

ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

San Diego, CA
March 26-27, 2009

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of 26 - 27, 2009
San Diego, California

Agenda

Introductory Items

1. Greetings and Introduction of new members. (Judge Swain)
2. Approval of minutes of Denver meeting of October 2 - 3, 2008. (Judge Swain)
 - Draft minutes.
3. Oral reports on meetings of other committees:
 - (A) January 2009 meeting of the Committee on Rules of Practice and Procedure, including status of Time Computation changes. (Judge Swain and Professor Gibson)
 - Draft minutes of the Standing Committee.
 - (B) November 2008 meeting of the Advisory Committee on Appellate Rules. (Judge Swain)
 - (C) January 2009 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Conti and Judge Swain)
 - (D) November 2008 meeting of the Advisory Committee on Civil Rules and hearings on proposed Civil Rules amendments, including the proposed amendments to Civil Rule 56. (Judge Wedoff)
 - (E) October 2008 meeting of the Advisory Committee on Evidence. (Judge Schell)
 - (F) Bankruptcy CM/ECF Working Group. (Judge Perris)
 - (G) Progress report from the Sealing Committee. (Judge Hopkins and Professor Gibson)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues. (Judge Wedoff and Professor Gibson)

- (A) Recommendation concerning modifications to the proposed amendment to Rule 3001(c) and new Rule 3002.1 concerning post-petition mortgage fees in chapter 13 cases, which were tentatively approved at the Denver meeting, in light of additional suggestions. (Judge Wedoff and Professor Gibson)
- Memo of February 19, 2009, by Professor Gibson and Mr. Rao.
 - Comments by the National Association of Chapter 13 Trustees
- (B) Recommendation concerning modification of Rule 4004 to authorize extending the time to file an objection to discharge in light of potential “gap period” issues. See, e.g., Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008). (Professor Gibson)
- Memo of February 13, 2009, by Professor Gibson.
- (C) (1) Report concerning response to questions raised by the Standing Committee on the use of the terms “household” and “family” on Official Forms 22A and 22C. (Judge Wedoff)
- Memo of February 13, 2009, by Professor Gibson.
- (2) Report concerning consideration of a possible amendment to Form B22C in reference to the calculation of disposable income in chapter 13 cases. (Judge Wedoff)
- Memo of February 12, 2009, by Judge Wedoff.
- (3) Recommendation concerning possible revisions to the instructions on Forms B22A, B22B, and B22C regarding the reporting of regular payments by another person or entity for the household expenses of the debtor or the debtor’s dependents. (Judge Wedoff)
- Memo of February 12, 2009, by Judge Wedoff.
- (4) Recommendation as to whether Form B22A should require the filing of means test information where only one debtor in a joint case is exempt from the means test presumption on the basis of disabled veteran or non-consumer status. (Judge Wedoff)
- Memo of February 13, 2009, by Judge Wedoff.

- (D) Report on Judge Small's Suggestion 08-BK-J that Rule 3001 be amended to facilitate identification of stale claims and inadequately documented claims filed after the bulk transfer of consumer debts. (Professor Gibson)
- Memo of February 17, 2009, by Professor Gibson.
 - Suggestion 08-BK-J. (The parties' briefs attached to the Suggestion are lengthy. They are included in the copy of the Suggestion posted at http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm. Additional copies will be available at the meeting.)
- (E) Recommendation concerning Judge Lundin's Suggestion 08-BK-L to amend Rule 2003 to provide a procedure for holding open a meeting of creditors to allow a chapter 13 debtor additional time to file tax returns with the taxing authorities. (Professor Gibson)
- Memo of February 7, 2009, by Professor Gibson.
 - Suggestion 08-BK-L .
5. Report of the Subcommittee on Business Issues. (Judge Hopkins and Professor Gibson)
- (A) Recommendation concerning the suggestion by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association that Rule 2019 be repealed and suggestions by the National Bankruptcy Conference and other commentators that the rule be retained and/or expanded. (The letter of November 30, 2007, which set out the original suggestion, was an attachment to Item 14 of the agenda materials for the March 2008 meeting in St. Michaels. The letter is posted at http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm as Suggestion 07-BK-G. Additional copies will be available at the meeting.)
- Memo of February 15, 2009, by Professor Gibson.
 - Report of December 10, 2008, by the National Bankruptcy Conference, which includes the NBC's letter of September 22, 2008. (The appendices to the NBC report are lengthy. They are included in the copy of the report posted at http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm as Suggestion 08-BK-O. Additional copies will be available at the meeting.)
 - Report of December 12, 2008, by the Business Bankruptcy Committee of the Business Law Section of the American Bar Association.
 - Letter of January 9, 2009, by Judge Gerber.
 - Letter of January 13, 2009, by Judge Drain.

(B) Recommendation concerning the suggestion by Judge Wedoff and former panel trustee Philip Martino that a streamlined procedure be created for the approval and payment of certain types of administrative expenses.

- Memo of February 8, 2009, by Professor Gibson.

6. Report of the Subcommittee on Forms. (Judge Perris, Mr. Myers)

(A) Recommended revision of Director's Form B240, the Reaffirmation Agreement; proposal for development of an electronic version. (Judge Perris and Professor Gibson)

- Memo of February 24, 2009, by Judge Perris with the following attachments:
 - Memo of January 7, 2009, by Professor Gibson on the statutory requirements for reaffirmation agreements.
 - Proposed amendment to Form B240.
 - Current Form B240.
 - Annotated text of 11 U.S.C. § 524(k).
 - Official Form B27 (scheduled to take effect on December 1, 2009).
 - Chart on the overlap of the proposed amendment to Form B240 and Official Form 27.
 - Results of Mr. Waldron's survey of bankruptcy clerks' offices regarding problems they observe in the use of the current form.

(B) Recommendation on suggestions by the courts in the Southern District of New York and the Eastern District of Pennsylvania that a space be added to Official Form 10 for the portion of a claim which is a general unsecured claim. (Mr. Wannamaker)

- Memo of February 26, 2009, by Mr. Wannamaker.
- Official Form 10.

7. Report of the Subcommittee on Privacy, Public Access, and Appeals. (Judge Pauley and Professor Gibson)

(A) Oral report on the special open subcommittee meeting on revision of the Part VIII rules held March 25, 2009, and plans for further work. (Judge Pauley, Professor Gibson, and Judge Swain)

- Working draft of the proposed revision.

- (B) Discussion of whether proposed new Rule 8007.1 and the proposed amendment to Rule 9024 on indicative rulings should be submitted for publication as approved at the October meeting or held for submission as part of the revision of the Part VIII rules. (Judge Pauley and Judge Swain)
- Text of proposed new Rule 8007.1 and proposed amendment to Rule 9024 as approved at the October meeting.
8. Report by the Subcommittee on Technology and Cross Border Insolvency. (Judge Coar)
9. Report of the Subcommittee on Attorney Conduct and Health Care. (Judge Schell)
10. (A) Recommendations concerning action in response to comments received on proposed new Rules 1004.2 and 5012, and proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, which were published in August 2009. (Professor Gibson)
- Memo of February 23, 2009, by Professor Gibson.
- (B) Technical amendment to Official Form 23 to conform to proposed amendment to Rule 1007(c). (Professor Gibson)
- Memo of February 23, 2009, by Professor Gibson.
 - Proposed amendment to Official Form 23.
11. Recommendation on time computation changes to Rule 4001(d)(2) and (3) which were overlooked in the package of time computation changes submitted earlier and approved by the Judicial Conference at its meeting in September 2008. (Judge Swain and Professor Gibson)
- Memo of February 16, 2009, by Professor Gibson.
12. Oral report on proposed amendment to Civil Rule 8(c) to delete the requirement that a bankruptcy discharge must be pleaded as an affirmative defense. (Judge Wedoff, Mr. Kohn, and Professor Gibson)
- Letters by Mr. Kohn and Judge Wedoff will be distributed separately.
13. Report concerning the proposed amendment to Civil Rule 56 and the possible need for a Bankruptcy Rule amendment in light of the Civil Rule amendment's impact on the timing of summary judgment motions in contested matters and adversary proceedings. (Judge Wedoff)

- Memo of February 12, 2009, by Judge Wedoff

Discussion Items

14. Oral report on status of the Bankruptcy Forms Modernization Project. (Judge Perris)
15. Oral report on planning for the future of the CM/ECF system. (Judge Perris)
16. Oral report on withdrawal of suggestion 08-BK-G by the Executive Office for United States Trustees to amend Rules 1017(e) and 4004(c). (Professor Gibson)
17. Oral report on the status of legislation authorizing modification of certain home mortgages in chapter 13 cases and efforts by the Administrative Office to collect data on the mortgage modifications. (Judge Swain, Judge Wedoff, Professor Gibson. Mr. Wannamaker)
 - Title I.A. (which provides for modification of home mortgages) of HR 1106, the "Helping Families Save Their Homes Act of 2009", as introduced on February 23, 2009.
 - Information on the data collection will be distributed separately.
18. Suggestion 08-BK-K by Judges Isgur, Magner, and Bohm to create two new forms to address problems related to claims secured by a debtor's home – an addendum to the proof of claim which sets out the full loan history and a calculation of the mortgage arrearage and a second form which serves as a payment change notice. (Professor Gibson)
 - Memo of February 19, 2009, by Professor Gibson.
 - Suggestion 08-BK-K.
19. Oral report on status of request by the Committee on Codes of Conduct for review of disclosure by the parties in connection with contested matters and other bankruptcy litigation in order to facilitate conflict screening. (Professor Gibson)
20. Oral report on planning for review of the restyled Evidence Rules. (Judge Swain, Professor Gibson, and Mr. McCabe)
21. Oral report on new privacy rules review project. (Judge Rosenthal and Judge Swain)
 - Memo of February 23, 2009, by Noel Augustyn, Assistant Director of the Administrative Office, announcing the review.

22. Oral report on Suggestion 09-BK-A, by Michael Fritz for revision of Schedule D. (Professor Gibson)

- Suggestion 09-BK-A.

Information Items

23. Rules Docket.
24. Oral report on the response to the Executive Committee's request that Conference Committees review the draft Best Practices Guide to Using Subcommittees of Judicial Conference Committees and report on the status of subcommittees. (Judge Rosenthal and Swain)
- Judge Rosenthal's report to the Executive Committee, with enclosures, will be distributed separately.
25. Status of notice to local courts concerning the need to review local rules in light of the upcoming time computation amendments. (Judge Swain)
26. *Bull Pen*: Proposed amendments to Rule 3001(c), Rule 9024, Form 22A, and Form 22C; and proposed new Rules 3002.1 and 8007.1, which were approved at the last meeting, are in the *Bull Pen*. They are addressed above.
27. Future meetings:
- September 30, 2009, Part VIII special open subcommittee meeting at Harvard Law School, followed by October 1 - 2, 2009, Committee meeting at the Langham Hotel in Boston. Possible locations for the spring 2010 meeting.
28. New business:
29. Adjourn.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEE/LIAISON ASSIGNMENTS 2008-2009

<p>Subcommittee on Attorney Conduct and Healthcare Judge Richard A. Schell, Chair Judge William H. Pauley, III Judge David H. Coar John Rao, Esq. J. Michael Lamberth, Esq. Mark A. Redmiles, Esq, <i>EOUST liaison</i></p>	<p>Subcommittee on Privacy, Public Access and Appeals Judge William H. Pauley, III, Chair Judge Elizabeth L. Perris Judge Richard A. Schell J. Christopher Kohn, Esq. Michael St. Patrick Baxter, Esq. David A. Lander, Esq. Mark A. Redmiles, Esq, <i>EOUST liaison</i></p>
<p>Subcommittee on Business Issues Judge Jeffery P. Hopkins, Chair Judge Eugene R. Wedoff Judge David H. Coar J. Christopher Kohn, Esq. J. Michael Lamberth, Esq. Michael St. Patrick Baxter, Esq. David A. Lander, Esq. James J. Waldron, <i>ex officio</i> Mark A. Redmiles, Esq, <i>EOUST liaison</i></p>	<p>Subcommittee on Style Dean Lawrence Ponoroff, Chair Judge David H. Coar Judge Judith H. Wizmur J. Michael Lamberth, Esq. David A. Lander, Esq.</p>
<p>Subcommittee on Consumer Issues Judge Eugene R. Wedoff, Chair Judge R. Guy Cole Judge William H. Pauley III Judge Jeffery P. Hopkins Judge Judith H. Wizmur John Rao, Esq. David A. Lander, Esq. James J. Waldron, <i>ex officio</i> Mark A. Redmiles, Esq, <i>EOUST liaison</i></p>	<p>Subcommittee on Technology and Cross Border Insolvency Judge David H. Coar, Chair Judge R. Guy Cole, Jr. Judge Richard A. Schell Dean Lawrence Ponoroff Michael St. Patrick Baxter, Esq. David A. Lander, Esq. Mark A. Redmiles, Esq, <i>EOUST liaison</i></p>
<p>Subcommittee on Forms Judge Elizabeth L. Perris, Chair Judge Judith H. Wizmur J. Christopher Kohn, Esq. John Rao, Esq. David A. Lander, Esq. James J. Waldron, <i>ex officio</i> Mark A. Redmiles, Esq, <i>EOUST liaison</i> Patricia S. Ketchum, Esq., <i>Consultant</i></p>	<p>Forms Modernization Project Judge Elizabeth L. Perris, Chair Judge Jeffery P. Hopkins Judge Judith H. Wizmur J. Christopher Kohn, Esq. John Rao, Esq. J. Michael Lamberth, Esq. David A. Lander, Esq. James J. Waldron, <i>ex officio</i> Patricia S. Ketchum, Esq., <i>Consultant</i></p>

CM/ECF Working Group

Judge Elizabeth L. Perris

Civil Rules Liaison:

Judge Eugene R. Wedoff

Sealing Committee Liaison:

Judge Jeffery P. Hopkins

Evidence Committee Liaison:

Judge Judith H. Wizmur

Item 1 will be an oral report.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 2 - 3, 2008
Denver, Colorado

(Draft Minutes)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge David H. Coar
District Judge Irene M. Keeley
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, outgoing reporter
Professor S. Elizabeth Gibson, incumbent reporter
Bankruptcy Judge Christopher M. Klein, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Professor Daniel R. Coquillette, reporter for the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen "Scott" Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following member was unable to attend:

Dean Lawrence Ponoroff

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, *other than materials distributed at the meeting after the agenda was published*, is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings; Appreciation of departing Reporter and Members.

The Chair welcomed the members and guests to the meeting. She noted that Judge Rosenthal and Professor Daniel Coquillette, the chair and reporter of the Standing Committee, were in attendance, and thanked them for coming. The Chair also praised the outgoing reporter, Professor Jeffery Morris, for ten years of outstanding service to the Committee, and she welcomed the incumbent reporter, Professor Elizabeth Gibson, to her new position. The Chair said Judge Kenneth Meyers had resigned from the Committee for personal reasons and he would not attend this meeting, and she said that this would be the last meeting for Judge Keeley and Mr. Brunstad. She commended the departing members' dedicated and effective Committee service. Finally, the Chair expressed the regrets of Dean Lawrence Ponoroff, who was unable to attend the meeting because Hurricane Gustav necessitated class rescheduling at Tulane Law School.

2. Approval of minutes of St. Michaels meeting of March 27-28, 2008.

The minutes were approved without objection.

3. Oral reports on meetings of other Committees.

(A) June 2008 meeting of the Committee on Rules of Practice and Procedure, including final Time Computation changes.

The Chair gave the report. She said with respect to the proposed time computation amendments, this Committee argued for change in the templates so that state holidays would not be taken into account in backward-looking deadlines. She reported that the Standing Committee approved the change, not only with respect to the bankruptcy template, but with respect to all of time computation templates. She said that the Standing Committee also approved the rest of this Committee's proposals.

(B) April 2008 meeting of the Advisory Committee on Appellate Rules.

The Chair said that the Appellate Rules Committee approved a procedure for indicative rulings, to coordinate with the procedure established by the Civil Rules Committee. She said that this Committee would also address the issue of indicative rulings during the course of the meeting.

- (C) June 2008 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Hopkins reported on the work of the Bankruptcy Committee. He said that it would be undertaking a time measurement study for judges, and that it discussed and supported legislation that would extend the FEGLI fix (a change relating to charges for life insurance premiums for older judges) to bankruptcy judges.

He reported that the Bankruptcy Committee also considered two requests from the Executive Office for United States Trustees. First, it had an extensive review and discussion of the EOUST's request for data-enabled forms. Although it did not recommend adopting such forms, it recommended providing most of the information requested by the EOUST through modifications to CM/ECF. Second, the Bankruptcy Committee approved a recommended change to CM/ECF that would provide for a virtual entry on the docket for chapter 7 trustee closing reports.

Judge Hopkins said that the Bankruptcy Committee did not recommend filling any bankruptcy judge vacancies at this time, and that it would assess vacancies going forward under the new case weighting standards. He said that, in light of the election cycle, judicial salary restoration was unlikely at this time.

Judge Conti added that the Bankruptcy Committee recently developed a long-range planning group, and that she anticipated that it would become a major impetus of the Bankruptcy Committee's work over the next several years.

- (D) April 2008 meeting of Advisory Committee on Civil Rules.

Judge Wedoff gave the report. He observed that the default timeline in the proposed changes to Rule 56 might require changes for the bankruptcy context. The Civil Rules Committee also discussed publishing alternate proposals for whether the court "must" or "should" grant a well-founded motion for summary judgment.

He said there were continued discussions with respect to the committee's proposal for revision of the expert witness disclosure provisions of Rule 26, including a new procedure for disclosure of the substance of anticipated testimony of an expert witness who is not required to prepare a formal report. The proposed changes to Rules 26 and 56 were published for comment in August 2008.

Judge Wedoff said that another issue concerned a proposal to eliminate bankruptcy

discharge as an affirmative defense in Civil Rule 8(c) on the ground that 11 U.S.C. § 524 was self-executing and a rule could not cause a debtor to waive a right that was granted by statute. He said that the Department of Justice had opposed removing discharges from the list on the ground that some debts, such as student loan and some tax debts, are not automatically included in the debtor's discharge.

Judge Wedoff said that Civil Rules Committee ultimately decided to table the Rule 8(c) issue until they could have further discussions with representatives of DOJ to address their concerns. Judge Rosenthal and Mr. Rabiej added that, if this Committee felt strongly about removing discharges from Rule 8(c), it should formally support removal.

Several members were in favor of sending a letter to the Civil Rules Committee recommending removal of discharges from the list of affirmative defenses in Rule 8(c), but Professor Morris said that the Committee should probably more fully discuss the matter as a formal agenda item. **After additional discussion, the Chair asked Judge Wedoff and Mr. Kohn to prepare memoranda for consideration by the Committee at its March 2009 meeting.**

(E) May 2008 meeting of Advisory Committee on Evidence.

Mr. McCabe gave the report. He said the Evidence Committee considered two major issues: (1) restyling the rules of evidence, which it recommended publishing for comment next August, and (2) an amendment to Rule 804(b)(3) extending the corroborating circumstances requirement to all declarations against penal interest made in a criminal case.

(F) Bankruptcy CM/ECF Working Group.

[See Agenda Item 10]

(G) Progress report from the Sealing Committee.

Professor Gibson reported that the Sealing Committee was looking at all cases with sealed documents in 2006. She noted that there were no cases in bankruptcy courts where the entire case was sealed.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning the 9th Circuit Bankruptcy Appellate Panel's decision in *Drummond v. Wiegand*, 386 B.R. 238 (9th Cir. BAP Apr. 3, 2008), that chapter 13 business debtors may not subtract business expenses from gross receipts in determining current monthly income on Official Form 22C.

Judge Wedoff described the issue raised by the *Wiegand* decision. In that case, the court

held that a chapter 13 debtor engaged in business may not subtract business expenses from gross receipts in determining his current monthly income (CMI). That conclusion led the court to declare that Form 22C, by instructing the debtor to make such a deduction, is inconsistent with §1325(b)(2). Judge Wedoff said the Consumer Subcommittee had considered the arguments presented in *Weigand*, and that it recommended no change to Form 22C.

Judge Wedoff said that the issue of business expenses was thoroughly discussed in the course of drafting Form 22C, and that several reasons supported the Committee's decision to deduct such expenses in the calculation of CMI. One reason is that the Census Bureau uses net rather than gross income in computing median family incomes. Since those are the figures that the debtor's annualized CMI must be compared with under § 1325(b), it makes sense to calculate current monthly income in the same manner.

Another reason is that the use of gross receipts for self-employed debtors would lead to distinctions in the calculation of CMI based merely on the business form under which the debtor has chosen to operate. Under the *Wiegand* approach, for example, a self-employed debtor with gross business receipts of \$250,000 would be above the applicable median family income of any state, even if his net income was only \$40,000. If the same debtor organized as an LLC, however, and took a salary of \$40,000, income would likely be below the applicable median family income. It seems unlikely that any such distinction was intentional, so the Committee, in approving Form 22C, chose to interpret "income" as used in § 101(10A)'s definition of "current monthly income" as net, rather than gross, business income.

Judge Wedoff said that a strict construction interpretation of § 1325(b)(3) and § 707(b)(2)(A) and (B) would also result in a self-employed debtor with an above-median family income never being able to deduct most business expenses. Section 1325(b)(3) requires an above-median-family-income debtor to determine "amounts reasonably necessary to be expended" according to "subparagraphs (A) and (B) of section 707(b)(2)." Those paragraphs of the means test require application of "the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service" All of those IRS standards and categories relate to personal and household, not general business, expenses. Permissible business expenses are included in another section of the IRS Financial Analysis Handbook. Likewise, all of the other expenses expressly allowed to be deducted under § 707(b)(2)(A) and (B) are personal and household, not business, expenditures. Thus, as the Advisory Committee previously concluded in approving Form 22C, the Subcommittee concluded that the most sensible interpretation of income for a self-employed debtor is net, not gross, income.

Several committee members said that they supported the Subcommittee's recommendation, **and, after a motion was made and seconded, the Committee voted to make no change to Form 22C with respect to this issue.**

- (B) Recommendation concerning use of the terms "household" and "family" on Official Forms 22A and 22C.

Judge Wedoff said that, once again, the Consumer Subcommittee had been called on to consider use of the term “household size” on Forms 22A and 22C. He said that on several lines of Forms 22A and 22C, the reference to “household size” was clearly appropriate and dictated by the statute. Section 707(b)(7) provides the safe harbor from the means-test presumption based on “household” size, and § 1325(b)(3) and (4) contain provisions that require comparing the debtor’s current monthly income with the appropriate “median family income of the applicable State” based on the debtor’s “household” size. The debtor’s “household” size is therefore the relevant consideration by the terms of the Code itself.

In the case of means-test deductions, however, Judge Wedoff said the Subcommittee concluded that use of the term “household” size was not dictated by the Code and could result in both under and over inclusion in calculating deductions, because it was not “dependent” orientated. For example, if a debtor has dependents who are not members of the debtor’s household, an instruction to take into account only household members results in a smaller deduction than the IRS standards allow. On the other hand, if a debtor lives in a household with persons the debtor does not support, allowing deductions to be based on household size results in a greater deduction than the IRS standards permit. In this context, Judge Wedoff said that the statute was not dispositive. Rather, § 707(b)(2)(A)(ii)(I) simply provides that “[t]he debtor’s monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards . . . for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case if the spouse is not otherwise a dependent.”

Judge Wedoff noted that the “National and Local Standards” are set out in the Internal Revenue Manual, and that, in the absence of a statutory provision to the contrary, the Committee has tried to apply the standards the same way they are applied in the Manual itself. He said that a review of the Manual indicates that the concept of “dependency” was relevant in applying deductions, and he cited several examples in excerpts at page 93 of the agenda materials.

Judge Wedoff said that the Subcommittee reviewed Forms 22A and 22C and concluded that the only way to ensure that those forms track the Manual’s calculations would be to change the instructions in Lines 19A, 19B, 20A, and 20B of Form 22A and Lines 24A, 24B, 25A, and 25B of Form 22C as set forth on pages 94-96 of the agenda materials.

Some members expressed concern that the change would add confusion to the existing forms but agreed that it should be published. Others agreed that the proposal should be published, but suggested that the second paragraph in the committee note, which described why the changes were being made, should be deleted and moved to the report and recommendation for publishing the change. After additional discussion, **the Committee approved a motion to publish in August 2009 the proposed changes to Forms 22A and 22C set forth on pages 94 – 96 of the agenda materials (with the exclusion of the second paragraph of the note).**

- (C) Recommendation concerning a possible national rule on post-petition mortgage fees in chapter 13 cases.

Judge Wedoff said that the Consumer Subcommittee recommended an amendment to

Rule 3001(c) and a new Rule 3002.1 to address the failure of many secured lenders to disclose post-confirmation charges and fees while the case was pending. He said the problem was that the subsequent assertion of those fees and charges immediately after the debtor emerges from bankruptcy undermined the debtor's fresh start.

Judge Wedoff said that, although several courts have already addressed the issue locally, to date, no uniform solution has emerged. He said that Congress has also held hearings, but that so far no legislation had been enacted.

He said that the purpose of the proposed rule changes was to ensure that any fee or payment changes are disclosed in a timely manner, during the case, so that they can be dealt with under the plan. He said that the proposed changes were set out in detail the August 27 memo distributed at the meeting (a revised version of the memo in the agenda materials).

Several members supported publishing the rule changes, but had concerns about particular provisions. Some wondered whether there was a basis for imposing the sanctions included in the proposals. Mr. Rao responded that the Subcommittee discussed the sanctions issue extensively. He said that, ultimately, subcommittee members concluded that discovery-type sanctions, such as these, do not address the substantive rights of the parties. Rather, they merely establish a consequence for failing to follow the procedural rules governing the presentation of evidence of substantive rights. Two members said that they were still in favor of removing the sanctions.

Another member suggested that requiring notice of a new fee or expense within 30 days of the fee or expense being incurred might be onerous in situations of small recurring changes. Judge Wedoff said the Subcommittee considered that possibility but decided in favor of 30 days to encourage early resolution of disputes.

One member recommended changing "security interest" to "claim" new Rule 3002.1, and another member proposed adding language that the notices required under the new rule were not entitled to prima facie validity under Rule 3001(f). After additional discussion, **the Committee voted, with one dissent, in favor of publishing the proposed amendment to Rule 3001 and new Rule 3002.1 as set forth in the handout with the following changes to Rule 3002.1:**

Strikeout "and" on line 13, and add "and (3) shall not be subject to Rule 3001(f)" at the end of line 14; substitute "claim" for security interest at line 21; change "of" to "after" on line 25; add "The notice shall not be subject to Rule 3001(f)" after "incurred" on line 26; change "payments" to "amounts" on line 54; and add "and shall not be subject to Rule 3001(f)" at the end of line 57.

- (D) Status of consideration of possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code.

Professor Morris reminded the Committee that § 521(i)(1) of the Code provides that if an individual debtor in a voluntary case fails to file all of the required information within 45 days of

the date of the filing of the petition, that “the case shall be automatically dismissed effective on the 46th day after the filing of the petition.” He reported that the courts still have not reached any consensus on the meaning and operation of § 521(i) when the debtor has not provided all the required information. Some courts have concluded that the provision requires a dismissal order effective on the 46th day after the filing of the case, while other courts have found the provision ambiguous and concluded that the dismissal is either not automatic, or that the order of dismissal need not be made effective on the 46th day after the filing of the petition. He recommended that the Committee continue to monitor the issue, and take no other action until after consensus develops. Professor Gibson agreed to continue monitoring case developments and to provide status reports at future meetings.

5. Report by the Subcommittee on Technology and Cross Border Insolvency.

Recommendation in response to suggestion by Judge Laurel Isicoff to create a new official form to be used as a petition in chapter 15 cases.

Judge Coar said that Judge Isicoff’s suggestion arose in the context of a consumer case involving a foreign national who had moved to the United States after an insolvency proceeding in the United Kingdom. In an attempt to attach the debtor’s assets in the U.S., the U.K. foreign representative initiated a chapter 15 case in the debtor’s name in the U.S. Judge Isicoff said this resulted in the credit rating agencies picking up the chapter 15 case as a new bankruptcy filing, when, in fact, it was not really a new case. She suggested that the problem could be resolved by creating a new form to be used specifically for chapter 15.

Judge Coar said the Subcommittee recognized the potential problem identified by Judge Isicoff, but concluded that the creating a separate form to commence a chapter 15 case was not warranted. He said that, as an initial matter, chapter 15 cases are rare (in 2007, just 42 were filed), and the vast majority involve corporations. Thus, the Subcommittee concluded few individual debtors would face the problem identified by Judge Isicoff.

Judge Coar said that Subcommittee also concluded that a new form would not prevent credit reporting agencies from posting a bankruptcy filing on the debtor’s credit report. He note that filing a chapter 15 petition for recognition commences a “case” under § 1504. Consequently, whether the filing is accomplished through Official Form 1, or some other form, the credit reporting agencies will simply report that a bankruptcy petition has been filed by or against the debtor. Creating a chapter 15-specific form will not change the fact that a bankruptcy case was filed. Moreover, since Form 1 already contains a checkbox that identifies the *type* of case (Chapter 7, 11, 12, 13 or 15), a form specifically for chapter 15 would not provide any new information. The Subcommittee therefore did not recommend creating a new form.

The Committee discussed the Subcommittee’s recommendation, and decided not to recommend a new or separate form for initiating a chapter 15 case.

6. Report of Subcommittee on Attorney Conduct and Health Care.

Recommendation on requests by the Bankruptcy Judges' Advisory Group and Judge Robert Kressel for further consideration of the December 1, 2007, amendment to Rule 6003

Judge Schell described the issue. Rule 6003 became effective on December 1, 2007, as part of a package of amendments offered to address problems that had arisen primarily in large chapter 11 cases. Subdivision (a) of the rule provides that the court, absent immediate and irreparable harm, cannot grant an application for the employment of a professional within 20 days after the commencement of the case. He said that the intent of the rule was to provide a short breathing spell for the courts and parties in interest who often face a large volume of documents being filed on the first day of a case. Other subdivisions of the rule restrict the entry of orders granting relief under Rule 4001 and for some matters under § 365.

Shortly after Rule 6003 became effective, some members of the bankruptcy community expressed concern that the rule could prevent corporate debtors from being represented during the first 20 days, because it seemed to prohibit authorization of representation by counsel during that time period. Judge Schell said that some members of the Bankruptcy Judges Advisory Group (BJAG) shared the concerns raised by the bankruptcy community, and suggested that the rule be amended to make clear that it did not prohibit counsel from representing debtors during the first 20 days of the case, subject to subsequent approval.

Judge Schell said that BJAG members also pointed out that Rule 6003 might be read more broadly than probably intended because it prohibits entry of any order during the first 20 days of the case "regarding" the enumerated categories. So, for example, since the sale of estate property is prohibited under the rule for the first 20 days, an order approving bidding procedures "regarding" a sale might also be prohibited during the first 20 days, even if the sale itself was scheduled to occur after 20 days.

Judge Schell said the Subcommittee on Attorney Conduct and Health Care had met by teleconference and discussed the matter. He said that subcommittee members agreed that the intent of the Committee in recommending Rule 6003 was merely to give the court and interested parties time to review applications for professional employment during the early part of a large case. Although no subcommittee member thought that rule prevented entry of an approval order on day 21 that was *effective* on an earlier date (such as when the case was opened, or when the application for employment was filed), subcommittee members did agree that it could be clearer. The Subcommittee therefore recommended publishing the rule with the clarifying amendments set out in the agenda materials.

Judge Schell said that the Subcommittee also considered a suggestion by Judge Robert Kressel (Bankr. D. Minn.), that the 20 day "cooling off" period in Rule 6003 be tied to the order for relief, rather than the filing of the petition, so it would operate similarly in voluntary and involuntary cases. Judge Schell said that the Subcommittee did not think the same issues were present in an involuntary case. Because creditors initiate an involuntary petition, they would likely be familiar with the issues involved long before the order for relief was entered, and would also be dealing with debtor's counsel before the order for relief was entered. The Subcommittee

therefore recommended no change with respect to Judge Kressel's suggestion

After discussing the matter, **the Committee recommended publishing the Subcommittee's suggested changes to Rule 6003 as set out at pages 131 – 133 of the agenda materials.**

7. Report of Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation on a possible new rule or rules to authorize indicative rulings.

Judge Pauley said that, at the last Committee meeting, the Subcommittee on Privacy, Public Access, and Appeals had been asked to consider whether the Committee should recommend rule changes that would formalize a process practiced in many federal courts of providing an "indicative ruling" when the bankruptcy court lacks jurisdiction to grant a party's motion due to the pendency of an appeal. He said the Subcommittee had been asked to consider this issue in light of similar rules proposed by the Advisory Committees on Civil Rules and Appellate Rules: Civil Rule 62.1 and Appellate Rule 12.1.

Judge Pauley said the Subcommittee agreed that modifying the rules to formalize indicative rulings by the bankruptcy court was warranted, and, to accomplish this, it recommended publishing a new Rule 8007.1, and an amendment to Rule 9024, as set forth at pages 152 – 155 of the agenda materials. He said that, initially, the Subcommittee also recommended an amendment to Rule 9023 (included in the materials), but that it now believes no change to that rule is necessary.

The Committee discussed the matter, and voted to recommend publishing new Rule 8007.1 as set out at pages 152-154; and the amendment to Rule 9024 as set out on pages 154-155 with the following substitutes for the new (underlined) material on page 155: "If the court lacks authority to grant a timely motion under this rule because an appeal has been docketed and is pending, the court may take any of the actions specified in Rule 8007.1(a)." Because of ongoing consideration of a complete revision to the appellate rules, the Committee decided to wait until at least the March 2009 meeting to decide whether to recommend that the proposed changes be published at the next opportunity (in August 2009), or if they should be held and published along with any global recommended revision of the Part VIII Rules.

(B) Recommendation on suggestion by Mr. Brunstad that Part VIII of the Bankruptcy Rules be rewritten to follow more closely the Federal Rules of Appellate Procedure.

Judge Pauley said that at the last meeting, Mr. Brunstad proposed a complete rewrite of Part VIII of the Bankruptcy Rules (the bankruptcy appellate rules), so that they more closely track the style and changes that have been made to the Federal Rules of Appellate Procedure (FRAP) over the years. He said that Mr. Brunstad agreed to attempt a first draft of proposed revisions, and he then asked Mr. Brunstad to report on that process so that the Committee could

consider how best to review and revise the proposal before deciding whether to recommend publishing proposed changes.

Mr. Brunstad distributed copies of his draft of the proposed revisions to the bankruptcy appellate rules and explained why he thought the revisions were needed. He said that unlike the current FRAP, the Part VIII Rules have not changed much over the years, and that he thought it made sense to try to go through the rules and harmonize the procedures with FRAP as much as possible.

Mr. Brunstad discussed the revision process by walking the Committee through proposed Rule 8001 in the handout. He noted that the language was modeled on the style used in the FRAP, as distinguished from the existing bankruptcy rule styling. He said that he recognized that the change would mean the Part VIII Rules would be styled differently than the rest the bankruptcy rules, but he said he thought it was worthwhile to conform the bankruptcy appellate styling to the other appellate rules to the extent possible. Moreover, because the bankruptcy rules would likely be restyled in the future, the proposed revisions to the Part VIII Rules could be a first step in that process.

Judge Pauley said that the question for the Committee is “where do we go from here?” He said that initially the Subcommittee was in favor of simply assigning to each Committee member, or maybe a small team of Committee members, a couple of rules with the task of reviewing Mr. Brunstad’s draft, and suggesting changes at the next meeting. He said that he now thought a better approach would be to convene a focus group of some type to take a look at the suggested proposal.

Mr. McCabe suggested the following procedure: convene a “mini-conference” to discuss the proposal (maybe by extending the spring meeting by a day) and inviting BAP judges, appellate judges, lawyers and other appeals experts to review, discuss and possibly refine the proposal. **The members discussed Mr. McCabe’s idea and unanimously agreed that it was a good approach and asked the Chair and AO staff to take steps to set up a mini-conference for the spring and possibly the fall meetings.** The Chair and membership also formally expressed their deep gratitude to Mr. Brunstad for the great start he has given the Committee in this endeavor.

8. Report of Subcommittee on Business Issues.

The Chair introduced Judge Hopkins as the new subcommittee chair, and she also explained that, since there was no activity by the Subcommittee over the past term, no report was needed.

9. Report of Subcommittee on Forms.

Oral report on proposed amendment to Form 201 to advise debtors that notices to joint debtors at the same address will be mailed in a single envelope addressed to both of the debtors.

Mr. Myers explained that the Bankruptcy Court Administration Division was considering a cost saving proposal under the new Bankruptcy Noticing Center contract to provide a single notice in joint cases if the husband and wife debtors live at the same address. He said that if the proposal went forward, the AO intended to amend Director's Form B201, generally given to consumer debtors at the beginning of the case, to inform joint debtors that they should expect only a single notice of events unless they tell the court that they want to receive notices at different addresses. No member objected to the proposed changes to B201.

Discussion Items

10. Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris updated the Committee on the CM/ECF working group, the Future of CM/ECF project, and the Forms Modernization Project. She explained that the CM/ECF working group has existed for some time and that it deals with ongoing CM/ECF issues and modification requests. She said that, as this Committee's liaison to that group, her role is to communicate upcoming changes to the rules and forms that might affect ongoing CM/ECF updates. By way of example, she said she anticipated speaking with the CM/ECF working group about whether any of the proposals under consideration by the Committee for post-petition claim adjustments for mortgages in chapter 13 (see Agenda Item 6C), would require changes to CM/ECF.

Judge Perris said that, in contrast to the CM/ECF working group, which focuses on current CM/ECF issues, the CM/ECF futures project is tasked with identifying and implementing the replacement/update of CM/ECF. She said nothing is really off the table with that project, and that the steering committee would have its initial kickoff meeting next week. She said that at the kickoff meeting, participants would discuss 10 "functionalities" that the AO has identified for the new system based on comments from the field, and would also discuss additional areas that might be considered. She said that the projected time line for implementation was 2013, and that the current thinking for the next step was to write requirements for the 10 function areas that have been identified so far.

Judge Perris next reported on the progress of Forms Modernization Project. She said that project members had their second in-person meeting at the AO this summer. She said that project members were looking at all the official bankruptcy forms with an eye toward increased ease of use both for those who fill out that forms and those who pull information from the forms. She then updated the Committee on the progress of the initial two subgroups that evolved out of the first meeting.

Judge Perris said that analytical subgroup continued to evaluate the forms. Judge Klein, chair of the analytical subgroup, added that the deeper into each form the group got, the more complex and interrelated the forms seemed to become, and the harder it became to determine whether seemingly redundant information was really dealing with subtly different issues.

Judge Perris said that the second subgroup continued to look at technology solutions, and that an ad hoc group of members had attended several AO and FJC functions, gave presentations about the project, and solicited feedback from bankruptcy judges and clerks. Judge Perris said that one suggestion that came from court personnel was that project members should solicit input from professionals who specialize in creating polls and questionnaires. She said that in response to this suggestion the ad hoc “user information” group met with representatives of the Census Bureau and the Bureau of Labor and Statistics to talk about how those groups updated their forms, how they developed questions for the public, and what outside resources they used.

Judge Hopkins reported that he participated in the discussions with the Census Bureau and Bureau of Labor and Statistics, and he met some of the people who had participated in revising forms for those agencies. He said that one suggestion to improve clarity was to try to avoid making forms that are all things to all debtors. So, for example, the ultimate recommendation might be to separate form packages by chapter (7, 11, 12, or 13) or by type (consumer or business) so that information that was irrelevant to the particular user could be eliminated. He said other suggestions included prioritizing changes by identifying the most common errors in the forms, and reducing errors by telling the debtor the types of documents that might be needed before filling out the forms.

11. Oral report on planning for the future of the CM/ECF system.

[See Agenda Item 10].

12. Suggestion by Chief Judge Vincent Zurzolo that Rule 9014(b) be amended to permit service on non-debtor attorneys of a motion initiating a contested matter through CM/ECF in the manner provided in Civil Rule 5(b) rather than requiring service in the manner provided in Rule 7004 for service of a summons and complaint.

Professor Gibson noted that a supplemental memo, dated September 12, had also been distributed on this issue. She said that Judge Zurzolo’s reading of Rule 9014(b) and Rule 7004 was that the rules require paper service on creditors’ attorneys of a motion initiating a contested matter, but allow electronic service on the debtor’s attorney in the same situation. He suggested that Rule 9014 be amended to allow electronic service of the first motion in a contested matter on either attorney (debtor’s or creditor’s) so long as the attorney for the defending party has entered an appearance in the case.

Some members disagreed with what seemed to be an assumption in Judge Zurzolo’s analysis, that an attorney who entered an appearance in a bankruptcy case on behalf of a party for one matter – to file a claim for example – was the party’s attorney for all matters. Other members pointed out that paper service of the first motion in the contested matter would still need to be made on the party, so requiring paper service on the party’s attorney (assuming the attorney was known) was not a significant additional burden. Of course, if the attorney had already entered an appearance in the case, the attorney would receive electronic notice of the filing as well. **After additional discussion, the Committee decided no change should be**

made.

13. Request by the Committee on Codes of Conduct for further study of policy issues concerning conflict screening.

The matter was moved to the next meeting, in anticipation of further clarification of the request by the Committee on Codes of Conduct.

14. Suggestion by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association to repeal Rule 2019.

The matter was referred to the Business Subcommittee in anticipation of further submissions from the National Bankruptcy Conference as well as other organizations.

15. Discussion of issues presented by *Zedan v. Habas*, 529 F.3d 398 (7th Cir. 2008): (1) whether Rules should permit application for denial or revocation of a discharge based on the debtor's fraud discovered by a party during a gap period after the deadline for objecting to discharge and before the granting of the discharge; and (2) Chief Judge Frank Easterbrook's concurrence concerning the impact of the designation of objections to discharge as adversary proceedings on appellate jurisdiction.

Professor Gibson said that the first issue was whether the rules, as currently in effect, permit a party to challenge the debtor's right to a discharge if the party discovers the basis for the challenge in a "gap period" after expiration of the discharge objection period, but before a discharge is entered. She said the court in *Zedan* concluded that the discharge cannot be revoked if the fraud is discovered during this gap period because 11 U.S.C. § 727(d)(1) requires a person seeking revocation of the discharge on the ground of fraud "not know of such fraud until *after* the granting of such discharge." The *Zedan* court acknowledged that if courts entered the discharge "forthwith" after the objection period closed, as required by Rule 4004, gap issue cases would be rare. It concluded, however, that in rare gap issue situation, no remedy was available, and suggested that an amendment to the rules be made to eliminate the gap period.

Professor Gibson said that some courts have worked around this problem by "deeming" the discharge to have been granted immediately after the objection deadline passed, even if no formal discharge order was entered. The *Zedan* court rejected this approach, however, as inconsistent with a literal reading of the rules and the statute.

Professor Gibson said that, if the Committee was inclined to make a change as suggested by the Seventh Circuit, a possible fix was incorporated in Rule 4004 at pages 211 and 212 of the agenda materials.

Some members suggested possible changes to the proposed language and, **after additional discussion, the Chair referred the matter to the Consumer Subcommittee for further review and recommendation.**

Professor Gibson said that the second issue in *Zedan* was raised in Judge Easterbrook's concurring opinion, which suggested that discharge objections should be classified as contested matters, rather than adversary proceedings.

After much discussion, the Committee decided to maintain the current procedure. It concluded that treating discharge objections as adversary proceedings is not inconsistent with their statutory classification as "core proceedings" and, because of the importance of the discharge to a debtor, the committee members favored adherence to the long-established position that the greater procedural protections available in an adversary proceeding are appropriate for the resolution of most objections to or attempts to revoke a discharge. In the relatively rare situation in which several different grounds for denying or revoking a discharge are raised by different parties, the Committee concluded, existing procedural mechanisms (such as consolidation and stay orders) can be employed to prevent premature or piecemeal appeals.

16. Discussion of Judge Paul Mannes' suggestions that Rule 3003 be amended to require chapter 11 debtors to give notice to creditors if a claim is scheduled as disputed, contingent, or unliquidated; and that Rule 2016 be amended to require the attorney for the debtor to file the § 329 statement (the statement of compensation paid or to be paid in connection with the case) with the petition, rather than being allowed to wait for 15 days.

The Committee carefully considered each of Judge Mannes' suggestions and, after extensive discussion decided that no action was needed.

17. Discussion of suggestions by Judge Eugene Wedoff and attorney Philip Martino for promulgation of a rule regarding applications for payment of administrative expenses.

Professor Gibson said that Mr. Martino had suggested an amendment to Rule 1017 that would allow a chapter 7 trustee to assert an administrative claim in a case converted to chapter 13 by filing a special administrative proof of claim form modeled on the current proof of claim form.

Judge Wedoff said such a procedure might also be warranted for certain administrative claims in chapter 11, such as when a supplier of goods in the ordinary course to a chapter 11 debtor seeks payment for those goods after the case converts to chapter 7. He said another example would be a supplier of goods who seeks payment for goods received by the debtor during the first 20 days before commencement of the case under § 503. **After additional discussion, the Chair referred the matter to the Business Subcommittee for further consideration.**

18. Discussion of suggestions by Judges Paul Mannes, Randall Newsome, and Robert Kressel for revision of Director's Form 240, Reaffirmation Agreement.

The matter was referred to the Forms Subcommittee.

19. Discussion of Judge Colleen Brown's suggested revision of Official Form 3B,

Application for Waiver of Chapter 7 Filing Fee.

Professor Gibson said that Judge Brown raised the issue of whether Official Form 3B should require more detailed financial information to aid the court in its determination of whether a fee waiver should be granted. Several members did not think a change was warranted, and that the issue was best managed at the local court level. **After additional discussion and careful consideration, the Committee decided not to change Official Form 3B.**

20. Discussion of suggestions by the courts in the Southern District of New York and the Eastern District of Pennsylvania that a space be added to Official Form 10 for the portion of a claim which is a general unsecured claim.

The matter was referred to the Consumer Subcommittee.

21. Discussion of suggestion by the Executive Office for United States Trustees for amendments to Rules 1017(e) and 4004(c).

Professor Gibson said that the EOUST had submitted two suggestions. She said the first suggestion was to amend Rule 1017(e) to define the term “date of the first meeting of creditors.” She said that the concept of the “first meeting of creditors,” which marks when the UST’s declination statement is due under § 704(b)(1)(A), is ambiguous – it could be the date on the § 341 notice (whether the meeting is actually held or not), the date that the meeting is actually commenced, or the date that the meeting, if held open, concludes.

On behalf of the EOUST, Mr. Redmiles said he believed that the term could be defined by rule and he thought that the suggested edits to Rule 1007(e) would accomplish that. However, he said that he would prefer that the issue be referred to the Consumer Subcommittee for consideration. He added that the EOUST’s primary aim was uniformity among the courts concerning when the declination statement was due.

