ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of Sept. 22, 2020
Held Remotely by Conference Call and Microsoft Teams

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro
Bankruptcy Judge Stuart M. Bernstein
Circuit Judge Bernice Bouie Donald
Bankruptcy Judge A. Benjamin Goldgar
Jeffery J. Hartley, Esq.
Bankruptcy Judge Melvin S. Hoffman
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Thomas Moers Mayer, Esq.
Debra L. Miller, Esq.
District Judge J. Paul Oetken
Jeremy L. Retherford, Esq.
Professor David A. Skeel
District Judge George Wu

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Laura Bartell, associate reporter
District Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure (the Standing Committee)
District Judge John D. Bates, incoming Chair of Standing Committee
Professor Daniel Coquillette, consultant to the Standing Committee
Professor Catherine Struve, reporter to the Standing Committee
Professor Daniel J. Capra, liaison to the CARES Act Subcommittee
District Judge Sara Darrow, Chair of the Committee on the Administration of the Bankruptcy System
Circuit Judge William J. Kayatta, Jr., liaison from the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Brittany Bunting, Administrative Office
Bridget Healy, Esq., Administrative Office

Scott Myers, Esq., Administrative Office
Shelly Cox, Administrative Office
David A. Levine, Administrative Office
Dana Yankowitz Elliott, Administrative Office
Daniel J. Isaacs-Smith, Administrative Office
Kevin Crenny, Rules Law Clerk
Molly T. Johnson, Federal Judicial Center
Nancy Whaley, National Association of Chapter 13 Trustees
Christopher N. Coyle, Bankruptcy Attorney, VandenBos & Chapman, LLP
Teri E. Johnson, Bankruptcy Attorney, Law Office of Teri E. Johnson, PLLC
John Hawkinson, freelance journalist

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group and thanked them for joining this meeting remotely. He introduced Judge Campbell, Judge Bates, Judge Darrow, Cathie Struve, Dan Coquillette, Dan Capra, Molly Johnson, and the new Rules Law Clerk Kevin Crenny, and the other observers. He noted that there were recent additions to the materials that have been added to the updated agenda. He thanked outgoing members of the Advisory Committee, Judge Stuart Bernstein, Judge A. Benjamin Goldgar, Jeffery J. Hartley, and Thomas M. Mayer. Judge Dow also asked Scott Myers to describe use of the software program used for the meeting.

2. Approval of minutes of remote meeting held on April 3, 2020.

Mr. Mayer and Ms. Elliott made suggestions for amendments to the minutes. The minutes were approved with the amendments by motion and vote.

3. Oral reports on meetings of other committees

(A) June 23, 2020 Standing Committee meeting

Judge Dow gave the report. Each Advisory Committee reported on its efforts in response to the directive of Section 15002(b)(6) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") , Pub. L. 116-136, which required that "the Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the "Rules Enabling Act"), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C.

§ 1601 et seq.)." Judge Dow reported on the review of the rules by the bankruptcy subcommittee and the plan to present a draft of a generally-applicable rule for emergencies at the next Advisory Committee meeting. The Standing Committee recommended that the various Advisory Committees coordinate in their consideration proposed emergency rules. Professor Dan Capra was appointed to assist in the coordination efforts.

The Advisory Committee presented proposed amendments to four rules that were published for comment last August. The amendments are to Rules 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination), 3007 (Objections to Claims), 7007.1 (Corporate Ownership Statement), and 9036 (Notice and Service Generally). The Standing Committee gave final approval to those amendments and transmitted them to the Judicial Conference. The Advisory Committee also submitted conforming amendments to five official forms in response to changes made to the Bankruptcy Code in the CARES Act that were approved without publication under the Advisory Committee's delegated authority to make technical and conforming changes to official forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee retroactively approved (and undertook to provide notice to the Judicial Conference concerning) the amendments to the five official forms.

The Advisory Committee also presented for publication (1) restyled Parts I and II of the Bankruptcy Rules that are proposed as part of the rules restyling project; and (2) amendments to thirteen rules and ten official forms that were previously issued on an interim basis in response to the Small Business Reorganization Act of 2019 ("SBRA"); as well as one additional form, Official Form 122B, proposed for amendment in response to SBRA. The Standing Committee voted to publish those rules and amendments. The Standing Committee also approved for publication amendments to Rule 3002(c)(6) (Time for Filing Proof of Claim), Rule 5005 (Filing and Transmittal of Papers), Rule 7004 (Process; Service of Summons, Complaint), Rule 8023 (Voluntary Dismissal).

Judge Dow reported to the Standing Committee on the approval of a modification to Interim Rule 1020 for one year only to reflect the changes implemented by the CARES Act that allow additional small business debtors to proceed under subchapter V of chapter 11. The Standing Committee approved that modification by email vote concluded April 11, and the Executive Committee of the Judicial Conference approved the amendment on April 14 and authorized its distribution. The interim rule was distributed to all chief judges of the district and bankruptcy courts on April 20, 2020.

Finally, Judge Dow reported to the Standing Committee on the adoption of Director's Forms relating to a discharge for debtors who proceed under subchapter V of chapter 11.

(B) April 4, 2020 and October 20, 2020 Meetings of the Advisory Committee on Appellate Rules

Judge Donald asked Bridget Healey to make the report. The Appellate Committee gave final approval to Federal Rule of Appellate Procedure 3, and conforming amendments to FRAP 6 and to Forms 1 and 2. The Appellate Committee had been looking at an amendment to Rule 42 but decided not to go forward with it at the meeting. At the upcoming meeting the Committee will revisit Rule 42 and consider some issues relating to *in forma pauperis* cases.

