UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
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January 29, 2013

MEMORANDUM

TO: Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts

FROM: Judge Dennis Montali

SUBJECT: Comments On Proposed Changes to Rules 8002, 8003, 8004, 8005, 8006, 8007, 8008, 8010, 8012, 8013 and 8019 of Federal Rules of Bankruptcy Procedure

Before making my specific comments below, I want to extend my appreciation and gratitude to the Bankruptcy Rules Committee and all of its members and advisors for their comprehensive overall of the rules governing bankruptcy appeals. The proposed changes are welcome and reflect the fact that we are in the twenty-first century and electronic filing is here to stay. They will make the entire bankruptcy appellate process run more efficiently and effectively.

I am in my twentieth year as a bankruptcy judge and for ten of those years I served as a member of the Ninth Circuit Bankruptcy Appellate Panel; in the last two years I was the Chief Judge of the BAP. Those years of service on the BAP have given me a valuable perspective about bankruptcy appeals and I believe qualify me for making the following comments.

Rule 8002(a)(2)

This subdivision deals with a notice of appeal filed after the court announces a decision. The common meaning of "announces" is an oral pronouncement but many courts just issue written decisions that trigger premature notices of appeal. There should be no confusion here. I suggest inserting the words "orally or in writing" after "announces."

Rule 8002(b)(1)

This subdivision repeats the familiar four types of tolling motions without recognizing the reality of bankruptcy practice.

For as long as I can remember losing parties have been filing motions for reconsideration, and opponents, law clerks and judges have been pointing out that there is no such motion recognized in the rules. Still courts act on such motions. I think it is time to recognize this de facto motion rather than to pretend it does not exist. I suggest adding it to the list of tolling motions presently in the rule; at least add in the Committee Note that a motion entitled motion to reconsider can be treated under this rule.

To prove my point about the common use of the phrase, simply look at proposed Rule 8013(b), which refers to a motion to reconsider.

Rule 8002(c)(1)

This subdivision makes reference to an inmate's appeal "to a district court or BAP," but that phrase does not appear in the several references to a notice of appeal in subdivision (a). Notices of appeal are of orders, judgments and decrees and they are not specifically to a district court or BAP. I suggest removing those words from this subdivision.

Rule 8003(a)(1)

This subdivision, apparently derived from current Rule 8001(a) seems redundant, particularly because proposed Rule 8002(a)(1) says that a notice of appeal "must" be filed within fourteen days of enter of the judgment, etc. I suggest removing it completely.

Rule 8004(a)

This subdivision sets forth what must be done for an appeal of an interlocutory order. It is not clear, however, whether the "harmless error" provisions of proposed Rule 8003(a)(2) apply here. It seems that they should and perhaps a comment in the Committee Note to that effect would be helpful.

Rule 8004(d)

This subdivision carries forward the provisions of current Rule 8003(c), permitting the court on appeal to consider a notice of appeal as a motion for leave to appeal. But the rule is silent as to whether a motion for leave to appeal may be treated as a notice of appeal. In my opinion it should be, and in fact proposed Rule 8005(b) plainly contemplates that result.

My concern is that an appellant who has filed the wrong document should not have to resort to a rule that deals with

elections (district court or BAP) to convince the court on appeal that the motion for leave to appeal should be treated as a timely notice of appeal. Further, the outcome of such a defective filing should be the same regardless of whether there a BAP is authorized for that particular circuit or district. Rule 8005 does not even apply in half of the country. Certainly the rule for treating a motion for leave to appeal as a notice of appeal should be the same throughout the country and an addition to Rule 8004(d) would solve the problem.

Rule 8005(a)(1)

The subdivision should make clear whether the Statement of Election should be set forth in a separate document. I believe the current practice should be continued in the new rules by requiring that separate document.

Rule 8005(c)

The proposed subdivision as drafted does not deal with the situation where the bankruptcy court erroneously transmits a notice of appeal to the district court even where no election has been made. It happens. In that case there should be a longer time, perhaps the same time the appellee has to make an election to have the appeal heard by the district court, to contest the referral to the district court. Further, even where there is a statement of election filed, requiring an appellee to file a motion within fourteen days of the filing of the statement in order to contest the election is far too short. The appellee may not even know about the problem until that time has nearly run. I suggest lengthening the time to parallel the time for the appellee to file a separate election.

