
From: John Rabiej
Subject: Rule 9013

September 15, 2026

RABIEJ LITIGATION LAW CENTER*

Subject: Proposed Amendment of Rule 9013 – Same letter sent to members of the Advisory Committee on Bankruptcy Rules and Standing Rules Committee

I write to urge the Committee to move forward with the proposed amendments to Bankruptcy Rule 9013 and reject the Subcommittee's recommendation to table them.

Having opened and directed the Rules Committee Support Office for twenty years (1990–2010), I managed every stage of the federal rulemaking process. I worked closely with the finest judges, including then Judges and now Justices Neil Gorsuch, Samuel Alito, and Chief Justice John Roberts. I maintained daily contact for months on end with Committee Chairs as we strategized on how best to successfully move contentious amendments through the rulemaking process across the Advisory Rules Committee, Standing Rules Committee, Judicial Conference, Supreme Court, and Congress.

Rulemaking efforts often met heavy resistance from vocal critics across the bench and bar, whereas supporters largely stayed on the sidelines, assuming their endorsement wouldn't make a difference. It came as no surprise that negative comments outpaced positive ones 99 to 1 during the public-comment period. Despite the negative reactions, the committees consistently chose principle over political path of least resistance. They repeatedly carried forward necessary rule changes, even in the face of heavy opposition from leading jurists, prominent attorneys, bar associations, and on occasion the Department of Justice.

Stated Grounds for Subcommittee's Retreat Cannot Withstand Scrutiny

The Subcommittee has retreated from its original recommendation — not on substantive grounds, but because it concluded that the Standing Committee is unlikely to approve an amendment to Rule 9013 at this time. This reversal stems entirely from constitutional concerns raised by the DOJ and skepticism from two Standing Committee members regarding the rule's necessity. However, neither rationale withstands close scrutiny.

The rules committees hold a statutory obligation to correct procedural rules that create systemic problems. I well know the history of failed attempts to amend Rule 9013. More than 30 years ago, I worked with the late Professor Alan Resnick, the committee reporter. Alan was a strong proponent of bankruptcy as a means of resolution for complex

litigation. He understood the burdens imposed on a bankruptcy judge in such cases. His objections to appointments of a special master to help bankruptcy judges were based exclusively on the potential diminution of the bankruptcy judge's power. Alan's concerns were eliminated with the extensive amendments of Civil Rule 53 in 2003.

The DOJ's constitutional arguments rely on a flawed analysis that echoes Alan's original apprehensions. Having served in the Division of Magistrate Judges when similar Article III challenges arose regarding appointments of magistrate judges, which were ultimately resolved in *United States v. Raddatz*, it is clear that reserving *de novo* review for the bankruptcy judge fully satisfies constitutional requirements, just as it answered Alan's objections. Furthermore, while the committee should defer heavily to the DOJ on the policy implications of proposed rule amendments, it owes no such deference to their legal opinions, which are ultimately the province of the judiciary. The Subcommittee basically came to the same conclusion.

After discounting the DOJ's objections, the Subcommittee grounded its recommendation exclusively on forecasting the Standing Rules Committee's vote, which is a highly speculative and risky approach. Historically, a strict boundary has separated advisory rules committees from the Standing Rules Committee. The advisory committee's proper role is to provide its best independent judgment on what amendments are justified on the merits, leaving it entirely to the Standing Committee to judge whether those proposals can politically survive the rulemaking process.

By encroaching upon the domain of the Standing Rules Committee, the Subcommittee further undermined its position by relying on an invalid premise: misconstruing the vocal skepticism of merely two members as a broader committee consensus. This approach is especially flawed because not a single committee member has actual experience administering mass-tort bankruptcies. Naturally, members without this specialized background remained quiet during early debates out of caution, not concurrence. Yet, clinging to this slim reed, the Subcommittee advocates for more delay after more than two years of exhaustive study, passing the buck to a future committee.

The Committee Should Not Discount the Views of 77 Judges

The results of the Federal Judicial Center's survey show that a significant number, but less than a majority, of judges see no need for an amendment. But that merely reflects the lack of experience of these judges with mass torts. Having rarely appointed special masters in their own cases, they have no basis to evaluate the needs of bankruptcy judges in the mass-tort context. Much more significant are the positive responses of 77 judges who favor the amendment and who likely have had to deal with mass-tort litigation.

To understand why 77 judges support this amendment, the Subcommittee need look no further than the monumental efforts required of "experts" in the *LTL Management* mass-tort bankruptcy — individuals who effectively stepped into roles that should have been

handled by a special master. There, the court was forced onto shaky procedural ground using Evidence Rule 706 to appoint Ken Feinberg and 12 consultants employed by him to estimate tort claims. While their work was cut short by the appellate decision, its immense scale is clear from their multi-million dollar compensation. Work that otherwise would have to be performed by the bankruptcy judge.

More Details on Special Master Work Unnecessary

The *LTL Management* bankruptcy is not an isolated case; similar mass-tort bankruptcies demanding complex tort-claim estimates are regularly filed. Each of these cases requires an estimation of individual tort claims, both for voting purposes and to construct a viable plan of reorganization, which a bankruptcy judge cannot approve without a clear understanding of the potential liabilities. While similar tort-claim estimations in mass-tort MDLs frequently consume years of work and rely on numerous experts, mass-tort bankruptcies demand that same monumental effort within a significantly compressed timeframe.

Also, unlike conventional bankruptcies, which may involve examination of thousands of creditor claims, a mass-tort bankruptcy is much more complicated and involves thousands of contingent and unliquidated claims, each entitled to the full panoply of constitutional rights, including the Seventh Amendment right to a jury trial. District judges handling mass-tort MDLs intimately understand this overwhelming burden. To them, appointing a special master is a given; the only question is how many are needed to manage discovery, privilege issues, settlements, and scheduling. Mass-tort bankruptcies, like mass-tort MDLs, can easily exceed \$100 million a year in litigation costs. As a result, parties readily accept special masters' fees for essential work that speeds up resolution and curbs runaway expenses.

Historically, the Advisory Committee on Bankruptcy Rules has amended rules to correct a single outlier court decision simply because it *might* cause problems in future cases. In contrast, current Rule 9013 has actively hindered bankruptcy judges across numerous cases, providing far greater justification for an immediate amendment.

Consequences of Inaction

Tabling this amendment penalizes the very judges handling complex, multi-billion-dollar dockets who are currently forced to invent ad-hoc workarounds. A single bankruptcy judge cannot single-handedly conduct mass-tort claims estimation involving thousands of contingent, unliquidated claims carrying Seventh Amendment rights under strict time constraints. After more than two years of exhaustive Subcommittee study, further delay does a profound disservice to the judges on the front lines — especially since no substantive grounds exist to support such delay.

Failing to amend Rule 9013 will guarantee continued delays, inflated overall administrative

costs, satellite litigation over procedural workarounds, and a patchwork of non-uniform practices governing experts. Importantly, the proposed amendment does not compel judges to appoint special masters in every bankruptcy; instead it limits the appointments only when a bankruptcy judge is unavailable to do it and it establishes uniform standards for when they do.

If the committee harbors concerns that bankruptcy judges might routinely abuse this appointment power, it should explicitly address them by implementing limitations — even though such restrictions are patently unnecessary.

Rule 9013 needs to be amended as soon as possible. In the meantime, the Committee should provide clear guidance to bankruptcy judges on how to manage the mass-tort estimation process without a special master's help.

I urge the Committee to reject further delay and move the amendment forward.

Thank you for your consideration.

John Rabiej*

*The statements expressed in this letter are solely those of John Rabiej.