(C) April 1, 2020 and October 16, 2020 Meetings of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report. This is his last report as liaison to the Civil Rules Committee.

The spring Civil Rules Committee was conducted telephonically because of the Covid-19 health emergency.

A joint subcommittee from the Appellate, Civil, and Bankruptcy Rules Committees is considering whether some amendment, probably to Fed. R. Civ. P. 42(a) or 54(b), would be appropriate in the wake of the Supreme Court's *Hall v. Hall* decision. At the subcommittee's request, the FJC studied whether as a practical matter *Hall* poses enough of a problem to justify an amendment. The FJC completed its study and found no evidence of any practical problems. The subcommittee therefore has decided not to proceed at this time.

Another joint subcommittee continues to study whether the e-filing deadline should be moved from midnight to the time when the clerk's offices closes.

After considerable discussion, the Committee gave final approval to the proposed amendments to Rule 7.1 published for comment last year. Among other changes, Rule 7.1(a)(1) would be amended to make the ownership disclosure requirement for nongovernmental corporate parties applicable to a nongovernmental corporation that seeks to intervene as a party. (A comparable amendment to Bankruptcy Rule 7007.1(a) was published for comment at the same time.) The sticking points in the Committee's discussion were proposed changes to Rules 7.1(a)(2) and (b), which are not relevant to bankruptcy, and the change to Rule 7.1(a)(1), which was non-controversial. The Committee will vote by email on a revised Committee Note that conforms to the proposed amended Rule.

The Committee will study a proposed amendment to Rule 17(d). Rule 17(d) says that a public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added. The proposed amendment would make the rule mandatory rather than permissive ("must" be designated by

official title rather than "may"). The idea is to avoid the need for substitution of the official's successor by name when the official leaves office. The Appellate Rules Committee has a similar proposal before it.

The Committee decided not to address proposals relating to (a) judicial involvement in settlement conferences, (b) sanctions for failing to participate in settlement conferences in good faith, and (c) so-called procedural safeguards in local ADR rules. The item was removed from the agenda.

The Committee decided not to consider proposed amendments to Rules 7(b)(2) and 10 addressing the forms of captions in pleadings and motions. The item was removed from the agenda.

The next Civil Rules Committee is to be held virtually on October 16.

Judge Bates thanked Judge Goldgar for his insights in the work of the committee during his service as liaison.

(D) June 11, 2020 meeting of the Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee")

Judge Darrow provided the report.

She thanked Judge Bernstein for his contributions to the Bankruptcy Committee.

The Bankruptcy Committee met by videoconference on June 11, 2020. Before that meeting, the Committee took action to address the impact of the COVID-19 pandemic on the bankruptcy system. Following the enactment in March 2020 of the CARES Act, and based on the possibility at the time that Congress might quickly move forward with further legislation in response to COVID-19, the Bankruptcy Committee recommended a legislative proposal that was included in the judiciary's package of legislative proposals transmitted to Congress in April 2020.

That proposal would authorize bankruptcy courts to extend statutory deadlines and toll statutory time periods under title 11 and chapter 6 of title 28 of the United States Code during the COVID-19 national emergency, upon a finding that the emergency conditions materially affect the functioning of a particular bankruptcy court of the United States. The authorization would expire 30 days after the date that the COVID-19 national emergency declaration terminates, or upon a finding that emergency conditions no longer materially affect the functioning of the particular bankruptcy court, whichever is earlier. Unfortunately, since the legislative proposal was transmitted to Congress in April, Congress has taken no action on it and it has not been included in any of the draft COVID-19 stimulus legislation introduced to date.

At its June meeting, the Bankruptcy Committee considered whether to recommend a permanent grant of authority during an ongoing emergency, which could enable bankruptcy courts to respond more quickly to future emergency or major disaster declarations. The Committee deferred making any recommendation until the COVID-19 emergency has subsided or ended and courts have resumed normal operations, and to evaluate the potential impact of any Bankruptcy Rule changes under consideration by the Bankruptcy Rules Committee that would impact or overlap with the proposal. As drafted, the permanent grant of authority under consideration would not extend to the Bankruptcy Rules.

Subcommittee Reports and Other Action Items

4. Report by Appeals, Privacy, and Public Access Subcommittee

(A) Report on possible amendments to Bankruptcy Rule 8003 to conform to proposed amendments to FRAP 3(c)

Judge Ambro introduced the issue. Last year the Advisory Committee on Appellate Rules published proposed amendments to FRAP 3(c) (Contents of the Notice of Appeal), which is intended to resolve the different practices in different courts of appeals with respect to whether a notice of appeal that mentions a specific order could inadvertently result in the appellant losing the right to appeal other orders that merge into the judgment. The Standing Committee has given its final approval to the amendments to FRAP 3, and the Subcommittee now recommends conforming changes to the equivalent Bankruptcy Rule, Rule 8003.

Professor Gibson provided the report. There are many bankruptcy cases that apply the merger rule, the rule that interlocutory orders merge into a final judgment and an appeal can be had from the interlocutory orders by filing a notice of appeal from entry of the final judgment. Adopting the amendments to FRAP 3(c) for Bankruptcy Rule 8003 would therefore not introduce any new doctrine or difficulty for bankruptcy appeals that does not already exist. Instead, the confirming amendment is intended to prevent appellants from unintentionally narrowing the scope of their appeals.

