2014	APPRAISERS & AUCTIONEERS	6005-1
2015	TRUSTEES - GENERAL	2015-2
2015(a)	DIP DUTIES	2015(a)-2
2015(a)	TRUSTEES - REPORTS & DISPOSITION OF RECORDS	2015(a)-1
2015(c)	TRUSTEES - CHAPTER 13	2015(c)-1
2015(d)	DIP DUTIES	2015(d)-1
2016	COMPENSATION OF PROFESSIONALS	2016-1
2016	APPRAISERS & AUCTIONEERS	6005-1
2019	ATTORNEYS - DUTIES	2019-1
2020	UNITED STATES TRUSTEES	2020-1

No Related National Rules:	Topic	Uniform Number
[none]	ESTATE ADMINISTRATION	2070-1
[none]	COMMITTEES - OF CREDITORS, etc.	2071-1
[none]	NOTICE TO OTHER COURTS	2072-1
[none]	CHAPTER 9	2080-1
[none]	CHAPTER 11 - GENERAL	2081-1
[none]	CHAPTER 12	2082-1
[none]	CHAPTER 13 - GENERAL	2083-1
[none]	ATTORNEYS - ADMISSION TO PRACTICE	2090-1
[none]	ATTORNEYS - DISCIPLINE AND DISBARMENT	2091-1

PART III

National Rule	Topic	Uniform Number
3001-3006, 3008	CLAIMS AND EQUITY SECURITY INTERESTS	3001-1 thru 3006-1, 3008-1
3007	OBJECTIONS TO CLAIMS	3007-1
3009	DIVIDENDS	3009-1
3010	DIVIDENDS	3010-1
3011	UNCLAIMED FUNDS	3011-1
3012	VALUATION OF COLLATERAL	3012-1
3015	AMENDMENTS TO PLANS (Ch.13)	3015-2
3015	CHAPTER 13 CONFIRMATION	3015-3
3015	CHAPTER 13 - PLAN	3015-1
3016	CHAPTER 11 - PLAN	3016-2
3016	DISCLOSURE STATEMENT	3016-1
3017	DISCLOSURE STATEMENT	3017-1
3018	ACCEPTANCE OR REJECTION OF PLANS	3018-2
3018	BALLOTS - VOTING ON PLANS	3018-1
3019	AMENDMENTS TO PLANS (Ch.11)	3019-1
3020	CHAPTER 11 - CONFIRMATION	3020-1
3021	DIVIDENDS (Ch.11)	3021-1
3022	FINAL REPORT, DECREE	3022-1

No Related National Rules:	Topic	Uniform Number
[none]	CHAPTER 13 - PAYMENTS OUTSIDE THE PLAN	3070-1

PART IV

National Rule	Topic	Uniform Number
4001(a)	AUTOMATIC STAY - RELIEF FROM	4001(a)-1
4001(b)	CASH COLLATERAL	4001(b)-1
4002	DEBTOR - DUTIES	4002-1
4002(5)	ADDRESS OF DEBTOR	4002(5)-1
4003	EXEMPTIONS	4003-1
4003(d)	LIEN AVOIDANCE	4003(d)-1

PART IV
cont.

National Rule	Topic	Uniform Number
4004	DISCHARGE HEARINGS	4004-1
4004	OBJECTIONS TO DISCHARGE	4004-2
4007	DISCHARGEABILITY COMPLAINTS	4007-1
4008	REAFFIRMATION	4008-1

No Related National Rule:	Topic	Uniform Number
[none]	INSURANCE	4070-1

PART V

National Rule	Topic	Uniform Number
5001	COURT ADMINISTRATION	5001-1
5001(c)	CLERK - OFFICE LOCATION/HOURS	5001(c)-1
5002	UNITED STATES TRUSTEE	5002-1
5003	CLERK - GENERAL/AUTHORITY	5003-1
5003	COURT PAPERS - REMOVAL OF	5003-2
5003(b)	CLAIMS AND EQUITY SECURITY INTERESTS	5003(b)-1
[5008] [abrogated 1991]	ESTATE ADMINISTRATION	5008-1
5009	FINAL REPORT/DECREE	5009-1
5010	REOPENING CASES	5010-1
5011	ABSTENTION	5011-1
5011	WITHDRAWAL OF REFERENCE	5011-2

No Related National Rules:	Topic	Uniform Number
[none]	CALENDARS AND SCHEDULING	5070-1
[none]	CONTINUANCE	5071-1
[none]	COURTROOM DECORUM	5072-1
[none]	PHOTOGRAPHY, RECORDING DEVICES AND BROADCASTING	5073-1
[none]	FAX FILING/SERVICE	5074-1
[none]	CLERK - DELEGATED FUNCTIONS OF	5075-1

PART V
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	COURT REPORTING	5076-1
[none]	TRANSCRIPTS	5077-1
[none]	FEES - GENERALLY	5078-1
[none]	FEES - FORM OF PAYMENT	5079-1
[none]	JUDGES - VISITING AND RECALLED	5080-1
[none]	SIGNATURES - JUDGES	5081-1
[none]	SEAL OF COURT	5082-1

PART VI

National Rule	Topic	Uniform Number
6004	SALE OF ESTATE PROPERTY	6004-1
6005	APPRAISERS AND AUCTIONEERS	6005-1
6006	EXECUTORY CONTRACTS	6006-1
6007	ABANDONMENT	6007-1
6008	REDEMPTION	6008-1

No Related National Rules:	Topic	Uniform Number
[none]	TAX RETURNS AND TAX REFUNDS	6070-1

PART VII

National Rule	Topic	Uniform Number
7001	ADVERSARY PROCEEDINGS	7001-1
7003	COVER SHEET	7003-1
7004	SERVICE OF PROCESS	7004-1
7004	SUBPOENAS, SUMMONS	7004-2
7005(d)	CERTIFICATE OF SERVICE	9078-1
7005(d)	DISCOVERY - NON-FILING OF MATERIALS	7005(d)-1
7007(b)	MOTION PRACTICE	7007(b)-1
7008(a)	CORE - NON-CORE PROCEEDING	7008(a)-1

PART VII
cont.,

National Rule	Topic	Uniform Number
7012(b)	CORE - NON-CORE PROCEEDING	7012(b)-1
7016	PRE-TRIAL PROCEDURES	7016-1
7024	INTERVENTION	7024-1
7024(c)	UNCONSTITUTIONALITY, CLAIM OF	7024(c)-1
7026	DISCOVERY - GENERAL	7026-1
7027-32	DEPOSITIONS & EXAMINATIONS	7027-1 thru 7032-1
7040	ASSIGNMENT OF CASES (APs)	7040-1
7042	JOINT ADMINISTRATION/ CONSOLIDATION (APs)	7042-1
7052	FINDINGS AND CONCLUSIONS	7052-1
7054	COSTS - TAXATION/PAYMENT	7054-1
7055	DEFAULT - FAILURE TO PROSECUTE	7055-1
7056	SUMMARY JUDGMENT	7056-1
7065	INJUNCTIONS	7065-1
7067	REGISTRY FUND	7067-1
7069	JUDGMENT - PAYMENT OF	7069-1

[No "unrelated" local rule topics.]

PART VIII

National Rule	Topic	Uniform Number
8001 ff.	APPEALS (See Appendix)	8001-1 ff.

For District Court/Bankruptcy Appellate Panel uniform local rule numbers, see "Appendix of Uniform Local Rule Numbers for Local Rules Governing Bankruptcy Appeals."

PART IX

National Rule	Topic	Uniform Number
9001	DEFINITIONS	9001-1
9002	DEFINITIONS	9002-1
9003	EX PARTE CONTACT	9003-1
9004	FILING PAPERS - REQUIREMENTS	9004-1

PART IX
cont.,

National Rule	Topic	Uniform Number
9004	CAPTION - PAPERS, APs	9004-2
9006	TIME PERIODS	9006-1
9007	NOTICE TO CREDITORS AND OTHER PARTIES IN INTEREST	9007-1
9009	FORMS	9009-1
9010	ATTORNEYS - DUTIES	9010-1
9010(c)	POWER OF ATTORNEY	9010(c)-1
9011	ATTORNEYS - DUTIES	9011-1
9011	PRO SE PARTIES	9011-2
9011	SANCTIONS	9011-3
9011	SIGNATURES	9011-4
9013	BRIEFS AND MEMORANDA OF LAW	9013-1
9013	MOTION PRACTICE	9013-2
9015	JURY TRIAL	9015-1
9016	SUBPOENA, SUMMONS	9016-1
9016	WITNESSES	9016-2
9019(a) & (b)	SETTLEMENTS AND AGREED ORDERS	9019(a)-1 & 9019(b)-1
9019(c)	ALTERNATIVE DISPUTE RESOLUTION (ADR)	9019(c)-1
9020	CONTEMPT	9020-1
9021	JUDGMENTS AND ORDERS	9021-1
9021	ORDERS - EFFECTIVE DATE	9021-2
9022	JUDGMENTS AND ORDERS	9022-1
9027	REMOVAL/REMAND	9027-1
9029	LOCAL RULES - GENERAL	9029-1
9029	LOCAL RULES - GENERAL ORDERS	9029-2
9035	BANKRUPTCY ADMINISTRATORS	9035-1
9036	NOTICE BY ELECTRONIC TRANSMISSION	9036-1

PART IX
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	FILING - NUMBER OF COPIES	9070-1
[none]	FILING - SIZE OF PAPERS	9071-1
[none]	EXHIBITS	9072-1
[none]	STIPULATIONS	9073-1
[none]	ORDERS - PROPOSED	9074-1
[none]	HEARINGS	9075-1
[none]	TELEPHONE CONFERENCES	9076-1
[none]	EMERGENCY ORDERS	9077-1

Topic Related to a National Rule Not in this Part:

National Rule	Topic	Uniform Number
7005(d)	CERTIFICATE OF SERVICE	9078-1

APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR LOCAL RULES GOVERNING BANKRUPTCY APPEALS [District Courts and Bankruptcy Appellate Panels (BAPs)]

National Rule	Topic	Uniform Number
8001	Appeal - Notice of	8001-1
8001(c)	Appeal - Dismissal (Voluntary)	8001(c)-1
8001(e)	Appeal Consent to Determining by BAP	8001(e)-1
8002	Appeal - Time for Filing	8002-1
8003	Appeal - Motion for Leave to	8003-1
8004	Appeal - Service of Notice	8004-1
8006	Designation of Record	8006-1
8007(a)	Appeal - Completion of Record	8007(a)-1
8007(b)	Appeal - Transmission of Record	8007(b)-1
8007(b)	Appeal - Docketing of	8007(b)-2
8007(c)	Appeal - Record for Preliminary Hearing	8007(c)-1
8008(a)	Appeal - Filing of Papers	8008(a)-1
8008(b)	Appeal - Service of All Papers Required	8008(b)-1
8008(c)	Appeal - Manner of Serving	8008(c)-1
8008(d)	Appeal - Proof of Service of Filed Papers	8008(d)-1
8009(a)	Appeal - Briefs, Time for Filing	8009(a)-1
8009(b)	Appeal - Time for Filing Appendix to Brief	8009(b)-1
8010(a)	Appeal - Form of Briefs	8010(a)-1
8010(b)	Appeal - Reproduction of Statutes, etc.	8010(b)-1
8010(c)	Appeal - Length of Briefs	8010(c)-1
8011(a)	Appeal - Motion, Response, Reply	8011(a)-1
8011(b)	Appeal - Determination of Procedural Motion	8011(b)-1
8011(c)	Appeal - Determination of Motion	8011(c)-1
8011(d)	Appeal - Emergency Motion	8011(d)-1

National Rule	Topic	Uniform Number
8011(e)	Appeal - Power of Single Judge to Entertain Motions	8011(e)-1
8012	Appeal - Oral Argument	8012-1
8013	Appeal - Disposition	8013-1
8014	Appeal - Costs	8014-1
8015	Appeal - Motion or Rehearing	8015-1
8016(a)	Appeal - Entry of Judgment by Clerk of District Court or BAP	8016(a)-1
8016(b)	Appeal - Notice of Order or Judgment	8016(b)-1
8016(b)	Appeal - Return of Record	8016(b)-2
8017(b)	Appeal - Stay Pending Appeal to Court of Appeals	8017(b)-1
8018	Appeal - Local Rules of District Court or BAP	8018-1
8019	Appeal - Suspension of Part VIII, Fed.R.Bankr.P.	8019-1
8020	Damages and Costs for Frivolous Appeal	8020-1
No Related National Rule:		
[none]	Appeal - Dismissal by Court for Non-Prosecution	8070-1

SPECIAL BANKRUPTCY APPELLATE PANEL MATTERS
(to which other national and uniform numbers apply)

9001	Definitions	9001-1 (Bankr.) LR 1.1. (Dist.)
9002	Definitions	9002-1 (Bankr.) LR 1.1. (Dist.)
[none]	Admission of Attorneys	2901-1 (Bankr.) LR 83.5 (Dist.)
[none]	Courtroom Photography, Broadcasting	5711-1 (Bankr.) LR 83.4 (Dist.)

Item #12

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: AMENDMENTS TO BANKRUPTCY RULES 2002(j)(4) AND 6007(a) PROPOSED BY THE ATTORNEY GENERAL

DATE: FEBRUARY 28, 1995

Attorney General Janet Reno, in her letter of September 6, 1994, proposed amendments to Bankruptcy Rule 2002(j)(4) regarding notices sent to the United States, and to Bankruptcy Rule 6007(a) regarding notice to the Environmental Protection Agency of a proposed abandonment of property that is subject to EPA claims or obligations. A copy of the Attorney General's letter is attached.

After receiving this letter, I contacted J. Christopher Kohn, a member of the Advisory Committee and a Director of the Commercial Litigation Branch in the Civil Division of the Department of Justice, to discuss these proposals. I was concerned that the proposed amendments were, in certain respects, too broad and could result in unintended consequences that the Justice Department or EPA may wish to consider. I told Mr. Kohn that I was not negotiating on behalf of the Committee or anyone else and that I would present to the Committee any proposals that the Attorney General may have, but nonetheless offered my personal suggestions for narrowing or refining these proposals. Our several conversations resulted in a number of modifications of the Justice Department's proposals.

Rule 2002(j)(4)

Bankruptcy Rule 2002(j)(4) provides as follows:

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed ... (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

The Attorney General points out two problems regarding this rule. First, notices sent to the U.S. attorney often do not identify the agency or agencies through which the debt was incurred. For example, the U.S. attorney may receive a notice of the meeting of creditors in a case (with a bar date for filing claims) without being able to determine from the notice whether it is a Housing and Urban Development debt, a Small Business Administration debt, or an Environmental Protection Agency liability. To enable the U.S. attorney to properly react to the notice, the Attorney General's letter suggests that the rule require that such notices be sent to the U.S. attorney "with the name of the department, agency, or instrumentality to which the debt is owed included in parenthesis on the mailing envelope."

In my conversations with Chris Kohn, I mentioned the technical difficulty that the proposed amendment may cause if it requires that the agency be identified "on the envelope." I understand that notices are often sent in address-window envelopes through which the address is displayed (nothing is written on the envelope itself). I suggested that it would be better to require only that the agency be identified in the address, rather than on the envelope. Mr. Kohn later responded

that the Executive Office of U.S. Attorneys would prefer my suggestion and modified the Attorney General's proposal accordingly.

Another problem addressed by the Attorney General is that, although notice also must be sent to the creditor agency, it is often sent to the address to which the debtor sent payments. "This is usually a centralized facility that cannot readily identify which particular field office would handle the claim." To remedy this problem, the Justice Department proposes an amendment to Rule 2002(j)(4) that would permit the United States to submit a list of local agency addresses to the bankruptcy court clerk's office to be used for noticing purposes. In particular, the Attorney General proposes that the following sentence be added to Rule 2002(j)(4):

> "If the United States Attorney's Office or the agency has provided to the bankruptcy court clerk's office a particular mailing address for the department, agency, or instrumentality, then that address shall be the proper one for purposes of notice to the department, agency, or instrumentality."

For the purposes of discussion, I recommend that the Advisory Committee focus on the following draft of Rule 2002(j) -- which includes my suggestions for stylistic improvement of the current rule and the language proposed by the Attorney General:

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

****

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under

this rule shall be mailed:

(1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at Washington, D.C., and at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices;

(2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.;

(3) in a chapter 11 case, to the District Director of Internal Revenue for the district in which the case is pending;

(4) if the papers filed in the case disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.; and

~~(4)~~ (5) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted~~; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C~~.

The department, agency, or instrumentality shall be identified in the address of the notice mailed to the United States attorney. The notice to the department, agency, or instrumentality shall be addressed as the United States attorney or another authorized agent of the United States may direct in a filed request, or, in the absence of a filed request, as provided in subdivision (g) of this rule.

COMMITTEE NOTE

This rule is amended to require that the address of any notice mailed to the United States attorney under subdivision (j) identify the particularly department, agency or instrumentality through which the debtor became indebted to the United States. This requirement may be satisfied by including in the address either the name or an acronym commonly used to identify the department. For example, this requirement may be satisfied by addressing the notice to "United States Attorney (SBA)" if the debt is owed through the Small Business Administration. If the debtor is indebted to the United States through more than one department, agency or instrumentality, each should be identified in the address.

The rule also is amended to clarify that the United States attorney, as well as any other authorized agent of the United States, may file with the clerk a general request -- applicable with respect to future notices in all cases -- that notices required to be sent to a specified department, agency or instrumentality be mailed to a particular address. The amendment will permit the United States to file with the bankruptcy clerk in each district a master list of local or regional addresses of federal agencies together with a request that the list be used for all future notices. This amendment will accommodate

departments and agencies that prefer to have notices sent to regional or local offices.

Rule 6007(a)

The Attorney General had requested in her letter that Rule 6007(a) be amended to require notice to the Environmental Protection Agency of any proposed abandonment or disposition of property with respect to which there may be claims or obligations under statutes or regulations administered by the EPA. Her specific proposal is set forth on page 3 of the attached letter.

This proposal is based on the Supreme Court's decision in Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986), in which the Court held that the trustee may not abandon property under § 554 of the Code in violation of state statutes that are reasonably designed to protect the public health or safety from identified hazards. "The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." 474 U.S. at 507.

I told Chris Kohn that I was concerned that the new language proposed by the Attorney General may be too broad (for example, it would require notice to the EPA when an automobile is abandoned because the EPA regulates auto emissions and there is an obligation under federal law not to pollute the air), and I suggested that the EPA consider limiting the proposal. As a result of several discussions and informal written drafts furnished by Mr. Kohn, the Justice Department revised its

proposal in several ways. One change was to limit it to the abandonment of nonresidential real property and to hazardous substances and hazardous waste. It also broadened the provision to include notice to state environmental agencies.

In considering the Attorney General's proposal, I realized that Rule 6007(a) may be unclear as to the meaning of "disposition" of property. As the original committee note indicates, the rule is intended to apply only to the abandonment of property under § 554(a) and to the disposition of property under § 725 (chapter 7 disposition of property in which another entity has an interest). A sale of property is not a "disposition" under Rule 6007 (a sale is governed by Rule 6004). If the Committee decides to amend Rule 6007(a), I suggest that it consider adding references to §§ 554 and 725 in the body of the rule for clarification purposes.

The most recent proposal from the Justice Department is as follows:

Rule 6007. Abandonment or Disposition of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTIONS. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. In the case of a proposed abandonment of non-residential real property with respect to which there are or may be claims or cleanup obligations under statutes or regulations administered by environmental agencies or of a proposed abandonment of hazardous waste or hazardous substances as defined by 42 U.S.C. § 9601(14) or 42 U.S.C. § 6903(5), notice shall also be given to

the U.S. Environmental Protection Agency Regional Administrator(s) of the Region(s) in which the property is located and the state environmental agency(ies) in the state(s) in which the property is located. A party in interest may file and serve an objection within 15 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

For discussion purposes, I recommend that the Advisory Committee focus on my draft of Rule 6007(a) that begins on page 9 of this memorandum. The draft includes my suggestions for stylistic improvement of the current rule and the language proposed by the Attorney General.

I am concerned that the proposed amendment -- to the extent that is would require notice of the proposed abandonment of "hazardous substances" -- may impose an undue burden on trustees and debtors in possession merely because of the difficulty in ascertaining which substances are included. I enclose for your information a copy of 42 U.S.C. § 9601(14) which defines "hazardous substance." As you can see, § 9601(14) contains many cross-references to other environmental statutes. I also enclose copies of those statutory provisions. I think that the Committee should consider whether the benefit to the EPA of including "hazardous substances" in the notice requirements of this rule is worth the added burden on trustees. I am less concerned about the inclusion of "hazardous waste" only because of the self-contained definition in 42 U.S.C. § 6903(5) (although it may nonetheless be difficult for a trustee or debtor in possession to

apply that definition). If the rule includes "hazardous waste" and not "hazardous substance", I would recommend including in the Committee Note the exact language of 42 U.S.C. 6903(5). That language is included in the following draft (the alternate language, if both hazardous waste and hazardous substances are included, is in brackets in the following draft of the rule and committee note).

Rule 6007. Abandonment or Disposition of Property

(a) ~~NOTICE OF~~ PROPOSED ABANDONMENT OR DISPOSITION BY TRUSTEE OR DEBTOR IN POSSESSION

(1) *Notice.* Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment of property under § 554 or a proposed disposition of property under § 725 of the Code to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code.

(2) *Notice to Environmental Agencies.* If the property is nonresidential real property with respect to which there is or may be a claim or cleanup obligation under any law administered by the United States Environmental Protection Agency or a state

governmental unit for the protection of the environment, or is hazardous waste as defined under 42 U.S.C. § 6903 [or a hazardous substance as defined under 42 U.S.C. § 9601], the trustee or debtor in possession shall give notice of a proposed abandonment under § 554 of the Code to the United States Environmental Protection Agency Regional Administrator of any region in which the property is located and to the environmental protection agency or department of any state in which the property is located.

(3) *Objections and Hearing*. A party in interest may file and serve an objection within 15 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

COMMITTEE NOTE

This rule is amended to provide notice to the Regional Administrator of the United States Environmental Protection Agency and to the appropriate state environmental protection agency when the trustee or debtor in possession proposes to abandon nonresidential real property with respect to which there may be a claim or cleanup obligation under applicable environmental laws. Environmental laws include federal and state statutes and regulations. The phrase "clean up obligation" includes an obligation

to remove hazardous substances that may be enforced by equitable remedies, whether or not the obligation has given rise to a claim under § 101 of the Code.

The notice requirement under subdivision (a)(2) also applies to a proposed abandonment of hazardous waste. "Hazardous waste," as defined under 42 U.S.C. § 6903(5), means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may --

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

[The notice requirement under subdivision (a)(2) also applies to a proposed abandonment of hazardous waste as defined in 42 U.S.C. § 6903 or a hazardous substance as defined in 42 U.S.C. § 9601.]

The amendments to subdivision (a) also clarify that this rule is applicable only to abandonment of property under § 554 or the disposition of property under § 725 of the Code. This rule is not applicable to the sale or lease of property, which is governed by Rule 6004.

The other amendments to subdivision (a) are stylistic.

APPLICABLE ENVIRONMENTAL STATUTES

any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term "implementation" does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

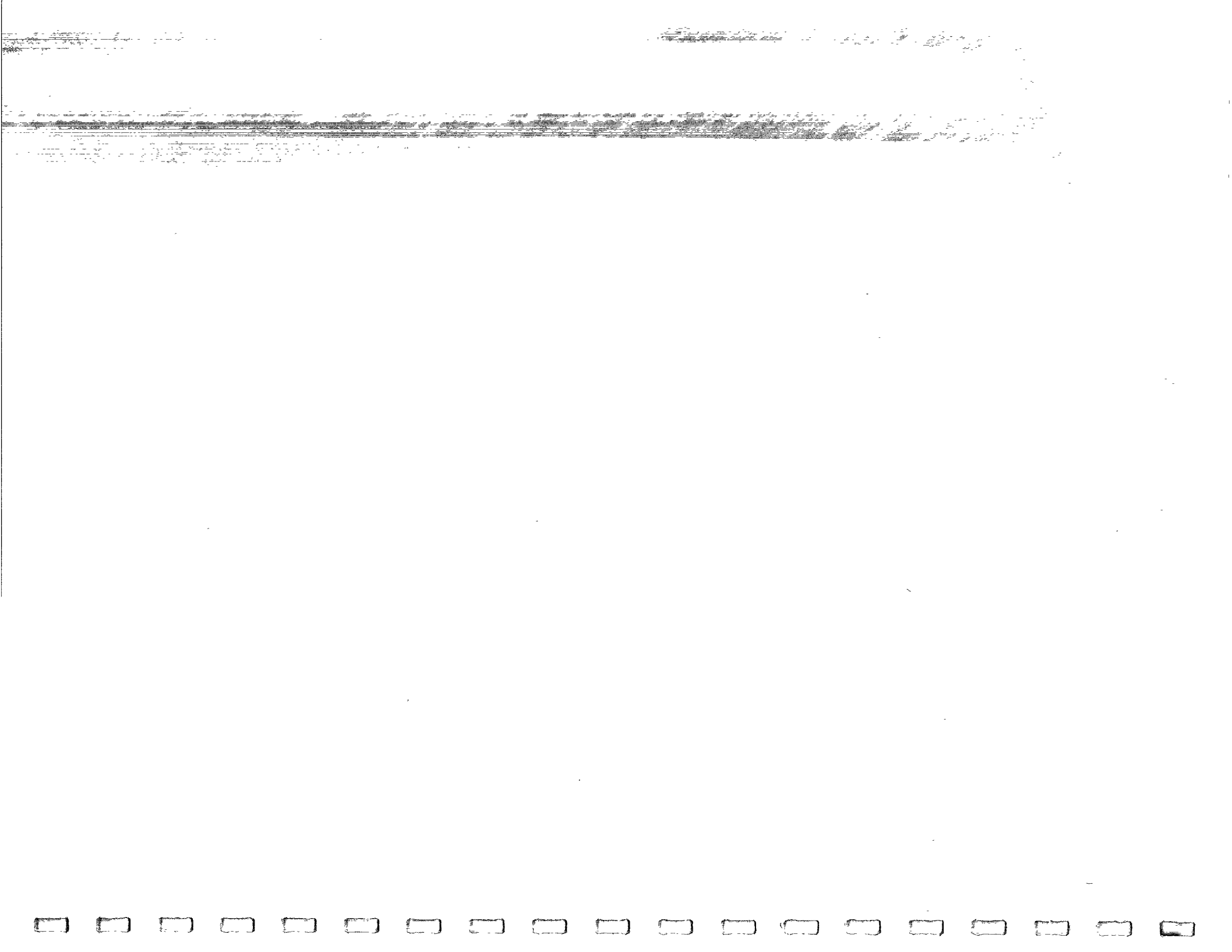
(9) The term "intermunicipal agency" means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term "interstate agency" means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term "long-term contract" means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term "municipality" (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorpo-



surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A. § 6925(a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of [1] section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317(b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Superfund established by section 9507 of Title 26.

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A.

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§ 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

(16) The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

(17) The term "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

(18) The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States.

(19) The term "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party.

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both

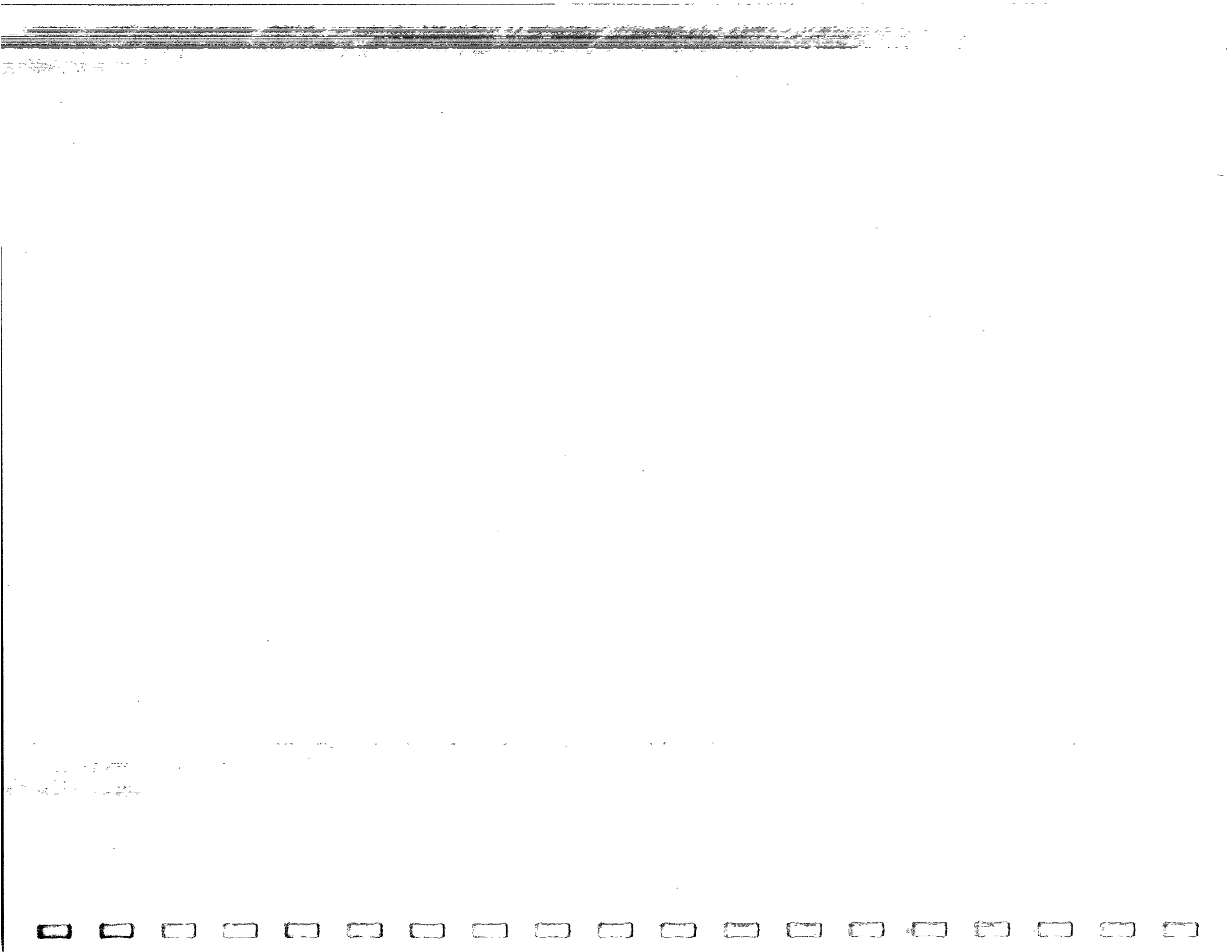
(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S. C.A. § 1801 et seq.]).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after the date of enactment of this paragraph, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 92–500 should be enacted.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which



19. Damages

Insurer under comprehensive general liability and excess liability policies had no obligation to defend or indemnify insured as potentially responsible party in CERCLA action for cleanup and remediation of polychlorinated biphenyl (PCB) contamination at site in Missouri; under Missouri law, term "damages" within meaning of those policies did not cover environmental cleanup costs. U.S. Fidelity and Guar. Co. v. Citizens Elec. Co., E.D.Mo.1991, 791 F.Supp. 231.

