ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 24-25, 1994

Sea Island, Georgia

AGENDA

Introductory Items

Approval of minutes of September 1993 meeting.

Report of January 1994 meeting of Standing Committee.

Rules

1. Published amendments to Rules 8018, 9029, and 9037 re: local rules, standing orders, and technical amendments. [Materials: Reporter's memorandum dated 12/27/93.]

2. Proposed amendment to Rule 9014 to make certain 1993 amendments to Fed.R.Civ.P. 26 inapplicable in contested matters. [Materials: Reporter's memorandum dated 01/03/94.]

3. Proposed amendments to Rule 3002 to conform the rule to §726 of the Code. Related proposed amendments to Rules 1019, 2002, and 9006. [Materials: Reporter's memorandum dated 01/06/94.]

4. Proposed amendments to Rules 1007(c) and 1019 concerning converted cases. [Materials: Reporter's memorandum dated 01/05/94.]

5. Proposed amendments to Rule 7004 to conform to 1993 amendments to Fed.R.Civ.P. 4. [Materials: Reporter's memorandum dated 01/09/94 and House Document 103-74 (amendments to Federal Rules of Civil Procedure).]

6. Proposed amendments to Rule 1006 to include administrative fee and to authorize chapter 13 trustee to collect filing fee installments on behalf of the clerk. Proposed adaptation of Official Form 3. [Materials: Reporter's memorandum dated 01/08/94; copy of proposed form.]

7. Proposed amendment to Rule 8002 re: filing of notice of appeal by an inmate. [Materials: Reporter's memorandum dated 01/07/94.]

8. Proposed amendments to Rules 3017, 3018, and 3021 re: record date for voting and distribution purposes. [Materials: Reporter's memorandum dated 01/04/94.]

9. Proposed amendment to Rule 2002(f)(8) to delete reference to final "account". [Materials: Reporter's memorandum dated 01/08/94.]

10. Proposed amendments to Rule 2002(h) and 3015(g) so that notice of a chapter 7 trustee's final report and modification of a chapter 13 plan would not be sent to creditors who failed to file claims. [Materials: Reporter's memorandum dated 01/09/94.]

11. Discussion of possible amendments to rules in response to the Supreme Court's interpretation of "excusable neglect" in the Pioneer Investment case. [Materials: Reporter's memorandum dated 01/10/94.]

Information Items

Copies of amendments to Rules 2015, 3016, and 4004 that were approved at the February 1993 meeting; copy of amendment to Rule 8002(c) that was approved at the September 1993 meeting. [Copies provided.]

Time line of the rules amendment process. [Materials to follow.]

Subcommittees

Report of the Subcommittee on Technology.

Report of the Subcommittee on Local Rules.

Report of the Subcommittee on Alternative Dispute Resolution.

Reporter of the Subcommittee on Forms.

Next Meeting

The next meeting will be held September 22-23, 1994, at a location to be selected.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

1/19/94

Chair:

Honorable Paul Mannes Chief Judge, United States Bankruptcy Court 451 Hungerford Drive Rockville, Maryland 20850	Area Code 301 344-8047 FAX-301-227-6452

Members:

Honorable Alice M. Batchelder United States Circuit Judge 807 East Washington Street Suite 200 Medina, Ohio 44256	Area Code 216 722-8852 FAX-216-723-4410
Honorable Adrian G. Duplantier United States District Judge United States Courthouse 500 Camp Street New Orleans, Louisiana 70130	Area Code 504 589-2795 FAX-504-589-4479
Honorable Eduardo C. Robreno United States District Judge 3810 United States Courthouse Philadelphia, Pennsylvania 19106	Area Code 215 597-4073 FAX-215-580-2362
Honorable Jane A. Restani United States Court of International Trade One Federal Plaza New York, New York 10007	Area Code 212 264-3668 FAX-212-264-8543
Honorable James J. Barta United States Bankruptcy Judge One Metropolitan Square 211 North Broadway, Seventh Floor St. Louis, Missouri 63102-2734	Area Code 314 425-4222,Ext.321 FAX-314-425-4753
Honorable James W. Meyers Chief Judge, United States Bankruptcy Court 940 Front Street San Diego, California 92189	Area Code 619 557-5622 FAX-619-557-5536
Professor Charles J. Tabb University of Illinois College of Law 504 East Pennsylvania Avenue Champaign, Illinois 61820	Area Code 217 333-2877 FAX-217-244-1478

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Henry J. Sommer, Esquire Community Legal Services, Inc. 3207 Kensington Avenue, 5th Floor Philadelphia, Pennsylvania 19134	Area Code 215 427-4898 FAX-215-427-4895
Kenneth N. Klee, Esquire Stutman, Treister & Glatt 3699 Wilshire Boulevard, Suite 900 Los Angeles, California 90010	Area Code 213 251-5100 FAX-213-251-5288
Gerald K. Smith, Esquire Lewis and Roca 40 North Central Avenue Phoenix, Arizona 85004-4429	Area Code 602 262-5348 FAX-602-262-5747
Leonard M. Rosen, Esquire Wachtell, Lipton, Rosen & Katz 51 West 52 Street New York, New York 10019	Area Code 212 403-1000 FAX-212-403-2000
Neal Batson, Esquire Alston & Bird One Atlantic Center 1201 West Peachtree Street Atlanta, Georgia 30309-3424	Area Code 404 881-7267 FAX-404-881-7777

Reporter:

Professor Alan N. Resnick Hofstra University School of Law Hempstead, New York 11550	Area Code 516 463-5930 FAX-516-481-8509

Liaison Member:

Honorable Thomas S. Ellis, III United States District Judge P.O. Box 21449 200 South Washington Street Alexandria, Virginia 22320	Area Code 703 557-7817 FAX-703-557-2830

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Bankruptcy Clerk:

Richard G. Heltzel	Area Code 916
Clerk, United States Bankruptcy Court	551-2678
8038 United States Courthouse	
650 Capitol Mall	FAX-916-551-2569
Sacramento, California 95814	

Representative from Executive Office for United States Trustees:

John E. Logan, Esquire	Area Code 202
Director	307-1391
Executive Office for	
United States Trustees	FAX-202-307-0672
901 E Street, NW, Room 700	
Washington, D.C. 20530	

Secretary:

Peter G. McCabe	Area Code 202
Secretary, Committee on Rules of	273-1820
Practice and Procedure	
Washington, D.C. 20544	FAX-202-273-1826

ADVISORY COMMITTEE ON BANKRUPTCY RULES

PRELIMINARY DRAFT
Minutes of the Meeting of September 13 - 14, 1993

Jackson Hole, Wyoming

The Advisory Committee on Bankruptcy Rules met at 9:00 a.m. on September 13, 1993, in a conference room of the Jackson Lake Lodge in Jackson Hole, Wyoming. The following members were present:

Circuit Judge Edward Leavy, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Joseph L. McGlynn, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Kenneth N. Klee, Esquire
Ralph R. Mabey, Esquire
Herbert P. Minkel, Jr., Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Alan N. Resnick, Reporter

One committee member was unable to attend: District Judge Harold L. Murphy.

The following persons also attended all or a part of the meeting:

District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee
John E. Logan, Director, Executive Office for United States Trustees, U.S. Department of Justice
Peter G. McCabe, Assistant Director for Judges Programs, Administrative Office of the U.S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
James H. Wannamaker, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
Elizabeth C. Wiggins, Research Division, Federal Judicial Center

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.

References to the Standing Committee are to the Committee on Rules of Practice and Procedure. References to the Bankruptcy Rules or the Rules are to the Federal Rules of Bankruptcy Procedure. References to the Official Forms are to the Official Forms prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009. References to the Civil Rules are to the Federal Rules of Civil Procedure. References to the Appellate Rules are to the Federal Rules of Appellate Procedure. References to the Criminal Rules are to the Federal Rules of Criminal Procedure. References to the Evidence Rules are to the Federal Rules of Evidence.

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

Preliminary Matters

The Chairman opened the meeting by welcoming two new members, Judge Batchelder and Professor Tabb, and requesting that all attendees introduce themselves. The Chairman recognized Judge Mannes, who has been appointed by the Chief Justice to serve as the next chairman of this Committee. The Chairman announced that Judge Alicemarie H. Stotler has been appointed as chair of the Standing Committee.

Mr. Sommer moved that the draft minutes of the February, 1993, meeting be approved. **The Committee approved the minutes by voice vote.**

Standing Committee

The Reporter stated that the Standing Committee approved the proposed amendments to Bankruptcy Rules 8002 and 8006 at its meeting in June, 1993. The amendments were to be submitted to the Judicial Conference the next week.

The Standing Committee has directed the publication for public comment of a proposed uniform rule on local rules and standing orders. As revised by the reporters for the advisory committees on the Civil, Criminal, Appellate, and Bankruptcy Rules, the uniform rule would be incorporated in Bankruptcy Rules 9029 and 8018. The Chairman expressed concern that this Committee had not considered the revised amendments, although the Chairman and the Reporter helped draft the revision.

The Standing Committee also directed the publication of a uniform rule on technical amendments to the Civil, Criminal, Appellate, and Bankruptcy Rules. The proposed uniform rule, which would be Bankruptcy Rule 9037, would authorize the Judicial Conference to make certain technical, nonsubstantive changes in the rules without approval from the Supreme Court and the Congress. The Reporter stated that this Committee was the only advisory committee to oppose the proposed uniform rule. Several members of the Committee expressed concern about how strictly technical amendments would be defined. The Reporter stated that he has been assured that each of the advisory committees will have input in future rule changes. Judge Ellis stated that he does not anticipate that future amendments would be adopted over the adamant opposition of this Committee.

The Reporter stated that the Style Committee of the Standing Committee expects to complete redrafting the entire body of the Civil Rules by the end of the year and then will turn to the Appellate Rules. Afterwards, this Committee will have to review those bankruptcy rules which incorporate the revised rules by reference.

As a result of this Committee's work on the revision of Rule 8002, discrepancies were discovered in the references to the deadlines for post-judgment motions. Civil Rules 50, 52, and 59 require that the motions be "made" or "served" within a certain time, whereas the Bankruptcy Rules require that the motions be "filed" by the deadline. The Reporter stated that the Civil Rules will be revised to conform to the use of "filed" in the Bankruptcy Rules.

The Reporter stated that both this Committee and the Standing Committee had opposed the proposed liberalization of the guidelines for filing by facsimile. Although the Committee on Court Administration and Case Management has insisted on going forward with consideration of the changes, it has accepted a revised draft prepared by the reporters for the rules committees. If adopted by the Judicial Conference, the revised guidelines would apply in bankruptcy matters when adopted by the local court and where authorized by the Rules, i.e., in adversary proceedings pursuant to Rule 7005. Mr. Mabey expressed concern that the proposed new guidelines exclude petitions and proofs of claim, creating a negative inference that other papers in bankruptcy cases may be filed by facsimile.

The Committee discussed filing by facsimile and by electronic transmission, and how original signatures could be accommodated by the two processes. Mr. Klee stated that an original signature is important for both Rule 9011 sanctions and perjury prosecutions. Mr. Minkel expressed concern that an electronic claim might be misplaced more easily than a piece of paper. Mr. Heltzel stated that there is the same potential for

misplacing either one. He said electronic dockets are backed up on the computer's hard disk, on tapes stored in the clerk's office, and on tapes stored off the premises. Mr. Minkel stated that the Committee should consider electronic filing in the context of the paper flow and the integrity of the record, especially in large cases in which the court may use a contractor to maintain some of the case papers.

The Chairman stated that it is important for the Committee to move forward and exercise leadership on the issue of electronic filing. He suggested that a subcommittee prepare an overview of where the Committee wants to go with electronic filing. Judge Mannes stated that he saw no reason to displace the existing Technology Subcommittee and indicated that he would charge it with preparing such an overview. He asked Mr. Minkel and Mr. Sommer to help prepare the overview. Several members suggested that a demonstration of the new technology similar to the one given by Gordon Bermant of the Federal Judicial Center (FJC) would be useful in this process.

Bankruptcy Forms

Ms. Channon stated that many of the forms in the Bankruptcy Forms Manual, which was published in 1988, have been updated but the new versions have not been included in the manual. She stated she expects a draft revision of the manual to be prepared within a year. The new version will be in a single volume including limited instructional material and will be available through the Government Printing Office.

Service of Process

The Reporter reviewed this Committee's action in freezing the version of Civil Rule 4 incorporated by reference in Rule 7004 as that in effect on January 1, 1990. A number of amendments to the civil rule are scheduled to take effect on December 1, 1993, but may blocked or changed by the Congress. The Committee agreed to review the amendments in their final form after they have taken effect.

The Reporter discussed S. 201, which was introduced by Senator Helms, and S. 540, a comprehensive bankruptcy bill introduced by Senators Heflin and Grassley. Each bill would modify the requirements for service of process on certain defendants in bankruptcy cases. The Chairman of the Standing Committee has written Senator Helms to oppose enactment of S. 201 and Francis F. Szczebak, the chief of the Bankruptcy Division, has testified against the service of process provisions in S. 540. The Committee discussed the prospects for the passage of

the two bills and whether additional comments should be directed to the Judiciary Committee.

Amendments to Civil Rule 26

A number of amendments to the Civil Rules will become effective on December 1, 1993, unless the Congress provides otherwise. The Reporter described the mandatory disclosure provision in Rule 26(a), as amended, and the mandatory meeting of the parties required by the amendment to Rule 26(f). Bankruptcy Rule 7026 applies Rule 26 in adversary proceedings and Bankruptcy Rule 9014, in turn, incorporates Rule 7026 in contested matters.

Mr. Rabiej stated that 20 districts have mandatory early disclosure as part of their civil justice expense and delay reduction plan. The Reporter stated that he believes the mandatory discovery provisions may be inappropriate in bankruptcy motions practice. Although both Rule 26(a) and Rule 26(f) authorize the court to opt out of the mandatory provisions by local rule or court order, he said the bankruptcy courts may not know about the changes in time to do so.

The Committee discussed the need to advise the bankruptcy courts of the situation. Congressman Hughes has introduced a bill to revise the amendment to Rule 26(a). Mr. McCabe stated that he is reluctant to distribute a memorandum on the changes until the Congress has acted or the amendments have taken effect without Congressional action. Judge Meyers moved to direct the Reporter to prepare a memorandum to the bankruptcy courts on the problem. Judge Mannes seconded the motion. The Reporter stated that it may be inappropriate for him to do so without taking the matter to the Standing Committee. The Administrative Office, however, could communicate with the district and bankruptcy judges on the changes and include a model local rule. Judge Mannes moved to amend the motion. Judge Meyers accepted the change. **The Committee agreed that no vote was necessary because such a directive is outside the Committee's functions.** The Reporter agreed to help prepare such a memorandum, if asked.

Pioneer Investment Services

The Reporter discussed the Supreme Court's application of the excusable neglect standard in Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489, to permit the late filing of proofs of claim based on perceived shortcomings in the form used to inform creditors of the deadline for filing claims. The Reporter outlined recent changes in Official Form 9. He stated that he believes the new official form is sufficient to meet the Supreme Court's requirements but could be improved further. The

Committee discussed further changes to make the form easier to understand.

Mr. Klee moved that the Committee make technical changes in Official Form 9 to be implemented forthwith in response to the Pioneer Investment decision. The Reporter stated that the changes could be presented to the Standing Committee in December and the Judicial Conference in March. He cautioned that the form had been amended several times in recent years and should not be changed again unless necessary. The Reporter stated that some judges might interpret an amendment as an indication that the Committee believes that the current form does not comply with Pioneer Investment.

Judge Barta stated that the form should be improved, even at the risk that some judges would view the change as a concession that the existing form is not good enough. Professor Tabb suggested that the Committee defer revising the form if it intends to review all of the forms in an effort to incorporate plain language. Judge Mannes called the question. The Chairman stated that the motion called for changes in the form to be presented to the next meeting of the Standing Committee. **The motion failed by a vote of 4-7. Judge Mannes stated that he would refer the matter to the Forms Subcommittee.**

Rule 3002

The Reporter outlined the Committee's consideration of Rule 3002 over the last few years, the apparent conflict between the rule and section 726(a)(3) of the Bankruptcy Code, the court's decision in In re Hausladen, and Judge Mannes' exchange of letters with Professor Lawrence P. King on behalf of the ad hoc subcommittee of bankruptcy judges. Judge Mannes expressed concern about the discharge of claims held by unnoticed and unknowing creditors and about the problems faced by a chapter 13 trustee when a late claim is filed after the trustee has made payments under a confirmed plan. For purposes of discussion, Judge Mannes moved the adoption of the Reporter's draft amendment included in the meeting materials. Judge McGlynn seconded the motion.

Speaking against the adoption of his own draft, (which was presented for discussion purposes only), the Reporter stated that deleting the reference to the "allowance" of claims would be essentially adopting the rationale of Hausladen, with which he disagrees. The Reporter stated that there is no urgency to fixing the section 726 "glitch". Mr. Sommer stated that Hausladen and its prodigy would create chaos in chapter 13, even without priority for late-filed claims. Professor Tabb said it is imperative that the rule continue to speak to "allowance".

Mr. Smith stated that he believes the Bankruptcy Code can be interpreted along the lines of Hausladen. He said that the rules could create a regime to allow tardy creditors to share in the distribution, although he was not sure how all of the potential problems would be resolved. The Reporter stated that a number of courts have expressed due process concerns about the treatment of tardy claims in chapter 13 and, as a result, allow those claims to share in the distribution or find them nondischargeable. Judge Mannes stated that it is not obvious that the claims are nondischargeable. The Reporter stated that, if the motion passes, he would like an opportunity to revise the draft to include some of the comments during the discussion. Judges Mannes and McGlynn agreed to the change in their motion. Mr. Klee stated that it could be catastrophic if the Hausladen concept carried over to chapter 11. **The motion failed by a vote of 3-6.**

Judge Ellis stated that Rule 3002 is not right as it currently exists. Mr. Sommer moved to amend Rule 3002 along the lines of subsection (a)(2) of the Reporter's draft which is set forth on page 58 of item VI of the agenda materials. **The motion passed by a vote of 8-0.** The Reporter stated that he would prepare a draft for discussion at the next meeting.

Professor Tabb moved to adopt the new subsection (c)(6) as set out on page 16 of the agenda materials for item VI. Judge Barta seconded the motion. The Reporter proposed that the Committee take a tentative vote, the Reporter prepare a memorandum on what the draft does, and the Committee take a final vote. The Committee agreed to follow that procedure.

Mr. Klee opposed the motion as an improper effort to codify due process in the form of a rule. The Reporter stated that many courts would find that they have no authority to extend the time for filing claims and that, as a result, due process requires that the claim not be discharged. Mr. Smith stated that the concept of paying a late creditor makes sense and that the plan could provide for doing so. Mr. Sommer stated that a late claim could be paid now under three different scenarios: 1) the debtor files a claim for the tardy creditor; 2) the creditor files a late claim, no one objects, and the trustee pays it; or 3) the debtor provides in the plan for late claims. The Reporter stated that the negative inference of the draft would stop the wide-spread practice of treating late claims as timely. **The motion failed by a vote of 3-8. The Reporter agreed to do another draft and Judge Mannes agreed to place it on the agenda for the next meeting.** The sole purpose of the draft will be to make Rule 3002 consistent with section 726 of the Bankruptcy Code regarding tardily-filed claims.

Rule 4008

The Reporter stated that there is no way for the court to know that a reaffirmation agreement will be filed -- and that a hearing should be scheduled -- if there is no deadline for filing the agreement. The matter was discussed at the last meeting and the Reporter offered a draft amendment to require that the agreement be filed within 10 days after the discharge is entered and that the reaffirmation hearing be held within the Rule 4008(a) period. Mr. Sommer moved to adopt the draft and Mr. Smith seconded the motion. Mr. Heltzel said the debtor generally does not get the discharge until seven days after its entry -- if everything goes right.

The Reporter suggested extending the time for the hearing and Mr. Heltzel suggested making the deadline for filing the agreement earlier, perhaps tied to the date for the meeting of creditors, because no-asset cases are closed shortly after the entry of the discharge. The Chairman stated that closing the case does not deprive the court of jurisdiction. Judge Mannes stated that he favored making the deadline 60 days after the meeting of creditors. He said there is no need to protect people who make a reaffirmation agreement and then shelve it. Mr. Sommer amended his motion to adopt the concept of the draft and to discuss the timing later. Mr. Smith accepted the amendment. **The motion failed by a vote of 4-7.**

Rule 8002(c)

The Reporter discussed Judge Kressel's suggestion that Rule 8002(c) be amended to require that any motion to extend the appeal period be filed within ten days after the entry of the judgment. Judge Mannes moved to adopt the draft amendment prepared by the Reporter. **The motion passed on a unanimous vote.**

Rule 1007(c)

The Reporter presented a draft amendment to delete the reference to chapter 7 in the third sentence of Rule 1007(c), which was promulgated when different schedules were used in chapter 13 cases. Mr. Klee questioned the use of the phrases "the pending case" and the "superseding case" as being inconsistent with the concept of a converted case being the same case before and after conversion. The Reporter said the phrases are used in a number of rules and that the matter could be referred to the Style Committee. He stated that he would prefer to change a number of rules at once, rather than acting piecemeal.

Judge Mannes moved to table the draft amendment. The motion carried. Judge Leavy suggested that the Reporter prepare substitute language, which could be considered at the next meeting. The Committee agreed.

Rule 5007

Mr. Klee stated that an attorney may need to obtain a transcript of a hearing in the bankruptcy court on an expedited basis in order to prepare a pleading or an appeal. Despite this, he stated that a supervisor in the Central District of California refused to honor his request for one. Mr. Klee moved to amend Rule 5007 to state that a party has a right to obtain a copy of the transcript on an expedited basis. Judge Duplantier stated that the rules can not make people behave. The motion failed for lack of a second.

Rule 7001

The Reporter discussed Mr. Klee's proposal to amend Rule 7001(3) to permit the sale of jointly-owned property and Rule 7001(7) to permit the issuance of an injunction or other equitable relief through a plan of reorganization without filing an adversary proceeding. The Reporter opposed amending Rule 7001(3) because selling a non-party's home should require more than inclusion in a plan. He stated that the Rule 7001(7) amendment was a closer call and that many chapter 11 plans do include injunctive relief. Mr. Klee stated that, because Rule 7001(8) includes a "carve out" for subordination, it ought to include other "carve outs" as appropriate.

The Committee discussed the use of injunctions to channel litigation to an insurance fund, to enjoin non-contributing partners in partnership cases, and to enjoin creditors from pursuing non-debtor guarantors. Judge Duplantier stated that he was surprised that plan proponents could take away those sorts of rights without filing a complaint and summons, and giving the affected parties a chance to answer. Mr. Mabey stated that the court decisions had generally supported the first two types of injunctions as long as they did not violate due process. He said the rule is possibly misleading or in conflict with these decisions. The Reporter stated that the injunction should be in both the plan and the confirmation order in order to give notice to the affected creditor.

Mr. Klee moved to adopt his draft revision of Rule 7001(7) with a further amendment to require that the injunction be included in both the plan and the confirmation order. Mr. Mabey questioned the repetition in the draft. Mr. Klee agreed to revise the draft to parallel the construction of Rule 7001(8).

Mr. Mabey seconded the motion, as amended. The Chairman stated that the amendment "superloads" the definition of adversary proceedings with what is permissible in a plan, which should be decided separately. Mr. Minkel stated that the amendment limits the mischief that a court might do in a major case. Judge Meyers stated that the proposal was prompted by In re Commercial W. Fin. Corp., which was decided in 1985 and has not caused a problem so far. Mr. Heltzel stated that the definition of adversary proceedings is a revenue issue because of the filing fees. **The motion failed by a vote of 4-7.**

Rule 9024

Mr. Klee stated that he had prepared an amendment to Rule 9024 out of concern that some courts where using the rule to do more than was intended. Since then, in In re Cisneros, the Ninth Circuit had upheld the use of Rule 9024 and Civil Rule 60 to vacate a chapter 13 discharge based on mistake, despite the provisions of section 1328(e). Mr. Klee asked that his proposal be held in abeyance until the next meeting, in order that he could consider the opinion and whether to go forward. **The Committee agreed.**

Rule 3010

Mr. Klee stated that the absence of a provision in Rule 3010 specifying the minimum distribution in a chapter 11 or chapter 9 case implies that the court cannot set a minimum. He said he would be happy if the rule just left it to the plan. The Reporter stated that he believes the proponent of a plan who does not want to make small payments can so provide in the plan.

The Reporter stated that it is dangerous for the Rules to specify what can or cannot be included in a plan. Furthermore, he said, by limiting small payments, the proposed amendment could impair classes of claims. Mr. Klee said he intended only to prohibit a series of small payments, not a one-time distribution. At the request of the chairman, Mr. Klee moved that a draft amendment be prepared for the next meeting. Mr. Minkel seconded the motion. Mr. Ellis stated that, if the Bankruptcy Code permits such a plan provision, there's no need for a rule to say that it can be done.

The Committee discussed how it views possible changes in the Rules. Mr. Minkel stated that, if the rules are not broken, the Committee should not try to fix them and that the Standing Committee does not want a number of piecemeal changes if there's no concern by the bench and bar. Mr. Mabey disagreed. He stated that the Code has gone through a revolution while the Rules went through an evolution. He said there are plenty of situations in

which the Committee ought to take a look at the Rules in a serious and fundamental way. Mr. Smith stated that he believes the Rules are "stop gap" ones which should be subject to a thorough review as a long range project.

Judge Ellis stated that it is not prudent to send a number of insignificant changes to the Standing Committee at every meeting, but that the type of changes proposed by Mr. Klee are within the ambit of what the Standing Committee intends for this Committee to do. The Reporter said it's a difference between protocol and substance. He said Mr. Klee was absolutely right to bring the proposals to the Committee, but that he, the Reporter, disagreed with them as a matter of substance. Mr. Klee withdrew the motion and Mr. Minkel withdrew his second.

Rule 1001

Mr. Klee stated that he suggested that the Reporter draft an amendment adding the word "proceedings" to Rule 1001 in order to clarify that the Bankruptcy Rules apply whenever a bankruptcy matter is before a trial court, regardless of whether a bankruptcy judge or a district judge is presiding. The Reporter presented two drafts. One draft added references to the district courts, bankruptcy courts, and bankruptcy appellate panels, and the other added references both to the courts and to civil proceedings arising under title 11 or arising in or related to cases under title 11.

The Committee discussed whether the proposed amendments would apply the Bankruptcy Rules to a civil action related to a bankruptcy case but filed in another district before the bankruptcy petition was filed. Mr. Klee stated that he would withdraw the proposal because no courts are misinterpreting the existing rule. At the request of Mr. Sommer, the Reporter agreed to review the wording of Rule 1001 in light of the Tenth Circuit's decision in In re Graham.

Rule 2002(h)

Glenn M. Gregorcy, the chief deputy clerk of the United States Bankruptcy Court for the District of Utah, has suggested that Rule 2002(h) be amended to include notices to file claims against a surplus in chapter 7 cases. Mr. Logan requested that the matter be set over to the next meeting. Judge Mannes suggested that a Rule 3015(g) notice of a plan modification only be given to creditors who have filed claims if the modification is filed after the time to file claims has expired. He requested that the two proposals be considered at the same time. The Committee agreed.

Rule 3009

One of the amendments which were effective on August 1, 1993, deleted the requirement that the court approve the trustee's proposed distributions in a chapter 7 case. Some disputes have arisen over what notices have to be sent and exactly what is the trustee's final report and account as that phrase is used in the Bankruptcy Code and Rules. Mr. Logan stated that he would report to the Committee at its next meeting on the protocol which is being developed in an effort to avoid double noticing.

Plain English Forms

Mr. Sommer stated that many notices sent out in bankruptcy cases are unintelligible to people who are not attorneys despite the fact that the bankruptcy courts probably have more pro se parties than any other part of the court system. He discussed efforts by the state courts to put parties on notice that their rights and property may be affected by a motion or other pleading and to give them some guidance on what they must do to oppose the motion or pleading. Mr. Sommer, who stated that the bankruptcy courts have dealt with this matter to varying degrees in their local rules, offered a generic notice for use in contested matters.

It was suggested that it is time for a new Forms Subcommittee to be organized and that the proposal could be referred to that group. Mr. Sommer accepted the suggestion and the Committee agreed.

Official Form 14

The Reporter stated that he was asked at the last meeting to prepare alternative draft revisions of Official Form 14, Ballot for Accepting or Rejecting Plan, to include comments by several members of the Committee. He presented one draft which could be used whether or not the ballot covers multiple plans and a pair of alternative forms, one of which would be used to vote on single plans and one to vote on multiple plans.

The Reporter cautioned against changing the form if all of the Official Forms are to be revised a year from now. Mr. Klee said the language of the drafts is a good improvement over the current form. He suggested that the last sentence of the first paragraph be in bold type and the addition of a statement that the ballot must be returned in a timely manner. Professor Tabb suggested that the matter be referred to the new Forms Subcommittee. There was no objection to doing so.

Official Form 5

Judge Jellen has suggested amending Official Form 5, Involuntary Petition, to require that the petitioner or petitioners allege the facts which are the basis of their eligibility to file the petition pursuant to section 303 of the Code. Mr. Minkel stated that the proposal might conflict with Rule 1003(b) and moved to reject the suggestion. The motion carried without any dissenting votes.

Technology Subcommittee

Judge Barta presented the report from the Technology Subcommittee.

Judge Barta stated that Robert Fagan of the FJC is heading a team which is preparing an interactive video training program on the Civil Rules. The program, which is aimed at deputy clerks, will be completed early in 1994. A similar interactive program is planned on the Bankruptcy Rules. Judge Barta asked if the Technology Subcommittee could serve as a liaison with the Bankruptcy Rules project. Judge Mannes stated that he would respond.

Mr. Heltzel stated that the contract had been awarded for the Bankruptcy Noticing Center and that the first courts would go on line late this fall. He stated that the Bankruptcy Automated Noticing System (BANS) courts would be the first to use the new system in which notice information will be transmitted to the contractor, which will print, sort, and mail the notices.

Judge Barta stated that Rule 9036 became effective on August 1, 1993, and has been well received. Mr. Heltzel has developed a model agreement between the court and creditors to implement electronic noticing. Mr. Heltzel said a three phase acknowledgment process will be used in which creditors or their agents acknowledge 1) receipt of some data, 2) specifically what data they received, and 3) whether the debtor is someone to whom they issued credit or who owes them money. If the creditor does not acknowledge the debt, the clerk's office informs the debtor. Mr. Heltzel stated that the system has been set up so that it requires virtually no human intervention on the court side.

Mr. Minkel stated that electronic noticing benefits both the court and the creditor, but that the creditor receives greater benefits. He asked when the courts will start charging for the service. Mr. Heltzel stated that the courts do not anticipate charging for the service. Mr. Sommer asked if electronic noticing was covered by the fee for electronic access to court information. Mr. Heltzel said electronic noticing is not covered by the access fee because the electronic notice only includes the

information in the paper notice. It does not include information on other creditors.

Mr. Smith asked whether the electronic notice includes the scheduled amount of the debt. Mr. Heltzel said neither the paper notice nor the electronic one has the amount. Mr. Klee asked whether, if the court directs a party to give notice, the party would have to do so electronically. Mr. Heltzel said that was not intended. Ms. Channon said the party may be able to contract with the noticing center to do so in the future.

Conclusion & Adjournment

Judge Mannes stated that the next meeting is scheduled for Memphis on February 24 - 25, 1994, and that the following meeting is tentatively set for September, 1994. He asked that Committee members consider where that meeting should be held.

The Chairman thanked Judge Ellis for his interest and for representing the Standing Committee. The Chairman thanked Mr. Rabiej for making the arrangements for the meeting and Mr. Mabey for entertaining the Committee members at his ranch. He thanked the Administrative Office for its support of this Committee and Mr. Logan and Mr. Heltzel for serving as liaisons with the Committee. Judge Mannes, in turn, thanked the Chairman for his three years of "world class" service in that position and for the caliber of the meetings during his tenure as chairman.

There being no further business, the meeting was adjourned at 11:20 a.m. on September 14, 1993.

Respectfully submitted,

James H. Wannamaker, III
Attorney
Division of Bankruptcy

AGENDA ITEM - 1
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO RULES 8018, 9029 AND 9037

DATE: DECEMBER 27, 1993

In late October of 1993, proposed amendments to Bankruptcy Rules 8018 and 9029 and proposed new Rule 9037 were published for public comment. A copy of these proposed amendments is attached.

The recently published package of amendments is unusual in that the original ideas for these amendments came from the Standing Committee in its desire to make uniform amendments to the Appellate, Bankruptcy, Civil, and Criminal Rules relating to the subjects of local rules and technical amendments. The language of the proposed amendments to Bankruptcy Rules 8018 and 9029 (on local rules and standing orders) and the new Rule 9037 (on technical amendments) is virtually identical to the language of similar amendments to the other bodies of rules. Pamphlets of all of these proposed amendments were circulated to the Advisory Committee several weeks ago. If you did not receive one, please let me know.

At the request of the Standing Committee, the four advisory committees submitted their own drafts of these amendments, which were then re-drafted at the past few Standing Committee meetings by the chairs and reporters under the leadership of the Professor Daniel R. Coquillette, Reporter to the Standing Committee, in an effort to achieve uniformity. The last time the Advisory Committee on Bankruptcy Rules considered

the amendments to these rules was in February 1993 when it approved a prior version of these amendments.

Changes to the Proposed Amendments Not Considered by the Advisory Committee

There were no changes made to proposed Rule 9037 (Technical Amendments) since the Advisory Committee last considered it. There were several minor stylistic changes in the language of proposed amendments to Rules 9029 and 8018 that were agreed to by all reporters since the last drafts of these amendments were approved by the Advisory Committee in February 1993. Committee notes also contain several minor changes. Unless you request otherwise, I do not intend to raise those for discussion.