Moreover, the Advisory Committee has tried to keep Part VIII rules parallel to the appellate rules so that procedures are consistent throughout the stages of a bankruptcy appeal. A failure to make conforming changes to Rule 8003 might suggest that the case law the amendments reject for appeals to courts of appeals is still applicable under Rule 8003.

Judge Campbell asked if "decree" should be mentioned in line 11 on p. 204, as it is in line 7. Professor Gibson agreed.

Judge Goldgar noted that "judgment" is defined in Rule 9001(7) as "any appealable order," so it seems redundant to use the additional terms. Professor Gibson noted that the Civil Rules have the same definition, but not everyone understands that judgment means something other than what is entered at the end of a case, and we are trying to conform to the Civil Rule. Professor Struve agreed that use of all terms – judgment, order and decree -- makes it clear that they are all included, and the Civil Rules have always broken out judgments and orders. Judge Hoffman noted that there are final decrees in bankruptcy cases, so reference to decrees is also appropriate.

Judge Goldgar pointed out that the references to "decree" should be added in several places on p. 205.

The Advisory Committee approved the Rule 8003 and its committee note as amended and directed that they be submitted to the Standing Committee for publication.

(B) Report on Suggestion 20-BK-G from the Bankruptcy Committee to amend Rule 3011

Judge Ambro introduced the topic. Professor Bartell provided the report. The Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) submitted a suggestion requesting that the Advisory Committee recommend amendments to Federal Rule of Bankruptcy 3011 for the purpose of requiring the clerk to publish notice of funds paid into court pursuant to § 347(a) of the Bankruptcy Code. The suggestion is consistent with past efforts of the Bankruptcy Committee to reduce the balance of unclaimed funds and to limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds.

The proposed amendment to Rule 3011 would designate the current language of the Rule as paragraph (a) and would add a new paragraph (b) to require the clerk to provide searchable access on the court's website to data about funds deposited pursuant to § 347(a). The Subcommittee made two changes from the suggested language. It changed the requirement that the clerk "publish" information about unclaimed funds -- which the Subcommittee thought might suggest that the clerk had to list names – to a requirement that the clerk provide access to the information. Second, the Subcommittee eliminated the phrase "unless the court order otherwise" at the beginning of the new section.

Subsequent to the meeting, Bridget Healy and Scott Myers discussed the recommendation with Dana Elliott, one of the attorneys supporting the Bankruptcy Committee, and David Levine, Chief of the Judicial Policy Division. They provided some background on

why the Bankruptcy Committee wanted the "unless the court orders otherwise" clause. It was suggested by the clerk of the court that hosts the unclaimed funds locator that some courts do not post information on unclaimed funds that are subject to a sealing order for some reason. An example given was claimants with unclaimed funds in a church diocese case. (The Subcommittee seemed to have anticipated that concern in part and attempted to address it by eliminating the word "publish" from the language suggested by the Bankruptcy Committee.) A second category are unclaimed funds from very old cases (apparently there are some over 50 years old), and lack of good information about the underlying claims. There may be other reasons to give a court discretion in the rule as well, but those were the examples that prompted the Bankruptcy Committee to include court discretion language in the suggestion.

Judge Goldgar expressed concern about the language "unless the court orders otherwise" as contrary to circuit guidance which requires a case by case determination. Ken Gardner said that particular unclaimed funds could be sealed in the unclaimed funds register, and that doing so is different from requiring the clerk to make the locator searchable. Judge Dow suggested adding language to (b) as follows: "The court may limit access to information in the database with respect to a specific case for cause shown." The proposed addition was accepted by Judge Darrow on behalf of the Bankruptcy Committee.

The Advisory Committee approved the proposed amendments to Rule 3011 and the committee note with the modification suggested by Judge Dow and directed that they be submitted to the Standing Committee for publication.

5. Report by the Business Subcommittee

(A) Consider Suggestion 20-BK-D from Thomas Moers Mayer regarding Rule 7007.1

Professor Bartell provided the report. Thomas Moers Mayer made a suggestion that Rule 9014(c) be modified to include Rule 7007.1 in the list of bankruptcy rules from Part VII that are applicable to contested matters.

Rule 7007.1 requires disclosure by any corporation that is party to an adversary proceeding (other than the debtor or a governmental unit) of any corporation that owns, directly or indirectly, 10% or more of any class of the corporation's equity interests. The Rule was derived from Fed. R. App. P. 26.1 and is similar to Fed. R. Civ. P. 7.1. The purpose of the disclosure required by the Rule is to assist the judge in making an informed decision on disqualification.

Rule 7007.1 was drafted at the direction of the Standing Committee acting at the request of the Committee on Codes of Conduct. It was approved by the Advisory Committee in 2001. At

the time, the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements, after lengthy discussions, declined to make it applicable to contested matters because of the complexity and speed with which contested matters, such as motions for relief from the stay, are presented to the court.

The Subcommittee agreed that including Rule 7007.1 in the list of Part VII rules applicable to all contested matters in Rule 9014(c) may not be advisable, although the Subcommittee did not find all the reasons itemized by the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements particularly persuasive. For example, the Subcommittee did not see any logic in distinguishing contested matters based on whether they sought relief from the stay or something else.

However, the Subcommittee believes that in certain contested matters disclosure of the type described in Rule 7007.1 is highly desirable to allow the bankruptcy judge to make an informed decision on disqualification.

The Subcommittee did not come to any conclusion on how to identify which contested matters should trigger compliance with Rule 7007.1. Possibilities that were discussed included matters involving a significant amount in controversy, or any contested matter if the court so orders, or all contested matters in non-consumer cases, or all contested matters in chapter 11 and chapter 15 cases only.

