ADVISORY COMMITTEE ON BANKRUPTCY RULES

Second Amended Minutes of the Meeting of February 1, 1990

Washington, D.C.

The Advisory Committee on Bankruptcy Rules met at 1 p.m. in Courtroom One of the National Courts Building. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edward Leavy
District Judge Malcolm J. Howard
District Judge Joseph L. McGlynn, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Joseph G. Patchan, Esquire
Harry D. Dixon, Esquire
Bernard Shapiro, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

The following additional persons also attended the meeting:

W. Reece Bader, Esquire, Member of the Committee on Rules of Practice and Procedure and liaison with this Committee
Peter G. McCabe, Assistant Director for Program Management, Administrative Office
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
Gordon Bermant, Research Division, Federal Judicial Center
John E. Logan, Acting Director and Counsel, Executive Office for United States Trustees, U.S. Department of Justice
James H. Wannamaker, Attorney, Bankruptcy Division, Administrative Office

James E. Macklin, Jr., Secretary to the Committee on Rules of Practice and Procedure and Deputy Director of the Administrative Office, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman indicated that Committee members Ralph R. Mabey and Herbert P. Minkel, Jr., were unable to attend the meeting due to schedule conflicts. Judge Edith Hollan Jones was unable to attend due to illness.

The approval of the minutes of the October 18, 1989, meeting was moved and seconded. The motion carried on a unanimous vote.

Professor King suggested that witnesses testifying at a public hearing before the Committee be required to submit written statements a specified number of days in advance of the hearing. He indicated that this would permit committee members to review the statements in advance and ask follow-up questions as needed. The Chairman directed Ms. Channon to call the three persons who have signed up to testify at the Dallas hearing and request that they submit written reports a minimum of seven days before the hearing. She will distribute the statements to committee members prior to the meeting.

Proposed Amendments to the Bankruptcy Rules

The next order of business was the consideration of comments on and suggested changes in the proposed amendments to the Bankruptcy Rules. The Committee considered comments and suggested changes submitted by the National Association of Credit Management; Ms. Lori Lapin Jones, Esquire; the Securities Investor Protection Corporation (SIPC); Mr. Michael L. Temin, Esquire; Walter W. Mounts, Clerk; Ms. Margaret Sheneman, Esquire; Mr. Ralph R. Mabey, Esquire; and Professor Larry King. Consideration of several matters was deferred until after the hearing on February 15, 1990, in expectation that the Committee would receive additional comments on these matters. Consideration of the comments and suggestions made by the Executive Office for United States Trustees and the Department of Justice was deferred in order to give the Reporter and the committee members time to review the material more thoroughly.

National Association of Credit Management. The Committee agreed to consider immediately the comments and suggested changes submitted by the National Association of Credit Management so that the Association's testimony earlier in the day would be fresh in the committee members' minds.

Rule 1009(a). In its testimony and prepared statement, the Association suggested allowing the debtor to amend the voluntary petition, lists, schedules, and statements as a matter of course only within 60 days following the filing of the petition. After 60 days, leave of court would be required for an amendment.

Several committee members indicated that there does not appear to be any problem with the provision in the current rule which permits the debtor to amend as a matter of course at any time until the case is closed. Although the Association indicated that some debtors intentionally omit certain creditors from the schedules, Professor King stated that doing so deliberately would constitute perjury on the debtor's part. Judge Howard moved to reject the suggestion. **The motion carried.**

Rule 1017(e). The Association suggested giving the United States trustee 120 days after the debtor's first appearance at a § 341(a) meeting of creditors to file a motion for the dismissal of the case for substantial abuse pursuant to § 707(b). The Association indicated that the additional time is needed to gather the information which is used to prepare such a motion. The Reporter opposed the suggestion, indicating that it would unnecessarily delay the administration of the case. **The Committee voted to reject the suggestion.**

Rule 2007(a). The Association suggested setting a 45-day deadline for filing motions for the court to determine whether the composition of a pre-petition committee later appointed as the creditors' committee satisfies the requirements of § 1102(b)(1). The Association stated that a recalcitrant creditor should not be permitted to wait until a pre-petition committee is actively involved in the case before objecting to the committee's composition. **The Reporter opposed the suggestion, which was rejected after a brief discussion.**