However, there were two substantive changes the Advisory Committee never discussed that are worthy of your attention:

(1) Bankruptcy Rules 9029(a)(2) and 8018(a)(2). These subdivisions, which are identical, were first added to the proposed amendments last summer at the suggestion of the Advisory Committee on Civil Rules. Proposed Bankruptcy Rule 9029(a)(2) and 8018(a)(2) provide as follows:

> "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement."

The Committee Note will provide:

> "Paragraph (2) of subdivision (a) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of -- or forgetting -- a local rule directing that jury trial demands be noted in the caption of the case, includes a

jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn -- covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring that a party demand a jury trial within a specified time period to avoid waiver of the right to a trial by jury."

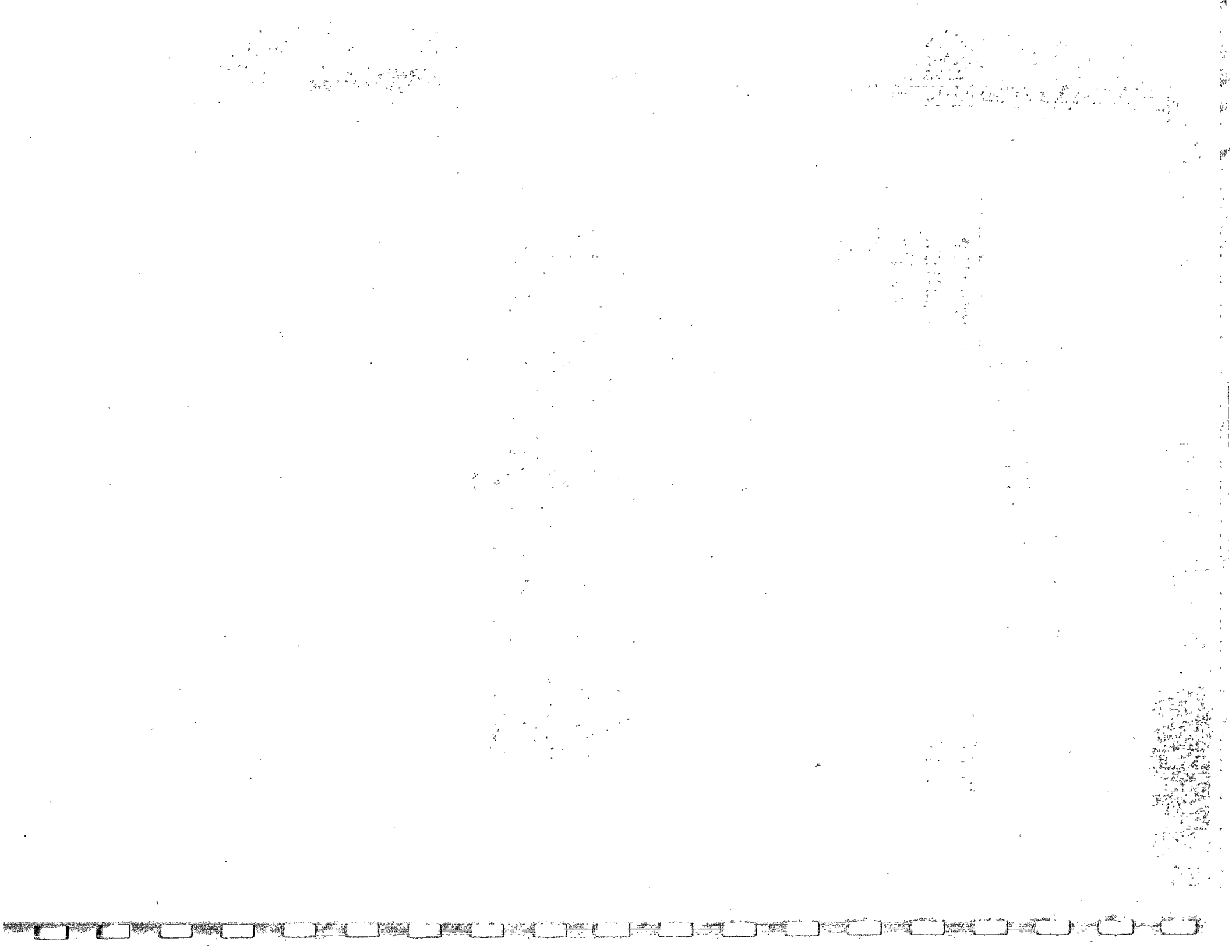
A question for the Advisory Committee is whether it makes sense for this provision to be applicable to bankruptcy courts where the volume of paper filed each day is much greater than that of district courts and courts of appeal. It is worth noting that the 1993 amendments to Rule 5005 already prohibit the clerk from refusing to accept papers that are not in proper form.

(2) Bankruptcy Rule 9029(b) and 8018(b). Last year, the Advisory Committee approved the following language regarding a judge's right to regulate practice by "standing orders" or "chambers rules": "No sanction or other disadvantage may be imposed for noncompliance with any requirement, not in a local rule, of which the alleged violator did not have actual notice." That language has been changed to read: "No sanction or other disadvantage may be imposed for noncompliance with any requirement, not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Is the addition of the phrase "in the particular case" significant?

Public Comment

The six-month public comment period for these proposed amendments ends on April 15, 1994, and a public hearing is scheduled for March 25th. At the end of the comment period, the Advisory Committee must consider all comments and make final recommendations to the Standing Committee, probably for its June meeting. Unfortunately, the Advisory Committee is not scheduled to meet again prior to the Standing Committee meeting. I suggest that the Committee consider at the February 25-26 meeting all comments received prior to that time. Any comments received after that time, if any, will be circulated together with the Reporter's recommendations regarding their merits. Depending on the response, the Advisory Committee could then vote by mail or fax or meet by telephone conference call. We have used this procedure in the past and it has worked well when the comment was light and noncontroversial.

So far, we received only one comment. The letter of Bankruptcy Judge Lisa Hill Fenning (C.D. Cal.), dated November 24th, is enclosed. We will discuss Judge Fenning's letter at the February meeting in Georgia.



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

May 7, 1993

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Edward Leavy, Chairman
Advisory Committee on Bankruptcy Rules

SUBJECT: Amendments Regarding Uniform Local Rule Numbering, Technical Amendments and Standing Orders

At the request of the Standing Committee, the Advisory Committee on Bankruptcy Rules, at its meeting on February 18, 1993, considered several proposals for rule amendments dealing with uniform local rule numbering, standing orders, and technical amendments. The proposed amendments to the Bankruptcy Rules that were reviewed by the Advisory Committee were based on language that was drafted in Asheville on December 18, 1992, by the reporter to the Standing Committee and the chairs and reporters of four advisory committees (the "Asheville draft"). After the Asheville meeting, the language was amended pursuant to several style recommendations of Bryan Garner.

* * * * *

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 8018. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

(a) Local Rules by Circuit Councils and District Courts.

(1) Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, ~~by action of~~ acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court, ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and the rules of

*New matter is underlined; matter to be omitted is lined through.

this Part VIII. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement. ~~In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner not inconsistent with these rules.~~

(b) Procedure When There is No Controlling Law. A bankruptcy appellate

panel or district judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the circuit council or district court. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

The amendments to this rule conform to the amendments to Rule 9029. See Committee Note to the amendments to Rule 9029.

Rule 9029. Local Bankruptcy Rules; Procedure When There is No Controlling Law

(a) Local Bankruptcy Rules.

(1) Each district court ~~by action of~~ acting by a majority of ~~the~~ its district judges ~~thereof~~ may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make

and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement. ~~In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.~~

(b) Procedure When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with applicable national rules but also with Acts of Congress. The amendment also states that local rules should not repeat applicable national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) of subdivision (a) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of -- or forgetting-- a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn -- covering only violations attributable to negligence and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring

that a party demand a jury trial within a specified time period to avoid waiver of the right to a trial by jury.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with federal law, with rules adopted under 28 U.S.C. § 2075, with Official Forms, and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for

noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

Rule 9037. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes needed to conform these rules to statutory changes.

COMMITTEE NOTE

This rule is added to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

AGENDA ITEM - 2
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9014 AND
THE 1993 AMENDMENTS TO CIVIL RULE 26

DATE: JANUARY 3, 1994

The amendments to Rule 26(a) of the Federal Rules of Civil Procedure that became effective on December 1, 1993, require disclosure of certain information without awaiting formal discovery requests. In addition, the 1993 amendments to Civil Rule 26(f) require the parties in a litigation to meet to discuss and resolve discovery issues in advance of the formal Rule 16 pretrial conference. A copy of Rule 26(a) and (f), as amended in 1993, is attached. These amendments are applicable in adversary proceedings under Rule 7026.

Although these amendments to the Civil Rules are controversial, I am not sure that there is a bankruptcy-related reason for recommending a blanket rule that makes these amendments inapplicable in adversary proceedings. Why should parties be immune from making the initial disclosures or from meeting to resolve discovery disputes in an adversary proceeding? It is important to note that the controversial mandatory disclosure provisions of Rule 26(a), as well as the meeting requirement of Rule 26(f), are subject to local opt-out. Rule 26 itself provides that courts, by local rule or order, may render these mandatory disclosure and meeting requirements inapplicable. Therefore, I am not recommending any amendments to Rule 7026, which makes Civil Rule 26 applicable in adversary proceedings.

However, Rule 9014 makes Rule 7026 (and, therefore, Civil Rule 26), applicable in contested matters. A contested matter is initiated by motion, not a summons and complaint, and is an expedited procedure that could be unduly delayed if the parties had to make initial disclosures mandated by Rule 26(a) and had to meet as required by Rule 26(f). Rule 26(a)(f), as amended, requires that the parties meet at least 14 days before a pretrial conference (pretrial conferences are not held in contested matters). Unless the court orders otherwise or the parties stipulate, Rule 26(a)(1) disclosures must be made within 10 days after the Rule 26(f) meeting of the parties. Rule 26(a)(2) disclosures on expert witnesses must be made, in the absence of a stipulation or court order directing otherwise, at least 90 days before the trial date. Pretrial disclosures under Rule 26(a)(3) must be made at least 30 days before trial unless the court orders otherwise. These time provisions are inconsistent with the expedited nature of contested matters.

For your consideration at the February 1994 meeting, I enclose a draft of proposed amendments to Rule 9014 that would render Rule 26(a)(1)-(4) and Rule 26(f) inapplicable in contested matters unless the court otherwise directs.

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, ~~7026,~~ 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. Unless the court otherwise directs, Rule 7026 shall apply except that parties shall not be required to make disclosures under Rule 26(a)(1)-(4) F.R.Civ.P., the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by methods of discovery prescribed by Rule 26(a)(5) F.R.Civ.P., and the parties shall not be required to meet pursuant to Rule 26(f) F.R.Civ.P. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties

a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

Rule 26(a)(1)-(4) F.R.Civ.P. was amended in 1993 to require parties to disclose certain information without awaiting formal discovery requests. Rule 26(f) F.R.Civ.P. also was amended to require parties to meet to resolve discovery and other issues in advance of the formal pretrial conference. These 1993 amendments to Rule 26(a)(1)-(4) and (f) should not be applicable in most contested matters in view of their expedited nature.

The amendment to this rule renders inapplicable in contested matters the 1993 amendments to Rule 26(a)(1)-(4) F.R.Civ.P. and (f), but provides flexibility by giving the court discretion to order otherwise. In the absence of such a court order, the provisions of Rule 26 F.R.Civ.P. apply except that any information described in Rule 26(a)(1)-(3) may be discovered only through traditional discovery methods and the parties are not required to meet pursuant to Rule 26(f).

The court's discretion in ordering appropriate disclosure requirements and discovery methods is broad. It may order that all or some requirements of Rule 26(a)(1)-(4) and (f) shall apply. The rule also continues the current practice of giving the court discretion to direct that Rule 7026, in its entirety, shall not be applicable. By providing this flexibility, courts may tailor appropriate disclosure and discovery methods to the particular needs of the contested matter.

telephone in order to consider possible settlement of the dispute.

* * * *

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party,

making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and

testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) **Pretrial Disclosures.** In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously

provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the

admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) **Form of Disclosures; Filing.** Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) **Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

~~(b)~~ **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is

information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

AGENDA ITEM - 3
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULE 3002 AND RELATED AMENDMENTS TO RULES 1019, 2002 AND 9006

DATE: JANUARY 6, 1994

At its meeting in September, the Advisory Committee voted to amend Rule 3002 for the sole purpose of making the rule consistent with § 726 of the Bankruptcy Code. The Committee decided that Rule 3002 is inconsistent with § 726, which recognizes that tardily filed claims may be allowed in chapter 7 cases. See § 726(a)(2)(C) and § 726(a)(3). For your convenience, a copy of § 726 is enclosed.

The Committee also decided that Rule 3002 should not be amended in reaction to the decision in In re Hausladen, 146 BR 557 (Bankr. D. Minn. 1992), where the bankruptcy court, sitting "en banc," held that Rule 3002 is inconsistent with the Bankruptcy Code to the extent that it requires disallowance of late filed claims in chapter 13 cases. The court noted that lateness is not one of the eight grounds for disallowance of claims listed in Code § 502(b) and, therefore, a claim may not be disallowed in a chapter 13 case solely because it was tardily filed.

At the time of our last meeting in September, bankruptcy courts were evenly split (4-4) on whether the Hausladen decision was proper, and there were no appellate decisions. As of now, however, most of the courts (at least 12) that have considered this issue have rejected the reasoning and conclusion in

Hausladen. See In re Clark, 1993 U.S. Dist. LEXIS 17566 (D. Utah 1993); In re Zimmerman, 156 BR 192 (Bankr. W.D. Mich. 1993) (en banc decision); In re Parr, 1993 Bankr. LEXIS 1889 (Bankr. N.D. Ala. 1993); In re Messics, 159 BR 803 (Bankr. N.D. Ohio 1993); In re Chavis, 1993 WL 455511 (Bankr. S.D. Ohio 1993); In re Leightner, 1993 WL 469162 (Bankr. D. Or. 1993); In re Keck, 160 BR 112 (Bankr. N.D. Ind. 1993); In re Crooker, 159 BR 790 (Bankr. E.D. Ky. 1993); In re Osborne, 1993 WL 405944 (Bankr. C.D. Cal. 1993); In re Turner, 157 BR 904 (Bankr. N.D. Ala. 1993); In re Bailey, 151 BR 28 (Bankr. N.D.N.Y. 1993); In re Johnson, 156 BR 557 (Bankr. N.D. Ill. 1993). See also Jones v. Arross, 1993 U.S. App. LEXIS 28033 (10th Cir. 1993) (late filed claim may not be allowed in chapter 12 case). Decisions following Hausladen (holding that a tardily filed claim may be allowed in a chapter 13 case) include In re Babbin, 156 BR 838 (Bankr. D. Colo. 1993), rev'd in part and remanded, 1993 U.S. Dist. LEXIS 15903 (D.Colo. 1993), and In re Judkins, 151 BR 553 (Bankr. D. Colo. 1993). In In re Rago, 149 BR 882 (Bankr. N.D. Ill. 1993), the court indicated its agreement with Hausladen, although that was a chapter 7 case.

Given the split among the bankruptcy courts and the absence of appellate decisions regarding the question of whether Rule 3002 is invalid as applied in chapter 13 cases, the Advisory Committee decided at its September meeting to refrain from taking any action on the Hausladen issue.

Following the vote to amend Rule 3002 to make it consistent

with § 726 -- but to otherwise leave the rule as is -- I was asked to prepare a draft of a proposed amendment to Rule 3002 designed for that purpose. In addition, I was asked to circulate a memorandum explaining the proposed amendment, and explaining how and why the proposed amendment does not deal with the Hausladen issue.

Why Rule 3002 is Inconsistent with Section 726.

Rule 3002(a) requires that an unsecured claim be filed "in accordance with this rule" to be "allowed." Rule 3002(c) sets forth the time for filing a proof of claim in a case under chapter 7, 12 or 13. Therefore, a plain reading of Rule 3002 indicates that an unsecured claim that is not filed within the time limit set forth in Rule 3002(c) may not be allowed. In addition, Rule 3009 provides that, in a chapter 7 case, "Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed. . . ." When read together, these rules lead to the conclusion that an unsecured creditor who misses the deadline for filing claims may not have an "allowed claim," and may not receive any distribution in a chapter 7 case.

In contrast, § 726 of the Code recognizes that a "tardily filed" claim may be "allowed" in a chapter 7 case, at least in certain circumstances. In particular, § 726(a)(2)(C) recognizes that a creditor without notice or knowledge of the case in time to file a timely claim may have an "allowed" claim that is "tardily filed," and that the creditor may share in a chapter 7

estate equally with timely filed claims. How can a tardily filed claim be an "allowed" claim when Rule 3002(a) provides in essence that a claim may be allowed only if timely filed under Rule 3002(c)? Apparently, Congress intended that "timeliness" is not a requirement for "allowance" in chapter 7 cases. Otherwise, § 726(a)(2)(C) would not make sense.

Similarly, § 726(a)(3) provides that, after other allowed claims are paid in full, there shall be a distribution "in payment of any allowed unsecured claim proof of which is tardily filed . . . ." [emphasis added]. Apparently, Rule 3002(c)(6), which gives the court the discretion to extend the bar date if there is a surplus after all other allowed claims have been paid, was designed to implement § 726(a)(3). However, it is not consistent with § 726(a)(3) for the court to have discretion to approve the filing of the proof of claim -- a creditor has an absolute right to file a tardy claim against a surplus under § 726(a)(3).

The inconsistency between Rule 3002 and § 726 has been recognized and criticized by the courts. For example, the Court of Appeals in United States v. Cardinal Mine Supply, Inc., 916 F2d 1087, 1089 (6th Cir. 1990), wrote: "Certainly section 726(a)(3) contemplates that some tardily filed claims can and will be filed and allowed. We cannot have a statute that specifically allows payment of tardily filed claims, and rules that prohibit their filing."

An illustration of the inconsistency between the Rule 3002

and § 726 may be helpful. Suppose that a debtor files a chapter 7 petition and has unsecured debts of $10,000 and non-exempt unencumbered assets worth $ 9,000. The unsecured claims include an $8,000 timely filed claim and a $2,000 claim filed after the bar date. How will the estate be distributed under the Bankruptcy Rules? A literal reading of Rule 3002 leads to the conclusion that, after the $8,000 timely claim is paid, the tardily filed claim may be paid the remaining $1,000 only if the court exercises its discretion (the court "may") to grant a motion to extend the time to file a claim under Rule 3002(c)(6). Under the Rules, it would not make any difference whether the claim was properly scheduled or whether the creditor had notice of the case prior to the bar date. In any event, under Rule 3002(c)(6) the tardily filed claim, whether or not scheduled, would not receive more than the $1,000 surplus (a recovery of 50%).

A different result would occur under § 726 of the Code. If the tardily filed claim was unscheduled and the creditor was not aware of the bankruptcy case, § 726(a)(2)(C) would give the creditor the right to receive payment on a pro rata basis with the $8,000 timely claim, thus giving the tardy creditor a 90% recovery. If the tardily filed claim was properly scheduled, the creditor would receive the $1,000 surplus (50% recovery) under § 726(a)(3). In any event, the creditor with the tardily filed claim would not have to make any motion to extend the bar date.

Another aspect of this problem relates to § 507 priority claimants who are entitled to priority in distribution under Code § 726(a)(1). If a priority claimant, such as the IRS, fails to file a timely claim because it has not been scheduled or noticed, does the creditor continue to have priority in distribution? Or, does the priority creditor lose priority status and share with general creditors under § 726(a)(2)(C)? Courts are divided on this issue. The Court of Appeals for the Sixth Circuit has held that the IRS does not lose priority rights where failure to timely file is due to lack of notice. See In re Century Boat Co., 986 F2d 154 (6th Cir. 1993) ("[A] priority creditor who fails to receive notice of the bankruptcy and consequently files an untimely proof of claim is not barred from receiving priority distribution as a matter of law."); United States v. Cardinal Mine Supply, Inc., 916 F2d 1087 (6th Cir. 1990); In re Cole, 146 BR 837 (D.Colo. 1992). However, the Bankruptcy Appellate Panel in the Ninth Circuit rejected Cardinal Mine and held that a late filed IRS priority claim shares with other unsecured non-priority creditors under § 726(a)(2)(C), whether or not it received adequate notice. In re Mantz, 151 BR 928 (9th Cir. BAP 1993).

This split of authority raises the question of whether Rule 3002 should attempt to resolve the issue relating to priority status under § 726(a)(1) for late filed claims. I believe that Rule 3002 should not do so because the case law focuses on statutory interpretation of an ambiguous Code provision, § 726, that is best left to the courts. Therefore, my draft of the

proposed amendment to Rule 3002 provides, in essence, that the bar date does not deprive a creditor of distribution rights to the extent that a tardily filed claim is entitled to distribution under § 726, leaving to the courts the task of deciding the appropriate priority under § 726.

Section 726(a)(4) raises similar questions regarding the right of a creditor with a claim for punitive damages to receive a distribution from a chapter 7 surplus if the bar date is missed. The statute is ambiguous. Notice that § 726(a)(2) and (3) distinguish between timely filed and tardily filed claims, but § 726(a)(4) provides for "payment of any allowed claim" for a fine or penalty. Whether a late filed claim for a fine or penalty has the right to share in the estate is a question of statutory interpretation that should not be decided by the rule.

Proposed Amendment to Rule 3002.

The following draft, which deletes subdivision (c)(6) and adds a new subdivision (d), is designed to cure the inconsistency between Rule 3002 and § 726.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent

person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have~~

~~been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

(d) TARDILY FILED CLAIM IN CHAPTER 7 CASE. If a creditor files a proof of claim in a chapter 7 case after the expiration of the time for filing the proof of claim prescribed in subdivision (c) of this rule, the claim may be allowed to the extent that the creditor, as the holder of an unsecured claim proof of which is tardily filed, is entitled to receive a distribution under section 726 of the Code.

COMMITTEE NOTE

The abrogation of subdivision (c)(6) and the addition of subdivision (d) are designed to make this rule consistent with § 726 of the Code. Section 726(a)(2)(C) and § 726(a)(3) recognize that in a chapter 7 case a tardily filed claim may be allowed, and that a creditor holding an allowed claim that has been tardily filed may be entitled to receive a distribution.

This amendment is not intended to resolve the issue of whether a claim of the kind entitled to priority under § 507 of the Code has the right to priority in distribution under § 726(a)(1) if the proof of claim is tardily filed. Compare, e.g., In re Century Boat Co., 986 F2d 154 (6th Cir. 1993), with In re Mantz, 151 BR 928 (Bankr. 9th Cir. 1993). The resolution of this issue and any other issues regarding priority in distribution are left to the courts as matters of substantive law and statutory interpretation.

Why the Proposed Amendment Does Not Affect the Hausladen Issue?

In Hausladen, the bankruptcy court held that Rule 3002(a) is invalid because it does not permit a tardily filed claim to be allowed in a chapter 13 case. In essence, Hausladen held that the late filing of a proof of claim cannot result, in and of itself, in the claim not being allowed. The court based its reasoning on (1) the fact that § 502(b) of the Code does not list lateness as a basis for disallowance of the claim, and (2) the language of § 726(a)(2)(C) and (a)(3) proves that Congress did not intend that tardily filed claims must be disallowed.

Under the proposed amendment, there will be no change with respect to Rule 3002(a). Therefore, under the rule, a claim may not be allowed in a chapter 13 case if it is not filed within the time provided in Rule 3002(c). The only change in the rule, which recognizes that tardily filed claims may be allowed and receive a distribution, will be applicable only in chapter 7 cases.

It should be noted that the proposed amendment, by not changing the rule as applied in chapter 13 cases, may be construed as the Advisory Committee's (and the Supreme Court's) rejection of the holding in Hausladen. In essence, the Court will be re-promulgating Rule 3002(a)'s prohibition of the allowance of tardily filed claims in chapter 13 cases.

Proposed Abrogation of Rule 1019(7).

If the above amendments to Rule 3002 are made, it would be

necessary to abrogate Rule 1019(7) which makes Rule 3002(c)(6) applicable in a case converted to chapter 7 from a different chapter. Under Rule 1019(2), a new time period for filing claims commences upon conversion of a case to chapter 7. If a creditor fails to file a timely claim in the converted case, the proposed new Rule 3002(d) would preserve whatever rights the creditor would have under § 726 with respect to the tardily filed claim. I suggest that the following committee note be used for the abrogation of Rule 1019(7):

COMMITTEE NOTE

> Subdivision (7) is abrogated to conform to the abrogation of Rule 3002(c)(6) and the addition of Rule 3002(d). If a proof of claim is tardily filed after a case is converted to a chapter 7 case, the claim may be allowed to the extent that the creditor, as the holder of an unsecured claim proof of which is tardily filed, is entitled to receive a distribution under section 726 of the Code.

Proposed Abrogation of Rule 2002(a)(4) and Technical Amendments to Other Rules Referring to Rule 2002(a)(4)-(9).

If the above amendments to Rule 3002 are made, it would be necessary to abrogate Rule 2002(a)(4) which requires 20 days notice to creditors of "the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6)." Since Rule 3002(c)(6) would be abrogated, Rule 2002(a)(4) also would have to be abrogated.

Abrogation of Rule 2002(a)(4) would require renumbering of Rule 2002(a)(5)-(9). This would require that all cross-reference to Rule 2002(a)(5)-(9) contained in other rules would have to be changed to conform to the new subdivision numbers of Rule

2002(a). This would require technical changes to the following rules: Rules 2002(c)(2), 2002(i), and 2002(k) (I will not burden you with the text of these amendments, which will only show a change in the paragraph numbers of the references to Rule 2002(a)).

In abrogating Rule 2002(a)(4), renumbering the remaining paragraphs of Rule 2002(a), and conforming cross-references to these paragraphs in other subdivisions of Rule 2002, I would suggest the Committee Note to Rule 2002 to state as follows:

COMMITTEE NOTE

> Paragraph (a)(4) is abrogated to conform to the abrogation of Rule 3002(c)(6). The remaining paragraphs of subdivision (a) are renumbered, and references to these paragraphs contained in other subdivisions of this rule are amended accordingly.

Rule 9006(c)(2) also refers to Rule 2002(a)(4). Specifically, Rule 9006(c)(2) states: "The court may not reduce the time for taking action under Rules 2002(a)(4)...." If Rule 2002(a)(4) is abrogated, reference to it in Rule 9006(c)(2) will also have to be stricken. The Committee Note to Rule 9006 could provide as follows:

COMMITTEE NOTE

> Subdivision (c)(2) is amended to conform to thee abrogation or Rule 2002(a)(4).

Proposed Amendment to Rule 2002(h).

If Rule 3002 is amended as provided above, I would also suggest the following amendment to Rule 2002(h):

"(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, the court may, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, direct that all notices required by subdivision (a) of this rule~~, except clause (4) thereof,~~ be mailed only to creditors whose claims have been filed ~~and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(6)~~."

COMMITTEE NOTE

Subdivision (h) is amended to conform to the abrogation of Rule 2002(a)(4) and Rule 3002(c)(6).

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

(c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1954 (26 U.S.C. § 6323) shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

SECTION 725 (11 U.S.C. § 725)

§ 725. Disposition of certain property. After the commencement of a case under this chapter, but before final distribution of property of the estate under section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title.

Bankruptcy Rule References: 6007 and 7001

SECTION 726 (11 U.S.C. § 726)

§ 726. Distribution of property of the estate.

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6) or (7) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112[,] [*sic*] 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507(a) of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541 (a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

Bankruptcy Rule References: 3001 and 3010

SECTION 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULES 1007(c) AND 1019

DATE: JANUARY 5, 1994

The third sentence of Rule 1007(c) provides that: "Schedules and statements previously filed in a pending chapter 7 case shall be deemed filed in a superseding case unless the court directs otherwise." At its September 1993 meeting, the Advisory Committee voted to delete reference to "chapter 7" in that sentence. The reason for this change is that, as a result of the 1991 amendments to the Official Forms, there now is only one form for the schedules and one form for the statement of financial affairs applicable to all debtors and all cases. The old Chapter 13 Statement has been abrogated. Therefore, it makes sense for the rule, in substance, to provide that schedules and statements previously filed in any type of case shall be deemed filed in a superseding case, unless the court directs otherwise.

However, at the September meeting, it was suggested that the phrases "superseding case" or "superseded case" should not be used in the Rules because they give the erroneous impression that the conversion of a case to another chapter creates a new case. Under the Code, conversion does not create a new case, but is a continuation of the original case under a different chapter. See, e.g., § 348(a) of the Code. Although the Committee agreed to eliminate the phrase "superseding case" in Rule 1007(c), I asked the Committee to defer this change until the next meeting

so that I would have an opportunity to search all other rules to find other uses of "superseding case" or "superseded case." I recommended that the use of these phrases in all rules should be purged at one time.

The only other rule that uses these phrases is Rule 1019. However, I also found that Rule 1019 uses the phrase "original petition," which gives the erroneous impression that there is a second petition in a converted case. In the attached draft of amendments to Rule 1019, I deleted references to "original" petition.

I recommend that the Committee approve the following proposed amendments to Rules 1007(c) and 1019(3) and (5).

Rule 1007. Lists, Schedules and Statements; Time Limits

* * *

(c) TIME LIMITS. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements ~~previously~~ filed prior to the conversion of a case to another chapter ~~in a pending chapter 7 case~~ shall be deemed filed in ~~a superseding~~ the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

COMMITTEE NOTE

Subdivision (c) is amended to provide that schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case, whether or not the case was a chapter 7 case prior to conversion. This amendment is in recognition of the 1991 amendments to the Official Forms that abrogated the Chapter 13 Statement and made the same forms for schedules and statements applicable in all cases.

This subdivision also contains a technical correction. The phrase "superseded case" creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. The effect of conversion of a case is governed by § 348 of the Code.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

* * * *

(3) CLAIMS FILED PRIOR TO CONVERSION ~~IN SUPERSEDED CASE~~. All claims actually filed by a creditor ~~in the superseded case~~ prior to conversion of the case shall be deemed filed in the chapter 7 case.

* * * *

(5) FILING FINAL REPORT AND SCHEDULE OF POSTPETITION DEBTS. Unless the court directs otherwise, each debtor in possession or trustee ~~in the superseded case~~ serving prior to the conversion of the case shall: (A) within 15 days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after ~~commencement of the superseded case~~ the filing of the petition including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a

chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after the commencement of a chapter 12 case. If the conversion order is entered after confirmation of a plan, the debtor shall file (A) a schedule of property not listed in the final report and account acquired after the filing of the ~~original~~ petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the ~~original~~ petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.

COMMITTEE NOTE

The amendments to subdivisions (3) and (5) are technical corrections. The phrase "superseded case" is deleted because it creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. Similarly, the phrase "original petition" is deleted because it erroneously implies that there is a second petition with respect to a converted case. See § 348 of the Code.

AGENDA ITEM - 5
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 7004 AND
THE 1993 AMENDMENTS TO F.R.CIV.P. 4

DATE: JANUARY 9, 1994

Rule 7004 governs service of process in adversary proceedings. Pursuant to Rule 9014, Rule 7004 governs service in contested matters (motions) and, pursuant to Rule 1010, Rule 7004 also governs service of process in involuntary cases. Probably the most significant feature of Rule 7004 is that it allows service of a summons and complaint by first class mail. Service by ordinary mail has been permitted in bankruptcy proceedings since 1976.

The remainder of Rule 7004 incorporates by reference many of the subdivisions of Civil Rule 4. Numerous amendments to Rule 4, including controversial ones, have been proposed and debated during the past five or six years. A comprehensive package of proposed amendments to Rule 4 was published for public comment in 1989. Because of the uncertainty regarding the timing and substance of amendments to Rule 4, Bankruptcy Rule 7004(g) was added in 1991 to "freeze" the rule as it applies in bankruptcy proceedings. Rule 7004(g) provides that "[t]he subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules shall be the subdivisions of Rule 4 F.R.Civ.P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto." By adding Rule 7004(g), the Advisory Committee was making sure that it would have an adequate opportunity to decide

whether, and to what extent, any future changes to Rule 4 should apply in bankruptcy proceedings.

Years of debate and uncertainty finally resulted in substantial revisions to Rule 4 promulgated by the Supreme Court in April. These amendments, which became effective on December 1, 1993, completely restructure Rule 4 by changing and rearranging subdivision numbers as well as making substantive changes. A copy of Rule 4, as amended, is contained in House Document 103-74 (pp.2-15), and a marked copy of Rule 4 showing the amendments and the committee notes explaining the changes are contained on pp. 132-171 of the House Document. Copies of the House Document will be distributed to members of the Advisory Committee together with the agenda materials.

In view of the recent revisions to Rule 4, the Advisory Committee should consider amendments to Bankruptcy Rule 7004. However, two possible future events may necessitate further amendments to Rule 7004. First, the Advisory Committee on Civil Rules is now in the process of considering proposed stylistic revisions to all Civil Rules that recently were recommended by the Style Subcommittee of the Standing Committee. In my discussions with Bryan Garner, consultant to the Standing Committee, he indicated that it was unlikely, but possible, that subdivision numbers in Rule 4 may be changed further in view of the Style Subcommittee's work.

Second, there is pending legislation that would mandate revisions to Rule 7004. S.201 would require personal service

(not service by first class mail) on financial institutions. S.540, a comprehensive bankruptcy bill, would amend Rule 7004 to provide for service by certified or registered mail, not ordinary first class mail, on any corporation, partnership, or unincorporated association. My personal view is that the provisions of both bills that deal with service are ill advised and should not be enacted. At the February 1993 meeting of the Advisory Committee, we discussed S.201 and the Advisory Committee decided to assist Judge Keeton, Chairman of the Standing Committee at that time, in the preparation of a letter in opposition to the bill. S. 540 was introduced after the February 1993 meeting. Frank Szczebak of the Administrative Office testified at a hearing on S.540 before a subcommittee of the Senate Judiciary Committee. As Frank pointed out, a proposal to provide for service by certified or registered mail in Civil Rule 4 was heavily criticized and was finally rejected by Congress in 1983.