The Subcommittee decided to solicit the views of the Advisory Committee on whether disclosure should be required in all or some contested matters, and if in only some contested matters, which ones.

Judge Goldgar expressed the view that requiring disclosure in chapter 13 cases would be impossible. Mr. Mayer said that in business cases it seems strange to require disclosure in adversary proceedings, which are relatively rare, and not in contested matters, which are plentiful. Goldgar suggested limiting disclosure to chapter 11 and 15 cases. Mr. Mayer suggested adding chapter 9. Mr. Mayer then noted that requiring disclosure by chapter is not a perfect alignment with "big" cases (there are "big" chapter 7 cases). He would be fine with a rule requiring disclosure based on debt limit or size of the case. He understands it can't apply to all cases. He thought that perhaps this should be solved by local rulemaking rather than the federal rules.

Judge Bernstein noted that bankruptcy judges have the authority under Rule 9014(c) to direct that Rule 7007.1 be applicable in a particular contested matter and thought we should just rely on the discretion of the judge to get the information necessary for disqualification when necessary.

The Advisory Committee decided to take no further action on the suggestion.

6. Report by the Consumer Subcommittee

(A) Consideration of Suggestion 20-BK-E from CACM for rule amendment establishing minimum procedures for electronic signatures of debtors and others

Professor Gibson presented the report. Judge Audrey Fleissig, chair of the Committee on Court Administration and Case Management ("CACM"), submitted a suggestion based on a question her committee received from Bankruptcy Judge Vincent Zurzolo (C.D. Cal.). Judge Zurzolo inquired whether debtors and others without CM/ECF filing privileges are permitted to electronically sign documents filed in bankruptcy cases. Judge Fleissig noted that in 2013 CACM "requested that the Rules Committee explore creating a national federal rule regarding electronic signatures and the retention of paper documents containing original signatures to replace the model local rules." That effort was eventually abandoned, however, largely because of opposition from the Department of Justice. Among the reasons for the DOJ's opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult.

Judge Fleissig's letter was addressed to Judge David Campbell, chair of the Standing Committee, and he referred it to the Advisory Committee. In doing so, he noted that, although the suggestion relates specifically to bankruptcy, it is an issue that is relevant to the work of the other rules advisory committees. He requested that the Advisory Committee take the lead in pursuing the issues.

The use of electronic signatures by debtors and others without a CM/ECF account is a matter that the Advisory Committee spent several years considering (2012-2014), only to abandon the proposed rule after reviewing the comments received following publication. Based on the Committee's earlier experience, the Subcommittee believes it would be desirable to get some input regarding the DOJ's position as early as possible. While it doubts that the Department will take any definitive position before seeing what is proposed, it does not want to get too far down the road without knowing whether the DOJ remains opposed, given currently available technology, to any use of electronic signatures (without the retention of wet signatures) by debtors and others without CM/ECF filing privileges.

If this project goes forward, the Subcommittee will seek the involvement of someone

with knowledge of current e-signature products, their security safeguards, and the feasibility of their use with bankruptcy software and the CM/ECF filing system. It will explore whether someone at the AO or FJC could provide this expertise. It will also reach out to relevant bankruptcy organizations for input on the desirability of allowing e-signatures by non-registered users.

David Hubbert recommended that this project go forward, and suggested that he could recommend that the Deputy Attorney General conduct a survey on the topic. The DOJ would not look at a specific product, but just the general topic of electronic signatures and fraud. Molly Johnson could also survey courts on their experience during the pandemic with electronic signatures.

The Advisory Committee authorized pursuit of the CACM suggestion and will consider which subcommittee will take the lead.

(B) Consideration of Suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1

Judge Goldgar introduced the topic and described the problem in chapter 13 of debtors who complete their chapter 13 plans only to find out that their mortgage lenders assert that they have not made all required payments on their home mortgages. Professor Gibson provided the report. As was discussed at the last three Advisory Committee meetings, the Advisory Committee has received suggestions 18-BK-G and 18-BK-H from the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy regarding amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence).

Judge Goldgar appointed a working group to review the suggestions and make a recommendation to the Subcommittee. The Subcommittee has carefully considered the Suggestions and the drafts of proposed amendments submitted by the two groups. At its meeting on July 21, it approved a draft to present to the Advisory Committee for discussion at the fall meeting. After obtaining that feedback, the Subcommittee hopes to prepare a final draft of the proposed amendments, along with a committee note and implementing forms, for consideration for publication at the spring 2021 Advisory Committee meeting.

Professor Gibson described the proposed changes to Rule 3002.1. The title to the Rule would change to refer to Chapter 13. Subdivision (a) would be modified only to make it applicable to reverse mortgages that do not have regular payments made in installments.

Subdivision (b) is intended to provide the debtor and the trustee notice of any changes in the home mortgage payment amount during the course of a chapter 13 case so that the debtor can remain current on the mortgage. The two main changes to this subdivision are the addition of provisions about the effect of late payment change notices and detailed provisions about notice of payment changes for home equity lines of credit (HELOCs). Proposed subdivision (b)(2) would provide that late notices of a payment increase would not go into effect until the required notice period (at least 21 days) expires. There would be no delay, however, in the effective date of an untimely notice of a payment decrease. Members of the Subcommittee debated whether the Rules Enabling Act, 28 U.S.C. § 2075, allows a rule to impose a delay in a payment increase. Some thought that it is permissible for the rule to impose such a consequence for failure to comply with a procedural requirement, while others thought that such a provision improperly modifies a substantive right. The Subcommittee decided that the best course would be to publish the rule with this provision in it and see whether it draws any concerns.