Rule 8006(d)

I believe requiring the bankruptcy court to make its own certification under Rule 8006(d) within thirty days of the effective date of the notice of appeal is far too short. Assume an appeal of an order for which there is no motion to reconsider or other tolling motion. Now that the clerk will be transmitting the appeal to the district court or BAP immediately, there are only thirty days or less before the matter is “pending” in the appropriate appellate court. At that time the bankruptcy court loses the ability to make a certification under Rule 8006(d).

To hold the bankruptcy court to a maximum of thirty days in order to make the certification, when that court is probably the most qualified and in the best position to do so, seems to be unreasonably short. There does not appear to be any proposed change to Rule 9006 that would allow the bankruptcy court to

extend that time. To complicate the matter further, a request for certification by a majority of the parties under Rule 8006(f) may be made within sixty days of entry of the judgment. Thus midway through that sixty day time period the court that may make the certification changes from the bankruptcy court to the district court or BAP. This is an invitation for confusion that can be solved by extending the time for the original certification to at least sixty days or in the alternative letting the bankruptcy court extend the time before the thirty days run.

Rule 8007(b)

Making a motion for a stay to the bankruptcy judge is nearly always a waste of time but that has been the law for too long to change. While I often entertain such motions orally when I announce my ruling, and then recite in the order that the stay was requested and denied, other judges require a written motion only after entry of the order to be appealed. This is a further waste of time, particularly when time is short enough to try to get a stay before everything becomes moot.

My suggestion is to make the stay request to the bankruptcy judge permissive rather than mandatory, and to make absolutely clear that when the stay is denied (as it normally is) and the appellant asks the district court or BAP for a stay, that request is to be considered de novo, and not to be treated as a review of the bankruptcy judge's discretionary denial. This would effectively abrogate decisions such as Wymer v. Wymer (In re Wymer), 5 B.R. 802, 805-07 (9th Cir. BAP 1980) that are often cited by unstayed appellees who ask that the district court or BAP apply an abuse of discretion standard and "affirm" the bankruptcy judge's denial of the stay. If abuse of discretion is the standard here, it will be nearly impossible for a district court or BAP to "reverse" a bankruptcy court's denial of a stay motion.

Rule 8008(c)

Since the revised rules in Part VIII deal, in part, with direct appeals to the court of appeals, it seems that this subdivision should be expanded to say that the court of appeals on a direct appeal may make the remand to the bankruptcy court after an indicative ruling. While I recognize that FRAP 12.1 deals with remand by the court of appeals after indicative rulings, a separate provision is necessary for direct appeals because FRAP 12.1 does not contemplate remand to the bankruptcy court. Further, the draft Committee Note, in paragraph 2, even states that "this provision applies to appeals pending in . . . the court of appeals." The rule should be consistent with the

comment.

Rule 8010(b)(4)

When the court where the appeal is pending directs that paper copies be provided, it may be appropriate for the appellee to provide them. I suggest adding at the end of the first sentence the following: "or the appellee where appropriate."

Rule 8012(a)

It may be worth adding a comment in the Committee Note that "corporate party" includes limited liability partnerships, limited liability companies, or other entities that fit within the bankruptcy code definition of "corporation" at 11 U.S.C. § 101(9).

Rule 8013(b)

As noted earlier, here the drafters recognize a motion to reconsider, a motion that should be elevated to equal dignity under Rule 8002(b).

Rule 8013(e)(2)

This subdivision permits the BAP to review a single BAP judge's action. BAPs typically sit in panels of three judges (see 11 U.S.C. § 158(b)(5)), but some have authority under certain circumstances to sit en banc, I suggest that this rule be revised to begin: "A three judge BAP panel may review a single judge's action. . . ."

Rule 8019(b) and (g)

There is an inconsistency between these two subdivisions. Subdivision (b) requires unanimity among BAP judges assigned to hear an appeal to dispense with oral argument, yet subdivision (g) simply says the BAP may direct that, notwithstanding the parties' agreement to submit on the briefs, the case be argued. I would suggest that a simple majority of the traditional three judge BAP panel be sufficient either to dispense with oral argument in subdivision (b) or to require it in subdivision (g).

Thank you for considering my comments.