20. Treatment

Heating solder dross so that metals contained would melt and separate from nonmetal impurities was "treatment" of hazardous substance within meaning of CERCLA; process changed physical character of dross and allowed company to recover reasonable portion. State of Cal. on Behalf of State Dept. of Toxic Substances v. Summer Del Caribe, Inc., N.D.Cal.1993, 821 F.Supp. 574.

Site owner's processing of scrap materials which it received to produce alloys constituted "treatment" under CERCLA. U.S. v. Pesses, W.D.Pa.1992, 794 F.Supp. 151.

21. Response costs

Although term "response costs" does not appear in CERCLA, term means "removal" and "remedial action," which terms are lengthily defined in statute. Avnet, Inc. v. Allied-Signal, Inc., D.R.I.1992, 825 F.Supp. 1132.

§ 9602. Designation of additional hazardous substances and establishment of reportable released quantities; regulations

(a) The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 9601(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title. The Administrator may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released. For all hazardous substances for which proposed regulations establishing reportable quantities were published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall promulgate under this subsection final regulations establishing reportable quantities not later than December 31, 1986. For all hazardous substances for which proposed regulations establishing reportable quantities were not published in the Federal Register under this subsection on or before March 1, 1986, the Administrator shall publish under this subsection proposed regulations establishing reportable quantities not later than December 31, 1986, and promulgate final regulations under this subsection establishing reportable quantities not later than April 30, 1988.

[See main volume for text of (b)]

(As amended Pub.L. 99–499, Title I, § 102, Oct. 17, 1986, 100 Stat. 1617.)

HISTORICAL AND STATUTORY NOTES

1986 Amendment

Subsec. (a). Pub.L. 99–499, § 102, added provisions requiring the Administrator to promulgate final regulations not later than Dec. 31, 1986 in the case of hazardous substances for which proposed regulations were published on or before Mar. 1, 1986, and requiring the Administrator to publish proposed regulations not later than Dec. 31, 1986 and promulgate final regulations not later than Apr. 30, 1988 in the case of hazardous substances for which proposed regulations were not published on or before Mar. 1, 1986.

Effective Date of 1986 Amendment

Amendment by Pub.L. 99–499 effective Oct. 17, 1986, see section 4 of Pub.L. 99–499, set out as a note under section 9601 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–499, see 1986 U.S. Code Cong. and Adm. News, p. 2835.

CROSS REFERENCES

Storage and disposal of nondefense materials on Department of Defense installations, definition of materials to include materials designated under this section, see section 2692 of Title 10, Armed Forces.

LAW REVIEW COMMENTARIES

Erosion of mens rea in environmental criminal prosecution. Ruth Ann Weidel, John R. Mayo and F. Michael Zachara, 21 Seton Hall L.Rev. 1125 (1991).

Legislative History

For legislative history and purpose of Pub.L. 98–616, see 1984 U.S.Code Cong. and Adm. News, p. 5576.

§ 6917. Office of Ombudsman

(a) Establishment; functions

The Administrator shall establish an Office of Ombudsman, to be directed by an Ombudsman. If shall be the function of the Office of Ombudsman to receive individual complaints, grievances, requests for information submitted by any person with respect to any program or requirement under this chapter.

(b) Authority to render assistance

The Ombudsman shall render assistance with respect to the complaints, grievances, and requests submitted to the Office of Ombudsman, and shall make appropriate recommendations to the Administrator.

(c) Effect on procedures for grievance, appeals, or administrative matters

The establishment of the Office of Ombudsman shall not affect any procedures for grievances, appeals, or administrative matters in any other provision of this chapter, any other provision of law, or any Federal regulation.

(d) Termination

The Office of the Ombudsman shall cease to exist 4 years after November 8, 1984.

(Pub.L. 89–272, Title II, § 2008, as added Pub.L. 98–616, Title I, § 103(a), Nov. 8, 1984, 98 Stat. 3225.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 98–616, see 1984 U.S.Code Cong. and Adm. News, p. 5576.

SUBCHAPTER III—HAZARDOUS WASTE MANAGEMENT

§ 6921. Identification and listing of hazardous waste

[See main volume for text of (a)]

(b) Identification and listing

(1) Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter. Such regulations shall be based on the criteria promulgated under subsection (a) of this section and shall be revised from time to time thereafter as may be appropriate. The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratagens) at levels in excess of levels which endanger human health.

[See main volume for text of (2) and (3); (c)]

(d) Small quantity generator waste

(1) By March 31, 1986, the Administrator shall promulgate standards under sections 6922, 6923, and 6924 of this title for hazardous waste generated by a generator in a total quantity of hazardous waste greater than one hundred kilograms but less than one thousand kilograms during a calendar month.

(2) The standards referred to in paragraph (1), including standards applicable to the legitimate use, reuse, recycling, and reclamation of such wastes, may vary from the standards applicable to hazardous waste generated by larger quantity generators, but such standards shall be sufficient to protect human health and the environment.

(3) Not later than two hundred and seventy days after November 8, 1984, any hazardous waste which is part of a total quantity generated by a generator generating greater than one hundred kilograms but less than one thousand kilograms during one calendar month and which is shipped off the premises on which such waste is generated shall be accompanied by a copy of the Environmental Protection Agency Uniform Hazardous Waste Manifest form signed by the generator. This form shall contain the following information:

(A) the name and address of the generator of the waste;

(B) the United States Department of Transportation description of the waste, including the proper shipping name, hazard class, and identification number (UN/NA), if applicable;

(C) the number and type of containers;

(D) the quantity of waste being transported; and

(E) the name and address of the facility designated to receive the waste.

If subparagraph (B) is not applicable, in lieu of the description referred to in such subparagraph (B), the form shall contain the Environmental Protection Agency identification number, or a generic description of the waste, or a description of the waste by hazardous waste characteristic. Additional requirements related to the manifest form shall apply only if determined necessary by the Administrator to protect human health and the environment.

(4) The Administrator's responsibility under this subchapter to protect human health and the environment may require the promulgation of standards under this subchapter for hazardous wastes which are generated by any generator who does not generate more than one hundred kilograms of hazardous waste in a calendar month.

(5) Until the effective date of standards required to be promulgated under paragraph (1), any hazardous waste identified or listed under section 6921 of this title generated by any generator during any calendar month in a total quantity greater than one hundred kilograms but less than one thousand kilograms, which is not treated, stored, or disposed of at a hazardous waste treatment, storage or disposal facility with a permit under section 6925 of this title, shall be disposed of only in a facility which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste.

(6) Standards promulgated as provided in paragraph (1) shall, at a minimum require that all treatment, storage, or disposal of hazardous wastes generated by generators referred to in paragraph (1) shall occur at a facility with interim status or a permit under this subchapter, except that onsite storage of hazardous waste generated by a generator generating a total quantity of hazardous waste greater than one hundred kilograms, but less than one thousand kilograms during a calendar month, may occur without the requirement of a permit for up to one hundred and eighty days. Such onsite storage may occur without the requirement of a permit for not more than six thousand kilograms for up to two hundred and seventy days if such generator must ship or haul such waste over two hundred miles.

(7)(A) Nothing in this subsection shall be construed to affect or impair the validity of regulations promulgated by the Secretary of Transportation pursuant to the Hazardous Materials Transportation Act [49 U.S.C.A. § 1801 et seq.].

(B) Nothing in this subsection shall be construed to affect, modify, or render invalid any requirements in regulations promulgated prior to January 1, 1983 applicable to any acutely hazardous waste identified or listed under section 6921 of this title which is generated by any generator during any calendar month in a total quantity less than one thousand kilograms.

(8) Effective March 31, 1986, unless the Administrator promulgates standards as provided in paragraph (1) of this subsection prior to such date, hazardous waste generated by any generator in a total quantity greater than one hundred kilograms but less than one thousand kilograms during a calendar month shall be subject to the following requirements until the standards referred to in paragraph (1) of this subsection have become effective:

(A) the notice requirements of paragraph (3) of this subsection shall apply and in addition, the information provided in the form shall include the name of the waste transporters and the name and address of the facility designated to receive the waste;

(B) except in the case of the onsite storage referred to in paragraph (6) of this subsection, the treatment, storage, or disposal of such waste shall occur at a facility with interim status or a permit under this subchapter;

(C) generators of such waste shall file manifest exception reports as required of generators producing greater amounts of hazardous waste per month except that such reports shall be filed by January 31, for any waste shipment occurring in the last half of the preceding calendar year, and by July 31, for any waste shipment occurring in the first half of the calendar year; and

(D) generators of such waste shall retain for three years a copy of the manifest signed by the designated facility that has received the waste.

Nothing in this paragraph shall be construed as a determination of the standards appropriate under paragraph (1).

(9) The last sentence of section 6930(b) of this title shall not apply to regulations promulgated under this subsection.

(e) Specified wastes

(1) Not later than 6 months after November 8, 1984, the Administrator shall, where appropriate, list under subsection (b)(1) of this section, additional wastes containing chlorinated dioxins or chlorinated-dibenzofurans. Not later than one year after November 8, 1984, the Administrator shall, where appropriate, list under subsection (b)(1) of this section wastes containing remaining halogenated dioxins and halogenated-dibenzofurans.

(2) Not later than fifteen months after November 8, 1984, the Administrator shall make a determination of whether or not to list under subsection (b)(1) of this section the following wastes: Chlorinated Aliphatics, Dioxin, Dimethyl Hydrazine, TDI (toluene diisocyanate), Carbamates, Bromacil, Linuron, Organo-bromines, solvents, refining wastes, chlorinated aromatics, dyes and pigments, inorganic chemical industry wastes, lithium batteries, coke byproducts, paint production wastes, and coal slurry pipeline effluent.

(f) Delisting procedures

(1) When evaluating a petition to exclude a waste generated at a particular facility from listing under this section, the Administrator shall consider factors (including additional constituents) other than those for which the waste was listed if the Administrator has a reasonable basis to believe that such additional factors could cause the waste to be a hazardous waste. The Administrator shall provide notice and opportunity for comment on these additional factors before granting or denying such petition.

(2)(A) To the maximum extent practicable the Administrator shall publish in the Federal Register a proposal to grant or deny a petition referred to in paragraph (1) within twelve months after receiving a complete application to exclude a waste generated at a particular facility from being regulated as a hazardous waste and shall grant or deny such a petition within twenty-four months after receiving a complete application.

(B) The temporary granting of such a petition prior to November 8, 1984, without the opportunity for public comment and the full consideration of such comments shall not continue for more than twenty-four months after November 8, 1984. If a final decision to grant or deny such a petition has not been promulgated after notice and opportunity for public comment within the time limit prescribed by the preceding sentence, any such temporary granting of such petition shall cease to be in effect.

(g) EP toxicity

Not later than twenty-eight months after November 8, 1984, the Administrator shall examine the deficiencies of the extraction procedure toxicity characteristic as a predictor of the leaching potential of wastes and make changes in the extraction procedure toxicity characteristic, including changes in the leaching media, as are necessary to insure that it accurately predicts the leaching potential of wastes which pose a threat to human health and the environment when mismanaged.

(h) Additional characteristics

Not later than two years after November 8, 1984 the Administrator shall promulgate regulations under this section identifying additional characteristics of hazardous waste, including measures or indicators of toxicity.

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

(As amended Pub.L. 98–616, Title II, §§ 221(a), 222, 223(a), Nov. 8, 1984, 98 Stat. 3248, 3251, 3252.)

Unconstitutionality of Legislative Veto Provisions

The provisions of former section 1254(c)(2) of Title 8, Aliens and Nationality, which authorized a House of Congress, by resolution, to invalidate an action of the Executive Branch, were declared unconstitutional in Immigration and Naturalization Service v. Chadha, 1983, 103 S.Ct. 2764, 462 U.S. 919, 77 L.Ed.2d 317. See similar provisions in this section.

HISTORICAL AND STATUTORY NOTES

References in Text

The Hazardous Materials Transportation Act referred to in subsec. (d)(7), is Pub.L. 93–633, title I, Jan. 3, 1975, 88 Stat. 2156, as amended, which is classified principally to chapter 27 (§ 1801 et seq.) of the appendix to Title 49, Transportation. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of Title 49 appendix and Tables.

1984 Amendment

Subsec. (b)(1). Pub.L. 98–616, § 222(b), added "The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratagens) at levels in excess of levels which endanger human health."

Subsec. (d). Pub.L. 98–616, § 221(a), added subsec. (d).

Subsecs. (e) to (h). Pub.L. 98–616, § 222(a), added subsecs. (e), (f), (g) and (h).

Subsec. (i). Pub.L. 98–616, § 223(a), added subsec. (i).

Ash Management and Disposal

Pub.L. 101–549, Title III, § 306, Nov. 15, 1990, 104 Stat. 2584, provided that: "For a period of 2 years after the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990], ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act [this section]. Such reference and limitation shall not be construed to prejudice, endorse or otherwise affect any activity by the Administrator following the 2-year period from the date of enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990]."

Regulation Under the Solid Waste Disposal Act

Pub.L. 99–499, Title I, § 124(b), Oct. 17, 1986, 100 Stat. 1689, provided: "Unless the Administrator of the Environmental Protection Agency promulgates regulations under subtitle C of the Solid Waste Disposal Act [42 USCA § 6901 et seq.] addressing the extraction of wastes from landfills as part of the process of recovering methane from such landfills, the owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, generating, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of that subtitle. If the aqueous or hydrocarbon phase of the condensate or any other waste material removed from the gas recovered from the landfill meets any of the characteristics identified under section 3001 of subtitle C of the Solid Waste Disposal Act [42 USCA § 6921], the preceding sentence shall not apply and such condensate phase or other waste material shall be deemed a hazardous waste under

1975, 526 F.2d 1027, motions granted 560 F.2d 589, 568 F.2d 284, certiorari denied 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

10. Presumptions

Regulations promulgated by Administrator imposing effluent limitations guidelines for inorganic chemicals manufacturing industry for both new and existing sources are presumptively applicable to permit applications issued by state and will control unless presumption is rebutted in connection with claim in application for permissible variance, modification or exception. E.I. du Pont de Nemours & Co. v. Train, C.A.4, 1976, 541 F.2d 1018, affirmed in part, reversed in part on other grounds 97 S.Ct. 965, 430 U.S. 112, 51 L.Ed.2d 204.

11. Review of Administrator's action

See Notes of Decision under section 1369 of this title.

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication

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outted in connection with claim for permissible variance, modi-eption. E.I. du Pont de Nem-Train, C.A.4, 1976, 541 F.2d in part, reversed in part on 97 S.Ct. 965, 430 U.S. 112, 51

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of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

59

soil other than incineration or disposal in approved chemical waste landfill. Id.

5. Exemptions

The parenthetical reference to subsec. (a)(6) of this section in the first part of the express preemption provision of section 2617 of this title does not constitute an exception for local disposal regulation since that would carry a limitation on the kind of federal regulatory action which triggers preemption over to the second or third part of the preemption provision of section 2617 of this title and establish it as a limitation on the scope of preemption, or as an exception thereto, once preemption has been triggered. SED, Inc. v. City of Dayton, D.C.Ohio 1981, 519 F.Supp. 979.

Ordinance of the city of Dayton which regulated, restricted, or prohibited storage of polychlorinated biphenyls (PCBs) did not fall within internal exemptions to preemptive effect of this chapter as pertaining to local regulations restricting or prohibiting disposal of hazardous substances. Id.

6. Jurisdiction

United States courts of appeals have exclusive jurisdiction over actions seeking preenforcement judicial review of rules promulgated under this chapter imposing a ban on manufacture, processing or distribution of polychlorinated biphenyls. Dow Chemical Co. v. Costle, D.C.Del.1980, 484 F.Supp. 101.

7. Weight and sufficiency of evidence

Record failed to show substantial evidence to support decision of Environmental Protection Agency to allow materials with lower concentrations of polychlorinated biphenyls than 50 ppm to remain unregulated, though agency correctly concluded that Congress did not design this section to regulate ambient sources of polychlorinated biphenyls, but, rather, this section was intended to regulate point sources of contamination. Environmental Defense Fund, Inc. v. Environmental Protection Agency, C.A.D.C.1980, 636 F.2d 1267, 205 U.S.App.D.C. 139.

§ 2606. Imminent hazards

(a) Actions authorized and required—(1) The Administrator may commence a civil action in an appropriate district court of the United States—

(A) for seizure of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture,

(B) for relief (as authorized by subsection (b) of this section) against any person who manufactures, processes, distributes in commerce, or uses, or disposes of, an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture, or

(C) for both such seizure and relief.

A civil action may be commenced under this paragraph notwithstanding the existence of a rule under section 2603, 2604, or 2605 of this title or an order under section 2604 of this title, and notwithstanding the pendency of any administrative or judicial proceeding under any provision of this chapter.

(2) If the Administrator has not made a rule under section 2605(a) of this title immediately effective (as authorized by subsection[1] 2605(d)(2)(A)(i) of this title) with respect to an imminently hazardous chemical substance or mixture, the Administrator shall commence in a district court of the United States with respect to such substance or mixture or article containing such substance or mixture a civil action described in subparagraph (A), (B), or (C) of paragraph (1).

(b) Relief Authorized—(1) The district court of the United States in which an action under subsection (a) of this section is brought shall have jurisdiction to grant such temporary or permanent relief as may be necessary to protect health or the environment from the unreasonable risk associated with the chemical substance, mixture, or article involved in such action.

(2) In the case of an action under subsection (a) of this section brought against a person who manufactures, processes, or distributes in commerce a chemical substance or mixture or an article containing a chemical substance or mixture, the relief authorized by paragraph (1) may include the issuance of a mandatory order requiring (A) in the case of purchasers of such substance, mixture, or article known to the defendant, notification to such purchasers of the risk associated with it; (B) public notice of such risk; (C) recall; (D) the replacement or repurchase of such substance, mixture, or article; or (E) any combination of the actions described in the preceding clauses.

(3) In the case of an action under subsection (a) of this section against a chemical substance, mixture, or article, such substance, mixture, or article may be proceeded against by process of libel for its seizure and condemnation. Proceedings in such an action shall conform as nearly as possible to proceedings in rem in admiralty.

(c) **Venue and consolidation**—(1)(A) An action under subsection (a) of this section against a person who manufactures, processes, or distributes a chemical substance or mixture or an article containing a chemical substance or mixture may be brought in the United States District Court for the District of Columbia or for any judicial district in which any of the defendants is found, resides, or transacts business; and process in such an action may be served on a defendant in any other district in which such defendant resides or may be found. An action under subsection (a) of this section against a chemical substance, mixture, or article may be brought in any United States district court within the jurisdiction of which the substance, mixture, or article is found.

(B) In determining the judicial district in which an action may be brought under subsection (a) of this section in instances in which such action may be brought in more than one judicial district, the Administrator shall take into account the convenience of the parties.

(C) Subpoenas requiring attendance of witnesses in an action brought under subsection (a) of this section may be served in any judicial district.

(2) Whenever proceedings under subsection (a) of this section involving identical chemical substances, mixtures, or articles are pending in courts in two or more judicial districts, they shall be consolidated for trial by order of any such court upon application reasonably made by any party in interest, upon notice to all parties in interest.

(d) **Action under section 2605 of this title**—Where appropriate, concurrently with the filing of an action under subsection (a) of this section or as soon thereafter as may be practicable, the Administrator shall initiate a proceeding for the promulgation of a rule under section 2605(a) of this title.

(e) **Representation.**—Notwithstanding any other provision of law, in any action under subsection (a) of this section, the Administrator may direct attorneys of the Environmental Protection Agency to appear and represent the Administrator in such an action.

(f) **Definition.**—For the purposes of subsection (a) of this section, the term "imminently hazardous chemical substance or mixture" means a

chemical substance or mixture which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment. Such a risk to health or the environment shall be considered imminent if it is shown that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture, or that any combination of such activities, is likely to result in such injury to health or the environment before a final rule under section 2605 of this title can protect against such risk.

(Pub.L. 94–469, § 7, Oct. 11, 1976, 90 Stat. 2026.)

[1] So in original. Probably should be "section".

Historical Note

Effective Date. Section effective Jan. 1, 1977, see section 31 of Pub.L. 94–469, set out as an Effective Date note under section 2601 of this title.

Federal Policy Regarding Export of Banned or Significantly Restricted Substances. For provisions defining the term "banned or significantly restricted substance" as including certain chemical substances under this section, and the Federal policy regarding the export of banned or significantly restricted substances, see Ex.Ord. No. 12264, Jan. 15, 1981, 46 F.R. 4659, set out as a note under section 2403 of Title 50, Appendix, War and National Defense.

Legislative History. For legislative history and purpose of Pub.L. 94–469, see 1976 U.S. Code Cong. and Adm.News, p. 4491.

West's Federal Forms

Claim to article arrested see § 11227.
Complaint,
  Against article, see § 11109.
  To enforce forfeiture, see § 5895.
Consent judgment of condemnation, see § 11753.
Consolidation of actions, see §§ 3893 to 3903.10.
Demand for jury trial, see § 11141.
Findings of fact and conclusions of law, see § 4306.
Judgment of condemnation, forfeiture and destruction, see § 4543.
Jurisdiction and venue in district courts, matters pertaining to, see § 1001 et seq.
Process in admiralty, see § 11151 et seq.
Service of process, see § 1301 et seq.
Special bond given after arrest of article, see §§ 11253, 11254.
Subpoenas, see § 3981 et seq.

Library References

Health and Environment ⇐25.5(3).
C.J.S. Health and Environment §§ 91 et seq., 106 et seq., 129 et seq.

§ 2607. Reporting and retention of information

(a) Reports.—(1) The Administrator shall promulgate rules under which—

(A) each person (other than a small manufacturer or processor) who manufactures or processes or proposes to manufacture or process a chemical substance (other than a chemical substance described in subparagraph (B)(ii)) shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require, and



conditions of test, not specifically to its timing. Wisconsin Elec. Power Co. v. Reilly, C.A.7, 1990, 893 F.2d 901.

27. Reasonableness of standards

Regulation promulgated in 1976 prohibiting discharge of vinyl chloride into atmosphere except under emergency conditions was enforceable "emission standard" rather than unenforceable "work practice standard" where regulation set quantitative limitation on emissions of zero without requiring specific work practices. U.S. v. B.F. Goodrich Co., D.C.Ky.1984, 609 F.Supp. 1.

30. Variable or flexible standards

Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 [main volume] reversed 104 S.Ct. 2778, 467 U.S. 837, 81 L.Ed.2d 694, rehearing denied 105 S.Ct. 28, 468 U.S. 1227, 82 L.Ed.2d 921.

32. Standards applicable

Renovation of existing asphalt concrete facility to replace filter bag house with electrostatic precipitator did not constitute "modification" of facility so as to invoke application of new source performance standards, where renovation not only did not increase amount or type of particulate matter emissions, but probably resulted in net decrease in particulate emission rate. U.S. v. Narragansett Imp. Co., D.C.R.I.1983, 571 F.Supp. 688.

35. Prohibited acts

Proposal of owner of aluminum reduction plant to turn off its wet scrubbers was a "modification" of existing facility under Clean Air Act; nonuse of wet scrubbers would leave gaseous fluorides virtually uncontrolled and would not decrease emissions of any other pollutant. National–Southwire Aluminum Co. v. U.S. E.P.A., C.A.6, 1988, 838 F.2d 835, certiorari denied 109 S.Ct. 390, 488 U.S. 955, 102 L.Ed.2d 379.

36. Notice and comment

Environmental Protection Agency's final rule, which required use of new source performance standards as emission level during good engineering practice fluid modeling demonstrations for above-formula stacks, unless standards were infeasible, was "logical outgrowth" of initial proposal, and, thus, final rule did not deprive industry petitioners of opportunity to comment, even though it was promulgated less than two weeks after Agency informed petitioners of decision to adopt change. Natural Resources Defense Council, Inc. v. Thomas, 1988, 838 F.2d 1224, 267 U.S.App. 274, certiorari denied 109 S.Ct. 219, 250, 488 U.S. 888, 901, 102 L.Ed.2d 210, 238.

40. Arbitrary or capricious administrative action

For purposes of determining applicability of "new source performance standards" under Clean Air Act to renovated electric power plant, Environmental Protection Agency's (EPA's) refusal to compare representative prerenovation emissions with actual postrenovation emissions was not contrary to EPA's regulations. Wisconsin Elec. Power Co. v. Reilly, C.A.7, 1990, 893 F.2d 901.

45. Remand

Environmental Protection Agency (EPA) did not adequately explain why ban on lead-acid vehicle battery combustion did not represent the best demonstrated technology for reducing harmful incinerator emissions, and rule thus had to be remanded to agency. State of N.Y. v. Reilly, C.A.D.C.1992, 969 F.2d 1147.

§ 7412. Hazardous air pollutants

(a) Definitions

For purposes of this section, except subsection (r) of this section—

(1) Major source

The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source

The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source

The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source

The term "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) Modification

The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant

The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect

The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit

The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator

The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source

The term "existing source" means any stationary source other than a new source.

(11) Carcinogenic effect

Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2–Acetylaminofluorene
107028	Acrolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4–Aminobiphenyl

CAS number	Chem a
62533	Anilin
90040	o-Anisidi
1332214	Asbestos
71432	Benze e
92875	Benzi n
98077	Benzotri
100447	Benzyl c
92524	Biphe l
117817	Bis(2- l
542881	Bis(chlor
75252	Brome o
106990	1,3–B a
156627	Calciu
105602	Caprolac
133062	Capta
63252	Carba l
75150	Carbon d
56235	Carbon t
463581	Carbo l
120809	Catec l
133904	Chloram
57749	Chlordan
7782505	Chlori e
79118	Chlor c
532274	2–Chloro
108907	Chlor e
510156	Chlor e
67663	Chlorofor
107302	Chlorom
126998	Chlor r
1319773	Cresol C
95487	o-Cresol
108394	m-Cresol
106445	p-Cres
98828	Cume
94757	2,4–D, sa
3547044	DDE
334883	Diazo t
132649	Diben f
96128	1,2–Dibr
84742	Dibut l
106467	1,4–Di l
91941	3,3–Dichl
111444	Dichloroe
542756	1,3–Di l
62737	Dichlo c
111422	Diethano
121697	N,N–Die
64675	Diethy s
119904	3,3–Di e
60117	Dimethyl
119937	3,3'–D
79447	Dimet l
68122	Dimethyl
57147	1,1–Dime
131113	Dimet l
77781	Dimet l
534521	4,6–Dinit
51285	2,4–Dinit
121142	2,4–Di t
123911	1,4–Di
122667	1,2–Dip

CAS number	Chemical name
62533	Aniline
90040	o-Anisidine
1332214	Asbestos
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2–ethylhexyl)phthalate (DEHP)
542881	Bis(chloromethyl)ether
75252	Bromoform
106990	1,3–Butadiene
156627	Calcium cyanamide
105602	Caprolactam
133062	Captan
63252	Carbaryl
75150	Carbon disulfide
56235	Carbon tetrachloride
463581	Carbonyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2–Chloroacetophenone
108907	Chlorobenzene
510156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106445	p-Cresol
98828	Cumene
94757	2,4–D, salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
96128	1,2–Dibromo–3–chloropropane
84742	Dibutylphthalate
106467	1,4–Dichlorobenzene(p)
91941	3,3–Dichlorobenzidene
111444	Dichloroethyl ether (Bis(2–chloroethyl)ether)
542756	1,3–Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N–Diethyl aniline (N,N–Dimethylaniline)
64675	Diethyl sulfate
119904	3,3–Dimethoxybenzidine
60117	Dimethyl aminoazobenzene
119937	3,3'–Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1–Dimethyl hydrazine
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6–Dinitro-o-cresol, and salts
51285	2,4–Dinitrophenol
121142	2,4–Dinitrotoluene
123911	1,4–Dioxane (1,4–Diethyleneoxide)
122667	1,2–Diphenylhydrazine

CAS number	Chemical name
106898	Epichlorohydrin (1–Chloro–2,3–epoxypropane)
106887	1,2–Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51796	Ethyl carbamate (Urethane)
75003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2–Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine (Aziridine)
75218	Ethylene oxide
96457	Ethylene thiourea
75343	Ethylidene dichloride (1,1–Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene–1,6–diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine
7647010	Hydrochloric acid
7664393	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
108316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74839	Methyl bromide (Bromomethane)
74873	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1–Trichloroethane)
78933	Methyl ethyl ketone (2–Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
108101	Methyl isobutyl ketone (Hexone)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert butyl ether
101144	4,4–Methylene bis(2–chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)
101779	4,4'–Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4–Nitrobiphenyl
100027	4–Nitrophenol
79469	2–Nitropropane
684935	N–Nitroso–N–methylurea
62759	N–Nitrosodimethylamine
59892	N–Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzene)
87865	Pentachlorophenol
108952	Phenol
106503	p-Phenylenediamine
75445	Phosgene
7803512	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride

CAS number	
1336363	
1120714	
57578	
123386	
114261	
78875	
75569	
75558	
91225	
106514	
100425	
96093	
1746016	
79345	
127184	
7550450	
108883	
95807	
584849	
95534	
8001352	
120821	
79005	
79016	
95954	
88062	
121448	
1582098	
540841	
108054	
593602	
75014	
75354	
1330207	
95476	
108383	
106423	
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NOTE: For all listing
following applies: Unl
chemical substance th
that chemical's infrastruc
1 X'CN where X = H'
example KCN or Ca(C
2 Includes mono- an
$(OCH_2CH_2)_n$–OR' whe
n = 1, 2, or 3

CAS number	Chemical name
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3–Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propoxur (Baygon)
78875	Propylene dichloride (1,2–Dichloropropane)
75569	Propylene oxide
75558	1,2–Propylenimine (2–Methyl aziridine)
91225	Quinoline
106514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8–Tetrachlorodibenzo–p–dioxin
79345	1,1,2,2–Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4–Toluene diamine
584849	2,4–Toluene diisocyanate
95534	o-Toluidine
8001352	Toxaphene (chlorinated camphene)
120821	1,2,4–Trichlorobenzene
79005	1,1,2–Trichloroethane
79016	Trichloroethylene
95954	2,4,5–Trichlorophenol
88062	2,4,6–Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4–Trimethylpentane
108054	Vinyl acetate
593602	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1–Dichloroethylene)
1330207	Xylenes (isomers and mixture)
95476	o-Xylenes
108383	m-Xylenes
106423	p-Xylenes
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds [1]
0	Glycol ethers [2]
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers [3]
0	Nickel Compounds
0	Polycylic Organic Matter [4]
0	Radionuclides (including radon) [5]
0	Selenium Compounds

NOTE: For all listings above which contain the word "compounds" and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

1 X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

2 Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol R–$(OCH_2CH_2)_n$–OR' where

n = 1, 2, or 3

R = alkyl or aryl groups

R' = R, H, or groups which, when removed, yield glycol ethers with the structure: R-(OCH2CH)$_n$-OH. Polymers are excluded from the glycol category.