Judge Wedoff supported referring the matter. He said that he didn’t think the issue is one of ambiguity, but rather a simple gap in the statute, which can be filled by rule. Judge Klein added that, if the matter was referred, the subcommittee should note that the term “first date set for the meeting of creditors” is used in Rules 4004 and 4007. **After further discussion, the Committee referred the Rule 1007(e) issue to the Consumer Subcommittee.**

The second EOUST suggestion concerned the timing of the court’s entry of the discharge. As a general matter, Rule 4004 requires the court to grant the discharge “forthwith” upon the expiration of the time stated by the rule for filing a complaint objecting to discharge. Subdivision (c), however, specifies twelve exceptions to that requirement. Among those exceptions are cases in which a motion is pending to dismiss the case, to extend the time for objecting to discharge, or to delay or postpone discharge. Mr. Redmiles suggests that those provisions, Rule 4004(c)(1)(D), (E), (F), (I), and (K), be amended by adding the language “or until appellate review is no longer available.” Mr. Redmiles said that the suggested change would clarify that “pending” includes the time until all appeals are exhausted, so that a discharge

was not entered immediately upon, for example, denial of a motion to dismiss.

Some members said that they understood the problem, but thought that the proposed solution would cause further problems, such as, for example, extending the “gap period” identified by the Seventh Circuit’s *Zedan* decision (discussed at Agenda Item 15). Professor Gibson added that she had been unable to identify any cases in which an appellate court reversed the denial of a motion to dismiss and yet considered itself bound to uphold the discharge, so she was not sure whether a change was needed. **After additional discussion, the Committee decided to table the matter until the March meeting, to allow time for a supplemental submission from Mr. Redmiles identifying the extent of the problem.**

22. Discussion of the Executive Committee’s request that Conference Committees review the draft Best Practices Guide to Using Subcommittees of Judicial Conference Committees and report on the status of subcommittees.

Judge Rosenthal addressed the issue. She said that each of the rules advisory committees needed to report on how subcommittees are used to conduct business, and also to clearly address why subcommittee use is so prevalent in the work of the rules advisory committees. She asked this Committee to coordinate its response with the other advisory committees. She said that, once the draft responses were received, she would circulate those responses to the other advisory committees.

Judge Rosenthal also encouraged the Committee to review and consider recommending clarification of the conference policy regarding appointment of non-committee members to subcommittee. She said that such appointments were sometimes needed to allow the advisory committees to more closely work with subject matter experts on various topics. She said that she believed that the current language allows the Director of the AO (as the designee of the Chief Justice) to approve non-committee members to subcommittees, but she acknowledged that the language could be interpreted (and has been in the past) as requiring the Chief Justice to personally act on each such appointment. Judge Rosenthal said that she thought revision the language to make clear that the Director has authority to make such appointments would streamline the process when it is needed, and would increase the efficiency of the committees.

The Chair thanked Judge Rosenthal and said that she and Professor Gibson would draft a response for the Committee and circulate it to the membership for comments and response in the coming weeks.

Information Items

23. Rules Docket.

Mr. Wannamaker told the Committee that an updated version of the Rules Docket was in the agenda materials and asked members to report any inaccuracies.

24. Posting a list of suggested rules amendments on the Internet.

Mr. Ishida updated the Committee on three projects undertaken by the Rules Support Office. First, he said, in response to the Chair's request, the Rules Support office was now not only tracking rules suggestions, but that, like comments, it was posting suggestions on the public website as well.

He said the second project concerned gathering older committee reports and minutes. He said the AO was in the process of digitizing the older records and posting them on the internet. He said that there were fairly large gaps of records in bankruptcy, but that he hoped to obtain many historical records from the Committee's former reporter, Alan Resnick.

Finally, Mr. Ishida noted that the FJC and the AO were working on a project to post an official copy of the bankruptcy rules in WIKI format that would have links to committee notes, all amendments, comments, and other background material.

25. Preparation of letters reporting the Committee's resolution of suggestions.

Mr. Ishida and Mr. Wannamaker reported on the process for preparing letters in response to the Committee's resolution of suggestions. In general, Mr. Wannamaker anticipated at least two letters: a general acknowledgment that the suggestion was received, followed by a letter that reports that the suggestion was referred to a subcommittee or that the Committee considered the suggestion at a particular meeting.

26. Status of legislation exempting certain members of the National Guard and Reservists from the means test.

Judge Wedoff described an amendment to § 707(b) of the Code that had just passed Congress (but had not yet been signed by the President) that would give a temporary exclusion from the means test to National Guard members and Reservists who are called up for active duty. He said that the exclusion period would be in effect if a qualifying debtor is called up for active duty military service or a homeland defense activity for more than 90 days, and would last until 540 days after the military service or homeland defense activity ends.

Judge Wedoff said that because the proposed amendment provided only for a *temporary* exclusion (rather than a permanent exemption like the disabled veteran exemption), implementing it through Form 22A (the chapter 7 means test form) was difficult. He envisioned that some qualifying debtors would file near the end of their exclusion period, such that it was almost certain that the exclusion would expire while the case was still pending, and while it was still possible to bring a § 707(b) motion asserting a presumption of abuse. He said it might make sense for such debtors to complete the whole form when filing, since they could probably be compelled to complete the form once the exclusion expired anyway. Other debtors, however, would file while on active duty, or early in the 540 day period, such that it was almost certain that their case could be completed long before the exclusion expired. He said that for such debtors it was unlikely that a presumption of abuse would arise during the case, and making them complete the entire means test form seemed to defeat the purpose of the legislation.

Judge Wedoff said that the challenge was deciding at what time during the exclusion period the Committee should recommend that a qualifying debtor be required to complete the entire Form 22A. He suggested two alternative approaches: (1) allow the debtor to check a box asserting that the exclusion applies, but still require completion of the form (even if the presumption of abuse will not apply to some); or (2) allow a temporary exclusion box, but only require completing the full form if the exclusion will expire shortly after filing (within 100 days, for example).

In discussing the matter, members advocated for each of the suggestions put forth by Judge Wedoff, and additional suggestions emerged. Some members rejected the position that all qualifying debtors should be required to complete the entire form, but could not agree on appropriate cutoff date. Professor Gibson suggested limiting the category of qualifying debtors who don't have to complete the entire form to active duty debtors, while Judge Perris suggested that a qualifying debtor be allowed to check a temporary exclusion box, along with a date of separation from active service, but only be required to complete the entire form if an interested party files a motion. Ultimately, five proposals emerged for a vote:

1. all qualifying debtors complete the entire form;
2. no qualifying debtor completes the entire form unless a motion is filed;
3. qualifying debtors must complete the entire form only if filing within 100 days of the expiration of the temporary exclusion;
4. qualifying debtors must complete the entire form unless they are on active duty or performing a homeland defense activity at the time of filing; or
5. qualifying debtors must complete the entire form only if the exemption expires during the case at the time a § 707(b) presumption of abuse motion could be filed (generally 60 days after the § 341 meeting, unless extended by the court).

A vote was taken in rounds, with option 5 (only complete entire form if a § 707(b) motion could be raised) carrying by two votes over option 2 (only complete entire form if a motion is filed). Because the legislation had an effective date of 60 days after enactment, and it was anticipated that the President would sign the legislation such that the effective date would occur in December, the Chair asked Judge Wedoff and Professor Gibson to revise Form 22A to incorporate option 5, and to draft a proposed interim rule for the Committee to consider via email for a final vote as soon as possible.

After the meeting, a version of Form 22A, containing a new temporary exclusion checkbox, and a new line 1C implementing option 5 above, was circulated to the Committee and approved without objection. The Committee also considered and recommended distributing proposed Interim Rule 1007-I to the courts with a recommendation that it be adopted as a local rule to implement the change to Form 22A. Both recommendations were approved on an expedited basis by the Standing Committee and the Executive Committee of the Judicial Conference.

27. Notice to local courts concerning the need to repeal or amend local rules adopting the

Interim Rules.

The Chair said that the AO recently notified the courts that, with one exception, they will need to sunset the general orders or local rules used to adopt the Interim Rules in 2005, because they would be replaced by the final BAPCPA-related amendments on December 1, 2008. She said the exception was Interim Rule 5012, which addressed Communication and Cooperation with Foreign Courts and Foreign Representatives. She said a permanent version of Rule 5012 was currently out for comment, and was on schedule to go into effect December 1, 2010.

28. Notice to local courts concerning the need to review local rules in light of the upcoming time computation amendments.

The Chair said she anticipated that the AO would soon notify the courts to revise their local rules in contemplation of the adoption of the time-amendment rules due to take effect in December, 2009. Mr. Rabiej added that the issue was pertinent to all the federal rules, and he anticipated that there would be several transmittals to the courts, as well as an article in the Third Branch.

29. *Bull Pen:* All of the proposed rules amendments currently in the *Bull Pen* are addressed above.

30. Oral report on appointment of new chairs of the Business and Forms Subcommittees and composition of subcommittees.

The Chair asked the members to review their subcommittee assignments and let her know if there are any changes needed.

31. Future meetings:

The Chair reminded the Committee that the next meeting will be on March 26-27, 2009, at Estancia La Jolla Hotel & Spa in San Diego. Possible locations for the fall 2009 meeting were discussed.

32. New business: No new business.

33. Adjourn

Respectfully submitted,

Stephen "Scott" Myers

Item 3 will be an oral report.



Draft minutes of the January 2009 meeting of the Standing Committee
will be distributed separately.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: FEEDBACK ON PROPOSED AMENDMENTS TO RULE 3001(c) AND NEW
RULE 3002.1, AND RECOMMENDED MODIFICATION OF RULE 3002.1

DATE: FEBRUARY 19, 2009

At the October 2008 meeting, the Advisory Committee approved a preliminary draft of amendments to Rule 3001(c) and a new Rule 3002.1. Among other things, these rules prescribe the supporting information to be included in a proof of claim for an obligation secured by a home mortgage and the procedures for disclosing and challenging in chapter 13 cases post-petition mortgage payment changes and charges. After the Denver meeting, because of informal feedback received concerning the proposed rule amendments, Judge Swain directed that the rules be placed on the agenda of the March meeting and asked the Subcommittee on Consumer Issues to give further consideration to them. This memorandum describes the feedback that we have received on proposed Rules 3001(c) and 3002.1 and discusses the **Subcommittee's recommendation that Rule 3002.1, as previously approved by the Advisory Committee, be modified as described below.** The Subcommittee further recommends that the proposed amendments to Rule 3001(c) and new Rule 3002.1 be submitted to the Standing Committee with a request that they be published for comment in August 2009.

Feedback on Proposed Rules and Subcommittee's Response

After the Denver meeting, the proposed rules were circulated informally to two groups with which the Subcommittee had conferred during the drafting process: the group of bankruptcy

judges chaired by Judge Ray Lyons (Bankr. D.N.J.) that was assembled to draft a model local rule to deal with mortgage charges in chapter 13 cases, and the National Association of Chapter Thirteen Trustees (“NACTT”) group of chapter 13 trustees, mortgage servicers, and attorneys that drafted the best practices document. Everyone who commented is supportive of the creation of national rules to govern mortgages in chapter 13 cases, and they were generally positive in their reaction to the Committee’s proposals. Each group, however, voiced some concerns, which the Subcommittee carefully considered.

Judges’ comments. The comments received from this group focused primarily on three topics: (1) the treatment of escrow deficits; (2) the provisions requiring various notices to be filed as supplements to the proof of claim, rather than being filed on the case docket; and (3) the procedure regarding the notice of final cure payment.

One comment concerned Rule 3002.1(b)(1), which says that the mortgage holder’s notice of a payment change “shall conform substantially to the form of notice under applicable nonbankruptcy law and the underlying agreement that would govern if the debtor were not a debtor in bankruptcy.” The concern expressed was that this provision would allow the mortgagee to collect a cure of a prepetition escrow deficit over a 12-month period rather than over the life of the plan, which was described as constituting “a radical departure from the cure provisions contained within the Code.” The Subcommittee, however, concluded that the provision concerns only the “form and content” of notices of payment changes. It does not address at all how escrow deficits are calculated, whether they are determined to arise prior to or after the petition, or the time period permitted for a cure.

A number of the comments addressed Rule 3002.1’s provision for the filing of notices by

mortgagees on the claims register, as a supplement to the proof of claim, rather than on the case docket by means of CM/ECF. The Subcommittee noted that the method of filing specified in the proposed rule was strongly urged by the Administrative Office's advisory groups of bankruptcy judges and bankruptcy clerks, who were concerned about the absence of statutory authority to give special CM/ECF access to one particular group of creditors, as well as about the resulting cluttering of the case docket. Judges who were critical of the proposed rule's approach noted the claims register's lack of electronic service capabilities and possible confusion between a supplement to a claim and a claim amendment. The Subcommittee concluded, however, that this issue appears to be one on which the rule cannot satisfy everyone. Because Rule 3002.1 requires actual service on the debtor, debtor's counsel, and the trustee, the Subcommittee favors adhering to the proposed handling of the notice filing.

The judges' comments about the procedure for the notice of final cure payment concerned what they viewed as its overly complex nature. Rule 3002.1(d) - (f) creates a three-step process. First the trustee (or debtor) files a notice of final cure payment. Next the mortgagee files a statement indicating whether it agrees that the debtor has fully cured the default and whether the debtor has maintained all the postpetition payments. If the mortgagee contends that all amounts have not been paid, it must itemize the amounts it contends remain unpaid. Finally, the debtor or trustee can move for a court determination of whether the cure and postpetition amounts have been paid in full.

The comments raised a concern that this procedure creates an unnecessary step, the filing of a statement by the mortgagee. Instead, the judges said that the mortgagee should just be required to file an objection to the trustee's notice. The Subcommittee concluded that this

comment suggested that the proposed rule does not make it sufficiently clear that the mortgagee's statement goes beyond the scope of the trustee's notice. The trustee only provides notice about the cure of the prepetition default. The mortgagee then responds to that statement, but also asserts whether postpetition amounts are current. In districts in which the debtor makes postpetition payments directly to the mortgagee, the trustee would not have a basis for stating whether all of those payments have been made. The Subcommittee therefore believes that there is a good reason for the structure of the procedure that the Advisory Committee previously approved, but it recommends a slight modification of proposed Rule 3002.1(e) and the Committee Note to make the steps of the procedure clearer. It recommends that subdivision (e) and the Committee Note be modified as indicated below:

**Rule 3002.1. Notice Relating to Claims Secured by Security
Interest in the Debtor's Principal Residence**

* * * * *

1 (e) RESPONSE TO NOTICE OF FINAL CURE
2 PAYMENT. Within 21 days after service of the notice given
3 pursuant to subdivision (d) of this rule, the holder of a claim
4 secured by a security interest in the debtor's principal residence
5 shall file and serve a statement indicating (1) whether it agrees that
6 the debtor has paid in full the amount required by the underlying
7 agreement and applicable nonbankruptcy law for the curing of the
8 default and (2) whether, consistent with § 1322(b)(5) of the Code,
9 the debtor is otherwise current on all the maintenance of payments

10 ~~in accordance with § 1322(b)(5) of the Code.~~ If applicable, the
11 statement shall contain an itemization of any required cure or
12 postpetition amounts that the holder contends remain unpaid in
13 connection with the security interest as of the date of the statement.
14 The statement shall be filed as a supplement to the holder's proof
15 of claim and shall not be subject to Rule 3001(f).

* * * * *

COMMITTEE NOTE

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Subdivision (e) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (d). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured. It must also indicate ~~and~~ whether the debtor is otherwise current on all payments ~~amounts have been paid in full~~ in accordance with § 1322(b)(5). If the holder of the claim contends that either amount has not been paid in full, its response must include an itemization of all missed amounts. The claim holder's responsive statement must be filed on the claims register as a supplement to the creditor's proof of claim and served on the trustee, the debtor, and the debtor's counsel. Rule 3001(f) does not apply to this statement, and therefore it will not constitute prima facie evidence of the validity and amount of the allegedly unpaid cure or postpetition obligations.

* * * * *

NACTT comments. Members of the NACTT Mortgage Liaison Committee initially provided their comments in separate conference calls with Mr. Rao and the reporter. The Subcommittee considered those comments during its December 23, 2008, conference call, and it

recommends a modification to proposed Rule 3002.1 in response. The group later submitted written comments, which are in the agenda materials following this memorandum. Because the Subcommittee was unable to give full consideration to the written comments, it asked Mr. Rao and the reporter to summarize the comments and provide responses for the Advisory Committee. That discussion is set forth in the next section of this memorandum.

The NACTT group raised a question about the application of proposed Rule 3002.1(a) to claims secured by the debtor's principal residence that are based on an open end credit agreement, such as home equity lines of credit. Because these loans are subject to monthly adjustments to the payment amount, they were concerned that compliance with proposed Rule 3002.1(a) requiring the filing of notices of payment changes would be overly burdensome. The Subcommittee carefully considered this issue and decided not to exempt home equity lines of credit from the coverage of the rule. It prefers to maintain a uniform requirement for all home mortgages and favors a filing requirement, which will eliminate disputes about whether a notice was in fact sent to the trustee or debtor.

The NACTT committee stated that the 30-day requirement in Rule 3002.1(c) for giving notice of postpetition charges is too short. They expressed concern that this monthly requirement "will cause a lot of havoc and discontent," especially as applied to nominal charges. They would prefer that the rule require such notices to be filed annually. (One judge also raised this concern and suggested an annual or semiannual notice requirement.) The Subcommittee originally proposed the 30-day requirement in order to allow disputed charges to be resolved quickly and also to allow the debtor to seek a plan modification to deal with charges before the accumulated amount becomes too great. It was persuaded, however, by the point made about the burden

caused by the need to file monthly with respect to relatively small amounts. Seeking to strike an appropriate balance, the Subcommittee recommends that the rule be modified to require notice of fees, expenses, and charges to be filed within 180 days after the date they are incurred. As modified, Rule 3002.1(c) and the Committee Note would read as follows:

**Rule 3002.1. Notice Relating to Claims Secured by Security
Interest in the Debtor's Principal Residence**

* * * * *

1 (c) NOTICE OF FEES, EXPENSES, AND CHARGES. In
2 a chapter 13 case, if a claim secured by a security interest in the
3 debtor's principal residence is provided for under the debtor's plan
4 pursuant to § 1322(b)(5) of the Code, the holder of such claim shall
5 file and serve on the debtor, debtor's counsel, and the trustee a
6 notice containing an itemization of all fees, expenses, or charges
7 incurred in connection with the claim after the filing of the
8 bankruptcy case that the holder asserts are recoverable against the
9 debtor or against the debtor's principal residence. The notice shall
10 be filed as a supplement to the holder's proof of claim and served
11 within ~~30~~ 180 days after the date when such fees, expenses, or
12 charges are incurred. The notice shall not be subject to Rule
13 3001(f). On motion of the debtor or trustee filed no later than one
14 year after service of the notice given pursuant to this subdivision,
15 after notice and hearing, the court shall determine whether such

16 fees, expenses, or charges are required by the underlying agreement
17 and applicable nonbankruptcy law for the curing of the default or
18 the maintenance of payments in accordance with § 1322(b)(5) of
19 the Code.

* * * * *

COMMITTEE NOTE

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Subdivision (c) requires an itemized notice to be given of any postpetition assessment of fees, expenses, or charges in connection with a claim secured by the debtor's principal residence. Such amounts might include, for example, inspection fees, late charges, and attorney's fees. The holder of the claim must serve a notice itemizing any such postpetition fees on the debtor, debtor's counsel, and the trustee within ~~30~~ 180 days after the charges are incurred. Notice must also be filed on the claims register as a supplement to the creditor's proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the postpetition fees, expenses, and charges.

* * * * *

The NACTT group also raised questions about the procedure regarding the notice of final cure payment. One objection was that the 21-day period in Rule 3002.1(e) for the mortgagee to file its response to the trustee's notice is too short. Some members of the group also suggested that the mortgagee should be required just to object to the trustee's notice, rather than to file its own statement. The proposed modification of Rule 3002.1(e), discussed above, is intended to clarify the intent of the rule so as to address the latter point. As for first objection, the Subcommittee was concerned that extending the response period to 60 days, as was suggested,

would unduly delay the closing of the case.

Finally, the NACTT group raised a question about whether the Rule 3001(c)(2)(A) amendment permits postpetition, pre-confirmation attorney's fees for preparing and filing the proof of claim to be included in the proof of claim, as some circuits currently allow. They were concerned that the language "incurred prior to the date of the petition" implies otherwise and suggested that the Committee Note might clarify this issue. The Subcommittee noted that the language of the amendment is similar to the language currently in Form 10, and that the proposed rule amendment does not preclude the inclusion of additional fees or charges if the court allows them to be treated as part of the claim. It is therefore not proposing a change in the Committee Note at this time.

Additional NACTT Comments

The written comments submitted by the NACTT committee raised some additional issues that were not addressed by the Subcommittee. They are briefly discussed here, with responses by Mr. Rao and the reporter, so that the Advisory Committee can determine whether it wishes to make any additional modifications to the proposed rules before they are published for public comment.

Comments on Rule 3001(c)

(1) Use of the term "itemized statement of interest" in (c)(2)(A) should be changed to "an itemization" to make clear that an additional requirement is not being imposed. In the alternative, the Advisory Committee should consider creating a model or form itemized statement.

- The term "itemized statement of interest" is taken directly from the current language of

item 1 on Form 10. It does not seem to require further clarification.

(2) The requirement in (c)(2)(B) that the claimant attach “a statement of the amount necessary to cure any default as of the petition date” should be clarified to resolve how the escrow shortage is calculated.

- As noted above in response to one of the judges’ comments, neither this amendment nor proposed Rule 3002.1 is intended to prescribe how escrow shortages are calculated or treated in chapter 13. That matter should be left to the courts, which currently take different approaches.

(3) The requirement in (c)(2)(C) that the proof of claim with respect to a home mortgage be accompanied by “an escrow account statement prepared as of the date of the filing of the petition” leaves a 60-day gap at the beginning of the case during which time the payment amount would be unclear. The rule should state that the newly calculated payment amount should take effect as of the date of the petition.

- This comment is based on the view that the Real Estate Settlement Procedures Act (“RESPA”) requires a servicer to provide 60 days’ notice of a change in the escrow amount following an escrow analysis before it can take effect. Mr. Rao does not read the law and accompanying regulations to impose such a requirement, and the reporter concurs in his interpretation. The regulations (24 C.F.R. § 3500.17) require a servicer to provide an escrow account statement within 60 days from the end of a “short year,” that is, a truncated escrow account computation year, which is likely to be utilized as a result of the requirement that an escrow account statement be prepared as of the date of the filing of the bankruptcy petition. The regulations do not say, however, that a change in the escrow payment amount may not take effect for 60 days. Nor does the proposed Rule 3001(c)(2)(C) preclude a newly calculated payment

amount from taking effect as of the date of the filing of the petition.

(4) The title of proposed Rule 3001(c)(3) – “Failure to Provide Supporting Information” – may suggest that a creditor must file all of the documents evidencing each itemized amount listed as an arrearage in the proof of claim (such as each broker price opinion, each late fee printout, and invoices for attorneys’ fees).

- This subdivision of the rule does not impose any additional documentation requirements. Instead, it specifies sanctions that may be imposed if “the holder of a claims fails to provide the information required in subdivision (c) of this rule.” If, however, the Advisory Committee believes the title of the subdivision is potentially misleading, it could be changed to “Failure to Provide Required Information.”

Comments on Rule 3002.1

(1) Proposed Rule 3002.1(c), which requires notice of postpetition fees, expenses, and charges, does not include any payment mechanism. It would be desirable for the rule to provide a uniform, nationwide practice regarding who will pay these charges and when they will be paid.

- Just as with the calculation and treatment of escrow shortages, this comment goes beyond the purpose of the rule. This provision seeks the disclosure of information during a chapter 13 case about fees and charges that are being assessed. How those additional amounts are to be paid should continue to be left up to the parties and the courts.

(2) Proposed Rule 3002.1(g), which provides sanctions for the failure to provide information required by the rule, should have a “provision in the commentary that allows a remedial filing.” When a lender fails to provide notice of a payment change in accordance with the rule, it should be allowed later to file notice of the change and have the payment change go

into effect 30 days after the date of the filing.

- Under subdivision (a), a notice of payment change must be filed and served “at least 30 days before a payment at a new amount is due.” Under subdivision (g), the failure to comply with this requirement would prevent the creditor from presenting evidence supporting the collection of that amount in any adversary proceeding or contested matter. It would not, however, prevent the creditor from later filing a notice of the change and seeking the new payment amount prospectively. No change therefore seems needed. If, however, the Advisory Committee believes that the rule is potentially unclear in this respect so that an addition to the Committee Note addressing this point would be helpful, one could be added.

Conclusion

Attached to this memorandum is the text of the amendments to Rule 3001(c) and new Rule 3002.1, as approved by the Advisory Committee in October and subsequently proposed for modification by the Subcommittee. The Subcommittee recommends that they be approved by the Advisory Committee and sent to the Standing Committee with the request that they be published for comment in August 2009.

Rule 3001. Proof of Claim

* * * * *

1 (c) SUPPORTING INFORMATION.

2 (1) *Claim Based on a Writing.* When a claim, or an
3 interest in property of the debtor securing the claim, is based on a
4 writing, the original or a duplicate shall be filed with the proof of
5 claim. If the writing has been lost or destroyed, a statement of the
6 circumstances of the loss or destruction shall be filed with the
7 claim.

8 (2) *Additional Statements Required.*

9 (A) If, in addition to its principal amount, a
10 claim includes interest, fees, expenses, or other charges incurred
11 prior to the date of the petition, an itemized statement of the
12 interest, fees, expenses, or charges shall be filed with the proof of
13 claim.

14 (B) If a security interest is claimed in property of
15 the debtor, the proof of claim shall include a statement of the
16 amount necessary to cure any default as of the date of the petition.

17 (C) If a security interest is claimed in property that is
18 the debtor's principal residence and an escrow account has been
19 established in connection with the claim, the proof of claim shall be

20 accompanied by an escrow account statement prepared as of the date
21 of the filing of the petition, in a form consistent with applicable
22 nonbankruptcy law.

23 (3) Failure to Provide Supporting Information. If
24 the holder of a claim fails to provide the information required in
25 subdivision (c) of this rule, the holder may not present that
26 information, in any form, as evidence in any hearing or submission
27 in any contested matter or adversary proceeding in the case, unless
28 the failure was substantially justified or is harmless. In addition to
29 or instead of this sanction, the court, after notice and hearing, may
30 award other appropriate relief, including reasonable expenses and
31 attorney's fees caused by the failure.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany a proof of claim and the consequences of failing to provide the required information. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement that itemizes these additional amounts. The itemization must be sufficiently specific to make clear the basis for the claimed amount.

If a claim is secured by property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default. In the case of a claim secured by the debtor's principal residence, if an escrow account

has been established in connection with the claim, the proof of claim must be accompanied by an escrow account statement showing the account balance and any amount owed as of the date of the filing of the bankruptcy petition. The statement shall be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.*, 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act).

A creditor who files a proof of claim and fails to provide any of the information required by subdivision (c) will be subject to the imposition of sanctions by the court. The creditor will be precluded from introducing into evidence or submitting in any form the omitted information at any trial or hearing in the bankruptcy case, unless the failure was substantially justified or is harmless. The court in its discretion, after notice and hearing, may award other appropriate relief, including costs and attorney's fees caused by the creditor's failure to provide the required information, in lieu of or in addition to the specified sanction.

Rule 3002.1 Notice Relating to Claims Secured by Security

Interest in the Debtor's Principal Residence

1 (a) NOTICE OF PAYMENT CHANGES. In a chapter 13
2 case, if a claim secured by a security interest in the debtor's
3 principal residence is provided for under the debtor's plan pursuant
4 to § 1322(b)(5) of the Code, the holder of such claim shall file and
5 serve on the debtor, debtor's counsel, and the trustee notice of any
6 change in the payment amount, including changes that result from
7 interest rate and escrow account adjustments, at least 30 days
8 before a payment at a new amount is due.

9 (b) FORM AND CONTENT. Any notice filed and served
10 pursuant to subdivision (a) of this rule (1) shall conform
11 substantially to the form of notice under applicable nonbankruptcy
12 law and the underlying agreement that would be given if the debtor
13 were not a debtor in bankruptcy, (2) shall be filed as a supplement
14 to the holder's proof of claim, and (3) shall not be subject to Rule
15 3001(f).

16 (c) NOTICE OF FEES, EXPENSES, AND CHARGES. In
17 a chapter 13 case, if a claim secured by a security interest in the
18 debtor's principal residence is provided for under the debtor's plan
19 pursuant to § 1322(b)(5) of the Code, the holder of such claim shall
20 file and serve on the debtor, debtor's counsel, and the trustee a
21 notice containing an itemization of all fees, expenses, or charges
22 incurred in connection with the claim after the filing of the
23 bankruptcy case that the holder asserts are recoverable against the
24 debtor or against the debtor's principal residence. The notice shall
25 be filed as a supplement to the holder's proof of claim and served
26 within 180 days after the date when such fees, expenses, or charges
27 are incurred. The notice shall not be subject to Rule 3001(f). On
28 motion of the debtor or trustee filed no later than one year after
29 service of the notice given pursuant to this subdivision, after notice
30 and hearing, the court shall determine whether such fees, expenses,

31 or charges are required by the underlying agreement and applicable
32 nonbankruptcy law for the curing of the default or the maintenance
33 of payments in accordance with § 1322(b)(5) of the Code.

34 (d) NOTICE OF FINAL CURE PAYMENT. Within 30
35 days after making the final payment of any cure amount made on a
36 claim secured by a security interest in the debtor's principal
37 residence, the trustee in a chapter 13 case shall file and serve upon
38 the holder of the claim, the debtor, and debtor's counsel a notice
39 stating that the amount required to cure the default has been paid in
40 full. If the debtor contends that the final cure payment has been
41 made and the trustee does not file and serve the notice required by
42 this subdivision within the specified time period, the debtor may
43 file and serve upon the holder of the claim and the trustee a notice
44 stating that the amount required to cure the default has been paid in
45 full.

46 (e) RESPONSE TO NOTICE OF FINAL CURE
47 PAYMENT. Within 21 days after service of the notice given
48 pursuant to subdivision (d) of this rule, the holder of a claim
49 secured by a security interest in the debtor's principal residence
50 shall file and serve a statement indicating (1) whether it agrees that
51 the debtor has paid in full the amount required by the underlying
52 agreement and applicable nonbankruptcy law for the curing of the

53 default and (2) whether, consistent with § 1322(b)(5) of the Code,
54 the debtor is otherwise current on all payments. If applicable, the
55 statement shall contain an itemization of any required cure or
56 postpetition amounts that the holder contends remain unpaid in
57 connection with the security interest as of the date of the statement.
58 The statement shall be filed as a supplement to the holder's proof
59 of claim and shall not be subject to Rule 3001(f).

60 (f) MOTION AND HEARING. On motion of the debtor
61 or trustee filed no later than 21 days after service of the statement
62 given pursuant to subdivision (e) of this rule, after notice and
63 hearing, the court shall determine whether the debtor has cured the
64 default and paid in full all postpetition amounts required by the
65 underlying agreement and applicable nonbankruptcy law in
66 connection with the security interest.

67 (g) FAILURE TO NOTIFY. If the holder of a claim
68 secured by a security interest in the debtor's principal residence
69 fails to provide information required by subdivision (a), (c), or (e)
70 of this rule, the holder may not present that information, in any
71 form, as evidence in any hearing or submission in any contested
72 matter or adversary proceeding in the case, unless the failure was
73 substantially justified or is harmless. In addition to or instead of
74 this sanction, the court, after notice and hearing, may award other

75 appropriate relief, including reasonable expenses and attorney's
76 fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee must be informed of the exact amounts needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amounts of the postpetition payment obligations. If the latter amounts change over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of those changes in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustments. Compliance with the notice provisions of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of changes in postpetition payment obligations might violate the automatic stay.

Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to notify the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. This notice must be provided at least 30 days before the new payment amount is due.

Subdivision (b) provides the method of giving the notice of a payment change. The holder of the claim must give notice of the change in substantially the same form that would be used according to the underlying agreement and nonbankruptcy law if the debtor were not a debtor in bankruptcy. In addition to serving the debtor, debtor's counsel, and the trustee, as required by subdivision (a), the holder of the claim must also file the notice of payment change on the claims register in the case as a supplement

to its proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the payment change.

Subdivision (c) requires an itemized notice to be given of any postpetition assessment of fees, expenses, or charges in connection with a claim secured by the debtor's principal residence. Such amounts might include, for example, inspection fees, late charges, and attorney's fees. The holder of the claim must serve a notice itemizing any such postpetition fees on the debtor, debtor's counsel, and the trustee within 180 days after the charges are incurred. Notice must also be filed on the claims register as a supplement to the creditor's proof of claim. Rule 3001(f) does not apply to this notice, and therefore it will not constitute prima facie evidence of the validity and amount of the postpetition fees, expenses, and charges.

Within a year after service of a notice under subdivision (c), the debtor or trustee may move for a court determination of whether the fees, expenses, or charges are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (d) requires the trustee to issue a notice within 30 days after making the last payment to cure a prepetition default on a claim secured by the debtor's principal residence. This notice, which must be served on the holder of the claim, the debtor, and the debtor's counsel, provides that the amount required to cure the default has been paid in full. If the trustee fails to file this statement within the time required by the subdivision, a debtor who contends that the prepetition default has been cured may file and serve the statement on the holder of the claim and the trustee.

Subdivision (e) governs the response of the holder of the claim to the trustee's or debtor's notice under subdivision (d). Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured. It must also indicate whether the debtor is otherwise current on all payments in accordance with § 1322(b)(5). If the holder of the claim contends that either amount has not been paid in full, its response must include an itemization of all missed amounts. The claim holder's responsive statement must be filed on the claims register as a

supplement to the creditor's proof of claim and served on the trustee, the debtor, and the debtor's counsel. Rule 3001(f) does not apply to this statement, and therefore it will not constitute prima facie evidence of the validity and amount of the allegedly unpaid cure or postpetition obligations.

Subdivision (f) provides the procedure for the judicial resolution of any disputes that may arise about the payment of a claim secured by the debtor's principal residence. The trustee or debtor may move no later than 21 days after the service of the statement under (e) for a determination by the court of whether the prepetition default has been cured and whether all postpetition obligations have been fully paid.

Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information required by subdivisions (a), (c), or (e). The holder of the claim will be precluded from introducing into evidence or submitting in any form the omitted information at any trial or hearing in the bankruptcy case, unless the failure was substantially justified or is harmless. The court in its discretion, after notice and hearing, may award other appropriate relief, including costs and attorney's fees caused by the creditor's failure to provide the required information, in lieu of or in addition to the specified sanction.

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (g).

Rule 3001 (c)(2)(A)

Comment: Current case law in the 5th Circuit (In re Madison), 9th Circuit (In re Atwood) 11th Circuit (In re Dean) address the inclusion of post petition pre confirmation fees in the pre petition arrearage claim. The NACTT best practices, as written and endorsed, envisioned that these fees would be itemized in the proof of claim arrearage form for reasonable and necessary fees actually incurred. The fees are for attorney fees for the preparation and filing of the proof of claim, filing of an appearance and review of the debtor's plan. The committee found that these types of fees are common in the majority of the Chapter 13 bankruptcies, and incurred and paid throughout the term of the plan.

Concern: The language in Rule 3001(c)(2)(A) – "*prior to the date of the petition*" appears to indicate a change in this practice. As these post petition pre confirmation fees and costs are so common, requiring these to be filed with the court for approval will increase the attorney fees paid by the debtor without reason. If this change was not the intended consequence of this provision, some change would appear to be in order.

Our committee suggests that an advisory comment be included stating that "Nothing in this Rule should mandate a change to current local practice that allows the post petition, pre confirmation fees to be included in the pre petition arrearage claim."

Comment: The language – "*an itemized statement of interest*" would appear to need some clarification in the commentary.

Concern: The committee asks the Rules committee to consider including in the advisory comments a clarification as to how the interest should be listed and itemized on the proof of claim. Our committee recommends that the commentary distinguish between nontraditional mortgages and traditional mortgages interest itemization. In nontraditional loans, (such as heloc's, daily simple interest and "exotic" loans) the itemized interest should actually be indicated as the interest accrued to the date of the petition. In traditional loans, some clarification as to whether or not the requirement is that each payment in arrears has to be detailed into principal and interest will need to be provided or if the total of interest can be provided.

Additionally, the committee asks the Rules subcommittee to consider changing the term of "itemized statement" to an "itemization". The committee is concerned that the term "itemized statement" can be construed as an additional requirement. To the extent that an itemized statement is being required, the committee requests that the Rules Committee consider a model or form itemization be included in the new Rules. Our committee is currently working on a model arrearage attachment for the proof of claim and we will provide this when completed in the next month or so. We thought that by providing a model form from the committee would allow greater consistency throughout various districts and provide clarification as to the type of itemization needed.

Rule 3001 (c)(2)(B)

Comment: With regard to listing the amount necessary to cure the default in the claim, the committee requested language indicating that post-petition, pre-confirmation fees and costs may be included where it is allowed by local practice. The language in Rule 3001(c)(2)(B) – “*as of the date of petition*” – appears to again indicate this change in current practice of including reasonable post petition pre confirmation fees in the proof of claim.

Concern: If this change was not the intended consequence of this provision, some change would appear to be in order.

Our committee suggests that a advisory comment be included stating that “Nothing in this Rule should mandate a change to current local practice that allows the post petition, pre-confirmation fees to be included in the pre petition arrearage claim.”

Comment: “*necessary to cure any default as of the date of the petition*”

Concern: An ongoing issue in practice, litigation and local rules is how to resolve the “escrow shortage” issue. The committee asks that clarification be provided in the commentary as to how the “escrow shortage” should be paid.

The escrow shortage is the amount needed to properly fund the escrow account on the date of the filing of the bankruptcy. If the mortgage is deemed “current” as of the date of filing, the escrow shortage is the amount that needed (the default) to be in the escrow account of the mortgage to be fully funded for the taxes, insurance and escrow disbursements for the coming escrow cycle.

If an escrow analysis is run as of the date of filing, the escrow shortage is calculated pursuant to RESPA guidelines and a specific amount is listed. Generally, this shortage amount is then divided by the 12 months in the analysis period and the post petition mortgage payment is raised accordingly. There are many local rules and practices on this issue – however consistency and national practice on this issue would be the committee’s goal.

The committee would suggest including this escrow shortage amount in the pre petition arrearage claim as is the current practice of many servicers to be the recommended practice.

Rule 3001(c)(2)(C)

Comment: on the language *“shall be accompanied by an escrow account statement”*

The trustees on the committee believe that this information and addition is critical as to the correct escrow amount for the payment if new legislation modifying mortgages was enacted allowing parties to know the amount of the escrow to be included in the modified payment.

Concern: The Real Estate Settlement Procedures Act (RESPA) applies to most mortgages. The requirements of RESPA are not abrogated by the filing of the bankruptcy. Under RESPA, a servicer must give 60 days notice from the time of the escrow analysis to the date of the change of payment. As such, the payment that will be indicated on the escrow analysis filed with court will not be effective for 60 days after filing.

This leaves a 60 day period in which direction would need to be provided as to the payment to be made.

If the Rule this seeks to calculate the monthly payment retroactive to the date of filing, this would appear to conflict with the requirements of RESPA. While this Rule is pending approval, we believe that HUD should be able to resolve this issue with a change to the RESPA regulations prior to enactment.

Our committee’s suggestion would be that the “new” calculated payment is immediately effective as of the date of the petition. This would appear to be fairer to the debtor as the “new” payment does not include any shortage that would have been included in the prepetition arrearage amount. It also provides more certainty to the servicer as they know what payment to expect as of the date of filing.

The committee asked that the comments clarify that an escrow analysis that resulted in a payment change be listed in the proof of claim and would not be required to file an additional payment change notice under Rule 3023(a). Our suggestion as to language is as follows:

“The Rule is not intended to be construed so that the giving of immediate effect to adjustments in the monthly payment amounts would constitute a per se violation of the noticing requirements of the Real Estate Settlement Procedures Act (RESPA) or any other applicable nonbankruptcy law.”

Rule 3001(c)(3)

Comment: *“Failure to provide supporting information”*

Our committee supports an itemization of the interest, fees and other charges due prior to the date of filing as part of the proof of claim and a copy of the note and mortgage. However, there is a concern as to the wording of the rule that it would require the creditor to file and include all of the documents evidencing each itemized amount listed in the arrearage in the proof of claim.

The committee suggests that the claim holder be allowed to present the information as evidence if the failure to provide or attach the supporting documentation is substantially justified or harmless.

If the rules seek to have each broker price opinion, each late fee printout and invoices for the foreclosure attorney fees filed with the proof of claim, the committee believes that this is excessive. This documentation is not necessary for most cases.

To the extent that the Debtor questions or wants additional information as to the itemized amounts contained in the arrearage, an objection to the proof of claim would appear to be the correct method.

The committee suggests that an advisory comment include "To the extent that the specifics of an itemized amount listed in the prepetition arrearage claim is at question, an objection should be filed."

Rule 3002.1(a) Notice of Payment Change

Comment: The committee supports the filing of Notice of Payment Changes with the Court as included in the NACTT Best Practices.

Concern: The committee requests clarification as to whether the notice provisions applied to mortgage loans that were not secured by the debtor's principal residence, such as rental property.

The committee's suggestion include in the commentary include procedures if payment change results in a decrease in payments. In these types of scenarios, the committee believes the creditor should refund any over payment to the payer of the ongoing mortgage payment- in trustee pay jurisdictions, the payment would be refunded to the Trustee, direct pay refunded to the debtor.

The committee advocates that the payments be made as a supplemental claim, with the ability for the servicer to file same without the added cost of their attorney.

Due to some adjustable rate loans that require monthly adjustments to the payment amount due to interest rate changes, some additional provisions or commentary which addresses this issue may want to be considered. Possible language is attached

New Provision in 3002.1 (non-traditional loan products)

(a) If a creditor has a claim that is secured by real property and is based on an open-ended credit agreement, such as a home equity line of credit (HELOC) or other loan type that may have frequent interest or payment adjustments that makes compliance with 3002.1(a) impracticable or burdensome, the real property creditor shall provide notice

of the loan type with creditor's proof of claim or in any future payment change notice.

Upon filing of said Notice the claimant's compliance with the 30 day notice requirement is vacated for the duration of the case and the trustee is directed to adjust the disbursements to the creditor effective with the date of the notice provided

Rule 3002.1(c) Notice of Fees, Expenses and Charges

Comment: The committee supports the filing of Notice of Fees, Expenses and Charges with the Court. The committee notes that in many Courts, the filing of such a Notice is still not possible by the creditor as a supplemental claim, due to restrictions by the Courts and lack of fields in CM/ECF

Concern: The timelines of requiring the servicer to file within 30 days a Notice with the Court is too short of a timeline and will add additional cost to the Debtor/borrower with little benefit.

The committee suggests lengthening the timeline to require the filing of all fees, expenses and costs on at least an annual basis as it is more efficient and cost effective than filing each time such items are incurred. Additionally, the committee believes that the timelines to object to the Notice is too long. The committee suggests that the timeline for objection by the Trustee or debtor's counsel be shortened to the standard objection timeframe of 30 days. The timeline allows clarity for the trustee as to whether or not to pay the additional monies outlined in the supplemental claim and allows for clarification and finality as to what may be added to an account for the servicer and the Debtor.

The proposed rule does not address those fees, expenses of charges that were approved and ordered by the Court. The Best Practices had suggested that those fees not be included in the Notice as they may have already been paid by the Trustee or Debtor as ordered by the Court and the inclusion of these fees, costs could cause double payment and confusion. The committee suggests the Notice should be solely for those fees that have not been ordered by the Court

The proposed Rule has no payment mechanism. Once the fees, costs and expenses are ordered, the proposed rule is silent as to who is to pay those fees and costs. In order to have a nationwide practice, the committee would suggest a uniform manner would be the most beneficial.

The committee requests an additional provision providing for the debtor to take action once the notice is filed. For example: the debtor should have 60 days to either (1) pay all post petition amounts included in the supplement to the claim; (b) file an objection to the supplement to claim with the court to be served on the creditor, the creditor's attorneys and the trustee; (c) enter into an agreed order allowing the claim (to be paid by the trustee); or (d) take no action and the amounts claimed shall be deemed allowed, but will not be paid by the trustee nor be discharged upon closure or conversion of the case.

The committee suggests that the commentary in the proposed rule address the payoff/request for reinstatement filed during the timeframe between the incurring of the fee or cost and the filing of the Notice.

Rule 3002.1(d)-(g)

Comment: The committee supports the idea of filing a Notice of Final Cure Payment but recommends a change in the procedure to better serve all parties in interest. It is the committee's recommendation that this Notice be provided within 90 days of the final payment in trustee conduit jurisdictions and after the prepetition arrearage claim is paid in non trustee conduit jurisdictions

Concern: The committee is unclear as to what constituted a "final cure" payment. Some members believed that the Rule is addressed the last payment made the Trustee on the pre petition arrearage claim. Some believed that the Final Cure was actually the last payment made on an ongoing mortgage payment by a Trustee at the end of the case.

The committee was concerned that this provision covers the original claim and pre petition arrearage, but did not address payment of supplemental claims filed under this subsection or any amounts allowed by order of the Court post filing.

The creditors on the committee are concerned about completing the audit of the mortgage account within the current 21 day timeline. They have requested that subcommittee consider a time increase from 21 days to 60 days to complete the final audit and file a response to the Notice of Cure Status. Additionally, the creditors of the committee are concerned if the rule no longer allows the court continues to have discretion to allow the creditor to present information required by this section where the failure to provide is substantially justified or harmless.

The committee suggests that Committee consider modifying the proposed rule as follows:

(d) Notice of Cure Status by Trustee

No later than 90 days prior to the anticipated final payment under a confirmed chapter 13 plan which contains a claim secured by the debtor's principal residence and such claim is provided for under §1322(b)(5) of the Code, the Trustee shall file and serve a statement containing the following information:

- (i) The pre petition arrearage claim of Rule 3001(c)(2)(A)and(B) has been cured or the balance that remains to be paid on such claim.*
- (ii) If the plan provides that the trustee acts as the disbursement agent for payments that come due during the pendency of the plan, a statement that the*

past petition payments have been made in accordance with the claim and supplement to the claim filed pursuant to Rule 3992 1(a) or the balance that remains to be paid to bring such amounts current.

- (iii) *Whether any amounts disclosed in a claim supplement filed pursuant to Rule 3002.1(c) have been paid by the Trustee or the balance that has not been paid by the Trustee*

(e) Notice of Cure Status by Debtor

If the debtor acts as the disbursement agent for payments that come due during the pendency of the plan, the debtor may file and serve the notices specified in (d)(ii) and/or (iii) above

(f) Response to Notice of Cure Status

Within 30 days after the service of notice given pursuant to subdivision (d) or (e) of this rule, the holder of a claim secured by a security interest in the debtor's principal residence shall file and serve a statement indicating that the holder contests the notice. If applicable, the statement shall contain an itemization of any required cure or post-petition amounts that the holder contends remains unpaid in connection with the security interest as of the date of the statement. The statement shall not be subject to Rule 3001(f).