Rule 3001(e). The Association suggested that transfers of claims pursuant to policies of credit insurance be exempted from the requirements of the rule. The Association stated that requiring compliance with the rule would be burdensome and would increase the cost of credit insurance. The Committee discussed the transfer of claims and Judge Leavy stated that the court records should reflect who holds claims against the estate. Judge Leavy moved to reject the suggestion. **The motion carried.**

Ms. Lori Lapin Jones, Esquire. In her testimony and prepared statements, Ms. Jones suggested that the proposed amendment to Rule 5002 be revised to provide that the court shall approve the employment of a relative of the United States trustee "unless the court finds that the employment would be improper under the circumstances of the case." She indicated that this would avoid any implication that the relationship itself is sufficient to trigger a disqualification. Judge Leavy indicated that the suggestion would place relatives of the United States trustee in the same position as anyone else because the court would disapprove of the employment of anyone whose employment would be improper. The Reporter opposed the suggestion and stated that the published draft amendment goes as far as it can

in permitting the employment of relatives of the United States trustee. Judge Leavy moved to reject the suggestion. **The motion carried.**

Securities Investor Protection Corporation. In its testimony and prepared statement, the SIPC suggested that Rule 2002(k) be amended to provide that nothing in the Bankruptcy Rules requires that notice be given to the United States trustee in cases administered under the Securities Investor Protection Act of 1970 (SIPA). Mr. Logan stated that he would ask the United States trustees to inform the courts that they do not wish to receive notice in SIPA cases. The Reporter and Judge Leavy expressed concern that the rule should not take a position on the substantive question of whether the United States trustee has any role in SIPA cases. The Chairman stated that the amendment would not prohibit notice to the United States trustee; it just would not require notice. Mr. Heltzel indicated that it often is easier for the clerk to give the notice rather than eliminating the United States trustee from the mailing matrix. Judge Leavy moved to accept the SIPC's suggestion. **The motion carried on a vote of 6-3.**

The Committee turned next to the comments and changes suggested by the bench and bar and set out in the Reporter's memorandum of January 22, 1990.

Rule 1007. Mr. Michael L. Temin, Esquire, is the chairman of the Rules Subcommittee of the Business Bankruptcy Committee of the Business Law Section of the American Bar Association. He suggested in his testimony and prepared statements that § 1114 committees of retirees should receive the same notice as is provided to other committees. He stated that, if § 1114 committees have the same rights, powers, and duties as other committees, they should have the same notice. The Reporter stated that § 1114 committees have the same rights, powers, and duties as other committees only for the purpose of carrying out the intent of §§ 1114 and 1129(a)(13). The Reporter recommended rejecting the suggestion. **The Committee agreed unanimously.**

Rule 1017(e). Walter Mounts, clerk of the bankruptcy court for the Western District of Oklahoma, suggested in a written comment that the deadline for § 707(b) motions be 15 days after the first date set for the § 341(a) meeting of creditors. Mr. Mounts stated that the deadline included in the proposed amendment to Rule 1017(e), 60 days after the debtor's first appearance for examination at the § 341(a) meeting, conflicts with the requirement in Rule 4004(c) that the discharge be entered 60 days after the first date set for the § 341 meeting. The Reporter noted that the Committee voted on January 18, 1990,

to use the Rule 4004(c) time period in Rule 1017(e). The Committee rejected the suggestion of Mr. Mounts.

Rule 4004(c). The Reporter suggested that Rule 4004(c) be amended to provide that the discharge shall not be entered if a Rule 1017(e) motion is pending. In light of the importance of entering the discharge in a timely manner, Judge Barta questioned whether the discharge should be deferred merely because the court or the United States trustee has a busy docket and is unable to try a § 707(b) motion before the deadline. Mr. Logan stated that the United States trustees have lost a number of § 707(b) motions because they could not be heard before the time to enter the discharge and because the court would not defer the discharge. Professor King discussed the origin of § 707(b) and questioned whether Congress intended for the statute to be effective. Judge Leavy stated that it is the business of the court to hear § 707(b) motions and, if that involves delaying the discharge, it is a legitimate cost. He stated that it is wrong to deny the motion by the passage of time. Judge Leavy moved to adopt the Reporter's suggestion. The motion carried on a vote of 7-3.

Judge Meyers asked whether the proposed amendment to Rule 4004(c) required publication. Professor King stated that the published preliminary draft of the proposed amendments set a deadline for § 707(b) motions for the first time and provided sufficient notice of the change. Judge Mannes moved to include the change in the present package of amendments. The motion passed.