[3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

[4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

[5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods

The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration

The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead

The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories

The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories

In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this

section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8–tetrachlorodibenzofurans and 2,3,7,8–tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in

accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than—

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate

standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved

No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate—

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate—

(i) the use of sodium silicate (or equivalent) luting compounds, if the Administrator determines that use of sodium silicate is an effective means of emissions control and is achievable, taking into account costs and reasonable commercial warranties for doors and related equipment; and

(ii) door and jam cleaning practices.

Notwithstanding subsection (i) of this section, the compliance date for such work practice regulations for coke oven batteries shall be not later than the date 3 years after November 15, 1990.

(C) For coke oven batteries electing to qualify for an extension of the compliance date for standards promulgated under subsection (f) of this section in accordance with subsection (i)(8) of this section, the emission standards under this subsection for coke oven batteries shall require that coke oven batteries not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries seeking an extension shall be not later than the date 3 years after November 15, 1990.

(9) Sources licensed by the Nuclear Regulatory Commission

No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State)

is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] for such category or subcategory provides an ample margin of safety to protect the public health. Nothing in this subsection shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of radionuclides which is more stringent than the standard or limitation in effect under section 7411 of this title or this section.

(10) Effective date

Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation.

(e) Schedule for standards and review

(1) In general

The Administrator shall promulgate regulations establishing emission standards for categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1) of this section as expeditiously as practicable, assuring that—

(A) emission standards for not less than 40 categories and subcategories (not counting coke oven batteries) shall be promulgated not later than 2 years after November 15, 1990;

(B) emission standards for coke oven batteries shall be promulgated not later than December 31, 1992;

(C) emission standards for 25 per centum of the listed categories and subcategories shall be promulgated not later than 4 years after November 15, 1990;

(D) emission standards for an additional 25 per centum of the listed categories and subcategories shall be promulgated not later than 7 years after November 15, 1990; and

(E) emission standards for all categories and subcategories shall be promulgated not later than 10 years after November 15, 1990.

(2) In determining priorities for promulgating standards under subsection (d) of this section, the Administrator shall consider—

(A) the known or anticipated adverse effects of such pollutants on public health and the environment;

(B) the quantity and location of emissions or reasonably anticipated emissions of hazardous air pollutants that each category or subcategory will emit; and

(C) the efficiency of grouping categories or subcategories according to the pollutants emitted, or the processes or technologies used.

(3) Published schedule

Not later than 24 months after November 15, 1990, and after opportunity for comment, the Administrator shall publish a schedule establishing a date for the promulgation of emission standards for each category and subcategory of sources listed pursuant to subsection (c)(1) and (3) of this section which shall be consistent with the requirements of paragraphs (1) and (2). The determination of priorities for the promulgation of standards pursuant to this paragraph is not a rulemaking and shall not be subject to judicial review, except that, failure to promulgate any standard pursuant to the schedule established by this paragraph shall be subject to review under section 7604 of this title.

(4) Judicial review

Notwithstanding section 7607 of this title, no action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title, when the Administrator issues emission standards for such pollutant or category.

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C.A. § 1281 et seq.]) not later than 5 years after November 15, 1990.

(f) Standard to protect health and the environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on—

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vicinity of sources, any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories for which standards under subsection (d) of this section are required to be promulgated within 2 years after November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to whic from any stationary sourc an existing source—

(A) such standard

(B) the Administr of up to 2 years after standard if the Admi installation of contro waiver to assure tha endangerment.

(5) Area sources

The Administrator shall subsection or promulgate er ry or subcategory of area section and for which an (d)(5) of this section.

(6) Unique chemical substa

In establishing standards pollutants without CAS nu establish such standards substances actually emit such emissions in the categ

(g) Modifications

(1) Offsets

(A) A physical change in, which results in a grea hazardous air pollutant sh quantity of actual emissions offset by an equal or gre hazardous air pollutant hazardous, pursuant to g (B). The owner or oper Administrator (or the State sentence.

(B) The Administrator later than 18 months after implementation of this su the extent practicable, emissions to the ambient ai this section sufficient to fa (A). Such guidance sh increased pollutant (or r adverse effects to human h determined unless there ar

(2) Construction, reconstru

(A) After the effective chapter in any State, r pollutants in such State, maximum achievable contr existing sources will be me basis where no applica Administrator.

(B) After the effective chapter in any State, no hazardous air pollutants the maximum achievable for new sources will be r

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

(g) Modifications

(1) Offsets

(A) A physical change in, or change in the method of operation of, a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification, if such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator under subparagraph (B). The owner or operator of such source shall submit a showing to the Administrator (or the State) that such increase has been offset under the preceding sentence.

(B) The Administrator shall, after notice and opportunity for comment and not later than 18 months after November 15, 1990, publish guidance with respect to implementation of this subsection. Such guidance shall include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions to the ambient air of each of the pollutants listed under subsection (b) of this section sufficient to facilitate the offset showing authorized by subparagraph (A). Such guidance shall not authorize offsets between pollutants where the increased pollutant (or more than one pollutant in a stream of pollutants) causes adverse effects to human health for which no safety threshold for exposure can be determined unless there are corresponding decreases in such types of pollutant(s).

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case

basis where no applicable emission limitations have been established by the Administrator.

(3) Procedures for modifications

The Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.

(h) Work practice standards and other requirements

(1) In general

For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) Definition

For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that—

(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law, or

(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

(3) Alternative standard

If after notice and opportunity for comment, the owner or operator of any source establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Numerical standard required

Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it is feasible to promulgate and enforce a standard in such terms.

(i) Schedule for compliance

(1) Preconstruction and operating requirements

After the effective date of any emission standard, limitation, or regulation under subsection (d), (f) or (h) of this section, no person may construct any new major source or reconstruct any existing major source subject to such emission standard, regulation or limitation unless the Administrator (or a State with a permit program approved under subchapter V of this chapter) determines that such source, if properly constructed, reconstructed and operated, will comply with the standard, regulation or limitation.

(2) Special rule

Notwithstanding the requirements of paragraph (1), a new source which commences construction or reconstruction after a standard, limitation or regulation applicable to such source is proposed and before such standard, limitation or regulation is promulgated shall not be required to comply with such promulgated standard until the date 3 years after the date of promulgation if—

(A) the promulgated standard, limitation or regulation is more stringent than the standard, limitation or regulation proposed; and

(B) the source complies with the standard, limitation, or regulation as proposed during the 3-year period immediately after promulgation.

(3) Compliance schedule for existing sources

(A) After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8).

(B) The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

(4) Presidential exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(5) Early reduction

(A) The Administrator (or a State acting pursuant to a permit program approved under subchapter V of this chapter) shall issue a permit allowing an existing source, for which the owner or operator demonstrates that the source has achieved a reduction of 90 per centum or more in emissions of hazardous air pollutants (95 per centum in the case of hazardous air pollutants which are particulates) from the source, to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under subsection (d) of this section for a period of 6 years from the compliance date for the otherwise applicable standard, provided that such reduction is achieved before the otherwise applicable standard under subsection (d) of this section is first proposed. Nothing in this paragraph shall preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension authorized by the previous sentence.

(B) An existing source which achieves the reduction referred to in subparagraph (A) after the proposal of an applicable standard but before January 1, 1994, may qualify under subparagraph (A), if the source makes an enforceable commitment to achieve such reduction before the proposal of the standard. Such commitment shall be enforceable to the same extent as a regulation under this section.

(C) The reduction shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that, there is no evidence that emissions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. The Administrator may allow a source to use a baseline year of 1985 or 1986 provided that the source can demonstrate to the satisfaction of the Administrator that emissions data for the source reflects verifiable data based on information for such source, received by the Administrator prior to November 15, 1990, pursuant to an information request issued under section 7411 of this title.

(D) For each source granted an alternative emission limitation under this paragraph there shall be established by a permit issued pursuant to subchapter V of this chapter an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation

under this paragraph. An alternative emission limitation under this paragraph shall not be available with respect to standards or requirements promulgated pursuant to subsection (f) of this section and the Administrator shall, for the purpose of determining whether a standard under subsection (f) of this section is necessary, review emissions from sources granted an alternative emission limitation under this paragraph at the same time that other sources in the category or subcategory are reviewed.

(E) With respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities including, but not limited to, chlorinated dioxins and furans, the Administrator shall by regulation limit the use of offsetting reductions in emissions of other hazardous air pollutants from the source as counting toward the 90 per centum reduction in such high-risk pollutants qualifying for an alternative emissions limitation under this paragraph.

(6) Other reductions

Notwithstanding the requirements of this section, no existing source that has installed—

(A) best available control technology (as defined in section 7479(3) of this title), or

(B) technology required to meet a lowest achievable emission rate (as defined in section 7501 of this title),

prior to the promulgation of a standard under this section applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to an action described in subparagraph (A) or (B) shall be required to comply with such standard under this section until the date 5 years after the date on which such installation or reduction has been achieved, as determined by the Administrator. The Administrator may issue such rules and guidance as are necessary to implement this paragraph.

(7) Extension for new sources

A source for which construction or reconstruction is commenced after the date an emission standard applicable to such source is proposed pursuant to subsection (d) of this section but before the date an emission standard applicable to such source is proposed pursuant to subsection (f) of this section shall not be required to comply with the emission standard under subsection (f) of this section until the date 10 years after the date construction or reconstruction is commenced.

(8) Coke ovens

(A) Any coke oven battery that complies with the emission limitations established under subsection (d)(8)(C) of this section, subparagraph (B), and subparagraph (C), and complies with the provisions of subparagraph (E), shall not be required to achieve emission limitations promulgated under subsection (f) of this section until January 1, 2020.

(B)(i) Not later than December 31, 1992, the Administrator shall promulgate emission limitations for coke oven emissions from coke oven batteries. Notwithstanding paragraph (3) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 1998. Such emission limitations shall reflect the lowest achievable emission rate as defined in section 7501 of this title for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than—

(I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);

(II) 1 per centum leaking lids;

(III) 4 per centum leaking offtakes; and

(IV) 16 seconds visible emissions per charge,

with an exclusion for emissions during the period after the closing of self-sealing oven doors (or the total mass emissions equivalent). The rulemaking in which such emission limitations are promulgated shall also establish an appropriate measurement methodology for determining compliance with such emission limitations, and shall establish such emission limitations in terms of an equivalent level of mass

emissions reduction from a coke oven battery, unless the Administrator finds that such a mass emissions standard would not be practicable or enforceable. Such measurement methodology, to the extent it measures leaking doors, shall take into consideration alternative test methods that reflect the best technology and practices actually applied in the affected industries, and shall assure that the final test methods are consistent with the performance of such best technology and practices.

(ii) If the Administrator fails to promulgate such emission limitations under this subparagraph prior to the effective date of such emission limitations, the emission limitations applicable to coke oven batteries under this subparagraph shall be—

(I) 3 per centum leaking doors (5 per centum leaking doors for six meter batteries);

(II) 1 per centum leaking lids;

(III) 4 per centum leaking offtakes; and

(IV) 16 seconds visible emissions per charge,

or the total mass emissions equivalent (if the total mass emissions equivalent is determined to be practicable and enforceable), with no exclusion for emissions during the period after the closing of self-sealing oven doors.

(C) Not later than January 1, 2007, the Administrator shall review the emission limitations promulgated under subparagraph (B) and revise, as necessary, such emission limitations to reflect the lowest achievable emission rate as defined in section 7501 of this title at the time for a coke oven battery that is rebuilt or a replacement at a coke oven plant for an existing battery. Such emission limitations shall be no less stringent than the emission limitation promulgated under subparagraph (B). Notwithstanding paragraph (2) of this subsection, the compliance date for such emission limitations for existing coke oven batteries shall be January 1, 2010.

(D) At any time prior to January 1, 1998, the owner or operator of any coke oven battery may elect to comply with emission limitations promulgated under subsection (f) of this section by the date such emission limitations would otherwise apply to such coke oven battery, in lieu of the emission limitations and the compliance dates provided under subparagraphs (B) and (C) of this paragraph. Any such owner or operator shall be legally bound to comply with such emission limitations promulgated under subsection (f) of this section with respect to such coke oven battery as of January 1, 2003. If no such emission limitations have been promulgated for such coke oven battery, the Administrator shall promulgate such emission limitations in accordance with subsection (f) of this section for such coke oven battery.

(E) Coke oven batteries qualifying for an extension under subparagraph (A) shall make available not later than January 1, 2000, to the surrounding communities the results of any risk assessment performed by the Administrator to determine the appropriate level of any emission standard established by the Administrator pursuant to subsection (f) of this section.

(F) Notwithstanding the provisions of this section, reconstruction of any source of coke oven emissions qualifying for an extension under this paragraph shall not subject such source to emission limitations under subsection (f) of this section more stringent than those established under subparagraphs (B) and (C) until January 1, 2020. For the purposes of this subparagraph, the term "reconstruction" includes the replacement of existing coke oven battery capacity with new coke oven batteries of comparable or lower capacity and lower potential emissions.

(j) Equivalent emission limitation by permit

(1) Effective date

The requirements of this subsection shall apply in each State beginning on the effective date of a permit program established pursuant to subchapter V of this chapter in such State, but not prior to the date 42 months after November 15, 1990.

(2) Failure to promulgate a standard

In the event that the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3) of this section, and beginning 18 months after such date (but not prior to the effective date of a permit program under subchapter V of this chapter), the owner or operator of any major source in such category or subcategory shall submit

a permit application under paragraph (3) and such owner or operator shall also comply with paragraphs (5) and (6).

(3) Applications

By the date established by paragraph (2), the owner or operator of a major source subject to this subsection shall file an application for a permit. If the owner or operator of a source has submitted a timely and complete application for a permit required by this subsection, any failure to have a permit shall not be a violation of paragraph (2), unless the delay in final action is due to the failure of the applicant to timely submit information required or requested to process the application. The Administrator shall not later than 18 months after November 15, 1990, and after notice and opportunity for comment, establish requirements for applications under this subsection including a standard application form and criteria for determining in a timely manner the completeness of applications.

(4) Review and approval

Permit applications submitted under this subsection shall be reviewed and approved or disapproved according to the provisions of section 7661d of this title. In the event that the Administrator (or the State) disapproves a permit application submitted under this subsection or determines that the application is incomplete, the applicant shall have up to 6 months to revise the application to meet the objections of the Administrator (or the State).

(5) Emission limitation

The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d) of this section. In the alternative, if the applicable criteria are met, the permit may contain an emissions limitation established according to the provisions of subsection (i)(5) of this section. For purposes of the preceding sentence, the reduction required by subsection (i)(5)(A) of this section shall be achieved by the date on which the relevant standard should have been promulgated under subsection (d) of this section. No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and, as expeditiously as practicable, but not later than the date 3 years after the permit is issued for existing sources or such other compliance date as would apply under subsection (i) of this section.

(6) Applicability of subsequent standards

If the Administrator promulgates an emission standard that is applicable to the major source prior to the date on which a permit application is approved, the emission limitation in the permit shall reflect the promulgated standard rather than the emission limitation determined pursuant to paragraph (5), provided that the source shall have the compliance period provided under subsection (i) of this section. If the Administrator promulgates a standard under subsection (d) of this section that would be applicable to the source in lieu of the emission limitation established by permit under this subsection after the date on which the permit has been issued, the Administrator (or the State) shall revise such permit upon the next renewal to reflect the standard promulgated by the Administrator providing such source a reasonable time to comply, but no longer than 8 years after such standard is promulgated or 8 years after the date on which the source is first required to comply with the emissions limitation established by paragraph (5), whichever is earlier.

(k) Area source program

(1) Findings and purpose

The Congress finds that emissions of hazardous air pollutants from area sources may individually, or in the aggregate, present significant risks to public health in urban areas. Considering the large number of persons exposed and the risks of carcinogenic and other adverse health effects from hazardous air pollutants, ambient concentrations characteristic of large urban areas should be reduced to levels

substantially below those currently experienced. It is the purpose of this subsection to achieve a substantial reduction in emissions of hazardous air pollutants from area sources and an equivalent reduction in the public health risks associated with such sources including a reduction of not less than 75 per centum in the incidence of cancer attributable to emissions from such sources.

(2) Research program

The Administrator shall, after consultation with State and local air pollution control officials, conduct a program of research with respect to sources of hazardous air pollutants in urban areas and shall include within such program—

(A) ambient monitoring for a broad range of hazardous air pollutants (including, but not limited to, volatile organic compounds, metals, pesticides and products of incomplete combustion) in a representative number of urban locations;

(B) analysis to characterize the sources of such pollution with a focus on area sources and the contribution that such sources make to public health risks from hazardous air pollutants; and

(C) consideration of atmospheric transformation and other factors which can elevate public health risks from such pollutants.

Health effects considered under this program shall include, but not be limited to, carcinogenicity, mutagenicity, teratogenicity, neurotoxicity, reproductive dysfunction and other acute and chronic effects including the role of such pollutants as precursors of ozone or acid aerosol formation. The Administrator shall report the preliminary results of such research not later than 3 years after November 15, 1990.

(3) National strategy

(A) Considering information collected pursuant to the monitoring program authorized by paragraph (2), the Administrator shall, not later than 5 years after November 15, 1990, and after notice and opportunity for public comment, prepare and transmit to the Congress a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas.

(B) The strategy shall—

(i) identify not less than 30 hazardous air pollutants which, as the result of emissions from area sources, present the greatest threat to public health in the largest number of urban areas and that are or will be listed pursuant to subsection (b) of this section, and

(ii) identify the source categories or subcategories emitting such pollutants that are or will be listed pursuant to subsection (c) of this section. When identifying categories and subcategories of sources under this subparagraph, the Administrator shall assure that sources accounting for 90 per centum or more of the aggregate emissions of each of the 30 identified hazardous air pollutants are subject to standards pursuant to subsection (d) of this section.

(C) The strategy shall include a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this or other laws (including, but not limited to, the Toxic Substances Control Act [15 U.S.C.A. § 2601 et seq.], the Federal Insecticide, Fungicide and Rodenticide Act [7 U.S.C.A. § 136 et seq.] and the Resource Conservation and Recovery Act [42 U.S.C.A. § 6901 et seq.]) or by the States. The strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants emitted by stationary sources of not less than 75 per centum, considering control of emissions of hazardous air pollutants from all stationary sources and resulting from measures implemented by the Administrator or by the States under this or other laws.

(D) The strategy may also identify research needs in monitoring, analytical methodology, modeling or pollution control techniques and recommendations for changes in law that would further the goals and objectives of this subsection.

(E) Nothing in this subsection shall be interpreted to preclude or delay implementation of actions with respect to area sources of hazardous air pollutants under consideration pursuant to this or any other law and that may be promulgated before the strategy is prepared.

(F) The Administrator shall implement the strategy as expeditiously as practicable assuring that all sources are in compliance with all requirements not later than 9 years after November 15, 1990.

(G) As part of such strategy the Administrator shall provide for ambient monitoring and emissions modeling in urban areas as appropriate to demonstrate that the goals and objectives of the strategy are being met.

(4) Areawide activities

In addition to the national urban air toxics strategy authorized by paragraph (3), the Administrator shall also encourage and support areawide strategies developed by State or local air pollution control agencies that are intended to reduce risks from emissions by area sources within a particular urban area. From the funds available for grants under this section, the Administrator shall set aside not less than 10 per centum to support areawide strategies addressing hazardous air pollutants emitted by area sources and shall award such funds on a demonstration basis to those States with innovative and effective strategies. At the request of State or local air pollution control officials, the Administrator shall prepare guidelines for control technologies or management practices which may be applicable to various categories or subcategories of area sources.

(5) Report

The Administrator shall report to the Congress at intervals not later than 8 and 12 years after November 15, 1990, on actions taken under this subsection and other parts of this chapter to reduce the risk to public health posed by the release of hazardous air pollutants from area sources. The reports shall also identify specific metropolitan areas that continue to experience high risks to public health as the result of emissions from area sources.

(l) State programs

(1) In general

Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants subject to this section or requirements for the prevention and mitigation of accidental releases pursuant to subsection (r) of this section. A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

(2) Guidance

Not later than 12 months after November 15, 1990, the Administrator shall publish guidance that would be useful to the States in developing programs for submittal under this subsection. The guidance shall also provide for the registration of all facilities producing, processing, handling or storing any substance listed pursuant to subsection (r) of this section in amounts greater than the threshold quantity. The Administrator shall include as an element in such guidance an optional program begun in 1986 for the review of high-risk point sources of air pollutants including, but not limited to, hazardous air pollutants listed pursuant to subsection (b) of this section.

(3) Technical assistance

The Administrator shall establish and maintain an air toxics clearinghouse and center to provide technical information and assistance to State and local agencies and, on a cost recovery basis, to others on control technology, health and ecological risk assessment, risk analysis, ambient monitoring and modeling, and emissions measurement and monitoring. The Administrator shall use the authority of section 7403 of this title to examine methods for preventing, measuring, and controlling emissions and evaluating associated health and ecological risks. Where appropriate, such activity shall be conducted with not-for-profit organizations. The Administrator may conduct research on methods for preventing, measuring and control-

ling emissions and evaluating associated health and environment risks. All information collected under this paragraph shall be available to the public.

(4) Grants

Upon application of a State, the Administrator may make grants, subject to such terms and conditions as the Administrator deems appropriate, to such State for the purpose of assisting the State in developing and implementing a program for submittal and approval under this subsection. Programs assisted under this paragraph may include program elements addressing air pollutants or extremely hazardous substances other than those specifically subject to this section. Grants under this paragraph may include support for high-risk point source review as provided in paragraph (2) and support for the development and implementation of areawide area source programs pursuant to subsection (k) of this section.

(5) Approval or disapproval

Not later than 180 days after receiving a program submitted by a State, and after notice and opportunity for public comment, the Administrator shall either approve or disapprove such program. The Administrator shall disapprove any program submitted by a State, if the Administrator determines that—

(A) the authorities contained in the program are not adequate to assure compliance by all sources within the State with each applicable standard, regulation or requirement established by the Administrator under this section;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the Administrator under paragraph (2) or is not likely to satisfy, in whole or in part, the objectives of this chapter.

If the Administrator disapproves a State program, the Administrator shall notify the State of any revisions or modifications necessary to obtain approval. The State may revise and resubmit the proposed program for review and approval pursuant to the provisions of this subsection.

(6) Withdrawal

Whenever the Administrator determines, after public hearing, that a State is not administering and enforcing a program approved pursuant to this subsection in accordance with the guidance published pursuant to paragraph (2) or the requirements of paragraph (5), the Administrator shall so notify the State and, if action which will assure prompt compliance is not taken within 90 days, the Administrator shall withdraw approval of the program. The Administrator shall not withdraw approval of any program unless the State shall have been notified and the reasons for withdrawal shall have been stated in writing and made public.

(7) Authority to enforce

Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section.

(8) Local program

The Administrator may, after notice and opportunity for public comment, approve a program developed and submitted by a local air pollution control agency (after consultation with the State) pursuant to this subsection and any such agency implementing an approved program may take any action authorized to be taken by a State under this section.

(9) Permit authority

Nothing in this subsection shall affect the authorities and obligations of the Administrator or the State under subchapter V of this chapter.

(m) Atmospheric deposition to Great Lakes and coastal waters

(1) Deposition assessment

The Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall conduct a program to identify and assess the extent of atmospheric deposition of hazardous air pollutants (and in the discretion of the Administrator, other air pollutants) to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters. As part of such program, the Administrator shall—

(A) monitor the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters, including monitoring of the Great Lakes through the monitoring network established pursuant to paragraph (2) of this subsection and designing and deploying an atmospheric monitoring network for coastal waters pursuant to paragraph (4);

(B) investigate the sources and deposition rates of atmospheric deposition of air pollutants (and their atmospheric transformation precursors);

(C) conduct research to develop and improve monitoring methods and to determine the relative contribution of atmospheric pollutants to total pollution loadings to the Great Lakes, the Chesapeake Bay, Lake Champlain, and coastal waters;

(D) evaluate any adverse effects to public health or the environment caused by such deposition (including effects resulting from indirect exposure pathways) and assess the contribution of such deposition to violations of water quality standards established pursuant to the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.] and drinking water standards established pursuant to the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.]; and

(E) sample for such pollutants in biota, fish, and wildlife of the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters and characterize the sources of such pollutants.

(2) Great Lakes monitoring network

The Administrator shall oversee, in accordance with Annex 15 of the Great Lakes Water Quality Agreement, the establishment and operation of a Great Lakes atmospheric deposition network to monitor atmospheric deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) to the Great Lakes.

(A) As part of the network provided for in this paragraph, and not later than December 31, 1991, the Administrator shall establish in each of the 5 Great Lakes at least 1 facility capable of monitoring the atmospheric deposition of hazardous air pollutants in both dry and wet conditions.

(B) The Administrator shall use the data provided by the network to identify and track the movement of hazardous air pollutants through the Great Lakes, to determine the portion of water pollution loadings attributable to atmospheric deposition of such pollutants, and to support development of remedial action plans and other management plans as required by the Great Lakes Water Quality Agreement.

(C) The Administrator shall assure that the data collected by the Great Lakes atmospheric deposition monitoring network is in a format compatible with databases sponsored by the International Joint Commission, Canada, and the several States of the Great Lakes region.

(3) Monitoring for the Chesapeake Bay and Lake Champlain

The Administrator shall establish at the Chesapeake Bay and Lake Champlain atmospheric deposition stations to monitor deposition of hazardous air pollutants (and in the Administrator's discretion, other air pollutants) within the Chesapeake Bay and Lake Champlain watersheds. The Administrator shall determine the role of air deposition in the pollutant loadings of the Chesapeake Bay and Lake Champlain, investigate the sources of air pollutants deposited in the watersheds, evaluate the health and environmental effects of such pollutant loadings, and shall sample such pollutants in biota, fish and wildlife within the watersheds, as necessary to characterize such effects.

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(4) Monitoring for coastal waters

The Administrator shall design and deploy atmospheric deposition monitoring networks for coastal waters and their watersheds and shall make any information collected through such networks available to the public. As part of this effort, the Administrator shall conduct research to develop and improve deposition monitoring methods, and to determine the relative contribution of atmospheric pollutants to pollutant loadings. For purposes of this subsection, "coastal waters" shall mean estuaries selected pursuant to section 320(a)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C.A. § 1330(a)(2)(A)] or listed pursuant to section 320(a)(2)(B) of such Act [33 U.S.C.A. § 1330(a)(2)(B)] or estuarine research reserves designated pursuant to section 1461 of Title 16.

(5) Report

Within 3 years of November 15, 1990, and biennially thereafter, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report on the results of any monitoring, studies, and investigations conducted pursuant to this subsection. Such report shall include, at a minimum, an assessment of—

(A) the contribution of atmospheric deposition to pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(B) the environmental and public health effects of any pollution which is attributable to atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters;

(C) the source or sources of any pollution to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters which is attributable to atmospheric deposition;

(D) whether pollution loadings in the Great Lakes, the Chesapeake Bay, Lake Champlain or coastal waters cause or contribute to exceedances [2] of drinking water standards pursuant to the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.] or water quality standards pursuant to the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.] or, with respect to the Great Lakes, exceedances [2] of the specific objectives of the Great Lakes Water Quality Agreement; and

(E) a description of any revisions of the requirements, standards, and limitations pursuant to this chapter and other applicable Federal laws as are necessary to assure protection of human health and the environment.

(6) Additional regulation

As part of the report to Congress, the Administrator shall determine whether the other provisions of this section are adequate to prevent serious adverse effects to public health and serious or widespread environmental effects, including such effects resulting from indirect exposure pathways, associated with atmospheric deposition to the Great Lakes, the Chesapeake Bay, Lake Champlain and coastal waters of hazardous air pollutants (and their atmospheric transformation products). The Administrator shall take into consideration the tendency of such pollutants to bioaccumulate. Within 5 years after November 15, 1990, the Administrator shall, based on such report and determination, promulgate, in accordance with this section, such further emission standards or control measures as may be necessary and appropriate to prevent such effects, including effects due to bioaccumulation and indirect exposure pathways. Any requirements promulgated pursuant to this paragraph with respect to coastal waters shall only apply to the coastal waters of the States which are subject to section 7627(a) of this title.

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this

section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

(2) Coke oven production technology study

(A) The Secretary of the Department of Energy and the Administrator shall jointly undertake a 6-year study to assess coke oven production emission control technologies and to assist in the development and commercialization of technically practicable and economically viable control technologies which have the potential to significantly reduce emissions of hazardous air pollutants from coke oven production facilities. In identifying control technologies, the Secretary and the Administrator shall consider the range of existing coke oven operations and battery design and the availability of sources of materials for such coke ovens as well as alternatives to existing coke oven production design.

(B) The Secretary and the Administrator are authorized to enter into agreements with persons who propose to develop, install and operate coke production emission control technologies which have the potential for significant emissions reductions of hazardous air pollutants provided that Federal funds shall not exceed 50 per centum of the cost of any project assisted pursuant to this paragraph.

(C) The Secretary shall prepare annual reports to Congress on the status of the research program and at the completion of the study shall make recommendations to the Administrator identifying practicable and economically viable control technologies for coke oven production facilities to reduce residual risks remaining after implementation of the standard under subsection (d) of this section.

(D) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1992 through 1997 to carry out the program authorized by this paragraph.