Despite the uncertainty regarding pending legislation on Rule 7004 and the work of the Style Subcommittee that could result in further changes to Rule 4, it may be appropriate for the Advisory Committee at this time to consider amendments to Rule 7004 in view of the 1993 revisions to Civil Rule 4. In fact, a review of the merits of the pending legislation regarding Rule 7004 may be useful in persuading Congress to refrain from amending the rule legislatively.

The following is a draft of proposed amendments to Rule 7004

that would conform the rule, in part, to the 1993 amendments to Civil Rule 4. I suggest that this draft be the focus of the Committee's discussions at the February meeting.

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE. Rule ~~4(a), (b), (c)(2)(C)(i), (d), (e) and (g)-(j)~~ 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule ~~4(d)~~ 4(e)-(j) F.R.Civ.P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(b) SERVICE BY FIRST CLASS MAIL. In addition to the methods of service authorized by Rule ~~4(c)(2)(C)(i) and (d)~~ 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the

person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to ~~also~~ the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to such officer or agency. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either

to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be

served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the

summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule ~~4(d) or (i)~~ 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the party's last known address and by at least one publication in such manner and form as the court may direct.

(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

~~(e) SERVICE ON DEBTOR AND OTHERS IN FOREIGN COUNTRY. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R.Civ.P.~~

~~(f)~~ (e) SUMMONS: TIME LIMIT FOR SERVICE. If service is made pursuant to Rule ~~4(d)(1)-(6)~~ 4(e)-(j) F.R.Civ.P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

~~(g) EFFECT OF AMENDMENT TO RULE 4 F.R.CIV.P. The subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules shall be the subdivisions of Rule 4 F.R.Civ.P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto.~~

COMMITTEE NOTE

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. Rule 7004, as amended, continues to provide for service by first class mail as an alternative to the methods of personal service provided under Rule 4 F.R.Civ.P.

Rule 4(d)(2) F.R.Civ.P. provides a procedure by which the plaintiff may request by first class mail that the defendant waive service of the summons. This procedure is not applicable in adversary proceedings because it is not necessary in view of the availability of service by mail under Rule 7004(b). However, if a written waiver of service of a summons is made in an adversary proceeding, Rule 4(d)(1) F.R.Civ.P. applies so that the defendant does not thereby waive any objection to the venue or the jurisdiction of the court over the person of the defendant.

Subdivisions (b)(4) and (b)(5) are amended to conform to the 1993 amendments to Rule 4(i)(3) F.R.Civ.P., which protect the plaintiff from the hazard of losing a substantive right because of failure to comply with the requirements of multiple service when the United States or an officer, agency, or corporation of the United States is a defendant. These subdivisions also are amended to require that the summons and complaint be addressed to the civil process clerk at the office of the United States attorney.

Subdivision (e), which has governed service in a foreign country, is abrogated and Rule 4(f) and (h)(2) F.R.Civ.P., as substantially revised in 1993, are made applicable in adversary proceedings.

Subdivision (g) is abrogated. This subdivision was promulgated in 1991 so that anticipated revisions to Rule 4 F.R.Civ.P. would not affect service of process in adversary proceedings until further amendment to Rule 7004.

Summary of Rule 4 Subdivisions Made Applicable by Rule 7004

The following subdivisions of the new Rule 4 are made applicable to adversary proceedings by the above proposed amendments to Rule 7004:

(1) **Rule 4(a)** - governs the form and contents of the summons. This subdivision is similar to former Rule 4(b) which is applicable in adversary proceedings under current Rule 7004.

(2) **Rule 4(b)** - governs the issuance of the summons, making it clear that the responsibility for filling in the information on the summons is that of the plaintiff, not the clerk. This subdivision is similar to former Rule 4(a), which is applicable in adversary proceedings under current Rule 7004.

(3) **Rule 4(c)(1)** - provides that the summons shall be served together with the complaint within the 120-day time limit imposed by Rule 4(m), and places responsibility for service on the plaintiff. This subdivision is similar to the introductory paragraph of former Rule 4(d) which is applicable in adversary proceedings under current Rule 7004.

(4) **Rule 4(d)(1)** - states only that waiver of service of a summons does not thereby waive any objection to the venue or the jurisdiction of the court over the person of the defendant. As indicated in the Advisory Committee Note to the 1993 amendments to Rule 4, the only issues eliminated by the waiver are those involving the sufficiency of the summons or the sufficiency of the method by which it is served. This new provision is designed to encourage the waiver of service to reduce costs. There is no similar provision in former Rule 4 or in Rule 7004. Although waiver of service will be rare in bankruptcy proceedings because of the availability of service by mail, I can think of no reason why new Rule 4(d)(1) should not apply in bankruptcy.

(5) **Rule 4(e) - 4(j)** - provides for the methods of service of a summons and complaint in a district court litigation. Rule 4(e) provides for service on individuals in the United States; Rule 4(f) provides for service on individuals in a foreign country; Rule 4(g) provides for service on infants and incompetent persons; Rule 4(h) provides for service on corporations and associations (both within and outside the United States); Rule 4(i) provides for service on the United States and its agencies, corporations, or officers; and Rule 4(j) provides for service on foreign, state, or local governments. I can think of no reason why these methods of service should not be available, as alternatives to first class mail, in adversary proceedings. The methods of service provided in former Rule 4 are now made applicable by Rule 7004.

(6) **Rule 4(l)** - governs proof of service. This subdivision is similar to former Rule 4(g) which is applicable in adversary proceedings under Rule 7004.

(7) **Rule 4(m)** - This subdivision contains the same 120-day time limit for service of the summons and complaint that was contained in former Rule 4(j), which is now applicable in adversary proceedings under Rule 7004.

Subdivisions of Rule 4 Not Made Applicable to Adversary Proceedings

The following subdivisions of new Rule 4 are not made applicable to adversary proceedings under the above draft of proposed amendments to Rule 7004:

(1) **Rule 4(c)(2)** - provides that (1) service may be effectuated by any person who is not a party and who is at least 18 years of age, (2) the court may direct that service be effectuated by a U.S. marshall or other officer appointed by the court for that purpose, and that such appointment must be made when the plaintiff may proceed in forma pauperis. This is not made applicable to adversary proceedings for several reasons. First, Rule 7004(a) now provides (and will continue to provide) that service pursuant to Rule 4 may be effectuated by any person who is not a party and who is at least 18 years of age. This means that anyone, including parties, may effectuate service by first class mail (which is authorized by Rule 7004 -- not Rule 4). This would not be a change in existing practice. Second, by not making this subdivision applicable in bankruptcy, we will be continuing the current rule that service by a U.S. marshall or other court appointee is not available. In view of the availability of service by first class mail, the expensive and cumbersome procedure involving service by a marshall or other appointee should not be necessary. Finally, mandating service by a court appointee when the plaintiff proceeds in forma pauperis is not necessary in view of the availability of service by mail.

(2) **Rule 4(d)(2)-(5)** - provides a procedure for requesting, by first class mail, that the defendant waive service. This is more elaborate than the procedure for requesting waiver of service contained in former Rule 4(c)(2)(C) and (D), which were not made applicable in bankruptcy proceedings. Additional incentives were added to the Civil Rules to encourage the waiver of service, such as the addition of 40 days to the time in which the defendant must serve an answer (see Rule 12 as amended in 1993). Because service in bankruptcy proceedings may be effectuated by first class mail, it does not make sense to have a procedure for requesting by first class mail that the defendant waive service. If Rule 4(d)(2)-(5) is made applicable under Rule 7004, it would probably cause confusion and, if used, result in

inadvertantly extending the time for the defendant to answer.

(3) **Rule 4(k)** - similar to former Rule 4(f), this subdivision places territorial limits on service of a summons and complaint. Rule 7004(d) currently provides, and will continue to provide, for nationwide service of process. Therefore, Rule 4(k) is not made applicable under Rule 7004.

(4) **Rule 4(n)** - This is a new subdivision that provides for the exercise of jurisdiction over property (in rem and quasi-in-rem jurisdiction). It provides that notice to claimants of property shall be sent the way that a summons is served "under this rule" (i.e., Rule 4). If this is made applicable in bankruptcy proceedings, it could be construed to mean that notice to claimants would have to be by personal service under Rule 4, and not be first class mail. In view of the availability of service by first class mail, I think that Rule 4(n) should not be applicable in adversary proceedings.

New Civil Rule 4.1

A new Rule 4.1 (Service of Other Process) has been added to the Civil Rules, effective December 1, 1993. As explained in the Committee Note, the purpose of the new rule "is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4." Those provisions in former Rule 4 that have been moved to new Rule 4.1 have not been made applicable to adversary proceedings, and I suggest that Rule 4.1 also should not be made applicable in adversary proceedings.

Rule 4.1(a) requires that the U.S. marshall or other appointee serve process other than a summons and subpoena. This provision is similar to former Rule 4(c)(1) which is not applicable in adversary proceedings now. I understand that former Rule 4(c)(1) was not made applicable to adversary proceedings under Bankruptcy Rule 7004 because motions in a

bankruptcy case that are not made in connection with an adversary proceeding could be considered "process" in that they commence litigation. Under Rule 9014, contested matters (motions) may be served under Rule 7004(b) (first class mail).

Rule 4.1(a) also places territorial restrictions on service that are inconsistent with Bankruptcy Rule 7004(d) ("The summons and complaint and all other process except a subpoena may be seved anywhere in the United States"). I suggest that Rule 7004(d) remain without change.

New Rule 4.1(b) governs territorial limits with respect to service and enforcement of an order in a civil contempt proceeding. "An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued." These territorial limitations are inconsistent with Rule 7004(d) which provides for nationwide service.

AGENDA ITEM - 6
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULE 1006: PAYMENT OF ADMINISTRATIVE FEE; PAYMENT OF INSTALLMENTS TO CHAPTER 13 TRUSTEE

DATE: JANUARY 8, 1994

This memorandum discusses two separate proposals for amendments to Rule 1006 (Filing Fees).

Payment of Administrative Fee in Installments

In 1992, the Judicial Conference authorized bankruptcy courts to collect a $30 miscellaneous administrative fee in all chapter 7 and chapter 13 cases to be paid when the petition is filed. Although 28 U.S.C. § 1930(a) provides that the filing fee prescribed under that subsection may be paid in installments, the new $30 administrative fee is authorized by 28 U.S.C. § 1930(b) and, as originally prescribed, did not provide for installment payments. However, in September 1993, the Judicial Conference amended the schedule of fees under § 1930(b) to authorize the court to permit payment of this administrative fee in installments.

Rule 1006(b) governs the payment of the filing fee in installments. In view of the recent authorization by the Judicial Conference allowing installment payments of the administrative fee, an amendment to Rule 1006 at this time would be appropriate.

I recommend that Rule 1006(a) be amended by adding the following sentence: "For the purpose of this rule, 'filing fee' means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5)

and any other fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code." By adding this sentence, practitioners will be informed of the existence of additional fees prescribed by the Judicial Conference, and the procedures set forth in Rule 1006(b) for the payment of the filing fee in installments will also apply to the $30 administrative fee.

The attached draft contains this proposed amendment and is accompanied by an appropriate committee note.

Payment of Filing Fee Installments to the Chapter 13 Trustee for Transmission to the Clerk

I recently received a letter from Mr. Ike Shulman, President of the National Association of Consumer Bankruptcy Attorneys ("NACBA"). A copy of the letter is attached. Specifically, the NACBA requests that Rule 1006 be amended "to allow debtors to pay the Chapter 13 filing fees in installments through their Chapter 13 Trustee plan payments." Mr. Shulman explains that it would "simplify matters greatly" for chapter 13 debtors to be able to pay filing fee installments through the trustee -- a procedure that he believes is already followed in some courts.

According to Mr. Shulman, chapter 13 debtors are often confused about where to send payments. Starting soon after the petition is filed, the debtor must send payments to the trustee for distribution to creditors. The debtor also may have to send separate filing fee installments to the clerk and, in many cases, the debtor must send payments to utility companies for deposits.

At least four payments that now must be paid to the clerk could be avoided if filing fee installments could be paid to the trustee together with plan payments. Mr. Shulman then added:

> "More importantly, payments to the Chapter 13 Trustee are usually taken directly from the debtor's wages and there is a much greater likelihood that they will smoothly arrive if the payments are made through that channel rather than through individual money orders or cash from the debtor (the clerks will not accept personal checks from bankruptcy debtors)."

For discussion purposes, I drafted the attached proposed amendments to Rule 1006(b). This amendment would permit the debtor to pay, or arrange for payment, of the filing fee installments to the chapter 13 trustee.

A question that is likely to arise is whether a chapter 13 trustee who receives and transmits installment fees to the clerk is entitled to receive compensation for that service. In most districts that have a high volume of chapter 13 cases, a standing trustee is appointed under 28 U.S.C. § 586(b). Compensation for standing chapter 13 trustees are based in part on a percentage fee to be collected "from all payments received by [the standing trustee] under plans in the [chapter 13 cases]." 28 U.S.C. § 586(e)(2). If the debtor pays the filing fee to the trustee, and the trustee sends it to the clerk, it appears to me that the receipt and transmission of the filing fee installments are not "under a plan" and, therefore, a standing trustee may not be entitled to a percentage fee for that service.

If the trustee in a chapter 13 case is not a standing trustee, reasonable compensation (not exceeding "five percent

upon all payments under the plan") may be allowed by the court in accordance with §§ 326(b) and 330 of the Code. Although it would be unlikely, a court in its discretion could award reasonable compensation to a trustee, other than a standing trustee, for services performed in receiving and transmitting filing fee installments.

In drafting the Committee Note, I added a paragraph expressing the view that the trustee is not entitled to a percentage fee based on collection and transmission of filing fee installments. Although I believe that this paragraph is accurate, the trustee's right to receive a fee is statutory and would not be controlled by an advisory committee note.

In connection with Mr. Shulman's letter, I contacted the president of the National Association of Chapter 13 Trustees ("NACTT"). I have not yet received his views on this proposal, but I hope to discuss it with him, as well as with John Logan, prior to the February meeting.

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the prescribed filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) APPLICATION FOR PERMISSION TO PAY FILING FEE IN INSTALLMENTS. A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) ACTION ON APPLICATION. Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the

court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3) PAYMENTS TO CHAPTER 13 TRUSTEE. In a chapter 13 case, if leave is granted to pay the filing fee in installments, any installment of the filing fee may be paid to the chapter 13 trustee who shall forthwith transmit the installment to the clerk.

~~(3)~~ (4) POSTPONEMENT OF ATTORNEY'S FEES. The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the debtor in connection with the case.

COMMITTEE NOTE

The Judicial Conference prescribes miscellaneous fees pursuant to 28 U.S.C. § 1930(b). In 1992, a $30 miscellaneous administrative fee was prescribed for all chapter 7 and chapter 13 cases. The Judicial Conference fee schedule was amended in 1993 to provide that an individual debtor may pay this fee in installments.

Subdivision (a) of this rule is amended to clarify that every petition must be accompanied by any fee prescribed under 28 U.S.C. 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a). By defining "filing fee" to include Judicial Conference fees, the procedures set forth in subdivision (b) for paying the filing fee in installments will also apply with respect to any Judicial Conference fee required to be paid at the commencement of the case.

Subdivision (b) is amended to permit a debtor in a chapter 13 case to pay fee installments to the chapter 13 trustee for transmission to the clerk. Debtors in

chapter 13 cases are required to send payments to the trustee for distribution to creditors. These payments to the trustee begin prior to confirmation of the plan. See § 1326 of the Code. It would simplify matters for the debtor to have the option of sending filing fee installments to the trustee together with plan payments. Moreover, if plan payments are made to the trustee directly from the debtor's wages or from another source, the debtor could arrange for fee installments to be paid in the same manner.

The payment of filing fee installments to a chapter 13 trustee, and transmission of the installments by the trustee to the clerk, are not payments under the plan and, therefore, should not be considered in determining any compensation, or limitation on compensation, that is based on a percentage of payments under a plan. See 11 U.S.C. § 326(b); 28 U.S.C. § 586(e).

National Association of Consumer Bankruptcy Attorneys

1350 Beverly Rd., Suite 115-252
McLean VA 22101-3633
Telephone: (703) 803-7040
Facsimile: (703) 802-0207

December 2, 1993

Professor Allen Resnick
Hofstra University School of Law
Hempstead, NY 11550

Re: Proposed change in Bankruptcy Rule 1006

Dear Professor Resnick:

I am writing you as the president of the National Association of Consumer Bankruptcy Attorneys, an organization of attorneys representing consumer bankruptcy debtors, with members in over 45 states, the District of Columbia, and Puerto Rico.

NACBA has reviewed various consumer bankruptcy issues which we believe need to be addressed. One of the issues which we have identified as a problem is the manner in which filing fees are required to be paid where the debtor is represented by an attorney. We believe this problem could be easily addressed by a change in Bankruptcy Rule 1006. Specifically, NACBA is requesting that Rule 1006 be changed to allow debtors to pay the Chapter 13 filing fees in installments through their Chapter 13 Trustee plan payments.

In most Chapter 13 cases, the debtor does not pay attorneys' fees to his or her attorney prior to filing a case, and is therefore eligible to pay the filing fee in installments. We think that it would simplify matters greatly for consumer debtors if those filing fee installments could be paid through the Chapter 13 Trustee. I understand that this procedure is already followed in some Courts.

However, in most Courts presently, the debtors are often confused about where to send payments, since at the outset of the case they must send installment payments not only to the Trustee, but also to the clerk for installment

National
Association
of
Consumer
Bankruptcy
Attorneys

filing fees and often to utility companies for deposits, as well. By permitting the filing fee to be paid through the Chapter 13 Trustee, at least four separate payments required of the debtor could be avoided.

More importantly, payments to the Chapter 13 Trustee are usually taken directly from the debtor's wages and there is a much greater likelihood that they will smoothly arrive if the payments are made through that channel rather than through individual money orders or cash from the debtor (the clerks will not accept personal checks from bankruptcy debtors).

I would appreciate it if you could present this proposal to the Rules Committee for possible action.

Very truly yours,

IKE SHULMAN

Form B3-1
12/93

UNITED STATES BANKRUPTCY COURT

for the

_____ District of _____

In re

Case No. _____

Chapter _____

, Debtor

APPLICATION TO PAY FILING FEE AND ADMINISTRATIVE FEE IN INSTALLMENTS

In accordance with Fed. R. Bankr. P. 1006 and Item 8 of the Judicial Conference Schedule of Fees for Bankruptcy Courts, application is made for permission to pay the filing fee and administrative fee on the following terms:

$ _____ with the filing of the petition, and the balance of
$ _____ in _____ installments, as follows:*

$ _____ on or before _____
$ _____ on or before _____
$ _____ on or before _____
$ _____ on or before _____

I certify that I am unable to pay the filing fee or the administrative fee except in installments. I further certify that I have not paid any money or transferred any property to an attorney or any other person for services in connection with this case or in connection with any other pending bankruptcy case and that I will not make any payment or transfer any property for services in connection with the case until the filing fee and the administrative fee are paid in full.

Date: _____

_____
Applicant

_____
Address of Applicant

_____

ORDER

IT IS ORDERED that the debtor pay the filing fee and the administrative fee in installments on the terms set forth in the foregoing application.

IT IS FURTHER ORDERED that until the filing fee and the administrative fee are paid in full the debtor shall not pay, and no person shall accept, any money for services in connection with this case, and the debtor shall not relinquish, and no person shall accept, any property as payment for services in connection with this case.

BY THE COURT

Date: _____

_____

* The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. Fed. R. Bankr. P. 1006(b)(2).

AGENDA ITEM - 7
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENT TO RULE 8002 REGARDING FILING OF NOTICE OF APPEAL BY AN INMATE

DATE: JANUARY 7, 1994

In Houston v. Lack, 487 US 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal in a habeas corpus case was "filed" at the time it was delivered to prison authorities for forwarding to the district court clerk, rather than the time it was received by the court clerk. The Court based its holding on the unique circumstances confronting a pro se prisoner, as well as the absence of any provision in the Federal Rules of Appellate Procedure defining when "filing" of a notice of appeal occurs.

In response to the Court's decision in Houston, F.R.App.P. 4 was amended, effective December 1, 1993, to add a new subdivision (c) that provides as follows:

> (c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION. If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the

district court's receipt of the defendant's notice of appeal."

The Committee Note to F.R.App.R. 4(c) explains the amendment as follows:

> "In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal is 'filed' at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.
>
> Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross-appeals. In a civil case, the time for filing a cross-appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the 'filing' date and perhaps even after the time for filing a cross-appeal has expired. To avoid that problem, subdivision (c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case."

Notice that the new provision applies to any "inmate confined in an institution," not only to prisoners.

In July of 1993, the Court of Appeals for the Third Circuit was faced with the issue of whether a joint notice of appeal filed by pro se prisoners appealing from the dismissal of their chapter 13 petitions was deemed filed when it was delivered to prison authorities addressed to the clerk of the bankruptcy court with postage prepaid. In re Flanagan, 999 F2d 753 (3rd Cir. 1993) (copy attached). In Flanagan, the notice of appeal was

delivered to prison authorities for mailing on the last day for filing, but the notice was stamped "filed" by the clerk when received eight days after the time to appeal had expired. The Court of Appeals, applying the rationale of Houston v. Lack to the filing of a notice of appeal under Bankruptcy Rule 8002, held that the notice was timely filed when it was deposited with prison officials.

I think it is important for the Advisory Committee to focus on the issue raised in Flanagan with a view toward amending Rule 8002. The present state of the law could be a trap -- lawyers who rely on the apparent finality of an order or judgment of the bankruptcy court because the docket fails to indicate that a timely notice of appeal has been filed may be unaware of the judge-made rule that a party who is a prisoner may timely file a notice of appeal by delivering it to a prison official. If the Committee agrees with the result in Flanagan, it should be codified as a warning to all parties who may rely on the finality of an order. If the Committee believes that the holding in Flanagan should be limited, a rule amendment would be necessary for that purpose.

It appears to me that the result in Flanagan was just, and I agree with the substance of F.R.App.R. 4(c). Nonetheless, a factor that should be considered by the Advisory Committee is that there is often a greater need for certainty regarding the finality of orders and judgments in bankruptcy cases than in other civil and criminal actions. This need is manifested by

certain provisions of Part VIII of the Bankruptcy Rules. For example, Appellate Rule 4(a)(5) allows a district court, based on excusable neglect or good cause, to permit a party to file a notice of appeal after expiration of the filing period so long as the motion to extend the time is filed within 30 days after expiration of the appeal period. Bankruptcy Rule 8002(c) contains a similar provision permitting the court, based on a finding of excusable neglect, to extend the time to file a notice of appeal if requested within 20 days after expiration of the appeal period. However, Rule 8002(c) expressly limits the court's power to extend the time for filing a notice of appeal based on excusable neglect. The court may extend the time to appeal only "if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting a case to a case under another chapter of the Code." It is interesting to note that the debtors in Flanagan would not have had the right to an extension of time based on excusable neglect because they were appealing an order dismissing their chapter 13 cases.

If the Committee recommends the amendment of Rule 8002 to conform generally to Appellate Rule 4(c), the Committee should also decide whether there should be any limitations on the provision. For example, a rule fixing the filing date as the date that the inmate places the notice of appeal in the internal

mail system could be made inapplicable to some or all of the types of orders and judgments that now are immune from the excusable neglect doctrine in Rule 8002(c). Protection of an inmate's right to appeal -- whether it is the inmate's bankruptcy case or someone else's -- should be weighed against the need for certainty and finality regarding certain types of orders.

To assist in the discussion of this issue, I prepared the following alternative drafts of a new subdivision (d) to Rule 8002. The language of "Alternative A" is very similar to the language of the new F.R.App.R. 4(c) that became effective last month. "Alternative B" conforms Rule 8002 to Appellate Rule 4(c) with respect to all orders and judgments when the inmate is the debtor in the case, but carves out certain types of orders and judgments (taken from the list of those that are carved out of the excusable neglect doctrine in Rule 8002(c)) when the inmate is not the debtor in the case. When the inmate is the debtor, there is greater likelihood that parties in interest will know that the debtor is an inmate and will take into consideration the inmate's ability to preserve the right to appeal by depositing the notice of appeal in the internal mail system. Parties in interest are not as likely to know that one of many creditors or shareholders of the debtor is an inmate. Of course, the Committee may wish to use "Alternative B" without making the distinction between the inmate as debtor and the inmate who is not the debtor.

Alternative A:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(d) FILING BY INMATE. If an inmate confined in an institution files a notice of appeal, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first class postage has been prepaid. If the first notice of appeal is filed in the manner provided in this subdivision (d), the period provided in subdivision (a) of this Rule 8002 for another party to file a notice of appeal runs from the date when the clerk receives the first notice of appeal.

COMMITTEE NOTE

Subdivision (d) is added to conform this rule to the 1993 amendment to F.R.App.P. 4(c) and to reflect the decision in In re Flanagan, 999 F2d 753 (3rd Cir. 1993), where the court of appeals held that a pro se prisoner's notice of appeal from an order of the bankruptcy court is 'filed' at the moment of delivery to prison authorities for forwarding to the bankruptcy court. The language of the amendment is similar to that in F.R.App.R. 4(c). See also Houston v. Lack, 487 U.S. 266 (1988).

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross appeals. The time for filing a cross appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is

possible that the notice of appeal will not arrive in the bankruptcy court until several days after the 'filing' date and perhaps even after the time for filing a cross appeal has expired. To avoid that problem, subdivision (d) provides that when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross appeal runs from the clerk's receipt of the notice.

Alternative B:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(d) FILING BY INMATE. If an inmate confined in an institution files a notice of appeal, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing if (i) the inmate is the debtor in the case, or (ii) the order or judgment appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting a case to a case under another chapter of the Code. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first class postage has been prepaid. If the first notice of appeal is filed in the manner provided in this subdivision (d), the period provided in subdivision (a) of this Rule 8002 for another party to file a notice of appeal runs from the date when the clerk receives the first notice of appeal.

COMMITTEE NOTE

Subdivision (d) is added to conform this rule to the 1993 amendment to F.R.App.P. 4(c) and to reflect the decision in In re Flanagan, 999 F2d 753 (3rd Cir. 1993), where the court of appeals held that a pro se

prisoner's notice of appeal from an order of the bankruptcy court is 'filed' at the moment of delivery to prison authorities for forwarding to the bankruptcy court. The language of the amendment is similar to that in F.R.App.R. 4(c). See also Houston v. Lack, 487 U.S. 266 (1988).

The protection afforded an inmate under subdivision (d) applies with respect to all appealable orders and judgments if the inmate is the debtor. However, this protection is not applicable with respect to certain categories of orders and judgments in cases in which the inmate is not the debtor. If the inmate is the debtor, there is greater likelihood that parties in interest will be aware of that fact and will take into consideration the inmate's ability to preserve the right to appeal by depositing the notice of appeal in the internal mail system.

There is often a need for a greater degree of certainty regarding the finality of certain types of orders and judgments in bankruptcy cases. For example, when closing a transaction in connection with implementation of a chapter 11 plan, parties may rely on the apparent inability of any party to appeal the order of confirmation. The proponent of a chapter 11 plan may rely on the finality of the order approving the disclosure statement before mailing vote solicitation materials. These types of orders and judgments in cases in which the inmate is not the debtor may be appealed by a party confined to an institution, but only if the notice of appeal is presented, by mail or otherwise, at the clerk's office within the time limit for filing.

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross appeals. The time for filing a cross appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the bankruptcy court until several days after the 'filing' date and perhaps even after the time for filing a cross appeal has expired. To avoid that problem, subdivision (d) provides that when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross appeal runs from the clerk's receipt of the notice.

serve as a basis for the imposition of sanctions under Rule 11. The district court should have engaged in further findings regarding the extent of the investigation conducted. *Cf. Lony*, 935 F.2d at 616 (bad faith not needed to support imposition of sanctions).

Our prior decisions make clear that the use of the auxiliary verb "shall" in Rule 11 was intended to surmount any hesitancy to issue sanctions against attorneys and parties who run afoul of the duty to conduct a reasonable investigation. *Lony*, 935 F.2d at 617; *Lieb*, 788 F.2d at 157. While trial judges retain a substantial measure of discretion with regard to Rule 11, "[this discretion] is now directed more to the nature and extent of sanctions than to initial imposition." [6] *Lieb*, 788 F.2d at 157.

At oral argument, Bradgate's counsel offered both a description of his investigation and an explanation for his actions. He conceded that he relied solely on his client's representations and did not independently investigate the allegations in the complaint. He also conceded that at the time he filed the federal complaint, he sought to avoid state court because he was involved in litigation against the Chief Justice of the New Jersey Supreme Court. On remand, the district court should take heed of these statements and conduct an appropriate inquiry.

We will vacate the district court's denial of Fellows, Read's Rule 11 motion and remand for further examination consistent with this opinion. We express no opinion as to the result the district court should reach on remand.

V.

For the foregoing reasons, we will reverse the order remanding the federal case to state court and instruct the district court to dismiss that portion of these consolidated cases after conducting further proceedings on the Rule 11 motion. *See Willy v. Coastal Corp.*, — U.S. —, —, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992) (imposition of Rule 11 sanctions is not an adjudication on the merits and, therefore, "does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction"). That portion of these consolidated cases which was removed from state court may be remanded to state court as the district court had originally ordered.

6. We are mindful that a proposed amendment to Rule 11 is pending before Congress. As revised, the rule would provide that a court *may*, not *shall*, impose sanctions upon finding a violation. Thus, the emphasis we have previously articulated and reiterate here may yield to a wider discretion among district court judges should the proposed amendment come to fruition.

In re John Webster FLANAGAN, Appellant,

Charles J. Dehart, III, Trustee.

In re Joseph Francis VALVERDE, Appellant,

Charles J. Dehart, III, Trustee.

In re Michael SAVICH, Appellant,

Charles J. Dehart, III, Trustee.

Nos. 92-7438 through 92-7440.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) May 17, 1993.

Decided July 27, 1993.

The Bankruptcy Court dismissed pro se prisoners' Chapter 13 petitions for failure to comply with the income requirements for Chapter 13 relief. Prisoners appealed. The United States District Court for the Middle District of Pennsylvania, James Focht McClure, Jr., J., dismissed appeals as untimely. Appeal was taken. The Court of Appeals, Hutchinson, Circuit Judge, held that: (1) joint notice of appeal was deemed filed at the moment notice was deposited

with prison authorities, addressed to the clerk of court with postage prepaid, and (2) disposition of appeal from dismissal of the petitions would not render moot appeal from the Bankruptcy Court's denial of one debtor's sanctions motion.

District Court order vacated and matter remanded.

1. Bankruptcy ⇐3767

Bankruptcy court order dismissing prisoners' Chapter 13 petitions without prejudice for failure to satisfy the income requirements for Chapter 13 was "final" order for appeal purposes; when the petitions were dismissed for lack of income, the prisoners were faced with a situation they could not cure so long as they were incarcerated. 28 U.S.C.A. § 158(a, d).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy ⇐3782

Whether prisoners' appeals to district court from bankruptcy court orders dismissing their Chapter 13 petitions were timely was jurisdictional issue involving interpretation of Bankruptcy Rule over which the Court of Appeals would exercise plenary review.

3. Bankruptcy ⇐2129, 3773

Local rule, which had been adopted by federal district court and which provided special filing rules for documents forwarded by prisoners, did not apply to bankruptcy appeal filed by prisoners; local rules adopted by district court under rule permitting district court to adopt local rules do not apply to proceedings in bankruptcy and the local rule in question had not been adopted or approved by the United States Supreme Court. U.S.Dist.Ct.Rules M.D.Pa., Rule 806; Fed. Rules Civ.Proc.Rule 83, 28 U.S.C.A.

4. Bankruptcy ⇐3773
Federal Courts ⇐667

When pro se prisoner deposits notice of appeal with prison authorities, addressed to the clerk of court with postage prepaid, it is deemed filed at that moment for purposes of the Federal Rules of Appellate Procedure and the Federal Rules of Bankruptcy Procedure; therefore, pro se prisoners' joint notice of appeal from bankruptcy court orders dismissing their Chapter 13 petitions without prejudice were timely filed when they were deposited with prison authorities, addressed to the clerk of court with postage prepaid, on the last day for filing. F.R.A.P.Rule 4(a), 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rule 8002(a), 11 U.S.C.A.

5. Bankruptcy ⇐2187

Fact that debtor cited Rule 11, rather than Bankruptcy Rule 9011, in sanctions motion was insufficient, by itself, to deny debtor relief. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

6. Bankruptcy ⇐3781

Appeal from denial of Chapter 13 debtor's motion to impose sanctions on attorney would not become moot upon disposition of appeal from order dismissing the underlying bankruptcy petition; appeal from denial of sanctions is collateral matter independent of the underlying merits of bankruptcy appeal.

John Webster Flanagan, pro se.

Joseph Francis Valverde, pro se.

Michael Savich, pro se.

James J. West, U.S. Atty., Robert R. Long, Jr., Asst. U.S. Atty., Joseph J. Terz, Office of U.S. Atty., Harrisburg, PA. for U.S.

James J. West, U.S. Atty., Robert R. Long, Jr., Asst. U.S. Atty., Harrisburg, PA, for Joseph J. Terz.

Present: SLOVITER, Chief Judge, HUTCHINSON and ROTH, Circuit Judges.

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Appellants, John W. Flanagan, Joseph F. Valverde and Michael Savich, prisoners proceeding *pro se*,[1] appeal orders of the United

1. Although Flanagan was listed as the attorney of record for himself and the other two appellants

States District Court for the Middle District of Pennsylvania dismissing as untimely their appeals from Chapter 13 bankruptcy court orders. The bankruptcy court dismissed without prejudice their petitions under Chapter 13 of the Bankruptcy Code for failure to meet the § 109(e) income requirements for relief under that Chapter. The district court dismissed their appeals as untimely because their joint notice of appeal was not received and stamped filed by the Clerk of the Bankruptcy Court until eight days after the ten-day period that Bankruptcy Rule 8002 allows for filing an appeal. The prisoners assert that their deposit of the notice of appeal with prison authorities for forwarding to the clerk within the ten days allowed should be deemed a timely filing.