Judge Hoffman expressed concerns with the penalty provision. He suggested instead eliminating any penalties imposed on the debtor for failure to meet the new payment requirements if the notice of a payment increase was untimely. Others pointed out that such a provision also altered the contract provisions and would be equally questionable under the Rules Enabling Act, if the existing provision is. Ms. Miller said that this suggestion came through the mortgage liaison committee between the mortgage servicers and chapter 13 trustees. She said this penalty provision is consistent with caselaw since about 2004.

Professor Gibson described the new subdivision (b)(3) which would replace language added to the rule in 2018 and would provide that a HELOC claimant would only file annual payment change notices—which would include a reconciliation figure (net over- or underpayment for the past year)—unless the payment change in a single month was for more than $10. This provision, too, would ensure at least 21 days' notice before a payment change took effect.

There were mostly stylistic changes to Subdivision (c) and (d), although subdivision (d) has been moved to subdivision (j). Subdivisions (e) and (f) implement a new mid-case assessment of the status of the mortgage. The Suggestions proposed such an addition so that a debtor would be informed of any deficiencies in payment while there is still time in the chapter 13 case to become current before the case is closed. As drafted, the procedure would begin with the trustee providing notice of the status of payments to cure any prepetition arrearage. In a conduit district—one in which the trustee rather than the debtor makes the postpetition mortgage payments—the trustee would also state the amount and due date of the next contractual payment. The mortgage lender would then have to respond (subdivision (f)) by stating any mortgage or arrearage amounts on which it contends the debtor is not current. The debtor or trustee could object to the response. If no objection was made, the amounts stated in the lender's response

would be accepted as correct. New official forms would be created for both the notice and the response.

Judge Hoffman noted that on line 116, the reference to "trustee" should be to "claim holder." Questions were raised about the use of the term "contractual payment" in line 112 and whether it should say "postpetition payment." The general consensus was that the context made the term clear.

Regarding (f)(1), Judge Hoffman thought the description of the response does not correspond to the scope of the objection. Professor Gibson and Ms. Miller expressed the view that the language covers everything to which the claim holder could object.

Judge Goldgar questioned use of the phrase "prepetition arrearage calculation." Professor Gibson and Ms. Miller will consider a better description of the concept.

Judge Hoffman questioned the word "correct" in line 132. The Advisory Committee supported changing it to "binding."

Subdivisions (g)–(i) provide for an assessment of the status of the mortgage at the end of a chapter 13 case—when the debtor has completed all payments under the plan. The procedure would be changed, however, from a notice to a motion procedure. The trustee would begin the procedure by filing a motion to determine the status of the mortgage. An official form would be created for this purpose. The claim holder would have to respond, again using an official form to provide the required information. Either the trustee or the debtor could object to the response. This process would end with a court order detailing the status of the mortgage. If the claim holder failed to respond to the trustee's motion, the order would state that the debtor is current on the mortgage. If there was a response and no objection to it was made, the order would accept as accurate the amounts stated in the response. If there was both a response and an objection, the court would determine the status of the mortgage. Subdivision (i)(4) specifies the contents of the order.

Subdivision (k) is the sanctions provision, and has only stylistic changes. The Subcommittee decided that it was not necessary to provide for an order compelling the servicer to respond and allowing contempt if it does not. The consequences of failure to respond were deemed sufficient.

Ms. Miller commented that the amended rule is going to be a great benefit to the parties and the court. Judge Hoffman commented that the language of line 140— "whether any arrearage has been cured" — is inconsistent with the existing language —"whether any default has been cured" — and with statutory language. He also expressed the view that the language

made no sense because arrearages are not cured. Deb Miller suggested "whether any prepetition default has been cured." That was accepted by the Advisory Committee, and Professor Gibson will search the draft to be sure that it is used consistently throughout. Judge Hoffman commented on lines 210-212 and suggested adding "and other escrow amounts" after "taxes." That suggestion was accepted.

The Advisory Committee supported the continuing work on the draft rule and associated forms.

7. Report by the Forms Subcommittee

(A) Consideration of Suggestion 20-BK-C from Judge Eric Frank for an amendment to Official Form 410A or its instructions

Professor Bartell provided the report. Bankruptcy Judge Eric Frank of the E.D. Penn. submitted a suggestion with respect to the instructions (Instructions for Mortgage Proof of Claim Attachment) to Form 410A (Proof of Claim, Attachment A) regarding the "Information required in Part 2: Total Debt Calculation." He notes that the instructions are unclear when applied to mortgage debts that have been reduced to judgment through a foreclosure proceeding and merge into that judgment under the merger rule.

Form 410A is the successor to Attachment A to former Official Form 10, an attachment that was adopted in 2011 to implement Rule 3001(c)(2) added the same year. Rule 3001(c)(2) requires that certain supporting information be provided by a mortgage claimant in an individual debtor case. The form requires an itemization of prepetition interest, fees, expenses and charges included in the claim and a statement of the amount necessary to cure any default. It also requires the claimant to provide a loan history showing when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. The form is intended to provide specificity with respect to the components of a claim secured by an individual debtor's principal residence and, if the debtor was in default prior to the bankruptcy filing, the amount necessary to cure that prepetition default.

The problem with Rule 3001(c)(2) and Form 410A is that they assume that the mortgage debt being described by the claimant is represented by a contractual obligation of the debtor — a note and a mortgage. Any such debt will therefore have a principal amount, will accrue interest from its inception until it is paid in full, and may carry with it contractual obligations to pay fees and costs and escrow amounts for taxes and insurance. Once the note and mortgage have merged into a judgment, the amounts owing by the debtor will be determined not by the note and mortgage but by the judgment itself.