(3) Publicly owned treatment works

The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions. The Administrator may prescribe uniform sampling, modeling and risk assessment methods for use in implementing this subsection.

(4) Oil and gas wells; pipeline facilities

(A) Notwithstanding the provisions of subsection (a) of this section, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c) of this section, except that the Administrator may establish an area source category for oil and gas production wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

(5) Hydrogen sulfide

The Administrator is directed to assess the hazards to public health and the environment resulting from the emission of hydrogen sulfide associated with the extraction of oil and natural gas resources. To the extent practicable, the assessment shall build upon and not duplicate work conducted for an assessment pursuant to section 8002(m) of the Solid Waste Disposal Act [42 U.S.C.A. § 6982(m)] and shall reflect consultation with the States. The assessment shall include a review of existing State and industry control standards, techniques and enforcement. The Administrator shall report to the Congress within 24 months after November 15, 1990, with the findings of such assessment, together with any recommendations, and shall, as appropriate, develop and implement a control strategy for emissions of hydrogen sulfide to protect human health and the environment, based on the findings of such assessment, using authorities under this chapter including sections 7411 of this title and this section.

(6) Hydrofluoric acid

Not later than 2 years after November 15, 1990, the Administrator shall, for those regions of the country which do not have comprehensive health and safety regulations with respect to hydrofluoric acid, complete a study of the potential hazards of hydrofluoric acid and the uses of hydrofluoric acid in industrial and commercial applications to public health and the environment considering a range of events including worst-case accidental releases and shall make recommendations to the Congress for the reduction of such hazards, if appropriate.

(7) RCRA facilities

In the case of any category or subcategory of sources the air emissions of which are regulated under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], the Administrator shall take into account any regulations of such emissions which are promulgated under such subtitle and shall, to the maximum extent practicable and consistent with the provisions of this section, ensure that the requirements of such subtitle and this section are consistent.

(o) National Academy of Sciences Study

(1) Request of the Academy

Within 3 months of November 15, 1990, the Administrator shall enter into appropriate arrangements with the National Academy of Sciences to conduct a review of—

(A) risk assessment methodology used by the Environmental Protection Agency to determine the carcinogenic risk associated with exposure to hazardous air pollutants from source categories and subcategories subject to the requirements of this section; and

(B) improvements in such methodology.

(2) Elements to be studied

In conducting such review, the National Academy of Sciences should consider, but not be limited to, the following—

(A) the techniques used for estimating and describing the carcinogenic potency to humans of hazardous air pollutants; and

(B) the techniques used for estimating exposure to hazardous air pollutants (for hypothetical and actual maximally exposed individuals as well as other exposed individuals).

(3) Other health effects of concern

To the extent practicable, the Academy shall evaluate and report on the methodology for assessing the risk of adverse human health effects other than cancer for which safe thresholds of exposure may not exist, including, but not limited to, inheritable genetic mutations, birth defects, and reproductive dysfunctions.

(4) Report

A report on the results of such review shall be submitted to the Senate Committee on Environment and Public Works, the House Committee on Energy and Commerce, the Risk Assessment and Management Commission established by section 303 of the Clean Air Act Amendments of 1990 and the Administrator not later than 30 months after November 15, 1990.

(5) Assistance

The Administrator shall assist the Academy in gathering any information the Academy deems necessary to carry out this subsection. The Administrator may use any authority under this chapter to obtain information from any person, and to require any person to conduct tests, keep and produce records, and make reports respecting research or other activities conducted by such person as necessary to carry out this subsection.

(6) Authorization

Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out this subsection.

(7) Guidelines for carcinogenic risk assessment

The Administrator shall consider, but need not adopt, the recommendations contained in the report of the National Academy of Sciences prepared pursuant to this subsection and the views of the Science Advisory Board, with respect to such report. Prior to the promulgation of any standard under subsection (f) of this section, and after notice and opportunity for comment, the Administrator shall publish revised Guidelines for Carcinogenic Risk Assessment or a detailed explanation of the reasons that any recommendations contained in the report of the National Academy of Sciences will not be implemented. The publication of such revised Guidelines shall be a final Agency action for purposes of section 7607 of this title.

(p) Mickey Leland urban air toxics research center

(1) Establishment

The Administrator shall oversee the establishment of a National Urban Air Toxics Research Center, to be located at a university, a hospital, or other facility capable of undertaking and maintaining similar research capabilities in the areas of epidemiology, oncology, toxicology, pulmonary medicine, pathology, and biostatistics. The center shall be known as the Mickey Leland National Urban Air Toxics Research Center. The geographic site of the National Urban Air Toxics Research Center should be further directed to Harris County, Texas, in order to take full advantage of the well developed scientific community presence on-site at the Texas Medical Center as well as the extensive data previously compiled for the comprehensive monitoring system currently in place.

(2) Board of directors

The National Urban Air Toxics Research Center shall be governed by a Board of Directors to be comprised of 9 members, the appointment of which shall be allocated pro rata among the Speaker of the House, the Majority Leader of the Senate and the President. The members of the Board of Directors shall be selected based on their respective academic and professional backgrounds and expertise in matters relating to public health, environmental pollution and industrial hygiene. The duties of the Board of Directors shall be to determine policy and research guidelines, submit views from center sponsors and the public and issue periodic reports of center findings and activities.

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(q) Savings provision

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(3) Scientific advisory panel

The Board of Directors shall be advised by a Scientific Advisory Panel, the 13 members of which shall be appointed by the Board, and to include eminent members of the scientific and medical communities. The Panel membership may include scientists with relevant experience from the National Institute of Environmental Health Sciences, the Center for Disease Control, the Environmental Protection Agency, the National Cancer Institute, and others, and the Panel shall conduct peer review and evaluate research results. The Panel shall assist the Board in developing the research agenda, reviewing proposals and applications, and advise on the awarding of research grants.

(4) Funding

The center shall be established and funded with both Federal and private source funds.

(q) Savings provision

(1) Standards previously promulgated

Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 shall remain in force and effect after such date unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments. Except as provided in paragraph (4), any standard under this section which has been promulgated, but has not taken effect, before such date shall not be affected by such Amendments unless modified as provided in this section before such date or under such Amendments. Each such standard shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) of this section within 10 years after the date of enactment of the Clean Air Act Amendments of 1990. If a timely petition for review of any such standard under section 7607 of this title is pending on such date of enactment, the standard shall be upheld if it complies with this section as in effect before that date. If any such standard is remanded to the Administrator, the Administrator may in the Administrator's discretion apply either the requirements of this section, or those of this section as in effect before November 15, 1990.

(2) Special rule

Notwithstanding paragraph (1), no standard shall be established under this section, as amended by the Clean Air Act Amendments of 1990, for radionuclide emissions from (A) elemental phosphorous plants, (B) grate calcination elemental phosphorous plants, (C) phosphogypsum stacks, or (D) any subcategory of the foregoing. This section, as in effect prior to November 15, 1990, shall remain in effect for radionuclide emissions from such plants and stacks.

(3) Other categories

Notwithstanding paragraph (1), this section, as in effect prior to November 15, 1990, shall remain in effect for radionuclide emissions from non-Department of Energy Federal facilities that are not licensed by the Nuclear Regulatory Commission, coal-fired utility and industrial boilers, underground uranium mines, surface uranium mines, and disposal of uranium mill tailings piles, unless the Administrator, in the Administrator's discretion, applies the requirements of this section as modified by the Clean Air Act Amendments of 1990 to such sources of radionuclides.

(4) Medical facilities

Notwithstanding paragraph (1), no standard promulgated under this section prior to November 15, 1990 with respect to medical research or treatment facilities shall take effect for two years following November 15, 1990, unless the Administrator makes a determination pursuant to a rulemaking under section 7412(d)(9) of this title. If the Administrator determines that the regulatory program established by the Nuclear Regulatory Commission for such facilities does not provide an ample margin of safety to protect public health, the requirements of section 7412 of this title shall fully apply to such facilities. If the Administrator determines that such regulatory program does provide an ample margin of safety to protect the public health, the Administrator is not required to promulgate a standard under this section for such facilities, as provided in section 7412(d)(9) of this title.

(r) Prevention of accidental releases

(1) Purpose and general duty

It shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance. The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of Title 29, to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph. Nothing in this section shall be interpreted, construed, implied or applied to create any liability or basis for suit for compensation for bodily injury or any other injury or property damages to any person which may result from accidental releases of such substances.

(2) Definitions

(A) The term "accidental release" means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

(B) The term "regulated substance" means a substance listed under paragraph (3).

(C) The term "stationary source" means any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur.

(3) List of substances

The Administrator shall promulgate not later than 24 months after enactment of the Clean Air Act Amendments of 1990 an initial list of 100 substances which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment. For purposes of promulgating such list, the Administrator shall use, but is not limited to, the list of extremely hazardous substances published under the Emergency Planning and Community Right-to-Know Act of 1986 [42 U.S.C.A. § 11001 et seq.], with such modifications as the Administrator deems appropriate. The initial list shall include chlorine, anhydrous ammonia, methyl chloride, ethylene oxide, vinyl chloride, methyl isocyanate, hydrogen cyanide, ammonia, hydrogen sulfide, toluene diisocyanate, phosgene, bromine, anhydrous hydrogen chloride, hydrogen fluoride, anhydrous sulfur dioxide, and sulfur trioxide. The initial list shall include at least 100 substances which pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases. Regulations establishing the list shall include an explanation of the basis for establishing the list. The list may be revised from time to time by the Administrator on the Administrator's own motion or by petition and shall be reviewed at least every 5 years. No air pollutant for which a national primary ambient air quality standard has been established shall be included on any such list. No substance, practice, process, or activity regulated under subchapter VI of this chapter shall be subject to regulations under this subsection. The Administrator shall establish procedures for the addition and deletion of substances from the list established under this paragraph consistent with those applicable to the list in subsection (b) of this section.

(4) Factors to be considered

In listing substances under paragraph (3), the Administrator shall consider each of the following criteria—

(A) the severity of any acute adverse health effects associated with accidental releases of the substance;

(B) the likelihood of accidental releases of the substance; and

(C) the potentia
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(5) Threshold quantity

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(6) Chemical safety board

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(C) the potential magnitude of human exposure to accidental releases of the substance.

(5) Threshold quantity

At the time any substance is listed pursuant to paragraph (3), the Administrator shall establish by rule, a threshold quantity for the substance, taking into account the toxicity, reactivity, volatility, dispersibility, combustibility, or flammability of the substance and the amount of the substance which, as a result of an accidental release, is known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health for which the substance was listed. The Administrator is authorized to establish a greater threshold quantity for, or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer.

(6) Chemical safety board

(A) There is hereby established an independent safety board to be known as the Chemical Safety and Hazard Investigation Board.

(B) The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate. Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation. The terms of office of members of the Board shall be 5 years. Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office. The Chairperson shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.

(C) The Board shall—

(i) investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages;

(ii) issue periodic reports to the Congress, Federal, State and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration, concerned with the safety of chemical production, processing, handling and storage, and other interested persons recommending measures to reduce the likelihood or the consequences of accidental releases and proposing corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible and may include in such reports proposed rules or orders which should be issued by the Administrator under the authority of this section or the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C.A. § 651 et seq.] to prevent or minimize the consequences of any release of substances that may cause death, injury or other serious adverse effects on human health or substantial property damage as the result of an accidental release; and

(iii) establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.

(D) The Board may utilize the expertise and experience of other agencies.

(E) The Board shall coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety. The Board shall enter into a memorandum of understanding with the National Transportation Safety Board to assure coordination of functions and to limit duplication of activities which shall designate the National Transportation Safety Board as the lead agency for the investigation of releases which are transportation related. The Board shall not be authorized to investigate marine oil spills, which the National Transportation Safety Board is authorized to investigate. The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activi-

ties. In no event shall the Board forego an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.

(F) The Board is authorized to conduct research and studies with respect to the potential for accidental releases, whether or not an accidental release has occurred, where there is evidence which indicates the presence of a potential hazard or hazards. To the extent practicable, the Board shall conduct such studies in cooperation with other Federal agencies having emergency response authorities, State and local governmental agencies and associations and organizations from the industrial, commercial, and nonprofit sectors.

(G) No part of the conclusions, findings, or recommendations of the Board relating to any accidental release or the investigation thereof shall be admitted as evidence or used in any action or suit for damages arising out of any matter mentioned in such report.

(H) Not later than 18 months after November 15, 1990, the Board shall publish a report accompanied by recommendations to the Administrator on the use of hazard assessments in preventing the occurrence and minimizing the consequences of accidental releases of extremely hazardous substances. The recommendations shall include a list of extremely hazardous substances which are not regulated substances (including threshold quantities for such substances) and categories of stationary sources for which hazard assessments would be an appropriate measure to aid in the prevention of accidental releases and to minimize the consequences of those releases that do occur. The recommendations shall also include a description of the information and analysis which would be appropriate to include in any hazard assessment. The Board shall also make recommendations with respect to the role of risk management plans as required by paragraph (8)(B) in preventing accidental releases. The Board may from time to time review and revise its recommendations under this subparagraph.

(I) Whenever the Board submits a recommendation with respect to accidental releases to the Administrator, the Administrator shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Administrator will—

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Administrator not to implement a recommendation of the Board or to implement a recommendation only in part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Administrator setting forth the reasons for such determination.

(J) The Board may make recommendations with respect to accidental releases to the Secretary of Labor. Whenever the Board submits such recommendation, the Secretary shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Secretary will—

(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation;

(ii) decline to initiate a rulemaking or issue orders as recommended.

Any determination by the Secretary not to implement a recommendation or to implement a recommendation only in part, including any variation from the schedule contained in the recommendation, shall be accompanied by a statement from the Secretary setting forth the reasons for such determination.

(K) Within 2 years after enactment of the Clean Air Act Amendments of 1990, the Board shall issue a report to the Administrator of the Environmental Protection Agency and to the Administrator of the Occupational Safety and Health Administration recommending the adoption of regulations for the preparation of risk management plans and general requirements for the prevention of accidental releases of regulated substances into the ambient air (including recommendations for listing substances under paragraph (3)) and for the mitigation of the potential adverse

effect on human health or the environment as a result of accidental releases which should be applicable to any stationary source handling any regulated substance in more than threshold amounts. The Board may include proposed rules or orders which should be issued by the Administrator under authority of this subsection or by the Secretary of Labor under the Occupational Safety and Health Act [29 U.S.C.A. § 651 et seq.]. Any such recommendations shall be specific and shall identify the regulated substance or class of regulated substances (or other substances) to which the recommendations apply. The Administrator shall consider such recommendations before promulgating regulations required by paragraph (7)(B).

(L) The Board, or upon authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Board, may for the purpose of carrying out duties authorized by subparagraph (C)—

(i) hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise attendance and testimony of such witnesses and the production of evidence and may require by order that any person engaged in the production, processing, handling, or storage of extremely hazardous substances submit written reports and responses to requests and questions within such time and in such form as the Board may require; and

(ii) upon presenting appropriate credentials and a written notice of inspection authority, enter any property where an accidental release causing a fatality, serious injury or substantial property damage has occurred and do all things therein necessary for a proper investigation pursuant to subparagraph (C) and inspect at reasonable times records, files, papers, processes, controls, and facilities and take such samples as are relevant to such investigation.

Whenever the Administrator or the Board conducts an inspection of a facility pursuant to this subsection, employees and their representatives shall have the same rights to participate in such inspections as provided in the Occupational Safety and Health Act [29 U.S.C.A. § 651 et seq.].

(M) In addition to that described in subparagraph (L), the Board may use any information gathering authority of the Administrator under this chapter, including the subpoena power provided in section 7607(a)(1) of this chapter.

(N) The Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties. The Board is authorized without regard to section 5 of Title 41 to enter into contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of the duties and functions of the Board with any other agency, institution, or person.

(O) After the effective date of any reporting requirement promulgated pursuant to subparagraph (C)(iii) it shall be unlawful for any person to fail to report any release of any extremely hazardous substance as required by such subparagraph. The Administrator is authorized to enforce any regulation or requirements established by the Board pursuant to subparagraph (C)(iii) using the authorities of sections 7413 and 7414 of this title. Any request for information from the owner or operator of a stationary source made by the Board or by the Administrator under this section shall be treated, for purposes of sections 7413, 7414, 7416, 7420, 7603, 7604 and 7607 of this title and any other enforcement provisions of this chapter, as a request made by the Administrator under section 7414 of this title and may be enforced by the Chairperson of the Board or by the Administrator as provided in such section.

(P) The Administrator shall provide to the Board such support and facilities as may be necessary for operation of the Board.

(Q) Consistent with subsection (G)[1] and section 7414(c) of this title any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress and the public, except that upon a showing satisfactory to the Board by any person that records, reports, or information, or particular part thereof (other than release or emissions data) to which the Board has access, if made public, is likely to cause substantial harm to the person's competitive position, the Board shall consider such record, report, or information or particular portion thereof confidential in accordance with section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, and authorized representatives of the United States concerned with

carrying out this chapter or when relevant under any proceeding under this chapter. This subparagraph does not constitute authority to withhold records, reports, or information from the Congress.

(R) Whenever the Board submits or transmits any budget estimate, budget request, supplemental budget request, or other budget information, legislative recommendation, prepared testimony for congressional hearings, recommendation or study to the President, the Secretary of Labor, the Administrator, or the Director of the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No report of the Board shall be subject to review by the Administrator or any Federal agency or to judicial review in any court. No officer or agency of the United States shall have authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony, comments, recommendations or reports to any officer or agency of the United States for approval or review prior to the submission of such recommendations, testimony, comments or reports to the Congress. In the performance of their functions as established by this chapter, the members, officers and employees of the Board shall not be responsible to or subject to supervision or direction, in carrying out any duties under this subsection, of any officer or employee or agent of the Environmental Protection Agency, the Department of Labor or any other agency of the United States except that the President may remove any member, officer or employee of the Board for inefficiency, neglect of duty or malfeasance in office. Nothing in this section shall affect the application of Title 5 to officers or employees of the Board.

(S) The Board shall submit an annual report to the President and to the Congress which shall include, but not be limited to, information on accidental releases which have been investigated by or reported to the Board during the previous year, recommendations for legislative or administrative action which the Board has made, the actions which have been taken by the Administrator or the Secretary of Labor or the heads of other agencies to implement such recommendations, an identification of priorities for study and investigation in the succeeding year, progress in the development of risk-reduction technologies and the response to and implementation of significant research findings on chemical safety in the public and private sector.

(7) Accident prevention

(A) In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source. Regulations promulgated pursuant to this subparagraph shall have an effective date, as determined by the Administrator, assuring compliance as expeditiously as practicable.

(B)(i) Within 3 years after November 15, 1990, the Administrator shall promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases. The Administrator shall utilize the expertise of the Secretaries of Transportation and Labor in promulgating such regulations. As appropriate, such regulations shall cover the use, operation, repair, replacement, and maintenance of equipment to monitor, detect, inspect, and control such releases, including training of persons in the use and maintenance of such equipment and in the conduct of periodic inspections. The regulations shall include procedures and measures for emergency response after an accidental release of a regulated substance in order to protect human health and the environment. The regulations shall cover storage, as well as operations. The regulations shall, as appropriate, recognize differences in size, operations, processes, class and categories of sources and the voluntary actions of such sources to prevent such releases and respond to such releases. The regulations shall be applicable to a stationary source 3 years after the date of promulgation, or 3 years after the date on which a regulated

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substance present at the source in more than threshold amounts is first listed under paragraph (3), whichever is later.

(ii) The regulations under this subparagraph shall require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment. Such plan shall provide for compliance with the requirements of this subsection and shall also include each of the following:

(I) a hazard assessment to assess the potential effects of an accidental release of any regulated substance. This assessment shall include an estimate of potential release quantities and a determination of downwind effects, including potential exposures to affected populations. Such assessment shall include a previous release history of the past 5 years, including the size, concentration, and duration of releases, and shall include an evaluation of worst case accidental releases;

(II) a program for preventing accidental releases of regulated substances, including safety precautions and maintenance, monitoring and employee training measures to be used at the source; and

(III) a response program providing for specific actions to be taken in response to an accidental release of a regulated substance so as to protect human health and the environment, including procedures for informing the public and local agencies responsible for responding to accidental releases, emergency health care, and employee training measures.

At the time regulations are promulgated under this subparagraph, the Administrator shall promulgate guidelines to assist stationary sources in the preparation of risk management plans. The guidelines shall, to the extent practicable, include model risk management plans.

(iii) The owner or operator of each stationary source covered by clause (ii) shall register a risk management plan prepared under this subparagraph with the Administrator before the effective date of regulations under clause (i) in such form and manner as the Administrator shall, by rule, require. Plans prepared pursuant to this subparagraph shall also be submitted to the Chemical Safety and Hazard Investigation Board, to the State in which the stationary source is located, and to any local agency or entity having responsibility for planning for or responding to accidental releases which may occur at such source, and shall be available to the public under section 7414(c) of this title. The Administrator shall establish, by rule, an auditing system to regularly review and, if necessary, require revision in risk management plans to assure that the plans comply with this subparagraph. Each such plan shall be updated periodically as required by the Administrator, by rule.

(C) Any regulations promulgated pursuant to this subsection shall to the maximum extent practicable, consistent with this subsection, be consistent with the recommendations and standards established by the American Society of Mechanical Engineers (ASME), the American National Standards Institute (ANSI) or the American Society of Testing Materials (ASTM). The Administrator shall take into consideration the concerns of small business in promulgating regulations under this subsection.

(D) In carrying out the authority of this paragraph, the Administrator shall consult with the Secretary of Labor and the Secretary of Transportation and shall coordinate any requirements under this paragraph with any requirements established for comparable purposes by the Occupational Safety and Health Administration or the Department of Transportation. Nothing in this subsection shall be interpreted, construed or applied to impose requirements affecting, or to grant the Administrator, the Chemical Safety and Hazard Investigation Board, or any other agency any authority to regulate (including requirements for hazard assessment), the accidental release of radionuclides arising from the construction and operation of facilities licensed by the Nuclear Regulatory Commission.

(E) After the effective date of any regulation or requirement imposed under this subsection, it shall be unlawful for any person to operate any stationary source subject to such regulation or requirement in violation of such regulation or requirement. Each regulation or requirement under this subsection shall for

purposes of sections 7413, 7414, 7416, 7420, 7604, and 7607 of this title and other enforcement provisions of this chapter, be treated as a standard in effect under subsection (d) of this section.

(F) Notwithstanding the provisions of subchapter V of this chapter or this section, no stationary source shall be required to apply for, or operate pursuant to, a permit issued under such subchapter solely because such source is subject to regulations or requirements under this subsection.

(G) In exercising any authority under this subsection, the Administrator shall not, for purposes of section 653(b)(1) of Title 29, be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

(8) Research on hazard assessments

The Administrator may collect and publish information on accident scenarios and consequences covering a range of possible events for substances listed under paragraph (3). The Administrator shall establish a program of long-term research to develop and disseminate information on methods and techniques for hazard assessment which may be useful in improving and validating the procedures employed in the preparation of hazard assessments under this subsection.

(9) Order authority

(A) In addition to any other action taken, when the Administrator determines that there may be an imminent and substantial endangerment to the human health or welfare or the environment because of an actual or threatened accidental release of a regulated substance, the Administrator may secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The Administrator may also, after notice to the State in which the stationary source is located, take other action under this paragraph including, but not limited to, issuing such orders as may be necessary to protect human health. The Administrator shall take action under section 7603 of this title rather than this paragraph whenever the authority of such section is adequate to protect human health and the environment.

(B) Orders issued pursuant to this paragraph may be enforced in an action brought in the appropriate United States district court as if the order were issued under section 7603 of this title.

(C) Within 180 days after enactment of the Clean Air Act Amendments of 1990, the Administrator shall publish guidance for using the order authorities established by this paragraph. Such guidance shall provide for the coordinated use of the authorities of this paragraph with other emergency powers authorized by section 9606 of this title, sections 311(c), 308, 309 and 504(a) of the Federal Water Pollution Control Act [15 U.S.C.A. §§ 1321(c), 1318, 1319 and 1364(a)], sections 3007, 3008, 3013, and 7003 of the Solid Waste Disposal Act [42 U.S.C.A. §§ 6927, 6928, 6934, and 6973], sections 1445 and 1431 of the Safe Drinking Water Act [42 U.S.C.A. §§ 300i and 300j–4], sections 5 and 7 of the Toxic Substances Control Act [15 U.S.C.A. §§ 2604, 2606], and sections 7413, 7414 and 7603 of this title.

(10) Presidential review

The President shall conduct a review of release prevention, mitigation and response authorities of the various Federal agencies and shall clarify and coordinate agency responsibilities to assure the most effective and efficient implementation of such authorities and to identify any deficiencies in authority or resources which may exist. The President may utilize the resources and solicit the recommendations of the Chemical Safety and Hazard Investigation Board in conducting such review. At the conclusion of such review, but not later than 24 months after November 15, 1990, the President shall transmit a message to the Congress on the release prevention, mitigation and response activities of the Federal Government making such recommendations for change in law as the President may deem appropriate. Nothing in this paragraph shall be interpreted, construed or applied to authorize the President to modify or reassign release prevention, mitigation or response authorities otherwise established by law.

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(As amended Nov. 15, 199
102–187, 105 Stat. 1285.)

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References in Text

The Atomic Energy Act of
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section 2011 of this title a

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date of enactment of Pub.L. 1
1990, 104 Stat. 2399, which
15, 1990.

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in subsecs. (k)(3)(C) and (r
94–469, Oct. 11, 1976, 90 Stat.

(11) State authority

Nothing in this subsection shall preclude, deny or limit any right of a State or political subdivision thereof to adopt or enforce any regulation, requirement, limitation or standard (including any procedural requirement) that is more stringent than a regulation, requirement, limitation or standard in effect under this subsection or that applies to a substance not subject to this subsection.

(s) Periodic report

Not later than January 15, 1993 and every 3 years thereafter, the Administrator shall prepare and transmit to the Congress a comprehensive report on the measures taken by the Agency and by the States to implement the provisions of this section. The Administrator shall maintain a database on pollutants and sources subject to the provisions of this section and shall include aggregate information from the database in each annual report. The report shall include, but not be limited to—

(1) a status report on standard-setting under subsections (d) and (f) of this section;

(2) information with respect to compliance with such standards including the costs of compliance experienced by sources in various categories and subcategories;

(3) development and implementation of the national urban air toxics program; and

(4) recommendations of the Chemical Safety and Hazard Investigation Board with respect to the prevention and mitigation of accidental releases.

(As amended Nov. 15, 1990, Pub.L. 101–549, Title III, § 301, 104 Stat. 2531; Dec. 4, 1991, Pub.L. 102–187, 105 Stat. 1285.)

[1] So in original. Probably should read "subparagraph (G)".

[2] So in original.

HISTORICAL AND STATUTORY NOTES

References in Text

The Atomic Energy Act of 1954, referred to in subsec. (d)(9), is Act Aug. 30, 1954, c. 1073, 68 Stat. 921, as amended, which is classified generally to chapter 23 (section 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Federal Water Pollution Control Act, referred to in subsecs. (e)(5), (m)(1)(D), (m)(4), (m)(5)(D) and (r)(9)(C), is Act June 30, 1948, c. 758, as amended generally by Pub.L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (section 1251 et seq.) of Title 33, Navigation and Navigable Waters. Title II of the Federal Water Pollution Control Act, referred to in subsec. (e)(5), is classified generally to subchapter II (section 1281 et seq.) of Title 33. Section 320 of such Act, referred to in subsec. (m)(4), is classified to section 1330 of Title 33. Sections 308, 309, 311(c) and 504(a) of such Act, referred to in subsec. (r)(9)(C), are classified to sections 1318, 1319, 1321(c) and 1364(a), respectively, of Title 33. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The enactment of the Clean Air Act Amendments of 1990, referred to in subsecs. (i)(5)(C), (r)(3), (r)(6)(K) and (r)(9)(C), probably means the date of enactment of Pub.L. 101–549, Nov. 15, 1990, 104 Stat. 2399, which was approved Nov. 15, 1990.

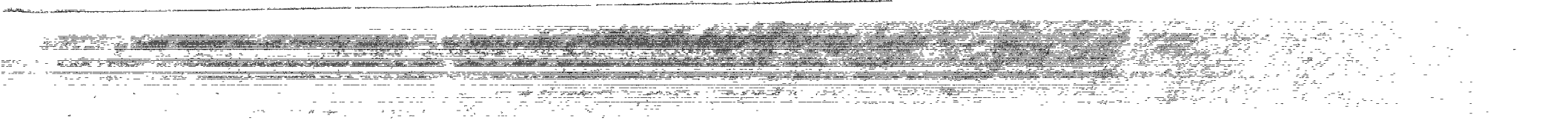
The Toxic Substances Control Act, referred to in subsecs. (k)(3)(C) and (r)(9)(C), is Pub.L. 94–469, Oct. 11, 1976, 90 Stat. 2003, as amended, which is classified generally to chapter 53 (section 2601 et seq.) of Title 15, Commerce and Trade. Sections 5 and 7 of such Act, referred to in subsec. (r)(9)(C), are classified to sections 2604 and 2606, respectively, of Title 15. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of Title 15 and Tables.

The Federal Insecticide, Fungicide, and Rodenticide Act, referred to in subsec. (k)(3)(C), is Act June 25, 1947, c. 125, as amended, which is classified generally to subchapter II (section 136 et seq.) of chapter 6 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 136 of Title 7 and Tables.

The Resource Conservation and Recovery Act of 1976, referred to in subsec. (k)(3)(C), is Pub.L. 94–580, Oct. 21, 1976, 90 Stat. 2796, as amended, which is classified generally to chapter 82 (section 6901 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of this title and Tables.

The Safe Drinking Water Act, referred to in subsecs. (m)(1)(D), (m)(5)(D) and (r)(9)(C), is Pub.L. 93–523, Dec. 16, 1974, 88 Stat. 1660, as amended, which is classified principally to subchapter XII (section 300f et seq.) of chapter 6A of this title. Sections 1431 and 1445 of such Act, referred to in subsec. (r)(9)(C), are classified to sections 300i and 300j–4 of this title, respectively. For complete classification of this Act to the Code see Short Title note set out under section 201 of this title and Tables.