All three prisoners' cases present the question whether the rule announced in *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) applies to a *pro se* prisoner's appeal to a district court from an order of a bankruptcy court. This is an issue of first impression in this Court.

For the reasons that follow, we hold that the rationale of *Houston* controls this case and that the prisoners' notice of appeal was timely filed when it was deposited with prison officials, addressed to the clerk with postage prepaid, on the last day for filing. Accordingly, we will vacate the order of the district court and remand for further proceedings consistent with this opinion. We also hold the district court erroneously considered Savich's appeal of the bankruptcy court's order denying his motion for sanctions against a government attorney as moot following the order dismissing his underlying bankruptcy proceeding. On remand, therefore, the district court is instructed to reconsider that issue on its merits.

I.

The bankruptcy court had jurisdiction over the prisoners' cases under 28 U.S.C.A. § 157(a) (West Supp.1993). It dismissed their Chapter 13 bankruptcy petitions without prejudice, *see* 11 U.S.C.A. § 349(a) (West 1993) (favoring dismissals without prejudice), because none of them had regular incomes sufficient to meet 11 U.S.C.A. § 109(e)'s income preconditions for Chapter 13 relief. We have held, in other contexts, that orders dismissing a complaint without prejudice are not final unless plaintiff can no longer amend the complaint. *See Borelli v. City of Reading*, 532 F.2d 950, 951–52 (3d Cir.1976) (per curiam) (order dismissing case without prejudice not final or appealable because "the deficiency may be corrected by the plaintiff without affecting the cause of action"); *see also Newark Branch, NAACP v. Town of Harrison*, 907 F.2d 1408, 1416–17 (3d Cir. 1990); *Czeremcha v. International Assoc. of Machinists and Aerospace Workers, AFL–CIO*, 724 F.2d 1552, 1554 (11th Cir.1984) (noting distinction between dismissal of the action and dismissal of the complaint).

[1] We have never applied that principle to an order dismissing a bankruptcy petition. We have, however, adopted an exception to the rule that a dismissal without prejudice is not final and appealable when a "plaintiff cannot or will not bring a second action" because that inability or unwillingness eliminates the "risk of multiple litigation" which is at the core of the finality principle. *Trevino–Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 878 (3d Cir.1990). In *Welch v. Folsom*, 925 F.2d 666, 668 (3d Cir.1991), we applied this exception to *Borelli's* non-finality rule in holding the dismissal of a *pro se in forma pauperis* complaint for failure to effect service of process was final and appealable when the prisoner had no means of paying for the service necessary to cure the defect because that inability eliminated the possibility of a second suit. *Id.* Similarly, when the prisoners in these cases had their petitions for relief under Chapter 13 dismissed because of a lack of income, they were faced with a situation they cannot cure so long as they are

in the bankruptcy court, he is not admitted to practice before this Court. Therefore, as the district court did, we will treat all three actions as filed *pro se*. *See In re Flanagan et al.*, Civ. Nos. 3:CV–92–792, 793, 794 and 795, slip op. at 1 n. 1 (M.D.Pa. June 30, 1992), *vacated on other grounds, In re Flanagan et al.*, Civ. Nos. 3:CV–92–792, 793, 794 and 795 (M.D.Pa. July 2, 1992). By order entered August 27, 1992, we consolidated the three prisoners' appeals at Nos. 92–7438, 7439, and 7440 for disposition on the merits.

incarcerated. Therefore, a second action posing that problem is not likely, and the order dismissing their petitions for relief without prejudice is, in practical effect, a final order that conclusively determines the prisoners' rights to avoid the Bureau of Prisons' regulation diverting their prison wages to payment of the obligations they seek to avoid.

[2] Accordingly, we believe the rationale of our cases holding orders dismissing a complaint without prejudice lack the finality that is a prerequisite to appeal has no application here. Therefore, the district court had jurisdiction over the orders of the bankruptcy court in question under 28 U.S.C.A. § 158(a) (West Supp.1993). We have jurisdiction over the appeal from the district court's final order dismissing the bankruptcy appeals as untimely under 28 U.S.C.A. § 158(d) (West Supp.1993). The issue of whether the prisoners' appeals to the district court were timely is, on this record, a jurisdictional issue involving interpretation of Bankruptcy Rule 8002, over which we exercise plenary review. *In re Universal Minerals, Inc.*, 755 F.2d 309, 312 (3d Cir.1985) (failure to file timely notice of appeal from bankruptcy court order deprives district court and also this Court of jurisdiction).

II. *Application of Houston v. Lack*

Appellants had filed voluntary Chapter 13 bankruptcy petitions in the United States Bankruptcy Court for the Middle District of Pennsylvania under 11 U.S.C.A. §§ 1301–30 (West 1979 & Supp.1993) after the United States Bureau of Prisons introduced a "Financial Responsibility" program to collect money that prisoners owed to the federal government. The Bureau of Prisons devised a program of payments said to be voluntary but which the prisoners allege punishes any prisoner who does not agree to make the payment. The three prisoners who filed these appeals had agreed to a proposed payment plan and made payments on it for over a year and a half. After the bankruptcy court agreed to accept payment of the filing fee in each of the bankruptcies in installments, the United States filed motions to dismiss[2] and the Chapter 13 Trustee filed objections to the prisoners' proposed wage earner plans. In each case, the bankruptcy court treated the Trustee's objections as motions to dismiss. Because the appellants did not have the regular income 11 U.S.C.A. §§ 109(e), 101(3) requires, it dismissed the prisoners' Chapter 13 petitions without prejudice by order dated May 8, 1992.[3] The prisoners received the orders dismissing their petitions from prison authorities on Monday, May 11. On May 18, the last day for filing, they signed a joint notice of appeal dated that day and deposited it with prison authorities addressed to the Clerk of the Bankruptcy Court with postage prepaid. The last sentence in the notice states that the prisoners filed it on May 18 "by placing same in the legal mail box at USP–Lewisburg properly packaged and addressed with the proper amount of postage thereon in accordance with the dictates of *Houston v. Lack*, 487 U.S. 266 [108 S.Ct. 2379, 101 L.Ed.2d 245] (1988)." Brief for Appellant Flanagan at 27–28. These facts are not contested.[4] The bankruptcy court stamped the notice of appeal as filed on May 26, 1992, eight days after the appeal period had expired.

On June 30, 1992, the district court entered an order affirming the bankruptcy court. A written opinion addressing the merits of the bankruptcy court's actions accompanied the order. It gave two reasons for affirming the bankruptcy court's dismissal of the petitions, only one of which the

2. The United States is not a party to Flanagan's or Savich's appeal. Savich had only one creditor because his debt arose out of a restitution order from a New York state court. Valverde allegedly owes money to the federal government and Internal Revenue Service for tax liens assessed against him. Flanagan disputes the identity of his creditors.

3. The bankruptcy court's order dismissed the Chapter 13 petitions of the three appellants in this case as well as one other individual, Richard Viccarone. We dismissed Viccarone's appeal, at our docket No. 92-7441, on January 14, 1993 for failure to file a brief and appendix.

4. In *Smith v. Evans*, 853 F.2d 155, 162 (3d Cir.1988), we held that this is sufficient to establish that the notice was, in fact, given to prison officials for mailing on that date.

bankruptcy court had addressed. The district court agreed with the bankruptcy court's holding that the petitions should have been dismissed because the prisoners had insufficient regular income to meet the requirement of 11 U.S.C.A. § 109(e). Alternately, the district court held the prisoners did not owe noncontingent, liquidated and unsecured debts of less than $100,000 as also required by that section.

On July 2, 1992, the district court withdrew the opinion and order it had entered June 30, 1992 dismissing the prisoners' petitions on their merits and entered instead an order dismissing the appeal for lack of jurisdiction because it was untimely.[5] The prisoners' joint notice of appeal was not filed within ten days of the date that the bankruptcy court entered its order of dismissal. *See* Bankr.Rule 8002 (requiring notice of appeal to be filed within ten days).[6] The appellants argue that *Houston*, which held an appeal from an order denying a prisoner's petition for writ of habeas corpus was timely filed when delivered to prison officials for mailing, should be extended to cover appeals from orders dismissing prisoners' bankruptcy petitions. If the *Houston* rationale applies, the prisoners' notice of appeal would be timely filed because they deposited it with prison authorities within the ten days allowed by Bankruptcy Rule 8002.

In *Houston*, the Supreme Court applied Federal Rule of Appellate Procedure 4(a)(1). It requires appeals to be filed within thirty days. The Court held that a *pro se* prisoner's notice of appeal in a habeas corpus case was filed at the moment it was delivered to prison authorities for forwarding to the district court. *Houston*, 487 U.S. at 270, 108 S.Ct. at 2382 (citing *Fallen v. United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964)). First pointing out that Federal Rule of Appellate Procedure 4(a)(1) did not define when "filing" occurs, *id.* 487 U.S. at 273, 108 S.Ct. at 2383, the Supreme Court went on to examine the unique circumstances confronting a prisoner proceeding *pro se*. It noted among them a *pro se* prisoner's inability to take the steps other litigants can to monitor the processing of a notice of appeal and ensure that the clerk receives and stamps it within the appeal period. *Id.* at 270–71, 108 S.Ct. at 2382–83. The Supreme Court also pointed out that a *pro se* prisoner does not have counsel to see that such notice is timely received by the clerk. *Id.* at 271, 108 S.Ct. at 2382. Thus, *pro se* prisoners who must use the mails to file documents and cannot personally travel to the clerk's office to do so are unlike other civil litigants who choose the mail for filing and must bear the risk of late delivery that is attendant on the means of filing he has chosen to use. *Id.* The Supreme Court then pointed out if there is a delay attributable to prison authorities rather than postal procedures, a prisoner is unlikely to be able to prove that the late filing resulted from the prison's delay in depositing the appeal in the mail or the clerk's failure to properly stamp the notice when it is received. *Id.*

In addition, the Court reasoned that its rejection of a mail box rule in other situations because of the difficulty in determining the time of deposit does not apply to a prisoner because prison authorities are in a position to easily show when a document was received or mailed under established prison procedures for recording the date and time at which papers are received by prison officials in the prison's mail room. *Id.* at 275, 108 S.Ct. at 2384. The Supreme Court created "a bright-line rule, not an uncertain one," *id.*, by holding that "the notice of appeal was filed at the time [the habeas] petitioner delivered it to the prison authorities for forwarding to the court clerk." *Id.* at 276, 108 S.Ct. at 2385.

[3, 4] We believe the *Houston* rationale is also controlling on a *pro se* prisoner's appeal

5. The district court stated that at the time it issued the June 30 opinion it was unaware of the United States' pending motion to dismiss the appeal as untimely. We express no opinion on the merits of appellants' claims because the district court withdrew its June 30, 1992 opinion and order.

6. Bankruptcy Rule 8002 was promulgated pursuant to the United States Supreme Court's authority "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11." 28 U.S.C.A. § 2075 (West 1982).

to a district court from a final order of a bankruptcy court. Bankruptcy Rule 8002(a), requiring that the notice of appeal be filed within ten days after entry of the order appealed from, like Federal Rule of Appellate Procedure 4(a), fails to define "filing." The Advisory Committee's Notes to Bankruptcy Rule 8002(a) state that it is an adaptation of Federal Rule of Appellate Procedure 4(a). *See also In re Universal Minerals, Inc.*, 755 F.2d at 312. *Houston* construes "filing" for *pro se* prisoners under 4(a) to mean the date a *pro se* prisoner deposits his notice of appeal, postage prepaid, in the prison mailroom. A *pro se* prisoner seeking to appeal a bankruptcy court order faces precisely the same problems as a prisoner who wishes to file a *pro se* appeal from an order dismissing a habeas petition. Therefore, we believe the *Houston* rule should be extended to bankruptcy appeals.[7] *Cf. Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 430 & n. 3 (8th Cir.1990) (*Houston* applies to filing under Federal Rule of Appellate Procedure 4(a) and Bankruptcy Rule 8002(a) because rules are practically identical) (dicta). Bankruptcy appeals present a strong case for the application of *Houston's* prison mailbox rule because the time for appeal under Rule 8002(a) is only ten days instead of the thirty days the *Houston* appellants had to appeal the order dismissing Houston's habeas petition. *See United States v. Grana*, 864 F.2d 312, 315 (3d Cir.1989) (where appeal period is short, even slight delay can compromise prisoner's right to appeal) (citation omitted).[8]

In *Smith v. Evans*, 853 F.2d 155, 161–62 (3d Cir.1988), this Court considered *Houston's* application to Federal Rule of Civil Procedure 59(e) motions for reconsideration of orders dismissing § 1983 actions. Rule 59(e), like Bankruptcy Rule 8002(a), allows only ten days for filing instead of the thirty days Federal Rule of Appellate Procedure 4(a), the rule in *Houston*, allows. In *Smith*, we held that *Houston* would not save the *Smith* appeal because "we [could not] conclude that prison delay in transmitting Smith's motion contributed to the lateness of the motion." *Id.* at 162. Smith had submitted his motion on May 13, 1987, but the order he appealed from was entered April 23, 1987. Therefore, "when Smith put his motion in the envelope (even before he gave it to prison authorities to mail) his motion was untimely." *Id.* In this respect, *Smith* is plainly distinguishable. Here, the prisoners have shown they delivered their joint notice of appeal to the prison mail room within the ten days Rule 8002(a) allows.

Houston requires no more of a prisoner than a delivery of his notice of appeal to prison authorities within the filing period. If this task is completed, the notice is deemed "filed" when the prisoner turns it over to the prison authorities. Once that happens, it passes out of the *pro se* prisoner's control and he or she can do nothing more to insure its arrival at the clerk's office in time. *Cf. Grana*, 864 F.2d at 316 (*Houston* held applicable to *pro se* prisoner's motion to correct presentence investigation report; alleged negligent delay by prison officials in transmitting notice of final order to incarcerated *pro se* litigant so that he did not receive it until seventeen days after order was entered and seven days after appeal period expired was excluded from filing period).

In this case, however, there is no allegation of delay by the prison in transmitting the notice to or from postal authorities. The

7. The appellants allege that Local Rule 806 of the Middle District of Pennsylvania controls the appeal from the bankruptcy court to the district court. Local Rule 806 provides special filing rules for documents forwarded by prisoners. The Local Rules, adopted pursuant to Federal Rule of Civil Procedure 83, do not apply to proceedings in bankruptcy. Local Rule 806 has not been adopted or approved by the United States Supreme Court. *See* Fed.R.Civ.P. 81. Therefore, it does not apply to this case.

8. On April 22, 1993, the United States Supreme Court approved an amendment to Federal Rule of Appellate Procedure 4, codifying the *Houston* rule, and transmitted it to Congress for its approval, as required by 28 U.S.C.A. § 2074(a) (West Supp.1993). Proposed new Rule 4(c) would provide:

> If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing.

H.R.Doc. No. 103–72 at 12, 103d Cong., 1st Sess. (April 22, 1993).

United States contends slow mail should not justify *Houston's* application and that some allegation of actual delay on the part of prison officials is required. *See Grana*, 864 F.2d at 316 (prison delay should not count against prisoner); *cf. Wilder v. Chairman of Cent. Classification Bd.*, 926 F.2d 367, 371 (4th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 109, 116 L.Ed.2d 78 (1991). Certain statements in *Houston*, along with its reliance on the concurrence in *Fallen*, indicate a broader rule—one that seems to make the prison mail room an adjunct of the clerk's office without regard to whether there has been an allegation of actual delay.[9] We hold that when a *pro se* prisoner deposits his notice of appeal with prison authorities, addressed to the clerk of court with postage prepaid, it is deemed filed at that moment for purposes of Federal Rule of Appellate Procedure 4(a) and Bankruptcy Rule 8002(a). Therefore, a showing of delay on the part of prison officials is not necessary.

III. *Bankruptcy Court's Denial of Sanctions*

[5] Savich's appeal presents an additional collateral issue. During the bankruptcy proceedings he moved for the imposition of sanctions against United States Attorney Terz. The bankruptcy court denied his motion. In the bankruptcy court Terz had filed a motion to dismiss Savich's Chapter 13 petition as well as those of Flanagan and Valverde. The United States, however, was not a creditor in Savich's case. At the time Terz filed the motion to dismiss the petition he believed that the United States was in fact a creditor. He believed the Order of Restitution which Savich sought to discharge had been issued by the same federal court that had issued the order under which Savich was incarcerated. Terz says he did not learn until later that the restitution order against Savich had been issued by a New York state court. Savich filed a motion seeking Federal Rule of Civil Procedure 11[10] sanctions against Terz for filing a frivolous motion to dismiss on behalf of a person not a party to Savich's case.

The bankruptcy court denied Savich's motion for sanctions on April 15, 1992. Savich deposited his own notice of appeal from the denial of sanctions in the prison mailbox on April 23. It was received and stamped filed by the clerk of courts on April 27, two days after the ten-day filing deadline. Because of our holding that *Houston* applies to a *pro se* prisoner's appeal from a bankruptcy court's final order, *see* discussion *supra* in Part II, this notice of appeal must also be deemed timely filed.

The district court docket sheet, however, does not show that the district court ruled on the merits of Savich's appeal from the bankruptcy court's order dismissing Savich's motion for sanctions before issuing its July 2, 1992 order dismissing the joint appeal of the underlying bankruptcy cases as untimely. In its July 2 order, however, the district court stated that its order "renders moot all other outstanding motions."

[6] All parties agree that the district court had appellate jurisdiction over the bankruptcy court order denying sanctions despite the district court's order dismissing Savich's appeal from the dismissal of his

9. Though none of the prisoners in this case have specifically alleged that the cause for the untimely notice was delay on the part of prison officials, they argued that slow mail in the prison contributed to the untimely filing because the bankruptcy court order was entered on a Friday but was not received by them until the following Monday at 4:00 p.m., the next normal prison mail delivery. This interval between the prison's receipt of mail and its delivery to the prisoners does not seem to us to show undue prison delay. The prisoners also argue that even if they had mailed the notice of appeal on the day the bankruptcy court order was received, *i.e.* May 11, the notice still would not have been received and filed until May 19, one day after the ten-day deadline, because it actually took the notice mailed on May 18 until May 26 to reach the Clerk's office. *But see Grana*, 864 F.2d at 316 (court can do nothing about slow mail). Because of our conclusion that *Houston* extends to the present situation and the notice of appeal is deemed filed when it is turned over to prison officials, we need not consider these arguments.

10. Although we recognize that the Federal Rules of Civil Procedure are not applicable to bankruptcy proceedings absent directions from the Supreme Court, *see* Fed.R.Civ.P. 81(a)(1); *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir.1987), Bankruptcy Rule 9011, based upon Rule 11, provides the bankruptcy court with authority to impose sanctions. Savich's failure to cite the appropriate rule should not deny him relief.

bankruptcy petition itself. An appeal from a denial of sanctions is a collateral matter independent of the underlying merits of the bankruptcy appeal. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S.Ct. 2447, 2455, 110 L.Ed.2d 359 (1990) (voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(i) does not deprive district court of jurisdiction over Rule 11 motion); *see also In re Epco Northeast, Inc.*, 118 B.R. 267, 268 (Bankr.E.D.Pa.1990). Even if the district court meant to include Savich's appeal from the denial of sanctions in that part of its order dismissing all other motions as moot, it appears to have erred when it failed to consider the merits of Savich's appeal from the district court's denial of sanctions.

That issue does not become moot on disposition of the underlying bankruptcy petitions. Therefore, on remand, the district court should decide the merits of the prisoners' appeals from the bankruptcy court orders dismissing their Chapter 13 petitions without prejudice as well as the merits of Savich's appeal from the bankruptcy court order denying his motion for sanctions.

IV.

For the foregoing reasons we will vacate the order of the district court and remand for further proceedings consistent with this opinion.

Melvin WILLIAMS; Mary Williams, Petitioners–Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent–Appellee.

No. 92–2385.

United States Court of Appeals, Fourth Circuit.

Argued May 4, 1993.

Decided July 14, 1993.

Tax deficiencies were assessed against taxpayers by the United States Tax Court. Taxpayers appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) Commissioner of Internal Revenue was not required to link taxpayers' unreported income to illegal drug activities that allegedly generated it; (2) Commissioner provided ample link to drug dealing activity; and (3) notices of deficiency did not disguise criminal charge of drug distribution for which taxpayers had never been indicted by grand jury.

Affirmed.

1. Internal Revenue ⇐4490

Taxpayer is required to keep sufficient records to enable Commissioner of Internal Revenue to determine taxpayer's correct tax liability; in absence of such records, Commissioner may compute taxpayer's income by any method that clearly reflects income. 26 U.S.C.A. §§ 446(b), 6001.

2. Internal Revenue ⇐4529

Where taxpayer has failed to report amounts of income, and where available records are not sufficient otherwise to establish income, Government may employ indirect methods to compute taxpayer's income. 26 U.S.C.A. §§ 446(b), 6001.

3. Internal Revenue ⇐4529

Commissioner of Internal Revenue's determinations of taxpayer's income, derived from application of funds method and announced in notice of deficiency, are presumed correct, and taxpayer bears burden of proving that determinations are arbitrary or erroneous. 26 U.S.C.A. §§ 446(b), 6001.

4. Internal Revenue ⇐4529

Tax Court generally will not look behind statutory notice of deficiency to examine evidence used, propriety of Commissioner of Internal Revenue's motive, administrative policy, or procedure followed in making deficiency determination.

5. Internal Revenue ⇐4529

In order to assess deficiency, Commissioner of Internal Revenue was not required

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULES 3017, 3018 and 3021 REGARDING THE RECORD DATE FOR VOTING AND DISTRIBUTION

DATE: JANUARY 4, 1994

After a disclosure statement is approved in a chapter 9 or chapter 11 case, Bankruptcy Rule 3017(d) requires that certain documents (the plan, disclosure statement, ballots for voting, etc.) be mailed to creditors and equity security holders so that they have an opportunity to vote on the plan. The last sentence of Rule 3017(d) provides as follows:

> "For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered."

Rule 3018(a), which governs the right to vote on the plan, contains a similar provision:

> "[A]n equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered."

Because of these two sentences, the right of a security holder to receive vote solicitation materials and to vote on a plan depends on whether the entity is a holder of record on the date that the order approving the disclosure statement is entered.

Ken Klee has suggested that these provisions be amended because "the date of entry of the order approving the disclosure

statement is a date that is fraught with uncertainty in large districts where docketing delays are common." Ken suggests that "the court ought to be entitled to enter an alternative record date such as the date the court orally approves the disclosure statement. This will allow the preparation of lists and prompt solicitations without having to wait for the fortuity of entry of the order."

To assist the Advisory Committee in its discussion regarding Ken's suggestion, I have prepared two alternative sets of draft amendments to Rules 3017(d) and 3018(a). These sets of drafts are attached. The first set (Alternative A) amends Rules 3017(d) and 3018(a) to give the court the discretion to order that the date on which the court announces its approval of the disclosure statement, rather than the date of entry of the order, shall be the record date for voting purposes. The second set of drafts (Alternative B), which is favored by Ken, gives the court greater flexibility in fixing the record date. While I do not feel strongly about this choice, I have a slight preference for Alternative A because it should cure the problem pointed out by Ken while not giving the courts the power to deviate too much from the date on which the order approving the disclosure statement is entered. In general, I think that the record date for voting purposes should be the latest practicable date before solicitation materials are mailed. In any event, it is important that the amendments regarding the record date be the same for Rules 3017(d) and 3018(a).

Rule 3021

Rule 3021, which governs distributions under a plan, provides as follows:

> "After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security interests have not been disallowed and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) and which have been allowed."

Ken also suggests that Rule 3021 presents problems in large cases because distributions may be made only to holders of securities who are record holders "at the time of commencement of distribution." Ken notes that "it often takes several days to determine the identity of holders of record. Indeed, if the distribution is only to a class of securities holders, the distribution cannot even commence until the identity of the holders of record is determined. On the other hand, under Rule 3021 the disbursing agent can't determine the record date until the distribution has commenced. This rule should be fixed to permit the Court or the plan to designate a record date. If you wish to designate a default option for a distribution date, it ought to be the 'effective date' of the plan."

I agree with Ken that it makes little sense to make the record date for distribution purposes the time when distributions commence, unless some flexibility is provided for those cases in which the debtor cannot determine the record holders on that date. I attach a draft of proposed amendments to Rule 3021 that will provide such flexibility.

Alternative A

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

* * * *

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS AND EQUITY SECURITY HOLDERS. On approval of a disclosure statement, unless the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; and (4) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders pursuant to Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or

only a summary of the plan is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the expense of the proponent of the plan, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record ~~at~~ on the date the order approving the disclosure statement ~~was~~ is entered or, if the court so directs, on the date on which the court announces the order approving the disclosure statement.

* * * *

COMMITTEE NOTE

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents under this subdivision. In some districts, there may be a delay between the oral announcement of the bankruptcy judge's order approving the disclosure statement and entry of the order on the court docket. This amendment gives the court the discretion to fix the date on which the judge orally approves the disclosure statement as the record date for the purpose of applying this rule, so that the parties

may expedite preparation of the lists necessary to facilitate the distribution of these documents.

If the court orders the distribution of documents to holders of securities who are holders of record when the judge announces the approval of the disclosure statement, and the holders of such securities are impaired by the plan, the judge also should order that the same record date shall apply for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Alternative A

Rule 3018. Acceptance or Rejection of Plans

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or, if the court so directs, on the date on which the court announces the order approving the disclosure statement. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. In some districts, there may be a delay between the oral announcement of the bankruptcy judge's order approving the disclosure statement and entry of the order on the court docket. This amendment gives the court the discretion to fix the date on which

the judge orally approves the disclosure statement as the record date for the purpose of voting eligibility, so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the ballots and other documents required to be distributed under Rule 3017(d).

If the court fixes the date on which the judge announces the approval of the disclosure statement as the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed under Rule 3017(d).

Alternative B

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

* * **

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS AND EQUITY SECURITY HOLDERS. On approval of a disclosure statement, unless the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; and (4) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders pursuant to Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan is transmitted, the opinion of

the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the expense of the proponent of the plan, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record ~~at~~ on the date the order approving the disclosure statement ~~was~~ is entered or such other date as the court for cause fixes.

* * * *

COMMITTEE NOTE

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents under this subdivision. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

If the court fixes a record date under this subdivision with respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date shall apply for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Alternative B

Rule 3018. Acceptance or Rejection of Plans

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or such other date as the court for cause fixes. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so

that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed under Rule 3017(d).

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record ~~at the time of commencement of distribution~~ whose claims or equity security interests have not been disallowed and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) and which have been allowed. For the purpose of this subdivision, except as otherwise provided in the plan or the order confirming the plan, holders of securities of record are the holders of record at the time of commencement of distribution.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

AGENDA ITEM - 9
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENT TO BANKRUPTCY RULE 2002(f)(8)

DATE: JANUARY 8, 1994

Rule 2002(f) provides that "the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of ... (8) a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500." The trustee's "final report" is a different document than the trustee's "final account." I understand that the current practice is to mail to creditors only the final report.

Section 704(9) of the Code requires the trustee in a chapter 7 case to "make a final report and file a final account of the administration of the estate with the court and with the United States trustee." Therefore, it is clear from the statute that these are intended to be two separate documents.

It is my understanding that the final report is filed and mailed prior to the distribution of funds in a chapter 7 case, whereas the final account is completed after the distribution. It makes sense to mail to the debtor and the creditors the final report, giving them an opportunity to object or take other steps prior to the distribution of funds. However, once the final report is circulated, there probably is no reason to incur the expense of mailing the final account to all creditors. The United States trustee receives the final account and, as

supervisor of chapter 7 trustees, should review it.

It has been suggested that Rule 2002(f)(8) should be amended to conform to the current practice of mailing to creditors the final report, but not the final account. I think the amendment makes sense. Accordingly, I recommend that the words "and account" be deleted from Rule 2002(f)(8), and that the following Committee Note be used:

COMMITTEE NOTE

> Paragraph (8) of subdivision (f) is amended so that a summary of the trustee's final account, which is prepared after distribution of property, does not have to be mailed to the debtor, all creditors, and indenture trustees in a chapter 7 case. Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property.

AGENDA ITEM - 10
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULES 2002(h) AND 3015(g)

DATE: JANUARY 9, 1994

Rule 2002(h)

Bankruptcy Rule 2002(a) requires the mailing of certain notices to creditors. Rule 2002(h) provides that, in a chapter 7 case, "the court may, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, direct that all notices required by [Rule 2002(a)], except clause (4) thereof, be mailed only to creditors whose claims have been filed. . . ." The effect of Rule 2002(h) is that, after the claims bar date prescribed by Rule 3002(c) has passed, it is not necessary to mail certain notices to creditors who have failed to file their claims. We have received two letters recommending changes to Rule 2002(h).

Mr. Gregorcy's Recommendation

Glenn M. Gregorcy, Chief Deputy Clerk of the Bankruptcy Court for the District of Utah, has recommended that Rule 2002(h) be amended to include a reference to Rule 2002(f)(8), which requires that creditors receive a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500. I understand that the summary of the trustee's final report is mailed prior to the actual distribution. Mr. Gregorcy believes that, after the bar date has passed, the chapter 7 trustee's summary should not be sent to

creditors who failed to file claims. A copy of Mr. Gregorcy's letter, dated January 28, 1993, is enclosed. Mr. Gregorcy's recommendation was on the agenda for the September 1993 meeting, but was deferred to the February 1994 meeting.

This recommendation is designed to save the clerk's office and estates the cost of copying and mailing these summaries to creditors who have not filed claims. However, I do not know how much money will be saved and, even if the savings will be substantial, there are other factors that should be considered by the Committee. First, the Committee should consider the fact that creditors with tardily filed claims in chapter 7 cases may, under certain circumstances, receive a distribution. Under § 726(a)(3), if there is a surplus after timely filed claims are paid in full, tardily filed claims receive a distribution. In such cases, it is important to notify creditors who did not yet file proofs of claim that there is such a surplus and the trustee's final report is a good way to accomplish that. In addition, § 726(a)(2)(C) treats a tardily filed claim the same as a timely filed claim if the creditor did not receive notice and had no knowledge of the case in time to file the claim before the bar date. If a creditor did not receive any notice of the case, but now receives a summary of the trustee's final report, the creditor may immediately file the tardy claim and share in the distribution.

The Committee also should consider the fact that mistakes sometimes occur, and that a proof of claim could be misfiled or

lost. To illustrate, in In re Cisneros, 994 F2d 1462 (9th Cir. 1993), a proof of claim was timely filed by the IRS in a chapter 13 case, but "for reasons that remain obscure, the Trustee did not receive notice of that fact." 994 F2d at 1464. If a proof of claim is misfiled or lost in a chapter 7 case, the last opportunity for the mistake to be corrected is when all scheduled creditors receive a summary of the trustee's final report that lists the creditors who will receive a distribution. I realize that these are rare occasions, but the Committee should consider this factor in determining whether the summary of the trustee's final report should be mailed only to creditors who have filed claims prior to that time.

If the Committee agrees with Mr. Gregorcy's recommendation, and decides not to make any other amendments, the language of Rule 2002(h) could be amended as follows:

> (h) NOTICE TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, the court may, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, direct that all notices required by subdivision (a) of this rule, except clause (4) thereof, or required by subdivision (f)(8) of this rule be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims be reason of an extension granted under Rule 3002(c)(6).
>
> COMMITTEE NOTE
>
> Subdivision (h) is amended to permit the court to order in a chapter 7 case, after the time to file proofs of claim has expired, that the summary of the trustee's final report be mailed only to creditors who have filed claims in a chapter 7 case.

Mr. Harp's Recommendation

Jay Andrew Harp, Chief Deputy Clerk of the Bankruptcy Court for the District of Southern District of Indiana, has commented that there is a "technical inconsistency" between Rule 2002(h) and Rules 3002(c)(5), 3004 and 3005. A copy of Mr. Harp's letter, dated November 19, 1993, is enclosed.

My reactions to his letter are as follows:

(1) Rule 2002(e) provides that, if it appears from the schedules that there are no assets from which a dividend can be paid in a chapter 7 case, the notice of the meeting of creditors may include a statement to that effect and may inform creditors that it is unnecessary to file claims. If such a "Notice of No Dividend" is sent, and it later appears that there will be assets from which to make a distribution, Rule 3002(c)(5) provides that notice to that effect shall be mailed and the bar date for filing claims will be 90 days after the mailing of that notice. Mr. Harp comments that Rule 2002(h) does not take Rule 3002(c)(5) into consideration. I agree. Rule 2002(h) should be amended to provided that, in essence, if a creditor still has time to file a timely claim under Rule 3002(c)(5), it should receive the Rule 2002(a) notices. I do not mean to suggest that this is a serious problem. Since Rule 2002(h) is discretionary with the court, I assume that courts are not issuing Rule 2002(h) orders if there has been a "Notice of No Dividend". Nonetheless, the rule probably should be

corrected and I have attempted to do so in the draft below.

(2) Rules 3004 and 3005 permit the debtor, trustee or codebtor to file a claim on behalf of the creditor within 30 days after the bar date for the filing of claims. Mr. Harp suggests that Rule 2002(h) be amended to require that all creditors continue to receive Rule 2002(a) notices until after the 30 day period in Rules 3004 and 3005 also have expired. This is an issue worth discussing, but I have a slight preference for not amending the rule as suggested by Mr. Harp. Under Rule 2002(h), any creditor "for whom a claim is filed" (even if the debtor, trustee, or a codebtor filed it) must continue to get notices. Therefore, once the 90-day bar date has expired, the creditor stops getting notices. If a claim is filed under Rule 3004 and 3005, the creditor then starts getting notices again. Since it is very rare for a claim to be filed in a chapter 7 case under Rule 3004 or 3005, I do not think that all creditors should continue to get notices until 120-days after the meeting of creditors. Nonetheless, if the Committee agrees with Mr. Harper, I suggest the bracketed language on the attached draft.

Reporter's Recommendation Regarding Rule 2002(h).

