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Law Office of Tracy Essig PLC

The Judicial Conference Advisory Committee on Rules of  
Bankruptcy Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544

**Treasurer**

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National Assn. of Attorney's General

Re: SABA Comments on Proposed Amendments to the  
Rules of Bankruptcy Procedure

**Immediate Past President**

Renee J. Jordan/Essig  
Law Office of Tracy Essig PLC

To the Honorable Members of the Committee:

Jay D. Befort  
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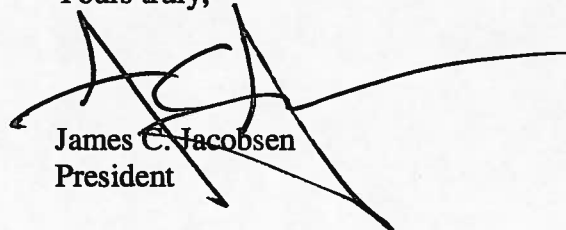
Allen Rosenberg  
Massachusetts Department of Revenue

Esther E. Tryban Telsler  
City of Chicago

The States' Association of Bankruptcy Attorneys (SABA) is an organization composed of attorneys and non-attorneys who regularly represent the interests of governmental units across the County in cases under the Bankruptcy Code. Many of our members, but not all, are public employees. We do not represent the interests of any particular government; instead we seek to protect the interests of the citizenry as a whole in insolvency process, through education, collaboration and mutual support. As such we have a keen interest in the efficient operation of the bankruptcy process. We believe the proposed amendments to the Federal Rules of Bankruptcy Procedure published June 11, 2012, if enacted, would benefit the system, but can be improved. Therefore we offer for your consideration the comments and suggestions set forth below.

Thank you for your service on the Advisory Committee. We trust you will find our comments useful, and our proposals worthy of incorporation.

Yours truly,



James C. Jacobsen  
President

Attachment

## SABA COMMENTS ON RULE CHANGES

**Format of Comments:** The original changes made by the Rules Committee are set out below. SABA's explanatory comments are listed next, and then the SABA-proposed changes are included in the text of the rule as revised by the Rules Committee. If a provision is not listed, we have no comments thereon.

### I. Rule 1014. Dismissal and Change of Venue

#### (b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS.

If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, the court in the district in which the first-filed petition is pending may determine, in the interest of justice or for the convenience of the parties, the district or districts in which any of the cases should proceed. The court may so determine on motion and after a hearing, with notice to the following entities in these cases: the United States trustee, entities entitled to notice under Rule 2002(a), and other entities as the court directs. The court in the district in which the petition filed first is pending, may order the parties to the later-filed cases not to proceed further until it makes the determination.

#### SABA COMMENTS:

We understand from the Committee Notes that the Rule changes seek to define a procedure for determining what court considers all petitions when cases are filed in more than one jurisdiction. We have some concerns that the drafting does not clearly achieve what is intended. While the Rule *allows* the first-filed court to decide the issue of which jurisdiction should consider all the petitions, the rule does not expressly state that the court where the first petition is filed shall be the *only* one to determine the issue. Nor is it clear who can initiate such a determination or whether the court may or should do so sua sponte.

The Committee Notes also state that the first-filed court may order the moving party to provide notice to the parties in the other cases, but that is not stated in the Rule (nor is it clear exactly how or why the moving party

would necessarily have that information). Further, because the stay of the other cases is not automatic, and because there is no time limit for when a determination may be requested, the other proceeding(s) may well be quite far advanced in the other court(s) before an effort is made to transfer it to the first-filed court.