(g) Hearing on Notice

If a response is filed pursuant to subdivision (f) of this Rule, the Court shall determine whether the notice filed pursuant to subdivision (d) or (e) is accurate and whether the default and all post-petition amounts required by the underlying agreement and applicable non-bankruptcy law have been paid.

Rule 3002.1(g) Failure to Notify

Failure to Notify

Comment: The committee recommends a provision in the commentary that allows a remedial filing. If a creditor does not notify the appropriate parties of the payment changes in accordance with the proposed rules, the committee recommends that notice be effective and the trustee or debtor be able to make the payment change prospectively 30 days after the filing of the notice of payment change

For example, a payment change that should have been filed and implemented on January 1, 2008 was actually filed on March 1, 2008. The recommendation would be that the payment change is effective on

April 1, 2008 and the payment changes for the period of January to March 2008 would be moot due to the servicer's failure to modify

If the creditor fails to provide information required by subsection (a) of the Rule within the time period proscribed, such payment change shall be effective prospectively thirty (30) days after the filing of the notice of the payment change. If the payment change resulted in a decrease in the monthly payment the trustee shall retroactively adjust the payment down and make necessary adjustment to future disbursements.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: SUBCOMMITTEE ON CONSUMER ISSUES
RE: RULE 4004 GAP ISSUE
DATE: FEBRUARY 13, 2009

At the October 2008 meeting, the Advisory Committee directed the Subcommittee on Consumer Issues to consider whether there is a need to amend Rule 4004 to address the situation in which there is a gap between the deadline for objecting to discharge and the actual entry of the discharge order. If a trustee or creditor learns during that gap period of fraud committed by the debtor, a literal reading of the current rule and § 727(d) of the Code prevents both an objection to discharge (because it would be untimely) and the revocation of the discharge once it is entered (because knowledge of the fraud would have been obtained *before* the entry of the discharge). The Seventh Circuit's recent decision in *Zedan v. Habash*, 529 F.3d 398 (2008), so held, and that court suggested the possible need for a rule or statutory amendment to address the situation.

During conference calls on December 23, 2008, and January 28, 2009, the Subcommittee discussed possible actions that might be taken to address this gap issue, noting the need to balance the interests of fairness to creditors and the integrity of the bankruptcy process against the desire for finality and a prompt resolution of discharge issues. The Subcommittee discussed four possible responses to the problem, including leaving Rule 4004 as it currently reads. Based on these discussions, **the Subcommittee recommends that Rule 4004(b) be amended to allow under certain circumstances the granting of an extension of time to object to discharge**

after the original objection period has expired. The Subcommittee suggests two options for how Rule 4004(b) might be amended to eliminate the gap problem. These alternatives are discussed below, as well as other options that the Subcommittee considered but decided not to recommend. The Subcommittee recommends that any amendment proposal approved by the Advisory Committee be sent forward to the Standing Committee with the request that it be published for public comment in August 2009.

Background

In the *Zedan* case, a creditor brought an adversary proceeding under §§ 523(a)(4) and 727(d)(1) more than one year after his period for objecting to discharge had expired and several months after the expiration of the extended objection period that had been granted the trustee. The bankruptcy court, however, had not entered the discharge at that time and indeed did not do so for another nineteen months. The objecting creditor, *Zedan*, asserted that the debtor had fraudulently misrepresented his income and the value of his assets and sought “revocation” of the discharge (which, as noted above, had not yet been issued).

The Seventh Circuit ultimately affirmed the dismissal of *Zedan*’s complaint. Noting that he had based his challenge to the discharge on § 727(d)(1) because the deadline for objecting under § 727(a) had long since passed, the court pointed out the “quandary created by the juxtaposition of the Bankruptcy Code with the Federal Rules of Bankruptcy Procedure.” 529 F.3d at 404. Rule 4004(a) requires the filing of an objection to discharge no later than 60 days following the first date set for the § 341 meeting, but it permits extension of that deadline for cause upon motion of the trustee or another party in interest filed before the original deadline has expired. Rule 4004(b). If no objection is made by the applicable deadline, the rule directs the

bankruptcy court in most cases to “forthwith grant the discharge.” Rule 4004(c)(1)

In a case like *Zedan*, however, in which the discharge is not immediately granted, a gap period is created between the objection deadline and the discharge. If a creditor discovers during that gap period that the debtor has engaged in fraud, it will be too late under the rule to object to discharge or to obtain an extension of time to do so, but the creditor will not be able to seek revocation of the discharge based on fraud even after the discharge is granted. That is because § 727(d)(1) requires that the party seeking revocation of discharge on the ground of fraud “not know of such fraud until *after* the granting of such discharge” (emphasis added). While the *Zedan* court acknowledged that the Second and Ninth Circuits had interpreted § 727(d)(1) flexibly to allow relief in this type of gap situation,¹ it sided with several district and bankruptcy courts that had enforced the literal terms of the statute. Among other things, the Seventh Circuit concluded that the relief *Zedan* sought was “nonsensical” because a “bankruptcy court cannot revoke an order that it has never issued.” *Id.* at 405.

Although the court recognized that Rule 4004 as written should have prevented the problem that the creditor faced because the rule does not allow for a significant gap period, it said that the Code must prevail when the rules are not followed. The court invited either Congress or the Supreme Court to address this problem to avoid what it characterized as the “clash” between the Bankruptcy Rules and the Code. *Id.* at 406.

¹ See *Citibank, N.A. v. Emery (In re Emery)*, 132 F.3d 892, 896 (2d Cir.1998) (imputing the discharge date back to the expiration of the deadline for objecting to discharge for purposes of § 727(d)(1)); *Ross v. Mitchell (In re Dietz)*, 914 F.2d 161, 164 (9th Cir.1990) (deeming the discharge to have been granted immediately after the objection deadline passed, even though no formal discharge order was ever entered).

Options Considered but Rejected by the Subcommittee

The Subcommittee first considered the possibility of recommending no amendment to Rule 4004. It concluded, however, that the problem created when there is a gap between the expiration of the objection period and the entry of the discharge is sufficiently significant to warrant an amendment to resolve it. Notwithstanding Rule 4004(c)(1)'s provision for the immediate entry of a discharge following the expiration of the objection period, the case law demonstrates that this direction is not always followed. A delay in the entry of a discharge has occurred with sufficient frequency to produce a conflict in the circuits on what to do when the debtor's fraud is discovered during that gap period. Moreover, Rule 4004(c)(1) itself allows for the creation of a gap since it specifies seven situations in which the discharge is not to be entered immediately upon the expiration of the time for objecting to discharge. So long as a gap can exist, there is a possibility of situations arising in which fraud will be discovered too late to object to discharge but too early to provide a basis for revocation of the discharge. According to the Seventh Circuit and some district and bankruptcy courts, there is nothing that can be done in that situation to deny the debtor a discharge.

The Subcommittee also considered whether the solution to the gap problem should be to permit the granting of any party's motion for an extension of time to object to discharge to apply to all parties in interest. That amendment would allow fraud discovered by any party during what would otherwise be a gap period to provide a basis for that party to file a complaint objecting to the discharge. While this solution would address some situations in which the gap problem arises, it would not address all situations, including the situation that gave rise to the issue in the *Zedan* case itself. Although the trustee in that case was granted an extension of time to object,

the creditor discovered the debtor's fraud several months after the trustee's deadline had expired. For unexplained reasons, the bankruptcy court did not enter a discharge for over two years after the expiration of the trustee's deadline for objecting. Allowing the creditor the same time to object as the trustee was granted would not have permitted the creditor to prevent the debtor's discharge. The Subcommittee therefore concluded that a broader solution was needed.

Based on its discussions, the Subcommittee concluded that an amendment is needed that allows a party in interest to seek an extension of time to object to discharge after the original objection deadline has expired but prior to the court's entry of the discharge. The question becomes under what circumstances such an extension of time should be allowed. The Subcommittee considered the two options discussed below, which it puts forward for the Committee's consideration.

Alternatives Suggested by the Subcommittee

Option 1. An extension of time to object may be granted if a ground for revocation is discovered during the gap period.

Under this proposal, Rule 4004(b) would be amended to allow a party to obtain an extension of time to object to discharge after the initial objection period expires if the party discovers facts that would provide a basis for revoking the discharge had the discharge already been entered. The proposed language of the amendment is as follows:

Rule 4004. Grant or Denial of Discharge

* * * * *

1

(b) EXTENSION OF TIME.

2

(1) On motion of any party in interest, after hearing on

3 notice, the court may for cause extend the time to file a complaint
4 objecting to discharge. Except as provided in paragraph (2), the
5 motion shall be filed before the time has expired.

6 (2) A motion for extension of time to file a complaint
7 objecting to discharge may be filed after the time has expired and
8 before the granting of the discharge if the objection is based on
9 facts that, if learned after the discharge, would provide a basis for
10 revocation under § 727(d), and the movant did not have knowledge
11 of those facts in time to permit the timely filing of the complaint.

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to allow, under certain specified circumstances, a party to seek an extension of time to file a complaint objecting to discharge after the time has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If a party during that period discovers fraud committed by the debtor or other facts that would provide grounds for revocation of the discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. In that situation, subdivision (b)(2) allows the party to file a motion for an extension of time to object to the discharge based on those facts so long as they were not known to the party in time to file a timely complaint.

This solution would cover all gap situations – those created by another party’s extension of time to object, by the existence of one of the situations described in Rule 4004(c)(1), and by the court’s inadvertent failure to enter the discharge in a timely manner.

It does have the possible disadvantage, however, of combining objections to discharge with grounds for revoking discharge. It would allow the moving party additional time to file a complaint objecting to discharge, but the grounds on which the complaint could be based would be limited to those that would also provide a basis for revocation under § 727(d). That means that some of the grounds for objecting to discharge under § 727(a) would no longer be available to the objecting party. Instead, in order to obtain an extension of time, the moving party would have to assert grounds for objecting to discharge under subsection (a) that also would provide a basis for revocation under subsection (d). The necessary overlap could exist at least in some cases with respect to the grounds specified in § 727(a)(2), (3), (4), and (6), all of which could involve fraud or disobedience on the part of the debtor that the objecting party might have been unable to discover before the original deadline for objecting expired. (Note that § 727(d)(3) expressly incorporates (a)(6).)

Given the interest in finality, it may be appropriate to narrow the grounds for objecting to discharge in this situation to those that would also provide a basis for revocation. The purpose is not to allow an extended period for raising any ground for objection, but merely to allow the moving party time to assert what would have been a basis for revocation of the discharge had the discharge been promptly entered. This amendment therefore permits a result similar to that allowed by the Second and Ninth Circuits, which deem the discharge to have been entered “forthwith” upon the expiration of the objection deadline, thus permitting revocation based on facts discovered after that point.

Option 2: An extension of time to object may be granted if grounds for objection are discovered during the gap period.

Some members of the Subcommittee thought that the first amendment proposal was too convoluted or too narrow in the grounds it permits the objecting party to invoke. A second option was therefore considered. Rule 4004 could be amended to allow an extension of time if the moving party discovers any ground for objection after the initial time period has expired but prior to the entry of the discharge. This amendment would be worded as follows:

Rule 4004. Grant or Denial of Discharge

* * * * *

1 (b) EXTENSION OF TIME. On motion of any party in interest,
2 after hearing on notice, the court may for cause extend the time to
3 file a complaint objecting to discharge. The motion shall be filed
4 before the time has expired, except that the motion may be filed
5 after the time has expired and before the granting of the discharge
6 if the movant did not have knowledge of the facts giving rise to the
7 objection in time to permit the timely filing of the complaint. If a
8 party in interest seeks an extension of time after the time has
9 expired, the motion must be filed promptly after the movant
10 discovers the facts on which the objection is based.

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to allow, under certain specified circumstances, a party to seek an extension of time to file a complaint objecting to discharge after the time has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry

of the discharge order. If a party during that period discovers previously unknown grounds for objecting to the debtor's discharge, it may seek an extension of time to file its complaint, so long as it files its motion promptly.

A possible argument that might be made against this proposal is that it could undermine the interests in achieving a prompt and final resolution of the debtor's discharge. It also goes beyond the problem illustrated by the *Zedan* case – the inability of a party to seek revocation of a discharge because of the court's delay in entering the discharge order. On the other hand, the enactment of such an amendment might underscore to courts the importance of promptly entering the discharge when the objection period expires and give debtors an incentive to make sure that the discharge order is promptly entered in order to prevent the possibility of extended discharge litigation.

If the Committee prefers the second proposal, consideration should be given to whether the last sentence, requiring the motion to be filed promptly upon the discovery of the facts on which the objection is based, is needed. It was included in the draft in order to prevent unnecessary prolongation of discharge litigation. Even without the explicit statement, however, a court could take into account a party's lack of diligence in filing its motion for an extension of time. The Subcommittee therefore raises the issue for discussion by the full Committee.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: QUESTIONS RAISED BY STANDING COMMITTEE CONCERNING
PROPOSED CHANGES TO FORMS 22A AND 22C

DATE: FEBRUARY 13, 2009

At the October 2008 meeting, the Advisory Committee approved proposed changes in the means test forms – 22A and 22C – to eliminate in certain lines references to “household size” and replace that term with “number of persons” or “family size.” The proposed amended forms would instruct the debtor to use the “number of persons . . . that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.”

When this item was presented to the Standing Committee at its January 2009 meeting for approval for publication, several questions were raised about the wording of the proposed instruction. Because approval for publication in August could be obtained at the June meeting when other changes to the means test forms are likely to be proposed, Judge Swain withdrew this item from the Standing Committee’s consideration at the January meeting. She later referred the matter to the Subcommittee on Consumer Issues for its consideration of whether any changes should be made to the amendment proposal and committee note previously approved by the Advisory Committee. Based on its discussion of the matter during its January 28, 2009, conference call, the **Subcommittee recommends that no additional changes be made and that the proposed amendments to Forms 22A and 22C approved at the October 2008 meeting be**

submitted to the Standing Committee for approval for publication for public comment, along with any other proposed amendments to the means test forms approved by the Advisory Committee at this meeting.

One member of the Standing Committee questioned whether the proper terminology is “personal exemption” rather than “exemption.” A subsequent check of the 1040 form revealed that “exemption” is correct. Thus no change needs to be made to that wording.

Another member questioned the circumstances in which someone could be a “dependent” if that person was not “currently . . . allowed as an exemption on [the debtor’s] federal income tax return.” The Subcommittee has concluded that there are two answers to the question. First, § 707(b)(2)(A)(ii)(I) of the Code allows deductions from current monthly income of specified expenses for the “debtor, the dependents of the debtor, and the spouse of the debtor in a joint case.” There is no statutory mandate that the term “dependents” be defined according to the IRS definition. Thus the form allows for a debtor to contend that “dependent” for means test purposes extends beyond those who may be claimed as exemptions for tax purposes.

More significantly, the IRS itself recognizes that there are situations in which someone may be a “dependent” for purposes of the expense allowances even though that person is not allowed as an exemption on the taxpayer’s current income tax return. The IRS Manual’s discussion of both national and local expense standards states that there may be “reasonable exceptions” to the general rule that “the total number of persons allowed for determining family size should be the same as those allowed as exemptions.” The examples the Manual gives are “foster children or children for whom adoption is pending.” IRS Manual 5.15.1.7, 5.15.1.9 (05-09-2008).

The Subcommittee therefore concluded that the proposed wording of the instruction – “number of persons . . . that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support” – is appropriate. It gives sufficiently concrete instruction to be helpful (“number of persons . . . allowed as exemptions”), while allowing sufficient flexibility to permit legitimate argument about the meaning of “dependent” under the Code and to take account of the reasonable exceptions recognized by the IRS (“any additional dependents whom you support”).

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules
FROM: Subcommittee on Consumer Issues
RE: Form 22C and disposable income
DATE: February 12, 2009

In a conference call held on January 28, 2009, the Subcommittee considered whether Official Form 22C should be amended to reflect decisions questioning its calculation of disposable income under § 1325(b) of the Bankruptcy Code. The Subcommittee determined that no change should be made at this time. This memorandum describes the issue and the reasons for the Subcommittee's determination.

The issue. Part I of Form 22C requires a report from debtors of their "current monthly income," as that term is defined in § 101(10A) of the Bankruptcy Code. Section 101(10A) defines "current monthly income" as the average monthly income from all sources that the debtor receives in the six calendar months before the bankruptcy filing. Accordingly, in Line 1, Form 22C directs debtors to report their "average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case." The income reported in Part I is then used to determine the debtor's

applicable commitment period under § 1325(b)(4) (Part II of the form), the applicability of the means test deductions in calculating disposable income under § 1325(b)(3) (Part III of the form), and (if the means test deductions are applicable) the calculation of disposable income under § 1325(b)(1)-(2) using the means test deductions (Parts IV and V of the form).

Since the time that this structure of Form 22C was originally adopted, a split has developed in judicial decisions as to whether a debtor's average income in the six months before filing should, as the form provides, determine "projected disposable income to be received in the applicable commitment period," as specified by § 1325(b)(1)(B). One line of authority, recently joined by the Ninth Circuit in *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008), holds that the form is correct in basing disposable income exclusively on the pre-filing six month average. However, a larger number of decisions, illustrated by *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), and *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1282 (10th Cir. 2008), hold that post-filing changes in a debtor's financial condition may (or must) be taken into consideration in determining disposable income. Form 22C has no express provision for reporting changes in income or expenses that have occurred after the time specified for reporting.

To comply with the interpretation of § 1325(b)(2) adopted by the second group of reported decisions, Form 22C could be amended to include a new line for reporting changes in post-filing income and expenses, such as the following:

Post-filing changes. If changes from the income or expenses reported in the lines above have occurred or are anticipated to occur during your applicable commitment period, and if you believe that these changes are relevant in determining your disposable income, state in the space below each line affected by a change, the reason for the change, the date of the change, and the amount by which the amount reported on the affected line should be increased or decreased. For example, if child who is currently living at home is expected to begin preschool sometime after the case is filed, an entry would be made showing that in Line 35, a new preschool expense will be incurred as of the date the schooling is anticipated to begin, increasing the amount stated on that line by the amount of the anticipated monthly cost of the schooling. Add a separate page with additional lines, if necessary.

Lines to Change	Reason for change	Date of change	Increase (+) or Decrease (-)	Amount of change
				\$
				\$
				\$
				\$

The Subcommittee's determination. In determining that no change should be made in the Form 22C to address the disposable income issue, the Subcommittee relied on three considerations.

First, although Form 22C does not explicitly direct disclosure of changes in income or expenses that have occurred or are expected to occur after the six-month pre-filing period, the existing forms provide at least some opportunity to disclose this information. Schedules I and J require a statement of changes anticipated to occur within a year of their filing, and

Form 22C itself, in Line 57, allows debtors to take deductions from disposable income for "special circumstances," which could include additional expenses anticipated to occur during the case.

Second, the question of how to calculate disposable income is unsettled, and changes to Form 22C could be seen, albeit incorrectly, as indicating a position on the question.

Finally, there is a potential for Supreme Court review of the issue, with the petition for certiorari (No. 08-998) filed in the *Lanning* case. Any change in the form should await a possible decision of the Supreme Court.

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules
FROM: Subcommittee on Consumer Issues
RE: Forms 22A-C and household expense payments
DATE: February 12, 2009

In its January 28 conference call, the Subcommittee decided to recommend a technical correction in the means test forms, as part of the package of amendments to those forms that will be forwarded to the Standing Committee.

Consistent with the definition of current monthly income in § 101(10A), each of the means test forms requires debtors to disclose “[a]ny amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor’s dependents, including child support paid for that purpose.” See Form 22A, Line 8; Form 22B, Line 7, and Form 22C, Line 7. In each of the forms, there are blanks in the columns for both the debtor and the debtor’s spouse to report such regular payments. This arrangement could be seen as requiring a report of all payments in question in each column, thus double counting the same income items. To avoid this result, the Subcommittee suggests that an additional sentence be included in the instruction for these relevant lines, as follows: “Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.”

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules
FROM: Subcommittee on Consumer Issues
RE: Form 22A: Means Test Exclusions in Joint Cases
DATE: February 13, 2009

Background of the issue. There are currently three exclusions from the means test presumption of abuse established by § 707(b)(2) of the Bankruptcy Code, dealing with (1) disabled veterans, (2) debtors who do not have primarily consumer debts, and (3) certain current or former members of the National Guard and reserves called to active duty or involved with homeland and defense activities (a new exclusion added by the National Guard and Reservists Debt Relief Act of 2008, effective December 19, 2008). These exclusions are treated, respectively, in Lines 1A, 1B, and 1C of Official Form 22A of the 12/08 version of Form 22A. A copy of the first page of the form, showing these lines, is attached. For each of the exclusions, Form 22A allows the debtor simply to verify that the exclusion applies, and then avoid providing any of the information otherwise needed to determine the existence of a presumption of abuse.

The problem of means test exclusions in joint cases In the process of amending the form to deal with the new National Guard/reservists exclusion, Judge Swain questioned whether the new exclusion would apply to the spouse of an excluded debtor in a jointly filed case. Before this amendment, Form 22A did not expressly address this question. Rather, it set out an initial instruction governing joint filings generally—“Joint debtors may complete one statement only”—with no indication of what should be done if an exclusion applied to one spouse but not the other. The effect of this instruction was that if the filer designated as “the debtor” was covered

by an exclusion, the filer designated as “the debtor’s spouse” would be allowed to avoid completing the form.

The 12/08 version of Form 22A was adopted on an emergency basis, with changes limited to those required to implement the National Guard/reservists exclusion. The new version does address the question of the application of the exclusion in joint cases. Its initial instruction has been changed to provide the following: “Unless the exclusion in Line 1C [the National Guard/reservists exclusion] applies, joint debtors may complete a single statement. If the exclusion in Line 1C applies, each joint filer must complete a separate statement.”

After adoption of the 12/08 version of Form 22A, the Subcommittee on Consumer Issues was asked to consider, in a more deliberate fashion, the question of how the exclusions from means testing should be treated in joint cases.

Subcommittee recommendation. The subcommittee recommends that joint debtors be given an option of completing either a single form or separate forms in any situation where one of the debtors is covered by any of the exclusions from means testing. This recommendation would be implemented a revised instruction, and the subcommittee suggests alternative formulations of the instruction, with no recommendation as to which is preferable.

Reasons for the recommendation The three exclusions from means testing are defined by different statutory language, and so the subcommittee dealt with the exclusions individually. However, there is an overriding problem common to all of the exclusions—the distinction that the means test makes between “the debtor” and “the debtor’s spouse” in a joint case.

In the pre-BAPCPA Bankruptcy Code, there was no such distinction; in a joint case, each of the spouses was treated equally as a “debtor.” Thus, § 302(b) provides that “[a]fter the commencement of a joint case, the court shall determine the extent, if any, to which the debtors’ es-

tates shall be consolidated.” The means test, however, repeatedly distinguishes between the debtor and the debtor’s spouse in a joint case. See §§ 707(b)(2)(A)(i)(I) (stating that “the debtor’s applicable monthly expense amounts” shall be those specified under the IRS standards “for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case”); 707(b)(2)(A)(i)(II) (allowing an expense deduction for a “member of the debtor’s immediate family (including . . . the dependents of the debtor, and the spouse of the debtor in a joint case”); 707(b)(6) (referring to “the current monthly income of the debtor, or in a joint case, the debtor and the debtor’s spouse”). See also the definition of “current monthly income” in § 101(10A), which refers to income “that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive).” This distinction suggests that, for purposes of the means test, provisions applicable to the person filing as “the debtor” may not apply to “the debtor’s spouse” in a jointly filed case unless there is a provision specifying inclusion of the spouse. With this problem in mind, the individual exclusions from means testing can be considered in turn.

1. *Non-consumer debt.* Section 707(b)(1) provides for dismissal or conversion of Chapter 7 cases that are found to be “an abuse of the provisions of [that] chapter.” This provision is the predicate for the means test of § 707(b)(2), which is simply a mechanism for establishing a presumption of § 707(b)(1) abuse. But abuse under § 707(b)(1) applies only to “a case filed by an individual debtor . . . whose debts are primarily consumer debts.” Thus, debtors whose non-consumer debts are at least half of their total indebtedness are excluded from means testing; only “an individual debtor . . . whose debts are primarily consumer debts” is “the debtor” subject to all of the later provision of § 707(b), including the requirement of § 707(b)(2)(C) that “the debtor” shall file a means test statement.

This is where the problem of the possible distinction between “debtor” and “debtor’s spouse” first arises. If the “debtor’s spouse” in a joint case is considered someone distinct from “the debtor,” and if “the debtor” does not have primarily consumer debt, then no means test statement would be required in the case, since all of § 707(b) applies only to “the debtor.” Under this reading, the current version of the form—not requiring a separate statement from the spouse of a “debtor” without primarily consumer debt—would be correct.

On the other hand, if—as under pre-BAPCPA law—both of the two joint filers are considered “debtors” for purposes of § 707(b), then the non-consumer debt exclusion would have to be applied individually, and the fact that one of the filers was excluded would not relieve the other of the obligation to file a completed means test form.

2. *Disabled veterans.* As amended by the National Guard act, § 707(b)(2)(D)(1) now provides the following:

Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing—

(i) if the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was—

(I) on active duty (as defined in section 101 (d)(1) of title 10); or

(II) performing a homeland defense activity (as defined in section 901 (1) of title 32)

This language presents a similar issue to that of the non-consumer debt exclusion. If “the debtor” is distinct from “the debtor’s spouse,” and if “the debtor” is a disabled veteran within the scope of § 707(b)(2)(D)(i), then the debtor’s spouse, even if not excluded, would have no obligation to file a separate means test form, because only “the debtor” would have the filing obliga-

tion. But again, if both spouses are considered “debtors” required to file, then the exclusion of one as a disabled veteran would not excuse the other from filing a means test form.

Judge Swain has pointed out an additional consideration. The initial language in § 707(b)(2)(D)(1) states that the court may not dismiss or convert “a case” if “the debtor” is a disabled veteran within the scope of the provision. If “the debtor” applies to both of the two jointly filing spouses, then there arguably could be no dismissal or conversion based on means testing if either of the spouses was a disabled veteran, and a single form, reflecting disabled veteran status and providing no income or expense information, would be sufficient. However, if “the debtor” is only the person listed as “debtor” (rather than “debtor’s spouse”) on the form, then “the debtor” would have to complete the entire form even if “the debtor’s spouse” were an excluded disabled veteran.

3. *National Guard/reservists.* The statutory language applicable here is the § 707(b)(2)(D)(ii), which states:

Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing . . .

(ii) with respect to the debtor, while the debtor is—

(I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days; or

(II) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32) performed for a period of not less than 90 days;

if after September 11, 2001, the debtor while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.

By making its exclusion from means testing apply “with respect to the debtor,” this provision appears to emphasize the distinction between “the debtor” and “the spouse of the debtor in a joint case.” It is difficult to see what effect the phrase “with respect to the debtor” could have other than distinguishing between a debtor eligible for the National Guard/reservist exemption and a jointly filing spouse who would not be eligible. With this distinction, the exemption would plainly apply only “with respect to the [excluded] debtor” rather than to the debtor’s spouse.

This distinction, however, would again be of no consequence if only “the debtor,” as opposed to the debtor’s spouse, is subject to § 707(b).

Possible resolutions. There are at least five possible resolutions of the problem of applying the means test exclusions in joint cases: (1) require separate filings only for the National Guard/reservist exclusion (retain the present introductory instruction of Form 22A); (2) require separate filings only for the National Guard/reservist and non-consumer debt exclusion, with a single filing allowed in connection with the disabled veteran exclusion because of its unique formulation of the exclusion; (3) require no separate filings for any of the three exclusions (return to an instruction like the one in the versions of Form 22A in effect before 12/08); (4) require separate filings for all of the exclusions (create a new instruction, like the present one, but applicable to all of Line 1); (5) allow, but not require, separate filings for all of the exclusions (create a new instruction stating that jointly filing debtors may choose whether to complete a separate form depending on their view of the applicability of § 707(b)(2)(C)).

The subcommittee’s recommended resolution. The subcommittee recommends adoption of the final listed option. The statutory language is ambiguous, and it is not manifestly absurd to allow the exclusions for military service to extend to spouses. Indeed, without that extension, it could be argued that the exclusion is of little benefit, since the contributions that the

spouse makes to household expenses would have to be reported and all of both debtors' expenses would be claimed. There is less apparent policy justification for protecting the spouses of debtors without primarily consumer debts, but since the statutory language problem is identical here, there is no basis for distinguishing this exemption from the other two.

Moreover, giving debtors the choice of completing separate forms is consistent with the Advisory Committee's general policy regarding the means test forms—allowing courts to resolve ambiguities in the means test rather than determining the outcome in forms. If “the debtor” in a joint case claims an exclusion and the spouse does not file a separate form, this will be obvious to the UST and case trustee, who can seek appropriate relief, allowing the court to determine whether the spouse is in fact subject to § 707(b)(2)(C). Each of the other options has the drawback of imposing an interpretation of the Code that is arguably incorrect. In particular, directing that jointly filing spouses not file a separate form if “the debtor” is covered by an exclusion would arguably contradict § 302(b), which treats each of the jointly filing spouses as “debtors.”

To implement the final option, the subcommittee recommends that the introductory instruction of Form 22A be changed to one of the following alternatives, between which the subcommittee did not develop a consensus recommendation:

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Unless one of the exclusions in Line 1C applies, joint debtors may complete a single statement. If any of the exclusions in Line 1 applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

or

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Unless one of the exclusions in Line 1C applies, joint debtors may complete a single statement. If any of the exclusions in Line 1 applies, joint debtors should complete separate statements

unless they contend that this is not required by § 707(b)(2)(C).

In re _____
Debtor(s)

Case Number: _____
(if known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement).

- The presumption arises.
- The presumption does not arise.
- The presumption is temporarily inapplicable.

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Unless the exclusion in Line 1C applies, joint debtors may complete a single statement. If the exclusion in Line 1C applies, each joint filer must complete a separate statement.

Part I. MILITARY AND NON-CONSUMER DEBTORS

Disabled Veterans. If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

IA

Declaration of Disabled Veteran. By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).

Non-consumer Debtors. If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

IB

Declaration of non-consumer debts. By checking this box, I declare that my debts are not primarily consumer debts.

Reservists and National Guard Members; active duty or homeland defense activity. Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.

IC

Declaration of Reservists and National Guard Members. By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard

a. I was called to active duty after September 11, 2001, for a period of at least 90 days and
 I remain on active duty /or/
 I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed;

OR

b. I am performing homeland defense activity for a period of at least 90 days /or/
 I performed homeland defense activity for a period of at least 90 days, terminating on _____, which is less than 540 days before this bankruptcy case was filed.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: SUGGESTION REGARDING FILING OF CLAIMS BY CONSUMER DEBT BUYERS

DATE: FEBRUARY 17, 2009

Judge Tom Small has submitted a suggestion (08-BK-J) that the Advisory Committee consider whether the Bankruptcy Rules should be amended to deal with the proofs of claim filed by companies that buy consumer debt in bulk. In particular he raises concerns about creditors' inadequate documentation of claims and inadequate pre-filing review to determine if the claims are still viable. The result, he suggests, of these practices by consumer debt purchasers is the imposition of greater burdens on debtors, trustees, and the court system. Although Judge Small does not propose specific rules amendments, he does include a recent opinion – *In re Andrews*, 394 B.R. 384 (Bankr. E.D.N.C. 2008) – that illustrates the problems that he believes need to be addressed and that includes some ideas about possible solutions.

The Subcommittee on Consumer Issues discussed the suggestion during its December 23, 2008, teleconference, and it designated a working group to consider the issues further. The Working Group is composed of Judge Wedoff, Messrs. Rao and Lander, and the reporter. This memorandum, which is a report of the Working Group, summarizes the content of Judge Small's suggestion and the issues it raises, and presents for discussion by the Advisory Committee the suggestions of the Working Group about possible rule and form amendments to address the

issues raised by Judge Small.

The Problem as Revealed in *In re Andrews*

Two unsecured creditors – B-Real, LLC and Roundup Funding, LLC – filed proofs of claim in the Andrews’ chapter 13 case. The debtor objected to the claims on the grounds that they were barred by the statute of limitations and that the proofs of claim were not accompanied by the writings upon which the claims were based or a statement explaining how those writings had been lost or destroyed. After the creditors withdrew their claims, the debtor sought sanctions and attorneys fees from the creditors and a court examination of their collection practices. Judge Small denied the relief requested by the debtor, but stated that he would ask the Advisory Committee to consider whether there was a need for a rule amendment, as well as referring the issue to the local rules committee to consider an interim solution.

The creditors’ proofs of claim in the *Andrews* case did not attach any documentation showing that the claim filer was the assignee of the debt that was originally incurred in favor of another creditor, nor did it attach the underlying loan agreement or an explanation for the failure to attach it. Instead, each proof of claim was accompanied by account information stating the following: the debtor’s name and last four digits of her social security number, last four digits of the account number, name of the entity that had assigned the claim to the filing creditor, the “open date” of the loan and its “charge off date,” the loan balance as of filing, and the basis of the claim (“money loaned”). The creditor stated that this information was “a redacted version of the information in the computer files documenting the account.”

The debtor argued that these claims were a tiny part of a large group of “inadequately reviewed and stale claims filed by bulk buyers of charged-off debts” in the Eastern District of

North Carolina and throughout the country. She submitted evidence that the two creditors in this case had filed a total of 1,688 claims in cases in that district in the first seven months of 2008 and that B-Line had sold over 138,000 chapter 7 bankruptcy receivables to its wholly owned subsidiary Roundup. Because of the high volume of debts owned by claims purchasers such as these creditors, the debtor argued that their claims filing practices involved minimal or inadequate review that undermined the bankruptcy goal of achieving an efficient and economical administration of bankruptcy estates.

Although Judge Small agreed that claims filing by bulk purchasers presents a problem that needs addressing, he noted that many courts have concluded that filing stale claims or ones lacking documentation does not warrant sanctions under Rule 9011. Instead, he stated that it presents a matter better addressed by the rulemaking process. After reviewing the statutory and rules provisions governing proofs of claim, Judge Small observed that a proof of claim based on a stale claim is deemed allowed under § 502(a) unless an objection is asserted under § 502(b)(1) that raises the statute of limitations defense, an affirmative defense under many states' laws. While this filing and objection scheme leads to efficiency in the ordinary situation, Judge Small suggested that "requiring debtors to file objections and to raise affirmative defenses to large numbers of stale claims filed by assignees based on a business model rather than after careful review and evaluation is both burdensome and expensive."

One possible rule-based solution he suggested was a requirement either that an assignee indicate in a proof of claim whether the claim is barred by the statute of limitations applicable in the district where the case was pending (and if so to provide a statement explaining why it was nevertheless not a valid defense) or that no statute of limitations defense is applicable. A claim

lacking such a statement would be prima facie evidence of its invalidity and would be disallowed.

Judge Small also addressed the consequence of a bulk purchaser filing a proof of claim that fails to attach the documentation required by Rule 3001(c) and Form 10. A majority of courts have concluded that the lack of compliance deprives the claim of the prima facie presumption of validity, but that it does not provide a basis for disallowance of the claim. Disallowance, they have concluded, is permitted only for one of the statutory reasons set forth in § 502(b), the invocation of which requires the filing of an objection by the debtor. Judge Small acknowledged that “[p]erhaps that result cannot be changed without changing the Bankruptcy Code, but it may be possible for the Advisory Committee on Bankruptcy Rules to craft a Rule to relieve the debtor from this burden.”

Issues for Consideration

(1) *Should more documentation be required for a proof of claim?* If bulk claim purchasers are not providing sufficient documentation for their claims, consideration might be given to whether there is a need for a rule or form amendment. To a large extent, however, the problem does not seem to arise from the insufficiency of the rules. Current Rule 3001(c) requires that, when a claim is based on a writing, the original or a duplicate of the writing be filed with the proof of claim, and if that writing has been lost or destroyed, a statement detailing the circumstances of the loss or destruction must be filed with the claim. The problem courts are facing is that bulk claims purchasers are just not complying with this rule.

Official Form 10 does provide that a summary of the writing “may also [be] attach[ed].” Bulk claim purchasers frequently contend that the account information they attach to their proofs

of claim satisfies this summary requirement. The information, however, does not satisfy the rule's requirement of attaching the writing on which the claim is based.

The Working Group considered the possibility of amending the rule and the form to make even clearer that the original credit agreement must be provided (or an explanation given concerning its loss or destruction). The problem with that solution, however, is that in the case of open end credit accounts, the terms of the underlying agreement change frequently. The original agreement therefore may no longer be applicable to the claim in bankruptcy.

The Working Group came to the conclusion that a better solution is to require, in the case of an open end credit account, the attachment of the last account statement sent to the debtor prior to the filing of the petition (or an explanation of why that statement is not available). Imposing such a requirement could have several beneficial effects. The statement would document the most recently reported account balance and applicable interest rate. It would also provide some indication of how recently payment was sought on the account, which could help address the claim staleness issue addressed below. The statement would provide the debtor with the name of the creditor with whom she was dealing prior to bankruptcy, who may well be someone different from the claim purchaser who is filing the claim and whose name is likely unknown to the debtor. Finally, the ability to attach the statement would tend to show that the claim had in fact been assigned to the claimant.

This requirement could be implemented by making the following amendments to Rule 3001(c) and Form 10.

Rule 3001. Proof of Claim¹

* * * * *

1 (c) SUPPORTING INFORMATION.

2 (1) *Claim Based on a Writing.* When a claim, or an
3 interest in property of the debtor securing a claim, is based on a
4 writing, the original or a duplicate shall be filed with the proof of
5 claim. If the writing has been lost or destroyed, a statement of the
6 circumstances of the loss of destruction shall be filed with the
7 claim. When a claim is based on an open end or revolving credit
8 agreement, the last account statement sent to the debtor prior to the
9 filing of the petition shall also be filed with the proof of claim.

* * * * *

COMMITTEE NOTE

Subdivision (c)(1) is amended to require a proof of claim based on an open end or revolving credit agreement, such as one underlying the issuance of a credit card, to be accompanied by the last account statement sent to the debtor prior to the filing of the bankruptcy petition. This requirement applies whether the statement was sent by the entity filing the proof of claim or by a prior holder of the claim.

Form 10. Proof of Claim

* * * * *

¹ Changes are shown to the preliminary draft of Rule 3001(c)(1) that was approved by the Advisory Committee in October 2008.

1 **7. Documents.** Attach redacted copies of any documents that
2 support the claim, such as promissory notes, purchase orders,
3 invoices, itemized statements of running accounts, contracts,
4 judgments, mortgages, and security agreements. You may also
5 attach a summary. If the claim is based on an open end or
6 revolving credit agreement, you must attach a redacted copy of the
7 last account statement sent to the debtor prior to the filing of the
8 bankruptcy petition. Attach redacted copies of documents
9 providing evidence of perfection of a security interest. You may
10 also attach a summary. (*See definition of "redacted" on reverse*
11 *side.*)

12 DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED
13 DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

14 * * * * *

15 **INSTRUCTIONS FOR PROOF OF CLAIM FORM**

16 * * * * *

17 **7. Documents:**

18 Attach to this proof of claim form redacted copies documenting the
19 existence of the debt and of any lien securing the debt. You may
20 also attach a summary. If the claim is based on an open end or

21 revolving credit agreement, you must attach a redacted copy of the
22 last account statement sent to the debtor prior to the filing of the
23 bankruptcy petition, whether it was sent by you or by a prior holder
24 of the claim. You must also attach copies of documents that
25 evidence perfection of any security interest. You may also attach a
26 summary. FRBP 3001(c) and (d). Do not send original
27 documents, as attachments may be destroyed after scanning.

* * * * *

COMMITTEE NOTE

The form is amended in section 7 and accompanying instructions to require the attachment of the last account statement sent to the debtor prior to the filing of the bankruptcy petition when a claim is based on an open end or revolving credit agreement. This change is made to conform to amended Rule 4001(c)(1).

The other issue on which Judge Small noted a lack of documentation is proof that the claimant is in fact the assignee of a claim incurred by the debtor to another creditor. In some cases it is difficult for a debtor or trustee to match up a proof of claim with any of the debtor's known obligations. Rule 3001(e)(2) requires "evidence of the transfer" of a claim occurring after the proof of claim has been filed. But Rule 3001(e)(1) does not contain a similar requirement for claims transferred prior to the filing of a proof of claim. It requires only that the claim be filed by the transferee.

The Working Group could not reach a consensus on whether rule and form amendments are needed to address this problem. Two members of the group believe that requiring attachment

of the most recent prepetition account statement will generally provide the information needed to match up the claimant with the creditor known to the debtor and will provide some evidence of the transfer of the claim. The other two members favor amending Rule 3001(e)(1) and Form 10 to require evidence of transfer to be filed with the proof of claim when a claim is transferred before the filing of the proof of claim. The requirement could be limited to situations in which the claimant is not listed as a creditor on the debtor's schedules.

(2) *Should some or all creditors filing a proof of claim be required to state whether the claim is timely under the relevant statute of limitations?* Imposition of this requirement in Rule 3001, coupled with Rule 9011, would require a creditor or its attorney to certify after an inquiry reasonable under the circumstances that the contention regarding the timeliness of the claim is warranted by existing law or by a nonfrivolous argument for the extension, etc. of existing law. The change would thereby place the initial burden on the creditor to check to make sure it was not filing a stale claim and would provide a basis for imposing sanctions when the certification turned out to be in violation of Rule 9011.

During the Subcommittee's discussion of this issue, there was not a consensus favoring requiring the claimant to make an affirmative statement about the timeliness of the claim. Making such a change would require a determination that the Bankruptcy Rules Enabling Act provides authority to reassign the burden of pleading the timeliness or untimeliness of a claim from the debtor to the claimant. Even if such authority exists for purposes of pleading only (and not with respect to the burden of proof at trial), some members of the subcommittee believed that there are too many factors involved with a statute of limitations defense for a claimant to be able to affirmatively certify that it is inapplicable. Moreover, if the claimant were required to attach

the most recent account statement sent to the debtor before bankruptcy, the date of that statement could provide a basis for a debtor to identify more easily a stale claim.

The Working Group discussed more broadly the need for claimants to properly investigate their claims before filing proofs of claim. Rule 9011 imposes an obligation on a claimant to undertake an inquiry reasonable under the circumstances to determine to the best of the claimant's knowledge, information, and belief that a claim is warranted by existing law and that factual contentions have evidentiary support. Currently the instructions to Form 10 state that the "person filing this proof of claim must sign and date it. FRBP 9011." A creditor filing a proof of claim without the assistance of a lawyer is likely to find that reference to Rule 9011 obscure at best.

At the bottom of the form itself, however, is the following statement: "Penalty for presenting fraudulent claims: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571." The Working Group suggests that a claimant's duty to investigate the validity of a claim before filing a proof of claim could be further emphasized by adding to the signature line the same statement that debtors are required to sign on the petition and other forms: "I declare under penalty of perjury that the information provided above is true and correct." This declaration, while not addressing the statute of limitation issue, would impress upon the claimant the importance of ensuring the accuracy of the information provided.

(3) *What should be the consequence of the failure to comply with the requirements of Rule 3001?* Rule 3001(f) provides affirmatively that a proof of claim filed in accordance with the rules constitutes prima facie evidence of the validity and the amount of the claim. That provision has led courts to conclude that a failure to comply with the rules deprives the claim of

this evidentiary effect, but as noted above, many courts have held that such a failure does not provide a basis for disallowance of the claim. Such a conclusion undermines the enforceability of the rules' requirements, but it seems supported by the wording of § 502(b). That provision states that the court shall allow a claim except to the extent that one of the nine listed bases for objection is found to apply. None of them requires procedural conformity with the rules.

The proposed amendment to Rule 3001(c) approved by the Advisory Committee in October would impose a new sanction provision – (c)(3) – for the failure to provide the information required in subdivision (c). It prohibits a noncomplying creditor from presenting the omitted “information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless.” In addition to or instead of this sanction, it would authorize the court, after notice and hearing, to “award other appropriate relief, including reasonable expenses and attorney’s fees caused by the failure.” If applied to the situation involving inadequate proofs of claim by bulk purchasers, the new provision would not relieve the debtor of the obligation to object; nor would it automatically disallow the claim. It would, however, prevent a creditor from proving a litigated claim with evidence of information that should have been included in or attached to the proof of claim, such as the most recent account statement, and it would also provide a basis for the imposition of other sanctions. The Working Group believes that this provision probably goes as far as the Code allows in providing a sanction for noncompliance with proof of claim requirements.

Conclusion

The issues raised by Judge Small are very important ones that are impacting courts

nationwide. This report does not come with a recommendation for action at this point. Instead, the Subcommittee on Consumer Issues believes it will benefit from a full discussion by the Advisory Committee of these issues and the Working Group's suggestions. Because Judge Small will be in attendance at the March meeting, he will be able to share his insights about the problems and possible solutions with the Committee.

United States Bankruptcy Court
Eastern District of North Carolina

A Thomas Small
Judge
919 856-4603

POST OFFICE DRAWER 2747
ROOM 220
CENTURY STATION
300 FAYETTEVILLE STREET
RALEIGH, NORTH CAROLINA 27602

October 1, 2008

08-BK-J

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Bankruptcy Rule regarding filing of claims by consumer debt buyers

Dear Mr. McCabe:

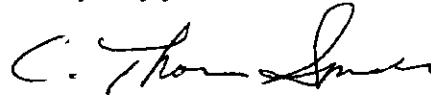
In recent years there has been a marked proliferation of the number of debts being purchased in bulk by consumer debt buyers. These charged-off debts then resurface as claims filed by the assignees. Increasingly, the proofs of claim are either for stale claims that are outside the applicable statute of limitations, or are filed without the documentation required by 11 U.S.C. § 501 and Rule 3001(c) of the Federal Rules of Bankruptcy Procedure, or both.

Debtors and trustees must file objections asserting affirmative defenses based on the statute of limitations, but in this context, because the assignees' proofs of claim are filed without adequate review on the part of the assignee, the incidence of stale claims is high and the burden of sifting through these claims without the documentation to assess them falls increasingly and unfairly upon debtors.

This practice would benefit from a review by the Advisory Committee on Bankruptcy Rules and from eventual implementation of a rule that takes into account the new landscape of debt trading. I have no firm proposal in mind but feel sure that the Committee could develop a rule appropriately tailored to address the problem. I entered an order discussing these issues earlier this week, and enclose a copy of the decision in In re Andrews, Case No. 08-00151-8-JRL (Bankr. E.D.N.C. September 30, 2008), for your consideration. The lawyers did a good job of illustrating the big picture of debt trading as well as both sides of the argument, and many of their points are set out in the order.

Along with the Andrews order, which will be submitted for publication, I also enclose the useful briefs of both the debtor and the creditors.