After receiving the comments of Mr. Gregorcy and Mr. Harp, I was somewhat puzzled by other aspects of Rule 2002(h) and decided to take a fresh look at the subdivision. I reached the following

conclusions regarding the present rule.

(1) The current language, if read literally, means that, after 90 days following the § 341 meeting, "only creditors" will receive Rule 2002(a) notices. But what about the trustee and the debtor? It is obvious to me that the intention is that the trustee and debtor continue to receive notices. The rule should be corrected to say that notices "required to be mailed to creditors" shall be mailed "only to creditors who . . ."

(2) As suggested by Mr. Harp, if a "Notice of No Dividend" is given under Rule 2002(e), Rule 2002(h) should not apply until 90 days after a Rule 3002(c)(5) notice is mailed.

(3) Under a separate memorandum, dated January 6, 1994, ("Proposed Amendments to Bankruptcy Rule 3002 and Related Amendments to Rules 1019, 2002 and 9006"), I recommend that Rule 3002(c)(6) be abrogated because it is inconsistent with § 726 of the Code. That also would require abrogation of Rule 2002(a)(4) (which requires notice of the time to file a claim against a surplus pursuant to Rule 3002(c)(6)). Therefore, the phrase "except clause (4) thereof," as well as the reference to Rule 3002(c)(6), contained in Rule 2002(h) should be deleted. [I do not know about you, but I am getting dizzy!].

(4) As presently drafted, Rule 2002(h) permits a court to order that creditors do not get notice, even if it is the United States or an infant or incompetent and the court has granted an extension to file a claim under Rule 3002(c)(1) or (c)(2). I think that Rule 2002(h) should be amended to change that.

In view of the recommendations mentioned above, I prepared the following draft of proposed amendments to Rule 2002(h). I put in brackets reference to subdivision (f)(8) and the related sentence in the Committee Note, which Mr. Gregorcy has suggested (I prefer to leave it out, but the Committee may disagree). I also put in brackets the reference to "120 days" and the related sentence in the Committee Note that would implement Mr. Harp's suggestion that subdivision (h) should not be used until the time to file claims under Rule 3004 or 3005 have expired. Again, I do not support that suggestion. To make it easier for the Committee, I first offer a clean draft of the subdivision as amended, followed by a marked copy showing the changes:

> (h) NOTICE TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, after 90 [120] days following the first date set for the meeting of creditors pursuant to § 341 of the Code or, if a notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of the notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that all notices required to be mailed to creditors by subdivision (a) [and (f)(8)] of this rule be mailed only to creditors who hold claims for which proofs of claim have been filed and creditors, if any, who are still permitted to file timely claims by reason of an extension granted under Rule 3002(c)(1) or (c)(2).

Marked Copy and Committee Note:

> (h) NOTICE TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, ~~the court may~~ after 90 [120] days following the first date set for the meeting of creditors pursuant to § 341 of the Code or, if a notice

of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 [120] days following the mailing of the notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that all notices required to be mailed to creditors by subdivision (a) [and (f)(8)] of this rule~~, except clause (4) thereof,~~ be mailed only to creditors ~~whose claims~~ who hold claims for which proofs of claim have been filed and creditors, if any, who are still permitted to file timely claims by reason of an extension granted under ~~Rule 3002(e)(6)~~ Rule 3002(c)(1) or (c)(2).

COMMITTEE NOTE

Subdivision (h) is amended to [prohibit the court from issuing an order under this sudivision until the time for filing claims on behalf of creditors under Rule 3004 and 3005 has expired. It is also amended to] provide that an order under this subdivision may not be issued if a notice of no dividend is given under Rule 2002(e) and the time for filing claims has not expired as provided in Rule 3002(c)(5). It is also amended to clarify that notices required to be mailed by subdivision (a) to parties other than creditors must be mailed to those entities despite an order issued under subdivision (h). This subdivision also is amended so that if the court, pursuant to Rule 3002(c)(1) or 3003(c)(2), has granted an extension of time to file a proof of claim, the creditor for whom the extension has been granted must continue to receive notices despite an order issued under subdivision (h). [In addition, this subdivision is amended to include within its scope the notice regarding the trustee's final report that is required by subdivision (f)(8).] Finally, references in subdivision (h) to clause (4) of subdivision (a), and to Rule 3002(c)(6), have been deleted because of their abrogation.

Rule 3015(g)

Rule 3015(g) was added to the rules, effective December 1, 1993, to govern modification of a chapter 12 or chapter 13 plan after confirmation. It provides as follows:

> (g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

It has been suggested that the rule be modified to provide that, if the time to file claims has expired, the 20 days notice of the proposed modification and the time to object should be sent only to those creditors who have filed claims. This suggestion is similar to that of Mr. Gregorcy. Why should a creditor who has failed to timely file a proof of claim, and therefore does not have an "allowed" claim pursuant to Rule 3002(a), be entitled to receive notice of a plan modification?

My initial reaction to this suggestion was favorable, and I think that the suggestion is worthy of careful consideration.

However, after further consideration, I question whether such an amendment should be made at this time. If the Advisory Committee proposes that Rule 3015(g) be amended so that creditors who failed to file timely claims in a chapter 13 case would not be entitled to receive notice of a proposed modification -- on the theory that such creditors have no rights under the plan -- that would be the equivalent of the Committee's rejection of the Hausladen decision (holding that tardily filed claims are allowable in chapter 13 cases). See my memorandum dated January 6, 1994 ("Proposed Amendments to Bankruptcy Rule 3002 and Related Amendments to Rules 1019, 2002 and 9006"), distributed with the agenda materials for the February 1994 meeting. The Committee decided at its last meeting that it will not take any position at this time regarding the Hausladen issue.

If an amendment is made, the Committee should consider its effect on secured creditors who did not file proofs of claim. If a secured creditor does not file a claim, the lien remains effective pursuant to § 506(d). If a plan modification proposes to affect the lien, should the secured creditor receive notice of it and have an opportunity to object? It probably would be best to limit the amendment to unsecured creditors.

If an amendment is made, the question arises as to whether the period in the amendment should be 90 days (i.e., the time for filing claims under Rule 3002) or 120 days (which includes the 30 day period under Rule 3004 or 3005). This is the same issue discussed above regarding Rule 2002(h).

I think that the language of the current rule, which requires notice to all creditors of a proposed modification "unless the court orders otherwise with respect to creditors who are not affected by the proposed modification," is sufficient to permit the court to order that notice not go to unsecured creditors who do not have allowed claims because they missed the bar date.

If the Committee decides to amend Rule 3015(g) as suggested, I offer the following proposal for discussion purposes:

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. Unless the court orders otherwise, if the proposed modification is filed more than 90 [120] days after the first date set for the meeting of creditors called pursuant to § 341 of the Code, notice shall not be mailed to any unsecured creditor who holds

a claim proof of which has not been filed. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

COMMITTEE NOTE

Subdivision (g) is amended so that, unless the court orders otherwise, if a proposed plan modification is filed after the expiration of the time for filing claims under Rules 3002(c), [Rule 3004 and 3005] notice of the proposed modification shall not be mailed to any unsecured creditor whose claim has not been filed, either by the creditor under Rule 3002 or by the debtor, the trustee, or a codebtor pursuant to Rules 3004 or 3005.

United States Bankruptcy Court
District of Utah
Frank E. Moss United States Courthouse
Room 348
350 South Main Street
Salt Lake City, Utah 84101

William C. Stillgebauer
Clerk of Court

TELEPHONE
(801) 524-6565
(801) 524-5157

January 28, 1992

Peter G. McCabe, Secretary
Committee on Rules of
Practice and Procedure
Administrative Office of
The United States Courts
Washington, D.C. 20544

Dear Mr. McCabe,

This letter is to propose a possible alteration to Federal Rules of Bankruptcy Procedure 2002(h). At present, the subdivision encompasses all notices that are mentioned in 2002(a) except for clause (4). It is this clerk's suggestion that the notice mentioned in Rule 2002(f)(8) also be included in subdivision (h). Logically, the trustee's summary will be of interest/consequence to only those creditors who have previously filed a claim. It is felt that by not receiving the notice no harm befalls those creditors who did not file a claim.

Thank you.

Very truly yours,

Glenn M. Gregory
Chief Deputy Clerk

United States Bankruptcy Court
Southern District of Indiana
123 United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204

Jay Andrew Harp
Chief Deputy Clerk

(317) 226-7985

November 19, 1993

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

I would like to point out a technical inconsistency between rule 2002(h) and rules 3002(c)(5), 3004 and 3005 of the Federal Rules of Bankruptcy Procedure and propose a corrective amendment.

Rule 2002(h) provides:

> In a chapter 7 case, the court may, after 90 days following the first date set for the meeting of creditors pursuant to §341 of the Code, direct that all notices required by subdivision (a) of this rule, except clause (4) thereof, be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(6).

Rule 3002(c)(5) permits claims to be filed within 90 days after the mailing of the notice of possible assets when the chapter 7 case is initially treated as a no-asset case. In addition, rule 3004 permits claims on behalf of certain creditors and rule 3005 permits claims on behalf of certain co-obligors to be filed within 30 days after expiration of the time for filing claims.

The point is that notices should not be limited to claimants until after the expiration of the time(s) for filing claims.

Please consider whether rule 2002(h) should be amended so that the underscored language indicated above reads something like "... after the time periods set forth in Rules 3002(c), 3004 and 3005 for filing proofs of claim have expired...."

If you have any questions or need any further information, please do not hesitate to contact me.

Thank you for your consideration.

AGENDA ITEM - 11
Sea Island, Georgia
February 24-25, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: "EXCUSABLE NEGLECT" UNDER PIONEER INVESTMENT

DATE: JANUARY 10, 1994

Bankruptcy Rule 3003(c)(3) provides that in a chapter 11 case "[t]he court shall fix and for cause may extend the time within which proofs of claim or interest may be filed." Rule 9006(b)(1) permits the court to extend the time for filing claims in chapter 11 cases (as well as many other time periods prescribed by the rules) after the period has expired "where the failure to act was the result of excusable neglect."

In Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489 (1993), the Supreme Court, in a controversial 5-4 decision, construed the "excusable neglect" standard. A copy of the decision is enclosed. In Pioneer, the Supreme Court adopted a flexible standard based on a balancing of several factors, as indicated on page 1498 of the opinion:

> "[W]e conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

By adopting this flexible "balancing test," the Court rejected a stricter standard used by the bankruptcy court in Pioneer and by some other courts that construed "excusable neglect" to mean that the party's failure to timely act was due

to circumstances beyond its reasonable control.

The Court's liberal construction of "excusable neglect" was sharply criticized in the dissenting opinion for being inconsistent with the language of Rule 9006(b) and "inconsistent with sensible notions of judicial economy." Justice O'Connor commented that the Court's decision "invites unproductive recourse to appeal" and emphasized that "[a]n entity in bankruptcy can ill afford to waste resources in litigation." 113 S.Ct. at 1505.

At its September 1993 meeting, the Advisory Committee discussed the Pioneer decision in connection with the language of the official form for the proof of claim. The form was referred to the Subcommittee on Forms for its review.

Ken Klee has suggested that the Supreme Court has misconstrued the phrase "excusable neglect" and that the Court's decision has caused problems in chapter 11 cases because of its impact on the bar date for filing claims. Ken has requested that the Pioneer decision be discussed again by the Advisory Committee, but this time with a view toward amending the Rules to overrule or limit the effects of the decision.

To assist the Committee in its discussion, I enclose the decision in Pioneer, as well as the following two decisions in which bankruptcy courts have extended the time to file a claim based on the liberal standard of excusable neglect announced in Pioneer: In re Earth Rock, 153 BR 61 (Bankr. D. Idaho 1993); In re Arts Des Provines De France, Inc., 153 BR 144 (Bankr. S.D.N.Y.

1993). There have been many other decisions applying Pioneer (many have denied requests to extend the time to file a claim), but I selected these two for discussion purposes because one (Earth Rock) shows how liberal a court could get in allowing a late file claim even where the creditor's attorney made a deliberate decision not to file the claim, and the other decision (Arts Des Provinces) presents, in my view, a more sympathetic situation in which the debtor's negligence in giving the creditor notice contributed to the lateness of the proof of claim.

The Committee also should consider the following factors in its discussion:

(1) Although "excusable neglect" may justify a late claim in chapter 11 cases, it is not applicable in chapter 7, chapter 12, or chapter 13 cases. Rule 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 3002(c) only to the extent permitted by that rule. Rule 3002(c), which governs the time for filing a proof of claim in a case under chapter 7, 12, or 13, does not contain an "excusable neglect" exception.

(2) The "excusable neglect" language is found in several rules in addition to Rule 9006(b):

(a) Rule 8002(c) allows the court to allow a late filed notice of appeal based on excusable neglect if it is filed within 20 days after the deadline for filing the notice.

(b) Rule 7013 provides that a trustee or debtor in possession who fails to plead a counterclaim "through

oversight, inadvertance, or excusable neglect, or when justice so requires," may by leave of court amend the pleading, or commence a new adversary proceeding or separate action.

(c) Rule 9033(c) provides that a request to extend the time for filing objections to the bankruptcy judge's proposed findings of fact and conclusions of law in a non-core matter may be granted upon a showing of "excusable neglect" if the request is made within 20 days after the expiration of the time for filing such objections.

(d) Although Rule 9024 does not contain the phrase "excusable neglect," that rule makes Civil Rule 60 applicable in bankruptcy proceedings. Rule 60(b) permits the court to relieve a party from a final judgment, order or proceeding for "mistake, inadvertence, surprise, or excusable neglect."

There are several alternatives that the Advisory Committee may consider. It could conclude that Pioneer was a correct decision and decide to leave the law as is. It also could decide to make the "excusable neglect" doctrine inapplicable to the bar date for filing claims in chapter 11 cases (as it is now with respect to proofs of claim in chapter 7, chapter 12, and chapter 13 cases). The Committee may wish to go further and include a new definition of "excusable neglect" (although that could result in a conflict with the Civil Rules unless those rules are amended

also). In addition, the Committee could delete the phrase "where the failure to act was the result of excusable neglect" in Rule 9006(b) and elsewhere, and replace it with another phrase, such as "where the failure to act was due to circumstances beyond the party's reasonable control." These are only some of the alternatives available to the Committee (I am sure others could think of more).

with the United States in this case are, in my view, plainly sufficient to subject petitioners to suit in this country on a claim arising out of its nonimmune commercial activity relating to respondent. If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry; for as Justice WHITE explains, *ante*, at 1482, n. 2, 1483, when a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace. I would therefore affirm the judgment of the Court of Appeals.[4]

PIONEER INVESTMENT SERVICES COMPANY, Petitioner

v.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP et al.

No. 91-1695.

Argued Nov. 30, 1992.

Decided March 24, 1993.

Creditors of Chapter 11 debtor sought extension of bar date for filing late proofs of claim, alleging excusable neglect. The Bankruptcy Court denied the motion and the United States District Court for the Eastern District of Tennessee, Robert Leon Jordan, J., affirmed. The Court of Appeals for the Sixth Circuit, 943 F.2d 678, reversed and remanded. On certiorari review, the Supreme Court, Justice White, held that rule authorizing bankruptcy court to accept late filings where failure to act is result of "excusable neglect," contemplates that courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond party's control.

Affirmed.

Justice O'Connor dissented and filed opinion in which Scalia, Souter and Thomas, Justices, joined.

1. Statutes ⇐212.6

Courts properly assume, absent sufficient indication to the contrary, that Congress intends words in its enactments to carry their ordinary, contemporary, common meaning.

2. Bankruptcy ⇐2900(1)

Rule authorizing bankruptcy court to accept late filings where failure to act is result of "excusable neglect," contemplates that courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond party's control. Fed.Rules Bankr.Proc. Rule 9006(b)(1), 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⇐2900(1)

Determination of whether neglect is "excusable," warranting allowing of late filing of claim, is at bottom an equitable

more narrow requirements of "specific" jurisdiction), I am inclined to agree with the view expressed by Judge Higginbotham in his separate opinion in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 204-205 (1984) (concurring in part and dissenting in part), that the first clause of § 1605(a)(2), interpreted in light of the relevant legislative history and the second and third clauses of the provision, does authorize "general" jurisdiction over foreign entities that engage in substantial commercial activities in the United States.

4. My affirmance would extend to respondents' failure to warn claims. I am therefore in agreement with Justice KENNEDY's analysis of that aspect of the case.

one, taking account of all relevant circumstances surrounding party's omission; these include danger of prejudice to debtor, length of delay and its potential impact on judicial proceedings, reason for delay, including whether it was within reasonable control of movant, and whether movant acted in good faith. Fed.Rules Bankr.Proc. Rule 9006(b)(1), 11 U.S.C.A.

4. Attorney and Client ⇐77

Clients are held accountable for acts and omissions of their attorneys.

5. Bankruptcy ⇐2900(1)

In determining whether creditors' failure to file proofs of claim prior to bar date was excusable, proper focus is upon whether neglect of creditors and their counsel was excusable. Fed.Rules Bankr.Proc. Rule 9006(b)(1), 11 U.S.C.A.

6. Bankruptcy ⇐2897.1

Claims bar date in bankruptcy case should be prominently announced and accompanied by explanation of its significance.

7. Bankruptcy ⇐2900(1, 2)

Creditors' failure to timely file proof of claim was result of excusable neglect, warranting allowance of late claim; though upheaval in counsel's law practice at time of bar date was irrelevant, creditors acted in good faith, debtor was not prejudiced by delay, and notice of bar date was deficient. Fed.Rules Bankr.Proc.Rule 9006(b)(1), 11 U.S.C.A.

Syllabus *

As unsecured creditors of petitioner—a company seeking relief under Chapter 11 of the Bankruptcy Code—respondents were required to file proofs of claim with the Bankruptcy Court before the deadline, or bar date, established by that court. An August 3, 1989, bar date was included in a "Notice for Meeting of Creditors" received from the court by Mark Berlin, an official for respondents. Respondents' attorney was provided with a complete copy of the case file and, when asked, assertedly assured Berlin that no bar date had been set. On August 29, 1989, respondents asked the court to accept their proofs under Bankruptcy Rule 9006(b)(1), which allows a court to permit late filings where the movant's failure to comply with the deadline "was the result of excusable neglect." The court refused, holding that a party may claim excusable neglect only if the failure to timely perform was due to circumstances beyond its reasonable control. The District Court remanded the case, ordering the Bankruptcy Court to evaluate respondents' conduct under a more liberal standard. The Bankruptcy Court applied that standard and again denied the motion, finding that several factors—the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, and whether the creditor acted in good faith—favored respondents, but that the delay was within their control and that they should be penalized for their counsel's mistake. The District Court affirmed, but the Court of Appeals reversed. It found that the Bankruptcy Court had inappropriately penalized respondents for their counsel's error, since Berlin had asked the attorney about the impending deadlines and since the peculiar and inconspicuous placement of the bar date in a notice for a creditors' meeting without any indication of the date's significance left a dramatic ambiguity in the notification that would have confused even a person experienced in bankruptcy.

Held:

1. An attorney's inadvertent failure to file a proof of claim by the bar date can constitute "excusable neglect" within the meaning of Rule 9006(b)(1). Pp. 1494–1499.

(a) Contrary to petitioner's suggestion, Congress plainly contemplated that the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control. This flexible understanding comports with the ordinary meaning of "neglect." It also accords with the underlying policies of Chapter 11 and the bankruptcy rules, which entrust broad equitable powers to the courts in order to ensure the success of a debtor's reorganization. In addition, this view is confirmed by the history of the present bankruptcy rules and is strongly supported by the fact that the phrase "excusable neglect," as used in several of the Federal Rules of Civil Procedure, is understood to be a somewhat "elastic concept." Pp. 1494–1498.

(b) The determination of what sorts of neglect will be considered "excusable" is an equitable one, taking account of all relevant circumstances. These include the first four factors applied in the instant case. However, the Court of Appeals erred in not attributing to respondents the fault of their counsel. Clients may be held accountable for their attorney's acts and omissions. See, *e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734. Thus, in determining whether respondents' failure to timely file was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable. Pp. 1498–1499.

2. The neglect of respondents' counsel was, under all the circumstances, excusable. As the Court of Appeals found, the lack of any prejudice to the debtor or to the interest of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim. As for the culpability of respondents' counsel, it is significant that the notice of the bar date in this case was outside the ordinary course in bankruptcy cases. Normally, such a notice would be prominently announced and accompanied by an explanation of its significance, not inconspicuously placed in a notice regarding a creditors' meeting. P. 1499.

943 F.2d 673 (CA6 1991), affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA, SOUTER, and THOMAS, JJ., joined.

Craig J. Donaldson, Morristown, NJ, for petitioner.

John A. Lucas, Knoxville, TN, for respondents.

Justice WHITE delivered the opinion of the Court.

Rule 3003(c) of the Federal Rules of Bankruptcy Procedure sets out the requirements for filing proofs of claim in Chapter 9 Municipality and Chapter 11 Reorganization cases.[1] Rule 3003(c)(3) provides that the "court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules. Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier

1. Bankruptcy Rule 3003(c), in relevant part, provides:

"(c) Filing Proof of Claim.

"(1) *Who May File.* Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

"(2) *Who Must File.* Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

"(3) *Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4)."

deadline "was the result of excusable neglect." [2] In this case, we are called upon to decide whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute "excusable neglect" within the meaning of the rule. Finding that it can, we affirm.

I

On April 12, 1989, petitioner filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Tennessee. The petition sought relief under Chapter 11 of the Bankruptcy Code. Petitioner also filed a list of its 20 largest unsecured creditors, including all but one of respondents here. The following month, after obtaining extensions of time from the Bankruptcy Court, petitioner filed a statement of financial affairs and schedules of its assets and liabilities. The schedules, as amended, listed all of the respondents except Ft. Oglethorpe Associates Limited Partnership as creditors holding contingent, unliquidated, or disputed claims; the Ft. Oglethorpe partnership was not listed at all. Under § 1111 of the Bankruptcy Code, 11 U.S.C. § 1111(a), and Bankruptcy Rule 3003(c)(2), all such creditors are required to file a proof of claim with the bankruptcy court before the deadline, or "bar date," established by the court.

On April 13, 1989, the day after petitioner filed its Chapter 11 petition, the Bankruptcy Court mailed a "Notice for Meeting of Creditors" to petitioner's creditors. Along with the announcement of a May 5 meeting was the following passage:

> "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. Sec. 1111 & Bankruptcy rule 3003. Bar date is August 3, 1989." App. 29a.

The notice was received and read by Mark A. Berlin, president of the corporate general partners of each of the respondents. Berlin duly attended the creditors' meeting on May 5. The following month, respondents retained an experienced bankruptcy attorney, Marc Richards, to represent them in the proceedings. Berlin stated in an affidavit that he provided Richards with a complete copy of the case file, including a copy of the court's April 13, 1989, notice to creditors. Berlin also asserted that he inquired of Richards whether there was a deadline for filing claims and that Richards assured him that no bar date had been set and that there was no urgency in filing proofs of claim. *Id.*, at 121a. Richards and Berlin both attended a subsequent meeting of creditors on June 16, 1989.

Respondents failed to file any proofs of claim by the August 3, 1989, bar date. On August 23, 1989, respondents filed their proofs, along with a motion that the court permit the late filing under Rule 9006(b)(1). In particular, respondents' counsel explained that the bar date, of which he was unaware, came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm on July 31, 1989. *Id.*, at 56a. Because of this disruption, counsel did not have access to

2. Bankruptcy Rule 9006(b) provides:

"(b) Enlargement.

"(1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

"(2) *Enlargement Not Permitted.* The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 2003(a) and (d), 7052, 9023, and 9024.

"(3) *Enlargment Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules."

his copy of the case file in this matter until mid-August. *Ibid.*

The Bankruptcy Court refused the late filing. Following precedent from the Court of Appeals for the Eleventh Circuit, the court held that a party may claim "excusable neglect" only if its "'failure to timely perform a duty was due to circumstances which were beyond [its] reasonable control.'" *Id.*, at 124a (quoting *In re South Atlantic Financial Corp.*, 767 F.2d 814, 817 (CA11 1985), cert. denied *sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986)). Finding that respondents had received notice of the bar date and could have complied, the court ruled that they could not claim "excusable neglect."

On appeal, the District Court affirmed in part and reversed in part. The court found "respectable authority for the narrow reading of 'excusable neglect'" adopted by the Bankruptcy Court, but concluded that the Court of Appeals for the Sixth Circuit would follow "a more liberal approach." App. 157a. Embracing a test announced by the Court of Appeals for the Ninth Circuit, the District Court remanded with instructions that the Bankruptcy Court evaluate respondents' conduct against several factors, including: "'"(1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect."'" *Id.*, at 158a–159a (quoting *In re Dix*, 95 B.R. 134, 138 (CA9 Bkrptcy. Appellate Panel 1988) (in turn quoting *In re Magouirk*, 693 F.2d 948, 951 (CA9 1982))). The District Court also suggested that the Bankruptcy Court consider whether the failure to comply with the bar date "resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel." App. 159a.

On remand, the Bankruptcy Court applied the so-called *Dix* factors and again denied respondents' motion. Specifically, the Bankruptcy Court found (1) that petitioner would not be prejudiced by the late filings; (2) that the 20-day delay in filing the proofs of claim would have no adverse impact on efficient court administration; (3) that the reason for the delay was not outside respondents' control; (4) that respondents and their counsel acted in good faith; and (5) that, in light of Berlin's business sophistication and his actual knowledge of the bar date, it would not be improper to penalize respondents for the neglect of their counsel. *Id.*, at 168a–172a. The court also found that respondents' counsel was negligent in missing the bar date and, "[t]o a degree," indifferent to it. *Id.*, at 172a. In weighing these considerations, the Bankruptcy Court "attache[d] considerable importance to *Dix* factors 3 and 5," and concluded that a ruling in respondents' favor, notwithstanding their actual notice of the bar date, "would render nugatory the fixing of the claims' bar date in this case." *Id.*, at 173a. The District Court affirmed the ruling.

The Court of Appeals for the Sixth Circuit reversed. The Court of Appeals agreed with the District Court that "excusable neglect" was not limited to cases where the failure to act was due to circumstances beyond the movant's control. The Court of Appeals also agreed with the District Court that the five "*Dix* factors" were helpful, although not necessarily exhaustive, guides. *In re Pioneer Investment Services Co.*, 943 F.2d 673, 677 (1991). The court found, however, that the Bankruptcy Court had misapplied the fifth *Dix* factor to this case. Because Berlin had inquired of counsel whether there were any impending filing deadlines and been told that none existed, the Court of Appeals ruled that the Bankruptcy Court had "inappropriately penalized the [respondents] for the errors of their counsel." *Ibid.*

The Court of Appeals also found "it significant that the notice containing the bar date was incorporated in a document entitled 'Notice for Meeting of Creditors.'" *Id.*, at 678. "Such a designation," the court explained, "would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims." *Ibid.* Indeed, based on a comparison between the notice in this case and the model notice set out in Official Bankruptcy Form 16, the court concluded that the notice given respondents contained a "dramatic ambiguity," which could well have confused "[e]ven persons experienced in bankruptcy." *Ibid.* Having determined that the fifth *Dix* factor favored respondents rather than petitioner, the Court of Appeals found that the record demonstrated "excusable neglect."

Because of the conflict in the courts of appeals over the meaning of "excusable neglect," [3] we granted certiorari, 504 U.S. ——, 112 S.Ct. 2963, 119 L.Ed.2d 585 (1992), and now affirm.

II

A

There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. In between lie cases where a party may *choose* to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence. Petitioner contends that the Bankruptcy Court was correct when it first interpreted Rule 9006(b)(1) to require a showing that the movant's failure to comply with the court's deadline was caused by circumstances beyond its reasonable control. Petitioner suggests that exacting enforcement of filing deadlines is essential to the Bankruptcy Code's goals of certainty and finality in resolving disputed claims. Under petitioner's view, any showing of fault on the part of the late filer would defeat a claim of "excusable neglect."

[1, 2] We think that petitioner's interpretation is not consonant with either the language of the rule or the evident purposes underlying it. First, the rule grants a reprieve to out-of-time filings that were delayed by "neglect." The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through care-*

3. The Courts of Appeals for the Fourth, Seventh, Eighth, and Eleventh Circuits have taken a narrow view of "excusable neglect" under Rule 9006(b)(1), requiring a showing that the delay was caused by circumstances beyond the movant's control. See *In re Davis*, 936 F.2d 771, 774 (CA4 1991); *In re Danielson*, 981 F.2d 296, 298 (CA7 1992); *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310, 1314–1315 (CA8 1987); *In re Analytical Systems, Inc.*, 933 F.2d 939, 942 (CA11 1991). The Court of Appeals for the Tenth Circuit, by contrast, has applied a more flexible analysis similar to that employed by the Court of Appeals in the present case. *In re Centric Corp.*, 901 F.2d 1514, 1517–1518, cert. denied *sub nom. Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp.*, 498 U.S. 852, 111 S.Ct. 145, 112 L.Ed.2d 112 (1990). The Courts of Appeals similarly have divided in their interpretations of "excusable neglect" as found in Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Some courts have required a showing that the movant's failure to meet the deadline was beyond its control, see, *e.g.*, *650 Park Ave. Corp. v. McRae*, 836 F.2d 764, 767 (CA2 1988); *Pratt v. McCarthy*, 850 F.2d 590, 592 (CA9 1988), while others have adopted a more flexible approach similar to that employed by the Court of Appeals in this case, see, *e.g.*, *Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916 (CA3 1987), cert. denied *sub nom. Consolidated Freightways Corp. v. Secretary of Transp. of Pennsylvania*, 484 U.S. 1032, 108 S.Ct. 762, 98 L.Ed.2d 775 (1988); *Lorenzen v. Employees Retirement Plan of Sperry-Hutchinson Co.*, 896 F.2d 228, 232–233 (CA7 1990).

lessness." Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Contrary to petitioner's suggestion, this flexible understanding of "excusable neglect" accords with the policies underlying Chapter 11 and the bankruptcy rules. The "excusable neglect" standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases.[4] The rules' differentiation between Chapter 7 and Chapter 11 filings corresponds with the differing policies of the two chapters. Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. See *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 2312–2313, 76 L.Ed.2d 515 (1983). In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527–528, 104 S.Ct. 1188, 1197, 79 L.Ed.2d 482 (1984). This context suggests that Rule 9006's allowance for late filings due to "excusable neglect" entails a correspondingly equitable inquiry.

The history of the present bankruptcy rules confirms this view. Rule 9006(b) is derived from Rule 906(b) of the former bankruptcy rules, which governed bankruptcy proceedings under the former Bankruptcy Act. Like Rule 9006(b)(1), former Rule 906(b) permitted courts to accept late filings "where the failure to act was the result of excusable neglect." The forerunner of Rule 3003(c), which now establishes the requirements for filing claims in Chapter 11 cases, was former Rule 10–401(b), which established the filing requirements for proofs of claim in reorganization cases under Chapter X of the former Act, Chapter 11's predecessor. The Advisory Committee Notes accompanying that former rule make clear that courts were entrusted with the authority under Rules 10–401(b) and 906(b) to accept tardy filings "in accordance with the equities of the situation":

> "If the court has fixed a bar date for the filing of proofs of claim, it may still enlarge that time within the provisions of Bankruptcy Rule 906(b) which is made applicable in this subdivision. This policy is in accord with Chapter X generally which is to preserve rather than to forfeit rights. In § 102 it rejects the notion expressed in § 57n of the Act that claims must be filed within a six-month period

4. The time-computation and -extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006 enumerate those time requirements excluded from the operation of the "excusable neglect" standard. One of the time requirements listed as excepted in Rule 9006(b)(3) is that governing the filing of proofs of claim in Chapter 7 cases. Such filings are governed exclusively by Rule 3002(c). See Rule 9006(b)(3); *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428, 1432 (CA9 1990). By contrast, Rule 9006(b) does not make a similar exception for Rule 3003(c), which, as noted earlier, establishes the time requirements for proofs of claim in Chapter 11 cases. Consequently, Rule 9006(b)(1) must be construed to govern the permissibility of late filings in Chapter 11 bankruptcies. See Advisory Committee Note accompanying Rule 9006(b)(1).

to participate in any distribution. Section 224(4) of Chapter X of the Act permits distribution to certain creditors even if they fail to file claims and § 204 fixes a minimum period of 5 years before distribution rights under a plan may be forfeited. This approach was intentional as expressed in Senate Report 1916 (75th Cong., 3d Sess., April 20, 1938):

> "'Sections 204 and 205 insure participation in the benefits of the reorganization to those who, through inadvertence or otherwise, have failed to file their claims or otherwise evidence their interests during the pendency of the proceedings.'
>
> "This attitude is carried forward in the rules, first by dispensing with the need to file proofs of claims and stock interests in most instances and, secondly, by permitting enlargement of the fixed bar date in a particular case with leave of court and for cause shown in accordance with the equities of the situation." Advisory Committee Note accompanying Rule 10-401(b), reprinted in 13A J. Moore & L. King, Collier on Bankruptcy, ¶ 10-401.01, p. 10-401-4 (14th ed. 1977).

This history supports our conclusion that the enlargement of prescribed time periods under the "excusable neglect" standard of Rule 9006(b)(1) is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer.

Our view that the phrase "excusable neglect" found in Bankruptcy Rule 9006(b)(1) is not limited as petitioner would have it is also strongly supported by the Federal Rules of Civil Procedure, which use that phrase in several places. Indeed, Rule 9006(b)(1) was patterned after Rule 6(b) of those rules.[5] Under Rule 6(b), where the specified period for the performance of an act has elapsed, a District Court may enlarge the period and permit the tardy act where the omission is the "result of excusable neglect."[6] As with Rule 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the courts of appeals have generally recognized that "excusable neglect" may extend to inadvertent delays.[7] Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept"[8] and is not limited strictly to omissions caused by circumstances beyond the control of the movant.[9]

5. See Advisory Committee Note accompanying Rule 9006(b).

6. Federal Rule of Civil Procedure 6(b) provides: "(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

7. See, *e.g.*, *United States v. Borromeo*, 945 F.2d 750, 753-754 (CA4 1991); *Hill v. Marshall*, No. 86-3987, 1988 WL 117163, at *2, 1988 U.S.App. LEXIS 14742, *4 (CA6, Nov. 4, 1988); *Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (CA3 1988); *Sony Corp. v. Elm State Electronics, Inc.*, 800 F.2d 317, 319 (CA2 1986); *United States ex rel. Robinson v. Bar Assn. of District of Columbia*, 89 U.S.App.D.C. 185, 186, 190 F.2d 664, 665 (1951). But see *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1552-1553 (CA Fed. 1991).