SABA suggests the following revised language to address those issues:

**(b) PROCEDURE WHEN PETITIONS INVOLVING THE SAME OR RELATED DEBTORS ARE FILED IN DIFFERENT COURTS.**

If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, the court in the district in which the first-filed petition is pending shall have the exclusive authority, to determine, in the interest of justice or for the convenience of the parties, the district or districts in which any of the cases should proceed. The court shall make such a determination based upon a motion filed by any party in interest in any of the cases described above and after notice and a hearing. Notice shall be given by such entity as the court directs to the following entities in the cases described above: the United States trustee, all entities entitled to notice under Rule 2002(a) in all of the affected cases, and such other entities as the court directs. Upon the filing of such a motion, the court may order the parties to the later-filed cases not to proceed further until it makes the determination. Any such motion must be filed within not more than [X] days after the order for relief in the later-filed cases. Any determination by the first-filed court to transfer one or more such cases from the district in which they were later filed shall ensure that the parties in those cases are not prejudiced by the transfer of the case.

**II. Stern v. Marshall changes, Rules 7008, 7012, 9027**

**Rule 7008. General Rules of Pleading**

(a) Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court.

**Rule 7012 Defenses and Objections—When and How Presented— By Pleading or Motion—Motion for Judgment on the Pleadings**

(b) APPLICABILITY OF RULE 12(b)-(I) F.R. CIV. P. Rule 12(b)-(i) F.R. Civ. P. applies in adversary proceedings. A responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court

**Rule 9027. Removal**

(a) NOTICE OF REMOVAL.

(1) *Where filed; form and content.* A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court and be accompanied by a copy of all process and pleadings.

(e) PROCEDURE AFTER REMOVAL.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

**SABA COMMENTS:**

We agree with the basic thrust of these changes. Our one suggestion is that the Rules should make clear that it is possible for a party to consent to some aspects of a determination being made by the bankruptcy court, but not others. For instance, a state might consent to the bankruptcy court making a final determination on whether the stay applies to its police and regulatory

actions, while being unwilling to agree that the substantive issues in that underlying matter should be decided by the bankruptcy court at all, particularly as a final judgment. Our suggested revision would go into all four Rules provisions; we give the change for Rule 7008 as a model.

(a) Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court with respect to some or all matters at issue in the adversary proceeding.

### **III. Rule 7054. Judgments; Costs**

#### **(b) COSTS; ATTORNEY'S FEES**

(1) *Costs Other Than Attorney's Fees.* The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

#### **SABA COMMENTS:**

Our only suggestion here is that the "costs" provision should be expanded to refer to any governmental unit, not just the United States.

#### **(b) COSTS; ATTORNEY'S FEES**

(1) *Costs Other Than Attorney's Fees.* The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against a governmental unit, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

### **IV. Rule 9033. Proposed Findings of Fact and Conclusions of Law**

(a) SERVICE. In a proceeding in which the bankruptcy

court has issued proposed findings of fact and conclusions of law, the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

**SABA COMMENTS:**

Our only suggestion here is that the provision, as written, requires that the clerk must serve the findings by mail. Since virtually all service today is made electronically, this appears to be an unintended anachronism. We suggest revising it to simply provide for the clerk to serve the parties (by whatever means are normally used).

(a) SERVICE. In a proceeding in which the bankruptcy court has issued proposed findings of fact and conclusions of law, the clerk shall serve forthwith copies on all parties and note the date of service on the docket.

APPELLATE COMMENTS

**Format of Comments:** Since in these rules, the drafters have started from scratch, rather than redlining to the existing rules, our changes are made directly in the original text of the Rules Committee proposals with comments following.

**8003. Appeal as of Right—How Taken; Docketing the Appeal [And RULE 8004].**

(a) FILING THE NOTICE OF APPEAL.

(1) *In General.* An appeal from a judgment, order, or decree of a bankruptcy court to a district court or BAP under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

\* \* \* \*

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.

(1) Transmitting the Notice. After the expiration of the time set out in 28 U.S.C. 158(c)(1) for parties to make an election, pursuant to Rule 8006, to have an appeal heard by the district court, tThe bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and if no party the appellant has not elected to have the district court hear the appeal. However, if any party timely elects to have the appeal heard by the district court, Otherwise, the bankruptcy clerk must promptly transmit the notice to the district clerk upon receipt of such election.