Very truly yours,

A handwritten signature in black ink, appearing to read "A. Thomas Small". The signature is written in a cursive style with a large initial "A" and a long, sweeping tail.

A. Thomas Small

Enclosures
ATS:td



SO ORDERED.

SIGNED this 30 day of September, 2008.

A handwritten signature in cursive script, appearing to read "A. Thomas Small".

A. Thomas Small
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

IN RE:

CASE NO.

ROBIN GRAHAM ANDREWS

08-00151-8-JRL

DEBTOR

ORDER REGARDING OBJECTIONS TO CLAIMS

The matters before the court are the objections filed by the chapter 13 debtor, Robin Graham Andrews, to the claims of two unsecured creditors, B-Real, LLC (B-Real) and Roundup Funding, LLC (Roundup). The debtor maintains that both claims are barred by the statute of limitations. In addition, she contends that the writings upon which the claims were based, or statements explaining the circumstances of the loss or destruction of those writings, were not filed with the proofs of claim, and, therefore, the proofs of claim filed by B-Real and Roundup do not comply with Rule 3001(c) of the Federal Rules of Bankruptcy Procedure. B-Real and Roundup filed responses, but at the hearing held on July 24, 2008, in Wilmington, North Carolina, they announced that their claims had been withdrawn.

Notwithstanding the withdrawals, the debtor requests that the court enter show cause orders to examine the collection practices of B-Real and Roundup and to determine if these two creditors should be sanctioned pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. The

debtor also asked that she be awarded attorney's fees for having to file objections to the claims. Both parties filed post-hearing briefs, the last of which was filed on September 2, 2008.

BACKGROUND

On January 9, 2008, the debtor filed for relief under chapter 13 of the Bankruptcy Code, and proposed a plan that provides for monthly payments of \$300 for 24 months and \$441 for 36 months, but which pays no dividend to holders of general unsecured claims. On February 29, 2008, B-Real filed a proof of claim (Claim No. 5) in the amount of \$3,287.92 for money loaned, stating that it is an assignee of a claim that was previously held by NCO Portfolio Management, Inc. and originally owed to DEBT ONE. B-Real did not attach any documentation establishing that it is the assignee or holder of a claim that the debtor may have owed to DEBT ONE, and did not, as required by Rule 3001(c) of the Federal Rules of Bankruptcy Procedure, attach the writing upon which the claim was based, or a statement explaining the circumstances of the loss or destruction of the writing.

An attachment to the proof of claim, however, did include "account information" in which B-Real states the name of the debtor, the last four digits of the debtor's social security number, the last four digits of the related account number, the name of NCO Portfolio Management, Inc. as "assignor," the name of DEBT ONE as the "original creditor," the "open date" of November 19, 1997, the "charge off date" of June 28, 1999, the "balance as of filing" of \$3,287.92, and "money loaned" as the "basis for claim." The proof of claim also includes this statement:

This claim is based on an unsecured account acquired from Assignor. Pursuant to Instruction 7, above is a redacted version of the information contained in the computer files documenting the account.

This information substantially conforms to 11 U.S.C. § 501, Federal Bankruptcy Rule 3001 and the Instructions to Form B10. See, e.g., In re Moreno, 341 B.R. 813 (Bankr. S.D. Fla. 2006); In re Cluff, 2006 WL 2820005 (Bankr. D. Utah 2006); In re Heath, 331 B.R. 424 (9th Cir. B.A.P. 2005); In re Dove-Nation, 318 B.R. 147 (8th Cir. B.A.P. 2004); In re Guidry, 321 B.R. 712 (Bankr. N.D. Ill. 2005); In re Burkett,

329 B.R. 820 (Bankr. S.D. Ohio 2005); In re Lapsansky, 2006 WL 3859243 (Bankr. E.D. Pa. 2006); In re Irons, 343 B.R. 32 (Bankr. N.D. N.Y. 2006).

On March 10, 2008, Roundup filed a proof of claim (Claim No. 7) in the amount of \$1,405.11, stating that it is the assignee of a claim it purchased from National Credit Adjusters and that was originally owned by HSBC. Roundup also did not attach any documentation establishing that it is an assignee or holder of a claim that the debtor may have owed to HSBC, and did not, as required by Rule 3001(c) of the Federal Rules of Bankruptcy Procedure, attach the writing upon which the claim was based, or a statement explaining the circumstances of the loss or destruction of the writing. It did, however, include an attachment in the same format as the attachment to the B-Real proof of claim, setting out “account information” in which Roundup states the name of the debtor, the last four digits of the debtor’s social security number, the last four digits of the related account number, the name of National Credit Adjusters as “assignor,” the name of HSBC as the “original creditor,” the “open date” of September 2, 2002, the “charge off date” of April 30, 2003, the “balance as of filing” of \$1,405.11, and “money loaned” as the “basis for claim.”

DISCUSSION

Counsel for the debtor begins her brief with a statement that succinctly explains why the issue before the court is so significant. The court agrees with her observation that “[w]ith such imaginative and innocuous names, it is easy to underestimate the negative impact large-scale consumer debt buyers like B-Real, LLC and Roundup Funding are having on the bankruptcy court system.” Debtor’s Brief at p. 1. The debtor contends that the high volume of inadequately reviewed and stale claims filed by bulk buyers of charged-off debts places an inordinate burden on individual debtors and the bankruptcy system. The debtor argues further that the claims filing practices of bulk

debt buyers undermines the Bankruptcy Code's and the Bankruptcy Rules' goal of promoting the efficient and economical administration of bankruptcy estates.¹

In this case, of the twelve filed unsecured proofs of claim, five were filed by bulk claims purchasers. Although the plan will not pay a dividend to unsecured creditors, the debtor felt compelled to file objections to four of the five claims because "[i]f the debtor does not raise by objection the affirmative defense of the statute of limitations, that defense may be deemed waived [if the case is dismissed]." Debtor's Brief at p. 6. The four objections were identical and, after the objections were filed, the claims were withdrawn. The debtor maintains that this is a pattern that is becoming all too familiar in this and other districts through the country.

The phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system. The debtor contends that the remedies available under the Bankruptcy Code and the Bankruptcy Rules are inadequate to address the problem, and proposes as a solution that the court enter a show cause order for the purpose of examining the practices of Roundup and B-Real. It is the debtor's expectation that the court will find the creditors' claim filing procedures to be

¹ The debtor contends that the number of debt buying claims is so high that they may, through cumulative effect, undermine the Bankruptcy Rules' important policy goals of efficient and economical administration of the bankruptcy system. In the Eastern District of North Carolina, during the first seven months of 2008 alone, B-Real filed 614 claims and Roundup filed 1,074 claims.

The debtor notes that Mr. Steven G. Kane is the authorized agent signing the claims at issue in this case, and his affidavit was filed in another case in this district earlier this year regarding the assignment of claims in In re Coates, Case No. 03-04673-8-JRL (Bankr. E.D. N.C.). In his affidavit in that case, Mr. Kane stated that B-Line purchased 61,017 chapter 7 bankruptcy receivables from Bank One, Delaware, NA and 77,408 chapter 7 bankruptcy receivables from Chase Manhattan Bank, USA, NA, among which were Ms. Coates' three accounts. B-Line then sold those 138,425 accounts to its wholly-owned subsidiary, Roundup. Those claims are in no way at issue in this case, but are noted here to illustrate the sheer volume of claims that are trading ownership and moving into the bankruptcy system.

unacceptable and will impose sanctions that will encourage Roundup, B-Real, and other bulk claims purchasers to change their ways.

The court agrees that the problem needs to be addressed, but disagrees that a show cause order is the best approach. First of all, the damages sustained by a debtor whose plan pays nothing to unsecured creditors are questionable. More importantly, it is not clear that the claim filing practices of Roundup or B-Real are sanctionable under Bankruptcy Rule 9011. Many courts have looked into this emerging issue and found that sanctions were not warranted for filing stale claims or for filing claims without the accompanying documentation required by Rule 3001(c) of the Federal Rules of Bankruptcy Procedure. In addition to the cases mentioned in their proofs of claim, Roundup and B-Real cite numerous decisions to support their procedure of filing stale claims and for filing summaries instead of the statements required by Rule 3001(c). *See, e.g., In re Simms*, 2007 WL 4468682 (Bankr. N.D. W. Va. 2007); *In re Kincaid*, 388 B.R. 610 (Bankr. E.D. Pa. 2008); *In re Kemmer*, 315 B.R. 706 (Bankr. E.D. Tenn. 2004); *In re Mazzoni*, 318 B.R. 576 (Bankr. D. Kan. 2004); *but see In re Wingerter*, 376 B.R. 221 (Bankr. N.D. Ohio 2007) (on appeal by B-Line to the Sixth Circuit Bankruptcy Appellate Panel).

Whether this court agrees or disagrees with those cases, there was a substantial body of existing case law upon which Roundup and B-Real reasonably relied, and because of their reasonable reliance, Rule 9011 sanctions are not justified. Accordingly, the debtor's request for a show cause order to examine the claims filing practices of Roundup and B-Real will be denied.

If the Federal Rules of Bankruptcy Procedure do not adequately deal with the problem, the issue should be submitted to the federal rulemaking process. The Judicial Conference of the United States' Advisory Committee on Bankruptcy Rules is well qualified to examine all aspects of the claims filing process and to determine if changes are needed.

The objective of the Federal Rules of Bankruptcy Procedure is “to secure the just, speedy, and inexpensive determination of every case and proceeding,” Fed. R. Bankr. P. 1001, and for the most part the claims process has met that goal. Section 101(5) of the Bankruptcy Code broadly defines “claim” to include rights to payment that are contingent, unmatured, and disputed, and § 501(a) provides that any creditor may file a proof of claim. Section 502(a) provides that if a proof of claim is filed, the claim is deemed allowed unless a party in interest objects based on one of the grounds specified in § 502(b). “A proof of claim executed and filed in accordance with [the Bankruptcy Rules] shall constitute prima facie evidence of the validity and amount of the claim.” Fed. R. Bankr. P. 3001(f).

Section 502(b)(1) provides that one of the grounds for disallowing a claim is that the claim is unenforceable under applicable law. A statute of limitations, such as North Carolina’s three-year statute of limitations, is the type of applicable law referred to in § 502(b)(1) that is grounds for disallowing a claim. See N.C. Gen Stat. § 1-52(1). In many states, including North Carolina, statutes of limitation are affirmative defenses that must be affirmatively pled. See Overton v. Overton, 259 N.C. 31, 129 S.E. 2d 593 (1963). Consequently, a proof of claim based on a stale claim will be deemed allowed under § 501(a) unless the affirmative defense is raised in a filed objection. In re Varona, 388 B.R. 705 (Bankr. E.D. Va. 2008).

Allowing claims based on unchallenged proofs of claim is efficient and economical in most cases. However, requiring debtors to file objections and to raise affirmative defenses to large numbers of stale claims filed by assignees based on a business model rather than after careful review and evaluation is both burdensome and expensive.

A possible solution is to have a rule that requires an assignee that files a proof of claim to disclose whether the claim violates a statute of limitations applicable in the district where the case

is pending. If the claim is outside the statute of limitations and the assignee does not provide a statement explaining why the statute of limitations is not a valid defense, the lack of a statement would constitute prima facie evidence that the defense is valid and the claim would not be allowed. A similar approach would be to require an assignee to state in the proof of claim that no statute of limitations defense is applicable. A failure to make the disclosure would constitute prima facie evidence that the defense is valid and the claim would be disallowed.

Bankruptcy Rule 3001(a) requires that a proof of claim must substantially conform to Official Form 10, which provides that limited information must be filed with each proof of claim, including the basis for the claim, the date the debt is incurred, the secured or unsecured status of the claim, and the amount of the claim. Rule 3001(c) provides that when a claim is based upon a writing, “the original or a duplicate [of that writing] shall be filed with the proof of claim,” and further that “[i]f the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.” Most bulk purchasers of claims, such as Roundup and B-Real, do not file the required writings and do not file statements explaining the writings’ loss or destruction. The consequence of that failure, however, is not the disallowance of the claim, but rather a loss of the prima facie presumption of validity.

“Many courts have weighed in on the ramifications of a creditor’s failure to comply with Rule 3001(c) . . . [and the] majority view is that failure to attach documents required by Rule 3001 and Official Form 10 is not, by itself, a basis for disallowance” 9 Collier on Bankruptcy ¶ 3001.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2007). Moreover, bankruptcy courts in the Fourth Circuit have held that a lack of documentation of the claim is not a basis for disallowance. See, e.g., In re Herron, 381 B.R. 184, 190 (Bankr. D. Md. 2008); In re Simms, 2007 WL 4468682 at *2 (Bankr. N.D. W. Va. 2007). Rather, the appropriate remedy for failure to

properly document a claim or assignment of claim under Rule 3001 is that the claim loses its prima facie presumption of validity and amount. Simms, 2007 WL 4468682 at *2. But, loss of the presumption of validity is of little consequence to the debtor, who must still file an objection to the claim to prevent the claim from being deemed allowed under 11 U.S.C. § 502(a). Perhaps that result cannot be changed without changing the Bankruptcy Code, but it may be possible for the Advisory Committee on Bankruptcy Rules to craft a Rule to relieve the debtor from this burden.

Based on the foregoing, the debtor's request for a show cause order to examine the claims filing practices of Roundup and B-Real and her request for attorney's fees are **DENIED**. The court will ask the Advisory Committee on Bankruptcy Rules to consider whether changes should be made to the Federal Rules of Bankruptcy Procedure and to the Official Bankruptcy Forms to alleviate the significant burden on individual debtors and on the bankruptcy system caused by the large number of undocumented, stale claims being filed by the bulk purchasers of charged-off debts. The briefs prepared by counsel for both the debtor and the creditors were thorough and comprehensive, and in light of their usefulness the court will make them available to the Advisory Committee. Finally, because the federal rule-making process typically takes no less than three years to produce a new rule, this issue will also be referred, with the consent of the two other judges of this district, to the Local Rules Committee of the Eastern District of North Carolina.

SO ORDERED.

END OF DOCUMENT

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: SUBCOMMITTEE ON CONSUMER ISSUES
RE: AMENDMENT OF RULE 2003(e) REGARDING NOTICE OF
ADJOURNMENT OF MEETING OF CREDITORS
DATE: FEBRUARY 7, 2009

During conference calls on December 23, 2008, and January 28, 2009, the Subcommittee on Consumer Issues considered a suggestion (08-BK-L) submitted to the Committee by Bankruptcy Judge Keith Lundin (M.D. Tenn.). The issue was referred to the Subcommittee by Judge Swain. Judge Lundin has proposed an amendment to Rule 2003 (Meeting of Creditors or Equity Security Holders) that would provide a procedure for holding open a meeting of creditors to allow a chapter 13 debtor additional time to file tax returns with taxing authorities.

Section 1308, added by BAPCPA, requires a chapter 13 debtor to file all tax returns for taxable periods ending during the four years before the filing of the petition. Under § 1308(a) the debtor is required to make these filings “[n]ot later than the day before the date on which the meeting of creditors is first scheduled to be held.” Section 1308(b), however, allows for some flexibility in this requirement. It provides that if the debtor has not filed all the returns required to be filed by subsection (a) by the date on which the meeting of creditors is first scheduled, the trustee may “hold open that meeting for a reasonable period of time” in order to give the debtor additional time to satisfy the requirement. This additional period of time may be no longer than 120 days after “the date of that meeting.” The court, however, may extend the time period an

additional 30 days if the failure to file was due “to circumstances beyond the control of the debtor.” Under § 1307(e), the debtor’s failure to file the tax returns as required by § 1308 is a basis for dismissal or conversion of the case.

Judge Lundin suggests that the concept of holding open a meeting of creditors is unique to § 1308 and that no rule currently addresses this action. He argues that there is a need to have a clear rule prescribing how meetings of creditors are held open so that everyone is aware of the debtor’s deadline for filing tax returns with the taxing authorities. To that end Judge Lundin has proposed a new Rule 2003(f) that would provide for the announcement and filing of notice by the trustee of the “Hold Open Period.”

The Subcommittee’s discussions of the proposal led it to conclude that the issue raised by Judge Lundin could best be addressed by amending existing Rule 2003(e), which governs adjournments, to require the filing of notice of an adjournment. This decision was based on the conclusion that “holding open” a meeting, to which § 1308(b) refers, is synonymous with adjournment. **Accordingly, the Subcommittee recommends that the Advisory Committee approve the following draft of amended Rule 2003(e) and that it seek approval for the publication of the proposed amendment for public comment in August of this year.**

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

1 (e) ADJOURNMENT. The meeting may be adjourned
2 from time to time by announcement at the meeting of the
3 adjourned date and time ~~without further written notice.~~ The

4 presiding official shall file a notice specifying the date and time to
5 which the meeting is adjourned.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended to require the presiding official to file notice of the adjournment of a meeting of creditors or equity security holders. The presiding official in chapter 7 and 11 cases is the United States trustee and in chapter 12 and 13 cases, the standing trustee. This requirement will provide notice to parties in interest who are not present at the initial meeting of the date of the adjourned meeting. When a meeting is adjourned or "held open" as permitted by § 1308(b)(1) of the Code in order to allow a debtor additional time in which to file tax returns with taxing authorities, requiring written notice of the period of adjournment will serve to prevent premature motions to dismiss or convert the case under § 1307(e).

08-BK-L

Keith
Lundin/TNMB/08/USCOURTS

To rules_comments@ao.uscourts.gov
cc

10/01/2008 03:18 PM

bcc

Subject rule suggestion -- holding open meeting of creditors

I invite the Advisory Committee on Bankruptcy Rules to consider a new rule fixing the procedure for "holding open" a meeting of creditors pursuant to 11 USC section 1308(b).

The problem starts in section 1308(a) which mandates -- not later than the day before the first date scheduled for the meeting of creditors -- debtors in Chapter 13 cases must file all state and federal tax returns required during the four year period prior to the petition. If not all tax returns have been filed, section 1308(b) permits the trustee to "hold open" the meeting of creditors for "a reasonable period" to allow the debtor to file missing returns. Under section 1308(b)(1) and (2) the hold open period can be as long as 120 days without court approval, plus up to an additional 30 days with court approval. The kicker is in section 1307(e) -- on request of a party in interest, the court "shall" convert or dismiss a Chapter 13 case upon failure of the debtor to file a tax return under section 1308.

It is not uncommon for debtors to come into a Chapter 13 case missing required tax returns. Because of the accelerated timing of confirmation in section 1324(b) and the mandate in Bankruptcy Rule 2003 that the meeting of creditors in a Chapter 13 case take place in 20 - 50 days of the petition, it is also common that Chapter 13 debtors need more time to complete the filing of four years of required tax returns. To avoid the risk of mandatory conversion or dismissal under section 1307(e), an increasing number of Chapter 13 debtors must obtain a hold open period for the meeting of creditors.

The problem then becomes that there is no Bankruptcy Rule addressing procedure for holding open a meeting of creditors. Bankruptcy Rule 2003(e) permits "adjournment" of a meeting of creditors by announcement and without further notice, but "hold open" in section 1308(b) suggests something different and the death sentence in section 1307(e) is too severe to leave the issue this loose. Debtors and "parties in interest" have a stake in knowing with certainty whether a meeting of creditors has been held open and for how long. The bankruptcy courts have acknowledged the absence of clear procedure in this area. See, e.g., *In re Kuhar*, 2008 WL 2894893 (Bankr. E.D. Pa. June 24, 2008).

The solution might be the addition of a subsection to Bankruptcy Rule 2003 along these lines.

(f) HOLD OPEN. The meeting may be held open as permitted by section 1308(b) of the Code by announcement of the trustee at the meeting. The trustee shall file a Notice of Hold Open Period. The Announcement and Notice shall specify the beginning and ending dates of the hold open period. Subsequent extensions of the hold open period within the limits specified in section 1308(b) shall be filed by the trustee.

Keith M. Lundin
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(615) 736-7705 (fax)
<keith_lundin@tnmb.uscourts.gov>

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: SUBCOMMITTEE ON BUSINESS ISSUES
RE: PROPOSED AMENDMENT OF RULE 2019
DATE: FEBRUARY 15, 2009

In December 2007 two trade associations – the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association – submitted a suggestion to the Advisory Committee that Rule 2019 be repealed. This rule, which concerns the “Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases,” requires certain disclosures by entities and committees, other than official committees appointed under § 1102 or 1114, that represent more than one creditor or equity security holder in a case. At the March 2008 meeting the Advisory Committee tabled consideration of the suggestion until the October meeting in order to allow for the possibility of further public input on whether Rule 2019 should be repealed. Prior to the October meeting the National Bankruptcy Conference (“NBC”) submitted a letter opposing repeal and indicating that it would be submitting a more detailed comment possibly suggesting ways in which Rule 2019 should be amended. The Advisory Committee in October referred the matter to the Subcommittee for further consideration.

In December and January, several submissions were made to the Advisory Committee in response to the suggestion that Rule 2019 be repealed. The NBC, the ABA Business Bankruptcy Committee, and Bankruptcy Judges Robert Gerber and Robert Drain, both from the Southern District of New York, opposed repeal and suggested that Rule 2019 be expanded in scope and

revised in various ways.

During conference calls on December 12, 2008, February 9, and February 12, 2009, the Subcommittee engaged in lengthy discussions about Rule 2019 and carefully considered all of the views that had been submitted. Based on these discussions, **the Subcommittee recommends that Rule 2019 be retained and that it be substantially amended as set forth in this memorandum.** The Subcommittee further recommends that the preliminary draft of amended Rule 2019 be submitted to the Standing Committee and that approval be sought for its publication in August 2009 for public comment.

After setting forth background information about the existing rule, this memorandum summarizes the views expressed in the initial suggestion that the rule be repealed and the views of those who have submitted suggestions opposing repeal and seeking amendment of the rule. It then sets forth and explains the Subcommittee's proposed amendment of Rule 2019.

Legal Background of Rule 2019

Rule 2019 is derived from §§ 209 - 213 of the Bankruptcy Act and former Chapter X Rule 10-211. Only recently, however, has it has given rise to controversy. Prior to a 2007 decision by Judge Allan Gropper of the Bankruptcy Court for the Southern District of New York, Rule 2019 was generally applied in a fairly casual manner. Since Judge Gropper's decision in *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007), the rule's application to *ad hoc* committees, particularly those formed by hedge funds and other distressed investors, has been the subject of debate. So far this issue has not produced other published opinions.

Under the system of federal equity receiverships that grew up prior to the creation of an effective bankruptcy procedure for corporate reorganization, the corporation's management or

the underwriter of a class of its securities would form protective committees for each class of its public securities. Protective committees were responsible for formulating plans of reorganization to be approved by the federal court. Although they were supposed to represent the interests of the security holders, these committees were often dominated by insiders or others with conflicts of interest, including those with either no interest in the debtor or with interests acquired at depressed prices.¹

A 1937 report from the Securities and Exchange Commission highlighted problems with the equity receivership system. The SEC noted that corporate insiders, who controlled protective committees, often used their position as representatives of public investors to improve their own financial position to the detriment of the investors they represented. The SEC recommended that representatives of investors act as true fiduciaries and that Congress require representatives of multiple creditors or security holders to make disclosures, among other things, about their interests in or claims against the debtor, when they acquired them, whom they were representing, and how that representation came about. The SEC Report concluded that such information "will provide a routine method of advising the court and all parties in interest of the actual economic interest of all persons participating in the proceedings."² Congress enacted these

¹ See James M. Shea, Jr., Note, *Who Is at the Table? Interpreting Disclosure Requirements for Ad Hoc Groups of Institutional Investors Under Federal Rule of Bankruptcy Procedure 2019*, 76 FORDHAM L. REV. 2561, 2568-70 (2008).

² Menachem O. Zelmanovitz & Matthew W. Olsen, *Rule 2019: A Long Neglected Rule of Disclosure Gains Increasing Prominence in Bankruptcy*, PRATT'S J. BANKR. L., July-Aug. 2007, at 3-4.

recommendations in the Chandler Act, and the subsequently adopted rule requiring the disclosures is the predecessor of Rule 2019.

In chapter 11 cases Rule 2019 requires covered entities and committees representing more than one creditor or equity security holder to disclose the following information: the name and address of the creditor or equity security holder; the nature and amount of the claim or interest and when it was acquired (unless it was acquired more than a year before the filing of the petition); facts and circumstances concerning the employment of the entity or committee, including in the case of a committee the names of the entities at whose instance it was organized; and the amounts of claims or interests owned by the entity and the members of the committee, when those claims or interests were acquired and at what price, and any sales or other dispositions of those claims or interests. Rule 2019(b) provides that a failure to comply with these disclosure requirements may result, among other things, in the invalidation of “any authority, acceptance, rejection, or objection” by the entity or committee. Most of the reported decisions concerning Rule 2019 concern its application in the following contexts: (1) lawyers or law firms representing multiple creditors or equity security holders; (2) class actions; (3) attempts to keep information disclosed in Rule 2019 statements confidential.

Prior to Judge Gropper’s 2007 decision in *Northwest Airlines*, informal or *ad hoc* committees participating in chapter 11 cases had generally complied with Rule 2019 by filing a verified statement by the attorney or law firm representing the committee that listed the members of the committee, the aggregate amount of their interests or claims in the case, and the circumstances under which the attorney was retained. There was apparently little litigation over

the sufficiency of these disclosures.³

In *Northwest Airlines*, an *ad hoc* committee of equity security holders filed a Rule 2019 statement verified by the committee's counsel. According to the court the statement provided the following information:

[I]t identifies the 11 members of the Committee; discloses that, "[t]he members of the Ad Hoc Equity Committee own, in the aggregate, 16,195,200 shares of common stock of Northwest and claims against the Debtors in the aggregate amount of \$164.7 million" and that "[s]ome of the shares of common stock and some of the claims were acquired by the members of the Ad Hoc Equity Committee after the commencement of the Cases;" states that KBT & F has been retained as "counsel to the Ad Hoc Equity Committee in the Cases pursuant to an engagement letter in the form annexed as Exhibit B hereto;" and states that KBT & F does not own any claims against or interests in the Debtors and that the members of the Committee are responsible for the firm's fees "subject to their right to have the Debtors reimburse KBT & F's fees and disbursements and other expenses by order of the Court."

363 B.R. 701, 702. The debtor moved for an order requiring the committee to supplement its statement to provide the additional information required by Rule 2019. Specifically it sought disclosure by each of the committee members of the information required by Rule 2019(a)(4): the amounts of the claims or interests owned by each committee member, when they were acquired and the amounts paid, and any sales or dispositions of those claims or interests.

The court agreed with the debtor that the plain terms of the rule required the committee members to provide the additional information, and it ordered them to disclose it. Judge Gropper rejected the committee's argument that Rule 2019 did not require the requested disclosure because the members of the committee did not represent any other entities and counsel for the committee did not own any claims or interests in the debtor. Responding that "the rule may not

³ See *Shea*, *supra* note 1, at 2598.

be so blithely avoided,” he stressed that the committee had been appearing in the case and that “[w]here an *ad hoc* committee has appeared as such, the committee is required to provide the information plainly required by Rule 2019 on behalf of each of its members.” *Id.* at 703. He noted that by organizing themselves as a committee, these equity security holders “implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings.” *Id.* Judge Gropper further pointed out that the SEC report that gave rise to the rule “centered on perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations.” *Id.* at 704. In the end, the court stated that there was no basis for not applying Rule 2019 as written, even if, as the committee argued, it had been “frequently ignored or watered down.” *Id.*

In a subsequent opinion Judge Gropper denied the *ad hoc* committee’s motion to allow the supplemental Rule 2019 statement to be filed under seal and made available only to the court and the U.S. trustee. *In re Northwest Airlines Corp.*, 363 B.R. 704 (2007). The court found “improbable” and unsupported by the evidence the committee’s contention that disclosure of the information would allow competitors to discern their investment strategies. Instead, affidavits submitted in support of the committee’s motion showed that the members were seeking to shield information about the price at which they purchased their claims and interests for strategic reasons in the case. According to Judge Gropper, by choosing to act as a group, the committee members subjected themselves to Rule 2019’s disclosure requirements and gave up their right to keep their purchase information secret. The court remarked that “[t]his is not unfair because their negotiating decisions as a Committee should be based on the interests of the entire shareholders’ group, not their individual financial advantage.” *Id.* at 708. Rule 2019, Judge

Gropper said, “is based on the premise that the other shareholders have a right to information as to Committee member purchases and sales so that they may make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own.” *Id.* at 709. In this case, he said, that information could be especially important to other shareholders because committee members owned a significant amount of debt as well as stock and they had indicated that they might sell their interests, leaving the shareholders without representation.

Although the *Northwest Airlines* decisions have provoked a significant amount of commentary and indeed have led to the proposal before the Advisory Committee to repeal Rule 2019, neither decision has been cited by a subsequent reported decision. One bankruptcy court, however, has rejected the approach adopted by Judge Gropper. Judge Schmidt of the Bankruptcy Court for the Southern District of Texas denied a debtor’s motion to require an *ad hoc* committee of noteholders to disclose the type of information under Rule 2019 that Judge Gropper required in *Northwest Airlines*. *In re Scotia Pacific Co.*, 2007 WL 2726902 (Bankr. S.D. Tex. May 29, 2007). The only reported document is Judge Schmidt’s denial of the debtor’s motion for reconsideration, which does not reveal the court’s reasoning. According to commentators, however, the noteholders referred to themselves as a “group” rather than a “committee” and argued that Rule 2019 did not apply to them because they did not speak for anyone outside the group.⁴ Thus they claimed that they were not representatives of anyone else. At the hearing on the motion, Judge Schmidt agreed that they were “just one law firm representing a bunch of

⁴ See Shea, *supra* note 1, at 2604-06; Kevin J. Coco, Survey, *Empty Manipulation: Bankruptcy Procedure Rule 2019 and Ownership Disclosure in Chapter 11 Cases*, 2008 COLUM. BUS. L. REV. 610, 632.

creditors.” Taking what he articulated as “a practical approach,” Judge Schmidt ruled that the individual noteholders did not have to provide the information required by Rule 2019(a)(4).

The Trade Associations’ Suggestion for Repeal

The trade associations make several arguments in support of their suggestion that Rule 2019 be repealed (07-BK-G). First they contend that the mandated disclosures are unlikely to be relevant to any legal issue in a chapter 11 case. In particular they argue that the price and time of acquisition of a claim or interest has no legal relevance to the holder’s rights in a reorganization. Second they contend that if the information required by Rule 2019 ever is relevant, it can be obtained pursuant to traditional discovery methods. Third the associations argue that Rule 2019 is both irrational and inefficient. They claim that it is irrational in focusing only on *ad hoc* committees and not also on official committees. Furthermore, they state that the rule has come to be used as a weapon to deter *ad hoc* committees from taking positions adverse to the debtor’s strategies and that it therefore is inefficient because it deters collective representations. Finally the associations argue that the rule may adversely impact reorganization efforts by spawning satellite litigation and by discouraging investment in distressed companies.

Suggestions of the NBC and the Business Bankruptcy Committee

Both the NBC and the Business Bankruptcy Committee oppose the repeal of Rule 2019 and instead argue for expanding its coverage. Each group also suggests other amendments that it believes should be made to the rule, some of which respond to the trade associations’ arguments that the current rule is underinclusive and irrational. Their respective positions are summarized below.

NBC’s position (08-BK-O). The NBC opposes the suggestion that Rule 2019 be repealed

for several reasons. First it supports the rule's disclosure requirements as a means for revealing potential conflicts of interest and the actual economic interests of participants in reorganization cases, including *ad hoc* committees. The NBC further notes the importance of the rule in regulating attorney conduct by requiring attorney disclosure revealing the representation of multiple stakeholders with potentially conflicting interests or the absence of a true attorney-client relationship.

The NBC then proposes that Rule 2019 be amended in several respects:

- It should be expanded to require disclosure of the nature and amount of claims or interests held by all creditors and equity holders who participate in a reorganization case by seeking or opposing relief from the court.
- The rule should require some public disclosure by members of official committees. This disclosure should include the nature and amount of all holdings in the debtor, any changes in the holdings while the case is pending, and a description of any ethical wall procedures (but not the disclosure of holdings on the other side of an ethical wall that the court has approved to allow a committee member to continue trading). Unlike members of *ad hoc* committees, members of official committees would not have to publicly disclose the time of acquisition and the price paid for their holdings in the debtor.
- Rule 2019 should be expanded to require disclosure by official and *ad hoc* committee members, not just of claims or interests, but also of other financial instruments – such as derivatives and options – that give the members an economic interest in or against the debtor.
- The rule should be amended to require disclosure of the dates of acquisition and

purchase price of holdings only by *ad hoc* committees and individuals who claim to represent others. If an unofficial committee only acts on behalf of its own members, it should not be subject to this disclosure requirement.

Business Bankruptcy Committee's position (08-BK-P). The Committee opposes the repeal of Rule 2019 because the rule facilitates openness and transparency in reorganization cases. It results in the disclosure of information that provides a basis for assessing the motives of parties participating in negotiations during the case. The Committee does, however, suggest the following amendments to the rule:

- The scope of the rule should be expanded to cover not only *ad hoc* committees but also official committees and “all other groups of claim or equity holders who band together through shared professionals to advance common positions and strategies.”
- The bankruptcy court should be authorized by the rule to waive for good cause the requirement of disclosing purchase price and acquisition date of holdings in the debtor that the holder believes is confidential proprietary information. In considering whether to waive this disclosure requirement, the court should consider whether the information is a “confidential trade secret that would more properly be filed under seal” and the amount of the holdings at issue in relation to all of the claims or interests of that type.
- The rule should be amended to clarify that supplemental disclosure under (a)(4) is not required each time a trade is made but only after a specified cumulative threshold has been reached. The rule should also provide timing requirements for these supplemental disclosures.

Suggestions of Judges Gerber and Drain

Judge Robert Gerber (Bankr. S.D.N.Y) submitted a letter dated January 9, 2009, to the Advisory Committee (08-BK-M) in response to the trade associations' suggestion that Rule 2019 be repealed. He opposes the repeal of the rule, explains why it is needed, and suggests how it should be amended to address issues presented by the large role in chapter 11 cases being played by distressed debt investors.

Judge Gerber observes that the requirements of Rule 2019 are not being complied with in most cases. Disclosures of claims against the debtor held by a group or committee are usually made in the aggregate rather than with respect to each individual member, and dates of acquisition are vaguely revealed as being "at various times" or "on a number of dates." Prices paid for these claims are generally not disclosed. Other parties usually do not object to inadequate compliance with Rule 2019, except when they are pursuing some private agenda of their own. Trading activities of members of *ad hoc* committees during the case are normally not disclosed, and *ad hoc* groups justify their noncompliance on the ground that they are not "committees."

Judge Gerber sees a need for amending the rule to allow it "to catch up with modern times." His overriding concern is with respect to the active participation in chapter 11 cases by distressed debt investors who attempt to influence the outcome of the case in ways that advance their own personal investment objectives. Although they purport to advocate what is good for the estate, in some situations failure of the reorganization may be their desired outcome. Because of inadequate disclosure, the judge is unaware of their conflicting interests or hidden motives.

Judge Gerber proposes several ways in which Rule 2019 could be amended to clarify its

requirements and to “modernize it.” Overall he seeks to expand the rule’s requirements to require disclosure of “any position or interest that would result in financial gain upon the failure or delay of the chapter 11 case, or upon decreased recoveries by any other constituency.” More specifically, he would require disclosure of short positions, derivatives with the same economic effect, and derivatives that separate ownership from economic risk. He would also require disclosure of any information necessary to prevent other disclosed information from being misleading. He would clarify that the rule requires disclosure on an individual basis by group members, rather than disclosure in the aggregate, and that “it covers any instance in which multiple creditors are represented by the same counsel, whether or not they call themselves a ‘committee.’” Judge Gerber would broaden the rule to include individual parties in interest by prohibiting anyone from (a) making representations to the court about its ownership or control of debt of or interest in the debtor, or (b) being heard on any matter requiring the court’s exercise of judicial discretion, without having first made the disclosures required by Rule 2019. Finally, if the rule were expanded as he suggests, he would delete the requirement of disclosure of the price paid for a claim or interest, leaving that information to discovery in appropriate cases.

Bankruptcy Judge Robert Drain, also of the Southern District of New York, submitted a letter to the Committee dated January 13, 2009 (08-BK-N). Judge Drain agrees with Judge Gerber’s views and adds a couple of additional reasons why Rule 2019 should not be repealed. First he says that its repeal would impair the settlement process in chapter 11 cases because a settling party would not know who the other side was, since all the entities constituting a group would not be revealed. Second he fears that, because of the very large sums at stake in many inter-creditor disputes in chapter 11 cases, in the absence of the disclosure requirements of Rule

2019, clients may mislead or selectively inform their counsel about their underlying interests.

The Subcommittee's Proposal for Amending Rule 2019

Based on all of the submissions and its own discussions, the Subcommittee recommends that Rule 2019 not be repealed. The rule continues to serve an important purpose in requiring disclosure by entities, such as attorneys, and unofficial committees that serve in a representative capacity. The Subcommittee, however, agrees with the original suggestion that the rule is underinclusive, and it agrees with the other suggestions that there is a need to expand the rule with respect to who is covered by its provisions and what information must be disclosed.

The Subcommittee recommends that the rule apply in most respects to official, as well as *ad hoc*, committees, and that it apply to groups of more than one creditor or equity security holder, whether or not they call themselves a "committee." The Subcommittee further recommends that the rule not be limited to groups or committees that purport to represent others, but that it instead should apply as well to groups or committees that represent only their own interests, such as groups of distressed debt investors. The Subcommittee, however, is not prepared at this point to recommend that disclosure be mandated in all cases with respect to each party in interest that appears before the court on its own behalf to seek or oppose relief. It instead recommends that the rule expressly grant the court authority to require disclosure by individual parties in interest in particular instances in which the court determines that such disclosure is needed.

The Subcommittee agrees with the suggestions that Rule 2019 be amended to expand the types of financial interests that must be disclosed. It therefore proposes the disclosure of a broad listing (denominated as "disclosable economic interests") of financial instruments and rights that

could affect the positions in a chapter 11 case that the holder might take. In light of this expanded disclosure, the Subcommittee accepted the suggestions that disclosure of the amount paid for disclosable economic interests not be required in all cases. Rather than eliminate the disclosure of that information entirely, the Subcommittee recommends that requiring such disclosure be left to the discretion of the court. In order to clarify the intent of the rule, the Subcommittee recommends amendments that require disclosure with respect to *each* committee or group member and that specify that supplemental statements setting forth any material changes be filed monthly unless the court orders otherwise. Finally, the Subcommittee’s proposed draft substantially reorganizes the rule and makes stylistic changes in order to make it easier to read and understand.

Because of the substantial revision of Rule 2019 that the Subcommittee recommends, it is set out below as a clean copy of the proposed amended rule. The current version of the rule would be stricken through in its entirety.

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

1 (a) DEFINITION. In this rule “disclosable economic
2 interest” means any claim, interest, pledge, lien, option,
3 participation, or derivative instrument, or any other right or
4 derivative right that grants the holder an economic interest that is
5 affected by the value, acquisition, or disposition of a claim or
6 interest.

7 (b) DISCLOSURE BY ENTITIES, GROUPS,

8 COMMITTEES, INDENTURE TRUSTEES, AND OTHER
9 PARTIES IN INTEREST. In a chapter 9 or chapter 11 case, every
10 entity, group, or committee consisting of or representing more than
11 one creditor or equity security holder and, unless otherwise
12 directed by the court, every indenture trustee, shall file a verified
13 statement setting forth the information specified in subdivision (c).
14 On motion of a party in interest or on its own motion, the court
15 may require disclosure of some or all of the information specified
16 in subdivision (c)(2) by a party in interest who appears before the
17 court seeking or opposing the granting of relief.

18 (c) INFORMATION REQUIRED. The verified statement
19 shall set forth the following information:

20 (1) the pertinent facts and circumstances concerning—

21 (A) the employment of the entity or indenture
22 trustee, including the name or names of the entity or entities at
23 whose instance the employment was arranged; or

24 (B) in the case of a group or committee, other than a
25 committee appointed pursuant to §§ 1102 or 1114 of the Code, the
26 formation of the group or committee, including the name or names
27 of the entity or entities at whose instance the group or committee
28 was formed or agreed to act;

29 (2) with respect to the entity, each member of the group or

30 committee, or the indenture trustee, if not disclosed under
31 subdivision (c)(1)—

32 (A) its name and address;

33 (B) the nature and amount of, and if directed by the
34 court, the amount paid for, each disclosable economic interest held
35 in or in relation to any debtor in the case as of the time of the
36 employment of the entity, the formation of the group or committee,
37 or the appearance in the case of the indenture trustee; and

38 (C) the date when each of those disclosable
39 economic interests was acquired, unless acquired more than one
40 year prior to the filing of the petition; and

41 (3) with respect to the creditors or equity security holders
42 represented by the entity, group, or committee, other than a
43 committee appointed pursuant to §§ 1102 or 1114 of the Code, or
44 by the indenture trustee, if not disclosed under subdivision (c)(1) or
45 (c)(2)—

46 (A) their names and addresses;

47 (B) the nature and amount of, and if directed by the
48 court, the amount paid for, each disclosable economic interest held
49 in or in relation to any debtor in the case as of the date of the
50 statement; and

51 (C) the date when each of those disclosable

52 economic interests was acquired, unless acquired more than one
53 year prior to the filing of the petition.

54 A copy of the instrument, if any, whereby the entity, group,
55 committee, or indenture trustee was empowered to act on behalf of
56 creditors or equity security holders shall be attached to the verified
57 statement .

58 (d) SUPPLEMENTAL STATEMENTS. A supplemental
59 verified statement shall be filed monthly, or as frequently as the
60 court otherwise orders, setting forth any material changes in facts
61 contained in the previous statement filed by the entity, group,
62 committee, or indenture trustee under this rule, including
63 information about any acquisitions, sales, or other dispositions of
64 disclosable economic interests by the entity, members of the group
65 or committee, or indenture trustee.

66 (e) FAILURE TO COMPLY; EFFECT. On motion of any
67 party in interest or on its own initiative, the court may take any of
68 the following actions: .

69 (1) determine whether there has been a failure to
70 comply with the provisions of this rule;

71 (2) determine whether there has been a failure to
72 comply with any other applicable law regulating the activities and
73 personnel of any entity, group, committee, or indenture trustee or

74 whether any other impropriety in connection with any solicitation
75 has occurred;

76 (3) if the court determines that a failure to comply
77 or other impropriety has occurred, refuse to permit the
78 noncompliant entity, group, committee, or indenture trustee to be
79 heard further or to intervene in the case;

80 (4) examine any representation provision of a
81 deposit agreement, proxy, trust mortgage, trust indenture, deed of
82 trust, or authorization to act as a representative, and any claim or
83 interest acquired by any entity, group, or committee in
84 contemplation of or in the course of a case, and grant appropriate
85 relief; and

86 (5) hold invalid any authority, acceptance, rejection,
87 or objection given, procured, or received by an entity, group, or
88 committee that has not complied with this rule or with § 1125(b) of
89 the Code.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

The content of subdivision (a) is new. It sets forth a

definition of the term “disclosable economic interest,” which is used in subdivisions (c)(2), (c)(3), and (d). The definition of the term is intended to be sufficiently broad to cover all economic interests that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. Such economic interests extend beyond claims and interests owned by a stakeholder.

Subdivision (b) specifies who is covered by the rule’s disclosure requirements. In addition to entities and committees that represent more than one creditor or equity security holder, the amendment extends the rule’s coverage to committees that consist of more than one creditor or equity security holder. It also applies to groups of creditors and equity security holders that act in concert to advance common interests, even if they do not call themselves committees. The rule continues to apply to indenture trustees, unless the court directs otherwise.

As amended, the rule authorizes a court, on motion of a party in interest or *sua sponte*, to require disclosure of some or all of the information specified in subdivision (c)(2) by a party in interest who appears before the court seeking or opposing the granting of relief. Although the rule does not automatically require disclosure by parties that act individually and on their own behalf, it allows for such disclosure when a court believes that knowledge of the party’s economic stake in the debtor will assist it in evaluating the party’s arguments.

Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require the disclosure of information concerning the employment of entities and indenture trustees and the formation of committees and groups, other than official committees.

Subdivision (c)(2) specifies information that must be disclosed with respect to entities, indenture trustees, and committee and group members. In the case of committees and groups, the information about the nature and amount of disclosable economic interests must be specifically provided on a member-by-member basis, and not in the aggregate. Likewise, dates of acquisition of such interests must be specifically provided, but such information does not need to be provided for disclosable economic interests

acquired more than a year before the filing of the petition. The amendment leaves to the court's discretion whether to require the disclosure of the amount paid for each disclosable economic interest. Unless the court orders its disclosure, that information does not have to be included in the verified statement.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, committee, or indenture trustee. This provision does not apply with respect to those represented by official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under (c)(2). The amendment clarifies that under (c)(3) the nature and amount of disclosable economic interests of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (d) requires the filing of a supplemental statement when there are material changes in facts contained in the previously filed verified statement. Such supplemental statements shall be filed monthly (assuming material changes have occurred), unless the court orders otherwise.

Subdivision (e) specifies the actions that a court may take if it determines that there has been a failure to comply with the requirements of this rule or other applicable law.

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

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Advisory Committee on Bankruptcy Rules

c/o Peter G. McCabe, Secretary

Committee on Rules of Practice and Procedure

Administrative Office of the United States Courts

Washington, DC 20544

To the Members of the Advisory Committee:

I write on behalf of the National Bankruptcy Conference (the "Conference") in order to provide you with an update of our letter to you of September 22, 2008 (copy attached), regarding the request of the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") that Bankruptcy Rule 2019 be repealed. As explained in our earlier letter, during the past year (actually, for more than one year), the Conference has been considering recommendations to modify Rule 2019 to require adequate disclosure, possibly broadening it in certain respects, while limiting or eliminating some disclosure. Our earlier letter noted that we anticipated discussing these issues at our annual meeting in Washington, D.C., on October 23rd and 24th, and intended to update the Advisory Committee with our conclusions shortly thereafter. The purpose of this letter is to provide you with that update.

At our Annual Meeting, the Conference voted to make the following recommendations with respect to Bankruptcy Rule 2019:

1. The Conference opposes the repeal of Rule 2019 and recommends that Rule 2019 be retained. The Conference further recommends that the Rule be amended as described below to address the fact that the Rule (i) is underinclusive and (ii) does not address the economic reality of derivative investments, options and participations which allow stakeholders to have an economic interest in (or economic exposure to) claims and equity securities without directly owning or acquiring them. Additionally, the Rule should be amended to limit the circumstances under which purchase price and time of acquisition must be disclosed.

2. The disclosure requirements of Rule 2019 should be expanded to require that any party in interest that files any pleading in a case, including a motion seeking any relief or an objection to any relief, be required to disclose all claims or interests held by that party but, except as described below, the disclosure need not include the time of acquisition or the amount paid for the claim or interest.