Attachment A to Form 410A requires the creditor to provide a Total Debt Calculation by adding the specified principal balance, interest due, fees, costs due, and escrow deficiency for funds advanced, and subtracting total funds on hand, to find the total debt as of the filing date. If a secured claim has merged into a foreclosure judgment, the term "principal balance on the debt" is misleading; it could be read to be either the amount of the judgment or alternatively the principal balance on the debt if no judgment had been obtained. In addition, any postjudgment interest, fees, costs and escrow deficiencies specified in the mortgage will be continuing obligations of the debtor only insofar as the judgment recognizes those obligations or state law otherwise provides that they survive the merger of the mortgage into the judgment.

The Subcommittee recommended inserting a single new paragraph in the instructions to Form 410A with respect to the information to be included in Part 2 before the paragraph beginning with: "Also disclose the *Total amount of funds on hand.*" This new paragraph would read as follows:

> If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the amount of the judgment. Any post-judgment interest due and owing, fees and costs and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

Judge Goldgar suggested inserting a comma after the word "costs." Judge Campbell questioned whether some of the judgment might have been paid prepetition so that "amount of the judgment" was overbroad. Ms. Miller suggested dealing with that concern by inserting the word "remaining" before "amount of the judgment." The Advisory Committee approved that change, and approved the proposed amendment as modified to the instructions to Form 410A. The change does not require publication and will be immediately implemented by the AO.

(B) Proposed conforming amendments to Official Form 417A (Notice of Appeal and Statement of Election)

Professor Gibson provided the report. The Subcommittee was asked to recommend to the Advisory Committee whether to propose amendments to Official Form 417A that conform to amendments to Appellate Form 1 (Notice of Appeal) that have been proposed by the Advisory Committee on Appellate Rules and published for public comment.

This Subcommittee decided to recommend using the language of the proposed amendment to Rule 8003(a)(3)(B) but not creating two separate notice-of-appeal forms. The Subcommittee thought that using separate forms would potentially create confusion.

Professor Gibson noted that the comma after the word "order" should be deleted in Parts 2 and 3 of the proposed form.

The Advisory Committee approved the proposed amendments to Form 417A and committee note and directed they be submitted to the Standing Committee for publication with the goal of making them effective when the amendments to Rule 8003 go into effect.

(C) Recommendation of No Action Regarding Suggestion 20-BK-F (Valdislav Kachka) to Revise "Explanation of Discharge in a Chapter 7 Case"

Professor Bartell provided the report. Vladislav Kachka, an attorney in Pennsylvania, suggested changes to the language included in the section labelled "Explanation of Bankruptcy Discharge in a Chapter 7 Case" in Official Form 318 (Discharge of Debtor). The concern of Mr. Kachka is that under Pennsylvania law a civil judgment creates an automatic lien against real property that a defendant owns at the time of the judgment and property acquired by the defendant thereafter. If the defendant obtains a discharge of the judgment in bankruptcy after the judgment is entered, the lien no longer attaches to postpetition property of the defendant. However, an abstract of judgment entered against the defendant continues to appear on a title report and many underwriters will not certify that the property has clear title when the defendant attempts to obtain financing for a post-discharge property purchase because the underwriters fail to understand that the judgment lien does not attach to that property.

Mr. Kachka suggested that if the Explanation of Bankruptcy Discharge in a Chapter 7 Case includes language specifically stating that a discharged judgment does not create a lien on property acquired after the discharge, it will provide debtors something they can show the underwriters without having to embark on a detailed explanation of § 524 of the Bankruptcy Code.

The Subcommittee considered the substance of Mr. Kachka's suggestion, and language that might be added to Form 318 (and the other forms used for discharge under other chapters of the Code), and ultimately concluded not to recommend any change to the forms. There were two reasons for the Subcommittee's decision.

First, the Subcommittee does not think that an amendment to the language in the Explanation section of the discharge orders would alleviate the problem Mr. Kachka seeks to address. The Subcommittee believes that a title company or other party involved in a real estate transaction would be unlikely to rely on language in the Explanation section of the discharge order, and would still demand a "comfort order" signed by the bankruptcy judge explicitly stating that the post-petition property is not subject to the lien before insuring title to that property.

Second, although Mr. Kachka is absolutely correct that a post-petition lien cannot attach to property obtained by a debtor after bankruptcy to secure a debt that has been discharged, putting language into the forms to that effect could open the door to further requests for specific language describing exactly what is and is not discharged and the effect of the discharge. The Subcommittee was not willing to start down the road of providing legal advice about the meaning and scope of § 524 of the Code, even when there is no dispute about its accuracy, especially where any benefit in doing so would be questionable.

For those reasons, the Subcommittee recommended no action be taken on this suggestion. The Advisory Committee concurred with the Subcommittee's recommendation.

8. Report by the Restyling Subcommittee

Judge Marcia Krieger, chair of the Subcommittee, and Professor Bartell provided the report. Judge Krieger began with an expression of gratitude to the members of the Subcommittee for their work. Professor Bartell thanked Judge Campbell for his leadership in this area, and those staff members at the Administrative Office who assisted with the programs to facilitate the process. She also thanked the style consultants for their contributions.

Professor Bartell provided a status report. The Subcommittee has almost completed its review of Part III of the Rules, after which its comments will be forwarded to the style consultants for their reaction. The Subcommittee will then begin its review of Part IV of the rules. It has two more meetings scheduled for mid-October. The Subcommittee expects to present both Parts to the Advisory Committee for its approval and submission to the Standing Committee for publication at the spring meeting.