Rule 1019. Mr. Temin suggested that the requirement of filing a final report and account be omitted from Rules 1019(5) and 5009(a) as holdovers from practice under the Bankruptcy Act. He stated that, if a final report and account is to be required, the rule should specify its content. The Reporter indicated that a final report and account is still required by § 704(9). He stated that the United States trustee should specify its content. Judge Howard moved to reject Mr. Temin's suggestion. The motion passed unanimously.

Rule 2002(a)(3). Mr. Temin suggested that agreements settling objections to claims should be excluded from the notice requirements of Rule 2002(a)(3). He stated that giving such notice could cause significant expense in a sizable case. The Reporter indicated that settlement of a large claim against the estate could be significant to all creditors. He recommended rejecting the suggestion. Judge Howard moved to reject the suggestion. The motion carried unanimously.

Rule 2007. The Committee deferred consideration of the comments and suggestion by Mr. Thomas Stanton, former director of the Executive Office for United States Trustees.

Mr. Temin suggested deleting the rule, which he indicated contains several ambiguities concerning the eligibility of pre-petition committee members to serve on post-petition committees and the authority of the court to review the appointment of other committees. The Reporter recommended adding a paragraph to the Committee Note to clear up any ambiguities. Judge Barta moved to accept the Reporter's recommendation and approve the draft of the paragraph to be included in the Committee Note. **The motion passed on a vote of 10-0.**

Ms. Sheneman suggested that the rule be amended to delete references to vacating the appointment of the entire committee. She indicated that less drastic remedies, such as expansion or reduction of the committee, would avoid leaving creditors with no representation in the early part of the case. The Reporter agreed with Ms. Sheneman's comment and suggested that the word "and" be changed to "or" in line 39 of the published draft amendment. Several committee members indicated that the court should not appoint new committee members because that is the responsibility of the United States trustee. Professor King moved to reject both Ms. Sheneman's suggestion and the Reporter's suggestion. The Reporter withdrew his suggestion. **The motion carried unanimously.**

Rule 2007.1. Ms. Sheneman suggested adding the words "person as" at the end of line 2 of the published draft amendment in order to clarify that any party in interest may move for the appointment of a trustee or examiner. The Reporter recommended rejection of the suggestion as unnecessary, but offered the Committee an option for clarifying subdivision (b) by adding the words "person to serve as" before "trustee" on line 6. Mr. Shapiro moved to reject both Ms. Sheneman's suggestion and the Reporter's clarification. **The motion carried unanimously.**

Rule 3001(e). Professor King moved to defer consideration of Ms. Sheneman's comments on trading claims. He stated that the Committee may receive more testimony on the matter at its hearing in Dallas. **The Committee agreed to defer the matter.**

Rule 3002(c). Mr. Temin suggesting changing the five-day period for filing proofs of claim in chapter 12 cases to eight days in order to avoid any confusion in applying Rule 9006(a). The latter rule excludes Saturdays, Sundays, and holidays from the computation of periods of time of less than eight days. The Reporter indicated that the change from five days to eight might avoid confusion and would not interfere with the purpose of the published draft amendment, which is to require that claims be filed before chapter 12 confirmation hearings. Professor King stated that the draft amendment did not prescribe a five-day period, but prescribes a period ending five days after the first date set for the § 341(a) meeting. Thus, Rule 3002(c) prescribes a period of at least 25 days after the petition for relief. The

Reporter indicated that the distinction could be confusing. Judge Leavy moved to reject Mr. Temin's suggestion. **The motion failed on a vote of 6-2.** Judge Barta moved to increase the time from five days to eight. **The motion passed on a vote of 5-1.**

Rule 3016(a). **The Committee deferred consideration of Professor Kennedy's, Mr. Temin's, and Ms. Sheneman's comments on the proposed deadline for filing additional chapter 11 plans.** The Reporter indicated that the Committee may receive additional testimony on the matter.

Rule 3017(d). Mr. Temin and Ms. Sheneman suggested deletion of the provision in the published draft amendment that would authorize the court to direct that copies of the plan and approved disclosure statement not be mailed to unimpaired classes. Mr. Temin stated that every party should be given an opportunity to object to the plan. Ms. Sheneman indicated that the issue of impairment may be disputed, which requires that members of the classes that the plan proponent designates as unimpaired must receive notice of the designation.