ADMINISTRATIVE OFFICE
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[NYCORP:3114230v1:4400:12/09/08--10:53 p]]

3 Rule 2019 should be amended to require that each member of an official committee established under section 1102 or 1114 of the Code be required to disclose, in a publicly-filed pleading (and not just confidentially to the United States Trustee): (1) all holdings of claims or interests in any class, excluding any holdings on the other side of an "ethical wall" (2) any subsequent changes in holdings; and (3) a description of ethical wall procedures. Further, each member of an official committee should be required to disclose, not only claims or interests that it "owns," but also all derivative, option and participation interests held in or in relation to the debtor.

4. Each member of an ad hoc or unofficial committee of creditors or equity holders (however named) that purports to be representative of a larger group (and not just of the interests of its members), excluding any indenture trustee or any agent for a bank group, and each individual stakeholder who purports to speak for a class or group, should be required to make the same disclosure as required of official committees, as described in paragraph 3, *supra*, and, in addition, to disclose the time of acquisition and price paid for all holdings. This additional disclosure requirement of time of acquisition and price paid would not apply to an ad hoc or unofficial committee or "group" (however named) that does not purport to be representative of any interests beyond those of its own members.

The following table summarizes the level of disclosure which the Conference recommends be required of various parties in interest under an amended Rule 2019, with an "X" in the box indicating that disclosure should be required:

Party	Nature of Claim	Amount of Claim	When Acquired	Amount Paid	Derivatives/ Participations
Single Party in Interest Appearing in Case	X	X			
Nonrepresentative Ad Hoc or Unofficial Committee or Group	X	X			
Representative Ad Hoc or Unofficial Committee or Group	X	X	X	X	X
Official Committee	X	X			X

These recommendations, and their underlying rationale, are described in more detail in the attached memorandum.

Advisory Committee on Bankruptcy Rules
December 10, 2008
Page 3

The Conference appreciates your consideration of our views.

Very truly yours,

/s/ Isaac M Pachulski

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Enclosures

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

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NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

September 22, 2008

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Re Comments on Federal Rule of Bankruptcy Procedure 2019

To the Members of the Advisory Committee:

I write on behalf of the National Bankruptcy Conference (the "Conference"). We understand that the Loan Syndications and Trading Association (LSTA) and the Securities Industry and Financial Markets Association (SIFMA) have requested that Bankruptcy Rule 2019 be repealed. The Conference opposes repeal and urges the Committee to carefully consider the ramifications of repealing the Rule before acting on the LSTA/SIFMA's request.

During the past year, the NBC has been reviewing the overall plan negotiation and approval process in light of today's highly complex capital structures. One of the issues we have identified as potentially affecting plan outcomes is cross-voting. Cross-voting occurs when one holder (or a related party) holds debt or securities in different parts of the capital structure and votes against the remaining holders' interests in one class to further its interest in another class. The Conference has been considering recommendations to modify section 1126(e) of the Bankruptcy Code to deal with this and other potential conflicts of interest. It is also considering recommendations to modify Rule 2019 to require adequate disclosure, possibly broadening it in certain respects, while limiting or eliminating some disclosures. For example, the Conference is currently considering whether the Rule should be amended to require members of official committees appointed under sections 1102 and 1114 of the Code to disclose their holdings or whether all creditors should be required to disclose their holdings when they file pleadings or vote on a plan. The Conference is also considering what disclosures should be made under the Rule, including whether it might make sense to abridge or eliminate certain disclosures required under the current Rule. We will be discussing all of these issues at our meeting in Washington, DC on October 23rd and 24th and intend to update the Advisory Committee with our conclusions shortly thereafter.

We strongly urge the Committee to allow for further study of Rule 2019. Its substance has been part of the bankruptcy law since 1938 and should not be repealed without considerable thought given to the reasons and consequences.

The Conference appreciates your consideration of our views.

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE
ON FEDERAL RULE OF BANKRUPTCY PROCEDURE 2019

December 10, 2008

1. Rule 2019 Should Not Be Repealed.

Bankruptcy Rule 2019 is a disclosure rule that is designed to increase transparency in the chapter 11 process; reveal potential conflicts of interest on the part of those acting in a representative capacity or purporting to act for the benefit of others; and advise the court and parties in interest of the actual economic interest of those participating in a reorganization case—which is all about economics and economic interests. The Rule requires that "in a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code [an official committee], every entity or committee representing more than one creditor or equity security holder . . . shall file a verified statement setting forth" the following information:

- (1) the name and address of the creditor or equity security holder;
- (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;
- (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee and in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and
- (4) with reference to the time of the employment of the entity, the organization or formation of the committee or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.

The substance of the disclosure requirements now contained in Bankruptcy Rule 2019 has been part of bankruptcy law for seventy years. The progenitor of Rule 2019 was enacted as part of Chapter X of the former Bankruptcy Act in the 1930's (Bankruptcy Act §§ 210-12, former 11 U.S.C. §§ 610-12), in the aftermath of an SEC study which "centered on perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations." *In re Northwest Airlines Corp.*, 363 B.R. 701, 704 (Bankr. S D.N.Y. 2007).

Among other things, the SEC Report warned of possible conflicts of interest by outside as well as inside financial interests, finding that "these conflicts permeate the entire protective committee system. Their elimination is as essential toward making the outside groups effective and responsible as it is towards eliminating the abuses of the insiders." *SEC Report*, Part I at 880. As one step toward this end the Commission recommended that persons who represent more than 12 creditors or stockholders (including committees) be required to file with the court a sworn statement containing the information now required by Rule 2019. The Report also recommended that "[a]ttorneys who appear in the proceedings should be required to furnish similar information respecting their clients." The SEC specifically found that the foregoing information "will provide a routine method of advising the court *and all parties in interest* of the *actual economic interest* of all persons participating in the proceedings."

In re Northwest Airlines Corp., 363 B.R. 704, 707 (Bankr. S.D.N.Y. 2007) (first emphasis in original; second emphasis added).¹

The function of Rule 2019 as a self-reporting device that discloses (and, hopefully, helps prevent) potential conflicts of interest and advises the court and parties in interest of the "actual economic interest" of participants in a reorganization case is as

¹ Bankruptcy Judge Alan Gropper, who authored both of the reported *Northwest Airlines* decisions dealing with Rule 2019, is a member of the Conference.

valid now as it was 70 years ago To put it colloquially, sunlight is the best disinfectant. Moreover, compliance with Rule 2019 is not unduly burdensome – a Rule 2109 Statement is not a complex or difficult document to prepare. The shortcoming in Rule 2019 is not that it exists, but that it is underinclusive and has not kept pace with the increasingly sophisticated financial devices whereby a stakeholder can have an economic interest in a claim or interest without "owning" the claim or interest.

To begin with, although the Chapter X antecedents of Rule 2019 were enacted in large measure to address perceived abuses and conflicts of interest on the part of unofficial committees, that was not their only purpose: Another important purpose has been to regulate the conduct of attorneys who purport to act on behalf of multiple parties. Thus, former Chapter X included not only a provision requiring disclosure by committees and representative groups (Bankr. Act §211, former 11 U.S.C. § 611)² but also a *separate* disclosure requirement applicable solely to attorneys representing creditors or stockholders:

² Section 211 provided that:

Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include –

(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders,

(2) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;

(3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefore, and any sales or other disposition thereof; and

(4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each

An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition.

Bankruptcy Act § 210, former 11 U.S.C. § 610. Rule 2019 imposes similar requirements on attorneys under the rubric of "any entity . . . representing more than one creditor or equity security holder . . ."

Those advocating the repeal of Rule 2019 with respect to holders of financial interests have overlooked its equally important role in monitoring and regulating the conduct of attorneys. For example, the disclosure required by Rule 2019 may assist the court in addressing (and enforcing) the ethical obligations of counsel who represents multiple stakeholders with potentially conflicting interests in a bankruptcy case. See *In re Oklahoma P.A.C. First Ltd Partnership*, 122 B.R. 387, 393 (Bankr. D.Ariz. 1990) ("Moreover, the court should also play a role in ensuring that lawyers adhere to certain ethical standards. Bankruptcy Rule 2019 was designed for such a purpose.").

Similarly, Rule 2019 may assist the court in regulating the conduct of counsel who purport to have the right to vote hundreds (or even thousands) of claims. For example, in *Barron & Budd P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147 (D.N.J. 2005), the District Court affirmed an order of the Bankruptcy Court directing various asbestos law firms that represented multiple claimants and asserted the right to vote their claims to include in their Rule 2019 Statements:

holder of such claims or stock acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof.

a list and detailed explanation of any type of co-counsel, consultant or fee-sharing relationships and arrangements whatsoever, in connection with this bankruptcy case or claims against any of the Debtors, and attachment of copies of any documents that were signed in conjunction with creating that relationship or arrangement . .

Id. at 154.

In affirming the Bankruptcy Court, the District Court characterized Rule 2019 as a disclosure provision:

designed to ensure that lawyers involved in the Chapter 11 reorganization process adhere to certain ethical standards and approach all reorganization related matters *openly and* subject to the scrutiny of the court. *See, e.g., In re the Muralo Co Inc.*, 295 B.R. 512, 524 (Bankr. D.N.J. 2003) (Rule 2019 "is designed to foster the goal of reorganization plans which deal fairly with creditors and which are arrived at openly."); *In re Oklahoma P.A.C.*, 122 B.R. 387, 392-393 (Bankr. D. Ariz. 1990) (same); CF Holding, 145 B.R. at 126 (The "purpose of Rule 2019 is to further the Bankruptcy Code's goal of complete disclosure during the business reorganization process."); *In re F&C Int'l, Inc.*, 1994 Bankr. LEXIS 274, (Bankr. S.D. Ohio 1994) (Absent compliance with Rule 2019, there is a danger that "parties purporting to act on another's behalf may not be authorized to do so and may receive distributions to which they are not entitled.").

Id. at 166 (emphasis added).

In the District Court's view, the required Rule 2019 disclosures bore on the overall fairness of a plan. Among other things, the District Court noted: (i) evidence that two law firms which, together, purported to "speak for" over 75% of all asbestos claimants might not in fact "represent" those claimants in the traditional sense of an attorney-client relationship but, rather, may have represented other attorneys who, in turn, represented the individual claimants (*id.* at 160); (ii) the Bankruptcy Court's concern that many of the creditors purportedly represented by counsel who claimed the right to vote their claims had never seen a copy of the chapter 11 disclosure statement and, for all the

Court knew, had absolutely no idea how their claims would be treated under the plan (*id* at 166); (iii) the appropriateness of applying Rule 2019 "to prevent conflicts of interest among creditors' counsel from undermining the fairness of the Plan" (*id* at 167); and (iv) disclosures by some non-Appellant law firms revealing that "some attorneys with an inventory of claims in this bankruptcy share as much as one-third of their fees with members of the prepetition committee, who are also Appellants in this case." *Id* at 167, 169.

In sum, as illustrated by *Baron & Budd*, Rule 2019 is a disclosure rule that serves to assist the Bankruptcy Court in monitoring and regulating the conduct of counsel who purports to speak and act for multiple parties. There is no reason to deprive the Court of this tool.

Of course, the other major purpose of Rule 2019 (and its predecessors) is to require transparency on the part of committees and similar creditor and equity holder groups that purport to represent the interests of a class, and not just to speak for the interests of individual stakeholders who jointly retain counsel. That purpose is as valid now as it was 70 years ago. Once a group of creditors or equity holders elects to seek greater credibility by portraying themselves as an "ad hoc committee" that is looking out for the economic interests of a class of claims or interests, rather than merely the parochial interests of individual members, greater transparency on their part is appropriate because of the greater credibility and influence they seek by acting as a "committee." *Cf. In re Northwest Airlines*, 363 B.R. at 704 (noting that Rule 2019 "requires" unofficial committees that play a significant public role in reorganization

proceedings and enjoy a level of credibility and influence consonant with group status to file a statement containing certain information") (emphasis added).

As explained by the Bankruptcy Court in *Northwest Airlines*:

Ad hoc or official committees play an important role in reorganization cases. By appearing as a "committee" of shareholders, the members purport to speak for a group and implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings. Moreover, the Bankruptcy Code specifically provides for the possibility of the grant of compensation to "a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title [an official committee], in making a substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503(b)(3)(D). A committee purporting to speak for a group obviously has a better chance of meeting the "substantial contribution" test than an individual, as a single creditor or shareholder is often met with the argument that it was merely acting in its own self-interest and was not making a "substantial contribution" for purposes of § 503(b)(3) . . .

In re Northwest Airlines, 363 B.R. 701, 703 (Bankr. S.D.N.Y. 2007) (citations omitted).

When "ad hoc" and "unofficial" committees seek greater credibility and influence by styling themselves as such and claiming to act for the benefit of a larger group, it is appropriate to require greater disclosure of the actual economic interests of their members in and relating to the debtor, so that the Court and parties in interest can understand their motives and verify whether their economic interests are aligned with those of the larger group for whom they purport to speak:

[T]he other [stakeholders] have a right to information as to Committee member purchases and sales so that they can make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own. It also gives all parties a better ability to gauge the credibility of an important group that has chosen to appear in a bankruptcy case and play a major role.

Id. at 709.

In sum, the self-reporting function of Rule 2019 continues to provide a useful mechanism to assist the court and parties in interest in dealing with "unofficial" creditor groups who seek enhanced credibility by styling themselves as such.

2 Recommended Amendments To Rule 2019.

a. Rule 2019 Should Be Amended to Require the Disclosure of the Holdings of Individual Creditors and Equity Holders Who Appear In a Case

In their memorandum dated November 20, 2007, the LSTA and SIFMA

note that:

If the information required by Rule 2019 were truly important to bankruptcy reorganizations, it would be required of all active participants and not merely those who form *ad hoc* committees. Rule 2019 in its current form is therefore irrational because it only requires such purportedly important information from *ad hoc* committee members. The primary explanation for this lies in bankruptcy history which varies dramatically from present bankruptcy practices. In light of that disparity, the Rule is irrational, because it is under-inclusive and does not apply to investors who are not members of *ad hoc* committees but who may nonetheless pursue the same strategies the Rule ostensibly deters.

LSTA/SIFMA Memorandum at 15.

They further argue that:

To the extent that Rule 2019 provides the court and the debtor with an understanding of the motives of participants in the process, it is under-inclusive, because it does not require disclosure from all participants, just from *ad hoc* committees. Therefore, if transparency truly allows the court and the debtor to "root out" investors who act in bad faith or to uncover conflicts of interest between committee members and their representatives, then the Rule should apply *equally* to all participants in a bankruptcy case and not just to members of *ad hoc* committees.

LSTA/SIFMA Memorandum, at 17. To support their point, the LSTA/SIFMA cite some examples of situations where the "wrongdoers" were individual creditors.

The Conference has considered this issue and agrees that Rule 2019 is underinclusive. The solution to this shortcoming is not, however, to abolish a Rule that has important disclosure and prophylactic purposes, but to broaden it to require the disclosure of holdings by individual creditors and equity holders who participate in a reorganization case (regardless of whether they are part of a "group", "consortium" or "committee" or have jointly retained counsel), without requiring the disclosure of the purchase price paid for claims or interests or the time of their acquisition (from which their purchase price may often be derived). Where an individual creditor or equity holder appears in a case to seek relief from the Court or oppose relief sought by others, the Court is entitled to know the nature of the creditor's (or equity holder's) actual economic interest that motivates the creditor's (or equity holder's) position, particularly since much of what comes before the Court involves the exercise of discretion. Such disclosure will reduce the likelihood that a "hidden agenda" stays hidden, and would not be unduly burdensome (about one paragraph of a pleading).

b. Rule 2019 Should Be Amended to Require Public Disclosure By Members of Official Committees as Well as Ad Hoc Committees.

Rule 2019 specifically excludes from its disclosure requirements "a committee appointed pursuant to § 1102 or 1114 of the Code," i.e., official creditors and equity holders committees. Although members of official committees appointed by the United States Trustee are required to make various private disclosures to the U.S. Trustee, that information is not made public; there is no required public disclosure of official committee members' holdings or actual economic interests in the case.

It is quite anomalous, however, to require *no* public disclosure of holdings or changes in holdings from members of *official* committees when such disclosure is required from members of *unofficial* committees. The same considerations that warrant the public disclosure of the actual economic interests of the members of an unofficial committee to the Court and to the creditors or equity holders that the unofficial committee purports to represent apply with equal force to members of official committees. These considerations are reinforced by the fiduciary duties of members of official committees to their constituents, the fact that the views of official committees generally carry greater weight and have more credibility with the Court and others than those of individual stakeholders or unofficial committees, and the fact that professionals employed by official committees are compensated by the estate without any showing of "substantial contribution." Compare 11 U.S.C. §§ 503(b)(3)(D), (4), with *id.* §§ 330(a), 503(b)(2). These considerations support disclosure and transparency with respect to the economic interests of members of official committees. Accordingly, the Conference recommends that Rule 2019 be amended to require members of an official committee to file with the court a statement disclosing: (1) all holdings of claims and interests of each member of the committee, in all classes of claims or interests, but not including any holdings on the other side of an ethical wall that has been established with court approval to permit the entity represented on the committee to continue to engage in trading; (2) any changes in their holdings; and (3) a description of the "ethical wall" procedures.

In contrast to its recommendation with respect to *ad hoc* or unofficial committees (or even individual creditors) that purport to speak for a larger group, however, the Conference recommends *against* requiring the *public* disclosure by

members of official committees of the price paid for their holdings or the time of acquisition (from which the price paid might often be determined). This recommendation results from a concern that requiring the disclosure of purchase price information would unduly discourage parties from being willing to serve on official committees, an input received from the U.S. Trustee's Office on this point. This approach to not requiring public disclosure would not affect the ability of the U.S. Trustee to require the private disclosure of such information to the U.S. Trustee as part of its appointment and maintenance in office of official committee members.

This distinction between official committees and unofficial committees with respect to the public disclosure of purchase price and time of acquisition information is warranted by the very different nature of the "appointment" process for such committees. Members of official committees are screened and appointed by the U.S. Trustee's Office (which can require the provision of information on a private basis as a condition of such service). In contrast, there is no judicial or administrative body that performs an analogous screening function for *ad hoc* committees: Members of unofficial committees are self-selected and need not make any disclosure on a private basis to any judicial or administrative body in order to serve on an unofficial committee.

- c. Rule 2019 Should Be Amended to Require Disclosure Not Only Regarding "Claims" or "Interests" "Owned" By Committee Members But Also of Derivatives, Option and Participations Giving Rise To Economic Interests In or Against the Debtor.

Rule 2019 requires disclosure only with respect to "claims or interests owned" by the members of a committee. However, in light of the proliferation and use of sophisticated, sometimes complex financial instruments that allow stakeholders to acquire economic interests and exposures without directly purchasing the underlying

claim or equity security, the limited reference to "owned" "claims" and "interests" in Rule 2019 does not comport with current economic reality, and needs to be broadened. Otherwise, the limited disclosure required by Rule 2019 may provide an incomplete or distorted picture of where a committee member's economic interests truly lie. *Cf.* Stephen Lubben, *Credit Derivatives and the Future of Chapter 11*, 81 *Am Bankr L.J.* 405, 427 ("Petitioning creditors should be required to disclose their swap positions as part of the involuntary petition . . . so that courts considering petitions have some awareness if the creditors had incentives to 'jump the gun' with the petition.").

While not involving Rule 2019 (because members of official committees are not required to comply with Rule 2019), the cease and desist order entered in *In re Van D Greenfield and Blue River Capital LLC*, Administrative Proceeding 3-12098, SEC Release No. 52744 (Nov. 7 2005) (copy attached as Appendix "C") illustrates the shortcomings of a disclosure scheme that is limited to "claims" and "interests" that are "owned." There, Blue River, a broker-dealer owned by Mr. Greenfield, owned less than \$7 million in WorldCom unsecured notes when WorldCom filed its chapter 11 case on July 21, 2002. Only July 26, 2002, Greenfield arranged to have a short sale of \$400 million in face amount of WorldCom unsecured notes ("Notes") executed in one Blue River proprietary account "as of" July 19, 2002, and a purchase of \$400 million in face value of such Notes concurrently executed in another Blue River proprietary account. Then, Greenfield sent a letter to the U.S. Trustee applying for appointment to WorldCom's Official Unsecured Creditors' Committee, representing that Blue River held a \$400 million unsecured claim against WorldCom based on the Notes.

The letter did not, however, disclose that Blue River also had a \$400 million short position in the Notes in another proprietary account and, thus, no net economic interest in the Notes beyond the original position of less than \$7 million. Based on the \$400 million "long" position in the Notes (and the failure to disclose the offsetting short position), Blue River was appointed to the Official Committee and Greenfield became its co-chair. The next day, Greenfield directed the cancellation of the short sale and the associated purchase of the Notes, leaving Blue River with its original less than \$7 million position in WorldCom debt. Of course, had the "short" position been disclosed, Greenfield would never have been appointed to the Official Committee.

In order to provide complete and meaningful disclosure of economic interests in or relating to the debtor of members of official committees, members of ad hoc committees that portray themselves as speaking for a larger group, and individual stakeholders who purport to speak for a class or group, such committee members and individual stakeholders should be required to disclose not only "claims" or "interests" which they "own," but also any pledge, lien, option, participation, derivative instrument or other right or derivative right that grants the holder thereof an economic interest in a claim or interest that has the same or similar economic effect as if such holder held, acquired, or sold a claim or interest.

- d. Rule 2019 Should Be Amended To Limit the Requirement of Disclosing the Time of Acquisition and the Purchase Price of Claims and Interests to Members of Unofficial Committees and Individual Creditors That Purport to be Acting for a Larger Group.

The Conference recommends that Rule 2019 be amended so that any general requirement of public disclosure of purchase price of a claim or interest or the time of acquisition (from which the purchase price can often be derived) should apply

only to (i) members of ad hoc or unofficial committees or groups (however denominated) that claim to be representative of claims or interests similar to those represented on the committee or in the "group," and (ii) individual creditors who purport to represent or speak for a class of claims or interests. The common element in all of these situations is that the party before the Court is purporting to represent the interests of others on a self-selected basis, without having been screened or subject to appointment by any judicial or administrative body. In such a situation, those "others" should have sufficient information to determine whether their interests are actually aligned with those of the parties purporting to speak or act on their behalf.

However, for reasons already summarized in section 2(c), *supra*, the Conference recommends against extending the requirement of *public* disclosure of purchase price and time of acquisition to members of official committees who are appointed (and screened) by the U.S. Trustee. In addition, there appears to be no reason to require stakeholders who do not purport to be acting for or representing the interests of others to disclose what they paid for their claims or interests. Accordingly, Rule 2019 should be amended to eliminate any requirement to disclose the acquisition price of a claim or the time of acquisition for any ad hoc committee or group that does not claim to be representative of claims or interests similar to those represented on the committee or within the group, or to be acting for anyone beyond its own members.



BUSINESS BANKRUPTCY COMMITTEE

The World's Largest Organization of Bankruptcy Restructuring Lawyers

**THIS REPORT IS NOT, AND SHOULD NOT BE CONSTRUED AS,
THE OFFICIAL POLICY OR POSITION OF
THE AMERICAN BAR ASSOCIATION**

**REPORT OF THE BUSINESS BANKRUPTCY COMMITTEE
SPECIAL TASK FORCE ON BANKRUPTCY RULE 2019**

**MICHAEL ST. PATRICK BAXTER
CHAIR, BUSINESS BANKRUPTCY COMMITTEE**

DECEMBER 12, 2008

REPORT OF THE BUSINESS BANKRUPTCY COMMITTEE
SPECIAL TASK FORCE ON BANKRUPTCY RULE 2019

December 12, 2008

Introduction

The Judicial Conference of the United States Advisory Committee on Bankruptcy Rules has asked the Business Bankruptcy Committee to comment on a proposal to repeal or amend Bankruptcy Rule 2019. The Chair of the Business Bankruptcy Committee established the Special Task Force on Bankruptcy Rule 2019 (the "Task Force") to review and provide comments, suggestions and recommendations on the proposal to repeal or amend Bankruptcy Rule 2019. The Task Force was comprised of the Chairs or Vice-Chairs of the following Subcommittees: (1) Rules Subcommittee; (2) Avoiding Powers Subcommittee; (3) Trust Indentures; (4) Corporate Governance, (5) Bankruptcy Crimes, Fraud and Abuses of Bankruptcy Process; (6) E-Newsletter; (7) Claims Trading; (8) Secured Creditors; (9) Legislation; (10) Current Developments; (11) Partnerships and Limited Liability Entities in Bankruptcy; and (12) Legislation.

The following is the report of the Task Force. **THIS REPORT DOES NOT REPRESENT THE OFFICIAL POLICY OR POSITION OF THE AMERICAN BAR ASSOCIATION.**

Background

A. History of Rule 2019.

Rule 2019 provides, in relevant part, as follows:

- (a) **Data Required.** In a chapter 9 municipality or chapter 11 reorganization case...every entity or committee representing more than one creditor or equity security holder...shall file a verified statement setting forth
 - (1) the name and address of the creditor or equity security holder;
 - (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;
 - (3) ...in the case of a committee, the name or names of the entity or entities at whose instance...the employment was arranged or the committee was organized and agreed to act; and

(4) . . .the amounts of claims or interests owned by the entity, the member of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.

Fed. R. Bankr. P. 2019 (a).

Bankruptcy Rule 2019 (and its predecessor rules) has existed for nearly 70 years. It is a disclosure rule designed to facilitate open and fair negotiations in reorganization proceedings. Bankruptcy Rule 2019 is derived from Rule 10-211 of the former Chapter X of the Bankruptcy Act. Rule 10-211 was enacted following the SEC Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1937) (the “SEC Report”).

The SEC Report examined perceived abuses by unofficial committees in corporate reorganizations. The SEC Report examined the then common practice of the formation of “protective committees,” which were formed to protect the interests of security holders, but in practice were often dominated by insiders, financial advisors or other parties with potential or actual conflicts. The SEC Report noted that other security holders may be misled by such groups’ participation in a reorganization by the mistaken belief their cause would be well served by the committees. *In re Northwest Airlines*, 363 B.R. 701 at n.6 (S.D.N.Y. 2007)(quoting SEC Report at 880). As such, the SEC Report recommended “that persons who represent more than 12 stockholders . . . be required to file with the court a sworn statement containing the information now required by Rule 2019.” *Northwest*, 363 B.R. at 704. Bankruptcy Rule 2019 is substantially the same as its predecessor rule under Chapter X of the Bankruptcy Act.

B. The Northwest and Scotia Decisions.

Courts in the past often have not required strict compliance with the disclosure requirements of Bankruptcy Rule 2019. However, as hedge funds and other distressed security investors began to participate more frequently in reorganization proceedings, parties in interest began to focus more on Bankruptcy Rule 2019 and whether Bankruptcy Rule 2019 was being followed, because these parties are more likely to form unofficial committees and actively trade debt prior to and after the commencement of a Chapter 11 case.

A dispute over the scope of the disclosure required by *ad hoc* committees recently erupted in the *Northwest* case. In *Northwest*, an *ad hoc* committee of equity security holders entered an appearance in the case and filed a Bankruptcy Rule 2019 disclosure statement that did not include the amounts of claims or interests owned by members of the committee, the times when acquired, the amounts paid for the interests, and any sale or disposition of the interests. *Northwest*, 363 B.R. at 701. The Debtors filed a motion seeking to compel the *ad hoc* committee to disclose this information and the *ad hoc* committee opposed its disclosure. The *ad hoc* committee contended that this information was confidential proprietary information and that disclosing it would be highly

prejudicial. The Court found that Bankruptcy Rule 2019 required the members of the *ad hoc* committee to disclose this information. In support of its ruling, the Court noted that *ad hoc* committees play an important part in the reorganization process and by appearing as a committee, the members purport to speak for a group and ask the Court and other parties to give their positions a level of credibility that is appropriate for a large group. *Id.* at 703. In a subsequent decision, the court denied the committee's request to file the disclosures under seal. *In re Northwest Airlines Corp.*, 363 B.R. 704, 706 (Bankr. S.D.N.Y. 2007).

This issue also surfaced in *In re Scotia Development, LLC*, Case No. 07-20027 (Bkrcty. S.D. Tex.). Many of the same arguments (both for and against disclosure) were raised in *Scotia*. However, the Court never reached the merits of how Bankruptcy Rule 2019 should be applied. In *Scotia*, a group of noteholders claimed that they were not subject to the disclosure requirements of Bankruptcy Rule 2019 because they were just a group of different noteholders represented by the same law firm. The Court agreed. It found that the *ad hoc* group of noteholders appearing before it was not a committee but rather "just one law firm representing a bunch of creditors." Tr. of Hearing, at 5. The *Scotia* Court went on to remind counsel for such creditors that counsel has an ethical obligation to disclose conflicts. The *Scotia* Court did not elaborate on the basis for its determination or publish an opinion on the matter.

Subsequent to the *Northwest* and *Scotia* decisions, issues involving Bankruptcy Rule 2019 have been raised in reorganization proceedings with greater frequency.

C. The Proposal to Repeal or Amend Bankruptcy Rule 2019

The Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") are currently seeking to have Bankruptcy Rule 2019 repealed. The primary issue which they have raised as a concern is the requirement that *ad hoc* committee members in Chapter 11 cases disclose the purchase price and purchase date of distressed securities that they hold. LSTA and SIFMA contend this type of information, *i.e.*, the trade date and purchase price of distressed securities, is proprietary information confidential to the purchaser and that requiring the disclosure of the purchase price and trade date will have a chilling effect on the willingness of distressed security investors to (a) trade in such distressed securities in the future, and (b) participate in the bankruptcy process. They further contend that the chilling effect on distressed security investors will result in more expense and time for Bankruptcy Courts because, without *ad hoc* committees, the Courts will be clogged with duplicative pleadings filed by similarly situated claimholders.

Comments, Suggestions and Recommendations

The Task Force has reviewed numerous materials regarding the issues associated with the proposed repeal of Bankruptcy Rule 2019 including the November 30, 2007 letter by LSTA and SIFMA, relevant case law on the subject, law review articles and other information addressing these issues. Upon careful consideration, the Task Force believes

that Bankruptcy Rule 2019 should not be repealed. The Task Force believes that disclosure of certain minimum information is necessary and important for understanding the motivations of parties in negotiations in the reorganization process.¹

The Task Force believes that several modifications should be considered to clarify the language contained in Bankruptcy Rule 2019 and to help achieve the main purpose of Bankruptcy Rule 2019, namely transparency.

1. Bankruptcy Rule 2019 should be amended to apply uniformly to *ad hoc* committees, official committees, and all other groups of claim or equity holders who band together through shared professionals to advance common positions and strategies.

2. Bankruptcy Rule 2019 should be amended to include a provision giving the Bankruptcy Court authority, upon the showing of good cause by a party in interest, to enter an order waiving the requirement of disclosure of the purchase price or trade date information or other information that a claim or equity holder believes is confidential proprietary information. The burden to establish good cause should be on the party in interest seeking relief from the disclosure requirements of Bankruptcy Rule 2019. In determining whether good cause exists, the Bankruptcy Court should take into consideration, among other things, whether the information sought to be withheld is a confidential trade secret that would more properly be filed under seal and whether the group of claim or equity holders at issue represents a material portion of the holders of such claims or equity interests

3. Bankruptcy Rule 2019(a)(4) should be amended to provide more clarity as to when supplemental disclosure is required. Bankruptcy Rule 2019(a)(4) should not be triggered every time that a trade is made. There should be a cumulative trading threshold before Bankruptcy Rule 2019(a)(4) is triggered. Additionally, it is advisable to clarify in the Rule the timing for when supplemental disclosures are required.

The Task Force believes that the disclosure requirements of Bankruptcy Rule 2019 are important to maintaining the transparency of the bankruptcy process. The proposed amendments will help further the transparency and openness that is necessary to facilitate fair and orderly negotiations in reorganization proceedings.

¹ The Task Force understands that the National Bankruptcy Conference is also examining Bankruptcy Rule 2019. Specifically, the National Bankruptcy Conference is focusing its review of Bankruptcy Rule 2019 on the issue of cross-voting, *i.e.*, one holder holds debts or securities in different parts of the capital structure and votes against the remaining holders' interests in one class to further its interest in another class.

BUSINESS BANKRUPTCY COMMITTEE
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January 9, 2009

Advisory Committee on Bankruptcy Rules
c/o Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Fed.R.Bankr.P 2019

To the Members of the Advisory Committee:

I understand that representatives of investors in distressed debt are lobbying the Committee to repeal Fed. R. Bankr. P. 2019. Their efforts arise in the context of two written decisions of another judge in my court,¹ with which I fully concur, enforcing Rule 2019 as it was written, and an oral decision of another bankruptcy judge, who declined to apply Rule 2019 to require disclosures by an *ad hoc* committee² of investors in distressed debt in a case before him.³ These issues are a matter of increasing discussion in the legal literature.⁴ I write to urge the Advisory Committee on Bankruptcy Rules to update Bankruptcy Rule 2019—but not to repeal it.

¹ See *In re Northwest Airlines Corp.*, 363 B.R. 701 (Bankr. S.D.N.Y. 2007); *In re Northwest Airlines Corp.*, 363 B.R. 704 (Bankr. S.D.N.Y. 2007).

² “*Ad hoc* committees” can mean different things in different cases (and may in the future be less common, as a device to circumvent Rule 2019 as it now is drafted), but typically are groups of distressed debt investors who retain common counsel, and who sometimes, but not always, have committee by-laws or other procedures for making decisions as to joint courses of action. During the pendency of a chapter 11 case, *ad hoc* committees or their members do not receive reimbursement for their legal expenses, but at the end of the case, they not infrequently seek reimbursement for their legal expenses for “substantial contribution” to the outcome of the case under section 503(b) of the Code, or arrange for their entitlement to reimbursement for their legal fees as part of a settlement and/or under a chapter 11 plan.

³ Hearing Transcript at 4-5, *In re Scotia Development, LLC*, No. 07-20027-C-11 (Bankr. S.D. Tex. Apr. 17, 2007).

⁴ See generally Note, *Who Is at the Table? Interpreting Disclosure Requirements for Ad Hoc Groups of Institutional Investors Under Federal Rule of Bankruptcy Procedure 2019*, 76 FORDHAM L. REV. 2561 (2008); Note, *The Rule 2019 Battle: When Hedge Funds Collide with the Bankruptcy Code*, 73 BROOK. L. REV. 1411 (2008); Menachem O. Zelmanovitz & Matthew W. Olsen, *Rule 2019: A Long Neglected Rule of Disclosure Gains Increasing Prominence in Bankruptcy*, PRAIT’S J. BANKR. L. (July-Aug. 2007).

Background

My experience in large chapter 11 cases, principally as a bankruptcy judge who has presided over a host of them,⁵ has given me a useful perspective on Rule 2019, and the judicial—and business—environment in which Rule 2019 operates. Since I started in bankruptcy about 35 years ago, the dynamics of the reorganization process has changed dramatically. In many, if not most, of the largest cases, the traditional creditors in chapter 11 cases—those left holding the bag when businesses fail—have in large part been replaced as players in the chapter 11 process by investors in distressed debt who become stakeholders in the reorganization process by choice.

That by itself is not necessarily bad, and is sometimes a good thing. Investors in distressed debt provide an escape mechanism for the predecessor creditors who were (or would be) left unpaid at the time of the bankruptcy filing. With distressed debt investors buying up the debt, the predecessor creditors can then sell their bonds, claims, or participations in bank debt, and thereby realize some recovery on their positions at an earlier time, and with greater certainty, than they might ultimately achieve in distributions on their claims.⁶ And in some cases, investors in distressed debt provide other valuable services, such as needed financing or bidding for assets before the end of the chapter 11 case

But it is also the case that investors in distressed debt, like investors generally, have their own agendas, which not infrequently consist of simply maximizing return for themselves, in the shortest possible time horizon, without a broader regard for spending the time and effort

⁵ Since I came on the bench in 2000, the overwhelming bulk of my time has been spent on large chapter 11 cases, and the plenary litigation relating to them. My present docket includes about a hundred chapter 11 cases, of which about a dozen have more than \$100 million in debt, and about half a dozen have more than \$1 billion in debt.

⁶ As one commentator has explained:

Distressed debt traders normally purchase debt claims at substantial discounts. . . . These investors rely on the basic legal principle “[A] claim or interest in the hands of a purchaser has the same rights and disabilities as it did in the hands of the original claimant or shareholder.” Creditors involved in a Chapter 11 process often need to find liquidity, and the sale of their claims to vulture investors offsets the risks posed by the uncertainties of Chapter 11. Chapter 11 distressed debt traders decide to invest in debt claims based on two calculations: (1) that the reorganization will yield a higher return than the cost of the claim, and (2) that the plan of reorganization will be confirmed and consummated before the investor’s cost of carrying the investment—the time value of money—consumes whatever profit the investor hopes to make on the discount.

Harvey Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2014-2015 (2002) (footnote omitted)

necessary to stabilize the business, and/or to maximize its value for the good of all.⁷ Often that involves selling previously acquired debt during the pendency of the case, without awaiting the case's outcome. And by short selling—or the use of derivatives with the same economic effect—some distressed debt investors have placed economic bets on the failure of the chapter 11 case, or on pain to other constituencies

When distressed debt investors buy into the case and participate in it as passive investors (achieving their returns by their skill in knowing when to invest and for how much, by reason of superior financial analysis), their presence is at least generally benign. But increasingly, we see distressed investors—often, but not always, by means of *ad hoc* committees—attempting to influence the outcome of the chapter 11 case. They do so not just by voting their claims and determining what kind of reorganization plan will be to their liking, but also by taking positions on issues in the case, and/or litigating with other creditor constituencies—who increasingly are simply other distressed debt investors. They do so, of course, to advance their own personal investment objectives.

In that connection, I think it might be helpful for the Committee to drill down on the kinds of decisions we bankruptcy judges make. When we are deciding a disputed issue of fact or ruling on a disputed question of law, litigants' personal motivations are at least usually irrelevant. But a major element of any bankruptcy judge's workload, at least in the larger cases, is on matters of discretion. We exercise our discretion to determine what is best for the future of

⁷ See Robert J. Rosenberg & Michael J. Riela, *Hedge Funds: The New Masters of the Bankruptcy Universe*, 17 NORTON J. BANKR. L. & PRAC. 5 Art. 7 (2008). As observed there:

Some hedge funds seek a "quick flip" of their investments, while others engage in a "loan to own" strategy, in which they make loans to a distressed company with the intent to convert that debt to equity after the company defaults on the loans and restructures the debt. In sum, hedge funds are more likely than more traditional investors to seek short-term returns that are not necessarily tied to the debtor's successful reorganization.

[H]edge fund involvement in Chapter 11 cases can create a number of concerns for debtors, creditors, and shareholders. Partly as a result of hedge funds' short-term investment horizon and investments in multiple segments of a company's capital structure, hedge funds' interests are not always aligned with those of debtors and other parties. The focus by a number of hedge funds on the maximization of short-term returns often has caused tensions among the parties to a restructuring and may conflict with the Bankruptcy Code's emphasis on the rehabilitation of debtors. [D]istressed debt trading and changes in bankruptcy relationships have frayed the symbiotic relationship between debtors and creditors. Creditors who purchase debt at substantial discounts are likely to be much more interested in the return on their investment, than in the debtors' long-term viability.

the case—a decision that can involve a host of concerns, but which typically includes efforts to maximize the value of the estate, to maximize the ultimate return to creditors, and to save as many rank-and-file jobs as possible. On those discretionary calls, and there are many of them,⁸ stakeholders—including, and perhaps especially, distressed debt investors, or *ad hoc* committees of them—regularly weigh in. They frequently say—often in the first paragraph of their submissions—how big their positions are, and impliedly, that we should listen to them because of their importance.⁹ When they are professing to say what is good for the estate, their reasons for advancing their point of view—*i e*, their personal agendas, and any conflicts of interest that might accompany that point of view—often matter.

Need for Repair—But Not Repeal—of Rule 2019

Thus we get to why Rule 2019 should be updated but not repealed. Rule 2019 has its origins in pre-Code practice, going back to the 1930s or earlier, when “protective committees,” ostensibly speaking for what was good for bondholders or other creditors, but with side deals (often with incumbent management), conflicts of interest and other private agendas, were prevalent. Dealing with abuses of that type was plainly essential, but with the passage of time, they are no longer a matter of material concern. New regulatory needs have replaced them. Now, with the passage of time, when applied to chapter 11 as we now see it in the larger cases, Rule 2019 asks for some information that is not essential and that may chill legitimate distressed debt investing. But as importantly or more so, Rule 2019 is not as clear as it should be in requiring information that is essential—and Rule 2019 is insufficiently broad in covering the classes of stakeholders who should be making disclosure before they are heard on discretionary matters involving the future of the estate.

⁸ They include, by way of example, motions to extend or limit “exclusivity” (the time during which the debtor has the exclusive right to propose a reorganization plan); to approve settlements, to approve asset sales and financing arrangements, to appoint a trustee, to convert the case to chapter 7, and to “designate” (*i e*, disqualify) other creditors’ votes on a reorganization plan.

⁹ *See, e g*, one of many like pleadings I saw in the *Adelphia Communications Corporation* case, one of the large chapter 11 cases before me. Its first paragraph began, in relevant part

The Ad Hoc Committee of Arahova Noteholders . . . as holders (or indenture trustee on behalf of, or investment advisors to, holders) of over \$500 million in senior notes issued by Debtor Arahova Communications, Inc hereby files its (A) motion and (B) preliminary objection

Motion of the Ad Hoc Committee of Arahova Noteholders . . . *In re Adelphia Communications Corp*, No 02-41729 (REG), (S D N Y June 16, 2005) (Doc 7801)

Rule 2019 As It Is Now Operating

My experience with Rule 2019 has caused me to see the following phenomena

(1) In the absence of a court order requiring otherwise, failures to provide the information actually required by Rule 2019, as it is now written,¹⁰ are widespread, and failures to make all of the required disclosures are the rule, not the exception. Much of the time, a submission purporting to be made in accordance with Rule 2019 is filed. In fact, the better law firms file them religiously. But while my colleagues may have had better fortune than I have had, I have never seen a purported Rule 2019 submission in a case before me where all of the information Rule 2019 requires was actually provided. Rather, in all of the Rule 2019 submissions I have seen, an *ad hoc* committee or other investor group has described the ownership of the bonds or other debt of its members in the aggregate, without disclosure of the individual ownership by members of the committee or group. Nor have I ever seen any disclosure on behalf of a distressed debt investor or investor group of the dates of acquisition of the bonds or other debt acquired (other than saying that it was acquired at “various times,” or “on a number of dates”), nor the prices paid for it. Nor has any Rule 2019 filing I have ever seen included information on *sales* of the bonds, claims, or other debt—a matter significant not only in its own right, but also because it would reveal short positions in bonds, resulting in an interest in

¹⁰ Rule 2019 now provides, in relevant part

In a ... chapter 11 reorganization case, every entity or committee representing more than one creditor or equity security holder shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature *and amount* of the claim or interest and *the time of acquisition thereof* unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, *the times when acquired*, the *amounts paid* therefor, and *any sales or other disposition* thereof.

FLD R. BANKR. P. 2019(a) (Portions irrelevant to the present discussion deleted, matter particularly relevant to the present discussion, and including areas where disclosure is required but has not been made, italicized)

the failure of the chapter 11 case, or in lower distributions to other creditors long in those bonds.¹¹

(2) Most parties in interest disregard others' violations of Rule 2019, very possibly because they do not wish to comply with Rule 2019 any more than the others do.

(3) When parties do seek strict enforcement of Rule 2019, they often do so to advance private agendas of their own (such as to torment their opponents, or to get bargaining leverage), rather than by reason of abstract interests in the integrity of the chapter 11 process.

(4) Many distressed debt investors continue to buy and sell debtors' debt during the pendency of the chapter 11 case (as compared and contrasted to simply buying the debt and then awaiting the case outcome), and some *ad hoc* committees try to influence proceedings in the case even while their members are buying and selling debt whose prices or value might be affected by the rulings on the matters as to which they have sought to influence the court. These trading activities are normally not disclosed, even when the trader investors are members of *ad hoc* committees subject to Rule 2019.

(5) Investors in distressed debt are beginning to argue, even when they retain common counsel and act jointly, that the groups they form are not "committees" or otherwise within the reach of Rule 2019, and therefore that they need not make the disclosures Rule 2019 requires. In *Scotia Development*, that argument was successful.

In my view, none of these is a good thing. The underlying reasons for disclosure of the type Rule 2019 requires have changed, but the need for disclosure in this area is as important as ever. We frequently speak of the importance of transparency in the bankruptcy process, and of the importance that things "seem right."¹² Yet we here have an area where less transparency is the goal. Transparency must be maintained to permit parties in interest to participate

¹¹ Thus, in the *Adelphia Communications Corporation* case, before me, investors long in bonds of Adelphia Parent admitted to other investors that they had a short position in bonds of Arahova Communications, one of the Parent's subsidiaries. The investors' short position gave them an economic stake in a lower recovery for Arahova creditors—and, as some argued, an economic stake from which the investors would profit from the failure or delay of the entire chapter 11 case. But the Rule 2019 statement filed on behalf of the *ad hoc* committee of which those investors were members, while listing the long positions in bonds, made no mention of the short positions—a matter that was highly relevant when the *ad hoc* committee was professing to speak as to what was in the best interests of the various debtors in the case. The short positions at least seemingly could have resulted only from a sale of the subsidiary debtor's bonds, for which Rule 2019 would require disclosure. But even if it were read otherwise, disclosure of the short positions would seem to be essential to make that which was said about the long positions not misleading.

¹² See *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966) (Friendly, J) ("The conduct of bankruptcy proceedings not only should be right but must seem right.")

meaningfully in cases (and to take their own positions where warranted),¹³ and to permit judges to continue to act to maximize value and to achieve the best outcome for all, except in those relatively rare cases where our duties under the law require a different outcome.

Observations re Improvement

Obviously, distressed debt investors, and the organizations that lobby on their behalf, regard their profit maximization strategies as highly confidential—even sacred. To the extent that such investors do not try to influence the outcome of a bankruptcy case, I am not troubled by that, and think their desires can be accommodated. And in most cases, what they paid for their claims (and how much profit they will make as a consequence of intercreditor negotiations, or various case outcomes) will be a matter of indifference to the Court, and will not require disclosure. But when anyone in the case—*ad hoc* committee or not, or distressed debt investor or not¹⁴—professes to speak on what is best for the estate (and/or for its creditors, equity security holders, employees, and the communities in which our debtors operate), and/or to influence the outcome of the case, its private agenda can matter. If it does not want to reveal basic information as to its holdings in the case (which are an important indicator of “where it is coming from” in connection with the position it advocates), it should not be trying to influence the court.