The Solid Waste Disposal Act, referred to in subsecs. (n)(5), (n)(7) and (r)(9)(C), is Title II of Pub.L. 89–272, Oct. 20, 1965, 79 Stat. 997, as



TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2014(a) -- DISCLOSURE REQUIREMENTS

DATE: FEBRUARY 18, 1994

cl#UDFT

Bankruptcy Rule 2014(a) provides as follows:

Rule 2014. Employment of Professional Persons

(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. [emphasis added]

In his letter dated September 22, 1994, Harvey R. Miller, Esq., of the law firm of Weil, Gotshal & Manges, requested that the Advisory Committee study this rule and consider appropriate amendments to clarify the duty to disclose. A copy of his letter is attached.

As indicated in his letter, Mr. Miller enclosed several lengthy documents, including the Examiner's Report and Weil,

Gotshal's response to the Examiner's Report in the Leslie Fay case. After I received Mr. Miller's letter, a motion was made by the United States trustee and a response to the motion was filed by Weil, Gotshal, regarding, among other issues, the adequacy of disclosure under Rule 2014(a). Bankruptcy Judge Tina L. Brozman rendered a decision on the motion on December 15, 1994.

In March of 1992, the Advisory Committee considered Rule 2014(a) in response to a resolution of the American Bar Association on, among other issues, the duty to disclose under that rule. ABA Resolution 119A. At that time, the Advisory Committee considered the rule but decided that there should be no amendments.

In view of Mr. Miller's request, the Committee's review of the rule in 1992, our busy agenda, and the complexity of disclosure issues, Judge Mannes has placed this matter on the agenda for the March meeting only for a preliminary discussion to determine whether the Advisory Committee will undertake to study Rule 2014(a).

The documents enclosed with Mr. Miller's letter are too voluminous to duplicate and include in the agenda materials for the March meeting. Those relating to the Leslie Fay case are also incomplete in view of subsequent motion papers and Judge Brozman's decision. Instead of duplicating these materials, several copies will be available at the March meeting. Of course, if the Committee decides to undertake a study of Rule 2014(a) and wants these materials distributed, we can do so at

the appropriate time.

For the purpose of the preliminary discussion, I enclose the following documents:

(1) Mr. Miller's letter dated September 22, 1994.

(2) Judge Brozman's decision dated December 15, 1994, in the Leslie Fay case. The decision contains a summary of the Examiner's Report.

(3) Pages 51-58 of Weil, Gotshal's response to the Examiner's Report, where the firm sets forth its reasons why it believes that disclosure requirements have been met in that case.

(4) The part of the ABA Report accompanying Resolution 119A that relates to Bankruptcy Rule 2014.

(5) My memorandum dated February 13, 1992, on ABA Resolution 119A, which was distributed to the Committee in advance of its March 1992 meeting.

(6) The pages of the minutes of the March 26, 1992, meeting of the Advisory Committee summarizing the discussion on Rule 2014(a).

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94-BK-B

September 22, 1994

Professor Alan N. Resnick
Hofstra University School of Law
California Avenue
Hempstead, NY 11550

Re: Advisory Committee on Federal
Rules of Bankruptcy Procedure

Dear Alan:

I am writing to you in your capacity as the Reporter for the Advisory Committee on Bankruptcy Rules.

Recently an Examiner's Report was filed in pending chapter 11 cases in the United States Bankruptcy Court for the Southern District of New York which attracted the attention of the New York Times and the Wall Street Journal. The Report by Charles Stillman, Esq., was filed in the chapter 11 cases of The Leslie Fay Companies, Inc., Case No. 93 B 41724.

The Examiner was appointed at the request of the debtors in relation to issues that had been raised by members of the then-Creditors' Committee concerning assertions of conflicts of interest on the part of my Firm as attorneys for the debtors. At the request of the Creditors' Committee, the Examiner's charter was broadened to cover a review of the investigation into accounting irregularities, etc., which were a primary cause of the commencement of the chapter 11 cases. A copy of the Examiner's Report, covering the review of the investigation and Weil, Gotshal & Manges is enclosed herewith, together with a copy of my Firm's Response to the Report as it relates to the Firm.

As stated in the Response, the Firm believes that the Examiner's conclusion as to the lack of disinterestedness on the part of Weil, Gotshal & Manges is erroneous. The conflicts issue was raised as a tactical device and is no longer being pursued by the Creditors' Committee, whose membership has changed significantly since the commencement of the cases. In addition, the Committee of Equity Interest Holders disagrees with the Examiner's conclusion. What is of particular relevance for the Advisory Committee is the issue of the level of disclosure that is required of professionals to be employed by fiduciaries in the administration of chapter 11 cases and thereafter. In the case of The Leslie Fay Companies, Inc., the failure of disclosure focused upon by the Examiner related primarily to the Firm's representation of entities in totally unrelated matters who were employers of two members of the Board of Directors of The Leslie Fay Companies, Inc. Those entities are not parties in interest in the chapter 11 cases.

The issues raised by the Examiner's Report, our Response, and several other cases which I will refer to hereinafter, raise questions as to the clarity of Bankruptcy Rule 2014(a) and the need for amendment and clarification in the Rule. The Rule is not clear as to to what degree a professional is required to make disclosure in terms of consanguinity, commercial or personal relationships.

As you know, chapter 11 cases of any magnitude involve hundreds or thousands of persons. Large law firms, in particular, have broad and diverse representations in many different types of legal proceedings, often involving representation of groups, associations, etc. In that connection, should the Rule specify a level of materiality? What should be the level of disclosure with respect to representations which are related to totally different areas of the law, involving totally different divisions of the particular entity? For example, let us assume the professional is representing a debtor which manufactures and sells product to General Motors, and General Motors is a trade creditor but not a member of the creditors' committee and not one of the 10 largest creditors of the debtor, and the professional's firm represents General Motors in pending litigation in Eastern Europe. Assume that representation represents less than 1% of the annual revenues of the professional's firm. What disclosure is required or should be required under Bankruptcy Rule 2014(a)? Iterations of foregoing must also be considered.

The chapter 11 cases of CF Holding Corp., et al. pending in the United States Bankruptcy Court for the District of Connecticut, Case Nos. 92-21038 and 92-21039, present an additional facet of the problem of disclosure. In that case, the

Bankruptcy Judge dealt with an issue which he acknowledged was new, i.e., whether there exists an obligation on the part of the attorneys representing the debtor to make disclosure of potential infirmities on the part of other professionals in the chapter 11 case. A copy of the judgment in CF Holding Corp. is enclosed herewith.

In the context of Bankruptcy Rule 2014(a), what is the obligation of one professional to make disclosure concerning the relationships of another professional? The CF Holding Corp. cases are very troublesome, particularly in view of the fact that the Bankruptcy Court essentially ignored imposing upon this firm's co-counsel, a Connecticut law firm, a similar obligation of disclosure, and basically ignored other apparent failures of disclosure on the part of the attorneys for the creditors' committee. In that respect, I am enclosing copies of:

(a) The United States Trustee's Motion to Compel Day, Berry & Howard to File a Supplemental Rule 2014 Affidavit To Disclose its Connections with the Debtors, Creditors, Parties-in-Interest and Their Respective Attorneys as Required by 11 U.S.C. §§ 328 and 1103, Bankruptcy Rule 2014 and Local Bankruptcy Rule 24(a).

(b) The United States Trustee Objection to Application for Final Compensation, and

(c) Ruling and Orders on Fee Applications of Day, Berry & Howard and Murtha, Cullina, Richter and Pinney.

The extent of disclosure in bankruptcy and reorganization cases is very murky. If there has been any failure of disclosure by my Firm, it has been purely accidental or inadvertent. I hold no brief against disclosure. I favor it. However, it is an evolving area of the law which is being developed primarily through judicial decisions. This process creates major problems for practitioners, as their actions are being evaluated on a retrospective basis and not in the context of the rules of conduct as they existed at the time of engagement. As Justice Breyer indicated during his nomination hearings, the law should be set out in a fashion that judges and practitioners can easily understand and thereby conduct themselves accordingly.

I and my partners strongly desire to maintain and preserve our reputation for as attorneys of integrity and professional expertise. We hold a deep respect for the ethical, substantive and procedural requirements of the law. We do and intend to

continue to comply with all requirements of the Bankruptcy Rules and the Bankruptcy Code and other applicable statutes. In order to do so properly, it is essential that the law and the rules be set forth with clarity and definition so that all practitioners may know what is required of them.

In that context, it is respectfully suggested that the Advisory Committee take under consideration the adequacy of Bankruptcy Rule 2014(a) and any related Rules, and determine whether the Rule should be appropriately amended and recommendations be made as to other corrective measures that may be undertaken to clarify this difficult and ambiguous area.

Thank you for your consideration. If I can be of any assistance to the Committee, please do not hesitate to call upon me.

Respectfully,

Harvey R. Miller

HRM/pc
Enc.

cc: Honorable Paul Mannes,
Chairperson Advisory Committee
on Bankruptcy Rules
Chief Bankruptcy Judge
United States Bankruptcy Court
District of Maryland
451 Hungerford Drive
Rockville, MD 20850

1947

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In re		Chapter 11
THE LESLIE FAY COMPANIES, INC., et al.,	:	Case No. 93-B-41724(TLB)
	:	(Jointly Administered)
Debtors.	:	

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DECISION ON UNITED STATES TRUSTEE'S MOTION TO DISQUALIFY WEIL, GOTSHAL & MANGES AS DEBTORS' COUNSEL AND TO IMPOSE AN ECONOMIC SANCTION AGAINST WEIL, GOTSHAL & MANGES # 1962

APPEARANCES:

THE UNITED STATES TRUSTEE FOR THE
SOUTHERN DISTRICT OF NEW YORK
By: Arthur J. Gonzalez, Esq.
and Norma Ortiz, Esq.
80 Broad Street
New York, N.Y. 10004-2209

WEIL GOTSHAL & MANGES
Attorneys for the Debtors and appearing Pro Se
By: Harvey Miller, Esq. and Alan B. Miller, Esq.
767 Fifth Avenue
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WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for The Official Committee of
Unsecured Creditors
By: Chaim Fortgang, Esq.
51 West 52nd Street
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LORD, BISSELL & BROOK
Attorneys for The Official Committee of Equity Security

DOCKETED
DEC 15 1994
BANKRUPTCY COURT
OF NEW YORK

Holders
By: Benjamin Waisbren, Esq.
115 South La Salle Street
Chicago, IL 60603

TINA L. BROZMAN
UNITED STATES BANKRUPTCY JUDGE

Rarely am I faced with a motion as troubling as this one, the United States Trustee's motion to disqualify Weil, Gotshal & Manges ("Weil Gotshal"), the debtors' counsel, from further representation of its clients and to deny the firm fees because of its failure to disclose what the United States Trustee ("U.S. Trustee") dubs disabling conflicts. The motion is predicated upon the report of an examiner who had concluded that Weil Gotshal was not disinterested when retained and had failed to reveal to the court the connections which led to his conclusion. I am in accord with the examiner's assessment, although I do not share his view that the appropriate sanction is limited to imposition on Weil Gotshal of a portion of the costs which he incurred investigating Weil Gotshal's status. Indeed, it is the nature of the sanction which is the troubling element here for, as the examiner found, Weil Gotshal has rendered services competently and loyally to the debtors, notwithstanding its derelictions in the area of disclosure, and the debtors undoubtedly will be harmed by Weil Gotshal's complete removal from the case some twenty months into the reorganization effort. This fear of harm to the debtors is shared by both official committees as well as the examiner.

I.

A. Background[1]

The Leslie Fay Companies, Inc. ("Leslie Fay") is a large, publicly-owned corporation primarily engaged in designing, manufacturing, and selling women's dresses, suits, and sportswear. It is one of the few large American clothing manufacturers which still manufactures in the United States.

On January 29, 1993, Leslie Fay's controller, Donald Kenia, disclosed to senior management that he had been making unsupported entries into Leslie Fay's general ledger, resulting in a significant misstatement of its financial standing. Two days later, senior management informed Leslie Fay's board of directors (the "Board" or "Board of Directors") which in turn disclosed the existence of the false entries to the general public.

The Board directed its audit committee (the "Audit Committee") to conduct an investigation into the facts and circumstances surrounding the accounting irregularities. At the time, the Audit Committee was composed of three independent, non-management directors: Ira J. Hechler, a private investor; Ralph Destino, Chairman of Cartier, Inc.; and Michael L. Tarnopol, a senior officer at Bear Stearns & Co. ("Bear Stearns"). The Board then appointed Steven Friedman, the only other outside director of Leslie Fay, to join Hechler, Destino, and Tarnopol on the Audit Committee and in their investigation of the accounting irregularities. Friedman is a senior manager of Odyssey Partners L.P. ("Odyssey"), a large partnership that acts principally as a merchant bank.

Included in the Audit Committee's charter were the identification of all parties who may have been involved in the accounting irregularities and the consideration of possible legal claims

[1] The parties do not dispute the facts, most of which are drawn from the examiner's report or the court's own file.

that could be asserted on behalf of Leslie Fay. Toward those ends, the Audit Committee retained the accounting firm of Arthur Anderson & Co. and Weil Gotshal. Prior to its retention by the Audit Committee, Weil Gotshal had not done any work for Leslie Fay, whose general outside counsel was the law firm of Parker, Chapin, Flattau & Klimpl ("Parker Chapin").

In late February, 1993, the Audit Committee issued preliminary results of its work, announcing that Leslie Fay's 1991 profits had been overstated by over $12 million. Accordingly, the accounting firm of BDO Seidman ("Seidman"), Leslie Fay's independent auditors, officially withdrew its signature from Leslie Fay's 1991 financial statements. The Audit Committee had also learned by this point that Kenia's initial representation that he alone was responsible for the false entries was not true. As was later confirmed, the fraud reached to Leslie Fay's chief financial officer, Paul Polishan.

B. Weil Gotshal's Court-Approved Retention and the Subsequent Questions

The consequences of this burgeoning scandal were calamitous to Leslie Fay. Lenders and suppliers froze its credit lines, and Leslie Fay was unable to secure the financing necessary for the continued operation of its business. This led to an expansion of Weil Gotshal's role to include advice on financial restructuring. On April 5, 1993, nine weeks into the Audit Committee's investigation, Weil Gotshal filed chapter 11 petitions on behalf of Leslie Fay and its affiliates (the group referred to for convenience as "Leslie Fay"). The same day, Weil Gotshal submitted an application for retention as counsel for the debtors in possession, which was approved by the Hon. Cornelius Blackshear of this court. The order contemplated that Weil Gotshal would continue in its work for the Audit Committee as part and parcel of its

representation of the debtors. The U.S. Trustee, the only party in interest to receive notice, had indicated that he did not object to the retention.

By late September, the Audit Committee completed its investigation, and on September 27, 1993, it disclosed its findings to the Board of Directors. The Audit Committee concluded that there was no evidence that any member of the debtors' current[2] senior management or the Board of Directors knew of or participated in the fraudulent entries, which it estimated totalled some $160 million. The Audit Committee also discovered, contrary to what was originally believed, that the accounting irregularities dated back to at least 1990. These findings were made public on September 29, 1993.

At just about this time, questions regarding Weil Gotshal's disinterestedness were raised by the official committee of unsecured creditors (the "Creditors' Committee"). A hearing on first interim fee applications had been set for November 4, 1993. Both the Creditors' Committee and the U.S. Trustee filed objections to Weil Gotshal's request for fees on the grounds that Weil Gotshal was not disinterested as required by 11 U.S.C. § 327(a)[3] (title 11 of the United States Code hereafter referred to as the "Code") and had failed to file a full and complete disclosure

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[2] By this time, Polishan was no longer Leslie Fay's chief financial officer.

[3] Section 327(a) provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

The requirements of the section apply equally to a debtor in possession by virtue of section 1107 of the Code. See 2 L.King, Collier on Bankruptcy, ¶ 327.01 at n.1a (15th ed. 1994).

as required by Fed.R.Bankr.P. 2014.[4]

Weil Gotshal responded to the objections by asserting that it had met the Code's disinterestedness requirement and had fully satisfied its disclosure obligations in its retention affidavit. In addition, Weil Gotshal submitted a supplemental affidavit containing information regarding certain of its previously-undisclosed relationships that had been questioned by the Creditors' Committee.

C. Appointment of the Examiner

On December 2, 1993, in response to the cloud hovering over Weil Gotshal's representation of the debtors, Leslie Fay moved for the appointment of an examiner to look into Weil Gotshal's disclosure and disinterestedness and the veracity of the Audit Committee's report in light of those issues. The Creditors' Committee agreed that I should appoint an examiner, but asked that the scope of the examiner's retention be expanded beyond that proposed by Leslie Fay. On December 16, 1993, I ordered the appointment of an examiner who would be charged with two tasks, the first of which was

> undertak[ing] such investigation and analyses as are necessary to formulate a recommendation to the Court as to whether the law firm of Weil, Gotshal & Manges, in its capacity as attorneys for the Debtors in Possession herein, under the circumstances of these chapter 11 cases and in accordance with section 327 of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure, is disinterested or holds or represents an interest adverse to the Debtors' estates or made adequate disclosure.

The second task assigned to the examiner was to evaluate whether (i) there were any viable

[4] Rule 2014 deals with applications for professional employment in bankruptcy cases and requires "a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee."

claims that could be asserted against any other parties in connection with the accounting irregularities that could increase the size of the chapter 11 estate and; (ii) whether the Audit Committee's work in that regard had been acceptable or if further investigating was necessary. I approved the appointment of Charles A. Stillman as examiner on January 18, 1994. Over the next six months, the examiner conducted a thorough investigation into Weil Gotshal's alleged conflicts and into the Audit Committee's investigation of the accounting irregularities.

D. What the Examiner Found

1. The Audit Committee Membership

The disclosure of the accounting irregularities in early 1993 prompted a flurry of litigation. Weil Gotshal represented the Audit Committee members with respect to some of these matters. Class actions were filed charging certain officers and directors, including members of the Audit Committee, with securities fraud (the "Securities Fraud Litigation"), on the grounds that, as members of the Audit Committee, they knew or should have known of the irregularities, and that the irregularities caused a precipitous drop in the price of Leslie Fay stock. Weil Gotshal represented the Audit Committee in these actions, negotiating an agreement to drop the members' names from the litigation, subject to certain conditions. In addition, a shareholder's derivative suit was commenced in state court (the "Derivative Suit"), charging the Audit Committee with essentially the same impropriety that the Securities Fraud Litigation alleged. Weil Gotshal accepted service of process on behalf of the Audit Committee members, but had done nothing more with regard to this lawsuit prior to Weil Gotshal's retention in the

chapter 11 cases.[5]

2. Weil Gotshal's Relationships With the Potential Targets of Its Investigation

Whereas prior to Weil Gotshal's retention by the Audit Committee, it had never represented Leslie Fay, it did maintain professional and personal relationships with parties that had an interest in the outcome of the Audit Committee investigation. Yet none of these relationships was disclosed to the court.

(a) Tarnopol/Bear Stearns

Michael L. Tarnopol is a director of Leslie Fay and was a member of the Audit Committee throughout the period when the accounting irregularities were taking place. He is also a senior officer at Bear Stearns. Bear Stearns, a large investment bank, is a valuable client of Weil Gotshal, and was so at the time of Weil Gotshal's retention by Leslie Fay. Weil Gotshal admitted to the examiner that it would not initiate a lawsuit against Bear Stearns on behalf of another client without Bear Stearns' consent.

Bear Stearns was the lead underwriter in a secondary public offering of 2.1 million shares of Leslie Fay stock, then valued at approximately $40 million (the "Stock Sale") in June, 1991, well after the accounting irregularities began.

The examiner concluded that Tarnopol was a potential target of the Audit Committee's investigation.

(b) Friedman/Odyssey

Steven Friedman is a director of Leslie Fay who was appointed to the Audit Committee

[5] The Justice Department got into the act as well, commencing an investigation into the accounting fraud at Leslie Fay. The Audit Committee assured the United States Attorney of its intent to fully cooperate with the investigation. Typically, Weil Gotshal was responsible for responding to information requests by the U.S. Attorney on behalf of the Audit Committee.

when the accounting irregularities came to light. At the time of Weil Gotshal's retention, he was also a general partner of Odyssey. Odyssey is another longstanding client of Weil Gotshal, one against whom Weil Gotshal also would not initiate suit absent the client's consent. Additionally, Odyssey and Friedman were the owners of the 2.1 million shares that were the subject of the Stock Sale.

Weil Gotshal also represented Friedman personally, providing him with estate planning services in 1988 and 1989. It has done the same for other Odyssey partners. Moreover, two other Odyssey partners had served on Leslie Fay's Board of Directors during the period of the accounting irregularities.

The examiner found that Friedman, like Tarnopol, was a potential target of the Audit Committee's investigation.

(c) BDO Seidman

Seidman was Leslie Fay's independent auditor during the period of the accounting irregularities. It was Seidman that had certified Leslie Fay's false financial statements. That Seidman was a natural target of the Audit Committee's investigation is obvious. Not surprisingly, Seidman was a party to both the Securities Fraud Litigation and the Derivative Suit. Seidman is also a Weil Gotshal client, albeit on a much smaller scale than Bear Stearns or Odyssey. Weil Gotshal has represented Seidman in two matters. One matter involved the non-public investigation of a former Seidman client by a federal regulatory agency. Weil Gotshal assisted Seidman in furnishing documents requested by that agency. That matter was inactive at the time of Weil Gotshal's retention by Leslie Fay. Weil Gotshal also represented Seidman in a malpractice lawsuit commenced against Seidman in June, 1992. As of the date of Weil

Gotshal's retention by court order, the case was still active, although the amount of fees involved in that case was relatively small.

3. Weil Gotshal's Undisclosed Representation of Leslie Fay's Seventh Largest Creditor

At the time of Weil Gotshal's retention, Forstmann & Co. ("Forstmann") was Leslie Fay's seventh largest creditor, with a claim of approximately $700,000. It subsequently sold its claim and resigned from the Creditors' Committee. Weil Gotshal was general outside counsel to Forstmann through 1991 and since then has served Forstmann in a more limited role, nonetheless continuing to represent Forstmann on a variety of matters.

E. The Extent of Weil Gotshal's Disclosure

In connection with Weil Gotshal's retention application of April 5, 1993, Alan B. Miller, a partner of the firm, submitted an affidavit of retention to the court in which he professed that, to the best of his knowledge, Weil Gotshal did not "hold[] or represent[] any interest adverse to the debtors or their estates in the matters upon which [Weil Gotshal] was to be employed." The affidavit disclosed that Weil Gotshal had been working for the Audit Committee, had counseled Leslie Fay with regard to its efforts to restructure its debt, and had assisted it in the filing of the chapter 11 petitions. The affidavit also disclosed generally that Weil Gotshal represented entities that were "claimants of the Debtors in matters totally unrelated to the Debtors' cases." Some examples of those claimants were listed, although Forstmann was not one of them. (Even after the Creditors' Committee was formed and Forstmann was made a member, Weil Gotshal did not disclose its representation of Forstmann.) In addition, the

affidavit contained the boilerplate statement that Weil Gotshal was involved in numerous unrelated matters with attorneys and accountants that represented parties-in-interest in the chapter 11 cases, but that none of those relationships was adverse to Leslie Fay.

Weil Gotshal did not disclose, however, that it had professional relationships with individual Audit Committee members. It did not disclose that it represented Bear Stearns and Odyssey, and that those companies were connected to Friedman and Tarnopol, respectively. It did not disclose Bear Stearns' and Odyssey's relationship to the Stock Sale. Similarly, Weil Gotshal did not disclose its relationship with Seidman, despite the fact that, even at the time, Weil Gotshal recognized that Leslie Fay might have claims against Seidman.

F. The Examiner's Conclusions

The examiner concluded that "Weil Gotshal was not disinterested in the matter, and did not make proper disclosure, as mandated by the Bankruptcy Code and related provisions." (Ex. Report at 3). Specifically, he found that Weil Gotshal had failed to disclose its relationship to two of the members of the Audit Committee and the firms of which they were partners, to Seidman and to one of the debtors' largest unsecured creditors. And he concluded that these undisclosed relationships, if known, would have cast substantial doubt on whether Weil Gotshal could conduct a fair and impartial investigation for the Audit Committee.[6] However, he also found that "[t]he conflict presented [was] principally one of perception: under all the circumstances, there [was] a fair perception that because of multiple representations and client

[6] However, he did not believe that the Forstmann connection presented a conflict. I concur in that view, but believe that it should have been disclosed nonetheless pursuant to Rule 2014.

relationships, Weil Gotshal would be unable to act solely in the debtors' best interests." (Ex. Report at 3). According to the examiner, Weil Gotshal caused the debtors no actual injury, and represented them in an exemplary fashion. Thus, he concluded, the appropriate sanction would be the disallowance out of future fees of some of the cost of his investigation into Weil Gotshal's disinterestedness and disclosure, but he recommended that "disqualifying Weil Gotshal, or imposing a sanction beyond such limited allowance of fees, [was] not warranted." Id.

II.

The U.S. Trustee took a different view of things and on October 19, 1994, moved to disqualify Weil Gotshal from serving as counsel to the debtor in possession and for the imposition of economic sanctions. The U.S. Trustee bases his motion upon the findings of the examiner, disagreeing, however, with his conclusion that no actual harm accrued to Leslie Fay. Although the U.S. Trustee does not question the examiner's opinion that Weil Gotshal vigorously represented Leslie Fay, he believes that Weil Gotshal's asserted lack of disinterestedness called the integrity of the Audit Committee's investigation into question, regardless of how thoroughly the investigation was actually performed. According to the U.S. Trustee, "when the credibility of an action by the Debtors' counsel is an integral element of the very task to be performed -- as it was in this case -- any 'conflict' which exists in performing that function causes actual harm."(U.S. Trustee Mot. to Disqualify at 20).

In response to the U.S. Trustee's motion, Weil Gotshal vigorously denies that it ever had any conflict of interest or that it did not meet its disclosure obligations. In Weil Gotshal's view, "the U.S. Trustee's allegations are simply wrong as a matter of fact and law." (Weil Gotshal

Memorandum of Law at 2). Trying to turn the defense of its actions into an attack on the motives of those who have raised any question, Weil Gotshal has labeled the initial Creditors' Committee challenge as a pressure tactic and the U. S. Trustee's motion as a vindictive action prompted by certain newspaper articles which must have been unsettling to the Trustee. This is somewhat startling given the existence of a report by an independent examiner which concluded that there was substance to the concerns first voiced by the Creditors' Committee.

Perhaps ironically, the Creditors' Committee now opposes the U.S. Trustee's motion, at least to the extent that it seeks to disqualify Weil Gotshal.[7] As mentioned earlier, the Creditors' Committee fears grave harm to Leslie Fay, and, by extension, its creditors, stockholders and employees, should Weil Gotshal be disqualified. The Committee's preferred remedy is an economic sanction. The Official Committee of Equity Security Holders (the "Equity Committee") essentially concurs with the Creditors' Committee, admitting that disclosure was not complete but recommending that disqualification is unwarranted.

III.

There are two grounds upon which the U.S. Trustee bases his motion, first, that Weil Gotshal did not make the complete disclosure mandated by Fed.R.Bankr.P. 2014 and second, that Weil Gotshal was in fact not disinterested at the time of its retention in the chapter 11 cases, in violation of section 327(a) of the Code. The legal standards governing each theory are distinct and deserve separate attention. The facts to which the law must be applied will follow

[7] Since the time that the Creditors' Committee first challenged Weil Gotshal's entitlement to fees, the membership of that committee has almost completely changed. Also changed is the identity of its counsel.

the discussion of the legal standards.

A. Legal Standards Governing Retention

Section 327(a) of the Code, quoted earlier in this decision, seemingly imposes two requirements on a trustee or debtor in possession seeking to employ counsel: (i) that the attorney does not hold or represent an interest adverse to the estate and (ii) that the attorney is disinterested. The word "disinterested" is a term of art, defined in section 101(14) of the Code as, among other things, not having "an interest materially adverse to the interest of the estate..." (emphasis added). It is from this immediately apparent that the statutory definition of "disinterested" includes the first prong of the requirements for retention under section 327(a) (although the definition of "disinterested" includes the concept of materiality which is not mentioned in section 327). Thus, the First Circuit has noted that "the twin requirements of disinterestedness and lack of adversity telescope into a single hallmark." In re Martin, 817 F.2d 175, 181 (1st Cir. 1987); see also In re BH & P, Inc., 949 F.2d 1300, 1314 (3d Cir. 1991).

The requirements of section 327 cannot be taken lightly, for they "serve the important policy of ensuring that all professionals appointed pursuant to [the section] tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." Rome v. Braunstein, 19 F.3d 54, 58 (1st Cir. 1994). "Once counsel is employed, 'a lawyer owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative or other person connected with the entity.'" In re Grabill Corp., 113 B.R. 966, 970 (Bankr. N.D.Ill. 1990) quoting In re King Resources Co., 20 B.R. 191, 200 (D.Col. 1982). Concern with the proper attention to fiduciary obligation has prompted

a major treatise on bankruptcy to observe that section 327's standards "are to be rigidly applied." 2 L. King, Collier on Bankruptcy, ¶ 327.03 (15th ed. 1994).

The Code does not attempt to define what constitutes an adverse interest. However, interests are not considered "adverse" merely because it is possible to conceive a set of circumstances under which they might clash. See TWI International, Inc. v. Vanguard Oil and Service Co., 162 B.R. 672, 675 (S.D.N.Y. 1994) (conflicts that are "hypothetical or theoretical" not a basis for disqualification); In re Kelton Motors, Inc., 109 B.R. 641, 650 (Bankr. D.Vt. 1989). The more difficult area is when a live conflict of interest has not quite emerged, yet the factual scenario is sufficiently susceptible to that possibility so as to make the conflict more than merely "hypothetical or theoretical." The courts have been far from uniform in the way they have formulated tests for dealing with this type of situation.