Mr. Shapiro stated that the major players in a chapter 11 case know what the plan and disclosure statement say. If the plan provides that a whole class of trade creditors is to be paid in full, Mr. Shapiro indicated, they do not need to receive notice of the confirmation hearing and copies of the plan and disclosure statement. Judge Leavy stated that a plan proponent who wants the reorganization to work has an incentive to be cautious in designating unimpaired classes: avoiding future litigation over the designation and effectiveness of the discharge. He stated that the draft rule gets rid of the cost and bother of lots of unnecessary notice but at the peril of the plan proponent, the party who makes the initial "unimpaired" designation.

Professor King stated that Rule 2002(b) requires that all parties in interest receive notice of the confirmation hearing, which conflicts with the proposed amendment of Rule 3017(d). The Reporter indicated that, if there is a conflict, Rule 3017(d) should be revised to conform with Rule 2002(d). Professor King moved to revise the published draft amendment of Rule 3017(d) to require that members of unimpaired classes receive notice of the confirmation hearing. **The Committee agreed by a vote of 7-1.**

Rule 3022. Ms. Sheneman suggested that the Committee Note should be revised to state that deletion of the reference in the current rule to an injunction is not intended to foreclose the possibility of an injunction which may be entered by way of the final decree. She also suggested inclusion of the second sentence of the Committee Note in the rule itself. The Reporter indicated that the Committee Note could state that the amendments are not intended to prohibit inclusion in the final decree of

appropriate provisions by way of injunction or otherwise. He stated that Ms. Sheneman's second suggestion is unnecessary. Judge Leavy moved to leave Committee Note as published. The motion carried.

Rule 4001. The Committee agreed to defer consideration of Mr. Temin's and Ms. Sheneman's comments and suggestions in the expectation of receiving additional testimony on the matter.

Rule 4003. Ms. Sheneman suggested adding the words "or supplemental schedules filed under Rule 1007(h)" after the word "list" in line 11 of the published draft amendment. The Reporter agreed with her suggestion but proposed the language "or supplemental schedules" and the addition of a Committee Note. The Committee voted unanimously to accept the Reporter's recommendation.

Rule 5002. Mr. Stanton had objected to the proposed rule as an improper imposition of ethical standards for members of the executive branch by means of a judicial rule. The Reporter disagreed, stating that the rule merely provides standards for the court to use when court approval of appointments or employment are required by statute. The Committee deferred consideration of the matter in the expectation of receiving additional testimony.

Rule 5008. Mr. Stanton had noted that, pursuant to Rule X-1001(b), the current rule is not effective in United States trustee districts. He stated that there is no conceptual difference between determining the sufficiency of a bond, which the proposed rule assigns to the United States trustee, and approving the deposit of securities, which the proposed rule provides shall be done by court order. The Reporter recommended that the matter be reconsidered and stated that § 345(b) is silent on who shall approve the deposit of securities. Professor King stated that § 345(b) governs deposits or investment of estate moneys by the trustee and that the United States trustee supervises the trustees. Therefore, he indicated, the United States trustee may logically approve the deposit of securities pursuant to § 345(b), as was the practice in the pilot United States trustee districts. Mr. Logan stated that approving the deposit of securities involves considerable minutia, but that the United States trustees would continue to perform this function as part of their supervisory responsibility, even if court approval is required. Professor King moved to abrogate Rule 5008. The Committee agreed unanimously.

Rule 5009. Mr. Stanton had requested deletion of the statement in the Committee Note that the court may order the United States trustee to file a certification or submit reasons why one may not be filed. The Committee deferred consideration of the request as it has been superseded by the comments filed by

the United States at the hearing earlier in the day and which the Committee desired to study before reaching a decision.

Rule 8004. Ms. Sheneman suggested deleting the sentence "Failure to serve notice shall not affect the validity of the appeal." She suggested adding the following sentence to the end of the rule: "Failure to serve notice on a party or to transmit a copy of the notice to the United States trustee shall not affect the validity of the appeal." The Reporter agreed with her suggestion, but recommended retaining the existing language and adding the following language at the end of the rule: "but failure to transmit such shall not affect the validity of the appeal." **The Committee voted 5-3 to accept the Reporter's recommendation.** Professor King abstained.