9. Emergency Rules Subcommittee

Professor Gibson provided the report. The Subcommittee presented to the Advisory Committee a discussion draft of a proposed new Rule 9038 to address operation of the bankruptcy courts during an emergency. She explained that the Subcommittee, under the leadership of Judge Hoffman, had met five times since the middle of April and had concluded that an emergency rule that would allow time periods in the Bankruptcy Rules to be extended when there is a declared emergency that adversely affects the operation of the bankruptcy courts would be desirable.

Professor Gibson drafted such a rule, trying to the extent possible to adopt a uniform approach to that pursued by the other advisory committees. Professor Capra has served as liaison between the committees to promote such uniformity. Although that uniformity has

not yet been completely achieved, the current drafts of the bankruptcy, civil, and criminal rules have many elements in common. She then highlighted the issues in the proposed rule, and the extent to which they diverged from the approach of the other advisory committees.

The rule addresses what is an emergency (called a "rules emergency" in the draft). There are two requirements for a rules emergency: extraordinary circumstances and a resulting impairment of the court's ability to function in accordance with the rules. The extraordinary circumstances must relate to public health or safety or affect access to the court. Subsequently the criminal rules subcommittee decided to make the definition more restrictive, adding the requirement that "no viable alternative measures would eliminate such substantial impairment within a reasonable time." The current draft of the civil rule does not include the no-viable-alternative requirement. (The appellate rules have no comparable provision.)

Professor Capra said that probably no civil rule will be adopted for emergency situations because the Civil Advisory Committee thinks the existing rules are sufficiently flexible. Judge Goldgar said that he would change "viable" to "feasible." Professor Gibson thought that (a)(2) was not needed because there would be no substantial impairment if there was a feasible alternative. Judge Wu agreed and would delete (a)(2). Judge Goldgar thought that (a)(2) required an inappropriate decision by a judge. Judge Krieger wondered if we really have any need for an emergency rule. Mr. Mayer pointed out that the existing bankruptcy rules limit the flexibility of bankruptcy judges to modify deadlines and otherwise adopt local rules to deal with the emergency so an emergency rule is needed. The Advisory Committee agreed to drop (a)(2).

Judge Hoffman thought (a)(1) should not be limited to "impairing the ability of a court to perform its functions" but should include the parties. Professor Capra said that the only reason parties cannot perform their functions is because courts cannot function. Mr. Mayer supported the rule as drafted. Judge Campbell said that criminal defense attorneys currently can't get access to their clients because of lockdown and therefore cannot prepare for trial. In civil cases, parties cannot complete depositions or inspect properties. There are emergency situations in which the courts are not affected but the parties are prevented from doing what they need to do. Professor Capra thinks the language would operate in those situations because the court would be unable to perform its functions if the parties could not.

The proposed rule identifies who may declare an emergency. The various subcommittees are not in agreement about who should be authorized to declare a rules emergency. The civil and criminal drafts give this authority only to the Judicial Conference of the United States. The appellate draft also authorizes the chief judge of a circuit to do so for the courts in that circuit. The Subcommittee thought it important to also provide authority at the bankruptcy court level because of the specialized nature of the Bankruptcy Rules and the belief that emergency action could be taken more swiftly and with greater knowledge of local conditions at that level.

Judge Goldgar asked why the chief district judge is omitted. Professor Gibson noted that the chief district judge is omitted in the civil and criminal rules. Professor Coquillette said that the executive committee of the Judicial Conference operates very quickly and can get the information it needs from individual districts. Judge Krieger said that after 9-11 the S.D.N.Y. routed its cases to the E.D.N.Y. and she supports including the chief bankruptcy judge in the district. Judge Wu asked about review of a determination by a bankruptcy judge; Professor Capra suggested that we could include language that allowed the Judicial Conference to overrule the determination. Judge Bates did not think the situation posed by Judge Krieger is unique to bankruptcy — district courts had the same problem for civil and criminal matters. He expressed his concern that allowing the bankruptcy judge to make the determination may be a move too far for Congress, which used a presidential declaration as the trigger during the current pandemic. Judge Goldgar said that the chief district judge in his district said she had no authority to give directions to the bankruptcy court during the current pandemic. Professor Capra said that this is a distinct issue from who makes the declaration. Mr. Hartley noted that someone needs to be able to act unilaterally quickly until someone higher up makes a decision. Judge Krieger said that she has encountered problems that no one else knows about — HVAC problems, or plumbing problems, for example—and that no one higher up is going to know what has happened in that court. Professor Capra said that this rule is not about the burst pipe problem. The rule is intended for major emergencies. Judge Bates said that current rules are flexible enough to deal with Judge Krieger's hypothetical situations. Deb Miller said it is important that there be a quick, uniform approach in the case of an emergency. Professor Gibson wondered if having three different potential decision-makers might create confusion. Judge Goldgar said he personally has access to a member of the Judicial Conference so he feels comfortable with that. Judge Campbell noted that the first draft of the CARES Act would have legislatively amended the rules. In light of that history, Congress is going to be looking for national emergency rules, and probably expects centralized decision-making. There would have to be a really good reason why bankruptcy judges need authority that district court judges do not need in criminal or civil cases. Judge Dow supports allowing the decision to be made by the chief bankruptcy judge, and points out that all we are talking about is extending deadlines. Judge Hoffman suggested eliminating the chief bankruptcy judge but including the chief circuit judge.