A handful of courts has held or implied that only "actual," and not "potential," conflicts of interest are disabling. See In re Stamford Color Photo, Inc., 98 B.R. 135, 137-38 (Bankr. D.Conn. 1989); H & K Developers, Inc. v. Waterfall Village of Atlanta, Ltd. (In re Waterfall Village of Atlanta, Inc.), 103 B.R. 340, 344 (Bankr. N.D.Ga. 1989); see also, Comment, Bankruptcy Code Section 327(a) and Potential Conflicts of Interest -- Always or Never Disqualifying?, 29 Hous. L. Rev. 433 (1992). A greater number of courts, including some in this district, have concluded that even "potential" conflicts of interest are disabling. See In re Codesco, Inc., 18 B.R. 997, 999 (Bankr. S.D.N.Y. 1982) ("There should be no opportunity for the exercise of conflicting interests...."[emphasis added]); In re Proof of the Pudding, Inc., 3 B.R. 645, 647 (Bankr. S.D.N.Y. 1980); see also Bohack Corp. v. Gulf & Western Industries, Inc. (In re Bohack), 607 F.2d 258, 263 (2d Cir. 1979). Yet other courts have been critical of

the very distinction between actual and potential conflicts. See, e.g., In re Kendavis Industries, Inc., 91 B.R. 742, 744 755-56 (Bankr. N.D.Tex. 1988). Recently, in TWI International, decided in the Southern District of New York, 162 B.R. at 675, the district court stated that "'disqualification should be mandated when an actual, as opposed to hypothetical or theoretical, conflict is present. This in no way precludes disqualification for a potential conflict. The test is merely one of a potential actual conflict.'" Id., quoting In re Wm. J. O'Connor, 52 B.R. 892 897 (Bankr. W.D.Okl. 1985).

The debate over this issue may be more semantic than substantive, for a close review of the cited cases indicates that the results were largely driven by the facts of each case. And indeed, in the context of section 327, that is precisely the way it should be. See Iannotti v. Manufacturers Hanover Trust Co. (In re New York, New Haven & Hartford Railroad Co.), 567 F.2d 166, 175 (2d Cir. 1977) (no "mandatory requirement that reorganization courts woodenly must deny compensation in every case of conflict of interest, regardless of the facts."); Interwest Business Equipment, Ltd. v. United States Trustee (In re Interwest Business Equipment, Ltd.), 23 F.3d 311, 315 (10th Cir. 1994) (citing several cases for proposition that bankruptcy court has broad discretion in disqualification cases); In re Garza, 1994 WL 282570 *2, (Bankr. E.D.Va. Jan. 19, 1994) ("[C]ourts have generally declined to formulate bright-line rules concerning the criteria for disqualification, favoring instead an approach which evaluates the facts and circumstances of each particular case."). Potential conflicts, no less than actual ones, can provide motives for attorneys to act in ways contrary to the best interests of their clients. Rather than worry about the potential/actual dichotomy it is more productive to ask whether a professional has "either a meaningful incentive to act contrary to the best interests of the estate

and its sundry creditors -- an incentive sufficient to place those parties at more than acceptable risk -- or the reasonable perception of one." In re Martin, 817 F.2d at 180-81. In other words, if it is plausible that the representation of another interest may cause the debtor's attorneys to act any differently than they would without that other representation, then they have a conflict and an interest adverse to the estate.

B. Legal Standards Governing Disclosure

Fed.R.Bankr.P. 2014 requires that a professional seeking employment in a bankruptcy case submit a "verified statement... setting forth the person's connections" to the debtor, creditors and any other party in interest. The purpose of Rule 2014, as expressed by the Collier treatise,

> is to provide the court (and the United States Trustee) with information necessary to determine whether the professional's employment meets the broad test of being in the best interest of the estate. To that end, a failure to disclose any fact which may influence the court's decision may result in a later determination that disclosure was inadequate and sanctions should be imposed on the professional. The fact that disclosure was made elsewhere (e.g. in the debtor's schedules) is not likely to ameliorate a court's reaction to incomplete disclosure.

8 L. King, Collier on Bankruptcy, ¶ 2014.03 (15th ed. 1994). Rule 2014 disclosure requirements are to be strictly construed. Id.; Rome v. Braunstein, 19 F.3d at 59; In re Arlan's Dep't Stores, Inc., 615 F.2d 925, 933 (2d Cir. 1979) (decided under substantially similar predecessor to Rule 2014.). All facts that may have any bearing on the disinterestedness of a professional must be disclosed. Consistent with the duty placed on the professional, it is the responsibility of the professional, not of the court, to make sure that all relevant connections have been brought to light. See, e.g., Rome v. Braunstein, 19 F.3d at 58-60; In re Glenn

Electric Sales, 99 B.R. 596, 599 (D.N.J. 1988); Diamond Lumber, Inc. v. Unsecured Creditors' Committee (In re Diamond Lumber, Inc.), 88 B.R. 773, 776 (N.D.Tex. 1988). So important is the duty of disclosure that the failure to disclose relevant connections is an independent basis for the disallowance of fees or even disqualification. See Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.), 655 F.2d 463, 469 (2d Cir. 1981); In re Arlan's, 615 F.2d at 933; Rome v. Braunstein, 19 F.3d at 59; In re Granite Sheet Metal Works, Inc., 159 B.R. 840, 847 (Bankr. S.D.Ill. 1993); In re Envirodyne Industries, Inc., 150 B.R. 1008, 1021 (Bankr. N.D.Ill. 1993).

C. The Application of the Law to the Facts

1. Weil Gotshal Represented Interests that were Materially Adverse to the Debtors at the Time of its Retention.

Leslie Fay's bankruptcy, while certainly not unique, was at least unusual in that it was a direct consequence of fraud that had been perpetrated against the company, its shareholders, and its creditors. When the petitions were filed on April 5, 1993, the Audit Committee was far from completing the investigation it had undertaken; thus there was no way to be sure of the extent of the irregularities, or whether others besides Kenia and Polishan may have been involved. The Justice Department had already begun a criminal investigation into the fraud, and private party civil suits had also been commenced naming, among others, Leslie Fay's directors and its accountants. Because Weil Gotshal was requesting retention not only as Leslie Fay's general bankruptcy counsel but also to complete an investigation into a fraud which may have reached into senior management or even the board of directors, it was especially important that

the court ensure that counsel was completely disinterested. Thus, it was incumbent upon Weil Gotshal to be particularly thorough in its retention affidavit. Unfortunately, Weil Gotshal failed to give the court the ability to consider whether the firm had disabling conflicts. At the time of its retention, Weil Gotshal had significant ties to three potential targets of investigation, and yet told neither the court nor the U.S. Trustee.

Weil Gotshal's connections to Tarnopol and Friedman were not insignificant, as Weil Gotshal would have this court find. Both held positions in the highest tiers of Bear Stearns and Odyssey, respectively, which were large and valuable clients of Weil Gotshal. Thus, Weil Gotshal had a perceptible economic incentive not to pursue the possibility of claims against Tarnopol and Friedman with the same vigor and intensity it might have otherwise applied.

Weil Gotshal does not deny that it would not have been disinterested had there been viable claims against Tarnopol and Friedman, but rather contends that by the time it had been retained on April 5, it was clear that no such claims existed. This is said to be so for a number of reasons. First, the Audit Committee was already nine weeks into its investigation, and no evidence had turned up to implicate the Audit Committee or the Board of Directors. Second, according to Weil Gotshal, the scope of liability for outside directors under Delaware law is so narrow that any claims against them were "speculative and hypothetical." I disagree on both counts.

Weil Gotshal relies heavily on the fact that,

> [d]uring the interviews conducted prior to the commencement of chapter 11 proceedings, Mr. Kenia admitted that the adjustments to Leslie Fay's financial records were made at his direction. He also stated that the adjustments were made without the knowledge or participation of the independent auditors or the Board of Directors.

(Weil Gotshal Memo. of Law in Opposition to U.S. Trustee's Motion at 34). It is amazing that Weil Gotshal would give so much weight to the "admission" of a man who had committed wholesale fraud upon the company whose finances it was his job to protect, and who had already lied at least once by denying Polishan's involvement in the fraud. As it so happens, it was later discovered "that the adjustments had taken place over a longer time than previously asserted by Mr. Kenia," (Weil Gotshal Memo. of Law at 14) further confirmation that Kenia was not to be taken at his word.[8] Moreover, I am unpersuaded that Weil Gotshal could have been certain of the outcome of the Audit Committee's investigation in April, when that investigation would not be completed until September. By its own admission, Weil Gotshal did not realize the full scope of the accounting irregularities until the middle of May. Id. In light of all this, Weil Gotshal's claims that it knew at the time of its court-approved retention that the outside directors could not have been liable rings hollow.

It is true that the outside directors had significant protections under Delaware law, see generally, Donald E. Pease, Outside Directors: Their Importance to the Corporation and Protection from Liability, 12 Del. J. Corp. L. 25 (1987), but that is a far cry from saying that they could under no circumstances have been found liable. For example, because the investigation was not nearly completed as of the petition date, it is was impossible to say for certain that the directors had not been "reckless," which, as the examiner pointed out and Weil Gotshal did not deny, might provide a basis of liability under Delaware law. See, e.g., Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1312 (3d Cir. 1993); Solash v. Telex Corp., 1988 WL

[8] This means, too, that Weil Gotshal could not and did not know when it was retained by court order whether Leslie Fay might have any claims against Bear Stearns, Odyssey and Friedman arising out of the Stock Sale, another area in which Weil Gotshal had entanglements.

3587, *8 (Del. Ch. Jan. 19, 1988). Apparently, the outside directors thought enough of their potential liability to file indemnification claims against Leslie Fay in this court. At any rate, I do not deny that Weil Gotshal may have had an honest belief in the likely immunity of Leslie Fay's outside directors. "The point, however, is that such a determination must be made by the counsel who is in a position to make an independent judgment." Bohack, 607 F.2d at 263. And here, the attorneys with the entanglements were the ones who were determining whether Leslie Fay would have claims against the outside directors. Vis-à-vis two of those directors, Weil Gotshal had an adverse interest because it had an incentive to discount any possible liability so as to preserve its substantial client relationships with the firms of which the directors were principals. And with respect to Friedman, Weil Gotshal had represented him personally, wholly separate and apart from his affiliation with Leslie Fay.

I also find that Weil Gotshal was not disinterested relative to Seidman. Seidman was Leslie Fay's independent auditor throughout the period of the irregularities, and was therefore a very obvious target of potential plaintiffs. Indeed, Seidman was named in both the Derivative Suit and the Securities Fraud Litigation. Weil Gotshal does not deny this, nor does it deny that Leslie Fay may still have claims against Seidman.[9] Rather, it defends its disinterestedness by pointing to the relative insignificance of Seidman as a client to Weil Gotshal. (At the time of Leslie Fay's chapter 11 filing, Weil Gotshal was representing Seidman with regard to two matters, one of which was already inactive and one which subsequently became so, and the total fees in those cases approximated $40,000.) The short answer to this is that Weil Gotshal should

[9] These potential claims are currently being evaluated by counsel to the Creditors' Committee, which took responsibility for these claims after Weil Gotshal's possible conflicts with regard to them came to light.

be presumed to be loyal to its client. That the client may not be a major client is no reason to think that Weil Gotshal would ignore the relationship.

In any event, the size of the billing is irrelevant for another reason as well. Dennis J. Block, a Weil Gotshal partner, admitted in a deposition conducted by the examiner that Weil Gotshal would not have sued Seidman even if the facts warranted it. This, stated Block, was because Weil Gotshal represented accountants and "as a matter of Weil Gotshal policy," would therefore "not sue an accounting firm, period." (Dep. of Dennis J. Block at 126-27). Block testified that Weil Gotshal "told the audit committee and the board" of this policy, and had further told them:

> [I]f in fact it turned out that there would be a reason to take action against Seidman we would look at the facts, we'd tell them what the facts are but that would be something, ultimately, one, [sic] we'd be unwilling to handle because we don't sue accounting firms and that would be something that the company would have to deal with other counsel on.

Id. at 127. Although Weil Gotshal told the Audit Committee about its policy, it elected not to impart this important information to either myself or the U.S. Trustee, an omission that is simply inexcusable. There are two problems with Weil Gotshal's nondisclosure. Certainly that information was relevant to whether Weil Gotshal's retention was in the best interest of the estate given that it would not sue Seidman and retention of special counsel might have entailed additional cost to the estate. But in addition, this undisclosed condition of employment particularly when coupled with a client relationship with Seidman cast doubt on whether Weil Gotshal was the proper independent counsel to conduct the investigation into Seidman's conduct and possible liability. An unbiased investigation of the facts is no less crucial than an unbiased evaluation of the law in assessing potential claims. By unilaterally reserving the role of

investigating Seidman to itself, Weil Gotshal created the "opportunity for the exercise of [its] conflicting interests," by projecting the facts in a light more favorable to Seidman than it should have. In re Codesco, 18 B.R. at 999. I do not say that Weil Gotshal actually did that, nor do I mean to disparage Weil Gotshal's integrity by suggesting that it probably would have. But when evaluating conflicts of interest, I must do so objectively, "irrespective of the integrity of the person under consideration." In re Martin, 817 F.2d at 181.

As Judge Friendly noted in In re Ira Haupt & Co., 361 F.2d 164, 168 (2d Cir. 1966), quoted with approval in Bohack, 607 F.2d at 263, "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." And here, Weil Gotshal's conduct of an investigation where it had undisclosed ties to three of the targets just does not seem right. The better solution, as I will expand upon shortly, would have been for Weil Gotshal to decline the Audit Committee's representation. But in any case, once Leslie Fay filed for chapter 11 relief, it was no longer Weil Gotshal's decision to make. It was for the court, and not Weil Gotshal, to determine whether in fact a conflict existed and, if so, what the remedy should be. The "decision should not be left to counsel, whose judgment may be clouded by the benefits of potential employment." Rome v. Braunstein, 19 F.3d at 59 (citation omitted).

Weil Gotshal was also connected with Forstmann, Leslie Fay's seventh largest creditor, but I do not believe that those connections are sufficient to render Weil Gotshal interested with regard to Forstmann.

Section 327(c) of the Code provides that

> ...a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

Based upon the U.S. Trustee's submissions on his disqualification motion, it is not clear to me that the U.S. Trustee actually objects to Weil Gotshal's retention on the grounds of its Forstmann connection. However, I do not believe that Weil Gotshal's representation of Forstmann on unrelated matters constituted an actual conflict of interest in any case. At the time of its retention, Weil Gotshal was no longer Forstmann's regular counsel and there has been no showing that Forstmann was adverse to Leslie Fay. Had there been a problem with Forstmann's claim or had Forstmann been the recipient of an alleged voidable transfer, other counsel, such as Parker Chapin (the debtors' general counsel), could have handled the matter. In other words, any possible problem with Forstmann did not go to the heart of what Weil Gotshal was retained to do. This is not to say, however, that Weil Gotshal was free to keep secret its connection with Forstmann, a subject about which I will say more later.

2. Weil Gotshal did not Make a Complete and Candid Disclosure as Required by Rule 2014, Thereby Causing Actual Injury to Leslie Fay

As I have explained, the requirements of Fed.R.Bankr.P. 2014 are more-encompassing than those governing the disinterestedness inquiry under section 327. For while retention under section 327 is only limited by interests that are "materially adverse," under Rule 2014, "all connections" that are not so remote as to be de minimus must be disclosed. Consequently, there is "no merit to the... argument that [a party] did not have to disclose its connections... because its attorneys did not feel that a conflict existed." In re Rusty Jones, Inc., 134 B.R. 321, 345 (Bankr. N.D.Ill. 1991). Weil Gotshal had no right to "make a unilateral determination regarding the relevance of a connection." Arlan's, 615 F.2d at 470.

Weil Gotshal urges that it is not necessary to disclose connections to companies with

which the members of the debtor's board of directors are affiliated. As a general statement, that may have some validity. But where counsel is being retained to conduct an investigation into the actions of, among others, senior management and the members of the board of directors, most assuredly connections with entities affiliated with board members that could cause pressure on investigating counsel must be disclosed. It is by the same rationale that the connection with Seidman had to be disclosed.

Not only did Weil Gotshal violate Rule 2014 by not disclosing its connections to Friedman, Tarnopol and Seidman, it also violated the rule by not disclosing its connection to Forstmann, one of the largest creditors which served for a short while on the Creditors' Committee. Forstmann had employed Weil Gotshal as its regular counsel through 1991 and was still using Weil Gotshal on a more limited scale at the time of the April 5 filing. This was not merely a de minimus connection. The boilerplate language to the effect that Weil Gotshal may have in the past represented, currently represents, and may in the future represent entities which are claimants of the debtors was insufficient to alert the court to Weil Gotshal's representation of a creditor which was high on the list of the debtors' twenty largest creditors (from which list a creditors' committee is normally selected). The boilerplate is reasonable to cover inadvertent failures to disclose insignificant connections; it is not an adequate substitute for disclosure of representation of known and significant creditors. To rule any other way would be to eviscerate the disclosure requirements of Rule 2014(a). At a minimum, the order retaining Weil Gotshal should have carved out from the firm's role the responsibility for considering the bona fides of the Forstmann claim and Forstmann's prepetition course of dealing with Leslie Fay. By not disclosing its connection with Forstmann, Weil Gotshal caused the court to skip over an area

which deserved some attention.

Weil Gotshal's nondisclosure caused Leslie Fay very real harm. The Creditors' Committee spent time and energy examining Weil Gotshal's relationships to determine if it should request some form of relief. Leslie Fay itself felt compelled to ask for the appointment of an examiner to inquire into Weil Gotshal's compliance with the law. Not only was this examination necessary, but because of Weil Gotshal's undisclosed relationships it was necessary as well for the examiner to insure that Weil Gotshal's work for the Audit Committee was free from reproach. In other words, the examiner had to investigate the investigation. This entailed duplication of much of what Weil Gotshal had already done, at considerable expense to the estate.[10] Weil Gotshal suggests that the Audit Committee's retention of Arthur Andersen was sufficient to "sanitize" the investigation without the necessity of the examiner reviewing the work product. I cannot agree. Whereas the accountants are competent and diligent, their role was to uncover what was wrong with the debtors' books and records, not to determine liability therefor. It was simply beyond their expertise to render any opinion on what claims Leslie Fay might possess arising out of the fraud, and whether it was worthwhile to pursue such claims. At further expense to the estate, the Equity Committee was required to respond to the motion for sanctions so as to protect its constituency. These are tangible costs which Weil Gotshal foisted upon the estate by virtue of its nondisclosure. Thus, we are not faced solely with upholding the integrity of the bankruptcy process, although, of course, that is an important concern as well.

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[10] It is true that the examiner found no problems with the Audit Committee's investigation and characterized Weil Gotshal's work on its behalf as "thorough, diligent, and professional." (Ex. Report at 105). Nonetheless, because of Weil Gotshal's conflicts of interest, this could not be assumed but had to be confirmed by the examiner's lengthy investigation.

The shame in all of this is that the heavy financial and emotional toll in this matter could have been avoided completely. For had Weil Gotshal revealed its connections at the time it requested court approval of its retention, an examiner could have been appointed early on to review and then complete the Audit Committee's investigation, and, if warranted, special counsel could have been thereafter appointed to institute suit. This arrangement might even have permitted Weil Gotshal's retention, albeit in a narrower role. Unfortunately, Weil Gotshal's silence prevented that from happening. I do not mean to suggest that I believe Weil Gotshal to have been venal. The examiner's report shows that not to have been so. Harvey Miller, the partner from Weil Gotshal who argued this motion, reminded me that he had spent the last 30 years upholding the integrity of this court. I believe him to have been truthful in that statement. But that does not excuse the firm's arrogating to itself the decision as to whether it had a conflict of interest with the case in general or with the Audit Committee investigation in particular. Weil Gotshal was mandated to reveal any connections which might cast any doubt on the wisdom of its retention and leave for the court the determination of whether a conflict existed. It did not comply with that obligation.

D. The Sanctions to be Granted

The foregoing discussion brings us right back to where I began, with the troubling aspects of this motion. I have wide discretion in my selection of an appropriate remedy. See In re Kelton Motors, 109 B.R. at 654; In re Iorizzo, 35 B.R. 465, 468-69, (Bankr. E.D.N.Y. 1983); Ionnotti, 567 F.2d at 173. I could embrace the approach preferred by the Committees and the examiner, imposition of a monetary sanction which could be as large as the

disgorgement of all fees or as small as a portion of the fees charged to the estate by the examiner and his professionals. I could also grant the motion to disqualify Weil Gotshal from further representation of the debtors and either provide or not provide for a disgorgement of fees already awarded. See Rome v. Braunstein, 19 F.3d at 59, n. 3 ("[C]onflict is not invariably followed by disqualification.").

As the Second Circuit noted in Bohack, the Circuit has been loathe in the nonbankruptcy context to separate a client from his or her chosen attorney where the alleged misconduct does not prejudice the opposing party and taint the litigation in which the attorney is appearing. Yet, the Circuit Court took pains to point out, where the choice of counsel must be approved by the court as appropriate, such that the integrity of the judicial process is implicated, the cost and delay of replacing counsel with a conflict of interest may be outweighed. 607 F.2d at 263-64. Moreover, in the bankruptcy context we are not constrained simply by the Code of Professional Responsibility but by the Bankruptcy Code itself.

There is no question but that here the facts, if disclosed, would have led to a legitimate worry that Weil Gotshal could not impartially represent the debtors in their investigation of the financial irregularities and the decisions whether and whom to sue. Because the court was not armed with the facts, there was no meaningful opportunity provided for the court to determine whether to approve or disapprove Weil Gotshal's retention. Plainly, this implicates the integrity of the judicial process by which disinterested counsel is selected. On the other hand, by virtue of the reports prepared by the examiner, we know that Weil Gotshal actually performed the investigation competently and consistent with its fiduciary obligations to the estates. This suggests that the harm to Leslie Fay, which has been a victim first of an accounting scandal and

then of a legal one, should assume some importance in the equation by which an appropriate sanction is selected.

Admittedly, in every bankruptcy case the replacement of counsel causes disruption. And to refuse to replace counsel simply because the facts become known only late into the process could perversely encourage professionals to hold back information from the court. But this is a special case, in more ways than one. Unfortunately, only ten days or so ago I reluctantly signed an order authorizing Leslie Fay to pay its debtor-in-possession lender a fee of $500,000 for a one-month amendment to the loan. This was necessitated by Leslie Fay's failure by a substantial margin to meet its projections, in violation of covenants contained in the loan. The information regarding Leslie Fay's financial performance became available only in September and Leslie Fay is now revising its projections and negotiating with the lender for an amendment to the debtor-in-possession financing agreement. Simultaneously, and as part and parcel of the interim agreement with the lender, Leslie Fay is preparing a term sheet for a plan of reorganization which it has committed to present to the Committees by January 15, 1995. Put differently, Leslie Fay is at a critical juncture in its reorganization efforts.

The cases have been here some 20 months. During that time Leslie Fay has endured the forced departure of its financial staff, which is a blow no debtor in possession would willingly suffer; a crippling strike this past summer; and now, financial results which are far from those targeted, necessitating an expensive reevaluation of its business strategy. The financial burdens to Leslie Fay of remaining in chapter 11 are enormous. It may not be able to withstand the great delay and cost occasioned by the departure of the counsel with whom it has worked so long. It must begin the process of emerging from this court.

In an effort to reconcile the twin concerns of preserving the integrity of the bankruptcy process and the viability of the reorganization case, I have determined that I will permit Weil Gotshal to remain in the case to complete what it has begun. That is, Weil Gotshal may see the case through to reorganization and may finish those contested matters and adversary proceedings in which it is presently engaged. New counsel is to be brought in, however, to handle new matters such as litigation regarding claims, any avoidance actions and suits for relief arising out of the accounting irregularities. (To the extent that some of these matters could be handled more efficiently by counsel to one or the other of the committees, rather than special counsel to the debtors, I would consider that as well.) I reach this decision to retain Weil Gotshal for existing matters cognizant that the examiner found that: (i) nondisclosure aside, Weil Gotshal had performed the investigation properly and (ii) after exhaustive review, there were no viable claims to be asserted against senior management or Friedman and Tarnopol such that Weil Gotshal's conflict has now been eliminated. To the extent that Weil Gotshal may be called upon in a limited fashion to provide background to new counsel, I trust that it will not seek to foist this expense upon its client, an expense caused solely by Weil Gotshal's conduct.

With respect to the economic sanction which is sought by the U. S. Trustee, relief is plainly warranted there, too, both for nondisclosure and pursuant to section 328 of the Code, which permits the court to deny compensation for services and reimbursement of expenses of a professional person retained pursuant to section 327 if, at any time during that employment, the professional person is not disinterested or holds an adverse interest to the interest of the estate with respect to the matter on which the professional person is employed. Given that I am disqualifying Weil Gotshal from handling new matters, I am limiting the economic sanction to

disgorgement of the costs, direct and indirect, of both of the examiner's investigations and of the failure to disclose. This should relieve Leslie Fay of the burden imposed by its counsel. I have insufficient information to fix that number now. The costs are to include, however, not only the approximately $800,000 in fees and expenses incurred by the examiner and his professionals, but also those incurred by the Committees in dealing with Weil Gotshal's relationships and its disqualification or retention, because Leslie Fay would not otherwise have had to bear that expense. I decline to require Weil Gotshal to disgorge the fees paid it in connection with the Audit Committee investigation because that would foist upon Weil Gotshal the cost of not one, but two, investigations. One investigation would have been necessary in any event and was therefore an expense that is not related to Weil Gotshal's nondisclosure. In the event that Weil Gotshal, the Committees and the U. S. Trustee are unable to agree on the sum to be disgorged, they may schedule a further hearing to fix that number.

CONCLUSION

The motion of the U.S. Trustee is granted in part and denied in part. SETTLE ORDER consistent with this decision.

Dated: New York, New York
December 15, 1994

UNITED STATES BANKRUPTCY JUDGE

AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the enactment of legislation to amend the Bankruptcy Code to make clear that an attorney who represents a debtor-in-possession need not be a "disinterested person," as that term is defined in the Bankruptcy Code (so that, for example, counsel would not be disqualified automatically because outstanding fees for prepetition services might preclude being deemed "disinterested"), but that such counsel should comply with non-bankruptcy standards of professional responsibility generally applicable in the district where the case is pending, and should not hold or represent an interest materially adverse to the estate.

BE IT FURTHER RESOLVED, that the American Bar Association recommends the adoption of additions to the Bankruptcy Rules and to the Official Bankruptcy Forms which provide for more detailed disclosure than is presently required of potentially conflicting interests and similar information, and which provide that if such data has been filed in good faith, a subsequent termination of the attorney's employment will not disqualify that attorney from receiving compensation under applicable standards.

PROPOSED AMENDMENT TO BANKRUPTCY RULE 2014

(c) Attorney Declaration. The attorney declaration required by subsection (a) of this rule shall disclose all connections of the attorney or his firm with the debtor, creditors, or any other parties in interest, whether or not such connections would constitute a basis for disqualification, including whether the attorney, the attorney's firm or any other attorney in the firm:

1. represented the debtor within one year of the petition filing, including a description of the services, and dates performed and paid;

2. is a creditor of the debtor, including by reason of unpaid fees for prepetition services, and the amount, security held, and other particulars of any such claim;

3. holds any direct or indirect equity interest in the debtor, including stock, stock warrants, a partnership interest in a debtor partnership or right to acquire such an interest;

4. is or has served as an officer, director or employee of the debtor within two years before the petition filing;

5. is in control of the debtor or is a relative of a general partner, director, officer or person in control of the debtor;

6. is a general or limited partner of a partnership in which the debtor is also a general or limited partner;

7. is or has served as an officer, director, or employee of a financial advisor which has been engaged by the debtor in connection with the offer, sale, or issuance of a security of the debtor within two years before the filing of the petition;

8. has represented a financial advisor of the debtor in connection with the offer, sale, or issuance of a security of the debtor within three years before the filing of the petition;

9. presently represents a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner, lessor, lessee, party to an executory contract of the debtor, or person otherwise adverse or potentially adverse to the debtor or the estate, on any matter whether such representation is related or unrelated to the debtor or the estate, describing or attaching any waivers of conflicts obtained from such clients;

10. previously represented a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner,

lessor, lessee, party to an executory contract, or person who is otherwise adverse or potentially adverse to the debtor or the estate, on any matter substantially related to the bankruptcy case, describing or attaching any waivers of conflicts obtained from such former clients;

11. represents an affiliate or insider of the debtor, describing the affiliate's or insider's relationship with the debtor, including intercompany claims, asset transfers, overlapping creditors, creditor guaranties and subordination agreements, jointly-owned assets, shared officers, directors or owners;

12. has been paid fees prepetition or holds a security interest, guarantee or other assurance of compensation for services performed and to be performed in the case, with an explanation of the source, amount, and terms of any such arrangement;

13. has any agreement or understanding with anyone else for sharing compensation for services rendered in or in connection with the case, describing the particulars of any arrangement other than those within the attorney's own firm;

14. has any other connection with the debtor, creditors, United States Trustee or any employee of that office, or any other parties in interest; and

15. has any other interest, direct or indirect, which may be affected by the proposed representation.

(d) **Initial Employment.** The court shall evaluate the disclosures pursuant to subsection (c), which may or may not be indicia of disqualification. It may approve employment of counsel for a debtor in possession or trustee on an interim basis, without notice and a hearing.

(e) **Continued Employment.** The court may authorize continued employment by counsel for a debtor in possession or trustee after notice and a hearing. The attorney shall serve on the committee of unsecured creditors, if appointed, any other committees appointed in the case, the creditors on the list required by rule 1007(d), the United States trustee, any trustee appointed in the case, and such other parties in interests as the court may direct:

(1) the application to approve employment;

(2) the attorney declaration;

(3) the initial employment order; and

(4) either a notice of a hearing on further employment, or a notice of a date by which objections to further employment shall be filed and served on interim counsel, as the court directs.

Any hearing on continued employment shall be set not less than 20 days after notice of the hearing is served, and shall take place within 45 days of the application

filing. Any bar date for objections to further employment shall be set not less than 20 days after service of the notice, and shall provide that the court will set a hearing to consider any timely objections.

(f) Supplemental Attorney Declaration. A supplemental attorney declaration shall be filed within 15 days after the occurrence of any event, or the discovery of any fact, which is subject to disclosure pursuant to subsections (a) and (c) of this rule. Such supplemental verified statement shall be served on the parties listed in subsection (e) and such other parties in interest as the court may direct.

PROPOSED ATTORNEY DECLARATION FORM

[CAPTION AS IN FORM NO. 1]

[Attorney], a partner in [firm], submits the following statement in compliance with 11 U.S.C. § § 328(a) and 329(a) and Bankruptcy Rules 2014 and 2016.

1. [Firm] represented the debtor during the past year in [describe generally]. In connection with that representation, [describe when services were rendered and when payment was received].

2. [Firm] holds a retainer balance of $_____ in connection with the prior representation/or is owed $_____ for these prepetition services, and holds a guarantee by _____, who is related to the debtor as _____, or holds a security interest in _____ which is owned by _____, obtained on _____.

3. No attorney in [firm] holds a direct or indirect equity interest in the debtor [including stock, stock warrants, a partnership interest in a debtor partnership] or has a right to acquire such an interest, except _____.