Apart from the widespread failures to provide the information Rule 2019 requires, evolution in chapter 11 practice has resulted in areas where Rule 2019 needs to catch up with modern times, so that when Rule 2019 is complied with (a goal I think we should strive for), important information is forthcoming. When applied to investment strategies that we are now seeing, Rule 2019 has a requirement—disclosure of price paid—that probably is unnecessary. But on the other hand, Rule 2019 fails sufficiently to cover important matters, and fails to make certain of its requirements sufficiently unequivocal. These include ambiguities and loopholes as to *what* is covered, and *who* is covered. In particular, my concerns include the following

(1) Parties in interest no longer simply hold long positions in the underlying debt, with the understandable desire to be repaid as much as circumstances will permit. We now see strategies under which some acquire short positions in securities of one or more of the debtors,¹⁵ which typically have the effect (and, presumably, the purpose) of placing

¹³ Contrary to popular myth, the bulk of the controversies in the larger cases, in my experience, have not been between the debtor(s) and creditors, but rather have been between one group of creditors and another group of creditors—often with distressed debt investors on both sides.

¹⁴ Other instances where creditors have private agendas can exist, as in telecommunications cases, where competitors happen also to be creditors, and use their status as creditors to be heard as to the future of the case. But their competing agendas are normally already apparent to the other parties in interest.

¹⁵ In most large chapter 11 cases, there are many debtors in the single, jointly administered, case, some or all of which will be part of a larger, partly or wholly integrated, enterprise. And in many such cases, there will

an economic bet on the failure of the chapter 11 case, on delay in creditors' receiving payment, or on decreased recoveries by another creditor constituency¹⁶ Bets of that character should be disclosed. Information of that character is of the highest importance when people profess to be arguing for what is in the best interests of the estate

(2) Derivatives—securities or instruments whose value turns on the value of another security or instrument—are in increasing use in chapter 11 cases, as they are in the economy generally. In particular, credit default swaps are an increasingly important presence in large chapter 11 cases. Credit default swaps will at least usually result in a situation where an alternative entity bears the economic risk, or will reap the rewards, that would otherwise be borne or enjoyed by the original creditor. That could have the effect, in at least some cases, of entities participating in the chapter 11 process without “skin in the game.” Interests in derivatives—and especially credit default swaps—should be disclosed.¹⁷

(3) Rule 2019 submissions can be misleading when they omit information necessary to avoid half-truths. A classic example of this is disclosure of long positions without also disclosing short positions. As we do under the federal securities laws, we should require inclusion in submissions to bankruptcy courts of matter necessary to make that which was said not misleading.

(4) One of the most important things we should accomplish by Rule 2019 is protecting the system when decisions are made as to discretionary matters—*e.g.*, what is in the best interests of the estate—and advocates taking positions as to that have private agendas. Creditors from different constituencies often express different views on such matters. While disclosure of what investors paid for their claims or for the bonds they hold is rarely relevant when making determinations as to the future of a chapter 11 case (though *when* investors bought or sold debt often would be, especially if the trading took place very shortly before the investors sought to be heard), disclosure of their holdings often is important to evaluate their contentions¹⁸ That is particularly so when they have

be interdebtor obligations—sometimes with interdebtor disputes—apart from the intercreditor disputes that can arise with respect to a single debtor.

¹⁶ The advocates for repeal of Rule 2019 acknowledge that investors in distressed debt take short positions (see SIFMA/LSTA Ltr. of Nov. 30, 2007) (“SIFMA/LSTA Ltr.”) at 23, *cf id.* at 24), but do not address the significance of such a strategy

¹⁷ Once more, the advocates for repeal acknowledge distressed debt investors' use of derivatives in chapter 11 cases, see *id.* at 23, but do not address the implications of their use

¹⁸ As stated by counsel for the Creditors' Committee in the *Adelphia Communications Corporation* cases (every one of whose voting members was a distressed debt investor)

2019 is a provision that requires public disclosure of what people hold for obvious reasons. It is appropriate to know when somebody stands

positions in both the debt and equity of a debtor, in debt in different classes or of different debtors in the case,¹⁹ or, as so often is the case, they themselves put their holdings forward, so as to suggest that their views deserve weight²⁰

(5) I agree with Professor Gibson's observation²¹ that Rule 2019 is ambiguous in addressing whether it requires disclosure of claims or interests "held by the representative or those represented." To address the problems we face in the real world, Rule 2019 should make it clear that disclosure must be made with respect to "those represented," except, perhaps, in those rare cases where the representative also has its own holdings or positions to report.

(6) We are increasingly hearing of instances in which entities are seeking to circumvent Rule 2019 by ceasing to call their groups "*ad hoc* committees," or "committees" at all, but simply act in concert (often with common counsel, whose costs they share) while refraining from calling themselves anything. The parlance that was used in *Scotia Development* was that there was "just one law firm representing a bunch of creditors"²² The notion that Rule 2019, and particularly its purposes, properly can be circumvented in that fashion is troublesome to me. If we are to cover any and all groups acting in concert, whether or not called a "committee" (and I think we should), we should make that clear

up in court, somebody takes a position, somebody files pleadings,
it's appropriate to know who their clients are and what their positions
are"

Note, 76 *FORDHAM L. REV.* at 2564, n 22, quoting Transcript of Hearing on Sep. 11, 2006 at 66 1-8, *In re Adelphia Communications Corp.*, No. 02-41729 (REG) (Bankr. S.D.N.Y. Sep. 13, 2006)

¹⁹ That presumably is what the advocates for repeal are referring to when they refer to the "diversification" that is an element of the "aggressive and complex investment strategies" that "distressed investors such as hedge funds employ." See SIFMA/LSTA Ltr. at 23.

²⁰ The advocates for repeal argue that it is unfair that they should have to make disclosures of the type Rule 2019 requires, while members of official committees, such as Creditors' Committees, do not. I understand their point, and perhaps we should consider broadening disclosure obligations to cover members of official committees as well. But if we do, we will also want to consider whether we want to chill membership on official committees, whose members serve very important interests in chapter 11 cases, who, unlike members of *ad hoc* committees, assume fiduciary duties to their constituents when they assume their committee membership roles, and who at least normally become "restricted," precluding them from trading during the pendency of the case because they have access to confidential information, and/or create communications "walls" to separate the traders in their organizations from those serving on the official committee.

²¹ See Gibson, Memorandum, "Case Law Interpreting Rule 2019" (Aug. 9, 2008), at 3-4.

²² Note, 76 *FORDHAM L. REV.* at 2604, quoting Transcript of Hearing at 4-5, *In re Scotia Development, LLC.*, No. 07-20027-C-11 (Bankr. S.D. Tex. Apr. 17, 2007).

(7) Many of the concerns that trouble me apply, in my view, to individual parties in interest, just as they apply to ad hoc committees.²³ If others agree, we should require the same disclosures when individual parties in interest seek to influence the court as to the future of the case, just as Rule 2019 requires such for committees.

Recommendations

Thus I would recommend that the Committee not repeal Rule 2019. Instead, Rule 2019 should be amended to make certain things unequivocal, and to modernize it:

(1) Clarify Rule 2019 to make clear that it requires disclosure of short positions, or derivatives with the same economic substance.

(2) Add to Rule 2019 a requirement for disclosure of any interests in derivatives (such as credit default swaps) that result in a decoupling of record or beneficial ownership and economic risk

(3) Add to Rule 2019 a requirement that any disclosures must include such additional information as is necessary to make that which was said not misleading.

(4) Add to Rule 2019 a requirement for disclosure of any position or interest that would result in a financial gain upon the failure or delay of the chapter 11 case, or upon decreased recoveries by any other constituency.

(5) Clarify Rule 2019 to make clear that it requires disclosure of the required information for each individual member of any group, and that disclosure merely in the aggregate is insufficient

(6) Clarify Rule 2019 to make clear that (unless broadened further in the manner I would recommend in #7 below) it covers any instance in which multiple creditors are represented by the same counsel, whether or not they call themselves a "committee."

²³ Those urging repeal of Rule 2019 say very nearly the same thing. See SIFMA/LSTA Ltr. at 15 ("If the information required by Rule 2019 were truly important to bankruptcy reorganizations, it would be required of all active participants and not merely those who form *ad hoc* committees. In light of that disparity, the Rule is irrational, because it is under-inclusive and does not apply to investors who are not members of *ad hoc* committees but who may nonetheless pursue the same strategies the Rule ostensibly deters"), *id.* at 17 (recognizing that wrongdoers in the *Papercraft* and *Mirant* cases were individual creditors, noting that "if transparency truly allows the court and the debtor to 'root out' investors who act in bad faith or to uncover conflicts of interest between committee members and their representatives, then the Rule should apply *equally* to all participants in a bankruptcy case and not just to members of *ad hoc* committees.") (emphasis in original)

(7) Broaden Rule 2019 to provide that without having first made the disclosures Rule 2019 requires (or having made the required disclosure as an attachment to the written submission in question), no party in interest (including a single party in interest, or committee or group of parties in interest)

(a) shall make any representation to the Court as to the amount or nature of its ownership or control of any debt of (or interest in) the debtor (or any of the debtors in a multi-debtor case),

(b) shall be heard on any motion involving a determination by the bankruptcy court that reasonably can be expected to be subject to judicial discretion, or to involve consideration of what is in the best interests of a debtor, its creditors, or equity security holders.

(8) If most or all of the previous recommendations were implemented, we could delete from Rule 2019 the requirement of disclosure as to price paid. We would nevertheless have to make it clear, however, that the Court could still require disclosure, by discovery under Rule 2004 or the contested matter or adversary proceeding rules, in those cases where it is appropriate.

I would hope that recent developments in the financial markets have taught us to be wary of contentions that we should decrease regulation, by invoking fears that regulation—or the transparency that we routinely require in the other aspects of chapter 11 cases—might chill investment. I would urge the Committee to resist entreaties to repeal Rule 2019, and instead to continue with a Rule 2019, as updated, as an important disclosure device, providing significant benefits to the bankruptcy bench and to parties in interest in chapter 11 cases.

I would be happy to discuss any of these matters further with any members of the Committee or its Reporter if there is such a desire

Very truly yours,

s/Robert E Gerber

Robert E Gerber

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
ALEXANDER HAMILTON CUSTOM HOUSE
ONE BOWLING GREEN, 6TH FLOOR
NEW YORK, NEW YORK 10004-1408**

CHAMBERS OF
ROBERT D. BRAIN
UNITED STATES BANKRUPTCY JUDGE

(212) 668-2301

January 13, 2009

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

Re: Fed. R. Bankr. P. 2019

To the Members of the Advisory Committee:

I am writing with regard to the Advisory Committee's consideration of the possible amendment of Bankruptcy Rule 2019, or, as requested by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association, Rule 2019's repeal. I agree with the conclusion of my colleague, Bankruptcy Judge Robert E. Gerber, in his January 9, 2009 letter to you, that Rule 2019 should not be repealed but should, rather, be amended to clarify and (with the exceptions Judge Gerber noted) broaden its scope.

I do not intend to reiterate Judge Gerber's excellent analysis. I do, however, want to make two additional points. First, I want to highlight how the repeal of Bankruptcy Rule 2019 would in very practical terms impair the settlement process, the primary activity in bankruptcy cases. Separate and apart from obscuring the other side's basic economic motivation, discussed by Judge Gerber, the repeal of Rule 2019 would make it much more difficult to know literally who the other side is. Thus, one may negotiate a settlement that results in the withdrawal of a pleading only to have another pleading spring up by someone who purports not to have been in the group that settled. Or one may negotiate a settlement with someone only to learn later that they were still helping to fund the law firm that was prosecuting a group pleading -- or that the law firm is continuing to prosecute the pleading, ostensibly on behalf of the group, when, in fact, the group has shrunk because many of its members have settled. These are not hypothetical concerns. Each has occurred in cases before me, and reference to Rule 2019 helped to straighten out the situation and keep the parties' positions clear.

This leads to my second point. It may be argued that parties may avoid these problems by establishing preconditions to their negotiations or by more carefully drafting their

settlement agreements. Further, counsel are bound not only by Rule 11 but also by their ethical and professional duties not to misrepresent their clients' positions to the court. Since the Chandler Act and the related enactment of the predecessor to Rule 2019, however, more transparency has been required in bankruptcy cases. Very large sums of money are at stake in the largely inter-creditor disputes that Judge Gerber's letter accurately describes; pressures on counsel are intense, and without the added requirements of a disclosure rule like Rule 2019, clients may mislead, or selectively inform, their counsel. Rule 2019 is outdated not because the basic need for transparency that it addressed no longer exists, but because of changes in the financial markets and the players in bankruptcy cases. Clearly for some time there has been an active market in distressed debt, but it is a market that is heavily influenced by the litigation and negotiation stances taken by distressed debt holders and, therefore, the temptation to mislead the court and the other parties about one's underlying position is just as clear. If updated, Rule 2019 thus would continue to serve an important purpose. It should not be repealed.

Very truly yours,

Hon. Robert D. Drain

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: SUBCOMMITTEE ON BUSINESS ISSUES
RE: PROPOSAL FOR PROOF OF CLAIM PROCEDURE FOR CERTAIN ADMINISTRATIVE EXPENSES
DATE: FEBRUARY 8, 2009

At the October meeting in Denver, the Advisory Committee referred to the Subcommittee on Business Issues a proposal initially submitted by a former panel trustee, Philip Martino, and subsequently expanded by Judge Wedoff. Mr. Martino's original suggestion was for an amendment of Rule 1017 that would provide a streamlined procedure for a chapter 7 trustee to seek compensation in a case that gets converted to chapter 13. His proposal was to allow the trustee to file a proof of claim in the chapter 13 case, rather than a request for payment that would have to be approved by the court after notice and hearing. Judge Wedoff then suggested that there are at least two other types of administrative expenses that are sufficiently similar to prepetition claims that a proof of claim procedure might be appropriate: the claim of a supplier of goods or services furnished in the ordinary course of business during a chapter 11 case that later gets converted to chapter 7, and the claim of a supplier under § 503(b)(9) for the value of goods received by the debtor during the 20 days before bankruptcy. Judge Wedoff suggested that consideration be given to whether payment of all three of the administrative expenses noted above should be addressed by a Part III rule that would allow for the filing of a proof of claim by a specified deadline.

The Subcommittee carefully considered this issue during its conference call on December 12, 2008, and **it recommends that the Advisory Committee take no further action on the proposal.**

Background: Proofs of Claim and the Treatment of Administrative Expenses Under the Code and the Rules

Section 501(a) permits the filing of a proof of claim by creditors. The term “creditor” is defined in § 101(10) as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor,” that has a claim against the estate of a kind specified in “section 348(d), 502(f), 502(g), 502(h) or 502(I),” or that has a community claim. The listed statutory provisions govern various postpetition claims that are treated by the Code as if they arose prior to the petition. Of special relevance is § 348(d), that treats as arising prepetition those claims that arise after the order for relief but before conversion in chapter 11, 12, and 13 cases that are converted to another chapter. Excluded from this treatment, however, are administrative expense claims specified in § 503(b).

Section 502(a) provides that if no objection is made to a filed proof of claim, it is deemed allowed. The procedures for filing proofs of claim are set forth in Rules 3001 through 3004. Among other things, these rules prescribe the contents of a proof of claim, the time limits for filing, and the evidentiary effect of the filing (“prima facie evidence of the validity and amount of the claim”). Form 10 is the official proof of claim form.

In contrast to the extensive details about the filing of proofs of claim, the Code and rules provide little detail about the method of seeking payment of administrative expenses. Section 503(a) provides that an entity may “file a request for payment of an administrative expense.”

This filing may either be timely or, with the court's permission and for cause, tardy. The legislative history of this provision states that the Bankruptcy Rules "will specify the time, the form, and the method of such a filing." Section 503(b) provides that administrative expenses shall be allowed after notice and a hearing.

The Rules, however, do not provide much detail about requests for payment of administrative expenses. Rule 2016 prescribes procedures for applications for compensation from the estate for services rendered and reimbursement of expenses, and Rule 1019(6) governs the payment of postpetition claims incurred before conversion of a case. It provides that claims specified in § 348(d) may be filed by proofs of claim under Rule 3001(a)-(d) and 3002. Payment of administrative expenses, however, must be sought by a request for payment. Rule 1019(6) sets forth a procedure for providing notice of the time for filing such requests after the case has been converted. There is no official form for requests for payment of administrative expenses, nor a rule that generally prescribes the time, form, and method of filing such requests.

Basis for the Subcommittee's Recommendation

If adopted, the proposal referred to the Subcommittee would permit, in the absence of objection, the allowance of the three types of administrative expenses without a court order; instead, like filed claims to which no objections are made, they would be deemed allowed. This procedure would therefore provide a potentially simpler and less expensive means of requesting payment for administrative expenses that are either relatively modest in amount or are similar in nature to prepetition claims.

The Subcommittee, however, was concerned that such an amendment of the rules would be inconsistent with the Code. As outlined above, § 501 permits the filing of a proof of claim

only with respect to prepetition claims and a limited and specified group of postpetition claims. Administrative expenses are not included in that group. Instead, the payment of such expenses is governed by § 503, which requires a request for payment and court authorization after notice and a hearing. Moreover, with respect to the payment for goods and services furnished in the ordinary course of business in a chapter 11 case prior to conversion to chapter 7, § 348(d) preserves the administrative expense status of such claims and thereby excludes them from the proof of claim procedure of § 501.

The Subcommittee considered, but eventually rejected, the possibility that the distinction drawn by the Code is only a matter of nomenclature (“proof of claim” versus “request for payment”). If that were the case, then a rule amendment could be proposed that uses a new term – such as “administrative proof of claim” – that distinguishes the treatment of the three designated administrative expenses from both prepetition claims (and those that the Code deems to be treated as such) and regular administrative expenses. The Subcommittee, however, understood the purpose of the proposal to be to allow the payment of the specified administrative expenses according to the same procedures that are applicable to prepetition claims. Because the Code does draw significant differences in the procedural simplicity and the legal effect of proofs of claim as opposed to requests for payment of administrative expenses, the Subcommittee concluded that the rules should not blur the boundaries between prepetition claims and administrative expenses in the manner proposed.

Finally, the Subcommittee discussed whether a uniform set of rules prescribing the procedure for requests for payment of administrative expenses is needed. The legislative history of the 1978 Act indicates that Congress anticipated the promulgation of national rules governing

the time, form, and method of filing such requests. Thirty years later, no such rules have ever been enacted. Courts, however, have adopted their own procedures on a local basis, and they seem to be working satisfactorily. The Subcommittee therefore concluded that, in the absence of any indication that there is a problem for which national rules on requests for payment of administrative expenses are needed, it would recommend that no further action be taken at this time.

MEMO

To: Advisory Committee on Bankruptcy Rules
From: Elizabeth L. Perris
Chair, Forms Subcommittee
Subject: Proposed Revised Reaffirmation Documents Form - B240
Date: February 27, 2009

At our October, 2008 meeting we discussed several suggestions that the Bankruptcy Rules Committee has received for revision of Director's Form B240, the Reaffirmation Agreement. Professor Morris prepared a memo analyzing those comments, which was included, along with the comments, at Tab 18 of the meeting materials. During the October meeting I reported that the discontent with Form B240 was evident in the comments made during last summer's presentations by the Forms Modernization Working Group. That group conducted several meetings with bankruptcy judges and clerks' office personnel regarding its efforts. Even though the group explained that the focus was on the Official Bankruptcy Forms, we got a large number of complaints and suggestions regarding Director's Form B240.

At the October meeting, the Forms Subcommittee agreed to explore possible revision of B240 to address the concerns. One of the problems in revising the form is that the 2005 amendments to § 524, particularly § 524(k), require that there be extensive disclosures and other information in connection with a reaffirmation agreement. The current B240 largely tracks the statute. Thus, an initial question that had to be answered was how much flexibility there was in the layout and content of the form and in making the required disclosures. Professor Gibson has prepared a memorandum (attached) which discusses what provisions the statute mandates and where the statute provides some flexibility. Her advice guided the redrafting.

Jim Waldron, a member of the Subcommittee, conducted a survey of some clerks' offices regarding what problems they observe in the use of the current form. The Subcommittee used the results of his survey, which are attached, in drafting a proposed revision of the form.

Attached please find the proposed revised B240, along with a copy of current B240. In order to reduce the length of the current form, and to put the important term information at the beginning of the document, we started with the reaffirmation agreement, eliminated the summary of the reaffirmation agreement, and moved the disclosures (in addition to those included in the reaffirmation agreement itself) to the end of the agreement. To facilitate your review of this form, which strikes many people as complex, we have attached an annotated copy of § 524(k), which identifies in bold print following each subsection how the draft satisfies the pertinent requirement.

Because the reaffirmation agreement includes some of the required disclosures, we eliminated the option of attaching a separate reaffirmation agreement and of using the B240 only to provide the disclosures, the required debtor's statement in support of the reaffirmation agreement, and the attorney's certification. Anyone who wants to use their own reaffirmation agreement form will also have to prepare and file the related required documents. Creating a single document that could be used regardless of whether the agreement was part of the B240 or was merely attached to it created, in the opinion of the Subcommittee, a document that was too complex.

The Subcommittee briefly discussed the possibility of having two forms: B240A which would include the reaffirmation agreement, and the B240B, which would include the required disclosures, debtor's statement in support of reaffirmation agreement, and attorney's certification. A separate reaffirmation agreement would be attached to the B240B.

There are arguments on both sides of whether to offer one or two forms that I briefly describe here in case the Rules Committee would like to consider this further. The Subcommittee rejected the two-form approach because it thought that offering a single form would encourage use of the B240A, which includes the agreement. In addition, to the extent that local courts might mandate use of B240B if there was such a form, it would create the possibility that the same information would have to be entered in three separate documents as part of the reaffirmation process - the cover sheet (Official Bankruptcy Form 27), the B240B, and the

reaffirmation agreement. (But that might provide a great incentive to use B240A.) The arguments in favor of having a B240A and B240B relate to local court efficiency. Without the B240B, judges and clerks will be left in the position of getting non-standard disclosures, attorney certifications and debtor's statements in support of reaffirmation agreements that have to be reviewed for completeness. Such documents, of course, are more likely to have deficiencies and are more difficult to deal with because information is not in a predictable place. In addition, without both forms, local courts will be precluded from adopting a local rule mandating use of B240, because it does not provide the option of attaching a separate reaffirmation agreement and § 524(k)(3)(J)(i)1. indicates that such an option is permitted.

We removed the motion for court approval from the B240 because it is not required for the majority of reaffirmation agreements, which become effective without court approval There will be a separate Director's Form for this item, which we hope will reduce the number of unnecessary motions to approve reaffirmation agreements that are filed.

We realize that there is significant overlap between the reaffirmation cover sheet, use of which becomes mandatory starting 12/1/09, and the agreement (Part I of the draft B240), but we largely could not avoid that because of the statutory requirements of 524(k). Attached please find a copy of the cover sheet (Official Bankruptcy Form 27) and a chart that identifies the overlap and why we had to continue to include in the B240 information that also is included in the cover sheet.

Attachments: Professor Gibson's Memorandum
Draft Form B240
Current Form B240
Annotated § 524(k)
Official Bankruptcy Form 27
Chart re Overlap of Draft Form B240 and Official Form 27
Jim Waldron's Survey Results

MEMORANDUM

TO: SUBCOMMITTEE ON FORMS

FROM: ELIZABETH GIBSON, REPORTER

RE: STATUTORY REQUIREMENTS FOR REAFFIRMATION AGREEMENTS
AND DISCLOSURES

DATE: JANUARY 7, 2009

In connection with the Subcommittee's consideration of possible changes to the Director's Form Reaffirmation Agreement (Form 240A), I have reviewed § 524 of the Code to determine the extent to which the statute requires specific language to be incorporated into reaffirmation agreements and related disclosures. Although some parts of the provision appear to require specific language in lengthy detail, the overriding provision of § 524(k)(2) allows flexibility in the wording and organization of the reaffirmation documents. As a result, the specific wording of only two terms and possibly one statement is statutorily prescribed. How the rest of the information set out in § 524(k) should be conveyed is, I believe, left by the Code to the Advisory Committee's and the Director's discretion in promulgating a form.

Paragraph 524(c)(2) requires that a debtor seeking to reaffirm a debt receive "the disclosures described in subsection (k) at or before the time at which the debtor sign[s] the agreement." Subsection (k) in turn describes the disclosures required under (c)(2) as the entire set of reaffirmation documents set out in the statute: disclosure statement, reaffirmation agreement, attorney's certification, debtor's statement in support of the agreement, motion for court approval, and court order. Although § 524(k) provides in great detail, often with language

in quotation marks, what each of these documents “shall consist of,” paragraph (k)(2) provides that the “[d]isclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8),” subject to two exceptions. Two specific terms – “Amount Reaffirmed” and “Annual Percentage Rate” – must be used where indicated and must be written “more conspicuously.” (Likewise, it is stated in § 524(k)(3)(C) and (E) that the terms “Amount Reaffirmed” and “Annual Percentage Rate” must be used.)

In some places § 524(k) describes the content of various provisions in quoted language and in other places the content is not placed in quotes. One might therefore interpret the quoted language as being statutorily prescribed. But given the permission in paragraph (k)(2) to use different terminology and a different order than that set out in the statute, such an interpretation does not seem correct. For example, § 524(k)(3)(J) specifies various warnings and instructions to the debtor in quoted language. Some of these statements refer to “Part A” or “Part D,” etc. Because (k)(2) expressly allows the disclosures to be arranged in a different order than they appear in the statute, the alphabetical designations of the document parts are subject to change and thus would not need to be described in the quoted language.

There is one statement included in § 524(k)(3)(J) that could be read as being statutorily prescribed. Section 524(k)(3)(J)(ii), which applies in the case of reaffirmation agreements with credit unions, says that the required disclosure “shall read as follows.” It then sets forth the following statement in quoted language: “6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.” Because the statute states that most of the other disclosures “shall consist of” the specified information, it might be argued that the one statutory provision

regarding how a particular disclosure “shall read” is a specific directive as to its precise wording.¹ I think the better argument is that the permission in § 524(k)(2) to use different terminology allows a rewording of this statement as well as the others. To be safe, however, the director’s form could use the statutory language with respect to this particular statement. I note that the draft proposed by Judge Wizmur and modified by Judge Perris does so.

It therefore appears to me that, despite Congress’s inclusion of detailed language for reaffirmation agreement documents in § 524(k), the statute allows freedom to design a form that incorporates the substance of the statutory statements but uses different language and a different organization.

¹ The same argument could possibly be made regarding § 524(k)(3)(F), (H)(I), and (H)(ii), which refer to “stating” or “making the statement” of specific language. That terminology, however, is less directive than “shall read.” In any event, those provisions are also subject to § 524(k)(2)’s permission to modify the wording.

Presumption of Undue Hardship
 No Presumption of Undue Hardship
Check one. See Part II. below to determine which box to check.

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____
Chapter _____

REAFFIRMATION DOCUMENTS

Name of Creditor: _____

[Check this box if] Creditor is a Credit Union

I. REAFFIRMATION AGREEMENT

Reaffirming a debt is a serious financial decision. Before entering into this Reaffirmation Agreement, you must review the important disclosures, instructions and definitions found in Part IV of this Reaffirmation Documents packet.

I (we) agree to reaffirm the debt arising under the original agreement as described and, if applicable, modified below.

1. Brief description of the original agreement being reaffirmed: _____
(For example, auto loan)

2. **AMOUNT REAFFIRMED:** \$ _____
(The Amount Reaffirmed is the entire amount that you are agreeing to pay. This may include unpaid principal, interest, and fees and costs (if any) arising on or before the date you sign this Reaffirmation Agreement. See the definition of "Amount Reaffirmed" in Part IV C below.)

3. The **ANNUAL PERCENTAGE RATE** applicable to the Amount Reaffirmed is _____%.
This is a (check one) Fixed rate Variable rate
[If your loan has a variable rate, your future interest rate may increase or decrease from the Annual Percentage Rate disclosed here. See definition of "Annual Percentage Rate" in Part IV C below.]

4. Reaffirmation Agreement Repayment Terms:
 If fixed term: \$ _____ per month for _____ months, starting on _____
 If not fixed term, repayment terms
(Describe): _____

5. Describe the collateral, if any, securing the debt:
Description: _____
Current Market Value \$ _____

6. Did the debt you are reaffirming arise from your purchase of the collateral described above?
 Yes No

If yes, what was the purchase price for the collateral? _____
 If no, what was the amount of the original loan? _____

7. Detail the changes made by this Reaffirmation Agreement to the most recent credit terms on your reaffirmed debt:

	Terms Before Reaffirmation	Terms After Reaffirmation
Balance due (including fees and costs)	_____	_____
Annual Percentage Rate	_____	_____
Monthly Payment	_____	_____
Other Terms (attach additional page, if needed)	_____	_____

8. Check this box if the creditor is agreeing to provide the Debtor with additional future credit in connection with this Reaffirmation Agreement. Describe the credit limit, the Annual Percentage Rate that applies to future credit and any other terms on future purchases and advances using such credit: _____

I hereby certify that:

- I. Before signing this reaffirmation agreement, I read the terms disclosed in this Reaffirmation Agreement (Part I) and the Disclosure Statement, Instructions and Definitions included in Part IV below;
- ii. The Debtor's Statement in Support of Reaffirmation Agreement (Part II below) is true and complete;
- iii. I am entering into this agreement voluntarily and fully informed of my rights and responsibilities; and
- iv. I have received a copy of this completed and signed Reaffirmation Documents packet.

SIGNATURE(S):

Date _____ Signature: _____
Debtor

Date _____ Signature: _____
(Joint Debtor, if any)

[If joint reaffirmation agreement, both debtors must sign.]

Accepted by Creditor:

Creditor: _____
(Print Name) (Address)

(Print Name of Representative) (Signature) (Date)

(Title)

II. DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

1. Were you represented by an attorney during the course of negotiating this agreement?
(check one) Yes No
2. Is the creditor a credit union? (check one)
(check one) Yes No
3. If your answer to EITHER question 1. or 2. above is "No" complete a. and b. below. If your answer to BOTH questions 1. And 2. is "Yes," skip to 4. below.

a. My present monthly income and expenses are:

- I. Monthly income from all sources after payroll deductions
(take-home pay plus any other income) \$ _____
- ii. Monthly expenses (including all reaffirmed debts except
this one) \$ _____
- iii. Amount available to pay this reaffirmed debt (subtract ii. from I.) \$ _____
- iv. Amount of monthly payment required for this reaffirmed debt \$ _____

*If the monthly payment on this reaffirmed debt (line iv.) is **greater than** the amount you have available to pay this reaffirmed debt (line iii.), you must check the box at the top of page one that says "Presumption of Undue Hardship." Otherwise, you must check the box at the top of page one that says "No Presumption of Undue Hardship."*

b. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or on me because (check one of the two statements below, if applicable):

- I can afford to make the payments on the reaffirmed debt because my monthly income is greater than my monthly expenses even after I include in my expenses the monthly payments on all debts I am reaffirming, including this one.
- I can afford to make the payments on the reaffirmed debt even though my monthly income is less than my monthly expenses after I include in my expenses the monthly payments on all debts I am reaffirming, including this one, because: _____

(Use an additional page if needed for a full explanation.)

4. If your answers to BOTH questions 1. and 2. above were "Yes," check the following statement, if applicable: I believe this reaffirmation agreement is in my financial interest and I can afford to make the payments on the reaffirmed debt. *Also, check the box at the top of page one that says "No Presumption of Undue Hardship."*

III. CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]

I hereby certify that: (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and of any default under this agreement.

[Check box, if the *Presumption of Undue Hardship* box is checked on page 1 and the creditor is not a Credit Union] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payments.

Date _____ Signature: _____

Debtor's Attorney

Printed Name of Debtor's Attorney

IV. DISCLOSURE STATEMENT AND INSTRUCTIONS TO DEBTOR

Before agreeing to reaffirm a debt, review the terms disclosed in the Reaffirmation Agreement (Part I) and these additional important disclosures and instructions.

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps, detailed in Part B below, are not completed, the reaffirmation agreement is not effective, even though you have signed it.

A. DISCLOSURE STATEMENT:

1. **What are your obligations if you reaffirm a debt?** A reaffirmed debt remains your personal legal obligation. Your reaffirmed debt is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Your obligations will be determined by the reaffirmation agreement, which may have changed the terms of the original agreement. If you are reaffirming an open end credit agreement, that agreement or applicable law may permit the creditor to change the terms of that agreement in the future under certain conditions.
2. **Are you required to enter into a reaffirmation agreement by any law?** No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments that you agree to make.
3. **What if your creditor has a security interest or lien?** Your bankruptcy discharge does not eliminate any lien on your property. A "lien" is often referred to as a security interest, deed of trust, mortgage or security deed. The property subject to a lien is often referred to as collateral. Even if you do not reaffirm and your personal liability on the debt is discharged, your creditor may still have a right under the lien to take the collateral if you do not pay or default on the debt. If the collateral is personal property that is exempt or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the collateral, as the parties agree or the court determines.
4. **How soon do you need to enter into and file a reaffirmation agreement?** If you decide to enter into a reaffirmation agreement, you must do so before you receive your discharge. After you have entered into a reaffirmation agreement and all parts of this Reaffirmation Documents packet requiring signature have been signed, either you or the

creditor should file it as soon as possible. The signed agreement must be filed with the court no later than 60 days after the first date set for the meeting of creditors, so that the court will have time to schedule a hearing to approve the agreement if approval is required.

5. **Can you cancel the agreement?** You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters your discharge, or during the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled). Remember that you can rescind the agreement, even if the court approves it, as long as you rescind within the time allowed.
6. **When will this reaffirmation agreement be effective?**
 - a. If you were represented by an attorney during the negotiation of your reaffirmation agreement:
 - i. if the creditor is not a Credit Union, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship in which case the agreement becomes effective only after the court approves it;
 - ii. if the creditor is a Credit Union, your reaffirmation agreement becomes effective when it is filed with the court.
 - b. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, the reaffirmation agreement will not be effective unless the court approves it. To have the court approve your agreement, you must file a motion. See Instruction 5, below. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing, at which time the judge will review your reaffirmation agreement. If the judge decides that the reaffirmation agreement is in your best interest, the agreement will be approved and will become effective. However, if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home, you do not need to file a motion or get court approval of your reaffirmation agreement.
7. **What if you have questions about what a creditor can do?** If you have questions about reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement. If you do not have an attorney helping you, you may ask the judge to explain the effect of this agreement to you at the hearing to approve the reaffirmation agreement. When this disclosure refers to what a creditor “may” do, it is not giving any creditor permission to do anything. The word “may” is used to tell you what might occur if the law permits the creditor to take the action.

B. INSTRUCTIONS:

1. Review these Disclosures and carefully consider the decision to reaffirm. If you want to reaffirm, review and complete the information contained in the Reaffirmation Agreement (Part I above). If your case is a joint case, both spouses must sign the agreement if both are reaffirming the debt.
2. Complete the Debtor’s Statement in Support of Reaffirmation Agreement (Part II above). Be sure that you can afford to make the payments that you are agreeing to make and that you have received a copy of the Disclosure Statement and a completed and signed Reaffirmation Agreement.
3. If you were represented by an attorney during the negotiation of your Reaffirmation Agreement, your attorney must sign and date the Certification By Debtor’s Attorney

section (Part III above).

4. You or your creditor must file with the court the original of this Reaffirmation Documents packet.
5. If you are not represented by an attorney, you must also complete and file with the court a separate form entitled "Motion for Court Approval of Reaffirmation Agreement." You can use form B ___ to do this.

C. DEFINITIONS:

1. **"Amount Reaffirmed"** means the total amount of debt that you are agreeing to pay (reaffirm) by entering into this agreement. The amount of debt includes any unpaid fees and costs arising on or before the date you sign this agreement that you are agreeing to pay. Your credit agreement may obligate you to pay additional amounts that arise after the date you sign this agreement. You should consult your credit agreement to determine whether you are obligated to pay additional amounts that may arise after the date of this agreement.
2. **"Annual Percentage Rate"** means the interest rate on a loan expressed under the rules required by federal law. The Annual Percentage Rate (as opposed to the "stated interest rate") tells you the full cost of your credit including many of the creditor's fees and charges. You will find the Annual Percentage Rate for your original agreement on the disclosure statement that was given to you when the loan papers were signed or on the monthly statements sent to you for an open end credit account such as a credit card.
3. **"Credit Union"** means a financial institution as defined in 12 U.S.C. § 461(b)(1)(A)(iv). It is owned and controlled by and provides financial services to its members and typically uses words like "Credit Union" or initials like "C.U." or "F.C.U." in its name.

<input type="checkbox"/> Presumption of Undue Hardship <input type="checkbox"/> No Presumption of Undue Hardship (Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement)

UNITED STATES BANKRUPTCY COURT

District of _____

In re _____,
Debtor

Case No. _____
Chapter _____

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

- | | |
|--|---|
| <input type="checkbox"/> Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5) | <input type="checkbox"/> Part D: Debtor's Statement in Support of Reaffirmation Agreement |
| <input type="checkbox"/> Part B: Reaffirmation Agreement | <input type="checkbox"/> Part E: Motion for Court Approval |
| <input type="checkbox"/> Part C: Certification by Debtor's Attorney | |

[Note: Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. Note also: If you complete Part E, you must prepare and file Form 240B - Order on Reaffirmation Agreement]

Name of Creditor: _____

[Check this box if] Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: \$ _____

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

Form 240A - Reaffirmation Agreement (Cont.)
ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

\$ _____ @ _____ %;
\$ _____ @ _____ %;
\$ _____ @ _____ %.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed,

the amount of each balance and the rate applicable to it are:

\$ _____ @ _____ %;
 \$ _____ @ _____ %;
 \$ _____ @ _____ %.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item

Original Purchase Price or Original Amount of Loan

Optional--At the election of the creditor, a repayment schedule using one or a combination of the following may be provided.

Repayment Schedule:

Your first payment in the amount of \$ _____ is due on _____ (date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

— Or —

Your payment schedule will be: _____ (number) payments in the amount of \$ _____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.), unless altered later by mutual agreement in writing.

— Or —

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).
2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.
3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C
4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.
5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached
6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.
7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A "lien" is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor "may" do, it does not use the word "may" to give the creditor specific permission. The word "may" is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

PART B: REAFFIRMATION AGREEMENT

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

Accepted by creditor:

(Print Name)

(Printed Name of Creditor)

(Signature)

(Address of Creditor)

Date: _____

(Signature)

Co-borrower, if also reaffirming these debts:

(Printed Name and Title of Individual Signing for Creditor)

(Print Name)

Date of creditor acceptance:

(Signature)

Date: _____

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

[Check box, if applicable and the creditor is not a Credit Union.] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

*[Read and complete sections 1 and 2, **OR**, if the creditor is a Credit Union and the debtor is represented by an attorney, read section 3. Sign the appropriate signature line(s) and date your signature. If you complete sections 1 and 2 **and** your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]*

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$ _____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$ _____, leaving \$ _____ to make the required payments on this reaffirmed debt.

I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____

(Use an additional page if needed for a full explanation.)

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

— Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

3. I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

PART E: MOTION FOR COURT APPROVAL

[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (*check all applicable boxes*):

11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

Text of 11 U.S.C. § 524(k) with Annotations
Identifying Where in the Proposed Reaffirm Documents Packet the
Requirement is Satisfied

524(k)

(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement. ***The disclosures are made in Part IV, combined with the information that is contained in the agreement itself, which is Part I. The statement and declaration are Parts II and III. The motion and order will be a separate director's form because they are not required every time there is a reaffirmation agreement. They are required only when court approval is necessary, which is when debtor does not have an attorney who signs the attorney certification or there is an attorney certification, but there presumption is a presumption of undue hardship and the court must decide whether to approve the agreement.***

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated. ***The "AMOUNT REAFFIRMED" and "ANNUAL PERCENTAGE RATE" are made more prominent by capitalizing, bolding and underlining them and by putting them in the agreement on the first page of the document. The terms are defined in Part IV.C. At the beginning of the reaffirmation agreement, the debtor is instructed in bold print, "Before entering into this Reaffirmation Agreement, you must review the important disclosures, instructions and definitions found in Part IV. of this Reaffirmation Documents packet." When the debtor signs the agreement, s/he certifies that s/he has read the Disclosure Statement, Instructions and Definitions. There is no Summary of Reaffirmation Agreement because the Agreement itself, which is Part I, includes the information that would go in the Summary and it was the opinion of the drafting group that adding a Summary unnecessarily lengthened the document.***

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:"; ***This statement appears twice, in Part I ("Before entering into this Reaffirmation Agreement, you must review the important disclosures ...") and in Part IV ("Before agreeing to reaffirm a debt, please review these important disclosures ...").***

(B) Under the heading "Summary of Reaffirmation Agreement", the statement:

“This Summary is made pursuant to the requirements of the Bankruptcy Code”; *There is no Summary of Reaffirmation Agreement because the Agreement itself, which is Part I, includes the information that would go in the Summary and it was the opinion of the drafting group that adding a Summary unnecessarily lengthened the document.*

(C) The “Amount Reaffirmed”, using that term, which shall be—

(I) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

This definition is in Part IV.C. In addition, immediately following the Amount Reaffirmed in the Agreement it states "The Amount Reaffirmed is the entire amount that you are agreeing to pay. This may include unpaid principal, interest, and fees and costs (if any) arising on or before the date you sign this Reaffirmation Agreement. See the definition of 'Amount Reaffirmed' in Part IV.C... ." In Part IV.C. it states, " The total Amount Reaffirmed ... includes *any unpaid fees and costs arising on or before the date you sign this agreement that you are agreeing to pay." The provision related to fees and costs is in the Agreement, as well as the definition, so that when the creditor signs the agreement it is agreeing to limit any claim for fees or costs arising before the date of the reaffirmation agreement to those included in the amount reaffirmed.

(D) In conjunction with the disclosure of the “Amount Reaffirmed”, the statements—

(I) “The amount of debt you have agreed to reaffirm”; and

(ii) “Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.”.

Part IV.C.

(E) The “Annual Percentage Rate”, using that term, which shall be disclosed as—

(I) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms “credit” and “open end credit plan” are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the

disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

"Annual Percentage Rate" is defined in Part IV.C. In Part I. point 3, the APR applicable to the amount reaffirmed is stated and it states whether the rate is variable or fixed.

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

Part I. point 3 states whether the rate is variable or fixed and, if it is variable, the debtor is warned that his or her "future interest rate may increase or decrease from the Annual Percentage Rate disclosed here."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

Part I. points 5 and 6.

(H) At the election of the creditor, a statement of the repayment schedule using 1

or a combination of the following—

- (i) by making the statement: “Your first payment in the amount of \$XXX is due on XXX but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.”, and stating the amount of the first payment and the due date of that payment in the places provided;
- (ii) by making the statement: “Your payment schedule will be:”, and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or
- (iii) by describing the debtor’s repayment obligations with reasonable specificity to the extent then known by the disclosing party.

Part I. point 4.

(I) The following statement: “Note: When this disclosure refers to what a creditor ‘may’ do, it does not use the word ‘may’ to give the creditor specific permission. The word ‘may’ is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don’t have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.”.

Part IV.A. point 7.

(J)

(i) The following additional statements:

“Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

Introduction to Parts I and IV.

“1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

Part IV.B.1.

“2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

Part IV.B.2.

“3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

Part IV.B.3.

“4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

Part IV.B.5.

“5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

Part IV.B.4. The reference to a separate reaffirmation agreement is deleted because this packet can only be used if the debtor and the creditor use the agreement that is part of the form. We did this because the agreement and the disclosures are one integrated document. The disclosures are incomplete without the agreement.

“6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

Part IV.A.6.a. This was modified by adding an explanation regarding the effective date if the creditor is a credit union.

“7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

Part IV.A.6.b.

“Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Part IV.A.5.

“What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Part IV.A.1.

“Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

Part IV.A.2.

“What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ‘lien’ is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State’s law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.”.

Part IV.A.3.

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

“6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.”

Part IV.A.6.a.ii.

(4) The form of such agreement required under this paragraph shall consist of the following:

“Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below. **Part I. second paragraph**

“Brief description of credit agreement: **Part I. point 1**

“Description of any changes to the credit agreement made as part of this reaffirmation agreement: **Part I. point 7**

“Signature: Date:

“Borrower:

“Co-borrower, if also reaffirming these debts:

Part I, Signature Block

“Accepted by creditor:

“Date of creditor acceptance:”.

Part I, Signature Block

(5) The declaration shall consist of the following:

(A) The following certification:

“Part C: Certification by Debtor’s Attorney (If Any).

“I hereby certify that

(1) this agreement represents a fully informed and voluntary agreement by the debtor;

(2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and

(3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

“Signature of Debtor’s Attorney: Date:”.

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

Part III.

(6)

(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

“Part D: Debtor’s Statement in Support of Reaffirmation Agreement.

“1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$XXX, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$XXX, leaving \$XXX to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: XXX.

Part II, point 3.

“2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and

signed reaffirmation agreement.”.

Part I. point iv. of text immediately above debtor's signature block

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

“I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.”.

Part II. point 4 and, Part I. point iv. Of text immediately above debtor's signature block.

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

“Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

“I am not represented by an attorney in connection with this reaffirmation agreement.

“I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

“Therefore, I ask the court for an order approving this reaffirmation agreement.”.

The motion and order will be a separate Director's Form and is not included in the packet because many debtors will not require a motion. Including the motion in the packet seems to result in the filing of unnecessary motions. As explained in Part IV.A.6. many reaffirmation agreements are effective without the court entering an order.

(8) The court order, which may be used to approve such agreement, shall consist of the following:

“Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above.”.

The motion and order will be a separate Director's Form and is not included in the packet because many debtors will not require a motion. Including the motion in the packet seems to result in the filing of unnecessary motions. As explained in Part IV.A.6.a. many reaffirmation agreements are effective without the court entering an order.

Requirement	Cover Sheet	Reaffirmation Documents	Comments
Creditor Name	1.	Heading	Necessary for both documents.
Amount of debt	2.	Part I, pt. 2 and 7	The cover sheet requires the amount of debt on the date of bankruptcy and the amount being reaffirmed. Pt. 2 of the reaffirmation agreement implements 524(k)(2) which requires that the amount reaffirmed be disclosed and that the term "Amount Reaffirmed" shall be disclosed more conspicuously than other terms. Pt. 7 of the reaffirmation agreement implements 524(k)(4), (reaffirmation agreement shall include a description of any changes that it makes to the credit agreement) by requiring the amount before and after reaffirmation. We required the amount before the reaffirmation, rather than the date of the petition, because it is possible that there are postpetition accruals of interest and/or terms have changed postpetition.
Annual Percentage Rate	3.	Part I, pt. 3 and 7	The cover sheet requires the APR on the date of bankruptcy and the APR post-reaffirmation. The reaffirmation agreement requires the APR before and after reaffirmation. The applicable legal requirements are 524(k)(2) and (4) and the explanation is similar to that immediately above.
Repayment terms	4	Part I, pt. 4	The cover sheet requires the repayment terms only if the rate is fixed. The reaffirmation agreement requires more information: it requires the date that monthly payments begin and any other terms. The blank for other terms will require a description of repayment terms that are something other than a fixed rate for a fixed number of months. This effectively discloses repayment terms on all agreements and implements 524(k)(3)(H).

