


Re: Bankruptcy Rules Proposal
Rules Support to: A Thomas Small
 Sent by: **James Ishida**

07/25/2011 09:25 AM

Cc: "Alan N. Resnick", Eugene Wedoff, Rules_Support, S. Elizabeth Gibson, troy.mckenzie, Peter_McCabe, James Wannamaker, Scott Myers, Andrea Kuperman, LiAnn Shepard

 From: Rules Support/DCA/AO/USCOURTS
 To: A Thomas Small <tomsmall@nc.rr.com>
 Cc: "Alan N. Resnick" <Alan.N.Resnick@hofstra.edu>, Eugene Wedoff <eugene_wedoff@ilnb.uscourts.gov>, Rules_Support@ao.uscourts.gov, S. Elizabeth Gibson <Elizabeth_Gibson@unc.edu>, troy.mckenzie@nyu.edu, Peter_McCabe@ao.uscourts.gov,
 Sent by: James Ishida/DCA/AO/USCOURTS

Follow Up: Urgent Priority.

Dear Judge Small,

Many thanks for your suggestion to amend Bankruptcy Rules 7016 and 8001 allowing litigants in an adversary proceeding to waive or limit their right to appeal. I'm forwarding your proposal to the reporters and AO staff for their consideration.

I hope all is well. We do miss you at the rules meetings!

Best,

James

A Thomas Small

Peter G. McCabe, Secretary Committee on Rule...

07/24/2011 10:38:22 PM

 From: A Thomas Small <tomsmall@nc.rr.com>
 To: Rules_Support@ao.uscourts.gov
 Cc: Eugene Wedoff <eugene_wedoff@ilnb.uscourts.gov>, A Thomas Small <tomsmall@nc.rr.com>, "Alan N. Resnick" <Alan.N.Resnick@hofstra.edu>
 Date: 07/24/2011 10:38 PM
 Subject: Bankruptcy Rules Proposal

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

Dear Peter:

We are writing to suggest amendments to the Federal Rules of Bankruptcy Procedure that we believe would reduce delays and expenses in the administration of bankruptcy cases, reduce costs to litigants, and lessen the appellate workload of the federal judiciary.

Our recommendation is that the Bankruptcy Rules be amended to provide that, at any time after the commencement of an adversary proceeding and before entry of an order or judgment by the bankruptcy court, parties shall have the right to mutually agree that their appellate options shall

be limited to no more than one appeal or to no appeal at all, subject to certain limitations described in the drafts below. In addition, we recommend that the Rules require that prior to the commencement of a trial in an adversary proceeding, the parties jointly or separately file a statement stating whether they have mutually agreed that there shall be no appeal or only one appeal.

We believe that our recommendations can be implemented by amending Rules 7016 and 8001 as follows (or by similar language):

Rule 7016. Pre-trial Procedure; Formulating Issues; Waiving Right to Appeal

(a) Rule 16 F.R. Civ. P. applies in adversary proceedings.

(b) After the commencement of the proceeding and prior to the commencement of the trial, the parties shall by jointly or separately filing a statement state whether all parties have voluntarily waived the right to appeal under 28 U.S.C. § 158 from any order, judgment or decree to be rendered by the bankruptcy court in the proceeding or, if they have not waived such right to appeal, whether they have voluntarily waived the right to appeal to the court of appeals from any order, judgment or decree entered by the district court or bankruptcy appellate panel service under 28 U.S.C. § 158(a) or (c).

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal; Dismissal Based on Waiver; Certification to Court of Appeals Based on Voluntary Waiver of Appeal

(d) Except to the extent that the appeal is based on alleged lack of subject-matter jurisdiction, a violation of a right provided under the Constitution of the United States, or fraud or other improper means in the procurement of the order, judgment, or decree, an appeal from an order, judgment, or decree under 28 U.S.C. § 158 shall be dismissed if, at any time after the commencement of the proceeding in which such order, judgment or decree was entered, and before the date of such entry, all appellants and appellees in a joint statement or in separate statements expressly waived the right to take an appeal from such order, judgment or decree.

Though our recommended amendment to Rule 7016 is limited to adversary proceedings, where appropriate, courts could order that the new Rule 7016(b) shall be applicable in particular contested matters by reason of Rule 9014(c).

We are suggesting the above changes to both Rule 7016 and 8001. However, in the event that the Committee does not agree with our proposal regarding Rule 7016 (mandatory filing of statements in adversary proceedings regarding the waiver of appellate rights), we believe that our proposed amendment to Rule 8001 could stand by itself and should be adopted, regardless of whether Rule 7016 is amended, so that parties will know that they have the opportunity to

voluntarily and mutually waive appellate rights (subject to certain limitations) and that such waivers will be given effect.

We delayed making this recommendation until after the Supreme Court ruled in *Stern v. Marshall* , but we find nothing in that opinion that would preclude litigants from expressly and voluntarily waiving or limiting their appellate rights in an uncoerced manner to the extent provided above.

Sincerely,

A. Thomas Small
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cc: Hon. Eugene R. Wedoff