4. No attorney in the firm is or has served as an officer, director or employee of the debtor within two years before the petition filing, except _____.

5. No attorney in the firm is in control of the debtor or is a relative of a general partner, director, officer or person in control of the debtor, except _____.

6. No attorney in the firm is a general or limited partner of a partnership in which the debtor is also a general or limited partner, except _____.

7. No attorney in the firm is or has served as an officer, director, or employee of a financial advisor which has been engaged by the debtor in connection with the offer, sale, or issuance of a security of the debtor within two years before the filing of the petition, except _____.

8. No attorney in the firm has represented a financial advisor of the debtor in connection with the offer, sale, or issuance of a security of the debtor within three years before the filing of the petition, except _____.

9. No attorney in the firm presently represents a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner, lessor, lessee, party to an executory contract of the debtor, or person otherwise adverse or potentially adverse to the debtor or estate, on any matter, whether such representation is related or

unrelated to the debtor or the estate, except _____ [describe or attach any waivers of conflicts obtained from such clients].

10. No attorney in the firm has previously represented a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner, lessor, lessee, party to an executory contract, or person who is otherwise adverse or potentially adverse to the debtor or the estate, on any matter substantially related to the bankruptcy case, except _____ [describe or attach any waivers of conflicts obtained from such former clients].

11. No attorney in the firm represents an insider of the debtor or the debtor's parent, subsidiary, or other affiliate, except _____ [if any such representation, describe that client's relationship with the debtor, including intercompany claims, asset transfers, overlapping creditors, creditor guaranties and subordination agreements, jointly-owned assets, shared officers, directors or owners].

12. No attorney in the firm has been paid fees prepetition or holds a security interest, guarantee or other assurance of compensation for services performed and to be performed in the case, except _____

[explain the source, amount, and terms of any such arrangement].

13. There is no agreement of any nature, other than the partnership agreement of [firm] as to the sharing of any compensation to be paid to [firm], except _____.

14. No attorney in the firm has any other connection with the debtor, creditors, United States Trustee or any employee of that office, or any other parties in interest, except _____.

15. No attorney in the firm has any other interest, direct or indirect, which may be affected by the proposed representation, except _____.

[Where appropriate, the attorney may state the nature and scope of the inquiry upon which the declaration statements are made. Any pertinent information which counsel believes will satisfy any concerns of disqualification also may be included.]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on [date].

_____

Signature



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FILED UNDER SEAL
PURSUANT TO COURT ORDER

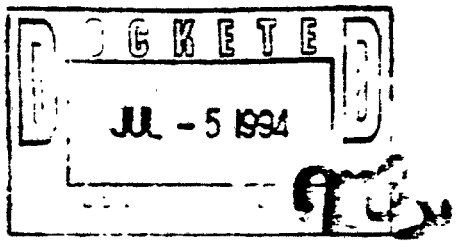
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
THE LESLIE FAY COMPANIES, INC., et al.,	:	Chapter 11 Case No. 93 B 41724 (TLB)
Debtors.	:	(Jointly Administered)
	:	

WEIL, GOTSHAL & MANGES' RESPONSE TO REPORT OF EXAMINER CHARLES A. STILLMAN CONCERNING "DISINTERESTEDNESS ISSUES" INVOLVING WEIL, GOTSHAL & MANGES

Dated: New York, New York
July 5, 1994

WEIL, GOTSHAL & MANGES
Attorneys for the Debtors
767 Fifth Avenue
New York, New York 10153
(212) 310-8000



clients -- members of the Audit Committee -- against its other clients -- the Debtors. The Examiner is simply wrong: Weil, Gotshal's only clients were the Debtors. Weil, Gotshal represented the Audit Committee in its capacity as the official entity designated by the Board of Directors of Leslie Fay to act on behalf of the Company. Weil, Gotshal did not represent the members of the Audit Committee individually.[19] Indeed, as the Examiner found, Weil, Gotshal did not advise the Audit Committee members nor did the firm assist with or prepare the proofs of claim. Accordingly, Weil, Gotshal would not have been in a position of representing two clients. (Even if that was the case, section 327(c) does not disqualify counsel solely because it represents a debtor and a creditor. In re Envirodyne Indus., Inc., 150 B.R. at 1015 ("[t]he issues of disinterestedness . . . and adverse interest do not arise solely because [counsel] maintains an ongoing relationship with a creditor of the estates"); BH & P, Inc., 103 B.R. at 562 ("something more than the mere fact of dual representation must be demonstrated" under § 327(c)).

D. Weil, Gotshal's Compliance With The Disclosure Requirements Of Bankruptcy Rule 2014(a) Does Not Merit Sanctions

The Examiner's conclusion that Weil, Gotshal should be sanctioned for its allegedly inadequate disclosure of client relationships is unwarranted. According

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19. Weil, Gotshal's representation of Messrs. Destino, Hechler and Tarnopol in the shareholder suits was for a very limited purpose. Weil, Gotshal is no longer representing them in those actions. See TWT Int'l, Inc. v. Vanguard Oil and Serv. Co., 162 B.R. 672 (S.D.N.Y. 1994) (counsel for debtor permitted to withdraw from representation of debtor's principal to avoid potential conflict of interest).

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to the Examiner, Weil, Gotshal supposedly failed to disclose its relationships with the Audit Committee, Bear Stearns, Odyssey and BDO Seidman.

Bankruptcy Rule 2014(a) provides that prospective counsel seeking to be employed in a bankruptcy case must disclose to the court all connections with the debtor, creditors or any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee. See In re Arlan's Dep't Stores, Inc., 615 F.2d 925, 933 (2d Cir. 1979); In re Rusty Jones, Inc., 134 B.R. 321, 345 (Bankr. N.D. Ill. 1991). Rule 2014(a) does not require counsel to disclose its representation of clients which have no relationship to a debtor's chapter 11 case. id.

Although the term "party in interest" is not expressly defined in section 101 of the Bankruptcy Code, section 1109 provides specific examples of parties in interest.[20] None of these examples encompasses an existing client with no other connection to the chapter 11 case. Additionally, although the courts do not appear to have considered the question of what constitutes a "party in interest" in the context of Bankruptcy Rule 2014(a), they have considered the question in relation to sections of the Bankruptcy Code. In In re American Motor Club, Inc., 149 B.R. 317, 321

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20. Section 1109(b) provides:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this Chapter.

(Bankr. E.D.N.Y. 1993) the court stated that "a determination whether an entity qualifies as a party in interest [under Section 362 of the Code] should be made within the specific reorganization process context for which the determination is sought." On the facts before it, the court found that the equity security holders had a significant interest in the recovery of the debtor's assets and they were therefore parties in interest under the Code. See also In re Johns-Manville Corp., 31 B.R. 965, 971 (S.D.N.Y. 1983) (insurer of debtor was a party in interest under the Bankruptcy Code because a judgment against the debtor would render the insurer a creditor of the debtor); Sanders Confectionery Products, Inc. v. Heller Fin., Inc., 973 F.2d 474, 481 (6th Cir. 1992), cert. denied, 113 S.Ct. 1046 (1993) (shareholder of parent of debtor who was not also an equity security holder of the debtor or a creditor of the debtor was not a party in interest in the bankruptcy case).

In determining whether an entity is a "party in interest," the courts consider whether the entity is "affected by the reorganization." In re River Bend-Oxford Assocs., 114 B.R. 111, 114 (Bankr. D. Md. 1990); In re Ionosphere Clubs, Inc., 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1992) ("if a party is not affected by the reorganization process it should not be considered a party in interest"). In In re Comcoach Corp., 698 F.2d 571 (2d Cir. 1983), for example, the court looked to the purpose of the Bankruptcy Code -- to provide a forum for settling disputes between the debtor and creditors -- before concluding that a mortgagee bank was not a party in

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interest in the bankruptcy cases of the tenant of the mortgaged property because the debtor had no obligation to the bank. id at 573.

In concluding that Weil, Gotshal violated Bankruptcy Rule 2014(a) by not disclosing its relationships with Bear Stearns, Odyssey, the Audit Committee members and BDO Seidman, the Examiner assumed, without any analysis, that these persons were Debtors, creditors or some other category of parties in interest. Had he appropriately considered the question, the Examiner would have been required to conclude that Bankruptcy Rule 2014(a) does not require the disclosure of the Bear Stearns and Odyssey relationships. First, neither Bear Stearns nor Odyssey is a shareholder or creditor of the estates. Moreover, they are not "parties in interest" as that term has been interpreted by applicable case law. Bear Stearns and Odyssey Partners have no interests or obligations in the chapter 11 cases, have filed no proofs of claim and will not be affected by any reorganization plan. The only possible basis for suggesting that either entity is a party in interest in the chapter 11 cases is if the Debtors have a claim against them in connection with the 1991 secondary public offering of the Odyssey-Friedman Leslie Fay stock in which Bear Stearns was the underwriter. As previously discussed, it is difficult to fathom what possible claims could reasonably be asserted by the Debtors against Bear Stearns or Odyssey.[21]

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21. See notes 6 and 15 at 18 and 42.

Indeed, as the Examiner has concluded, there is absolutely no legal or factual basis for such a claim.

Representation of Audit Committee members in their filings of proofs of contingent claims would appear to be subject to Bankruptcy Rule 2014(a). However, the Examiner acknowledged that Weil, Gotshal did not undertake such representation. His conclusion, therefore, that Weil, Gotshal violated Bankruptcy Rule 2014(a) by failing to disclose its representation of the Audit Committee is simply wrong. The Audit Committee members were not Weil, Gotshal clients for purposes of asserting their indemnity claims against the Company. Weil, Gotshal's original disclosure nonetheless clearly described the nature of the firm's representation of the Audit Committee in connection with the investigation into the accounting irregularities, the governmental investigations, and the shareholder litigations. (Order Pursuant to Section 327(a) of the Bankruptcy Code Authorizing Employment of Weil, Gotshal & Manges as Attorneys for Debtors; Application For Entry of An Order Pursuant to Section 327(a) of the Bankruptcy Code Authorizing the Employment of Weil, Gotshal & Manges as Attorneys for the Debtors) No objection was raised to Weil, Gotshal's representation of the Debtors, notwithstanding this disclosure.

Representation of BDO Seidman, the auditors for the Company, would appear to be subject to Bankruptcy Rule 2014(a). Weil, Gotshal's discrete and minor representation of BDO, in the context in which that representation might be subject to

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the Rule, however, fell within Weil, Gotshal's general disclosure regarding representation of potential parties in interest in unrelated matters. To the extent more specific disclosure was required, Weil Gotshal's omission to disclose that it represented BDO Seidman "in two discrete, relatively small matters" (WGM Report at 37) which were unrelated to Leslie Fay and which have been inactive for some time, was clearly inadvertent. Weil Gotshal respectfully asserts that such an immaterial omission would not merit the imposition of sanctions.

Section 328(c) of the Bankruptcy Code grants discretionary authority to the courts to deny compensation for services to those who have failed to meet the requirements of section 327(a) and Bankruptcy Rule 2014. In re EWC, Inc., 138 B.R. 276, 281-82 (Bankr. W.D. Okla. 1992). Although the courts may impose sanctions for nondisclosure even when no conflict exists, as a court of equity, the court has the ability to determine whether "the need for attorney discipline is outweighed by the equities of the case." In re Roberts, 75 B.R. at 412. Where the equities outweigh the need for attorney discipline, as in this case, "the law does not require the denial of fees and costs." Id. See also In re GHR Energy Corp., 60 B.R. 52, 68 (Bankr. S.D. Tex. 1985) (fees awarded where there was no actual injury or prejudice to the estates). In many cases, even where the court did find a conflict of interest, it declined to impose sanctions. In re Watson Seafood & Poultry Co., 40 B.R. 436, 440 (Bankr. E.D.N.C. 1984) (even where there is a conflict of interest

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there is no "mandatory requirement that reorganization courts woodenly must deny compensation . . . regardless of facts") (citing New York, N.H. & H.R. v. Iannotti, 567 F.2d 166, 175 (2d Cir.), cert. denied, 434 U.S. 833 (1977)); In re Georgetown of Kettering, Ltd., 28 B.R. 120, 129 (Bankr. S.D. Ohio), aff'd in part and remanded in part, 34 B.R. 368 (D.C. Ohio 1983)(as a matter of superintendency of estates administration, [denial of compensation] must be the rule only if for the protection of estates administration or the benefitted estate creditors").

In this instance, it would be inequitable to impose sanctions of any kind. The Examiner has concluded that no actual conflict arose out of Weil Gotshal's relationship with BDO Seidman and that the estates have not been prejudiced by such relationship.[22] Weil Gotshal represented BDO Seidman in two minor matters unrelated to the chapter 11 cases or to Leslie Fay; both matters have been inactive for some time. Further, Weil Gotshal's omission to specifically disclose the relationship

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22. The Examiner also notes Weil, Gotshal's relationship with BDO Seidman in connection with his analysis relating to his conclusion that the firm violated section 327(a) of the Bankruptcy Code. Although the Examiner's analysis does not appear to give significant weight to Weil, Gotshal's relationship with BDO, he does state in a footnote that he "cannot conclude that it was an immaterial adverse interest." (WGM Report at 114 n.33) Significantly, the Examiner does not conclude that the BDO relationship constitutes a material adverse interest.

In our view, given the "discrete, relatively small" nature of the matters, which were unrelated to Leslie Fay, on which Weil, Gotshal represented BDO Seidman, and the Examiner's conclusion that the representation caused no harm to the estates, this relationship does not constitute a material adverse interest under section 327(a) of the Bankruptcy Code.

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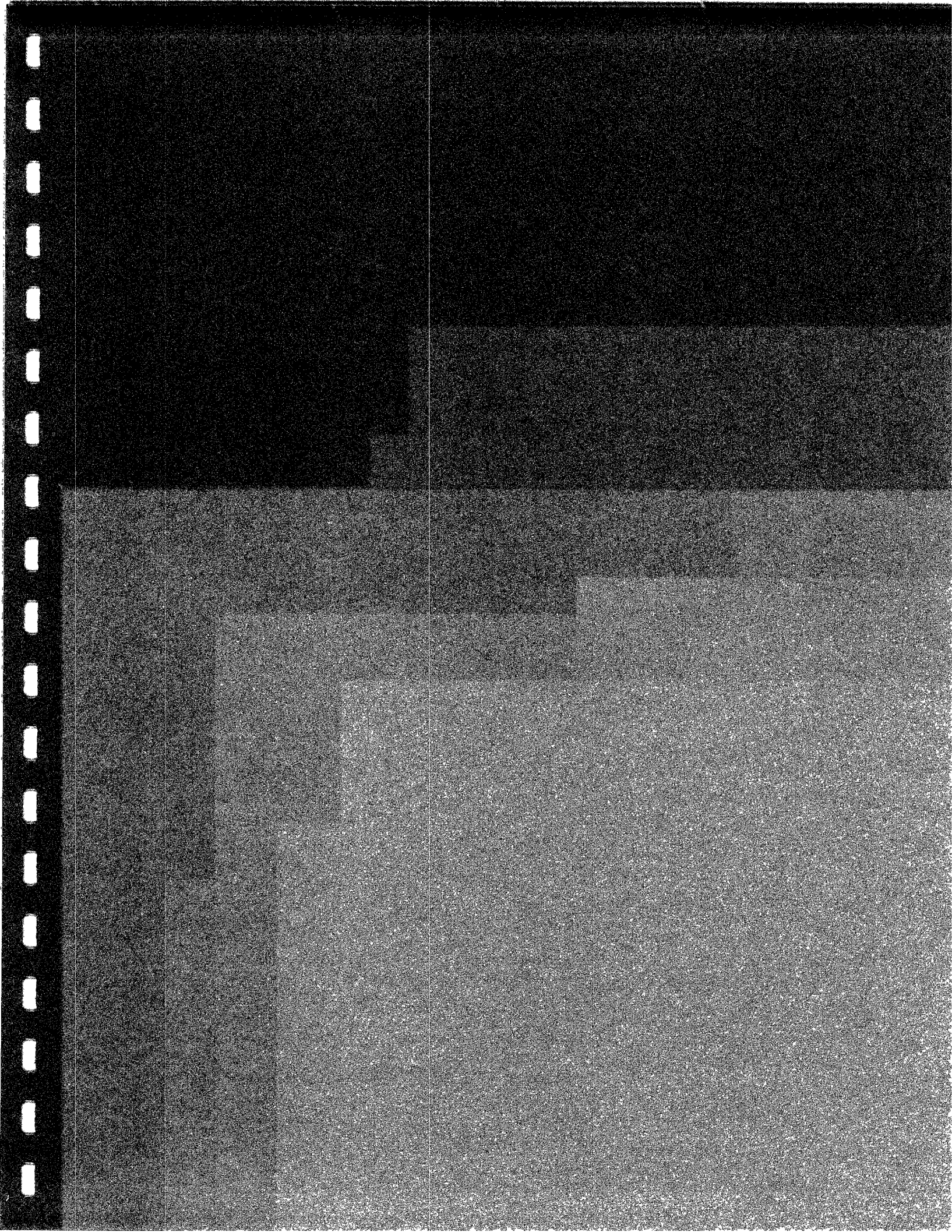
at the outset was inadvertent and the relationship was particularized in a supplemental filing.

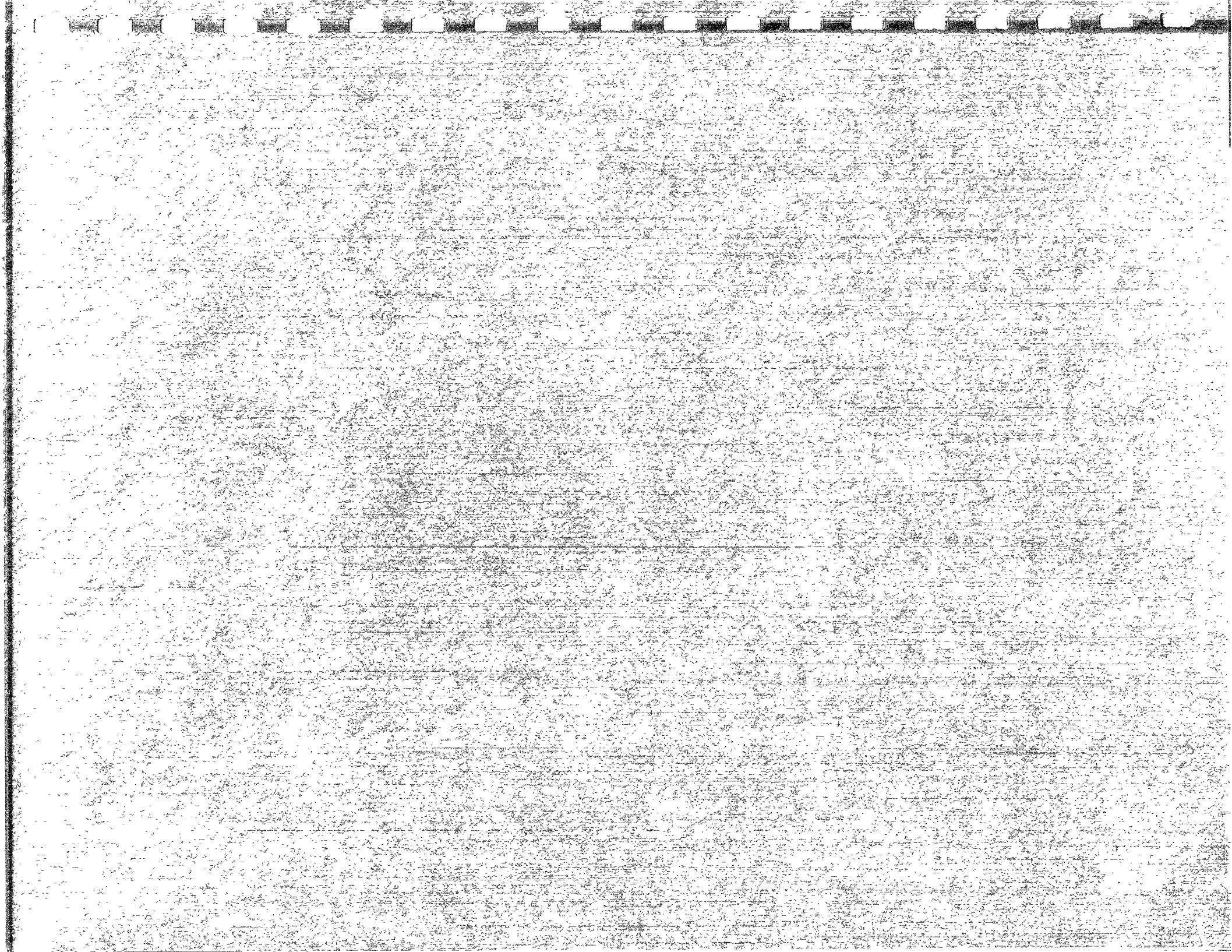
Moreover, although Weil, Gotshal contests that there was ever a reasonable appearance of a conflict, it would be particularly inequitable to order sanctions now after any purported perception of "potential" for conflict has been eliminated as a result of the Examiner's extensive and independent investigation. Accordingly, the Court should base its decision on the circumstances as they now exist, and not on some hypothetical set of facts.

E. There Is No Basis For A Reduction In Compensation

Section 328(c) of the Bankruptcy Code permits the Court to deny compensation if a professional person employed under section 327(a) is not a "disinterested person" or "represents or holds an interest adverse to the interest of the estates." 11 U.S.C. § 328(c). Beginning with Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949), courts have held that compensation should be diminished in proportion to the harm done by conflicting representations. See, e.g., In re Chicago & W.T. Ry., 230 F.2d 364 (7th Cir. 1956), cert. denied sub nom. Elward v. Friedman, 351 U.S. 943 (1956); Securities and Exch. Comm'n v. Cogan, 201 F.2d 78, 85 (9th Cir. 1951); Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 921 (2d Cir.), cert. denied, 340 U.S. 831 (1950).

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TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

DATE: FEBRUARY 13, 1992

RE: AMERICAN BAR ASSOCIATION RESOLUTION 119A

On February 3, 1992, Pat Channon distributed to the Advisory Committee copies of Resolution 119A adopted by the American Bar Association House of Delegates in August, 1991, together with an accompanying report. The resolution deals with the subject of the employment of attorneys and attorneys' fees. The purpose of this memorandum is to comment on the ABA resolution.

Background

Section 327(a) of the Bankruptcy Code provides that "the trustee, with the court's approval, may employ one or more attorneys, . . . or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons . . . ." Courts have held that "the trustee" includes a debtor in possession in a chapter 11 case. Accordingly, there are two requirements for eligibility to act as an attorney for a debtor in possession: (1) do not hold or represent an interest adverse to the estate, and (2) be "disinterested."

The term "disinterested person" is defined in § 101(14) of the Code to mean a person that:

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not an investment banker for any outstanding security of the debtor;

> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
>
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
>
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

Rule 2014 governs the procedure for obtaining court approval of the employment of a professional under § 327(a). The Rule requires that

> "The order approving the employment of attorneys, . . . or other professionals . . . shall be made only on application . . . . The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee."

Rule 2014 has been construed broadly so as to put the burden on the attorney to reveal all facts that may indicate an actual or potential conflict of interest, even if the attorney believes that the facts do not disqualify him or her from being employed. One district court had expressed its interpretation of the rule

as follows:

> "All facts that may be relevant to a determination of whether an attorney is disinterested or holds or represents an interest adverse to the debtor's estate must be disclosed to the court. [citations omitted]. The duty to disclose is so broad because the court rather than the attorney must decide whether the facts constitute an impermissible conflict of interest."

Diamond Lumber v. Unsecured Creditors' Committee, 88 BR 773, 777 (N.D. Tex. 1988). Accord, In re Rusty Jones, Inc., 134 BR 321, 345 (Bankr. N.D.Ill. 1991).

Another section of the Code that is relevant to the ABA resolution is § 328(c), which provides that

> ". . . the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under §327 . . . if, at any time during such professional person's employment . . . such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate . . . ."

Section 328(c) has been applied retrospectively to deny or reduce compensation to attorneys who were employed with court approval and who had rendered services to the estate, but who were later found to have had a conflict of interest. See, e.g., In re Rusty Jones, Inc., 134 BR 321 (Bankr. N.D. Ill. 1991).

The ABA Resolution

The ABA resolution itself is very general, but the report and the language of proposed amendments to the Rules and a proposed new Official Form reveal the actual recommendations in greater detail.

There are several aspects of the recommendation:

(1) Proposal to delete "disinterested" requirement.

The first part of the ABA resolution recommends an amendment to § 327(a) of the Bankruptcy Code to provide that an attorney for a debtor in possession need not be "disinterested." Of course, that part of the resolution is beyond the scope of the Rules and is addressed to Congress. There is no need for the Committee to discuss it.

(2) Proposal to amend Rule 2014 to be more specific and detailed in setting forth the facts that must be disclosed. This proposal is within the scope of the Rules and it is appropriate for the Committee to consider it.

To enable the court to determine whether a person is eligible to be employed as a professional, Rule 2014 now provides that the applicant and the person to be employed must file statements "setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." The ABA believes that this rule is deficient in that it does not provide sufficient detail. As stated in the ABA report (page 8):

> "No guidance is given as to the nature of the required disclosures or the test to be applied. Counsel are disqualified and required to forfeit fees earned in representing debtors in possession, because they were unaware of the caselaw that has developed on disinterestedness and the scope of disclosures involved in evaluating disinterestedness"

Although the report does not cite particular cases, the caselaw referred to probably includes such cases as, e.g., In re Michigan General Corp., 77 BR 97 (Bankr. N.D. Tex. 1987),

rehearing denied, 78 BR 479 (Bankr. N.D. Tex. 1987); In re Kendavis Industries International, 91 BR 742 (N.D. Tex. 1988); In re Churchfield Management & Invest. Corp., 100 BR 389 (Bankr. N.D. Ill. 1989); In re Hathaway Ranch Partnership, 116 BR 208 (Bankr. C.D. Cal. 1990). In general, courts interpret the disclosure requirements of Rule 2014 broadly. An opinion in a very recent case (one that was decided after adoption of the ABA resolution) that contains a detail discussion of the disclosure requirements is In re Rusty Jones, Inc., 134 BR 321 (Bankr. N.D. Ill. 1991). For your information, I enclose of copy of this opinion and focus your attention on pages 345-347.

The ABA recommendation is to amend Rule 2014 to provide a detailed list of relationships that must be disclosed, in addition to including the more general language similar to the language that now exists ("connections . . . with the debtor, creditors, or any other parties in interest . . ."). See the text of the ABA proposed amendment to Rule 2014 at the end of its report.

First, the Committee should consider whether or not it is desirable to have such a detailed list of relationships. Second, if the Committee thinks that it is desirable to have such a list in the rule, the Committee should focus on each item listed in the proposal. Some of the information required to be disclosed under the proposed amendment is contained in the definition of "disinterested person" in § 101(14) of the Code.

The proposed amendment to Rule 2014 also includes language

to make it clear that the attorney's connections with the debtor and others must be disclosed "whether or not such connections would constitute a basis for disqualification . . ." This is consistent with cases that interpret the present rule to require disclosure of all facts that may be relevant to the determination of whether the attorney should be approved, and that emphasizes the need to reveal connections even if the attorney thinks that such connections are not disqualifying. See In re Rusty Jones, Inc. at page 345. Even if the Committee thinks that the ABA detailed list approach is unnecessary or undesirable, it may want to add language to the present rule indicating that "connections" must be revealed whether or not the person thinks that they are disqualifying.

If the Committee thinks that the recommended changes to Rule 2014 are desirable, the Committee should then consider whether it should be limited to attorneys only. Why are accountants not in the same position?

(3) Proposal to protect an attorney's right to compensation despite termination of employment if there was good faith compliance with disclosure requirements. The ABA proposes an addition to Rule 2016 that, in connection with the awarding of fees, would provide a safe harbor for an attorney whose employment is terminated, but who had filed the required disclosure document "with the good faith belief, formed after inquiry appropriate to the circumstances of the case, that he

disclosed all material facts and met all requirements for representation of the debtor in possession or trustee."

Apparently, the purpose of this aspect of the proposal is to avoid the situation in which the court, after initially approving the employment of the attorney, subsequently terminates the employment based on a discovered conflict of interest and reduces or denies fees for work performed in the case.

I am not commenting on the merits or desirability of this aspect of the proposal because, regardless of the merits, I believe that it is inconsistent with § 328(c) of the Code. That section gives the court the power to deny compensation if

> "at any time during such professional person's employment . . . such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate . . . ."

In view of § 328(c), I do not think that the Rules may deprive the court of its discretionary power to deny or reduce fees if later in the case it discovers that the attorney is not disinterested, whether or not the attorney acted in good faith in making the disclosures required by Rule 2014. This aspect of the proposal requires Congressional action and should not be adopted by the Advisory Committee.

(4) Proposal to provide for interim employment followed by continued employment after notice and a hearing. Rule 2014 now provides that court approval of the employment of a professional is obtained by application. Prior to August 1991, notice of the application did not have to be served on anyone, although any committee or other party in interest could obtain a copy since it

was filed with the court. As of August 1, 1991, Rule 2014 was amended to require that the applicant transmit a copy of it to the United States trustee. Except for this notice to the United States trustee, there is no notice and hearing requirement. Typically, court approval of the employment of the attorney for the debtor in possession is obtained as one of the "first day orders."

The ABA recommends the addition of Rule 2014(d) to provide for the approval of employment on an interim basis, without notice and a hearing. Proposed Rule 2014(e) would provide for approval of continued employment after notice and a hearing. The attorney would have to serve the committees, the twenty largest creditors, the United States trustee, any trustee appointed in the case, and such other parties in interest as the court may direct, with copies of the application, the attorney declaration, the initial employment order, and notice of a hearing or a bar date for filing objections. The hearing would be on 20 days notice and would be held no later than 45 days after the application filing. It provides for a bar date for objections not less than 20 days after service of the notice, and provides that the court will consider "timely objections."

The ABA does not indicate the reason for this aspect of the proposal, although it apparently is designed to give parties notice of the attorney's disclosures and an opportunity to object to the attorney's employment, and to protect the attorney by imposing a bar date for objections. If that is the objective,

and the Committee agrees that this change is desirable, I question several aspects of it.

First, instead of involving the court in this process twice, would it make more sense to amend the Rule to require copies of the application and all related papers to be mailed to the committees, 20 largest creditors, and the United States trustee? If any party wishes to object, they may file a motion to terminate the attorney's employment. Since, in the vast majority of cases, the attorney's employment is not challenged, it should be more practical to streamline the process by requiring notice only, instead of two court orders in each case.