Requirement	Cover Sheet	Reaffirmation Documents	Comments
Collateral description & value	5	Part I, pt. 5 and 6	Section 524(k)(3)(G) requires that disclosure if the debt being reaffirmed is secured. If it is secured, 524(k)(3)(G) requires disclosure of a list of items comprising the collateral and original purchase price (if purchase money security interest) or original amount of the loan (if non-purchase money security interest). There is not a requirement that the value of the collateral be disclosed, but it is included so that it will be obvious to the debtor if s/he is agreeing to pay more than the collateral is worth.
Monthly income from all sources after payroll deductions	7.B.	Part II, pt. 3.a. (required only if creditor is not a credit union and debtor is not represented by counsel)	Section 524(k)(6)(A) requires a Debtor's Statement in Support of Reaffirmation Agreement and this information is extracted from what is required by that statute.
Monthly expenses and monthly payments on reaffirmed debts	8.B. and 9.B.	Part II, pt. 3.a. (required only if creditor is not a credit union and debtor is not represented by counsel)	Section 524(k)(6)(A) requires a Debtor's Statement in Support of Reaffirmation Agreement and this information is extracted from what is required by that statute.
Was debtor represented by counsel in negotiating the agreement?	Unnumbered, second box under "Other Information"	Part II, pt. 1, Part III.	Section 524(k)(5) requires a certification by debtor's attorney (if any).

United States Bankruptcy Court

District Of _____

In re _____,
Debtor

Case No _____
Chapter _____

REAFFIRMATION AGREEMENT COVER SHEET

This form must be completed in its entirety and filed, with the reaffirmation agreement attached, within the time set under Rule 4008. It may be filed by any party to the reaffirmation agreement.

- 1. Creditor's Name: _____
2. Amount of the debt subject to this reaffirmation agreement: \$ _____ on the date of bankruptcy \$ _____ to be paid under reaffirmation agreement
3. Annual percentage rate of interest: _____% prior to bankruptcy _____% under reaffirmation agreement (_____ Fixed Rate _____ Adjustable Rate)
4. Repayment terms (if fixed rate): \$ _____ per month for _____ months
5. Collateral, if any, securing the debt: Current market value: \$ _____
Description: _____
6. Does the creditor assert that the debt is nondischargeable? ___ Yes ___ No
(If yes, attach a declaration setting forth the nature of the debt and basis for the contention that the debt is nondischargeable.)

Debtor's Schedule I and J Entries

Debtor's Income and Expenses
as Stated on Reaffirmation Agreement

- 7.A. Total monthly income from Schedule I, line 16 \$ _____
7.B. Monthly income from all sources after payroll deductions \$ _____
8.A. Total monthly expenses from Schedule J, line 18 \$ _____
8.B. Monthly expenses \$ _____
9.A. Total monthly payments on reaffirmed debts not listed on Schedule J \$ _____
9.B. Total monthly payments on reaffirmed debts not included in monthly expenses \$ _____
10.B. Net monthly income \$ _____
(subtract sum of lines 8.B. and 9.B. from line 7.B. If total is less than zero, put the number in brackets)

11. Explain with specificity any difference between the income amounts (7.A. and 7.B):

12. Explain with specificity any difference between the expense amounts (8.A. and 8.B):

If line 11 or 12 is completed, the undersigned debtor certifies that any explanation contained on those lines is true and correct.

Signature of Debtor (only required if
line 11 or 12 is completed)

Other Information

Check this box if the total on line 10.B. is less than zero. If that number is less than zero, a presumption of undue hardship arises (unless the creditor is a credit union) and you must explain with specificity the sources of funds available to the Debtor to make the monthly payments on the reaffirmed debt: _____

Was debtor represented by counsel during the course of negotiating this reaffirmation agreement?

_____ Yes _____ No

If debtor was represented by counsel during the course of negotiating this reaffirmation agreement, has counsel executed a certification (affidavit or declaration) in support of the reaffirmation agreement?

_____ Yes _____ No

FILER'S CERTIFICATION

I hereby certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this Reaffirmation Agreement Cover Sheet.

Signature

Print/Type Name & Signer's Relation to Case

Advisory Committee on Bankruptcy Rules - Utilization of Director's Form 240A Reaffirmation Agreement

Report Index

Please indicate your Circuit.(e.g. 1st, 2nd)

Please indicate your District(e.g AK, CA-N)

Utilization of Director's Form 240A Reaffirmation Agreement

Does your court currently utilize the Director's Form 240A for submission of reaffirmation agreements?

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY. Do you quality control the Reaffirmation Agreement to check for attorney's signature?

Please indicate in the space provided your action if the certification has not been completed.

PART E: MOTION FOR COURT APPROVAL. Do you utilize part E when the debtor is not represented by counsel or do you have a different procedure?

Please identify what changes to Form B240 would make it easier for your court to process reaffirmation agreements?

If you utilize your own locally designed form in lieu of Form B240, please indicate where the Committee can obtain a copy.

Please indicate your Circuit:(e.g. 1st, 2nd)

Response total

63

Total # of respondents **63** Statistics based on **63** respondents **0** filtered; **0** skipped

Please indicate your District(e.g.AK, CA-N)

Response total

63

Total # of respondents **63**. Statistics based on **63** respondents **0** filtered; **0** skipped.

Utilization of Director's Form 240A Reaffirmation Agreement

Does your court currently utilize the Director's Form 240A for submission of

Response percent **Response total**

reaffirmation agreements?

Yes	<input type="checkbox"/>	93.7%	59
No	<input type="checkbox"/>	6.3%	4

Total # of respondents **63** Statistics based on **63** respondents 0 filtered, 0 skipped



PART C: CERTIFICATION BY DEBTOR'S ATTORNEY. Do you quality control the Reaffirmation Agreement to check for attorney's signature?
Please indicate in the space provided your action if the certification has not been completed.

Yes	<input type="checkbox"/>	92.1%	58
No	<input type="checkbox"/>	7.9%	5

Comment **43**

Total # of respondents **63**. Statistics based on **63** respondents 0 filtered, 0 skipped



PART E: MOTION FOR COURT APPROVAL. Do you utilize part E when the debtor is not represented by counsel or do you have a different procedure?

Yes	<input type="checkbox"/>	66.1%	39
No	<input type="checkbox"/>	33.9%	20

Other Procedure **34**

Total # of respondents **63**. Statistics based on **62** respondents 0 filtered; 1 skipped.



Please identify what changes to Form B240 would make it easier for your court to process reaffirmation agreements?

44

Total # of respondents **63**. Statistics based on **44** respondents 0 filtered, 19 skipped.



If you utilize your own locally designed form in lieu of Form B240, please indicate where the Committee can obtain a copy.

Local Website (Please enter web address for location of form)	<input type="checkbox"/>	75%	6
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Local Contact (Please enter name and number of person to contact at your court)	<input type="checkbox"/>	25%	2
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22

Total # of respondents **63** Statistics based on **22** respondents **0** filtered, **41** skipped



Please indicate your Circuit:(e g. 1st, 2nd)

Responses

(63 total)

1 2nd
2 6th
3 7th
4 8th
5 5th
6 9
7 4th
8 6th
9 8th
10 8th
11 Fourth (4th)
12 5th
13 4th
14 11th
15 11th
16 5th
17 5th
18 Sixth Circuit
19 11th
20 4th
21 4th
22 11th Circuit
23 2nd
24 11th
25 8th
26 Sixth
27 11th
28 4th
29 8
30 8th
31 7th
32 6th
33 4th
34 11th
35 9th Circuit
36 9th
37 5th
38 6th
39 6th
40 10th
41 Second
42 9th
43 8th
44 1st
45 6th
46 1st
47 9
48 9th
49 10th
50 D. C. Circuit
51 3rd Circuit
52 1st
53 10th
54 3rd
55 5th Circuit
56 First

- 57 5th
- 58 5th
- 59 6th Circuit
- 60 9th
- 61 3d
- 62 9th
- 63 10th

(63 total)

Please indicate your District(e.g.AK, CA-N)

Responses

(63 total)

- 1 NY-S
- 2 TN-M
- 3 IN-S
- 4 AR-E&W
- 5 Texas Western
- 6 or
- 7 WV-S
- 8 MI-W
- 9 ND
- 10 MN
- 11 NDWV
- 12 TX-N
- 13 MDNC
- 14 GAMB
- 15 AL-N
- 16 MSSB
- 17 TX-N
- 18 MIE
- 19 FL-M
- 20 SC
- 21 VAE
- 22 FL S
- 23 Vermont
- 24 NDGa
- 25 MO-W
- 26 KY-W
- 27 FL-N
- 28 NC-W
- 29 NE
- 30 IA-N
- 31 WI-W
- 32 OH-N
- 33 NC-E
- 34 AL-M
- 35 CA-C
- 36 AZ
- 37 LA - W
- 38 TNW
- 39 KY-E
- 40 CO
- 41 NY-W
- 42 MT
- 43 IA-S
- 44 NH
- 45 TN-E
- 46 RI
- 47 WAE
- 48 CA-E
- 49 NM
- 50 District of Columbia Bankruptcy Court
- 51 PA-M
- 52 MA
- 53 WY
- 54 PA-E
- 55 TX-E
- 56 NY-E

- 57 LA-M
- 58 LA-E
- 59 Ohio Southern
- 60 CA-N
- 61 PA-W
- 62 Hawaii
- 63 OK W

(63 total)

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY. Do you quality control the Reaffirmation Agreement to check for attorney's signature?
Please indicate in the space provided your action if the certification has not been completed.

Comment:

Responses

(43 total)

- 7 Schedule hearings on all reaffirmation agreements filed without attorney signature, unless they involve real property and no hardship exists.
- 8 Reaffirmation agreement is forwarded to chambers/calendar clerk to schedule for hearing
- 9 Issue Order to Comply
- 10 We have added a "signed by attorney" checkbox to the docket event, so the presence or absence of a signature is easily determined. We have adopted the Director's form as a Local Form, but without the motion and order. If a reaffirmation agreement is filed without an attorney's signature and the debtors are otherwise unrepresented in their case, we set the agreement on for hearing. If the debtors are represented in the case but their attorney has not signed the reaffirmation agreement, we issue an order and notice for hearing requiring the attorney to consult with the debtor concerning the agreement, confirm that Part D is properly completed or supplement the record if it is not, and explain any differences between Part D and Schedules I and J.
- 11 Enter an order noting deficient filing
- 13 we set it for hearing
- 15 The Reaffirmation Agreement is set for hearing if it has not been signed by all parties, it has been filed without attorney representation, or the attorney signed the agreement but marked the box that a presumption of undue hardship has been established with respect to the agreement.
- 16 Set for Hearing Treat Reaffirmation Agreement as Pro-Se
- 17 It is set for hearing
- 19 Set for hearing
- 21 If filed but not completed by debtor's attorney, refer to chambers for review
- 22 If an attorney has not signed the Certification, the matter is set for hearing.
- 23 We treat as if the debtor is pro se for purposes of the reaffirmation agreement and set for hearing if necessary.
- 24 If not signed by atty, reaffirmation is treated as pro se
- 25 If the attorney has not certified, the debtor is deemed to be pro se for purposes of the reaffirmation and a hearing is scheduled
- 26 set for hearing
- 27 Enter an Order to File Papers in Proper Form
- 28 Set for hearing
- 29 If not signed by the Attorney, the Reaffirmation is sent to the Judge for his review
- 31 However, we do not return or call if not signed. Judge will address with counsel.
- 32 If the reaf is not signed by all parties, attys and debtors, the reaf is set for hearing and in some cases the judge will order an amended reaf agreement. Many times information on the form will be inaccurate compared to schedules I & J.
- 33 Reaff is sent through for hearing if motion to approve is filed or if the debtor is truly pro se.
- 34 Reaffirmation is set for hearing if not signed by attorney.
- 36 If not signed by attorney, it is set for hearing.
- 37 Court sets for hearing
- 38 Depends on Judge assigned
- 39 Treated as pro se. We set a hearing.
- 40 4 of 5 Judge will set a hearing, treated as pro se. The 5th will only set a hearing if the debtor had no counsel in the case--pro se on everything (he won't let counsel unbundle the reaffirmation portion if they filed the case for the debtor)
- 41 If Part C is not completed, a hearing is set
- 42 If Part C lacks attorney's signature, the Judge holds a telephonic hearing with Debtor(s) and Debtor(s)' attorney for approval of reaff
- 44 If there is no certificate and there is an attorney of record on the case, the agreement is set for hearing, depending upon what is being reaffirmed.
- 46 Order Striking Reaffirmation is Entered
- 47 The reaffirmation is treated as if an attorney did not negotiate the agreement.
- 49 (1 -- a judge) Treat as pro se reaffirmation. (2 -- a courtroom deputy) Set hearing. (3 -- a case manager) Check to be sure attorney has filed reaffirmation as a motion for approval; this will set a flag which will alert chambers to set a hearing on the matter.
- 50 Currently all reaffirmation agreements are sent to Chambers for review regardless of certification. If no certification Chambers issues order to show cause
- 52 We treat the reaf agreement as filed "pro se" and schedule a hearing.
- 54 All reaffirmation agreements are referred to the court for review after filing. If the certification has not been completed, the

- court will schedule a hearing or otherwise direct the clerk's office on how to proceed
- 55 Attorney is contacted for amended certification, if not received within 24 hours, matter is set for hearing
 - 56 If the certification has not been completed and signed by the attorney, the court sets a hearing to approve the reaffirmation agreement and notices the parties of the hearing
 - 59 Case flagged and routed to Chambers for Action
 - 60 Either contact the attorney or set for hearing
 - 61 CAs do not enhance the entry to include "Declaration by Attorney " Also, Reaffs are reviewed by Judges' Chambers If not signed by the attorney, a hearing is scheduled or an order is entered directing the attorney to re-file.
 - 62 reviewed under undue hardship standard

(43 total)

PART E: MOTION FOR COURT APPROVAL. Do you utilize part E when the debtor is not represented by counsel or do you have a different procedure?

Other Procedure:

Responses

(34 total)

- 2 Filers on ECF use an ECF menu option for "Hearing Requested" or "No Hearing Requested." We treat a "Hearing Requested" as a Motion.
- 4 Clerk's office does not check to make sure this is filed
- 5 If the attorney does not sign it, then it is automatically set for hearing
- 6 We presume a motion
- 7 Schedule hearings on all reaffirmation agreements filed without attorney signature, unless they involve real property and no hardship exists
- 10 See answer to # 4 above for procedure
- 13 we just automatically set it when we see the aty has not signed
- 14 ARE rules do require a separate motion but if the debtor has signed part E we will hold a hearing
- 15 A hearing is set on the Reaffirmation Agreement if a motion for court approval is filed. Also, all pro se cases are set for a discharge hearing to determine if Reaffirmation Agreements should be approved
- 17 All pro-se reaffirmation agreements are set for hearing
- 22 If the debtor has not completed Part E, the court would still set the matter for hearing
- 25 Reaffirmations where the debtor is pro se are always set for hearing
- 26 automatically set for hearing if not signed by counsel
- 27 All pro se reaff's are automatically set for hearing
- 28 Set for hearing
- 29 Different procedure Parties are to file a separate motion for approval of the reaffirmation agreement and proceed under our local rule 9013.
- 31 To clarify, we just use Part E
- 32 Most judges set a hearing for all pro-se reaffirmation agreements
- 34 All reaffirmations filed by pro se debtors, whether Part E is completed or not, are set for hearing.
- 35 Set for hearing when debtor not represented by counsel
- 36 If not signed by attorney, it is set for hearing.
- 39 We set all pro se reafs for hearing So Part E is not necessary.
- 40 We also accept other forms and don't require that a motion be filed.
- 41 A hearing is always set when the debtor is not represented by counsel.
- 42 All reaffirmation agreements are brought to Chambers' attention for consideration; appropriate Orders are entered approving reaff or denying for lack of providing required information.
- 44 We do not utilize part E. For cases in which the debtor is not represented by counsel, a hearing is set unless the agreement is for consumer debt secured by real property. For those debts the agreement is often approved without a hearing.
- 45 Motion stricken by order if debtor represented by counsel; otherwise, reaffirmation set for hearing
- 48 Docket only if filed as a separate motion Always set pro se reaffirmations for hearing.
- 49 (1 -- a judge) Don't use Part E ever. (2 -- a courtroom deputy) I set all pro se reaffirmation agreements, unless it is secured by real property (3 -- a case manager) The case manager checks for the attorney's signature. If there is not one in Section C, then the case manager checks to be sure the event was docketed using the Motion for Reaffirmation event. If not, the REAF flag is set and the mapping is changed. (4 -- a law clerk) I assume we look at part E, but I believe our procedure is to set reaffirmation agreements when there is a presumption of hardship, or where the attorney has not signed off, or when the debtor is pro se -- regardless of whether there is a hardship.
- 54 All reaffirmation agreements are referred to the court for review after filing. If the debtor is not represented by counsel, the court will determine if a hearing will be scheduled
- 55 Pro Se Reaffirmation Agreements are set for hearing unless agreement pertains to homestead or the creditor is a credit union
- 56 If the debtor is pro se, the court automatically sets a hearing to approve the reaffirmation agreement and notices the parties of the hearing.
- 60 Not all divisions use this part and it is always set for hearing
- 61 Certain Judges schedule all Reaff Agrmts filed by pro se debtors

(34 total)

Please identify what changes to Form B240 would make it easier for your court to process reaffirmation agreements?

Responses

(44 total)

- 4 The presumption of hardship check box on the front page leads to a potential for confusion, since some reaffirmation agreements have this box checked for a presumption, but the presumption box in part c is NOT checked or vice versa Only 1 place on the form should be used to state whether there is a presumption of hardship or not
- 6 don't care - key here is our local cover sheet that we have used for years
- 7 The form needs to include a statement in support of reaffirmation agreement, as required by Bankruptcy Rule 4008(b), explaining the difference between the total income and expenses on Schedules I & J and the statement required under Sec. 524(k)(6)(A).
- 8 Even though the form is now 9 pages in length, we believe that the form is very clear and helpful to the debtors and court.
- 9 1) Move collateral being reaffirmed to front page; 2) Too many different signature pages for debtors and/or attorneys that they miss signing one, therefore, consolidate signature pages (Parts B, C, and D) and have one signature page for all parts. 3) Insert a blank line for creditor telephone number
- 13 I think one of our judges found a non standard form that he likes. I'll contact that judge and e-mail Jim a copy.
- 14 If there was NO motion as part of the form making the party file a separate motion. This would be similar to the procedure in Exhibit D filed with the petition that reads if you claim exigent circumstances, you have to file a motion for the court to determine if the circumstances are justified
- 15 None
- 16 Sever Part E (Motion for Approval) from the Official Form. Suggest to create a separate form for the Motion Debtor's are leaving Part E when it is not applicable which causes unnecessary hearings
- 17 Having two separate forms and form numbers would be beneficial in identifying pro-se reaffirmation agreements. The language in the form for pro-se debtors could be simplified or contain explanations and/or examples of the information being requested
- 18 Creditor Name and Address included on front page. Make this an official form so that we can enforce the use
- 19 Make the motion separate from the form. We docket as a separate entry when it's included and set for hearing.
- 20 We have clarified Part D and require the debtor to complete an additional section to indicate the reason for any difference between scheduled income and expenses and those listed in Part D We have also added 2 check boxes to the top of the form so that the debtor may indicate if the agreement is timely executed, if S21(a)(6) is applicable, and if the agreement is timely filed under 524.
- 21 The revised form is an improvement over the earlier form version; which is a good thing. The statute is very detailed and makes processing such agreements more cumbersome administratively
- 22 Our court has not had any problems with the form
- 23 We have developed our own version of proposed form B27, which addresses the issues. The form can be found at http://www.vtb.uscourts.gov/forms/B27_reaff_cover_sheet.pdf
- 24 *Add creditor's address to page 1 in addition to name *Require monthly payment amount be completed on page 3. (Not optional.) *Add case caption and case number to Part E - Motion for Court Approval- in case documents become separated.
- 25 1. Move all data and signatures/attestations to the first two pages with references to the boilerplate notice/instructions on the last pages. 2. Eliminate the presumption of abuse box, eliminate the check-off boxes showing parts submitted. 3. Simplify the page on interest--show just one amount with a check-off box for methodology selected which can be fully described later in the notes section. 4. Require debtor's counsel to attest to the accuracy of information on schedules I/J, etc. See our locally-required certification form on our web page.
- 27 A shortened version. Delete part E
- 28 Remove Part E: Motion for Court Approval
- 29 not sure
- 30 Move away from form to data transmission to court. Move instructions to front or back pages of form package and do not require them to be filed Include checkbox on Part C to allow attorney to notify court that he/she has discussed with client and does not recommend entering into reaffirmation agreement.
- 31 None come to mind
- 32 1. One judge issued a 2/08 memo addressing a number of reaffirmation agreements that had to be set for hearing due to deficiencies. 2. Pg3, First statement under Repayment Schedule is useless, because abuse can't be determined (by the court) based solely on the first payment amount. 3. Pg6, Part B, The brief description of credit agreement should be amended to brief description of ORIGINAL credit agreement.
- 33 1. Clearer language could be used about deducting the reaffirmation payment from the current monthly expenses to assist the debtor in computing the figure in Part D, so that the debtor does not compute a "false negative." 2. Rather than offering the debtor an opportunity to submit an explanation as to how payments will be made if Part D yields a negative income, require that the debtor do so
- 34 The form should be made available on the JNet and USCourt web site in a fillable pdf format. Our court currently has a fillable B240 (as revised January, 2007) available on ALMB web site, but it was created by another court We used to maintain a

- fillable reaffirmation form, but it became to difficult to maintain such a long form that is often amended
- 35 None at this time
- 36 Is this the right place for a party to indicate an exemption because sometimes they stop there?
- 37 Would like to see on Part E Motion for Court Approval a "caption" added for debtor(s) name and case number
- 38 Language is currently under consideration by the court
- 40 We have created a cover sheet for reaffirmation agreements to provide judges with more information, similar to proposed national form, but with enhancements. Please see http://www.cob.uscourts.gov/formsdom/lbf_4008_1.pdf to compare
- 41 Make Part E a separate document [Form 240A is the agreement, Form 240B is the order] Many times Part E is filed unnecessarily
- 43 The addition of a check box identifying lease agreement Yes/No Include the current value of item being reaffirmed, in addition to the original amount of the loan
- 44 Part D #1 first paragraph needs to be reworked Quite often the amounts listed are taken straight from schedules I & J, without subtracting the amount of the reaffirmation agreement that is being filed. Part E - I would remove totally, if it needs to be kept, it should have a standard case caption and the instructions need to be made clear that it should be filed as separate from the rest of the agreement as was done with the order approving
- 46 None
- 47 Place the name of the creditors in a more prominent position, maybe higher on the form Have the payment amount under part D also, for the determining if there is a presumption of abuse
- 49 (1 -- a judge) Need to have second page to Part D that complies with Rule 4008 -- see attached [M. Gay will send to J Waldron in e-mail] (2 -- a courtroom deputy) Hardship box is in two different places (front page and on part C) and is many times inconsistent Part D does not always reflect Schedule I and J Form has too many pages and it is difficult to find pertinent information Do not use order. Court prepares own order. (3 -- another courtroom deputy) I would do away with the Presumption or No Presumption box on the front page; we do not even know who checked the box. Also, sometimes, presumption could be checked or not checked and the attorney signature Part C could indicate the other choice Also, it would be nice to have on the front page, along with the name of the creditor, the mailing address Also, whether the debtor had counsel or not on the front page would help A brief description of the collateral would be nice too. (4 -- a case manager) The form contains a lot of explanations regarding the law I am wonderng if it would be possible to have this information at the very end and the pertinent information contained in one area for easy review (5 -- a law clerk) Form B240 Includes the name and address of the creditor where the creditor signs off on the agreement, but it would be helpful if the address were also listed on the front page of the document -- the form already has a spot for Name of Creditor The form is pretty long, but I know it has all the info that is necessary, so it's fine (6 -- another law clerk) Having the following information on the front page Name of Debtor's attorney or designation that debtor is pro se; name and address of creditor
- 50 None due to Court procedures
- 54 We have no suggested changes to Form B240 at this time
- 55 Change title to "Reaffirmation Agreement Between Debtor and (Creditor's Name)" - oftentimes the only reference to the creditor is in Part B.
- 56 The form could be shorter
- 60 Add the telephone number under the signature section (Part B) for the debtor and creditor
- 61 No recommendation at this time.
- 62 Part D is still confusing to applicants. Perhaps better wording needed.

(44 total)

If you utilize your own locally designed form in lieu of Form B240, please indicate where the Committee can obtain a copy.

Responses

(22 total)

- 1 In the SDNY, we have adapted B 240 to create our own local form Please contact Mark Diamond (Ops. Mgr) if you have any questions
- 6 orb.uscourts.gov Cover Sheet is Local Form #718.05
- 7 Leslie Gallian, Case Administration Manager, 304-347-3036
- 13 n/a
- 16 www.mssb.uscourts.gov (Collette Derouen)
- 18 We encourage the use of the director's form, but do not require it We don't have a local form, but will accept reaffirmation agreements that include information required by the director's form.
- 20 www.scb.uscourts.gov (local rules- Exhibit A to Local Rule 4008-1)
- 24 n/a
- 25 We have a local form to supplement the B240. It can be found at:
<http://www.mow.uscourts.gov/Formpage/bkforms/Reaffirmation%20-%20Certification%20of%20Debtors%20Attorney%20Regarding%20Reaffirmation%20Agreement.pdf>
- 28 Not Applicable
- 32 N/A
- 40 see response to question question 6
- 43 N/A
- 44 Our Administrative Order 4008-1 requires all reaffirmation agreements be substantially in the form of Form B240.
- 47 n/a
- 49 One judge requires use of a form which is the procedural form with additional information, as devised by a local creditor's attorney, but the judge just discovered an even better variation. We will be adjusting the form on the website. In the meantime, M. Gay will e-mail the pertinent page to J. Waldron (this is the attachment referred to in #6 above). And we'll get the new and improved form posted next week I will send Jim an e-mail with the whole form and to advise that it has been posted. Margaret Grammer Gay, chief deputy clerk, 505-348-2438. (P.S My mother-in-law is gravely ill. If I am not in the office, please contact Sharon A Kologie, Administrative Analyst, 505-348-2443, for assistance)
- 50 No local form has been designed
- 52 We use Form 240, but have added a sentence to the 2nd certification in Part C to clarify that the attorney is not guaranteeing payment by the debtor
- 54 N/A
- 56 N/A
- 60 We do not use a local copy of the form
- 61 We use the official form B240

(22 total)

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: SUBCOMMITTEE ON FORMS
RE: DOLLAR AMOUNTS ON PROOF OF CLAIM
DATE: February 25, 2009

Managers in the clerk's office in the bankruptcy courts in the Southern District of New York and the Eastern District of Pennsylvania have pointed out discrepancies between the proof of claim form (Official Form 10) and the entry screen for filing claims in CM/ECF. The managers said the discrepancies require extra work for deputy clerks and sometimes lead to errors in the information entered on the electronic claims register.

Official Form 10 includes blanks for the dollar amounts of the amount of the claim (box 1), the amount of the claim which is secured (box 4), and the amount of the claim entitled to priority (box 5). Generally, these three dollar amounts are the ones which are important to the court, the trustee, and the other parties. Box 4 also includes a blank for the unsecured portion of a partially secured claim.

The current docket event for filing a claim in CM/ECF, however, includes two additional blanks – “unsecured” and “unknown.” Unlike Form 10, CM/ECF requires entry of the amount that is unsecured for all claims, not just those that are partially secured. Furthermore, instead of the filer entering the total amount of the claim specified on the form, the software adds the dollar amounts to generate a total. A deputy clerk entering a claim filed on paper has to calculate the “unsecured” portion of the claim and the addition function in CM/ECF may overstate the total value of the claim if the creditor is confused and lists the components of the claim incorrectly.

Changes planned for the upcoming version 4.0 of CM/ECF address these concerns by tracking the three key blanks on Form 10 – the dollar amounts for the total value of the claim, the secured portion, and the portion entitled to priority. The blanks in CM/ECF for “unsecured” and “unknown” would be deleted, along with the addition function.

Because the planned changes in CM/ECF eliminate the main discrepancy between the claims entry screen and Official Form 10, **the Subcommittee recommends that no changes be made in the Official Form.** The court managers have indicated that the planned changes in

CM/ECF satisfy their concerns.

Mark Diamond, the operations manager in the bankruptcy court in the Southern District of New York, also pointed out a disparity between Form 10's treatment of secured claims and priority claims. Box 4, Secured Claim, includes a blank for the unsecured portion of a partially secured claim. Box 5, Amount of Claim Entitled to Priority, does not include a blank for the portion of a priority claim which is not entitled to priority. Although the dollar amount of the claim entitled to priority, not the dollar amount not entitled to priority, generally is more important to the parties, Mr. Diamond suggested that the Official Form should treat secured claims and priority claims in the same manner.

Because the additional blank for secured claims does not appear to have caused any major problems in the courts, **the Subcommittee recommends that Official Form 10 not be amended just to add a blank for the portion of priority claims not entitled to priority.**

UNITED STATES BANKRUPTCY COURT		PROOF OF CLAIM
Name of Debtor _____		Case Number _____
<i>NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property) _____		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim Court Claim Number: _____ (If known) Filed on _____
Name and address where notices should be sent _____ Telephone number _____		
Name and address where payment should be sent (if different from above) _____ Telephone number _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars <input type="checkbox"/> Check this box if you are the debtor or trustee in this case
1. Amount of Claim as of Date Case Filed: \$ _____		
If all or part of your claim is secured, complete item 4 below, however, if all of your claim is unsecured, do not complete item 4 If all or part of your claim is entitled to priority, complete item 5 <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B) <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4) <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5) <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7) <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8) <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)() Amount entitled to priority: \$ _____ <i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
2. Basis for Claim: _____ (See instruction #2 on reverse side)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side)		
4. Secured Claim (See instruction #4 on reverse side) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: _____ Value of Property: \$ _____ Annual Interest Rate _____ % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim		DO NOT SEND ORIGINAL DOCUMENTS ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING If the documents are not available, please explain _____
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side)		
Date: _____		
Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.		FOR COURT USE ONLY

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if the trustee or another party in interest files an objection to your claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. Secured Claim:

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). If the claim is based on the delivery of health care goods or services, see instruction 2. Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature.

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim

A claim is the creditor's right to receive payment on a debt owed by the debtor that arose on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.), and any applicable orders of the bankruptcy court.

Rule 8001. Scope of Rules

(a) These Part VIII rules govern procedure in the United States district courts and the bankruptcy appellate panels relating to appeals taken from judgments, orders, and decrees of bankruptcy judges.

(b) When these rules provide for filing a motion or other document in the bankruptcy court, the procedure must comply with the practice of the bankruptcy court. When these rules provide for filing a motion or other document in a court of appeals, the procedure must comply with the practice of the court of appeals.

Rule 8001 is modeled after FRAP 1. It is also patterned loosely after FRBP 7001, which identifies the scope of the Part VII rules. Like FRAP 1, Rule 8001 provides that the Part VIII rules govern appeals from bankruptcy judges to the district courts and the bankruptcy appellate panels. It also recognizes that, in instances where the Part VIII rules reference or provide for filings in the bankruptcy courts or the courts of appeals, filings in those courts must comply with the applicable practice of those courts. For example, Rule 8006(i) references the filing in the court of appeals of a request for permission to take a direct appeal of a certified matter. The request filed in the court of appeals must comply with applicable practice of the court of appeals.

Rule 8002. Appeal as of Right; How Taken; Joint Appeals

(a) Filing the Notice of Appeal.

(1) An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or a bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) must be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8003.

(2) An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or the bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.

(3) The notice of appeal must

(A) conform substantially to the appropriate Official Form;

(B) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys; and

(C) be accompanied by the prescribed fee.

Each appellant must file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8002(c).

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy judge and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the reviewing district court, bankruptcy appellate panel, or court of appeals.

(c) Service of the Notice of Appeal.

(1) The clerk must serve notice of the filing of a notice of appeal by mailing a copy to counsel of record for each party other than the appellant or, if a party is not represented by counsel, to the party's last known address.

(2) Failure to serve notice does not affect the validity of the appeal.

(3) The clerk must note on each copy served the date of the filing of the notice of appeal and must note in the docket the names of the parties to whom copies are mailed and the date of the mailing.

(4) The clerk must forthwith transmit to the United States trustee a copy of the notice of appeal, but failure to transmit notice to the United States trustee does not affect the validity of the appeal.

Rule 8002 is derived from current Rule 8001(a) and FRAP 3. FRAP generally places in separate rules the procedures that address appeals as of right and appeals by leave. Rule 8001(b) is derived from FRAP 3(b). Rule 8001(d) is derived from current rule 8004 and FRAP 3(d).

Rule 8003. Time for Filing Notice of Appeal

(a) Fourteen-day Period.

(1) The notice of appeal must be filed with the clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from.

(2) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise allowed by this rule 8003, whichever period last expires.

(3) A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree must be treated as filed after entry of the judgment, order, or decree

and on the day thereof. A new or amended notice of appeal is not required, except as provided in Rule 8003(b)(2).

(4) If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel must note thereon the date on which it was received and transmit it to the clerk and it is deemed filed with the clerk on the date so noted.

(b) Effect of Motion on Time for Appeal.

(1) If any party timely files in the bankruptcy court any of the following motions, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding:

(A) a motion to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed no later than 14 days after the entry of judgment.

(2) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree, but before it disposes of any motion listed in Rule 8003(b)(1), the notice becomes effective to appeal a judgment, order, or decree, in whole or in part, when the order disposing of the last such motion outstanding is entered. A party intending to challenge an order disposing of any motion listed in Rule 8003(b)(1), or a judgment, order, or decree altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal, of the order disposing of the motion or any judgment, order, or decree altered or amended upon the motion in compliance with Rule 8002 within the time prescribed by this Rule 8003 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(c) Extension of Time for Appeal.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 21 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 14 days from the date of entry of the order granting the motion, whichever is later.

Rule 8003 is derived from current Rule 8002 and FRAP 4(a). Rule 8003(b)(2) clarifies that, if a timely motion of the kind specified in Rule 8003(b)(1) is filed, any party wishing to appeal an order disposing of such a motion, or any judgment, order, or decree altered or amended as a result of such an order, must either amend an existing notice of appeal to include the order or the altered or amended judgment, order, or decree, or file an original notice of appeal that includes the order or the altered or amended judgment, order, or decree in compliance with these Part VIII Rules.

Rule 8004. Appeal by Leave to District Court or Bankruptcy Appellate Panel; How Taken

(a) Notice of Appeal and Motion for Leave to Appeal. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) must be taken by filing with the clerk a notice of appeal of the judgment, order, or decree, as prescribed by rule 8002(a) within the time allowed by Rule 8003, accompanied by a motion for leave to appeal prepared in accordance with Rule 8004(b) and with proof of service in accordance with Rule 8010.

(b) Content of Motion; Answer.

(1) A motion for leave to appeal under 28 U.S.C. § 158(a) must contain:

(A) a statement of the facts necessary to an understanding of the questions to be presented by the appeal;

(B) a statement of those questions and of the relief sought;

(C) a statement of the reasons why leave to appeal should be granted; and

(D) a copy of the judgment, order, or decree appealed from and of any opinion or memorandum relating thereto.

(2) Within 14 days after service of the motion, an adverse party may file with the clerk a cross motion or an answer in opposition.

(c) Transmittal; Determination of Motion. The clerk must transmit the notice of appeal, the motion for leave to appeal, and any answer thereto to the clerk of the district court or the clerk of the bankruptcy appellate panel as soon as all parties have filed answers to the motion or the time for filing an answer has expired. The motion and answer must be submitted to the district court or bankruptcy appellate panel without oral argument unless otherwise ordered by the district court or the bankruptcy appellate panel. The clerk must transmit the notice of appeal, the motion for leave to appeal, and any answer thereto, together with any statement of election allowed by Rule 8005, to the clerk of the district court or the clerk of the bankruptcy appellate panel prior to preparing and transmitting the record as prescribed by Rule 8009.

(d) Appeal Improperly Taken Regarded as a Motion for Leave to Appeal. If a required motion for leave to appeal an interlocutory judgment, order, or decree is not filed, but a notice of appeal is timely filed, the district court or the bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing must consider the notice of appeal as a motion for leave to appeal. Unless an order directing that a motion for leave to appeal be filed provides otherwise, the motion must be filed within 14 days of entry of the order directing filing.

(e) Appeal Authorized by Court of Appeals Regarded as Satisfying Leave Requirement. If leave to appeal an interlocutory judgment, order, or decree is required by 28 U.S.C. § 158(a) and has not earlier been granted by the district court or the bankruptcy appellate panel, a court of appeals' authorization of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal.

Rule 8004 is derived from current Rule 8001(b) and FRAP 5. Under FRAP 5(d)(2), a notice of appeal need not be filed if the court of appeals grants permission to appeal. Rule 8004, however, retains the practice in bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Rule 8004(c) clarifies that the clerk is to transmit the notice of appeal, the motion for leave to appeal, any answer thereto, and any statement of election allowed by Rule 8005, to the clerk of the district court or the clerk of the bankruptcy appellate panel prior to preparing and

transmitting the record as prescribed by Rule 8009. This reflects what Rule 8008(a)(1) and 8009(b)(3) provide, namely that, if an appeal requires leave of the district court or bankruptcy appellate panel to proceed, the parties do not commence the process of designating and assembling the record until leave has been granted. Rule 8004(e) is derived from current Interim Rule 8003(d) and clarifies that a court of appeals' authorization to proceed with a direct appeal constitutes satisfaction of the leave to appeal requirement and, hence, a separate order granting leave to appeal by the district court or bankruptcy appellate panel need not be filed. For purposes of designating the record, entry of such an order by the court of appeals would trigger the requirements of Rule 8008 in the same manner as an order granting leave to appeal entered by the district court or the bankruptcy appellate panel if neither the district court nor the bankruptcy appellate panel granted leave to appeal previously. If the court of appeals grants permission to appeal, the record must be transmitted in accordance with FRAP 11 and 12(c).

Rule 8005. Election To Have Appeal Heard by District Court Instead of Bankruptcy Appellate Panel

(a) Filing of Statement of Election. An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) Timeliness of Filing. To be timely, an appellant must file with the clerk its statement of election with its notice of appeal or amended notice of appeal within the time prescribed by Rule 8003. To be timely, a party other than the appellant must file its statement of election with the clerk within 30 days after service of a notice of appeal or amended notice of appeal.

(c) Transmission of Statement to District Court or Bankruptcy Appellate Panel. Upon receipt of a statement of election, the clerk must transmit the statement forthwith to the clerk of the bankruptcy appellate panel.

(d) Transfer of Motion or Appeal to District Court. Upon receipt from the clerk of a timely statement of election, the bankruptcy appellate panel must order forthwith the transfer of a motion or appeal to the district court.

(e) Statement Mistakenly Filed with District Court or Bankruptcy Appellate Panel. If a statement of election is mistakenly filed with the district court or the bankruptcy appellate panel before an appeal has been docketed by the clerk of the district court or the clerk of the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel must note thereon the date on which the statement was received and transmit it to the clerk and it is deemed filed with the clerk on the date so noted.

Rule 8005 is derived from current Rule 8001(e). The rule clarifies when a statement of election is timely taking into account the amended notice of

appeal requirement of Rule 8003(b)(2). Rule 8005(c) requires immediate transfer of a filed statement of election, and Rule 8005(d) requires immediate transfer of the appeal from the bankruptcy appellate panel to the district court if the statement of election is timely, so that appellate proceedings may be directed as quickly as possible to the proper appellate court, including pending motions for relief that have been filed with the bankruptcy appellate panel. Rule 8005(e) is patterned after the provision in current Rule 8002(a) that validates a timely notice of appeal that is filed mistakenly with the clerk of the district court or the clerk of the bankruptcy appellate panel.

Rule 8006. Certification for Direct Appeal to Court of Appeals; How Taken

(a) Final Orders, Judgments, or Decrees; Notice of Appeal.

Certification of a final judgment, order, or decree of a bankruptcy judge for direct review in a court of appeals under 28 U.S.C.

§ 158(d)(2) must be sought by filing with the clerk a notice of appeal of the judgment, order, or decree, as prescribed by Rule 8002(a) within the time allowed by rule 8003, and by compliance with the certification procedures of 28 U.S.C § 158(d)(2) and this Rule 8006.

(b) Interlocutory Orders, Judgments, or Decrees; Notice of Appeal and Motion for Leave to Appeal.

Certification of an interlocutory judgment, order, or decree of a bankruptcy judge for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) must be sought by filing with the clerk a notice of appeal of the judgment, order, or decree, and a motion for leave to appeal as prescribed by Rules 8002(a) and 8004(a) within the time allowed by Rule 8003, and by compliance with the certification procedures of 28 U.S.C § 158(d)(2) and this Rule 8006.

(c) Where to File Certification. A certification that one or more of the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists must be filed with the clerk of the court in which a matter is pending. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8009(b)(2), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3). A matter is pending in a district court or a bankruptcy appellate panel after the docketing, in accordance with Rule 8009(b)(2), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3).

(d) Court that May Make Certification.

(1) Before Docketing or Grant of Leave to Appeal. Only a bankruptcy judge may make a certification on request or on its own motion while the matter is pending in the bankruptcy court.

(2) After Docketing or Grant of Leave to Appeal. Only the district court or the bankruptcy appellate panel may make a certification on request of the parties or on its own motion while the matter is pending in the district court or the bankruptcy appellate panel.

(e) Certification by All Appellants and Appellees Acting Jointly.

A certification by all the appellants and appellees, if any, acting jointly that one or more of the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending. The certification may be accompanied by a short statement of the basis for the certification, which may include the information listed in subdivision Rule 8006(g)(3).

(f) Certification on Court's Own Motion.

(1) A certification on the court's own motion that one or more of the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists must be set forth in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8002(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by Rule 8006(g)(3)(A)-(C).

(2) A party may file a supplementary short statement of the basis for certification within 14 days after the certification.

(g) Certification on Request; Filing; Service; Contents.

(1) A request for certification that the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists, or by a majority of the appellants and a majority of the appellees, if any, must be filed with the clerk of the court in which the matter is pending within the time specified by 28 U.S.C. § 158(d)(2).

(2) Notice of the filing of a request for certification must be served in the manner required for service of a notice of appeal under Rule 8002(c)(1).

(3) A request for certification must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by statute or rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(E) an attached copy of the judgment, order, or decree that is the subject of the certification and any related opinion or memorandum.

(4) A party may file a response to a request for certification or a cross-request within 14 days after the notice of the request is served, or such other time as the court in which the matter is pending may fix.

(5) The request, cross request, and any response is not governed by Rule 9014 and must be submitted without oral argument unless the court in which the matter is pending otherwise directs.

(6) A certification of an appeal under 28 U.S.C. § 158(d)(2) must be made in a separate document served on the parties.

(h) Effectiveness of Certification. A certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) may not be treated as a certification entered on the docket within the meaning of § 233(b)(4)(A) of Public Law No. 109-8 until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8003.

(i) Proceeding in Court of Appeals Following Certification. After a certification has been filed with the clerk of the court as prescribed by this Rule 8006, a request for permission to take a direct appeal must be filed with the court of appeals in accordance with the practice of the court of appeals.

Rule 8006 is derived from current Interim Rule 8001(f). The intent of the revision is to clarify the relevant procedures without duplicating the statutory requirements or time limits.

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

(a) Initial Motion in the Bankruptcy Court; Time to File.

(1) A party must ordinarily move first in the bankruptcy court for the following relief:

(A) a stay pending appeal of the judgment, order, or decree of a bankruptcy judge;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending;

(D) a stay pending appeal of a judgment, order, or decree in a case under the Code other than the judgment, order, or decree appealed from;

(E) the suspension or continuance of proceedings in a case or other relief permitted by Rule 8007(f); or

(F) a stay of consummation or implementation of a plan.

(2) A motion for a stay of the judgment, order, or decree of a bankruptcy judge pending appeal, or for approval of a supersedeas bond, may be made before or after the filing of a notice of appeal of the judgment, order, or decree appealed from. A separate or amended notice of appeal need not be filed from an order granting or denying a motion for a stay pending appeal, or granting or denying approval of a supersedeas bond.

(b) Approval of Supersedeas Bond; Stay of Execution. The court must grant a stay of execution of a money judgment upon approval of an adequate supersedeas bond.

(c) Motion in the District Court or Bankruptcy Appellate Panel; Conditions on Relief. A motion for the relief specified in Rules 8007(a) or (b) may be made to the district court, the bankruptcy appellate panel, or the court of appeals. If a statement of election is timely filed with the clerk as prescribed by Rule 8005, a motion for the relief specified in Rules 8007(a) or (b) must be made in the district court rather than the bankruptcy appellate panel.

(1) If made to the district court or the bankruptcy appellate panel, the motion must:

(A) show that moving first in the bankruptcy court would be impracticable if the moving party has not sought relief in the first instance in the bankruptcy court; or

(B) state that, a motion having been made, the bankruptcy court denied the motion or failed to afford the relief requested, and state any reasons given by the bankruptcy court for its action or inaction.

(2) If made to the district court or the bankruptcy appellate panel, the motion must also include:

(A) the reasons for granting the relief requested and the pertinent facts;

(B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(3) If made to the district court or the bankruptcy appellate panel, the moving party must give reasonable notice of the motion to all parties.

(4) If made to the court of appeals, the movant must comply with applicable practice of the court of appeals.

(d) Filing of Bond or other Security. The district court, the bankruptcy appellate panel, or the court of appeals, may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

(e) Requirement of Bond for Trustee or United States. When an appeal is taken by a trustee, a bond or other appropriate security may be required, provided that when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States, a bond or other security may not be required.

(f) Continuation of Proceedings in the Bankruptcy Court. Notwithstanding Rule 7062, subject to the power of the district court, the bankruptcy appellate panel, or the court of appeals as provided in this rule or governing law, the bankruptcy judge may

(1) suspend or order the continuation of other proceedings in the case under the Code, or

(2) make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

(g) Proceeding Against Surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the bankruptcy court for purposes of enforcing the surety's liability on the bond or undertaking and irrevocably appoints the clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability as stated on its bond or undertaking may be enforced in the bankruptcy court without the necessity of an independent action. The motion and any notice that the bankruptcy court prescribes may be served on the clerk, who must promptly mail a copy to each surety whose address is known.

Rule 8007 is derived from current Rule 8005 and FRAP 8. Rule 8007(a)(1) expands the list of items enumerated in FRAP 8(a)(1) to reflect bankruptcy practice. Rule 8007(a)(2) clarifies that a motion for a stay pending appeal, or approval of a supersedeas bond, may be made before or after the filing of a notice of appeal. Rule 8007(a)(2) also recognizes that motions for stays pending appeal, and motions for approval of supersedeas bonds, are original proceedings in each court in which they may be filed. Accordingly, a notice of appeal need not be filed with respect to an order granting or denying such

motions. Rule 8007(b) reflects the rule, applicable to money judgments only, that a party may obtain a stay pending appeal as of right upon the court's approval of an adequate supersedeas bond.