8. 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, p. 479 (2d ed. 1987).

9. The Courts of Appeals generally have given a similar interpretation to "excusable neglect" in the context of Rule 45(b) of the Rules of Criminal Procedure, which, like Rule 9006(b), was modeled after Rule 6(b). See, *e.g.*, *United States v. Roberts*, 978 F.2d 17, 21-24 (CA1 1992); *Warren v. United States*, 123 U.S.App.D.C. 160, 163, 358 F.2d 527, 530 (1965); *Calland v. United States*, 323 F.2d 405, 407-408 (CA7 1963).

The "excusable neglect" standard for allowing late filings is also used elsewhere in the Federal Rules of Civil Procedure. When a party should have asserted a counterclaim but did not, Rule 13(f) permits the counterclaim to be set up by amendment where the omission is due to "oversight, inadvertence, or excusable neglect, or when justice requires." In the context of such a provision, it is difficult indeed to imagine that "excusable neglect" was intended to be limited as petitioner insists it should be.[10]

The same is true of Rule 60(b)(1), which permits courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect," but only on motion made within one year of the judgment. Rule 60(b)(6) goes further, however, and empowers the court to reopen a judgment even after one year has passed for "any other reason justifying relief from the operation of the judgment." These provisions are mutually exclusive, and thus a party who failed to take timely action due to "excusable neglect" may not seek relief more than a year after the judgment by resorting to subsection (6). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, and n. 11, 108 S.Ct. 2194, 2205 n. 11, 100 L.Ed.2d 855 (1988). To justify relief under subsection (6), a party must show "extraordinary circumstances" suggesting that the party is faultless in the delay. See *ibid.*; *Ackerman v. United States*, 340 U.S. 193, 197–200, 71 S.Ct. 209, 211–213, 95 L.Ed. 207 (1950); *Klapprott v. United States*, 335 U.S. 601, 613–614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable. In *Klapprott*, for example, the petitioner had been effectively prevented from taking a timely appeal of a judgment by incarceration, ill health, and other factors beyond his reasonable control. Four years after a default judgment had been entered against him, he sought to reopen the matter under Rule 60(b) and was permitted to do so. As explained by Justice Black:

> "It is contended that the one-year limitation [of subsection (1)] bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one-year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend ... due to inadvertence, indifference, or careless disregard of consequences." 335 U.S., at 613, 69 S.Ct., at 389.

Justice Frankfurter, although dissenting on other grounds, agreed that Klapprott's allegations of *inability* to comply with earlier deadlines took his case outside the scope of "excusable neglect" "because 'neglect' in the context of its subject matter carries the idea of negligence and not merely of non-action." *Id.*, at 630, 69 S.Ct., at 398.

Thus, at least for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. Because of the language and structure of Rule 60(b), a party's fail-

10. In assessing what constitutes "excusable neglect" under Rule 13(f), the lower courts have looked, *inter alia*, to the good faith of the claimant, the extent of the delay, and the danger of prejudice to the opposing party. See, *e.g.*, *New York Petroleum Corp. v. Ashland Oil, Inc.*, 757 F.2d 288, 291 (Temp.Ct.Emergency App.1985); *Gaines v. Farese*, No. 87–5567, 1990 WL 153937, *3, 1990 U.S.App. LEXIS 18086, *9 (CA6, Oct. 11, 1990); *Barrett v. United States Banknote Corp.*, 1992–2 Trade Cases ¶ 69,956, p. ——, 1992 WL 232055 (SDNY 1992); *Technographics, Inc. v. Mercer Corp.*, 142 F.R.D. 429, 430 (MD Pa. 1992). Federal Rule of Bankruptcy Procedure 7013 contains a similar allowance for late counterclaims brought by a trustee or debtor in possession.

ure to file on time for reasons beyond his or her control is not considered to constitute "neglect." See *Klapprott, supra.*[11] This latter result, however, would not obtain under Bankruptcy Rule 9006(b)(1). Had respondents here been prevented from complying with the bar date by an act of God or some other circumstance beyond their control, the Bankruptcy Court plainly would have been permitted to find "excusable neglect." At the same time, reading Rule 9006(b)(1) inflexibly to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word "neglect" and would be at odds with the accepted meaning of that word in analogous contexts.[12]

B

[3] This leaves, of course, the Rule's requirement that the party's neglect of the bar date be "excusable." It is this requirement that we believe will deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1). With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.[13] These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. See 943 F.2d, at 677.[14]

11. A similar, but even more explicit, dichotomy can be found in a former rule of the Circuit Court of Appeals for the Second Circuit governing the late filing of appeals. That rule permitted late filings "'upon a showing ... (a) that the delay has been due to cause beyond the control of the moving party or (b) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect....'" Rule 15(2), U.S.C.C.A., Second Circuit, quoted in *Pyramid Motor Corp. v. Ispass*, 330 U.S. 695, 703, n. 10, 67 S.Ct. 954, 958, n. 10, 91 L.Ed. 1184 (1947). Although the meaning given "excusable neglect" for purposes of this rule obviously is not controlling for purposes of Rule 9006(b)(1), it does suggest that the meaning of "excusable neglect" urged by petitioner is far from natural.

12. See also *United States v. Boyle*, 469 U.S. 241, 245, n. 3, 105 S.Ct. 687, 690, n. 3, 83 L.Ed.2d 622 (1985) ("neglect" as used in statute governing late filing of tax returns "impl[ies] carelessness").

13. The dissent discerns in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), an indication that the factors relevant to this inquiry extend no further than the movant's culpability and the reason for the delay, see *post*, at 1501. We cannot agree. *Lujan* held that a district court did not abuse its discretion in declining to permit a late filing under Rule 6(b) of the Civil Rules on grounds of excusable neglect. 497 U.S., at 897–898, 110 S.Ct., at 3193. The Court did not, however, define "excusable neglect" or even decide whether that standard could have been met on the facts of that case.

14. The dissent would permit judges to take account of the full range of equitable considerations only if they have first made a threshold determination that the movant is "sufficiently blameless" in the delay, see *post*, at 1501. The dissent believes that this formulation of the Rule's requirements would bring needed clarity to the Rule's application and save judicial resources. See *post*, at 1504–1505. But narrowing the range of factors to be considered in making the "excusable neglect" determination will not eliminate disputes over how the remaining factors should be applied in any given case. For purposes of the present case at least, the dissent appears willing to draw a line between ordinary negligence and partial "indifference" to deadlines, see *ibid.*, but parties with valuable interests at stake will no doubt find this distinction susceptible of litigation. The only reliable means of eliminating the "indeterminacy" the dissent finds so troubling would be to adopt a bright-line rule of the sort embraced by some Courts of Appeals, erecting a rigid barrier against late filings attributable in any degree to the movant's negligence. As we have suggested, however, such a construction is irreconcilable with our cases assigning a more flexible meaning to "excusable *neglect*." Faced with a choice between our own precedent and Black's Law Dictionary, we adhere to the former.

There is one aspect of the Court of Appeals' analysis, however, with which we disagree. The Court of Appeals suggested that it would be inappropriate to penalize respondents for the omissions of their attorney, reasoning that "the ultimate responsibility of filing the ... proof[s] of clai[m] rested with [respondents'] counsel." *Ibid.* The court also appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonably could to comply with the court-ordered bar date. In this, the court erred.

[4, 5] In other contexts, we have held that clients must be held accountable for the acts and omissions of their attorneys. In *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), we held that a client may be made to suffer the consequence of dismissal of its lawsuit because of its attorney's failure to attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Id.*, at 633, 82 S.Ct., at 1390. To the contrary, the Court wrote:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.*, at 633–634, 82 S.Ct., at 1390 (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)).

This principle also underlay our decision in *United States v. Boyle*, 469 U.S. 241, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985), that a client could be penalized for counsel's tardy filing of a tax return. This principle applies with equal force here and requires that respondents be held accountable for the acts and omissions of their chosen counsel. Consequently, in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable.

III

[6, 7] Although the Court of Appeals in this case erred in not attributing to respondents the fault of their counsel, we conclude that its result was correct nonetheless. First, petitioner does not challenge the findings made below concerning the respondents' good faith and the absence of any danger of prejudice to the debtor or of disruption to efficient judicial administration posed by the late filings. Nor would we be inclined in any event to unsettle factual findings entered by a Bankruptcy Court and affirmed by both the District Court and Court of Appeals. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572 (1987). Indeed, in this case, the Bankruptcy Court took judicial notice of the fact that the debtor's second amended plan of reorganization, offered after this litigation was well underway, takes account of respondents' claims. App. 168a–169a. As the Court of Appeals found, the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date. We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases. As the Court of Appeals noted, ordinarily the bar date in a bankruptcy case should be prominently announced and

accompanied by an explanation of its significance. See 943 F.2d, at 678. We agree with the court that the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors['] meeting," without any indication of the significance of the bar date, left a "dramatic ambiguity" in the notification. *Ibid.*[15] This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, "excusable."

For these reasons, the judgment of the Court of Appeals is

Affirmed.

Justice O'CONNOR, with whom Justice SCALIA, Justice SOUTER and Justice THOMAS join, dissenting.

Today the Court replaces the straightforward analysis commended by the language of Bankruptcy Rule 9006(b)(1) with a balancing test. Because the Court's approach is inconsistent with the Rule's plain language and unduly complicates the task of courts called upon to apply it, I respectfully dissent.

I

Bankruptcy Rule 9006(b)(1) provides that, if a party moves for permission to act after having missed a deadline, the court "may at any time in its discretion ... permit the act to be done where the failure to act was the result of excusable neglect." This language establishes two requirements that must be met before untimely action will be permitted. First, no relief is available unless the failure to comply with the deadline "was the result of excusable neglect." Bkrtcy.Rule 9006(b)(1). Second, the court may withhold relief if it believes forbearance inappropriate; the statute does not *require* the court to forgive every omission caused by excusable neglect, but states that the court "*may*" grant relief "in its discretion." *Ibid.* (emphasis added). Thus, the court must at the threshold determine its authority to allow untimely action by asking whether the failure to meet the deadline resulted from excusable neglect; if the answer is yes, *then* the court should consider the equities and decide whether to excuse the error.

Instead of following the plain meaning of the statute and examining this case in these two steps, the Court employs a multifactor balancing test covering numerous equitable considerations, including (and perhaps not limited to) "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, ... and whether the movant acted in good faith." *Ante*, at 1498. But Rule 9006(b) does not simply command courts to permit late filing whenever it would be "equitable" in light of all the circumstances. Rather, it establishes that the courts may exercise their discretion in accord with the equities *only* if the failure to meet the deadline resulted from excusable neglect in the first place.

15. Indeed, one commentator has warned expressly of the deficiency in the method of notification employed by the Bankruptcy Court here: "Prior to the adoption of the present bankruptcy rules some bankruptcy courts placed a time to close the receipt of claims in chapter 11 in the notice sent to the listed creditors for the first meeting of creditors. This practice should be strongly discouraged. It conflicts with some of the factual circumstances giving rise to a claim in chapter 11 and can ambush unwitting creditors. Since creditors are notorious for failing to read all of the boilerplate language in the xeroxed form distributed as the notice of the first meeting of creditors, counsel for creditors will be wise to double check and ask for a prompt receipt of the notice from the client or examine the notice on file in the particular bankruptcy case." R. Aaron, Bankruptcy Law Fundamentals § 8.02[7], p. 8–21 (rev. ed. 1991).

Whether the failure resulted from excusable neglect depends on the nature of the omission itself, both in terms of cause and culpability. Consequently, until the reason for the omission is determined to be sufficiently blameless, the consequences of the failure, such as the effect on the parties or the impact on the judicial system, are not relevant. *In re Vertientes, Ltd.*, 845 F.2d 57, 60 (CA3 1988) ("The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason"); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (CA11 1985) (The focus of the Rule is on the omission and the reasons therefor rather than on the effect on others), cert. denied, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986); see also *Maressa v. A.H. Robins Co.*, 839 F.2d 220, 221 (CA4 1988) (no exception to claim filing deadlines based on general equitable principles).

Although the Court pays lip service to the existence of a threshold determination regarding excusable neglect, see *ante*, at 1492 ("Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect' "), it holds that the threshold question is "at bottom an equitable one." *Ante*, at 1498. Our case law is to the contrary.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), we applied the virtually identical language of Federal Rule of Civil Procedure 6(b). Under that Rule, as under this one, a court may not permit untimely filing unless it "find[s] as a substantive matter ... that the failure to file on time 'was the result of excusable neglect.' " 497 U.S., at 897, 110 S.Ct., at 2733. Characterizing that "obstacle" as "the greatest of all," *ibid.*, we examined the reasons for the movant's failure to make a timely filing. Nowhere in our discussion did we mention the equities or the consequences of the movant's failure to file. Instead, we concentrated exclusively on the asserted cause of the failure and the movant's culpability. See *ibid.*

The Court concedes that Federal Rule of Civil Procedure 6(b) and Bankruptcy Rule 9006(b) have virtually identical language; indeed, it even relies on the former to support its interpretation of the latter. *Ante*, at 1496–1497. Yet the majority provides no reason why we should depart from the analysis we so recently employed in *Lujan*, except to say it reads that case differently. See *ante*, at 1498, n. 13. While it is true that we did not "define" the phrase "excusable neglect" in *Lujan*, *ante*, at 1498, n. 13, there is no denying that we applied that phrase to the facts before us: There is simply no other explanation for the opinion's discussion of whether the movant had overcome that "greatest" of "substantive obstacle[s]," 497 U.S., at 897, 110 S.Ct., at 2733. But even if *Lujan* might be read differently, the majority offers no affirmative reason to believe that the equities *should* bear on whether neglect is "excusable." Instead it states:

> "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Ante*, at 1498.

In my view, Congress *has* provided "guideposts" as to how courts should determine whether "neglect will be considered 'excusable.' " The majority simply fails to follow them. First is the remaining language of Rule 9006(b)(1) itself, a good portion of which the majority fails to consult. The Rule, read in its entirety, establishes that the excusable neglect determination requires inquiry into causation rather than consequences: Unless "the *failure* to act was *the result*" of the excusable neglect, relief is unavailable. "It is clear from this language that the focus of [the Rule] is on the movant's actions and the reasons for those actions, not on the effect that an extension might have on the other

parties' positions." *In re South Atlantic Financial Corp.*, 767 F.2d, at 819. Moreover, Rule 9006(b)(1) indicates that the court must determine whether the neglect was "excusable" as of the moment it occurred rather than in light of facts known when untimely action is proposed. The Rule authorizes relief in cases where the failure *"was"* the result of excusable neglect, not as to incidents where the neglect *is* excusable in light of current knowledge.

The majority also overlooks a second and dispositive guidepost—the accepted dictionary definition of "excusable neglect." That definition does not incorporate the results or consequences of a failure to take appropriate and timely action; to the contrary, it turns on the cause or reasons for the failure and the culpability involved. According to Black's Law Dictionary 566 (6th ed. 1990), "excusable neglect" is:

> "[A] failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party. As used in rule (*e.g.* Fed.R.Civil P. 6(b)) authorizing court to permit an act to be done after expiration of the time within which under the rules such act was required to be done, where failure to act was the result of 'excusable neglect', quoted phrase is ordinarily understood to be the act of a reasonably prudent person under the same circumstances."

Cf. 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, pp. 480, 482 (2d ed. 1987) ("Excusable neglect [in Fed. Rule Civ.Proc. 6(b)] seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance. . . . Absent a showing along these lines, relief will be denied"). Of course, we are not bound to accept Black's Law Dictionary as the authoritative expositor of American law. But if Congress had intended to depart from the accepted meaning of excusable neglect—supplementing its exclusive focus on the *reason* for the error with an emphasis on its *effect*—surely it would have so indicated.

In any event, it is quite unnatural to read the term "excusable neglect" to mean a variety of neglect that, in light of subsequent events and all the equities, turns out to be excusable. Not only does such an interpretation suffer from circularity—excusable neglect becomes the neglect that the court in its equitable discretion chooses to excuse—but it also renders critical language in the Rule superfluous. After all, the majority's interpretation would be no different if Rule 9006(b) afforded courts discretion to give relief in cases of "neglect" rather than "excusable neglect." The term "neglect" would describe the acceptable level of culpability, see *ante*, at 1494–1498, and the equities still would move the court's discretionary decision on whether it in fact would excuse the error once "neglect" was shown. The Court's interpretation thus reads the word "excusable" right out of the Rule. In my view, Congress included the word "excusable" to convey the notion that some types of neglect—at a minimum, the highly culpable and the willful—cannot be forgiven, regardless of the consequences.

The Court does recognize one guidepost. It states that the requirement of "excusable neglect" should be construed so as to "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Ante*, at 1498. But rather than concentrating on the types of culpable neglect that ought to be deterred, the majority immediately shifts its focus to considerations such as the *effect* of the failure to take timely action, including prejudice to the debtor and the effect on judicial proceedings. *Ante*, at 1499. If the goal of requiring neglect to be "excusable" is to deter culpable noncompliance, the consequences of such noncompliance should be

irrelevant. To hold otherwise not only undermines deterrence but excuses the inexcusable.

II

The Court's approach also undermines the interests the Bankruptcy Rules seek to promote. Because the majority's balancing test is indeterminate, its results frequently will be called into question. Reasonable minds often differ greatly on what the equities require. This case is a prime example. Applying much the same test the Court applies today, two courts below held that respondent's neglect was inexcusable. Then the Court of Appeals substituted its view and held otherwise. Today the Court evens the score at two to two. We ought not unnecessarily introduce so much uncertainty into a routine matter like an "excusable neglect" determination. Nor should we unhesitatingly endorse an approach that invites litigants to seek redetermination of their procedural disputes from four different courts.

Direct application of Rule 9006(b)(1)'s plain language to this case, in contrast, is straightforward. First, we must examine the failure to act itself and ask if it resulted from excusable neglect. If it did, then the lower court may, in its discretion, permit untimely action in accord with the equities. But if the failure did not result from excusable neglect, there is no reason to consider the effects of the failure.

That, of course, brings us to the question to which the majority devotes the bulk of its discussion: whether mere negligence can qualify as excusable neglect. *Ante*, at 1494–1498. As the majority points out, *ante*, at 1494, the Courts of Appeals have disagreed on this matter. Some require the omission to result from circumstances beyond counsel's reasonable control. See, *e.g.*, *In re South Atlantic Financial Corp.*, 767 F.2d, at 819, and cases cited *ante*, at 1494, n. 3. Others hold that negligence may constitute excusable neglect but distinguish among different types of negligence. Cf. *Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916, 919 (CA3 1987) ("Excusable neglect" inquiry entails a "qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence") (Fed.Rule App.Proc. 4(a)), cert. denied *sub nom.*, *Consolidated Freightways Corp. of Delaware v. Secretary of Transp. of Pennsylvania*, 484 U.S. 1032, 108 S.Ct. 762, 98 L.Ed.2d 775 (1988). In my view, we need not resolve that dispute in this case. Once we properly clarify the factors that are *relevant* to the excusable neglect determination, the Bankruptcy Court's findings compel the conclusion that respondent's neglect was inexcusable under any standard.

The Bankruptcy Court expressly found that respondent's former counsel's failure to file a timely proof of claim resulted from negligence and, to some degree, an attitude of "indifference" toward the deadline. App. 172a. In addition, the court noted that the client, a sophisticated business person and an active participant in the bankruptcy proceedings, had received actual notice of, and was aware of, the deadline. *Id.*, at 171a. Thus, this is not a case of a clerical or other minor error yielding an untoward result despite counsel's best efforts; it is a case in which counsel simply failed to look after his business properly, even if that failure was not the result of bad faith.

The Court of Appeals held the neglect excusable nonetheless for two reasons. First, it thought it inequitable to saddle the client with the mistakes of its attorney. The Court today properly rejects that rationale. *Ante*, at 1499. The second reason offered by the Court of Appeals was that the notice containing the deadline was incorporated in a document entitled "Notice for Meeting of Creditors." That designation, the court explained, was not enough to put those without extensive bankruptcy experience on notice that the "bar date" at the end of the notice was the final date for filing proofs of claims. *In re Pioneer In-*

vestment Services Co., 943 F.2d 673, 678 (CA6 1991). In addition, the court noted that use of the term "bar date" to designate the deadline for filing a proof of claim was "dramatic[ally] ambigu[ous]" since there are many bar dates in bankruptcy, not all of them for the filing of proofs of claims. *Ibid.* The Court today signals its agreement. *Ante*, at 1499, and n. 13. The majority and the Court of Appeals may be correct that the form of notice was unorthodox; they also may be correct in asserting that, if the inadequacy of notice caused respondent to miss the deadline, respondent's failure was the result of "excusable neglect." But they are not correct in asserting that respondent's former lawyer overlooked the deadline "as a result of" the unorthodox form of notice. The Bankruptcy Court made no such finding. Nor did it find that the notice's ambiguity somehow led counsel astray. On the contrary, the Bankruptcy Court found that both counsel and client had actual notice of the deadline and that the cause of their failure to file on time was indifference and negligence. App. 172a.

To be sure, we would not be obligated to accept those findings if they were not supported by the record. But they are supported by the record. Indeed, in a commendable display of candor, respondent's former counsel admitted that the "foul-up" was "particularly" his own. *Id.*, at 72a. Accord, *id.*, at 112a ("[T]he foul-up I can't lay to the clients' shoes because it really is probably mine"). There is no indication that he blamed his error on petitioner's form of notice. Rather, he appealed to the Bankruptcy Court's sense of fairness, arguing that it would be inequitable to penalize his client so greatly where the "delay was occasioned not by [the client], but by its counsel." *Id.*, at 73a. Accord, *id.*, at 102(a) ("[U]nder all the circumstances, we think it would be unfair and inequitable to visit the sins of the lawyer on the client"); *id.*, at 112a (Although the foul-up was respondent's attorney's, given "the lack of prejudice [and] the totality of all the circumstances, [it would be] inherently inequitable to visit the sins on the client for this situation").

Perhaps it would have been desirable for the Bankruptcy Court to make a specific factual finding on whether the unorthodox form of notice actually caused respondent's former counsel to miss the deadline. Given that respondent's lawyer offered no reason why he overlooked the bar date, it is not inconceivable that the notice's unorthodoxy led him astray. *Id.*, at 57a (no recollection of seeing the order setting the deadline); *id.*, at 103a (same). But if there is uncertainty, the answer is to remand to the Bankruptcy Court for appropriate factual findings. Based on the current state of the record and the findings the Bankruptcy Court did make, I cannot accept the majority's finding that counsel's failure in fact resulted from the inadequacy of notice.

Respondent's former counsel's error may represent a relatively unaggravated instance of negligence. He did not miss deadlines repeatedly despite clear warnings. Nor did he act in bad faith. But respondent, its former lawyer, the Court of Appeals, and the majority today, have all failed to produce a reasonable explanation for this rather major error. More important still, the Bankruptcy Court *did* explain the error. It found that respondent's failure to meet the deadline resulted at least in part from counsel's "indifference." The majority offers no reason for ignoring this finding. Even accepting the conclusion that excusable neglect may cover some instances of negligence, indifference falls outside the range of the "excusable." Because the failure to act in this case did not result from excusable neglect, there is no occasion to consider whether the Bankruptcy Court properly exercised its discretion in light of the equities; respondent was ineligible for relief in any event.

The Court's only response is that, even if one focuses exclusively on the nature of the error and why it occurred, the parties can still litigate the Rule's application. *Ante*, at 1498, n. 14. But that objection

can be made to any approach; courts always must apply law to facts. The point is that following the plain language of Rule 9006(b)(1) renders the law's application both easier and more certain. A determination that a party missed the filing deadline on account of "indifference" or some other reason is not as "susceptible of litigation," *ibid.*, as the result of multifactor balancing. The determination is factual and, as such, may be overturned on review only if clearly erroneous. In fact, no one—neither the parties nor any of the many courts that have reviewed this case—has suggested that there was clear error here. Rather, in this case, as in most others like it, the Bankruptcy Court's findings are more than adequately supported by the record.

Indeed, the majority succeeds in circumventing the finding of "indifference" only by ignoring it, concentrating instead on other considerations in the multifactor test. The Court's technique will no doubt prove instructive to anyone appealing an excusable neglect determination in the future, for it highlights the indeterminacy of the test: A simple shift in focus from one factor to another—here, from cause to effects—shifts the balance and the result. The approach required by the Rule itself, in contrast, precludes that slippery tactic. At the threshold, there is but one question on which to focus: the reason the deadline was missed. Contrary to the Court's assertion, *ibid.*, that singular focus does not require us to hold today that all incidents of negligence are inexcusable. We need hold only that *indifference* is inexcusable. That, I would have thought, goes without saying.

III

When courts depart from the language of a congressional command, they often create unintended difficulties in the process. This case, I fear, may prove no exception. The majority's single-step, multifactor, equitable balancing approach to "excusable neglect" is contrary to the language of Rule 9006(b) and inconsistent with sensible notions of judicial economy. Its indeterminacy not only renders consistent application unlikely but also invites unproductive recourse to appeal. Such consequences are especially unfortunate in the Rules of *Bankruptcy* Procedure. An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see. Congress established in Rule 9006(b) the inquiry that should be made when courts contemplate permitting untimely action. Under the approach commended by that Rule, respondent is barred from filing an untimely proof of claim because its omission resulted from a neglect that, on this record, was simply inexcusable; the equities, no matter how compelling, cannot propel respondent over that hurdle. I therefore respectfully dissent.

CITY OF CINCINNATI, Petitioner,

v.

DISCOVERY NETWORK, INC., et al.

No. 91-1200.

Argued Nov. 9, 1992.

Decided March 24, 1993.

Commercial publishers brought civil rights action, requesting declaratory and injunctive relief against enforcement of city ordinance prohibiting distribution of "commercial handbills" on public property, used as basis of ordering removal of news racks. The United States District Court for the Southern District of Ohio, S. Arthur Spiegel, J., entered judgment preventing enforcement of ordinance, and City appealed. The Court of Appeals for the Sixth Circuit, 946 F.2d 464, affirmed. Certiorari

no grounds to hold Beneficial in contempt or to stay its actions to foreclose the lien.

A separate order will be entered.

In re EARTH ROCK, INC., d/b/a Earth Rock Construction, Debtor.

Bankruptcy No. 92-00885.

United States Bankruptcy Court, D. Idaho.

April 23, 1993.

Creditor, a prime contractor for which Chapter 11 debtor was subcontractor, moved to extend claim's bar date to file its late claim. The Bankruptcy Court, Jim D. Pappas, J., held that creditor was entitled to deadline extension.

Motion granted.

1. **Bankruptcy ⇐2132**

For purposes of allowing late filing if failure to comply with earlier deadline was result of excusable neglect, notion of "neglect" is flexible, elastic concept encompassing broad variety of potential conduct. Fed.Rules Bankr.Proc.Rule 9006(b)(1), 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Bankruptcy ⇐2900(1)**

Creditor was entitled to extension of deadline to file proof of claim against Chapter 11 debtor, even though reason for the nearly eight-month delay between bar date and filing of motion to extend was solely the result of creditor's former counsel's decision, where there would be little, if any, prejudice to debtor if claim was allowed, and filing the claim would not delay significantly the debtor's reorganization proceedings. Fed.Rules Bankr.Proc.Rules 3003(c)(3), 9006(b)(1), 11 U.S.C.A.

Brent T. Robinson, Ling, Nielsen & Robinson, Rupert, Idaho, for debtor.

Quentin M. Knipe, Meuleman, Miller & Cummings, Boise, Idaho, for creditor Idaho Const. Co. Inc.

MEMORANDUM OF DECISION

JIM D. PAPPAS, Bankruptcy Judge.

Background.

This matter is before the Court after a hearing on a Motion to Extend Time to File Claim filed herein by creditor Idaho Construction Co., Inc. ("Creditor"). The relevant facts, coming primarily from the affidavit of Creditor's vice-president, are not disputed, and may be stated briefly.

In April, 1991, Creditor, as prime contractor, entered into a subcontract with Debtor, on a Boise construction project. In December, 1991, Creditor notified Debtor it was in default under the subcontract, and if not remedied, Creditor would take over the project and bill Debtor for any costs incurred in completing the contract. Debtor failed to cure the default and Creditor completed the project incurring about $130,000 in costs in excess of payments received.

On March 19, 1992, Debtor filed for relief under Chapter 11. Debtor listed Creditor in its schedules filed with this Court as holding a disputed claim. Under Section 1111(a) of the Bankruptcy Code and F.R.B.P. 3003(c)(2), Creditor was therefore required to file a proof of claim with the Clerk of the Court if it desired to participate as a creditor in this case. The Section 341(a) meeting of creditors was held on May 19, 1992, and under Local Bankruptcy Rule 401(a), the last day for filing proofs of claim was August 17, 1992. The notice mailed to Creditor by the Clerk in this case on March 23, 1992, advised Creditor of the need to file a proof of claim and of the deadline for doing so. The notice also advised Creditor of the date set by the Court for a creditor's meeting in the case. Credi-

tor apparently admits receipt of the notice in a timely fashion.

Creditor obtained an attorney to represent it in the bankruptcy case. When Creditor inquired of the attorney whether any affirmative actions were necessary to protect its interests in Debtor's bankruptcy case, it was informed that he (the lawyer) was taking care of the matter and that nothing more need be done until the bankruptcy was terminated. Evidently, because Creditor had received large payments on the contract, its attorney felt that an offset may be claimed by Debtor. Creditor concedes that the attorney therefore specifically advised it not to file a proof of claim in the bankruptcy case, and consequently none was filed.

Creditor retained another law firm in March, 1993. On April 1, 1993, the present motion was filed.

Discussion of the Issues.

F.R.B.P. 3003(c)(3) provides that "[t]he court shall fix and for cause shown may extend the time within which proof of claim or interest may be filed" in Chapter 11 cases. L.B.R. 401 implements this Rule, and sets the deadline for filing proofs of claim at ninety days from the first date set for the creditor's meeting in a Chapter 11 case in this district. The Local Rule also incorporates the Court's ability to extend this deadline for cause shown. L.B.R. 401(b).

Conveniently, the United States Supreme Court a mere month ago decided a case concerning issues very close to the matter now before the bar. In that decision, *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership,* — U.S. ——, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the Court reviewed the appropriate legal standard and factual circumstances under which a proof of claim may be filed after the bar date in Chapter 11 cases. In its decision, the Court holds that the issue is controlled by F.R.B.P. 9006(b)(1) which "empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'" *Id.* at ———, 113 S.Ct. at 1491–92. Specifically, the Court decided that an attorney's inadvertent failure to timely file a proof claim can constitute excusable neglect under the rule. The Court's analysis is, of course, instructive here.

[1] As an initial matter, the Court determined that in order to allow the late filing, the failure to timely file must be a result of "neglect". It construes this term by explaining:

> "[t]he rule grants a reprieve to out-of-time filings that were delayed by 'neglect.' The ordinary meaning of 'neglect' is 'to give little attention or respect' to a matter, or, closer to the point for our purposes, 'to leave undone or unattended to *especially through carelessness.*' Webster's Ninth New Collegiate Dictionary 791 (1983). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.... Hence, by empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."

Id. at ——, 113 S.Ct. at 1494–95. The notion of neglect for purposes of this issue is therefore a flexible, elastic concept encompassing a broad variety of potential conduct.

This first point is particularly pertinent to Debtor's argument in this case that because Creditor's counsel made a deliberate decision to refrain from filing a proof of claim, the conduct cannot be excused under the Rule. Creditor, through its new counsel, argues that while the decision was a conscious one, the decision was also a "bad one" and therefore clearly negligent.

Deciding whether a decision to file a proof of claim constitutes a careless mistake in professional judgment or something else is, naturally, an exercise in hindsight. What at the time may seem a correct

course of action in light of later analysis may seem inappropriate. On this record, the Court cannot conceive of why if Creditor intended to collect on its claim against Debtor that the decision to not file a proof of claim in the Chapter 11 case aided in that process. However, considering the instruction of *Pioneer Investment*, the Court should not hold, as Debtor urges, that as a matter of law there can be no "excusable neglect" in this case.

The more important question, it seems to the Court, is whether Creditor's neglect in failing to file a claim is "excusable" as required by the Rule. On this issue, the Supreme Court noted:

> "It is this requirement that we believe will deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1). With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. There is one aspect of the Court of Appeals' analysis, however, with which we disagree. The Court of Appeals suggested that it would be inappropriate to penalize [the creditors] for the omissions of their attorney, reasoning that 'the ultimate responsibility of filing the ... proofs of claim rested with [creditors'] counsel.' The court also appeared to focus its analysis on whether [the creditors] did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as [the creditors'] agent, did all he reasonably could to comply with the court-ordered bar date. In this, the court erred."

Id. at ———, 113 S.Ct. at 1498–99. (citations omitted) The Court went on to reason that since the creditors voluntarily chose their attorney as their representative, that they could not avoid the consequences of the acts or omissions of that agent, emphasizing that "in determining whether [the creditors'] failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of [the creditors] and their counsel was excusable." *Id.* at ——, 113 S.Ct. at 1499.

[2] Applying the various factors mentioned in *Pioneer Investment* to the facts of this case makes for a truly difficult decision for the Court.

On the one hand, Debtor concedes there would be little, if any, prejudice to the Debtor if the proof of claim were to be allowed as timely. In fact, Debtor's proposed disclosure statement filed after the bar date had expired contains a specific discussion of the contract with Creditor and continues to list Creditor as the holder of a disputed claim. The Debtor's proposed plan treats all unsecured creditors in the same fashion, and consideration of Creditor's claim would not necessarily alter that treatment. It appears that the filing of a proof of claim by Creditor will not delay Debtor's reorganization proceedings in any significant regard.