Second, I doubt that a bar date for objections would be meaningful. If a party misses a bar date, that party could file a motion to terminate the employment or to challenge the attorney's fee request, and the court, pursuant to § 328(c), could deny or reduce fees based on a finding that the attorney is not disinterested. My comment here is similar to the one regarding the attempt at providing a "safe harbor" for attorneys who are terminated later in the case (proposed amendment to Rule 2016). If this proposal is designed to protect the attorney against subsequent attack and loss of fees, I do not think that it will succeed because of the court's power under § 328(c).

(5) Proposal to require supplemental disclosures. The ABA recommends the addition of subdivision (f) of Rule 2014 that would require the attorney to file and serve on parties a supplemental statement within 15 days after the occurrence of an

event, or the discovery of any fact, which is subject to the disclosure requirements. This suggestion should be considered by the Committee.

(6) Proposal to adopt a new Official Form for Attorney Disclosure. The ABA recommends the adoption of a new Official Form entitled "Attorney Declaration Form" (attached to the report) that tracks the language of the ABA proposed amendment to Rule 2014. If the Committee adopts the proposal to amend Rule 2014 to include the list of connections that must be disclosed, there would be no need for an Official Form that merely tracks that language. If the Committee rejects the idea of having such a detailed list of connections, then the form should be rejected also.

I am not in this memorandum attempting to comment on the style and drafting problems that I observed regarding the ABA proposals. At this point I think that it would be premature to do so. After the Committee decides whether or not to adopt, in concept, all or part of the proposals, I intend to focus on the particular language.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the Meeting of March 26, 1992

Washington, D.C.

The Advisory Committee on Bankruptcy Rules met at 9:00 a.m. on March 26, 1992, in the sixth floor conference room of the Lafayette Building in Washington, D.C. The following members were present:

Circuit Judge Edward Leavy, Chairman
Circuit Judge Edith Hollan Jones
District Judge Malcolm J. Howard
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Harry D. Dixon, Esquire
Ralph R. Mabey, Esquire
Herbert P. Minkel, Jr., Esquire
Bernard Shapiro, Esquire
Henry J. Sommer, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

The following persons also attended the meeting:

District Judge Robert E. Keeton, Chairman, Committee on Rules of Practice and Procedure
John E. Logan, Director, Executive Office for United States Trustees, U.S. Department of Justice
Joseph F. Spaniol, Jr., Secretary, Committee on Rules of Practice and Procedure
Peter G. McCabe, Assistant Director for Judges Programs, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
James H. Wannamaker, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
John K. Rabiej, Special Assistant, Office of Judges Programs, Administrative Office of the U.S. Courts
James B. Eaglin, Assistant Director, Research Division, Federal Judicial Center
Elizabeth C. Wiggins, Research Division, Federal Judicial Center

Two committee members were unable to attend: District Judge Joseph L. McGlynn, Jr., and District Judge Harold L. Murphy. District Judge Thomas S. Ellis, III, a member of the Committee on Rules of Practice and Procedure and liaison with this Committee, also was unable to attend.

ABA Resolution

In August 1991, the House of Delegates of the American Bar Association adopted Resolution 119A and an accompanying report dealing with the employment of attorneys and attorney's fees. Mr. Minkel stated that it is significant and unusual for the House of Delegates to consider a bankruptcy matter. The Reporter indicated that the resolution and report include several aspects: deleting the "disinterested" requirement in 11 U.S.C. § 327(a), amending Rule 2014 to be more specific in setting forth the facts which must be disclosed, protecting an attorney's right to compensation despite termination of employment if there was good faith compliance with the disclosure requirement, providing for interim employment followed by continued employment after notice and a hearing, requiring supplemental disclosures, and adopting a new Official Form for Attorney Disclosure.

The Reporter stated that amending § 327(a) is beyond the scope of the rules. He indicated that the courts have interpreted the disclosure requirements of Rule 2014 very broadly and have required attorneys to disclose any connections with the debtor which may be relevant. He stated that if the court approves the employment of an attorney but subsequently determines that the attorney was not disinterested, the courts have used § 328(c) to deny any compensation or reimbursement to the attorney. The Reporter indicated that he had read dozens of these disqualification cases and that they are generally limited to egregious facts and situations in which a reasonable person would have made a more full disclosure originally.

According to the Reporter, the proposed amendment to Rule 2014 raises a number of questions, including whether such a detailed list is needed; if so, what should be on the list; and whether a safe harbor is desirable for attorneys who make a good faith disclosure. He added that the amendment may not be needed if Congress deletes the requirement that the attorney be disinterested. The Reporter indicated that the "safe harbor" proposal appears worthwhile but that § 328(c) may bar this Committee from creating such a "safe harbor" through the Rules. He added that § 328(c) also may conflict with creating a bar date for objecting to the employment of an attorney, which was part of the ABA proposal.

Professor King moved to disapprove all of the ABA's proposals and suggestions. He indicated that the effect of the proposal would be to require less disclosure, allow attorneys to be paid even if they don't disclose, permit attorneys to work and be paid even without providing an opportunity for objections by other parties and without prior court approval, and provide a bar date for objecting to the employment of counsel. He indicated that the concept of the proposal is wrong in light of the public concern about attorney fees in bankruptcy.

Mr. Mabey disagreed and stated that he believes the proposal would provide for fuller disclosure and more notice. Mr. Dixon stated that there is a problem with the disclosure requirement in Rule 2014 and attorneys should be given some comfort by describing how to comply with the rule. He indicated that this Committee, at least, should study the matter further and consider an alternative to the ABA proposal.

Mr. Minkel stated that he agrees that this is a significant problem and that the ABA proposal would provide for fuller disclosure. He indicated that the disclosure requirements set out in the proposed amendment to Rule 2014 would require revision because they are so detailed that they would make it virtually impossible for many large law firms to reach the "safe harbor." The Reporter stated that the proposed amendment could be interpreted even more broadly than the current rule because it requires the attorney to disclose "any other interest, direct or indirect, with the debtor, creditors, United States Trustee or any employee of that office, or any other parties in interest".

Mr. Mabey stated that the current procedure for approving the employment of counsel is a real problem. He indicated that there are problems with either seeking immediate court approval on notice to the U.S. trustee alone or seeking approval on 15-day notice to all parties. If the attorney gives limited notice, a party may move to have the attorney disqualified later. Mr. Mabey indicated that a 15-day notice is unsatisfactory because the attorney cannot work until the employment is approved after the notice period. Mr. Mabey stated that the procedures for employment are rudimentary and vary widely from district to district, despite the development of a national bankruptcy practice. Mr. Shapiro stated that a bankruptcy judge would usually give an attorney a safe harbor for 15 days if the attorney said that time was needed to make a full disclosure.

The Committee approved Professor King's motion by a vote of 8-1. Judge Leavy indicated that the written response to the ABA should indicate that the Committee's action is not necessarily an attitude of hostility to some resolution of what the ABA sees as a problem. He indicated that the solution may have to come by legislation but there may be room for something to be done by way of procedures, as suggested by Mr. Mabey. The Chair directed Mr. Minkel and the Reporter to draft a response. The Chair noted that the procedures for conduct of business by this Committee provide that, to the extent feasible, the Secretary of the Standing Committee, in consultation with the Chair of this Committee, shall advise a person making a recommendation or suggestion of the action taken thereon.

Date and Place of Next Meeting

The Chair suggested that the next meeting be held near Jackson Hole, Wyoming, in late September. Thursday and Friday, September 17 and 18, were chosen as the meeting dates. The meeting may begin at noon in order to accommodate committee members from the East Coast who have commitments on the day before. Thursday and Friday of the proceeding week were selected as alternative dates. The Jackson Lake Lodge was suggested as a meeting place. The Committee agreed.

It was moved that the committee adjourn. The motion carried without objection. The meeting was adjourned at 5:48 p.m. on March 26, 1992.

Respectfully submitted,

James H. Wannamaker, III
Attorney
Division of Bankruptcy

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9006(b)(1)

DATE: FEBRUARY 26, 1995

Item #14

Bankruptcy Rule 9006(b)(1) provides as follows:

Rule 9006. Time

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(b) ENLARGEMENT.

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

In In re Village Green Associates, BAP No. AZ-94-1232-ZRH (August 8, 1994) (copy attached), the Ninth Circuit Bankruptcy Appellate Panel analyzed Rule 9006(b)(1) and found several ambiguities. In Village Green, the bankruptcy court extended the bar date for filing claims in a chapter 11 case at the debtor's request because the debtor filed a competing chapter 11 plan (a creditor filed a plan earlier in the case). The extension order was entered after the original bar date had expired. The extended bar date was applicable to all claims and no showing of excusable neglect was made. A creditor argued that the court did not have the power to extend the bar date absent a request by a party affected by the bar date (i.e., a creditor), and that the

court could extend it only upon a finding of excusable neglect under Rule 9006(b)(1).

The BAP found that the rule is ambiguous in several ways. Although the preamble contains such language as "at any time" and "in its discretion", the remainder of the subdivision appears to limit relief in only two situations: (1) when a request is made before expiration of the period and cause is shown, and (2) when a motion is made after expiration of the period and excusable neglect is shown. In either situation, it appears that a request must be made. The ambiguity in (b)(1) regarding the need for a request is also caused by the apparently inconsistent phrasing: "with or without motion or notice" .... if the request therefor is made before the expiration of the period...." The BAP also pointed out the ambiguity caused by the presence of "with or without motion" in (b)(1) and the absence of that phrase in (b)(2).

Faced with the issue of whether the bankruptcy court -- in the absence of a request by a party affected by the bar date and without a showing of excusable neglect -- could extend the bar date after the original period had expired, the BAP concluded that the court could do so by reading Rule 9006 together with Rule 3003(c)(3) ("The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.") and § 105 of the Code (no provision in title 11 precludes sua sponte action).

It appears to me that the BAP, without expressly saying so,

was making a distinction between a permissible post-expiration date general extension of the bar date for all creditors without meeting the excusable neglect standard, and an order permitting a particular creditor, on request, to file a late claim as timely based on excusable neglect. I am not sure whether the BAP's holding is the proper one -- I find this to be a difficult question. Although it appears reasonable under the facts of that case for the court to be able to set a new bar date for all creditors, one could argue that if the court acting on request or sua sponte has the discretion "for cause" (which is a much easier standard to meet than excusable neglect) to extend the bar date for all creditors after the original period has expired, the "excusable neglect" requirement for a post-expiration extension is, as a practical matter, written out of the rule. Instead of struggling with the excusable neglect standard when a creditor seeks to file a late claim, the court could avoid it by finding cause to order a new bar date for everyone (such as by finding, with the benefit of hindsight, that there was no real need for such an early bar date -- which is the essence of the finding in Village Green).

In view of the BAP's opinion in Village Green, Ken Klee has suggested that the Rule 9006(b)(1) needs revision. I suggest that the Committee discuss the following issues relating to this rule (hopefully the discussion will result in a consensus that will provide some guidance for drafting appropriate revisions):

(1) Should a court have the discretion to act, in the

absence of a request, to extend a chapter 11 claims bar date or another deadline before the time period expires? I think that this is an easier question and the answer under the present rule is "yes."

(2) Should a court have the discretion to act sua sponte -- for cause but without finding excusable neglect -- to extend a chapter 11 claims bar date or another deadline for all parties after the time period had expired? (i.e., the holding in Village Green)? This is the harder question.

For the sake of focusing the discussion, it may be helpful for the Committee to consider the following principles regarding Rule 9006(b)(1) (except with respect to the exceptions set forth in Rule 9006(b)(2) and (3)):

> (1) if the applicable time period has expired, the court should have discretion to extend the period for cause to act sua sponte, so long as the period is extended in general -- so that all parties are treated equally. This view is consistent with the BAP's holding in Village Green, where the bankruptcy court, in view of a competing plan, decided that it made sense in that case to extend for everyone the bar date for claims. If the court has that discretion, I see no reason to require a motion by an affected party. This principle should not be limited to claims bar dates, but should apply to any other time period (except as provided in paragraphs (b)(2) and (3)).
>
> (2) if the applicable time period has expired and there

is no cause to extend the deadline for everyone, the time may be extended for a particular party only if the court finds that party's conduct is "excusable neglect." It makes sense to require the aggrieved party to request by motion such an extension and to meet the heavy burden of demonstrating excusable neglect. This is consistent with the current rule as interpreted by the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates, 113 S.Ct. 1489 (1993).

Also for the sake of discussion, I drafted two alternatives for amending Rule 9006(b)(1) (there may be others, including leaving the rule as is). Alternative A rejects the holding in Village Green and would not give the court discretion to order an extension of time after the time expires unless it is on motion and there is a finding of excusable neglect. Alternative B would codify Village Green and permit a post-expiration extension for cause (the only differences between Alternative A and Alternative B are in subdivision (b)(1)(A).

Alternative A:

Rule 9006. Time

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(b) ENLARGEMENT.

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court ~~for cause shown~~ may ~~at any time in its discretion~~

~~(1)~~ (A) for cause, with or without ~~motion or~~ notice, order the period enlarged if, before expiration of the period originally prescribed or as extended by a previous order, either a ~~the~~ request ~~thereof~~ for enlargement is made ~~before the expiration of the period originally prescribed or as extended by a previous order~~ or the court orders the enlargement sua sponte; or

~~(2)~~ (B) on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect.

COMMITTEE NOTE

Subdivision (b)(1) is amended to clarify that, unless a request for enlargement of the time

is made before its expiration, the court does not have discretion to enlarge a time period after its expiration without a finding of excusable neglect.

Other amendments are stylistic.

Alternative B:

Rule 9006. Time

****

(b) ENLARGEMENT.

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court ~~for cause shown~~ may ~~at any time in its discretion~~

~~(1)~~ (A) for cause, with or without ~~motion or~~ notice, order the period enlarged if at any time the court orders the enlargement sua sponte or, before the expiration of the period originally prescribed or as extended by a previous order, a ~~the~~ request ~~thereof~~ for enlargement is made ~~before the expiration of the period originally prescribed or as extended by a previous order~~ ;or

~~(2)~~ (B) on motion made after the expiration of

the specified period, permit the act to be done where the failure to act was the result of excusable neglect.

COMMITTEE NOTE

Subdivision (b)(1) is amended to clarify that the court, acting sua sponte, has discretion to enlarge a time period after its expiration for cause, but without the need to find excusable neglect by any party. The extension contemplated under this paragraph is a general extension applicable to all parties governed by the applicable time period. In contrast, the court may permit a party to act after the expiration of the applicable period -- without a general extension of the period for all parties governed by the time limit -- only if the party requests such relief and upon a finding of excusable neglect.

Other amendments are stylistic.



NOT FOR PUBLICATION

FILED

AUG - 8 1994 C.A.

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re VILLAGE GREEN ASSOCIATES, Debtor.	BAP No. AZ-94-1232-ZRH BK. No. 93-5963-PHX-RGM
CROWN LIFE INSURANCE COMPANY, Appellant, v. VILLAGE GREEN ASSOCIATES, Appellee.	MEMORANDUM

Argued and Submitted on
June 23, 1994 at Phoenix, Arizona

Filed - AUG - 8 1994

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Robert G. Mooreman, Bankruptcy Judge, Presiding

Before: ZURZOLO[1], RUSSELL, and HAGAN, Bankruptcy Judges.

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[1] Honorable Vincent P. Zurzolo, Bankruptcy Judge for the Central District of California, sitting by designation.

I. INTRODUCTION

Creditor, Crown Life Insurance Company ("Crown Life"), filed a plan of reorganization and a motion to set a confirmation hearing and to fix a bar date for the filing of prepetition claims and applications for allowance of administrative expenses. The confirmation hearing and bar date were set (the "First Order"). After the bar date expired, Village Green Associates ("Debtor"), the debtor in possession in this Chapter 11 case, filed a "Motion to Accept Late Filed Claims" (the "Motion") and a disclosure statement. The bankruptcy court extended the bar date (the "Extension Order"). Crown Life timely filed the notice of appeal of the Extension Order.

II. STATEMENT OF FACTS

Debtor commenced this Chapter 11 case by filing a petition on June 11, 1993. Debtor failed to file a plan of reorganization within the exclusivity period, and on December 3, 1993, Crown Life filed its own plan. On December 7, 1993, Crown Life filed a motion to set a confirmation hearing and to fix a bar date for filing claims and application for allowance of administrative expenses. Copies of the motion, the form of notice, and the order (with blanks to be filled in by the court) were served on the U.S. Trustee and Debtor's counsel. On December 8, 1993, the Court ordered that:

> [T]he bar date for the filing of prepetition claims and all applications for allowance and payment of administrative expenses (except for Crown Life's administrative expenses) is set for January 15, 1994; . . . the form of notice of confirmation hearing and

> notice of fixing last date to file claims and applications for allowance and payment of administrative expenses filed by Crown Life is approved . . . .

The court-approved notice of confirmation hearing and notice of fixing bar date (the "Notice") were served on all creditors and interested parties. The Notice reads: "All creditors of the above named estate are required to file their claims . . . . [A]ll applications for allowance and payment of administrative expenses (except for Crown Life's administrative expenses) . . . must also be filed by the date set for filing claims."

On January 24, 1994, Debtor filed an objection to confirmation of Crown Life's plan. On January 28, 1994, several documents were filed: Debtor's disclosure statement, the fee application of Debtor's counsel, an application for allowance of administrative expense of Debtor's general partner, and Debtor's Motion. The Motion requested an extension of the previously ordered bar date to January 31, 1994 and acceptance of all fee applications and proof of claims filed on or before January 31, 1994.

In the Motion, Debtor alleged that, on December 15, 1994, Debtor's counsel received a one page Notice with the confirmation hearing date in the front and the bar date in the back, that counsel's secretary inadvertently failed to calendar the bar date, and that the Notice was subsequently misplaced along with Crown Life's Plan and not recovered until January 28, 1994. On January 24, 1994, upon reviewing the Bankruptcy Court docket, counsel's paralegal also realized for the first time that a bar date had been

set but mistakenly calendared it for January 31, 1994 because the docket read "ORDER Setting Hearing on Confirmation and Establishing Bar Date for the filing of Prepetition Claims and Appls for Allwnce and Pmt of Admin Expenses on 01/31/94 at 11:30 a.m. . . . ." Debtor argued that the foregoing constituted cause to extend the bar date due to the excusable neglect of Debtor's counsel.

During the January 31, 1994 hearing on confirmation of Crown Life's plan, the bankruptcy court learned that Debtor had filed its own disclosure statement and plan and took the matter under advisement. The bankruptcy court thereafter entered its minute entry order, stating that the hearing on Crown Life's plan should be consolidated with the hearing on Debtor's plan. On February 14, 1994, the bankruptcy court signed and caused to be entered the Extension Order resetting the claims bar date to March 21, 1994, the date set for the hearing on Debtor's disclosure statement.

The Extension Order reads: "Upon consideration of debtor's Motion to Accept Late Filed Claims and arguments being presented thereon at the hearing for confirmation of Crown Life's Plan of Reorganization, and good cause appearing therefore . . . IT IS HEREBY ORDERED (sic) resetting the Bar Date for filing of proofs of claims to March 21, 1994." The Extension Order was entered on February 16, 1994.

III. ISSUE

Was it an abuse of discretion for the bankruptcy court to extend the bar date?

IV. STANDARD OF REVIEW

Whether the bar date for filing proofs of claim should be extended is a matter within the sound discretion of the bankruptcy court[2], and the bankruptcy court's decision will not be set aside absent abuse of discretion. In re Dix, 95 B.R. 134, 136 (9th Cir. BAP 1988).

V. DISCUSSION

Crown Life asserts that the Extension Order is based entirely on Debtor's claim of excusable neglect. It contends that the Extension Order must therefore be set aside because Debtor cannot seek extension under Federal Rule of Bankruptcy Procedure ("FRBP") 9006(b)(1)(2) as it cannot file a claim and cannot prove excusable neglect on its part.

Crown Life's argument fails because: (1) it erroneously applies FRBP 9006(b) to the circumstances of this case, and (2) it assumes that the bankruptcy court has no authority to extend the bar date absent a request from a party affected by that bar date. Federal Rule of Bankruptcy Procedure 9006(b)(1) states:

> [W]hen an act is required or allowed to be done at or within a specified period . . . the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period . . . or (2) on motion made after the expiration of the

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[2] Fed. R. Bankr. P. 9006(b)(1) provides that "when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . order the period enlarged. . . ."

specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1) (emphasis added).

This rule is ambiguous in many respects. First, although the preamble to the rule contains language such as "at any time" and "in its discretion", the remainder of the rule appears to limit relief to two specific instances: (1) when a request is made before the expiration of the specified period and cause is shown, and (2) when a request is made after the expiration of the specified period and excusable neglect is shown. Subpart one of the rule contains another ambiguity. Although it begins with the phrase "with or without motion or notice", which seems to imply that a motion is not required, it ends with "if the request therefor is made . . . ."

One reading of the rule is that FRBP 9006(b) is not limited to requests by parties affected by the deadline because the "at any time" and "without motion or notice" language create a third situation in which an extension of time is proper, i.e., when the court, on its own, determines at any time that there is cause for such an extension. This reading is problematic because it does not explain why the rule specifically provides for only two situations, "before" and "after", and why the "without motion" language is absent from subpart two[3].

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[3] There is a second layer of ambiguity inherent in this interpretation. The absence of the "without motion" language in subpart two could mean one of two things: (1) the court can only extend the bar date on its own motion before the date expires.

Another reading of the rule is that the "at any time" language simply sums up the "before" and "after" in subparts one and two and does not add a third scenario to the rule. Likewise, the "without motion and notice" language does not refer to a sua sponte extension of time by the court, but simply means that the request for extension of time before expiration of the deadline can be made either by a fully noticed motion, or without a motion, e.g., in open court at a disclosure statement hearing. Under the latter interpretation, FRBP 9006(b) only governs those situations in which a request or motion has been made by a party affected by the deadline and does not apply in this case where there was no request for extension of time by a party affected by the bar date either before or after the claim bar date[4] and where the court did not extend the bar date to afford relief to a tardy claimant[5].

After the bar date, a motion is required; or (2) the "without motion" language is not included in subpart two only because the court would never be aware of a party's excusable neglect on its own and thus the absence of that language does not preclude sua sponte action by the court where there is cause.

[4] The Motion was brought by Debtor who is not affected by a claim bar date in its own case.

[5] The bankruptcy court extended the bar date for reasons having nothing to do with the excusable neglect of Debtor's counsel.

The Extension Order reads:

> Upon consideration of debtor's Motion to Accept Late Filed Claims . . . and arguments being presented thereon at the hearing for confirmation of Crown Life's Plan . . . and good cause appearing therefor,
> IT IS HEREBY ORDERED resetting the Bar Date for filing of proofs of claims . . . to be concurrent with the date of the hearing scheduled for approval of Debtor's Disclosure

Existing case law is not helpful in resolving this apparent ambiguity. Of the numerous published opinions that construe FRBP 9006(b), every one concerns a request or motion by a party affected by the deadline. See, e.g., In re Pioneer Investment Services v. Brunswick Associates Ltd. Partnership, _U.S._, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993); In re Coastal Alaska Lines Inc., 920 F.2d 1428 (9th Cir. 1990); In re Dix, 95 B.R. 134 (9th Cir. BAP 1988). Without guidance from case law, we invoke the normal rule of statutory construction that a specific section of the statutes must be read in a way that is textually and structurally compatible with other sections of the statutes. Dewsnup v. Timm, 112 S. Ct. 773, 780-81 (1992) (citing Sullivan v. Stroop, 110 S. Ct. 2499, 2504 (1990)).

Federal Rule of Bankruptcy Procedure 9006(b) should be read

Statement . . . set for March 21, 1994.

We note that Debtor filed its own disclosure statement and its objection to Crown Life's plan along with the Motion. The Extension Order contains no findings as to excusable neglect. Instead, the bankruptcy court stated in the Extension Order that it considered the arguments presented at the hearing for confirmation of Crown Life's Plan. In that proceeding, there were no arguments on the "excusable neglect" issue, only discussions about Debtor's disclosure statement and the need to consolidate the hearings on Debtor's Plan and Crown Life's Plan.

It is significant that the Extension Order was signed after the court entered its minute entry consolidating the hearings on the two competing plans and that the bankruptcy court extended the bar date to March 21, 1994, the date set for the hearing on Debtor's disclosure statement, not the date requested in Debtor's Motion. It is also important that the Extension Order mentions nothing about the fee application of Debtor's counsel or the application for allowance of administrative expense of Debtor's general partner.

consistently with FRBP 3003(c)(3) which is the specific rule governing claim bar dates. Federal Rule of Bankruptcy Procedure 3003(c)(3) states that the "court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." There is no requirement in FRBP 3003(c)(3) that the extension be founded upon motions by parties affected by the claim bar dates. Thus, while FRBP 9006(b) may not be the source of authority for sua sponte extension of time by the court, it cannot be read to preclude the court from extending the claim bar date absent a request or motion by a party where the authority to do so is clearly provided by other rules.

In addition, 11 U.S.C. § 105(a)[6] states that "[N]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to . . . implement court orders or rules . . . ." Thus, if authority for sua sponte extension of time is lacking under FRBP 9006(b), it is provided by § 105(a).

We believe that FRBP 3003(c)(3) and § 105(a) enable the court below to extend the bar date in this case. The bankruptcy court fixed the original bar date for January 15, 1994 in anticipation of the hearing on confirmation of Crown Life's plan set for January 31, 1994. When the court ordered consolidation of the hearings on Crown Life's plan and Debtor's plan and continued the whole process

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[6] All statutory references are in Title 11 of the United States Code ("Bankruptcy Code"), unless otherwise indicated.

to a much later date, there no longer was a need for an earlier bar date. The filing of a competing plan is sufficient cause to extend the bar date under FRBP 3003(c)(3) and the court acted within its discretion under § 105(a) because the extension granted here was appropriate to enforce FRBP 3003(c)(3) and implement the order consolidating the hearing on the two competing plans.

VI. CONCLUSION

The language of the Extension Order, read in light of events occurring before it was signed, suggests that the bankruptcy court extended the bar date in order to accommodate Debtor's competing plan. On that basis, the Extension Order is affirmed.

ORAL PRESENTATIONS

Bankruptcy Rules Amendments - Status List

March 1995

Item #21

1. Proposed amendments approved 9/94 by the Judicial Conference and transmitted to the Supreme Court for consideration. If approved by the Supreme Court, must be transmitted to Congress by May 1. Possible effective date 12/1/95.

8018 (Local rules of dist. ct. & BAPs re: bankr. appeals)
9029 (Uniform numbering; lcl. rules must be published, etc.)

2. "Class of '96" --- Possible effective date 12/1/96. Proposed amendments published for comment 9/94. Comment period expired 2.18.95. Comments to be considered and final drafts approved at 3/95 meeting.

1006(a)
1007(c)
1019 [abrogation of subdivision (7)]
2002(a), (c)(2), (f)(8), (h), (i), (k)
2015(b), (c)
3002(a)(c)*
3016
4004(c)
5005(a)
7004
8008(a)
9006(c)(2)

* Committee to decided whether to republish.

3. "Class of '97" --- Possible effective Date 12/1/97. Approved in substance at February, September, or December 1994 meeting. To be presented to Standing Committee 7/95 with request for permission to published for comment.

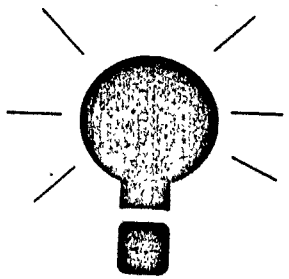
1020 [new rule]
2002(a), (n)
2007.1
3002(a), (c)*
3018(a)
3021
8001(a), (e)
8020
9015
9035

* Published 1994. Committee to decide whether to republish in light of changes made following enactment of 1994 bankruptcy amendments.

4. New Matters. (Some of these may joint the Class of '97 as a result of action at the 3/95 meeting.

1019(3), (5)
2002(j)(4)
2014(a)
3014
3017
3017.1 [new rule]
6007(a)
8002(c)
9006(b)(1)
9011

THE GESTATION OF AN AMENDMENT



YEAR 1

1020 (new), 2002(a), 2002(n), 2007.1, 3002(a), (c)*, 3018(a), 3021, 8001(a), (e), 8020, 9015, 9035

1019(3), (5), 2002(j)(4), 2014(a), 3014, 3017, 3017.1, 6007(a), 8002(c), 9006(b)(i)

YEAR 2

1006(a), 1007(c), 1019 [abrogation of subdivision (7)], 2002(a), (e)(2), (f)(B), (h), (i), (k), 2015(b), (c), 3002(a), (c)*, 3016, 4004(c), 5005(a), 7004, 8008(a), 9006(c)(2)

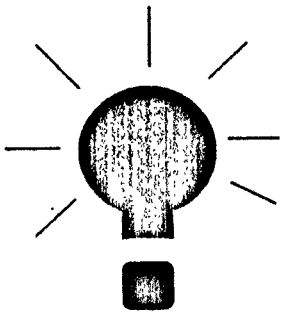
*Committee to decide whether to republish per changes made after enactment of 1994 amendments.

YEAR 3

8018
9029

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

THE EARLY LIFE OF AN AMENDMENT



1. Advisory Committee considers proposals for amendments. May approve draft amendments.
2. This period is of indeterminate length.
3. Proposals can come from Committee members, judges, clerks, or the public, or can result from statutory changes or case law developments.

YEAR 1

Advisory Committee approves draft of proposed amendments. (January -May)

Presents "preliminary draft" to Standing Committee with request to publish, usually at Standing Committee's summer meeting. (June)

Preliminary draft amendments are published and comments invited. (October)

YEAR 2

Advisory Committee reviews written comments and holds (optional) hearings(s). (January-March)

Public comment period closes. (mid-April)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate). (April-May)

Standing Committee reviews final draft; may 1) approve, 2) approve with changes, or 3) send back to Advisory Committee. (June)

The Judicial Conference approves amendments submitted by Standing Committee and forwards the Supreme Court. (September)

YEAR 3

Supreme Court forwards to Congress those amendments it intends to prescribe. (March or April) (must be by May 1)

Congress can alter or reject during the next 90 days. If Congress does not act, amendments take effect ~~August~~ December 1st.

Proposed amendments may be in each year of the cycle. Amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

NEXT MEETING

Portland, Oregon

September 7-8, 1995

