COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 6, 2021

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on September 14, 2021. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee voted to seek publication for comment of an amendment to Rule 7001 to exclude certain demands to recover estate property from the list of adversary proceedings. Part II of this report presents that action item.

Part III of the report presents three information items. The first concerns the Advisory Committee's approval of the addition of the Juneteenth holiday to the list of legal holidays in Rule 9006(a)(6). The second information item discusses the Advisory Committee's continuing consideration of the use of electronic signatures by debtors and others who are not registered users of CM/ECF. The final item provides an update on the restyling of the Bankruptcy Rules.

II. Action Item

Item for Publication

The Advisory Committee recommends that an amendment to Rule 7001 (Scope of Rules of Part VII) be published for public comment in August 2022. The text of the proposed rule amendment appears in the appendix to this report.

As we reported at the June 2021 meeting, the Supreme Court decided in *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021), that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She addressed the importance to a chapter 13 debtor of promptly regaining possession of a seized car so that the debtor can travel to work and continue to earn money to fund his or her plan, and she stated that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned."

Acting on Justice Sotomayor's comment, 45 law professors submitted a suggestion (21-BK-B) for rule amendments that would allow turnover proceedings to be brought by motion rather than by adversary proceeding. They offered specific language for the amendment of several rules. The National Bankruptcy Conference submitted a suggestion (21-BK-J) that is generally supportive of the law professors' suggestion. The law professors suggested "an expansion beyond chapter 13 to allow turnover actions by motion in all circumstances," but members of the Advisory Committee at the spring 2021 meeting expressed support for a narrower approach than was suggested. Among the comments were those of the Department of Justice representatives, who said that the government would be concerned with a broad rule applicable to all types of property, including funds held by the government, especially if the government had only seven days to respond.

Rule 7001(1) provides that, subject to a few listed exceptions, "a proceeding to recover money or property" is an adversary proceeding, governed by the Part VII rules. Despite this provision, it was reported that some bankruptcy courts allow turnover of money or property to be sought by motion, rather than by the filing of a complaint initiating an adversary proceeding. The Advisory Committee was interested in determining the content and scope of any such local rules as part of its consideration of the appropriate scope of any amendment to Rule 7001(1).

The Subcommittee on Consumer Issues surveyed bankruptcy clerks and chapter 13 trustees to determine the nature and extent of such local practices. The responses revealed that ten or so districts allow turnover to be sought by motion under certain circumstances. A few have local rules expressly allowing such motions, while others have rules or practices that merely refer to "turnover motions" without specifically authorizing them. In some districts turnover motions are limited to chapter 13 cases or to specific types of property, and in some the respondent to a turnover motion can demand that an adversary proceeding be brought.

In arriving at its recommendation to the Advisory Committee on how best to amend the rules to allow more expeditious turnover proceedings, the Subcommittee considered the nature of the concerns expressed by Justice Sotomayor, the concerns motivating the local court practices that deviate from Rule 7001(1), and comments by clerks and trustees. All members agreed that having to wait a hundred days on average to get a car needed to commute to work to earn money to fund a chapter 13 plan is not desirable.

The Subcommittee discussed several possible limiting principles of a rule allowing turnover to be sought by motion. They included allowing turnover by motion only in chapter 13 cases, the situation most frequently cited as giving rise to concerns. Subcommittee members, however, thought that the need for the urgent turnover of property could exist in other types of cases, so that it would be better to limit the proposed amendment to cases involving individual debtors rather than just chapter 13 cases. The Subcommittee also agreed that the procedure should be used only when turnover is sought under § 542(a)—that is, efforts to obtain "property that the trustee may use, sell, or lease under section 363 . . . or the debtor may exempt under section 522." That limitation would still require adversary proceedings for the turnover of debts under § 542(b), turnover of records by an attorney or accountant under § 542(e), and turnover of property by a custodian under § 543.

The Subcommittee then considered whether the rule should further limit the types of property for which turnover could be sought by motion. Several possibilities were discussed, and the Subcommittee concluded that any such limitation should be one that is easily discernible, because the type of procedure needed to initiate a turnover proceeding should not depend on an uncertain factual determination. Members concluded that adoption of a motion procedure is most appropriate for the turnover of tangible personal property.

Although the law professors suggested creating a new rule that would provide a national procedure for turnover motions, the Subcommittee concluded that an amendment to Rule 7001 is sufficient to implement the proposal. Rule 9014 (Contested Matters) would apply, and courts could use their own procedures for motion practice. Should a particular turnover proceeding require more detailed procedure, a court under Rule 9014(c) could order the application of the full range of Part VII rules.

After discussion, the Advisory Committee accepted the Subcommittee's recommendation that an amendment to Rule 7001(1)—creating an exception for "a proceeding by an individual debtor to recover tangible personal property under § 542(a)"—be approved for publication.

III. Information Items

Information Item 1. Rule 9006(a)(6) (Legal Holidays). In response to the enactment of the Juneteenth National Independence Day Act, P.L. 117-17 (2021), the Advisory Committee approved an amendment to Rule 9006(a)(6)(A) to insert the words "Juneteenth National

Independence Day," immediately following the words "Memorial Day." It will recommend at the June 2022 meeting that the Standing Committee approve the amendment without publication.