On the other hand, there was a delay of almost eight months between the bar date and the filing of Creditor's motion in this case. Such a lengthy delay suggests a severe lack of diligence on the part of both Creditor and its counsel in getting this issue before the Court.

Similarly, the reason for such delay is solely the result of the decisions made by Creditor's former counsel. This is not a case where the proof of claim was not filed for reasons beyond the control of the creditor.

In *Pioneer Investment*, the Supreme Court criticized the fact that the notice of the bar date may have been buried in the

"boilerplate" of the initial notice sent out to interested parties by the Clerk. Such is also the practice in this District, and in this particular bankruptcy case. By contrast, as noted above, the Court has by local rule established a standard bar date in Chapter 11 cases, and those rules have been published to the practicing bar in this district and copies of the rules are available to counsel from the Clerk. Here, Creditor's lawyer possessed considerable practice experience in Chapter 11 cases in this Court. In addition, there is no allegation here that either Creditor or its lawyer lacked notice of the bar date.

While it is a close case, the Court concludes that the deadline for filing a proof of claim should be extended in favor of Creditor under these facts. Were there any substantial showing that Creditor's failure to file the proof of claim would result in any prejudice to Debtor's reorganization efforts, or otherwise delay the administration of the bankruptcy case, the Court's decision may well be different. Under different facts, a creditor's attorney's determination to not file a proof of claim may have dire consequences, but there is little interest to be served in depriving this Creditor of the right to participate in this case.

A separate order will be entered. This Memorandum constitutes the Court's findings of fact and conclusions of law. F.R.B.P. 7052.

In re Robert W. MYERS, Trustee.

Misc. No. 392-304-H.

United States Bankruptcy Court, D. Oregon.

April 9, 1993.

Standing Chapter 13 trustee sought reimbursement for legal costs incurred in defending age discrimination suit brought by former employee of trustee's office. The Bankruptcy Court, 147 B.R. 221, granted reimbursement. Subsequently, trustee sought reimbursement for attorney fees and costs incurred in seeking initial reimbursement. The Bankruptcy Court, Henry L. Hess, Jr., Chief Judge, held that legal fees and costs incurred in establishing necessity of prior legal costs were also "necessary" and reimbursable.

So ordered.

1. Bankruptcy ⇐3152

Legal expenses incurred by standing Chapter 13 trustee in seeking court authorization for payment of legal costs incurred by trustee in defending age discrimination suit brought by former employee of trustee's office were themselves "necessary" and reimbursable; legal fees and costs incurred in seeking court authorization flowed logically and inevitably from operations of trustee's office and from inappropriate actions of Executive Office for United States Trustees in arbitrarily and capriciously denying reimbursement. 28 U.S.C.A. § 586(e).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy ⇐3152

Standing Chapter 13 trustee should be reimbursed for costs of any appeal by Executive Office for United States Trustees from bankruptcy court order granting reimbursement to standing trustee for legal fees incurred in seeking court authorization for payment of legal costs incurred in defending age discrimination suit brought by former employee of standing trustee's office. 28 U.S.C.A. § 586(e).

Paul S. Cosgrove, Portland, OR, for trustee.

Pamela J. Griffith, Portland, OR, for U.S. Trustees.

pursuant to Federal Rule of Civil Procedure 12(b)(6), as made applicable by Federal Rule of Bankruptcy Procedure 7012(b), is granted.

4. GTE's Motion to Dismiss the cause of action for willful misrepresentation asserted by the trustee in paragraph 23 of the Amended Complaint is granted.

5. The Third Claim of the Amended Complaint is dismissed under Federal Rule of Civil Procedure 12(b)(6), as made applicable to this case by Federal Rule of Bankruptcy Procedure 7012(b).

6. GTE Supply has agreed to provide the accounting requested in the Fourth Claim of the Amended Complaint and therefore, the Fourth Claim is dismissed subject to GTE Supply providing the requested accounting.

SETTLE ORDER on notice in accordance with the foregoing.

[Editor's Note: Remaining text separately sets forth proposed findings and conclusions regarding withdrawal of reference and is deleted for purposes of publication.]

In re ARTS DES PROVINCES DE FRANCE, INC., et al., Debtors.

Bankruptcy Nos. 92 B 21439 through 92 B 21447.

United States Bankruptcy Court, S.D. New York.

April 6, 1993.

After Chapter 11 debtors served notice of adjusted claims bar date upon managing agent of debtor's landlord rather than on landlord directly, landlord moved for order deeming its late-filed claim to be timely filed and for imposition of Rule 9011 sanctions. The Bankruptcy Court, Howard Schwartzberg, J., held that: (1) landlord's failure to file timely claim constituted excusable neglect, and (2) Rule 9011 sanctions could not be imposed.

Motions granted in part and denied in part.

1. Bankruptcy ⇐2132

Determination of what constitutes excusable neglect for purposes of Bankruptcy Rule on enlargement of deadlines is an equitable one, taking account of all relevant circumstances surrounding the party's commission. Fed.Rules Bankr.Proc.Rule 9006(b), 11 U.S.C.A.

2. Bankruptcy ⇐2900(1)

Landlord's neglect in filing its claim late constituted excusable neglect where delay in landlord's receipt of notice of the adjusted bar date could have been avoided if Chapter 11 debtors had properly listed landlord as the creditor rather than listing landlord's managing agent, and if debtors had served notice of bar date on landlord's counsel as required by their notice of appearance. Fed.Rules Bankr.Proc.Rule 9006, 11 U.S.C.A.

3. Bankruptcy ⇐2187

Refusal of Chapter 11 debtors' counsel to permit creditor to file claim late could not be sanctioned under Rule 9011, even though debtors had failed to notify creditor adequately of adjusted bar date, where creditor's failure to file timely claim was also due in part to neglect on part of debtors; neither side was blameless. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Itkowitz & Gottlieb, New York City, for D & D Associates.

Parker Chapin Flattau & Klimpl, New York City, for debtors.

DECISION ON MOTION FOR ORDER DEEMING D & D ASSOCIATES' PROOF OF CLAIM TIMELY FILED NUNC PRO TUNC AND FOR SANCTIONS

HOWARD SCHWARTZBERG, Bankruptcy Judge.

D & D Associates ("D & D"), a creditor in this Chapter 11 case, has moved for an

order pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3) and 9006 for an order deeming its proof of claim filed after the bar date to be timely filed, and for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 9011. D & D argues that the debtor failed to comply with the notice provisions of Rule 2002(a)(8) of the Federal Rules of Bankruptcy Procedure in that the debtors did not serve D & D or its counsel with notice of the bar date for filing proofs of claim. Instead, the notice was mailed to D & D's managing agent. The debtors did not serve counsel for D & D despite the filing of a notice of appearance by counsel for D & D. The debtors contend that D & D received actual notice in time to file a proof of claim and that their proof of claim, which was filed on March 11, 1993, after the bar date of March 5, 1993, should not be deemed filed timely.

UNDISPUTED FACTS

1. The debtors filed their Chapter 11 cases with this court on July 23, 1992 and are currently operating as debtors in possession in accordance with 11 U.S.C. §§ 1107 and 1108. The debtors are affiliated corporations engaged in the retail and wholesale of French fabrics, wall coverings, antiques, housewares and boutique items.

2. Pursuant to an order of this court entered on July 23, 1992, the debtors' cases were procedurally consolidated for administrative purposes and are jointly administered.

3. D & D is a former landlord of the debtor La Provence De Pierre Deux, Inc. On October 9, 1991, D & D commenced two nonpayment of rent proceedings against the debtor in the Civil Court of the City of New York, County of New York.

4. On August 18, 1992, the debtors served and filed a motion seeking an order pursuant to 11 U.S.C. §§ 365 and 363(b), authorizing Pierre Deux West, Inc., Pierre Deux New York, and Pierre Deux D.C., Inc. (collectively, the "Moving Debtors"), to close three retail and wholesale operations. In connection therewith, the moving debtors sought authorization to: (1) reject certain nonresidential real property leases; (2) make certain dispositions of inventory, including the sale of substantially all of the property of Pierre Deux D.C. to Pierre Deux New York; and (3) reject certain leases for office equipment.

5. As part of such motion, Pierre Deux New York sought authorization to reject two nonresidential real property leases with D & D Associates for two showrooms in the D & D Building which is located at 979 Third Avenue, New York, New York.

6. In response to the motion, Barry Gottlieb, Esq. of Itkowitz & Gottlieb, counsel to D & D appeared at the hearing on the Moving Debtors' motion and offered no opposition to the rejection of D & D's leases with Pierre Deux New York. The court granted the Moving Debtors' motion and directed the Moving Debtors to settle an order.

7. On or about September 25, 1992 and November 13, 1992, D & D, by its counsel, filed a Notice of Appearance and an Amended Notice of Appearance, respectively, in this court.

8. During September and October, 1992, Pierre Deux New York, along with the other debtors, completed and filed their schedules of assets and liabilities (the "Schedules"). Pierre Deux New York listed Williams Real Estate Co., Inc. ("Williams") on its schedule F, as a party holding a claim against it in the amount of $49,967.79 for prepetition rent which was due and owing to D & D.

9. Williams is D & D's leasing and managing agent for the D & D Building, and was the entity which invoiced Pierre Deux New York for its monthly rent at the D & D Building.

10. At no time did Williams, D & D or D & D's counsel ever contact the debtors or debtors' counsel to inform them that this was an error or to request that the schedules be amended to replace Williams with D & D.

11. On October 7, 1992, Counsel Press, the debtors' claims agent, served Williams

with a Notice of Commencement of Chapter 11 Cases and Meeting of Creditors Pursuant to Section 341 of the Bankruptcy Code (the "341 Notice") which incorporated a proof of claim form. In Williams' case, the proof of claim form indicated that Pierre Deux New York had scheduled Williams as having an unsecured claim in the amount of $49,967.79.

12. On December 11, 1992, this court entered an order rejecting Pierre Deux New York's leases with D & D for the D & D Building.

13. On February 2, 1993, the debtor served D & D's counsel with a copy of a motion (the "Bar Date Motion") for an order pursuant to Bankruptcy Rule 3003(c)(3), fixing March 15, 1993, as the bar date for filing proofs of claim in the debtors' cases.

14. Thereafter, Curtis, Mallet-Prevost, Colt & Mosle, counsel to the investor who had purchased the secured claim of Banque Nationale de Paris, the largest secured creditor in these cases, asked the debtors' counsel whether he could arrange to move the bar date up from March 15, to March 5, 1993. Debtors' counsel agreed to contact the court and ask if that was possible. Debtors' counsel was informed by the court clerk that there would not be a problem in changing the proposed bar date because all of the statutory notice requirements would be met. The proposed order accompanying the Bar Date Motion was revised to fix March 5, 1993 at 5:00 p.m. (EST) as the last day to file claims in these cases.

15. On or about February 8, 1993, this court signed an order (the "Bar Order") fixing March 5, 1993 as the bar date. Debtors' counsel directed Counsel Press to serve all of the scheduled creditors.

16. On February 10, 1993, Counsel Press served a copy of the Bar Order on all of the debtors' scheduled creditors, including Williams, D & D's rental and managing agent. As of February 10, 1993, D & D had a claim against Pierre Deux New York for rejection of its leases and prepetition rent arrearages.

17. Counsel Press failed to serve a copy of the Bar Order on D & D or on counsel for D & D, notwithstanding that counsel for D & D served and filed a Notice of Appearance in these proceedings on behalf of D & D, dated September 25, 1992, and served and filed on or about November 16, 1992 an Amended Notice of Appearance and demand for service of papers dated November 13, 1992.

18. On February 19, 1993, a lease administrator for Williams, discovered a copy of the Bar Order, with no envelope attached thereto, in her "in-box." She has no knowledge as to how the copy of the Bar Order came to be placed in her "in box," and/or who placed it there.

19. On February 19, 1993, the Williams's employee forwarded, by first-class mail, a copy of the Bar Order to the Controller for D & D.

20. On February 23, 1993, D & D's Controller received the copy of the Bar Order.

21. On March 2, 1993 or March 3, 1993, D & D's Controller forwarded to Jay B. Itkowitz, Esq., at Itkowitz & Gottlieb, by first-class mail, a copy of the Bar Order she had received.

22. On March 5, 1993, the Bar Date, Itkowitz & Gottlieb, attorneys for D & D, received the copy of the Bar Order mailed by D & D's Controller.

23. On March 5, 1993, Jay B. Itkowitz, Esq. was out of his office attending a closing and did not return until approximately 4:00 p.m. Upon returning to his office, Mr. Itkowitz opened that day's mail after 5:00 p.m. He reviewed the copy of the bar order and immediately contacted Parker Chapin Flattau & Klimpl, attorneys for the debtors, who refused to accept a proof of claim filed after March 5, 1993.

DISCUSSION

The debtors maintain that D & D's receipt of the Bar Order before the expiration of the bar date, even though it was addressed to the managing agent, Williams, and D & D's actual notice of the bar date, are fatal to D & D's motion. D & D argues that its failure to file a timely proof of claim was due to three factors caused by

the debtors: (1) The debtors' shortened the proposed bar date from March 15, 1993 to March 5, 1993. (2) Notice of the bar date was mailed to D & D's managing agent and not directly to D & D. (3) D & D's counsel was never mailed a copy of the bar date, notwithstanding that they filed a Notice of Appearance with a request to receive all notices of papers mailed in this case.

[1] The time for filing proofs of claim in Chapter 11 cases is governed by Federal Rule of Bankruptcy Procedure 3003(c)(3), which states:

> **FILING PROOF OF CLAIM OR EQUITY SECURITY INTEREST IN CHAPTER 9 MUNICIPALITY OR CHAPTER 11 REORGANIZATION CASES.**
>
> ....
>
> **(c) Filing Proof of Claim.**
>
> **(3) Time for Filing.** The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. *Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).*

Fed.R.Bankr.P. 3003(c)(3) (emphasis in original). Rule 9006(b)(1) permits a court to extend the bar date after the expiration of the specified period on motion by the late filer "where the failure to act was the result of excusable neglect." The determination of what constitutes excusable neglect is "an equitable one, taking account of all relevant circumstances surrounding the party's commission." *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, — U.S. —, —, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993) (footnote omitted).

This court stated in *In re Golden Distributors, Ltd.*, 128 B.R. 349, 357 (Bankr. S.D.N.Y.1991), that a debtor cannot claim that it will be prejudiced by allowing a landlord whose lease was rejected by the debtor to file a late claim for rejection damages because such damages came as no surprise and were anticipated by the debtor's rejection of the lease. This is especially true when the landlord was not properly noticed. The debtor should not reap a windfall because of the inadequate notice with respect to the bar order.

[2] In the instant case, the debtors may not assume the role of righteous indignation when they contributed to the confusion. First, they submitted, on notice to D & D, a proposed bar date of March 15, 1993. Thereafter, without notifying D & D, the debtors shortened the filing time to March 5, 1993. Had the time not been shortened, D & D's claim, which was filed on March 11, 1993, would have been timely. Second, the debtors failed to list D & D as the creditor, and instead, listed Williams, the managing agent from the leased premises. That Williams collected the rent from the debtors did not alter the fact that the landlord and creditor was D & D. Manifestly, the prepetition state court nonpayment of rent action was commenced against the debtors by D & D, and not Williams. Third, D & D's attorneys filed a Notice of Appearance in this case on behalf of D & D and requested a copy of all notices and papers directed to their client, D & D. The debtors failed to comply with this requirement.

On the other hand, D & D is not entirely blameless. It did receive actual notice of the bar date from Williams in time to file a timely proof of claim. However, D & D mailed the notice to its attorneys, who received it on the last day and at a time when the attorney handling this claim for D & D was out of his office attending a closing. Therefore, it may be concluded that D & D and its agents were neglectful in filing a proof of claim six days after the bar date when they had prior actual knowledge of the bar date. However, this neglectful conduct is excusable because the delay could have been avoided if the debtors had complied with bankruptcy procedure by properly listing D & D as a creditor and serving notice of the bar date on D & D's counsel, as required by their Notice of Appearance.

D & D's motion is granted and its proof of claim filed on March 11, 1993 will be deemed filed in timely fashion.

Sanctions

[3] Rule 11 Sanctions are bottomed on the fact that an attorney signed a pleading, motion or other paper in litigation, which the attorney certifies "is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purposes...." Fed.R.Bankr.P. 9011(a). The refusal of the debtors' counsel to permit a late filing of D & D's proof of claim is not sanctionable under Rule 11. D & D's failure to file a timely proof of claim was in part due to neglect, which neglect is excusable because of the debtors' failure to satisfy the notice requirements. Both sides are not blameless and, therefore, sanctions will not be imposed.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(B).

2. D & D's motion for an order deeming its proof of claim timely filed is granted because the late filing was the result of excusable neglect within the meaning of Federal Rule of Bankruptcy Procedure 9006(b)(1).

3. D & D's motion for sanctions is denied.

SETTLE ORDER on notice in accordance with the foregoing.

SPS TECHNOLOGIES, INC.

v.

BAKER MATERIAL HANDLING CORPORATION.

Civ. A. No. 92-4976.

United States District Court, E.D. Pennsylvania.

March 29, 1993.

Chapter 11 debtor's secured creditor, which had levied prepetition on debtor's account receivable, sought to collect from account debtor which had paid the receivable to the bankruptcy estate and not the secured creditor. Both secured creditor and account debtor moved for summary judgment. The District Court, Dalzell, J., held that the account receivable was property of the bankruptcy estate.

So ordered.

1. Federal Civil Procedure ⇐2470.1

For summary judgment purposes, issue is "genuine" only if there is sufficient evidentiary basis on which reasonable jury could find for nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

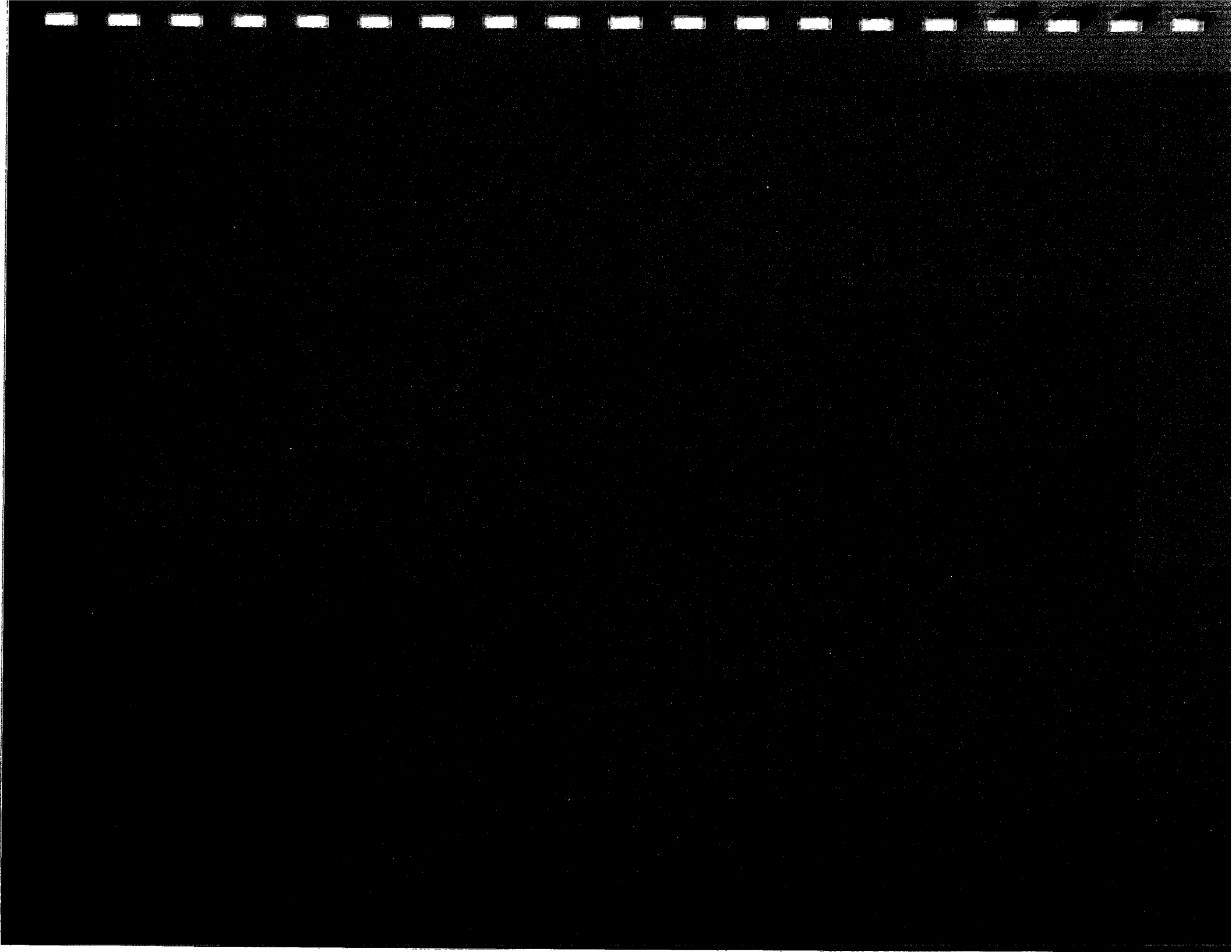
2. Federal Civil Procedure ⇐2470.1

For summary judgment purposes, factual dispute is "material" only if it might affect the outcome of suit under governing law. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⇐2534

To determine what is property of the bankruptcy estate, generally, debtor's legal or equitable interests are determined by application of nonbankruptcy law. Bankr. Code, 11 U.S.C.A. § 541(a)(1).



AMENDMENTS ADOPTED AT FEBRUARY 1993 MEETING

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall (1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file the reports and summaries required by § 704(8) of the Code which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited; (4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; (5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter until a plan is

confirmed or the case is converted or dismissed, file and transmit to the United States trustee a statement of disbursements made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930 (a)(6) that has been paid for such calendar quarter.

(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor in accordance with clause (1) of subdivision (a) of this rule. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(c) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) Business Cases. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor in accordance with clause (1) of subdivision (a) of this rule.

(2) Nonbusiness Cases. In a chapter 13

individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.

* * * *

COMMITTEE NOTE

Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business, is not required to file and transmit to the United States trustee a complete inventory of the property of the debtor unless the court so directs.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

~~(a) TIME FOR FILING PLAN. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.~~

~~(b)~~ (a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

~~(c)~~ (b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed.

Rule 4004. Grant or Denial of Discharge

* * * *

(c) GRANT OF DISCHARGE. In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, (3) the debtor has filed a waiver under § 727(a)(10), ~~or~~ (4) a motion to dismiss the case under Rule 1017(e) is pending, (5) a motion to extend the time for filing a complaint objecting to discharge is pending, or (6) the filing fee has not been paid in full. Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

* * * *

COMMITTEE NOTE

Subsection (c) is amended to delay entry of the order of discharge if a motion under Rule 4004(b) to extend the time for filing a complaint objecting to discharge is pending. This subdivision also is amended to delay entry of the

discharge order if the debtor has not paid the filing fee in full. If the debtor is authorized to pay the filing fee in installments in accordance with Rule 1006, the discharge order will not be entered until the final installment has been paid.

AMENDMENT ADOPTED AT SEPTEMBER 1993 MEETING

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be ~~made~~ filed before the time for filing a notice of appeal has expired, except that a request ~~made~~ filed no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

GORDON BERMANT, DIRECTOR
PLANNING & TECHNOLOGY DIVISION

TEL.: 202-273-4200
FAX: 202-273-4024

February 15, 1994

MEMORANDUM TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBJECT: BEYOND THE LONG RANGE PLAN: THE VIRTUAL BANKRUPTCY COURT

Introduction

Judge Barta has asked me to facilitate a discussion at your upcoming meeting on the future of automation in the bankruptcy courts. The purpose of the discussion is to think beyond the current state of bankruptcy court automation, including prospects under the present long range plan, to contemplate a bankruptcy system that incorporates completely the technology likely to be available and affordable to the courts a decade or two from now. The discussion thus fits within the framework of recent long range planning activity conducted by committees of the Judicial Conference and courts at all levels in the federal system.[1]

Initial long range planning discussions usually set aside concern with the present state of affairs long enough to ask how the courts would operate in an ideal or optimal state. The discussions proceed under the assumption that if an innovation in procedure or technique is a good idea, then the statutory and regulatory changes required to authorize it could eventually be achieved. The question is whether an innovation represents good policy and a worthwhile goal, whatever would be required to put the idea into practice.

Why do technological innovations in the courts deserve particular attention within the long range planning framework? One reason is that changes in court automation and communications technology will occur in any case, and each one alters how courts do and can accomplish their tasks. Each change is likely to be the cause of one or more required trade-offs; technology often alters some things for the

---

1 These activities have been stimulated by the Conference Committee on Long Range Planning chaired by Judge Otto R. Skopil Jr. Among the other Conference committees that have recently participated in long range planning are the Bankruptcy, Court Administration and Case Management, and Judicial Branch Committees. The Automation and Technology and Security, Space and Facilities Committees have had planning functions for some years. The Ninth Circuit Court of Appeals has published its own long range plan. Judges and staff of district courts and bankruptcy courts have participated in planning sessions supported by the Administrative Office and the Federal Judicial Center. I have facilitated virtual courthouse discussions such as this one with the Automation & Technology Committee, the Court Integrated Information Management Systems (CIIMS) umbrella group of the Administrative Office, and the Federal Court Clerks Association.

worse while changing others for the better.[2] More importantly, these changes often create additional unintended effects as a result of their interactions.[3] The unintended consequences may be beneficial, or they may be detrimental, to the work of the court. In either case, they are unintended. One purpose of the planning exercise is to try to bring to light the latent consequences of innovation and thus improve the quality of decision making about the future of the courts.

By necessity, many policy discussions about court technology involve considerations of short term costs and benefits, without explicit reference to the values courts are meant to protect. The long range planning exercise attempts to bring fundamental questions of value to the forefront.

Method: Debating the Benefits and Risks of the "Virtual Courthouse"[4]

We can place questions about value into relief by positing, as a hypothetical, the existence of the *virtual courthouse: the courthouse that needs to exist nowhere but electronically*. By taking the applications of technology to an extreme, we can examine what judicial life, and litigation, would be like when communications among parties and the court (including judges and the Clerk's office) are usually conducted over high-speed, high-quality electronic networks that permit data, voice and video transmissions on demand.

The evolution of virtual technologies. For over twenty years the adjective "virtual" has seen increasing use in the computer field, and more recently, in telecommunications. One of the dictionary definitions of virtual is "not actual, but equivalent, as far as effect is concerned." Because memory limitations have always existed with computers, techniques were developed in the 1960s that gave a user the equivalent of double or triple the actual memory of the device being used. The enlarged memory was referred to as the virtual memory. Today, such virtual-effect software programs are widely used.

---

2 An obvious example is the trade-off between the benefits of computerized docketing and the costs of delay and inconvenience when the computer goes down. Another is the trade-off between the benefits of fax technology and the personnel burdens associated with maintaining the equipment when the benefits create large demand for fax services. In general, automated systems require more qualified, hence more expensive, staff to maintain them, partially offsetting whatever cost-savings the automated systems were supposed to create. These kinds of problems may be particularly severe when automation is used merely to mechanize a process previously done manually.

3 For example, the numbers, locations, and costs of technical staff members in the courts are driven in uncertain fashion by competing trends toward centralized and decentralized control of technology.

4 The material that follows has also served, in essentially this form, as text for discussion by other court groups. I have not attempted to tailor it specifically to bankruptcy courts, assuming that the unique features of bankruptcy courts will be emphasized during the discussion.

More recently, telecommunications carriers have been offering a virtual network service, which provides to a customer an elaborate private network that does not exist physically, but is created by software and gives the equivalent effect of having a complete network of one's own.

As a result of wide usage and broad experience with virtual systems and services, the concept continues to expand, including discussions about a virtual town-hall and virtual reality. [5]

Conference calls and videoconferences. Many if not most judges have by this time participated in telephone conference calls. Although the conference lacks the visual aspect, groups of people are frequently willing to forgo seeing each other because of the time, money, and effort saved by using the telephone. But, importantly, *video*conferencing, which by definition includes transmission of visual images along with the voices of participants, is increasing rapidly. Costs are coming down as a result of wider bandwidth[6] at lower costs, improved compression techniques[7], and better equipment. Even so, one has to stretch to call today's videoconference a virtual conference. It has limitations in that not all participants can see all other participants all of the time by merely turning their head or shifting their gaze. But this is a technical limitation that will be solved before long to provide the capability to assemble a group of conference participants via a switched video network, with each participant having the ability to "look around the room" at different participants.[8]

---

5 For example, the *Wall Street Journal* , May 18, 1992, published a supplement on telecommunications that refers to "virtual-reality technology" (at R6) and "the virtual meeting space"(at R11). The term "virtual" has by now gained wide-spread use regarding legal communications. See, e.g. the National Law Journal, January 10, 1994.

6 Bandwidth is the term used in the industry to describe the capacity of the communication channel (whether over a wire or through the air) to carry information. The "wider" the bandwidth, the more information can be transmitted in a unit of time. Transmitting realistic visual images requires greater bandwidth than transmitting voice signals without visual images.

7 Compression is the term used to describe how visual images can be reduced in complexity so that one form of them can be transmitted over lower bandwidth channels. Current compression techniques tend to result in a slightly "jerky" or "stilted" image; but the technology is improving rapidly.

8 There is now no standard term of art for this capacity. The phrase "virtual reality," which might naturally apply, is now a term of art referring to totally stimulated effects through computer animation. It is presently limited to amusement and training applications, but no doubt its commercial uses will expand. A Link Trainer is an example of a primitive virtual reality machine. The phrase "enhanced videoconferencing" that I use here implies not only the highest possible quality of sound and visual image, but also simultaneous access to multiple locations and multiple participants at each location. In other words, an enhanced videoconference would supply to everyone at each videoconference location as much visual and auditory access to everyone else at a participating location, as participants now have in the traditional courtroom.

Applying virtual technologies to the courthouse. As we know it now, a courthouse is a specific location housing one aspect of the operation of a legal system[9] that serves a defined geographic area for certain classes of cases. The most salient feature of courthouses to the public is that they are the locations of civil and criminal trials. Trials involve the coming together of trial participants *in public*: the judge, courtroom staff, parties and their attorneys, witnesses, perhaps jurors -- and an audience of passive onlookers that is almost always completely self-selected. Today trials are held in a courtroom where, with few exceptions, all participants are physically present. It may be that appellate process is a better forum for testing enhanced videoconferencing. But concentrating on a harder case may allow bedrock issues to emerge more clearly.

Let us quickly concede, nevertheless, that constitutional requirements for public trials and confrontation in criminal litigation are more stringent than rules governing physical co-location of parties and adverse witnesses in civil litigation.[10] For purposes of exploring the virtual courthouse in our brief session, we will limit our attention to civil cases.

Characteristics of the virtual courthouse. The existence of a virtual courthouse means that the federal court system would not require physical co-location of participants in civil litigation. Litigants or their attorneys would instead require access to an audiovisual communications network linking them together for the purpose of completing a specific event in litigation or an alternative dispute resolution technique. For example, a judge, while in chambers anywhere in the country, could don his or her robe and walk to the "studio" location in chambers or

---

9 The federal courthouse, in particular, is a court of litigation. State courthouses are also archives of local public records. While this memorandum is not the appropriate location to attempt a thorough account of how the technologies of virtual reality might affect the operation of the courts, we can nevertheless note that even first efforts to come to grips with these effects require us to reassess our fundamental understandings of relations between courts, as collections of legal functions, and courthouses, as only one way of "housing" those functions.

10 One appellate court used the term "audiovisual interactive technology" to refer to a closed circuit television system with voice-activated cameras and monitors operating between the courthouse and federal prison, which was used for conducting criminal arraignments. The Ninth Circuit read Criminal Rules 10 and 43 to require that the district court arraign the accused face-to-face with the accused physically present in the courtroom. Valenzuela-Gonzalez v. U.S. Dist. Ct. for the Dist. of Arizona, 915 F.2d 1276, 1280 (9th Cir. 1990). The Sixth Circuit recently ruled against video depositions in criminal cases, on confrontation clause grounds. Stoner v. Sowders, 997 F. 2d 209, 213 (6th Cir. 1993). On the civil side, F.R. Civ. P. 43(a) requires that the "testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." The Judicial Conference Advisory Committee on Civil Rules recently decided not to forward a recommendation to liberalize this requirement. The Eighth Circuit has held that live telephone testimony is inadmissible in a civil jury trial, as violative of the "open court" provision of Rule 43(a), even though, the court noted, the rules are "anomalous" regarding the admissibility of indirect testimony. Murphy v. Tivoli Enterprises, 953 F.2d 354, 359 (8th Cir. 1992). For purposes of our session, query the meaning of "open court" in the context of a civil trial held in a virtual courthouse. Is it correct that an "open court" requirement is met if the public can "dial into" a network to observe any trial ongoing in a virtual courthouse?

physical courthouse[11] to participate in a hearing, conference, or trial with participants who are physically located at diverse locations in the district, circuit, or country. For any single case, the papers and evidence in the case could be filed with a clerk of court whose physical location, like the location of the judge, is, in principle at least, independent of the virtual location of the clerk's office for the purpose of doing the record-keeping business required for that case.[12]

The implications of this idea might lead us to discount or discredit it as impossible, silly, or destructive of important values and goals of the judiciary. We can be sure, however, that the idea is neither impossible nor silly. It is not impossible because the technology is already available; any present technical limitations would be more quickly overcome if vendors and technical service providers sensed the opening of a large new market. And it is not silly because, in various truncated forms, virtual courtroom and virtual courthouse applications are already in place. The use of telephonic motions conferences,[13] videotaped depositions,[14] electronic filing of documents and distribution of notices,[15] video displays of transcript and documents in courtrooms[16] and videoconference appellate proceedings[17] are all partial forms of the complete idea. If each of these parts is by

---

11 Note that the existence of a virtual courthouse for purposes of facilitating conference, hearings and trials doesn't imply the elimination of courthouses for other purposes, including the locations of judicial chambers, paper and electronic files, and perhaps, just to complete the extreme scenario intended for our session, an "auxiliary" place of holding court should a virtual courtroom be unavailable.