Rule 9014. Mr. Temin suggested that the rule be amended to permit local rules to provide that answers must be filed to all motions. The Reporter recommended rejection of the suggestion, indicating that, if there is good reason to avoid the necessity of answers to motions unless the court orders otherwise in a particular matter, this provision would be negated by such blanket local rules. Professor King stated that the existing rule already permits the court to order answers by means of a local rule or by an order in a particular matter. **The Committee voted unanimously to reject Mr. Temin's suggestion.**

Rule 9027(a)(1). Mr. Temin stated that the rule incorrectly implies that a case may be removed from another federal court to a bankruptcy court. The Reporter disagreed, stating that a civil action may be removed from a state or federal court in another district to the district court in which the bankruptcy case is pending. The district court to which the civil action is removed usually automatically refers it to the bankruptcy court. **The Committee agreed to reject Mr. Temin's suggestion.**

New Rule 9036. Ms. Sheneman suggested that the transition provisions for the proposed amendments be set out in a new rule. The Reporter indicated that this is a good idea, but that in the past the Supreme Court has included transition provisions in the orders adopting amendments. Professor King moved to reject Ms. Sheneman's suggestion. **The Committee agreed unanimously.**

Mr. Ralph R. Mabey. The Committee turned next to the comments and suggested changes set out in Mr. Mabey's memorandum of January 10, 1990.

Rule 1017. Mr. Mabey noted that Rule 1017 refers to the dismissal of a "petition" while §§ 305, 707, 1112, 1208, and 1307 refer to the dismissal of "cases." Mr. Shapiro moved to revise the rule to refer to the dismissal of "cases," not "petitions." **The Committee agreed unanimously.**

Rule 1017(a). Mr. Mabey indicated that Rule 1017(a) appears to require notice to all creditors of dismissal hearings in chapter 13 cases. Rule 2002(a)(5), however, does not require notice of dismissal hearings in chapter 13 cases. Mr. Mabey suggested amending Rule 2002(a)(5). Judges Barta and Mannes stated that creditors do not need notice of chapter 13 dismissal hearings, most of which are for failure to make plan payments or to file case papers. **Mr. Mabey's suggestion failed for lack of a motion.**

Rule 9006(b)(3). Mr. Mabey suggested that Rule 9006(b)(3) be amended to limit the extension of time to file § 707(b) motions. The Reporter agreed with the suggestion. **The Committee voted to accept the suggestion.**

Professor Larry King. The Committee turned next to the comments and suggested changes set out in Professor King's letter of December 29, 1989.

Rule 3003(c)(3). Professor King suggested amending Rule 3003(c)(3) to provide explicitly for the application of Rule 3002(c)(3) in chapter 11 cases. The Reporter agreed and recommended the application of the provisions of subsections (c)(2) and (c)(4) of Rule 3002 as well. Mr. Shapiro moved the adoption of the Reporter's recommendation. **The motion carried unanimously.**

New Rule 3017(e). Professor King suggested addition of a new subdivision (e) to provide for the transmittal of the disclosure statement, plan, and related documents to the beneficial owners of stock, bonds, debentures, notes, and other securities held in street names. The Reporter recommended adoption of the suggested amendment and Committee Note. Judge McGlynn moved that the Committee accept the recommendation. **The motion carried unanimously.**

Rule 2003(g). The Reporter discussed the discrepancy between proposed Rules 2003(g) and 2002(f). Rule 2003(g) requires notice of the trustee's final account if the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $250. Rule 2002(f) requires notice of the trustee's final report and account in a chapter 7 case only if the net proceeds realized exceed $1,500. The Reporter recommended amending Rule 2003(g) to conform to the $1,500 figure in Rule 2002(f). Judge McGlynn moved that the Committee accept the recommendation. **The motion carried unanimously.**

Adjournment and Future Meetings

The Chairman indicated that discussion of comments by the bench and bar on the proposed amendments to the Rules probably can be completed at the Committee's meeting of March 15-16, 1990, and that consideration of the revisions to the Official Bankruptcy Forms might be advanced to the Committee's April meeting. The balance of the April meeting could be used to develop an agenda which could be passed on to future committees, especially if a new chairman is selected for the Committee. Among the matters to be considered for inclusion on such an agenda is further study of the nature and extent of problems with the application of the Bankruptcy Rules in Chapter 13 cases.

Judge Leavy invited the Committee to meet in Oregon during the summer.

The Chairman adjourned the meeting at 3 p.m., February 1, 1990.

The next meeting of the committee will be held on February 15, 1990, following a public hearing on the proposed amendments to the Bankruptcy Rules at the United States Bankruptcy Court in Dallas, Texas.

Respectfully submitted,

James H. Wannamaker, III
Attorney
Division of Bankruptcy