**SABA COMMENTS:** Since appeals and cross-appeals must all be filed within the same short 14-day period, and since there is a limit of 30 days after the notices are filed for any party to elect to have the District Court hear the appeal, it seems to make more sense to simply have the bankruptcy court wait to transmit the Notice of Appeal(s) to the BAP until it is clear that no party will use its option to elect to have the matter heard in the District Court. Otherwise, the BAP may have to take the matter and docket it, only to have to remove the case from its docket and send it to the District Court within a few days if the appellee chooses the option of District Court review. On the other hand, once any party does elect to use the District Court, then there is no need to delay transmitting the notice immediately.

Similar changes should be made to Rule 8004(c) (see below).

If it is desired to move the process forward more quickly for parties willing to accept BAP review, a provision could be added to have the Statement of Election Form sent to all appellees with a request that they return it immediately if they accept the BAP jurisdiction.

#### **Rule 8004. Appeal by Leave – How Taken; Docketing the Appeal**

\* \* \* \*

#### **(C) TRANSMITTING THE NOTICE OF APPEAL AND THE MOTION; DOCKETING THE APPEAL, DETERMINING THE MOTION**

(1) After the expiration of the time set out in 28 U.S.C. 158(c)(1) for parties to make an election, pursuant to Rule 8006, to have an appeal heard by the district court, tThe bankruptcy clerk must promptly transmit the

notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district and if no party the appellant has not elected to have the district court hear the appeal. However, if any party timely elects to have the appeal heard by the district court, Otherwise, the bankruptcy clerk must promptly transmit the notice and motion to the district clerk upon receipt of such election.

**Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP**

(a) FILING OF A STATEMENT OF ELECTION. To elect to have an appeal heard by the district court, a party must:

- (1) file with the bankruptcy clerk a statement of election that conforms substantially to the appropriate Official Form; and
- (2) do so within the time prescribed by 28 U.S.C. § 158(c)(1).

**SABA COMMENTS:** Is there currently a nationally applicable Official Form? Or is this still being drafted? We have seen forms used by certain BAPs but are not clear if there is a single form being proposed. We would suggest that one be prepared if not already created.

We also strongly suggest that the Form combine the Notice of Appeal and Statement of Election into a single document. The current case law makes the ability to elect far more difficult than need be. The “separate statement” requirement is purely a creation of the current Rules, not the statute. As of now, appellants are required to file two *separate* documents which must still be filed at the *same* time. Filing the election in the same document with the notice of appeal voids the election; filing two documents that are received at different times can void the election, and so on, all of which leads to unnecessary litigation and confusion. Putting the two issues on the same form will ensure that they are filed “at the same time” as required and that the clerk has all of the relevant information in one place.

Moreover, since the official Notice of Appeal form is very short, it would be very easy to have an equally short Statement of Election added to that same form. If one is appealing, one would fill out both segments; if an appellee is merely making an election with respect to the BAP and not cross-appealing, it can simply check “not applicable” for the first segment. This should greatly simplify the matter for clerks who will not have to worry about



trying to find two separate documents and match them up to know to whom the appeal is to go.

Further, in conjunction with the proposed change to Rule 8003, the statement of election will *always* go to the bankruptcy clerk, since it will not transmit documents to the BAP until the appellee's 30-day right to elect expires, unless the appellant initially elects to use the district court.

(b) TRANSFERRING THE DOCUMENTS RELATED TO THE APPEAL.

(1) Upon receiving a ~~party's~~ ~~appellant's~~ timely statement of election, the bankruptcy clerk must transmit to the district clerk all documents related to the appeal. If no such statement is timely received, ~~Upon receiving a timely statement of election by a party other than the appellant,~~ the ~~BAP~~ bankruptcy clerk must transmit to the district clerk all documents related to the appeal to the BAP.

(c) DETERMINING THE VALIDITY OF AN ELECTION.

A party seeking a determination of the validity of an election must file a motion in the court to which the bankruptcy court has transmitted the documents pursuant to the provisions of subsection (b). ~~where the appeal is then pending.~~ The motion must be filed within 14 days after the statement of election is filed.