Information Item 2. Electronic signatures.

At the fall meeting, the Advisory Committee continued its consideration of the suggestion (20-BK-E) by the Committee on Court Administration and Case Management ("CACM") regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account.[1] It also considered two additional suggestions by Sai (21-BK-H and 21-BK-I) that have been folded into the consideration of the CACM suggestion. In a suggestion specific to the Bankruptcy Rules Committee, Sai argued that *pro se* litigants should not be subject to any more rigorous security requirements for electronic signatures than CM/ECF imposes on its registered users.

The Advisory Committee is still in the fact-finding stage of its consideration of the suggestions. Representatives to the Committee from the Department of Justice have been engaged in internal discussions about the Department's views on the issues raised by the suggestions and whether those views have changed since 2014, when it opposed a proposed amendment to Rule 5005(a) that would have allowed the use of debtors' scanned signatures without the retention of the documents bearing the original, "wet" signatures. Meanwhile, Ken Lee of the Federal Judicial Center has collected information about local bankruptcy and district court practices regarding electronic signatures and requirements for retaining wet signatures, both during "normal times" and during the COVID-19 pandemic. His research shows that most bankruptcy courts require debtors' attorneys to retain in paper format clients' wet signatures on documents filed electronically, although some courts are now allowing the signatures to be retained in electronic format. He reported that in response to the pandemic 69 bankruptcy courts (73%) had some suspension of wet signature requirement, most frequently by temporarily allowing attorneys to file either without or before obtaining wet signatures.

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person's signature for rules' purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF account to constitute a valid signature and, if so, under what circumstances.

The current local procedure of requiring the retention of the wet signature of a represented party has the drawback of making the attorney the custodian of potential evidence against the client—a situation that may not be ideal for either prosecutors or debtors' attorneys. If a rule were instead to permit the electronic filing of documents with signatures in a form that was deemed to

[1] Because in bankruptcy cases the issue most frequently arises with respect to debtors' signatures on electronically filed documents, this report generally refers to "debtors," but any proposed rule would likely apply as well to others who sign documents but do not have CM/ECF accounts.

constitute a valid signature, a requirement for retention of wet signatures by debtors' attorneys would be unnecessary. The Advisory Committee's 2013 proposal—which would have required the filing of a scanned signature page along with an electronically filed document—was an attempt at this type of solution. In proposing the amendment, the Advisory Committee was unaware, however, of the FBI's position that it would not provide conclusive expert testimony on handwriting analysis without a wet signature.

A solution that provides for an acceptable electronic signature on the document that is filed by an attorney—rather than a retention requirement—presents a challenge in the bankruptcy context. Most bankruptcy lawyers use commercial software for the creation and filing of forms that debtors must sign, such as the petition and schedules. Such software incorporating acceptable e-signature technology may not currently exist, and a rule that requires the development and purchase of new software is not desirable.

Because of the software issue, the Advisory Committee's discussion focused on requiring authorization of the use of a represented debtor's electronic signature to be retained, rather than on the use of technology that would allow an electronically filed document bearing a debtor's signature to be sufficient by itself. The Technology Subcommittee presented the following preliminary draft of an amendment to Rule 5005(a)(2)(C) for discussion:

(C) *Signing.*

(i) A filing made through a person's electronic-filing account and authorized by ~~that~~ the person whose signature appears on the document, together with that person's name on a signature block, constitutes the person's signature.

(ii) A filing under (i) is authorized by a person other than the account holder if—prior to filing—the account holder receives the document with the person's actual signature affixed or the person's signature affixed through a commercially available electronic signing technology that maintains an audit trail and other security features to ascertain the authentic identity of the signer. The account holder must retain the signed document for *x* years from the case's closing.

Discussion of the proposal brought up several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving. Some also noted that retention requirements are imposed by rules of professional responsibility and may not be appropriate for a national rule.

The Advisory Committee concluded that the question of electronic signatures of *pro se* debtors presents different issues and should be considered separately. If a local rule allows *pro se* debtors to file electronically through CM/ECF, they are covered by Rule 5005(a)(2)(C), and their electronic signature would be treated the same as an attorney with a CM/ECF account. Some Advisory Committee members thought that expansion of *pro se* litigants' rights to have CM/ECF accounts—either on a full or limited basis—would be appropriate. We understand that an inter-committee group will be considering whether national rules should be proposed that presumptively permit *pro se* litigants to file electronically, so the Advisory Committee's consideration of electronic signatures will be greatly affected by the outcome of those deliberations.

Information Item 3. Restyling.

Parts III-VI of the restyled Federal Rules of Bankruptcy Procedure have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

During its fall 2021 meetings, the Restyling Subcommittee completed its initial review of the restyled Part VIII. It also began its initial review of Part IX. Meetings will continue until the Subcommittee and style consultants have agreed on draft amendments. The Subcommittee expects to present Parts VII, VIII, and IX—the final sections of the rules—to the Advisory Committee at its spring 2022 meeting for approval and submission to the Standing Committee for publication.