12 The legality of filing papers by FAX or in an electronic medium is here presumed, and questions about dealing with physical evidence are begged. If the concept of the virtual courthouse gained acceptance, solutions to such problems would be found.

13 Meierhoefer, Business by Phone in the Federal Courts. Federal Judicial Center, 1983.

14 Coleman, The Impact of Video Use on Court Function: A Summary of Current Research and Practice. Federal Judicial Center, 1977. The field has advanced far beyond the facts of this early report.

15 "Complex Insurance Litigation Docket to be Available via Private Database." Press release by MeadData Central, November 4, 1991, announcing that the Delaware Superior Court had authorized LEXIS, as a private database service, to set up an electronic docketing system for 11 complex insurance law suits. According to the terms of the agreement, Delaware attorneys of record may file and retrieve pleadings for a case through the database, and any authorized person can retrieve documents from anywhere in the country.

16 At a minimum, there is provision for this now in federal courtrooms in the Southern District of Ohio and the District of Arizona. Individual judges have permitted use of graphic displays, simulations, and related presentations in numerous cases. For a review of the effectiveness of different forms of illustrative materials in litigation, *see* Richard J. Leighton, The Use and Effectiveness of Demonstrative Evidence in Federal Agency Proceedings. 42 Admin. L. Rev. 35 (1990).

17 The Third Circuit has completed a test of videoconferencing in which lawyers argued from Pittsburgh "before" a panel of judges seated in Philadelphia.

itself worthy of implementation, then, at least, it is not silly to inquire about putting them together systematically.

The possibility remains that the idea is a bad one because it is destructive of important goals and values of the judiciary. It certainly calls into question fundamental assumptions about how the federal judicial system should function. Consider, for example, how the geographical borders of judicial circuits, districts, and divisions could become less important when there is a broad bandwidth network linking every physical federal court facility with every other. Consider also how the question of proper venue might change if the concept of convenience is radically redefined, as it would be with the technology of a virtual courthouse in place. In ways both obvious and subtle, the technology of a virtual courthouse renders geographic considerations unimportant for conducting court business.

To go even further, if geographic considerations no longer obtain, upon what basis should judgeships be allocated? Should there be a national pool of judges who would be allocated to cases as needed? On what basis would assignments be made, and by whom? Would the current rules about "visiting judges" still apply? Should parts of the existing system be retained and combined with some of the features of the virtual courthouse? As mentioned above, this is already happening, so the question becomes one of when to limit, rather than eliminate, the use of technologies to substitute virtual for actual presence in court proceedings.

There is an almost endless stream of questions one might ask. To focus our thinking, we can ask how the virtual courthouse might operate in particular kinds of proceedings. We can begin with the courtroom operation itself.

How would a virtual courtroom operate?

To envision how a virtual courtroom would operate, it may help to look at four types of use: a pretrial conference, a motion hearing, an evidentiary hearing, and a bench trial.

Pretrial conference. At a minimum, the participants in a pretrial conference include the judge, two attorneys, and a courtroom clerk.[18] Assume that each of these participants has available a large screen (i.e. large enough to present "life-size" images of the other participants) as well as the equipment that allows the transmission of their own images, voices and exhibits to all the other participants. The background of the judge's setting could be courtroom or chambers, at the judge's option. The other participants would be seen sitting at a table or standing at

---

18 Court reporting and transcript production are considerably simplified in the virtual courtroom. Consider the availability of a central pool of shorthand reporters or audio recorders, who could record, transcribe, and provide "transcript" (in electronic form, for whatever subsequent treatment the participants wished to give it, e.g. making a paper copy) from a central location back to the participants without having been physically co-located with any of the participants at the time of the proceeding.

a lectern (details such as these would have to be worked out on the basis of experience) in their law office. The courtroom deputy might be in the courtroom,[19] or in the clerk's office.

The discussions between the judge and the attorneys would be identical to the discussions that would occur if all were physically together in a courtroom. Each participant can see and hear every other participant, two persons can talk at the same time – all essentials except complete physical presence would be obtained.

Given the technical feasibility of such conferences, are there reasons why the courts should not conduct them? If so, what are they?

Motion hearing. For a motion hearing, the minimum number of participants would be the same. The judge would probably be sitting behind the bench in the courtroom, and the courtroom clerk might also be in his or her regular place. But, arguably, the communications between the judge and the attorneys could be the same as if they were all physically present. If this is in fact not true, what would be different? And are there any features of a motion hearing that distinguish it from a pretrial conference, so that courts should permit one, but not the other, to take place in the virtual courtroom?

Evidentiary hearing. For an evidentiary hearing, one or more witnesses will be added as participants. Of course witnesses must be sworn. Note that in the virtual courtroom, all participants could both hear and see the administration of an oath. Persons to be sworn would stand, raise their hands, and take an oath, and be recorded as doing so, just as now, even though the witness might either be in his or her own office, or in a video conference facility close to his/her residence, or with the attorney for the party whose witness he or she was.[20]

Communications between the judge and the attorneys would be the same as above. But what about a bench conference? And what if a witness and his or her attorney need to have a whispered discussion of the type that would normally take place at their table (especially when the witness was not in the same physical place as the attorney)? Are these mere technical problems, or do they raise more serious questions about the balance between privacy and publicity of public judicial proceedings?

Questions of public access. Judges now vary in their choices of location for pretrial proceedings. Proceedings in chambers are not open to the public, while proceedings in the courtroom almost always are. Would the same distinction apply to proceedings in a virtual courthouse? If all that distinguished a proceeding in chambers from a proceeding in a courtroom was the nature of the backdrop in the

---

19 There would be no *necessity* , from the technical or logistical viewpoint, that the deputy be physically co-located with the judge.

20 Should parties and witnesses be permitted to participate from their own quarters (e.g. law offices), or would have to be physically present in some previously established and approved location for sending and receiving as participants in the virtual courthouse?

studio of the judge, on what basis would judges decide what the degree of publicity should be? And how could the managers of the virtual courthouse network assure publicity when it was required, and deny it when it should properly be denied? How much access suffices to count as what now suffices as public access to a court proceeding?

Trial. For a non-jury trial, the participants and the types of problems would be identical to those that might exist for an evidentiary hearing. A key distinction is the length of the proceeding, but in fact the virtual courthouse is likely to be less expensive than traditional courthouses for the conduct of protracted trials.

For a jury trial, a dimension of considerable complexity would be added to the problems to be solved. Can judges and lawyers successfully conduct "virtual voir dire"? And where would the jurors be physically located? Could jurors adequately judge the demeanor of witnesses who were virtually present but physically elsewhere? Is it essential to our civil jury system that jurors sit together during trial and deliberate together where they can touch each other?

Necessary infrastructure: The virtual clerk's office. The virtual courtroom could not function without support from a telecommunications and information processing infrastructure that enables easy, fast, reliable transmission of text, data, and document images throughout the country. Thus, the virtual courtroom must be supported by a virtual clerk's office.

While the virtual courtroom would be based on enhanced videoconferencing, the virtual clerks office would be based on high-speed wide area networks, distributed computer processing, and distributed civil case databases. The initial stages of this infrastructure are already being implemented under the direction of the Automation and Technology Committee, and the capabilities needed are just over the horizon -- if that far.[21]

The implementing requirements -- other than the technology of local and wide area networks, high performance PCs, imaging equipment, and distributed software and databases -- would be (1) a uniform docket numbering system, (2) use of that number to uniformly identify, sequentially, each document filed in a case,[22] and (3) a uniform citation for opinions.[23] Everything that is part of a case file would be entered in full text, or in graphic format as necessary. Each case file would be

---

21 The Administrative Office plans to install a Data Communications Network (DCN) that will link all federal court locations. The rate of installation is uncertain, due largely to budgetary constraints.

22 This is already the docketing practice in many districts.

23 Special needs arise in bankruptcy courts becaused of the specialized forms used there: claims registers, objections to claims, etc. Note, however, that some of these issues were addressed and solved long ago in the BANS system, which, is a virtual noticing system, in that the processingof the notice is unrelated to the physical location of the district in which the case arises.

available anywhere in the system. Responsibilities for docketing and filing into the virtual court clerks computerized files could be as today, or could be re-allocated. There could be one nation-wide virtual clerk's office; or there could be a virtual clerk's office in each circuit; or, clerk's offices could continue in their present organizational structure with the capability to provide clerk's office support not only in their own district, but to any other district court in the nation.

With the infrastructure provided by the virtual clerk's office and enhanced videoconferencing,[24] the administrative support for the virtual courtroom would be in place. Technically, the virtual courthouse is no more than the integration of the virtual courtroom and the virtual clerk's office.[25]

Advantages of a Virtual Courthouse

The advantages of a virtual courthouse should be addressed in terms of goals and values that judges hold consensually. There is arguably no better brief statement of core goals and values than the second sentence of F. R. Civ. P. 1, stating that all the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

We can agree that questions of speed and expense are more easily answered than questions of justice. There are obvious questions of time and money savings. All savings must eventually be compared to the costs of implementing the advanced technologies required by the virtual courthouse. These technologies are straightforward extensions of what is already contemplated for communications among courthouses connected by the DCN.[26] We might further assume that at least some costs of participation in the virtual courthouse would be borne by the bar and litigants.

Savings in judge and staff time. In many cases judge and court staff time would also be saved. This is especially true for district courts with divisional offices to which judges now must travel. With a virtual courtroom, the travel time normally expended by judges and staff in travelling could be largely eliminated. Further, the court would be available to the local community on a more flexible basis, not just on days when judge and staff travel to a divisional office. Other, incidental savings would accrue. For example, the staff time required to prepare files to be transported to the divisional office, and time required to process these files upon return, would also be eliminated.

---

24 This could eventually be the same infrastructure, i.e., a single high-speed network may provide both text, image, and video conferencing on a dial-up basis.

25 As a practical matter, such data sharing could even out current personnel problems due to overstaffing in some locations and understaffing in others. *See* e.g., Fewer Bankruptcy Filings Force Staff Cuts. The Arizona Star, Tucson, February 13, 1994. Page D1.

26 See *supra* note 21.

Savings in attorney time. Attorneys and their clients would save time and money by reducing the amount of time they now spend waiting in court. Time and expense associated with travelling to and from court would also be saved. The net result would be to lower the costs of litigation representation.

Efficient expanded use of visiting judges. The physical location of a judge becomes at least technically irrelevant in the virtual courthouse. At a minimum, judges who would now travel to other districts or circuits to help them out could do so much more easily. A more radical proposal, which would be *technically* straightforward, would be to assign cases on the basis of available judicial time, irrespective of the physical location of the parties and the judge.

Efficient expanded use of clerical support. Just as judges can "go where they are needed" very easily in the virtual courthouse, so can clerks of court and their deputies. Documents could be filed and managed where there was clerical time to do the electronic work involved, irrespective of the physical locations of any of the participants in the process.

Disadvantages of a Virtual Courthouse

An extreme form of the virtual courthouse is a radical departure from the traditional forms of federal court litigation. But which values and goals that are consensually held by judges are seriously threatened by the implementation of such a technology? We can list a number of potential candidates.

Core value. As valuable as it is, F.R.Civ. P. 1 does not capture the core value of the federal courts, because it does not emphasize the requirement that the courts must preserve and enhance the rule of law.

Authenticity. As a personal representative of the federal government, the judge should be perceived by the parties as a complete person whose decisions reflect his or her own commitment to the administration of justice. Arguably, lack of tangible presence of judges, over time, would erode the sense of authentic judicial power.

Legitimacy. Power that is exercised without authenticity will be perceived as illegitimate, and hence the use of the virtual courthouse will breed disrespect for federal law and federal courts.

Dignity. Legitimacy is also supported by the formality of traditional court proceedings and the intentional trappings of authorized power that surround the judicial office (the elevated bench, black robes, the expectation that the judge will be addressed as "Your Honor," the judge equating himself or herself, in speech, with "the court," etc.). Though forms of address would not necessarily change in the virtual courthouse, there would be an inevitable weakening of the symbolic effectiveness of the physical surroundings.

Control. The technical infrastructure required to operate the virtual courthouse places a great deal of control in the hands of technical staff. This opens the process up to technical failures, misadventures, and efforts at interruption or subversion.

Due process. Without second-guessing or predicting what any particular court has done or will do regarding the legality of virtual-courthouse-like procedures, there are reasons to believe that some of the procedures are inconsistent with current judicial understanding of how "presence" and "open court" are to be interpreted on due process grounds. But there is no doubt that such standards can evolve rapidly, particularly in the context of the sort of balancing analysis that is the standard form of analysis in procedural due process cases.[27]

Job satisfaction. Many judges might object that direct personal contact with parties, attorneys, and the public is an essential feature of the satisfaction they receive from their work. Obviously, an extreme form of the virtual courthouse would substantially lessen this form of contact among courtroom participants.

Conclusion

Though this list could be expanded, it suffices to raise real questions about the costs, risks, and benefits of enhanced videoconferencing and automation. How should the advantages and disadvantages be balanced against each other? And by whom? Is there more to the analysis than a balancing of costs and benefits? For example, are some of the values inherent in current practice so fundamental that there are no cost or time savings large enough to justify change? If so, which values?

These are the questions that lie beyond -- but not far beyond -- the current long range plan.

Gordon Bermant

---

27 Redish and Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 *Yale L.J.* 455 (1986) (arguing that a meaningful concept of procedural due process cannot be found within a theory that grounds the extent of due process protection only in legislative guarantees strictly construed by judges). Redish & Marshall provide a list of non-instrumental values that overlaps in part with the list provided here. Their list includes the appearance of fairness; equality; predictability, transparency, and rationality; participation; revelation; and privacy-dignity (at 483-488).

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 24 -25, 1994
Sea Island, Georgia

Minutes

The Advisory Committee on Bankruptcy Rules met at The Cloister in Sea Island, Georgia. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge James J. Barta
Bankruptcy Judge James W. Meyers
Professor Charles J. Tabb
Henry J. Sommer, Esquire
Kenneth N. Klee, Esquire
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
Neal Batson, Esquire
Professor Alan N. Resnick, Reporter

The following former members also attended the meeting:

District Judge Joseph L. McGlynn, Jr.
Ralph R. Mabey, Esquire
Herbert P. Minkel, Esquire

The following additional persons also attended all or part of the meeting:

District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee
Bankruptcy Judge Lee M. Jackwig, member, Committee on Automation and Technology
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, and Assistant Director, Administrative Office of the U.S. Courts
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U. S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern District of California
Gordon Bermant, Director, Planning and Technology Division, Federal Judicial Center

Elizabeth C. Wiggins, Research Division, Federal Judicial Center

District Judge Alicemarie H. Stotler, chair, Committee on Rules of Practice and Procedure, was ill and could not attend. Circuit Judge Edward Leavy, former chair of the Advisory Committee, was unable to attend due to an en banc hearing. District Judge Paul A. Magnuson, chair of the Committee on the Administration of the Bankruptcy System, also was unable to attend. William F. Baity, acting director, Executive Office for United States Trustees, U.S. Department of Justice, was unable to attend.

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

Minutes of the September 1993 Meeting. The Committee approved the minutes of the September 1993 meeting with one change. On page 3, paragraph 3, of the draft, the phrase "bankruptcy rules require" should be changed to "Bankruptcy Rule 8002 will require."

Report on the January 1994 Meeting of the Committee on Rules of Practice and Procedure, ("Standing Committee"). The Reporter reviewed the issue of filing by facsimile transmission ("fax filing"). Fed.R.Civ.P. 5(e) and Fed.R.App.P. 25(a) allow fax filing under Judicial Conference guidelines, and Fed.R.Bankr.P. 7005 incorporates the civil rule for adversary proceedings. The Advisory Committee on Bankruptcy Rules is on record as strongly opposing fax filing, because it is outdated technology and a burden on the clerks. Guidelines for fax filing were proposed in 1993, however, by the Judicial Conference Committee on Court Administration and Case Management. Both the Standing Committee and the Committee on Automation and Technology opposed the draft guidelines, and the Judicial Conference declined to adopt them. The Standing Committee, however, must put forward a substitute proposal at the September 1994 meeting of the Judicial Conference. At its January 1994 meeting, the Standing Committee decided not to allow fax filing on a routine basis and to exempt bankruptcy courts from any requirement to accept fax filings.

Professor Resnick also reported that the Standing Committee had expressed concern about Congress enacting rules changes outside the Rules Enabling Act process, as a provision in S. 540, the

bankruptcy bill currently pending, would do. Amendments to Rule 8002 and 8006 are pending at the Supreme Court and will take effect August 1, 1994, absent congressional action to the contrary. No bankruptcy rules amendments were before the January 1994 Standing Committee meeting, and there was sentiment by Standing Committee members, he said, that advisory committees should exercise restraint in proposing amendments.

With respect to the style revisions to the rules, Professor Resnick reported that Bryan Garner had submitted the proposed draft of the civil rules and the Advisory Committee on Civil Rules is in the process of line-by-line review. The intent is to make only style changes, not substantive ones, he said.

Professor Resnick said that the Judicial Conference has guidelines on access to materials. He said that committee members should be careful about circulating memoranda that do not represent committee positions. Mr. Sommer observed in response that rules committee meetings are open to the public (28 U.S.C. § 2073(c).) and that committee records also are public.

PUBLISHED DRAFT RULES

Published (Preliminary Draft) Amendments to Rules 8018, 9029, and Proposed New Rule 9037. Professor Resnick reviewed the history of these proposals for "common rules" concerning local rules and technical amendments. He described the initiating of the amendments by the Standing Committee, the negotiating of the language with the other advisory committees, and the publication of similar amendments for the appellate, civil, and criminal rules. The last time the proposals were considered by the Advisory Committee was in February 1993, and several changes were introduced after that, which the committee had not had a chance to consider prior to publication of the preliminary draft. Most of these were stylistic or involved minor changes to the committee notes. There were two changes that were substantive, however.

The first was an insert to the amendments to Rules 8018(a)(2) and 9029(a)(2) that would prohibit a court from enforcing any local rule imposing a requirement of form in a way that would cause a party to lose rights if the failure to conform to the requirement was a "negligent failure." Mr. Rosen asked how other "non willful" failures would be treated under the rule and suggested that the appropriate standard ought to be "non willful," rather than negligence. Professor Coquillette said this was a good suggestion and might be adopted if the other advisory committees concur. Judge Robreno said he thought it "revolutionary" to have rules that do not have to be followed, but wondered whether his comment might be too late to have any effect. The Reporter said it was not too late. Judge Meyers

said he thought the concept of repeated noncompliance (as an indicator of willfulness) should be part of the committee note, and the Reporter agreed to suggest it, if it is not already in there. **A motion to approve the amendment to Rule 9029(a) subject to changing the word "negligent" to "non willful" carried by a vote of 10-1.**

The second substantive change is in Rules 8018(b) and 9029(b) and involves the prohibition of sanctions for noncompliance with a local requirement unless the alleged violator had actual notice of the requirement "in the particular case." The Reporter stated that the proposed standard would relieve an attorney of any duty to seek rules out and could spawn additional disputes in a bankruptcy setting, due to the incidence of litigation within a case. Participants in such litigation may not have been active in the earlier stages of a case; they may enter a proceeding months, or even years, after any mass mailing of the judge's rules and likely were not present when such rules may have been stated orally. These conditions, which are typical of bankruptcy litigation, may generate disputes over whether a party had actual notice of a requirement. Although the committee directed that the record reflect its consideration of this issue, no motion was made and no vote taken concerning the addition of "in the particular case" to the rule.

Professor Resnick reviewed the three comment letters the committee had received concerning the published draft. Bankruptcy Judge Fenning's letter cautioned the committee against appearing to support one-judge-only standing orders, so long as they are published, rather than court-wide procedures under local rules applicable to all judges in a district. Judge Barta said he was surprised that no comments had been received about proposed Rule 9037, the technical amendments rule. The committee is on record as opposing this rule, the Reporter said, but the Standing Committee published it anyway. **A motion to reaffirm the committee's opposition to Rule 9037 failed on a tie vote.**

AMENDMENTS RELATED TO CIVIL RULES AMENDMENTS

Rule 9014 and the 1993 Amendments to Fed.R.Civ.P. 26. The Reporter stated that the recent amendments to Rule 26 governing discovery automatically apply in adversary proceedings (through Rule 7026) and in contested matters (through Rule 9014), which are expedited proceedings initiated by motion. Although there does not appear to be any reason to exclude adversary proceedings from the provisions of Rule 26, contested matters could suffer undue delay if the requirements of Rule 26(a)(1)-(4), (mandatory disclosure), and 26(f), (mandatory discovery meeting), are followed. Rule 26 itself permits courts, by local rule or order, to opt out of the mandatory disclosure and meeting requirements.

In the event the committee thought it appropriate to make the mandatory disclosure and meeting requirements inapplicable to contested matters nationally, the Reporter had drafted an amendment to Rule 9014 for this purpose. After discussion, **a motion to defer action and study the operation of discovery deadlines in contested matters overall carried by a 6-0 vote.**

Rule 7004 and the 1993 Amendments to Fed.R.Civ.P. 4. The 1991 amendments to the bankruptcy rules "froze" the Fed.R.Civ.P. 4 (to which reference is made in Rule 7004 and parts of which are incorporated into the bankruptcy rules by Rule 7004) to the version of the rule that was in effect on January 1, 1990. This action was taken because amendments to Rule 4 were pending, but their final form was still uncertain. Rule 4 now has been amended, and it is time to amend Rule 7004 to conform to the new Rule 4. The Reporter had prepared a draft for this purpose. In addition, the Reporter had drafted a new subdivision (f) to cover service and personal jurisdiction over a party who is a non-resident of the United States having contacts with the United States sufficient to justify application of United States law but insufficient contact with any single state to support jurisdiction under a state long-arm statute. The new subdivision tracks a similar new provision in Rule 4. **A motion to adopt the Reporter's draft carried by a vote of 6-2.** The amendments to Rule 4 included creating a new Rule 4.1 to cover "other" process, not a summons or subpoena. These provisions formerly were in a subdivision of Rule 4 that was not incorporated by Rule 7004. The Reporter said he had consulted with Professor Lawrence P. King, a former member and former Reporter to the committee, about the history of not incorporating the subdivision. Professor King had said the subdivision was left out intentionally so that it would not apply to the service of motions. Rule 4.1 also contains territorial limits on service that are inconsistent with the nationwide service provisions of Rule 7004. **There was no opposition to the Reporter's recommendation that Rule 4.1 not be incorporated into the bankruptcy rules.**

PROPOSED AMENDMENTS

Rule 1006. Professor Resnick stated that the Judicial Conference in 1992 had prescribed a $30 administrative fee for chapter 7 and chapter 13 cases, payable at filing. As originally prescribed, this fee was not payable in installments as is the filing fee for such cases. In late 1993, however, the Judicial Conference had amended the schedule of fees prescribed under 28 U.S.C. § 1930(b) to permit payment of the $30 fee in installments. Professor Resnick had proposed two drafts to incorporate the administrative fee into the rule on installment payments. **A motion to adopt the shorter draft, amending Rule 1006(a), carried on an 8-3 vote.** The Reporter stated that there also had been a proposal by the president of the National Association of Consumer Bankruptcy

Attorneys to amend Rule 1006(b) to permit installment payments of filing fees to be made to a standing chapter 13 trustee (who would pay the fees to the clerk). The Reporter had drafted an amendment to implement the suggestion, and also had asked the Federal Judicial Center to conduct a survey to evaluate the suggested amendment. Ms. Wiggins reported the results of the survey. Most respondents thought such an amendment unnecessary and that no purpose would be served by mixing court fees and payments intended for creditors, she said. Nine courts permit such arrangements under the existing rule and are satisfied with how their systems work. **A motion to adopt the proposed amendment to Rule 1006(b) failed by a vote of 0-9.**

Rules 1007(c) and 1019. At the September 1993 meeting, the Committee had voted to delete from Rule 1007(c) the reference to "chapter 7," which dated to a time when there were separate schedules for a chapter 7 case and a chapter 13 case. At that meeting, a member of the Committee had suggested that the phrase "superseding case" or "superseded case" should be replaced to avoid giving the erroneous impression that conversion of a case to another chapter creates a new case. The Reporter, accordingly, presented draft amendments to the two rules in which these phrases appear. Rule 1019 also contains the phrase "original petition," which gives the erroneous impression that there is a second petition in a converted case. **There was a consensus that the amendments to Rule 1007(c) should be approved. With respect to Rule 1019, the Committee discussed a number of changes to the draft, but referred the rule back to the Reporter for further study.**

Rule 2002(f)(8). The present rule requires notice to the debtor, all creditors, and indenture trustees of "a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500." The trustee's "final report" is a separate document than the trustee's "final account," and the current practice is to mail only the final report. The final report is filed and mailed prior to distribution of dividends, while the final account is completed after the distribution. The Reporter's memorandum to the committee points out that, once the final report is circulated, there probably is no reason to incur the expense of mailing the final account to all creditors. The United States trustee receives the final account and, as the supervisor of chapter 7 trustees, should review it. The proposed amendment would delete the words "and account" from the rule. **A motion to adopt the proposed amendment carried, 12-0. The Committee rejected a proposal to amend Rule 2002(f)(8) to restrict the mailing of the summary of the trustee's final report to only those creditors who have filed claims.**

Rule 2002(h). This rule authorizes the court to direct that, after the period for filing claims has expired, the court may direct that notices be sent only to creditors who have filed

claims. The Reporter reviewed his memorandum dated January 9, 1994, which detailed various suggestions for amendments, two from deputy clerks of court, several related to deleting references to Rule 3002(c)(6) which the Committee separately had voted to abrogate, and several further amendments suggested by Professor Resnick. **The Committee approved amendments to Rule 2002(h) that would assure the mailing of notices to the debtor, the trustee, and all creditors during any 90-day claims filing period arising from notification by the trustee that newly discovered assets may be available for distribution. The Committee rejected a proposal to amend subdivision (h) to extend the period during which all creditors receive notices until the time has expired for the filing of a claim on behalf of a creditor by the debtor or the trustee. The Committee referred the proposed amendments to Rule 2002(h) and the Committee Note to the style subcommittee with the following instructions: 1) make sure line 12 does not exclude the debtor, the trustee, and the U.S. trustee from receiving notices, 2) make sure that creditors who filed claims late are not excluded from receiving notices, and 3) reorganize the Committee Note to state simply that the rule is being amended "as follows" and list the changes. A motion to approve the proposed amendments as described above, subject to further work by the style subcommittee, carried unanimously.**

Rule 3002. The Reporter briefly reviewed the history of various proposals to amend this rule that have been considered by the Committee and noted that the case law concerning the status of a late-filed proof of claim remains very unsettled. The Committee did not take any action on the issue. Nevertheless, the language of Rule 3002(a), especially when read together with Rule 3009, leads to the conclusion that an unsecured creditor who misses the deadline for filing claims may not have an "allowed claim" and may not receive any distribution in a chapter 7 case. This conclusion, however, conflicts with the provisions of § 726 of the Code that indicate that a late-filed claim can be an "allowed" claim, at least in some instances, and expressly direct payment of "tardily filed" claims under certain circumstances. To clear up any conflict between the Code and the rules on this issue, the Reporter had drafted amendments that would add a new subdivision (d) to the rule and delete existing subdivision (c)(6) as unnecessary if (d) were added. The proposed subdivision (d) would state that a late claim may be allowed to the extent the creditor would be authorized to receive a distribution by § 726. Mr. Rosen offered alternative language to accomplish the same result. **A motion to approve the amendments as redrafted to incorporate Mr. Rosen's suggestions carried, with none opposed. A motion to approve conforming changes to the proposed Committee Note also carried, with none opposed.**

Rules 3017, 3018, and 3021 and Proposed Amendments Regarding the Record Date for Voting and Distribution. Rule 3017(d) requires that certain documents in a chapter 11 case be mailed to

creditors and equity security holders so that they can vote on the plan. Rule 3018(a) governs the right to vote on a plan. The Reporter explained that both provisions contain language stating that the record date for determining who the equity security holders are is the date the order approving the disclosure statement was entered on the court's docket. The Reporter stated that Mr. Klee had suggested that these rules be amended because using the entry date of the order causes unnecessary delay. The Reporter, accordingly, had drafted alternate amendments to the two rules, one set of amendments would give the court discretion to order that the record date be the date the court announces its approval of the disclosure statement, and the other set would give the court greater flexibility in fixing a record date. **A motion to postpone consideration of these proposals to the next meeting carried, with none opposed.** The proposed amendment to Rule 3021 would permit the plan or order confirming the plan to designate a record date for distribution that is different from the date on which distribution commences. This change would permit the debtor to ascertain who are the equity security holders entitled to receive distribution prior to commencing actual distribution. **A motion to adopt the Reporter's draft amendment carried, 11-0.**

Rule 8002. The Reporter had drafted an amendment creating a new subdivision (d) of the rule that would deem a prisoner's notice of appeal to have been timely filed if it was deposited in the prison's internal mail system on or before the last day for filing. The proposal would conform Rule 8002 to a 1993 amendment to Fed.R.App.P. 4(c) and would reflect the decision in In re Flanagan, 999 F.2d 753 (3rd Cir. 1993), in which the court of appeals held that a pro se prisoner's notice of appeal from an order of the bankruptcy court is "filed" at the moment of delivery to prison authorities for forwarding to the bankruptcy court. **A motion to take no action carried by a vote of 8-4.**

SUBCOMMITTEE REPORTS

Subcommittee on Technology

At the request of the Subcommittee on Technology, Mr. Bermant led a discussion of "the virtual bankruptcy court." Committee members expressed divergent views concerning the pros and cons of technological developments that could largely replace the courtroom, in which a judge, lawyers, and parties are physically present, with video conferencing equipment and computers operated by a judge, lawyers, and parties who all may be in different locations. Judges and lawyers both stated that people will continue to need and want direct contact with colleagues and adversaries, even if such contact is not absolutely necessary to accomplish their work. On the other

hand, if the individuals do not all have to be physically present at every proceeding, much time and energy can be saved and other efficiencies realized in the utilization of judicial time. For example, a judge could handle a case from another district without having to travel.

Judge Barta, chairman of the subcommittee, reported that the subcommittee had met twice and had drafted two amendments that would authorize courts to accept electronic filings. These are discussed below. Judge Barta stated that the report requested by the Committee on the future of technology and the rules was not yet complete due to the raising at the first subcommittee meeting of several issues that require further inquiry. The philosophy anchoring the report would be that the Advisory Committee should take a leading role in adopting rules to implement changing technology, he said. One result of the Committee's having stepped forward is Rule 9036, which now permits delivery of information from the court by means other than paper; the next step, he said, is to authorize the court to receive documents other than on paper. Judge Barta said he expects the report to be finished in time for the Standing Committee to consider it in connection with any request to publish the proposed electronic filing amendments.

Rule 5005. The subcommittee on technology proposed adding a new subdivision (a)(2) that would authorize a court by local rule to "permit documents to be filed, signed or verified by electronic means" consistent with any technical standards established by the Judicial Conference. **A motion to adopt the proposed amendment carried, with none opposed. On further motions, the Committee approved the deletion of lines 12 - 15 (no intent to permit filing by facsimile transmission) and lines 68 - 71 (no intent to affect any statute requiring a "writing" or "signature") of the proposed Committee Note.**

Rule 8008(a). The subcommittee's proposed amendment to the rule would authorize a district court or bankruptcy appellate panel by local rule to accept electronic filings. **A motion to adopt the amendment carried, with none opposed.**

Subcommittee on Alternative Dispute Resolution

Professor Tabb, chairman of the subcommittee, requested guidance on the need for proposed amendments concerning alternative dispute resolution. The consensus was that, although some districts operate local, voluntary programs, there is not a need for national rules at this time. A need could arise if Congress were to mandate an ADR program for the bankruptcy courts. Accordingly, the subcommittee's work remains investigatory at this time.

Subcommittee on Forms

Mr. Sommer, chairman of the subcommittee, reported that, in addition to considering proposals for amendments that had been referred to it at the September 1993 meeting, the subcommittee would undertake a conversion to "plain English" for forms that go to the public.

Subcommittee on Local Rules

Judge Duplantier, chairman of the subcommittee, reported that the subcommittee had met to discuss the outstanding issues concerning the proposed uniform numbering system for local rules developed by Ms. Channon. The system is based on the national rule numbers and the subcommittee had requested that Ms. Channon add uniform numbers based on the Part VIII rules governing appeals for use by a district court or bankruptcy appellate panel. The subcommittee had approved the proposed numbering system subject to that addition. The subcommittee also had requested Ms. Channon to prepare a new memorandum explaining the system and stating the topics on which rules now exist that had been omitted and the reasons for the omission. The memorandum also would describe the difficulties a district might experience in adapting certain types of rules, such as those titled "Chapter 13 Cases," to the numbering system. Judge Duplantier said that at this point the subcommittee favored some kind of publication and solicitation of comment from the courts and the bar. **A motion to approve the proposed system, circulate it to the judges and clerks for comment, and release it to the "bankruptcy press," carried unanimously.**

"EXCUSABLE NEGLECT"

The Committee discussed briefly whether to undertake a review of the rules for the purpose of restricting the "balancing test" standard announced by the Supreme Court in Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489 (1993). The consensus appeared to be that it is too soon to assess the impact of the Court's decision, and **a motion to table the matter carried by a vote of 6-2.**

FUTURE MEETINGS

The next meeting of the Committee will be September 22-23, 1994, in New York City.

The chairman requested Judge Duplantier to investigate whether the Committee could meet in Lafayette, Louisiana, in mid-to-late March 1995. The Committee also agreed on Portland,

Oregon, as the site for a meeting in August 1995, and on Arizona for a meeting in February or March of 1996.

Respectfully submitted,

Patricia S. Channon