The Subcommittee voted on whether to limit decision-making to the Judicial Conference. That motion was defeated with only one vote — Judge Goldgar — in favor. The Subcommittee then voted on whether to allow either the Judicial Conference or chief judge of the circuit to declare a rules emergency. That motion was supported by five votes. The Subcommittee then voted between two options: allowing the Judicial Conference or chief judge of the circuit to declare a rules emergency and second, allowing the chief bankruptcy judge also to make the declaration. The former option was supported by Judges Bernstein, Hoffman, Goldgar, and Oetken, and Mr. Retherford. The latter option, with three levels of decisionmakers, was

supported by Ms. Miller, Mr. Mayer, Judge Wu, Judge Krieger, Mr. Hartley, and Judge Dow. Mr. Hubbert abstained. As a majority of the Advisory Committee supported that approach, the rule will continue to include the existing provisions allowing the chief bankruptcy judge to declare a rules emergency.

Professor Gibson will modify subpart (b)(4) (dealing with early termination of a rules emergency) to include the ability of the chief judge of the circuit or the Judicial Conference to overrule a decision of the chief bankruptcy judge as to the existence of a rules emergency.

The proposed rule provides for extensions of time limits set forth in the rules (other than those mandated by the Bankruptcy Code). As drafted, the authority to permit extensions of time limits on a district-wide basis is given to the chief bankruptcy judge, regardless of who made the declaration of the emergency. The Subcommittee thought this approach was appropriate because a local actor will be in the best position to assess conditions and determine the rule departures that are needed. Judge Campbell suggested revised language in (c)(1) to eliminate the requirement that the chief bankruptcy judge in a district has to authorize a bankruptcy judge to order extensions in a particular case. A conforming change will be made to (c)(3).

Judge Goldgar wants the ability not merely to extend time limits, but the ability to modify local rules. Professor Gibson suggested that this is not a matter for the federal rules. Professor Capra and Professor Struve also agreed. Professor Struve suggested that the reference to Bankruptcy Code in line 39 should be to any statute. Judge Bernstein asked whether the chief bankruptcy judge should be able to order extensions for specific cases as indicated by line 34 — the presiding judge is the one who would know about that. Everyone agreed that the language would so require.

An extended or tolled time period will terminate either 30 days after the rules emergency declaration terminates or when the original time period would have expired, whichever is later — unless the extension or tolling itself expires sooner than 30 days after the declaration's termination. In that case, that date would be compared to the original termination date (and of course will be the later of the two dates since it is an extension). The court may provide an additional extension in a specific case or proceeding.

The draft rule left space for consideration of additional rules provisions that might be considered for inclusion in an emergency rule. The first is an authorization for remote hearings. Virtually all bankruptcy courts switched to remote means of conducting any hearings that could not be postponed following the declaration of the Covid-19 emergency. Such action could be required in any type of emergency that endangers public health and safety or impairs access to the court. The Advisory Committee concluded that inserting such a provision in the emergency rule would suggest that existing local orders providing for remote hearings constitute a departure

from the Bankruptcy Rules and are not authorized. Professor Capra agreed. The rule will eliminate the placeholder for remote hearings.

The other rules that the Subcommittee has identified for consideration are those requiring service or transmission by first class mail. It has been suggested that in some types of emergencies, the U.S. postal system might be disrupted, and thus compliance with mailing requirements in the rules might be difficult or impossible. Judge Dow does not know what we would propose as an alternative. The Advisory Committee concluded that no emergency provisions were needed for this situation.

Other procedures that the Subcommittee considered and decided not to address in an emergency rule are ones governing electronic filing by unrepresented parties, payment of filing fees online by unrepresented parties, and electronic signature requirements. The Subcommittee determined that the existing Bankruptcy Rules on these topics either contain sufficient flexibility to allow adjustments during an emergency or leave the issues to regulation by local rules or orders.

The final provision of the proposed draft, which is in brackets, is the last provision of the current criminal rule draft. This "soft landing" provision is intended in part to do what subdivision (c)(2) of the Subcommittee's draft aims for — to prevent unfairness in the transition period after the termination of an emergency declaration. Subdivision (c)(2) addresses only time period extensions and tolling, whereas the criminal rule provision applies to all types of rule departures authorized by the emergency rule. Given that the bankruptcy rule will now address only time extensions, this provision will not be necessary.

Judge Bates asked whether the Advisory Committee had determined that an emergency rule is necessary. The concern would be that adopting a rule dealing only with extensions of deadlines might create the implication that nothing else can be modified in an emergency. Professor Gibson thought that the emergency rule was indeed necessary because of all the deadlines included in the bankruptcy rules, and that this rule should be presented to the Standing Committee in January for its consideration. Judge Dow agreed that the rule is needed.

10. Future meetings

The spring 2021 meeting has tentatively been scheduled for April 8–9, 2021.

11. New Business

There was no new business.

12. Adjournment

The meeting was adjourned at 3:15 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Business Subcommittee.

   A. Recommendation of no action regarding Suggestion 20-BK-A from the Foundation for Defense of Democracies for proposed rulemaking concerning national security matters (Professor Bartell).

2. Consumer Subcommittee.

   A. Recommendation of referral of Suggestion 20-BK-B to make the court's database of electronic creditor notice addresses available to any case participant required to serve notices on creditors. (Professor Gibson).

3. Recommendation for technical changes to all versions of Official Form 309 to update PACER internet address, to amend national instruction to Form 309 to list all versions of the form, and to permit courts to update the internet links as needed on those forms in the future. (Scott Myers)