SABA COMMENTS: In light of some case law that says an invalid election of the district court is a nullity and the case will be heard by the BAP *despite* the attempt to elect the district court, the draft language is ambiguous. The bankruptcy clerk is given parameters in subsection (b) as to where and when to transmit the appellate documents. It is the court to whom the documents have been transmitted that should be the one that decides on the validity of an election attempt, whether the attempt turns out to be valid or not.

**Rule 8006. Certifying a Direct Appeal to the Court of Appeals**

(b) FILING THE CERTIFICATION. The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, a matter remains pending in the bankruptcy court for 30 days after the effective date, pursuant to Rule 8002, of the first notice of appeal from the

judgment, order, or decree for which direct review is sought. A matter is pending in the district court or BAP thereafter upon the valid election in accordance with Rule 8005.

SABA COMMENTS: The cross-references are inserted for clarity. The provision here that the matter remains pending in the bankruptcy court for 30 days after the first notice of appeal is consistent with the amendment we proposed to Rule 8003, postponing transmission of the record to the BAP for the same 30 days to allow the election process to take place. Retaining the appeal in the bankruptcy court for 30 days thus serves multiple purposes.

### **Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings**

(d) BOND FOR A TRUSTEE OR THE UNITED STATES. The court may require a trustee to file a bond or other appropriate security when the trustee appeals. A bond or other of security is not required when an appeal is taken by ~~the United States, a governmental unit, its officer, or its agency or~~ by direction of any department of ~~the federal~~ a governmental unit.

SABA COMMENTS: The United States should not be the only party that is excepted from the bond requirement when an appeal is taken. In general, it is our view that all governmental units should be treated equally.

### **Rule 8013. Motions; Intervention**

(a) CONTENTS OF A MOTION; RESPONSE; REPLY.

(1) *Request for Relief.* A request for an order or other relief is made by filing a motion with the district or BAP clerk where the case is pending, with proof of service on the other parties to the appeal.

SABA COMMENTS: Added for clarity only

### **Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.**

(a) (7) *Length.*

(A) *Page limitation.* A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

**SABA COMMENTS:** We have no issue with the page limits; however, we think the commentary is confused about the calculation of the applicable page limits in the Federal Rule of Appellate Procedure 32. The discussion in the Notes twice indicates that it is assumed that the FRAP rules mandate significantly shorter briefs than are now allowed in BAP or District Court appeals. This is not correct. The commentary for FRAP 32, from which these provisions are drawn, makes clear that the 30 page limit in subsection (A) is *not* the equivalent of the word or line limits in subsections (B) and (C). Rather, it is a much shorter limit that is given merely as a safe harbor. The limits in the other subsections are expected to approximate the current 50-page limits for briefs, absent any problems with the “printing ‘tricks’” referred to in the FRAP discussion. Thus, while it makes sense to use the same calculation methods, it should be clear that no significant reductions in brief lengths are being proposed. We would suggest using the following revised wording in the Committee’s Notes for the third paragraph of the comments.

Subdivision (a)(7) is revised to be consistent with F.R.App.P. 32(a)(7). As explained in the commentary to that Rule, the 30 page limit is a shorter “safe harbor” calculation; the other calculations are expected to approximate the current 50-page limits for primary briefs.

### **Rule 8017. Brief of an Amicus Curiae**

(a) WHEN PERMITTED. A governmental unit or its ~~The United States~~ or its officer or agency ~~or a state~~ may file an amicus-curiae brief without the consent of the parties or leave of court.

**SABA COMMENT:** Again, the intention is to have provisions generally applicable to all governmental entities. [Note, the provisions of Rule 8007 also apply to actions “at the direction of a department of the federal government” (or, as rephrased, any governmental unit). This Rule and Rule 8021, though, only apply to the government or its officer or agency. Is there a reason for the discrepancy? If not, we would recommend that all of the provisions be worded alike.]

**Rule 8021. Costs**

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against a governmental unit, ~~the United States~~, its agency, or its officer may be assessed under subdivision (a) only if authorized by law.

SABA COMMENT: Again, the intention is to have provisions generally applicable to all governmental entities.