Rule 8008. Record and Issues on Appeal

(a) Composition of the Record on Appeal and Statement of Issues on Appeal.

(1) Appellant's Duties. Within 14 days after filing the notice of appeal as prescribed by Rule 8002(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8003(b)(1), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

(2) Appellee's and Cross-Appellant's Duties. Within 14 days after the service of the appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record.

(3) Cross Appellee's Duties. A cross appellee may, within 14 days of service of the cross appellant's designation and statement, file and serve on the cross appellant a designation of additional items to be included in the record.

(4) Record on Appeal. Subject to Rule 8008(d), the record on appeal shall include the items designated by the parties as provided by Rules 8008(a)-(c), the notice of appeal, the judgment, order, or decree appealed from, any order granting leave to appeal, any opinion, findings of fact, and conclusions of law of the court, any transcript ordered as prescribed by Rule 8008(b), and any statement prescribed by Rule 8008(c). Notwithstanding the parties' designations, the district court, the bankruptcy appellate panel, or the court of appeals may order the inclusion of additional items from the record as part of the record on appeal.

(5) Copies for Clerk. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense.

(b) Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8003(b)(1), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to any local rule of the district court or bankruptcy appellate panel, and with the following qualifications:

(i) the order must be in writing; and

(ii) the appellant must, within the same period, file a copy of the order with the clerk; or

(B) file with the clerk a certificate stating that the appellant will not order a transcript.

(2) Cross Appellant's Duty to Order. Within fourteen days after the appellant files with the clerk the copy of the transcript order or certificate stating that appellant will not order a transcript, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8003(b)(1), whichever is later, the appellee as cross appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not ordered by appellant or already on file as the cross appellant considers necessary, subject to any local rule of the district court or bankruptcy appellate panel, and with the following qualifications:

(i) the order must be in writing; and

(ii) the cross appellant must, within the same period, file a copy of the order with the clerk; or

(B) file with the clerk a certificate stating that the cross appellant will not order a transcript.

(3) Appellee's or Cross Appellee's Right to Order. Within fourteen days after the appellant or cross appellant files with the clerk a copy of the transcript order or certificate stating that appellant or cross appellant will not order a transcript, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8003(b)(1), whichever is later, the appellee or cross appellee may order such additional transcripts as the appellee or cross appellee considers necessary, subject to any local rule of the district court or bankruptcy appellate panel, with the qualification that the order must be in writing and a copy of the order must be filed with the clerk.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) Unsupported Finding or Conclusion. If an appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must

include in the record a transcript of all evidence relevant to that finding or conclusion.

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. Within 14 days after filing the notice of appeal, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8003(b)(1), whichever is later, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if the transcript of a hearing or trial is unavailable. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 8008(a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy judge. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it, together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal, must be approved by the bankruptcy court and must then be certified to the district court or the bankruptcy appellate panel as the record on appeal. The clerk must then send it to the clerk of the district court or the clerk of the bankruptcy appellate panel within the time provided by Rule 8009(b)(2). A copy of the agreed statement may be filed in place of the appendix required by Rule 8017(b).

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded;

(C) by the district court, the bankruptcy appellate panel, or the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the district court or bankruptcy appellate panel.

(f) Other. All parties must take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8008 is derived from current Rule 8006, current Rule 8007(a), and FRAP 10. Among other things, FRAP 10(a) provides that the record on appeal consists of all of the papers and exhibits filed in the district court -- i.e., all of the items filed in the district court case. This is often unworkable in the bankruptcy context, in which all of the items filed in the bankruptcy case may include tens of thousands, or even hundreds of thousands, of items. Rule 8008 retains the designation process of the current rules. Otherwise, Rule 8008 is patterned after FRAP 10.

Rule 8009. Completion and Transmission of the Record; Docketing of the Appeal; Docketing of Motion for Leave to Appeal; Assignment

(a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 8008 and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) Duties of Reporter and Clerk of the Bankruptcy Court.

(1) Duty of reporter to prepare and file transcript. The reporter must prepare and file a transcript as follows:

(A) On receipt of a request for a transcript, the reporter must acknowledge on the request the date it was received and the date on which the reporter expects to have the transcript completed and must transmit the request, so endorsed, to the clerk or to the clerk of the district court or the clerk of the bankruptcy appellate panel.

(B) On completion of the transcript the reporter must file it with the clerk and, if appropriate, notify the clerk of the district court or the clerk of the bankruptcy appellate panel.

(C) If the transcript cannot be completed within 30 days of receipt of the request the reporter must seek an extension of time from the clerk or from the clerk of the district court or the clerk of the bankruptcy appellate panel and the action of the clerk must be entered in the docket and the parties notified.

(D) If the reporter does not file the transcript within the time allowed, the clerk or the clerk of the district court or the

clerk of the bankruptcy appellate panel must notify the bankruptcy judge.

(2) Duty of Clerk to Transmit Copy of Record; Docketing of Appeal; Effect of Mediation Procedure on Briefing; Setting Briefing Schedule.

(A) Subject to Rule 8009(b)(3), when the record is complete for purposes of appeal, the clerk must transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel.

(B) On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel must enter the appeal in the docket under the title of the bankruptcy court action and must identify the appellant, adding the appellant's name if necessary, and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed.

(C) If the bankruptcy appellate panel directs that additional copies of the record be furnished, the clerk of the bankruptcy appellate panel must notify the appellant and, if the appellant fails to provide the copies, the clerk must prepare the copies at the expense of the appellant.

(D) If the district court or bankruptcy appellate panel has a mediation procedure applicable to appeals from bankruptcy judges, the clerk of the district court or the clerk of the bankruptcy appellate panel must notify the parties forthwith at the time of docketing of the appeal whether the mediation procedure has the effect of staying or modifying the time for filing briefs in the appeal, and the clerk must give adequate notice of the requirements of the mediation procedure.

(E) If the district court or the bankruptcy appellate panel establishes a briefing schedule at the time of docketing, whether by notice of the deadlines prescribed in Rules 8015 or 8017 or by order modifying the deadlines prescribed in Rules 8015 or 8017, the clerk must notify the parties forthwith at the time of docketing of the briefing schedule. If the district court or bankruptcy appellate panel does not establish a briefing schedule by notice or order, the deadlines prescribed by Rules 8015 or 8017 apply.

(3) Docketing of Motion; Leave to Appeal. Upon receipt of the notice of appeal, the motion for leave to appeal, any answer thereto, and any statement of election transmitted by the clerk as prescribed by Rules 8004(c) and 8005(c), the clerk of the district court or the clerk of the bankruptcy appellate panel must enter the motion in the docket under the title of the bankruptcy court action and must

identify the movant, adding the movant's name if necessary, and give notice promptly to all parties to the judgment, order, or decree of the date on which the motion was docketed. Subject to Rule 8009(c), if a motion for leave to appeal has been filed with the clerk as prescribed by Rule 8004, the clerk does not prepare and transmit the copy of the record unless and until leave to appeal has been granted by the district court or the bankruptcy appellate panel.

(c) Record for preliminary hearing. If prior to the time the record is transmitted as prescribed by Rule 8009(b)(2) a party moves in the district court or the bankruptcy appellate panel

(1) for leave to appeal,

(2) for dismissal;

(3) for a stay pending appeal;

(4) for approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or

(5) for any other intermediate order,

the clerk at the request of any party to the appeal must transmit to the clerk of the district court or the clerk of the bankruptcy appellate panel a copy of the parts of the record as any party to the motion or appeal designates.

(d) Retaining the Record Temporarily in the Bankruptcy Court for Use in Preparing the Appeal. The parties may stipulate, or the bankruptcy court on motion may order, that the clerk retain the record temporarily for the parties to use in preparing papers on appeal. In that event the clerk must certify to the clerk of the district court or bankruptcy appellate panel that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the district court or the bankruptcy appellate panel orders or the parties agree, the appellant must request the clerk to forward the record.

(e) Retaining the Record by Court Order.

(1) The district court or the bankruptcy appellate panel may, by order or local rule, provide that a certified copy of the relevant docket entries for the items designated by the parties be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The bankruptcy judge may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the district court or the bankruptcy appellate panel.

(3) If part or all of the record is ordered retained, the clerk must send to the district court or the bankruptcy appellate panel a copy of the order and the relevant docket entries together with the parts of the original record allowed by the bankruptcy judge and copies of any parts of the record designated by the parties.

(f) Retaining Parts of the Record in the Bankruptcy Court by Stipulation of the Parties. The parties may agree by written stipulation filed with the clerk that designated parts of the record be retained in the bankruptcy court subject to call by the district court or the bankruptcy appellate panel or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Assignment. A motion or appeal may not be referred to a magistrate judge without the prior express written consent of all parties to the motion or appeal. **[Alternative: A motion or appeal may not be referred to a magistrate judge.]**

Rule 8009 is derived from current Rule 8007(b) and (c) and FRAP 11. Rule 8009(b)(2)(D) clarifies that the clerk must provide notice of the effect of any court-sponsored mediation procedure on any briefing schedule in the appeal, as well as the requirements of the procedure. Rule 8009(b)(2)(D) clarifies that notice of the briefing schedule must be provided. Rule 8009(b)(3) clarifies procedures regarding motions for leave to appeal. Rule 8009(c) is derived from FRAP 11(g) and provides for the transmission of certain items to be used as part of certain preliminary hearings that may be held in the district court or the bankruptcy appellate panel prior to the preparation and transmission of the record on appeal. Rule 8009(g) concerns referrals of bankruptcy appeals to magistrate judges. Note: if a bankruptcy matter is assigned on appeal to a magistrate judge, this may subject the matter to as many as four different stages of review as of right, and five or six different stages of review if the matter is heard en banc in the court of appeals, and/or the Supreme Court ultimate considers the matter on certiorari. The alternative in Rule 8009(g) would prohibit the assignment of bankruptcy appeals to magistrate judges.

Rule 8010. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in the district court or the bankruptcy appellate panel must be filed with the clerk thereof.

(2) Filing: Method and Timeliness.

(A) In general. Filing may be accomplished by mail addressed to the clerk of the district court or the clerk of the bankruptcy appellate panel, but except as provided in Rule 8010(a)(2)(B) filing is not timely unless the clerk receives the paper within the time fixed for filing.

(B) A brief or appendix. A brief or appendix is timely filed if, on or before the last day for filing, it is:

(i) mailed to the clerk of the district court or the clerk of the bankruptcy appellate panel by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk of the district court or the clerk of the bankruptcy appellate panel within 3 calendar days.

(C) Electronic filing. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated pursuant to Rule 8026.

(D) Quantity of Copies. An original and one copy of all papers must be filed when an appeal is to the district court. An original and three copies must be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished.

(3) Filing a Motion with a Judge. In appeals to the bankruptcy appellate panel, if a motion requests relief that may be granted by a single judge thereof, the judge may permit the motion to be filed with the judge. The judge must note the filing date on the motion and give it to the clerk.

(4) Clerk's Refusal of Documents. The clerk of the district court or the clerk of the bankruptcy appellate panel must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these Rules or by any local rule or practice.

(5) Privacy Protection. An appeal in a case whose privacy protection was governed by Rule 9037 is governed by the same rule on appeal.

(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these Rules to be served by the clerk of the district court or the clerk of the bankruptcy appellate panel must, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel must be made on counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 calendar days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the district court's or bankruptcy appellate panel's transmission equipment to make the electronic service under Rule 8010(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the district court or the bankruptcy appellate panel.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) Papers presented for filing must contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service in the form of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) The clerk of the district court or the clerk of the bankruptcy appellate panel may permit papers to be filed without acknowledgment or proof of service at the time of filing but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing or dispatch in accordance with this Rule 8010(a)(2)(B), the proof of service must

also state the date and manner by which the document was mailed or dispatched to the clerk.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Rule 8010 is derived from current Rule 8008 and FRAP 25. FRAP 25 has considerably more detail than current Rule 8010. Rule 8010 adopts most of this detail. Rule 8010(a)(2)(C) conforms to the electronic filing convention of the current FRBP. Rule 8010(a)(2)(D) provides that an original and one copy of all papers are to be filed if the appeal is to the district court, and an original and three copies are to be filed if the appeal is to the bankruptcy appellate panel, subject to adjustment by either court. This convention is used throughout these rules.

Rule 8011. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a district court or the bankruptcy appellate panel must file a statement that identifies any parent corporation, any publicly held corporation that owns 10% or more of its stock, or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the statement prescribed by Rule 8001(a) with its principal brief or upon filing a motion, response, petition, or answer in the district court or the bankruptcy appellate panel, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include a statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 8011(a) changes.

(c) Number of Copies. If the statement prescribed by Rule 8001(a) is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 1 copy with the clerk of the district court if the appeal is taken to the district court, or an original and 3 copies with the clerk of the bankruptcy appellate panel if the appeal is taken to the bankruptcy appellate panel. The district court or bankruptcy appellate panel may require a different number by local rule or by order in a particular case.

Rule 8011 is derived from FRAP 26.1.

Rule 8012. Motions; Expedition; Intervention

(a) Content of Motions; Response; Reply.

(1) Application for Relief. A request for an order or other relief, including an extraordinary writ, must be made by filing with the clerk of the district court or the clerk of the bankruptcy appellate panel

a motion for such order or relief with proof of service on all other parties to the motion or appeal.

(2) Contents of a Motion.

(A) Grounds and Relief Sought; Motion to Expedite. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. A motion to expedite the consideration of an appeal must explain why expedition is warranted and the circumstances that justifies the district court or the bankruptcy appellate panel considering the appeal ahead of other matters. If a motion to expedite is granted, the district court or the bankruptcy appellate panel may accelerate the transmission of the record, the deadline for filing briefs and other papers, oral argument, and resolution of the appeal. A motion to expedite may be filed with the district court or the bankruptcy appellate panel prior to docketing of an appeal as prescribed by Rule 8009(b)(2). If a statement of election is timely filed with the clerk as prescribed by Rule 8005, a motion to expedite made prior to docketing of an appeal must be made in the district court rather than the bankruptcy appellate panel.

(B) Accompanying Documents and Other Matter.

(i) Any affidavit, declaration, or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit or declaration must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief from a judgment, order, or decree of a bankruptcy judge must include a copy of the bankruptcy judge's order and any accompanying opinion as a separate exhibit.

(iv) A motion must contain or be accompanied by any other matter required by a specific provision of these Rules governing such a motion.

(C) Documents Barred or Not Required.

(i) A separate brief supporting or responding to a motion must not be filed unless ordered by the district court or the bankruptcy appellate panel.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) Supporting Papers. If a motion is supported by briefs, affidavits, declarations, or other papers, they must be served and filed with the motion unless otherwise ordered by the district court or the bankruptcy appellate panel.

(4) Response and Reply; Time to File. Any party may file a response in opposition to a motion other than one for a procedural order within 14 days after service of the motion, but the district court or the bankruptcy appellate panel may shorten or extend the time for responding to any motion. The movant may file a reply to a response within seven days after service of the response.

(b) Determination of Motions for Procedural Orders.

Notwithstanding Rule 8012(a)(4), motions for procedural orders, including any motion under Rule 9006, may be acted on at any time, without awaiting a response thereto and without a hearing. Any party adversely affected by such action may move for reconsideration, vacation, or modification of the action.

(c) Determination of All Motions; Oral Argument. All motions will be decided without oral argument unless the district court or the bankruptcy appellate panel orders otherwise. A motion for a stay pending appeal or for other emergency relief may be denied if not presented promptly.

(d) Emergency Motions.

(1) Whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court or the bankruptcy appellate panel to receive and consider a response, the word "Emergency" must precede the title of the motion.

(2) The emergency motion

(A) must be accompanied by an affidavit or declaration setting forth the nature of the emergency;

(B) must state whether all grounds advanced in support thereof were submitted to the bankruptcy judge and, if any grounds relied on were not submitted, why the motion should not be remanded to the bankruptcy judge for consideration in the first instance in the bankruptcy court;

(C) must include the office addresses and telephone numbers of moving and opposing counsel; and

(D) must be served as prescribed by Rule 8010.

(3) Prior to filing an emergency motion, the movant must make every practicable effort to notify opposing counsel in time for

counsel to respond to the motion. The affidavit or declaration accompanying the emergency motion must also state when and how opposing counsel was notified, or if opposing counsel was not notified why it was not practicable to do so.

(e) Power of a Single Judge of the Bankruptcy Appellate Panel to Entertain Motions.

(1) A single judge of a bankruptcy appellate panel may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise decide an appeal or a motion for leave to appeal.

(2) The action of a single judge may be reviewed by the panel.

(f) Form of Papers; Page Limits; and Number of Copies.

(1) Format.

(A) Reproduction. A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Cover. A cover is not required for a motion, response, or reply, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) Binding. The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) Paper size, line spacing, and margins. The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) Typeface and type styles. The document must comply with the typeface requirements of Rule 8014(a)(5) and the type-style requirements of Rule 8014(a)(6).

(2) Page Limits. A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 8012(a)(2)(B),

unless the district court or the bankruptcy appellate panel permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) Number of Copies. If the appeal is taken to the district court, an original and 1 copy must be filed with the clerk of the district court and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. If the appeal is taken to the bankruptcy appellate panel, an original and 3 copies must be filed with the clerk of the bankruptcy appellate panel and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. The district court or the bankruptcy appellate panel may require a different number by local rule or by order in a particular case.

(g) Signature. Every motion, response, and reply filed with the district court or the bankruptcy appellate panel, and any brief in support thereof, must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(h) Local Variation. Every district court or bankruptcy appellate panel must accept documents that comply with the form and length requirements of this Rule. By local rule or order in a particular case a district court or a bankruptcy appellate panel may accept documents that do not meet all the form requirements of this rule.

(i) Intervention. Unless a statute provides another method, a person who wants to intervene in an appeal pending in the district court or the bankruptcy appellate panel must file a motion for leave to intervene with the clerk of the district court or the clerk of the bankruptcy appellate panel and serve a copy on all parties. The motion, or other notice of intervention authorized by statute, must be filed within 14 days after the appeal is docketed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

Rule 8012 is derived from current Rule 8011, FRAP 27, FRAP 32(d) and (e), and FRAP 15(d). FRAP 27 has more detail than current Rule 8011. Rule 8012 adopts most of this detail. Rule 8012(a)(2)(A) clarifies procedures with respect to motions to expedite the consideration of an appeal. Rule 8012(g) is derived from FRAP 32(d). Rule 8012(h) is derived from FRAP 32(e). Rule 8012(i) clarifies procedures with respect to intervention and is derived from FRAP 15(d).

Rule 8013. Form of Briefs

(a) Form of briefs. Unless the district court or the bankruptcy appellate panel by local rule otherwise provides, the form of brief must be as follows:

(1) Brief of the appellant. The brief of the appellant must contain under appropriate headings and in the order here indicated:

(A) a table of contents with page references, and a table listing cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where they are cited;

(B) a statement of the basis of appellate jurisdiction, including:

(i) the basis for the bankruptcy court's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(ii) the basis for the district court's or bankruptcy appellate panel's jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(iii) the filing dates establishing the timeliness of the appeal; and

(iv) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the district court's or bankruptcy appellate panel's jurisdiction on some other basis;

(C) a statement of the issues presented and the applicable standard of appellate review;

(D) a statement of the case, which must first indicate briefly the nature of the case, the course of the proceedings, and the disposition in the bankruptcy court, and which must be followed by a statement of the facts relevant to the issues presented for review, with appropriate references to the appendix or, if the reference is to an item not in the appendix, to the record;

(E) an argument, which may be preceded by a summary, and which must contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on;

(F) a short conclusion stating the precise relief sought; and

(G) the certificate of compliance, if required by Rule 8014(a)(7) or Rule 8015(e)(3).

(2) Brief of the appellee. The brief of the appellee must conform to the requirements of Rule 8013 (a)(1), except that none of

the following need appear unless the appellee is dissatisfied with the appellant's statement:

- (A) the statement of the basis of appellate jurisdiction;
- (B) the statement of the issues;
- (C) the statement of the case;
- (D) the statement of the facts; and
- (E) the statement of the applicable standard of appellate review.

(b) Reply brief. The appellant may file a brief in reply to the appellee's brief. A reply brief must contain a table of contents, with page references, and a table of authorities listing cases alphabetically arranged, statutes, and other authorities and references to the pages of the reply brief where they are cited.

(c) No Further Briefs. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the bankruptcy court, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix.

(f) Reproduction of Statutes, Rules, Regulations, or Similar Material. If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar material, relevant parts thereof must be reproduced in the brief or in an addendum, or they may be supplied to the court in pamphlet form.

(g) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(h) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed, or after oral argument but before a decision, a party may promptly advise the clerk of the district court or the clerk of the bankruptcy appellate panel by letter signed by the party filing the

letter or, if the party is represented, by one of the party's attorneys, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Rule 8013 is derived from current Rule 8010(a) and (b) and FRAP 28. FRAP 28 has considerably more detail than current Rule 8010(a) and (b). Rule 8013 adopts most of this detail. Rule 8013(h) adopts the procedures of FRAP 28(j) with respect to the filing of supplemental authorities with the district court or the bankruptcy appellate panel after a brief has been filed or after oral argument.

Rule 8014. Format of Briefs, Appendices, and Other Papers; Length

(a) Format of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8009(b)(2)(B);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Typeface. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) Type Styles. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page limitation. A principal brief of the appellant or appellee may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 8014(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief of the appellant or appellee is acceptable if:

(a) it contains no more than 14,000 words; or

(b) it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 8014(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of Compliance.

(i) A brief submitted under this Rule 8014(a)(7)(B) or Rule 8015(e)(2) must include a

certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

(a) the number of words in the brief; or

(b) the number of lines of monospaced type in the brief.

[(ii) Official Form ____ is a suggested form of a certificate of compliance. Use of Form ____ must be regarded as sufficient to meet the requirements of Rule 8015(e)(3) and this Rule 8014(a)(7)(C)(i).]

(b) Form of an Appendix. An appendix must comply with Rule 8014(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) **Motion.** The form of a motion, response, or reply is governed by Rule 8012(f).

(2) **Other Papers.** Any other paper, such as an addendum to a brief, must be reproduced in the manner prescribed by Rule 8014(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 8014(a)(2). If a cover is used, it must be white.

(B) Letters setting forth supplemental authorities as prescribed by Rule 8013.

(d) Signature. Every brief filed with the district court or the bankruptcy appellate panel must be signed by the party filing the brief or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every district court or bankruptcy appellate panel must accept documents that comply with the form and length requirements of this Rule 8014. By local rule or order in a particular case a district court or bankruptcy appellate panel may accept documents that do not meet all the form requirements of this rule.

Rule 8014 is derived from current Rule 8010(c) and FRAP 32. FRAP 32 has considerably more detail than current Rule 8010(c). Rule 8014 adopts most of this detail. FRAP 32(a)(7) permits the length of a brief to conform either to a prescribed page limitation or a type-volume limitation. Rule 8014 adopts this convention. Like FRAP 32(e), Rule 8014(e) directs that every district court or bankruptcy appellate panel must accept documents that comply with the form and length requirements of the national rule. Accordingly, the district courts and bankruptcy appellate panels may not require by local rule or otherwise that briefs be limited to shorter page lengths or lesser type-volume restrictions than the national rule allows. Rule 8014(e) prevents the 'hour-glass' problem that occurs in cases in which the parties must constrict their appellate presentations in the district court or the bankruptcy appellate panel (and perhaps even forfeit arguments) owing to variations in local practice that limit briefs in some jurisdictions to as little as twenty pages, but then have the full benefit of the national page limit and type-volume rules established in FRAP 32 in the court of appeals. Sharply restricted page limitations or type-volume restrictions would also sometimes leave the parties with little room for argument after satisfying the procedural requirements of Rule 8013. A theme of the revised Part VIII rules is to make bankruptcy appellate practice in the district courts and the bankruptcy appellate panels as consistent as possible with bankruptcy appellate practice in the courts of appeals to avoid the inefficiencies of each party having to craft its presentation to conform to different practices and procedures at the different levels of appeals. Note: Rule 8014 calls for an official form for the certificate of compliance similar to Official Form 6 in the Appendix of FRAP Forms.

Rule 8015. Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 8013(a)-(c), 8014(a)(2), 8014(a)(7)(A)-(B), and 8017(a) do not apply to such a case, except as otherwise provided in this Rule 8015.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for purposes of this Rule 8015 and Rules 8017(b) and 8018. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 8013(a)(1).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 8013(a)(1), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 8013(a)(1)(A)-(E) and (G), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the statement of the basis of appellate jurisdiction;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the applicable standard of appellate review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 8013(a)(1)(A) and (G) and must be limited to the issues presented by the cross-appeal.

(5) No Further Briefs. Unless the district court or the bankruptcy appellate panel permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 8014(a)(2).

(e) Length.

(1) Page Limitation. Unless it complies with this Rule 8015(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's brief, 15 pages.

(2) Type-Volume Limitation.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in this Rule 8015(e)(2)(A).

(3) Certificate of Compliance. A brief submitted under this Rule 8015(e)(2) must comply with Rule 8014(a)(7)(C).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) The appellant must serve and file its principal brief within 30 days after entry of the appeal on the docket pursuant to Rule 8009(b)(2).

(2) The appellee must serve and file its principal and response brief within 30 days after service of the principal brief of appellant.

(3) The appellant must serve and file its response and reply brief within 30 days after service of the principal and response brief of the appellee.

(4) The appellee must file its reply brief within fourteen days after service of the response and reply brief of the appellant, or 3 days before scheduled argument, whichever is earlier, unless the district court or the bankruptcy appellate panel, for good cause, allows a later filing.

(5) If an appellant or cross appellant fails to file a brief within the time provided by this Rule 8015, or within an extended time, an appellee or cross appeal may move to dismiss the appeal or cross appeal. An appellee or cross appellee who fails to file a brief will not be heard at oral argument on the appeal or cross appeal unless the district court or bankruptcy appellate panel grants permission.

(6) Number of Copies. If the appeal is taken to the district court, an original and 1 copy of each brief must be filed with the clerk of the district court and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. If the appeal is taken to the bankruptcy appellate panel, an original and 3 copies of each brief must be filed with the clerk of the bankruptcy appellate panel and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. The

district court or bankruptcy appellate panel may by local rule or by order in a particular case require the filing or service of a different number of briefs.

Rule 8015 is derived from FRAP 28.1. It operates in the same way as FRAP 28.1.

Rule 8016. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. On its own motion, and with notice to all parties to an appeal, the district court or the bankruptcy appellate panel may request a brief by an amicus curiae.

(b) Motion for Leave to File. The motion for leave must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Content and form. An amicus brief must comply with Rule 8014. In addition to the requirements of Rule 8014, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required by Rule 8011. An amicus brief need not comply with Rule 8013, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities listing cases alphabetically arranged, statutes, and other authorities, with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(5) a certificate of compliance, if required by Rule 8014(a)(7)(C) or 8015(e)(3).

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing; Number of Copies. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer. If the appeal is taken to the district court, an original and 1 copy of the amicus brief must be filed with the clerk of the district court and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. If the appeal is taken to the bankruptcy appellate panel, an original and 3 copies of the amicus brief must be filed with the clerk of the bankruptcy appellate panel and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. The district court or bankruptcy appellate panel may by local rule or by order in a particular case require the filing or service of a different number of briefs.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

Rule 8016 is derived from FRAP 29. The practice and procedure governing the filing of amicus briefs in the courts of appeals is well-established. Just as an amicus brief may be useful to a court of appeals in deciding an appeal, it may be equally useful to a district court or bankruptcy appellate panel, and the practice in the different courts should be the same to avoid the 'hour glass' problem that occurs when the presentation of an appeal is truncated in the district court or bankruptcy appellate panel in comparison to the court of appeals.

Rule 8017. Briefs and Appendix; Filing and Service; Number of Copies

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant must serve and file a brief within 30 days after entry of the appeal on the docket pursuant to Rule 8009(b)(2).

(2) The appellee must serve and file a brief within 30 days after service of the brief of appellant.

(3) The appellant may serve and file a reply brief within 15 days after service of the brief of the appellee, or 3 days before scheduled argument, whichever is earlier, unless the district court or the bankruptcy appellate panel, for good cause, allows a later filing.

(4) If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be

heard at oral argument unless the district court or bankruptcy appellate panel grants permission.

(5) Number of Copies. If the appeal is taken to the district court, an original and 1 copy of each brief must be filed with the clerk of the district court and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. If the appeal is taken to the bankruptcy appellate panel, an original and 3 copies of each brief must be filed with the clerk of the bankruptcy appellate panel and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. The district court or bankruptcy appellate panel may by local rule or by order in a particular case require the filing or service of a different number of briefs.

(b) Appendix to brief.

(1) Subject to Rule 8008(d) and Rule 8017(b)(5), the appellant must serve and file with the appellant's principal brief excerpts of the record as an appendix, which must include the following:

- (A)** the relevant entries in the bankruptcy docket;
- (B)** the complaint and answer or other equivalent pleadings;
- (C)** the judgment, order, or decree from which the appeal is taken;
- (D)** any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;
- (E)** the notice of appeal; and
- (F)** any relevant transcript or portion thereof.

An appellee, cross appellant, or cross appellee may also serve and file with its principal brief an appendix which contains material required to be included by the appellant or cross appellant, or relevant to the appeal or cross appeal, but omitted by appellant or cross appellant. The record is available to the district court or the bankruptcy appellate panel and the parties should include in the appendix only those materials that the district court or the bankruptcy appellate panel should examine. The unnecessary inclusion of items should be avoided.

(2) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The pages of the appendix must be numbered consecutively, and may be numbered by a bate stamp or similar process. The relevant docket entries must follow the table of contents. Other parts of the record

must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in the brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters such as captions, subscriptions, acknowledgments, and the like should be omitted.

(3) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed.

(4) Number of Copies. If the appeal is taken to the district court, 2 copies of the appendix and any separately reproduced exhibits must be filed with the clerk of the district court and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. If the appeal is taken to the bankruptcy appellate panel, an four copies of the appendix and any separately reproduced exhibits must be filed with the clerk of the bankruptcy appellate panel and 1 copy must be served on each unrepresented party and on counsel for each separately represented party. The district court or bankruptcy appellate panel may by local rule or by order in a particular case require the filing or service of a different number of briefs.

(5) Appeal on the Original Record Without an Appendix. The district court or the bankruptcy appellate panel may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the bankruptcy appellate panel may order the parties to file.

Rule 8017 is derived from current Rule 8009, FRAP 31, FRAP 30, and Supreme Court Rule 26.2. Rule 8017 adopts in general the deadlines of FRAP 31, but the deadlines are triggered differently given the different way in which the record is prepared and transmitted, and the appeal is docketed, in bankruptcy appeals. Rule 8017 retains the simpler practice of each party filing its own appendix rather than adopt the more complex procedures for negotiating and filing a joint appendix.

Rule 8018. Oral Argument

(a) Presumption of Oral Argument and Exception. Oral argument must be allowed in all cases unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs and record that oral argument is not needed.

(b) Opportunity to be Heard. Any party may file a statement setting forth the reason why oral argument should, or need not, be allowed. A party may include this statement at the beginning of its principal brief or it may file it separately with its principal brief.

(c) Reasons Foreclosing Oral Argument. Oral argument will not be allowed if

(1) the appeal is frivolous;

(2) the dispositive issue or issues has been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(d) Notice of Argument; Postponement. The clerk of the district court or the clerk of the bankruptcy appellate panel must advise all parties of the date, time, and place for oral argument, and the time allowed each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(e) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(f) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 8015(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or the bankruptcy appellate panel directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(g) Nonappearance of a Party. If the appellee fails to appear for argument, the district court or the bankruptcy appellate panel must hear appellant's argument. If the appellant fails to appear for argument, the district court or bankruptcy appellate panel may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the district court or the bankruptcy appellate panel orders otherwise.

(h) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the district court or the bankruptcy appellate panel may direct that the case be argued.

(i) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the district court or the bankruptcy appellate panel directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Rule 8018 is derived from current Rule 8012 and FRAP 34. FRAP 34 has considerably more detail than current Rule 8012. Rule 8018 adopts most of this detail.

Rule 8019. Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact and Conclusions of Law

(a) Disposition of Appeal. On an appeal the district court or the bankruptcy appellate panel may affirm, modify, vacate, or reverse a bankruptcy judge's judgment, order, or decree, or remand with instructions for further proceedings.

(b) Accorded Weight. Findings of fact in matters over which the bankruptcy judge has jurisdiction under 28 U.S.C. §§ 157(b)(1) or 157(c)(2), whether based on oral or documentary evidence, must not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy judge to assess the credibility of the witnesses. Findings of fact as to which a party has timely and specifically objected in matters over which the bankruptcy judge has jurisdiction under 28 U.S.C. § 157(c)(1) are subject to de novo review. Questions of law are subject to de novo review. A matter committed to the discretion of the bankruptcy judge is reviewed for abuse of discretion unless the bankruptcy judge applied an incorrect standard of law. Any matter may be reviewed for clear error.

Rule 8019 is derived from current Rule 8013. Rule 8019 clarifies that, in an appeal of an order, judgment, or decree over which the bankruptcy judge had jurisdiction under 28 U.S.C. §§ 157(b)(1) (core proceedings arising under title 11, or arising in a case under title 11), or 157(c)(2) (a proceeding related to a case under title 11 as to which all the parties have consented to have the bankruptcy judge hear and determine the proceeding), findings of fact, whether based on oral or documentary evidence, must not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy judge to assess the credibility of the witnesses. Consistent with FRBP 9033, in matters over which the bankruptcy judge had jurisdiction under 28 U.S.C. § 157(c)(1) (a proceeding that is related to a case under title 11 as to which all of the parties have not consented to have the bankruptcy judge hear and determine the proceeding), the district judge or bankruptcy appellate panel exercises de novo review of findings of fact as to which a party has timely and specifically objected. Questions of law are always subject to de novo review. A matter committed to the discretion of the bankruptcy judge is reviewed for abuse of discretion unless the bankruptcy judge applied an incorrect standard of law. And any matter may be reviewed for clear error. In combination, these complete the general rules of appellate review.

Rule 8020. Damages and Costs for Frivolous Appeal

If the district court or the bankruptcy appellate panel determines that an appeal from a judgment, order, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or the bankruptcy appellate panel and reasonable

opportunity to respond, award just damages and single or double costs to the appellee.

Rule 8020 is derived from FRAP 38.

Rule 8021. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the district court or bankruptcy appellate panel orders otherwise:

(1) if an appeal is dismissed other than as provided in Rule 8023, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee.

(b) Rule for Split or Vacated Decisions. If a judgment, order, or decree is affirmed or reversed in part, or is vacated, costs may be allowed only as ordered by the court

(c) Costs For and Against the United States. Costs for or against the United States, its agency, or officer may be assessed only if authorized by law.

(d) Costs Taxable on Appeal. Costs incurred in the production of copies of briefs, the appendices, exhibits, the record, and in the preparation and transmission of the record, the cost of the reporter's transcript if necessary for the determination of the appeal, the premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal must be taxed by the clerk as costs of the appeal in favor of the party entitled to costs under this Rule 8021. Costs do not include attorneys' fees. Each district court or bankruptcy appellate panel must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief, appendix, exhibits, or the record authorized by these Rules. The rate must not exceed that generally charged for such work in the area where the office of the clerk of the district court or the clerk of the bankruptcy appellate panel is located and should encourage economical methods of copying. If the district court or the bankruptcy appellate panel has not adopted such a local rule, the clerk of the district court or the clerk of the bankruptcy appellate panel shall in taxing costs use the rate authorized by local rule of the court of appeals as prescribed by Rule 39(c) of the Federal Rules of Appellate Procedure.

(e) Bill of Costs; Objections. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the clerk of the district court or the clerk of the bankruptcy appellate panel, with proof of service, an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time. The clerk of the district court or the clerk of the bankruptcy appellate panel must prepare and certify an itemized statement of costs.

Rule 8021 is derived from current Rule 8014 and FRAP 39. FRAP 39 has more detail than current Rule 8014. Rule 8021 adopts most of this detail.

Rule 8022. Motion for Rehearing

(a) Time to File; Contents; Answer; Action by the District Court or Bankruptcy Appellate Panel if granted

(1) Time. Unless the time is shortened or extended by order or local rule, any petition for rehearing by the district court or the bankruptcy appellate panel must be filed within 14 days after entry of judgment on appeal.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the district court or the bankruptcy appellate panel has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the district court or the bankruptcy appellate panel requests, no answer to a petition for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(4) Action by the District Court or the Bankruptcy Appellate Panel. If a petition for rehearing is granted, the district court or the bankruptcy appellate panel may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Time for Appeal Runs from Denial. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties runs from the entry of the order denying rehearing or the entry of a subsequent judgment on appeal.

(c) Form of Petition; Length. The petition must comply with Rule 8014(a)(1)-(6). Copies must be served and filed as Rule 8017(a)(5)

prescribes for the filing of a brief. Unless the district court or the bankruptcy appellate panel by local rule or order provides otherwise, a petition for rehearing must not exceed 15 pages.

Rule 8022 is derived from current Rule 8015 and FRAP 40. FRAP 40 has more detail than current Rule 8015. Rule 8022 adopts most of this detail.

Rule 8023. Voluntary Dismissal

(a) Dismissal in the Bankruptcy Court. If an appeal has not been docketed in the district court or the bankruptcy appellate panel, the appeal may be dismissed by the bankruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(b) Dismissal in the District Court or the Bankruptcy Appellate Panel. If an appeal has been docketed in the district court or the bankruptcy appellate panel, and the parties to the appeal sign and file with the clerk of the district court or the clerk of the bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or the clerk of the bankruptcy appellate panel must enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or the bankruptcy appellate panel.

Rule 8023 is derived from current Rule 8001(c) and FRAP 42.

Rule 8024. Duties of Clerk on Disposition of Appeal

(a) Entry of Judgment on Appeal. The clerk of the district court or the clerk of the bankruptcy appellate panel must prepare, sign and enter the judgment following receipt of the opinion of the district court or the bankruptcy appellate panel or, if there is no opinion, following the instruction of the district court or the bankruptcy appellate panel. The notation of a judgment in the docket constitutes entry of judgment.

(b) Notice of orders or judgments; return of record. Immediately on the entry of a judgment or order, the clerk of the district court or the clerk of the bankruptcy appellate panel must transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the clerk, together with a copy of any opinion respecting the judgment or order, and must make a note of the transmission in the docket. Original papers transmitted as the record on appeal must be returned to the clerk on disposition of the appeal.

Rule 8024 is derived from current Rule 8016 and FRAP 45. It largely retains the provisions of current Rule 8016.

Rule 8025. Stay of Judgment of District Court or Bankruptcy Appellate Panel

(a) Automatic stay of judgment on appeal. Judgments of the district court or the bankruptcy appellate panel are stayed until the expiration of 14 days after entry of the judgment, unless otherwise ordered by the district court or the bankruptcy appellate panel.

(b) Stay pending appeal to the court of appeals.

(1) On motion and notice to the parties to the appeal, the district court or the bankruptcy appellate panel may stay its judgment pending an appeal to the court of appeals.

(2) The stay must not extend beyond 30 days after the entry of the judgment of the district court or the bankruptcy appellate panel unless the period is extended for cause shown.

(3) If before the expiration of a stay entered pursuant to this subdivision there is an appeal to the court of appeals by the party who obtained the stay, the stay continues until final disposition by the court of appeals.

(4) A bond or other security may be required as a condition of the grant or continuation of a stay of the judgment.

(5) A bond or other security may be required if a trustee obtains a stay, but a bond or security may not be required if a stay is obtained by the United States or an officer or agency thereof or at the direction of any department of the Government of the United States.

(c) Power of court of appeals not limited. This rule does not limit the power of a court of appeals or any judge thereof to stay a judgment pending appeal or to stay proceedings during the pendency of an appeal or to suspend, modify, restore, vacate, or grant a stay or an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment subsequently to be entered.

Rule 8025 is derived from current Rule 8017.

Rule 8026. 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, 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 district court or the bankruptcy appellate panel consistent with, but not duplicative of, Acts of Congress and the rules of this Part VIII.

(2) 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 in the district court or the bankruptcy appellate panel.

(3) A local rule imposing a requirement of form may not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There is No Controlling Law.

(1) A district judge or bankruptcy appellate panel may regulate practice in any manner consistent with federal law, these Rules, the Official Forms, and local rules of the circuit council or the district court.

(2) No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the 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.

Rule 8026 is derived from current Rule 8018.

Rule 8027. Suspension of Rules in Part VIII

In the interests of expediting decision or for other cause in a particular case, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8014(a)(7), 8015(e), 8019, 8024, 8025, and 8026.

Rule 8027 is derived from current Rule 8019 and FRAP 2. Rule 8027 expands the list of rules that may not be suspended, namely those prescribing the manner and deadlines for taking an appeal as of right or by leave, the right of a party to file a statement of election, direct appeal certification, the page limit and type-volume requirements in appeals and cross-appeals, the disposition of an appeal, the duties of the clerk upon disposition of an appeal, the stay of a judgment in an appeal, and the procedures for adopting local rules.

Rule 8007.1 Indicative Ruling on Motion for Relief Barred by Pending Appeal; Remand by Court in Which Appeal is Pending

1 (a) RELIEF PENDING APPEAL. If a timely motion is made for
2 relief that the bankruptcy court lacks authority to grant because of
3 an appeal that has been docketed and is pending, the bankruptcy
4 court may:

5 (1) defer consideration of the motion;

6 (2) deny the motion; or

7 (3) state either that the court would grant the motion if the court in
8 which the appeal is pending remands for that purpose or that the
9 motion raises a substantial issue.

10 (b) NOTICE TO COURT IN WHICH THE APPEAL IS
11 PENDING. If the bankruptcy court states that it would grant the
12 motion, or that the motion raises a substantial issue, the movant
13 shall promptly notify the clerk of the court in which the appeal is
14 pending.

15 (c) REMAND AFTER INDICATIVE RULING. If the
16 bankruptcy court states that it would grant the motion or that the
17 motion raises a substantial issue, the court in which the appeal is
18 pending may remand for further proceedings. Upon remand, the
19 court in which the appeal is pending retains jurisdiction unless it
20 expressly dismisses the appeal. If the appeal is not dismissed, the
21 parties shall promptly notify the clerk of that court when the

COMMITTEE NOTE

This new rule is an adaptation of Rule 62.1 F.R.Civ.P. and Rule 12.1 F.R.App.P. It provides a procedure for issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a motion for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to grant the motion without resorting to the indicative ruling procedure.)

The court in which a bankruptcy appeal is pending, upon notification that the bankruptcy court has issued an indicative ruling, may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of a ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed.

Rule 9024. Relief from Judgment or Order

1 Rule 60 F.R.Civ.P. applies in cases under the Code except
2 that (1) a motion to reopen a case under the Code or for the
3 reconsideration of an order allowing or disallowing a claim against
4 the estate entered without a contest is not subject to the one-year
5 limitation prescribed in Rule 60(b), (2) a complaint to revoke a
6 discharge in a chapter 7 liquidation case may be filed only within

7 the time allowed by § 727(e) of the Code, and (3) a complaint to
8 revoke an order confirming a plan may be filed only within the
9 • time allowed by § 1144, § 1230, or § 1330. If the court lacks
10 authority to grant a motion under this rule because an appeal has
11 been docketed and is pending, the court may take any of the actions
12 specified in Rule 8007.1(a).

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8007.1. That rule governs the issuance of an indicative ruling when relief is sought in the bankruptcy court, but that court lacks authority to grant the relief sought because an appeal has been docketed and is pending.

Item 8 will be an oral report.

Item 9 will be an oral report.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: ELIZABETH GIBSON, REPORTER
RE: COMMENTS ON PUBLISHED RULES
DATE: FEBRUARY 23, 2009

In August 2008, proposed new rules 1004.2 and 5012 and proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001 were published for public comment. A total of five comments were received by the deadline, and the only provisions addressed were those relating to Rules 1019, 4004, 5009, 7001, and 1004.2. This memorandum discusses the comments submitted on each of those rules and recommends changes to Rules 4004, 7001, and 1004.2 in response.

Rule 1019

The proposed amendment creates a new subdivision (2)(B), which provides a new time period to object to a debtor's claimed exemptions when a case is converted to chapter 7 from chapter 11, 12, or 13. This new time period would not arise, however, if the case had previously been in chapter 7 and the objection period had expired in that case, or if the case was converted to chapter 7 more than a year after the first order confirming the chapter 11, 12, or 13 plan was entered.

Comment 08-BK-005 was submitted by Mr. Martin P. Sheehan, a chapter 7 panel trustee, on behalf of himself and the National Association of Bankruptcy Trustees ("NABT"). Mr. Sheehan expresses strong support for allowing a new period for a trustee to object to exemptions after a case is converted to chapter 7, but he and NABT oppose the exception for

cases converted more than a year after the plan in the other chapter was confirmed. He sees no rationale for imposing this limitation, which he terms “arbitrary.”

The Advisory Committee included this restriction in the rule in order to strike a balance between competing considerations. On the one hand, the reason for providing a new objection period is to prevent a debtor from reaping the benefits of excessive exemptions that were claimed in a context in which creditors and the trustee may have had little incentive to object. On the other hand, if a case is converted to chapter 7 after pending for a substantial period of time in another chapter, allowing a new period to object to exemptions previously claimed may be problematic. The debtor may have made improvements to the property or otherwise relied on its exempt status; it may now be difficult to determine the value of the property as of the petition date, given the passage of time; and the debtor may have made substantial payments to creditors under the plan, thus undercutting the likelihood that the debtor was engaging in strategic behavior.

The one-year restriction represents a fair compromise between these countervailing considerations. **I recommend therefore that no change be made to the published draft of Rule 1019.**

Rules 4004(a), (c)(1), and 7001

The proposed amendments to these rules are related. Rule 7001, which governs the scope of the Part VII rules, would be amended to provide, in what would be subdivision (a)(4), that certain objections to discharge – those specified in subdivision (b) – would not be treated as adversary proceedings. New subdivision (b) would state that an objection to discharge under § 727(a)(8), (a)(9), or 1328(f) is commenced by motion and is governed by Rule 9014. Rule

4004(a) and (c) would be amended to take account of these changes. The amendment to subdivision (a) would provide a deadline for filing motions under Rule 7001(b), and subdivision (c)(1)(B) would be amended to refer to motions as well as complaints objecting to discharge.

Two comments were submitted that address a technical aspect of these amendments. Bankruptcy Judge Robert Kressel (D. Minn.) submitted **Comment 08-BK-001**, in which he states that the content of Rule 7001(b) does not belong in the Part VII rules since the proposed subdivision deals with contested matters. He suggests specifying in Rule 7001(4) the types of objections to discharge that are not adversary proceedings, and then moving the substance of subdivision (b) to Rule 4004. Judge Kressel notes that when he was on the Advisory Committee several years ago, they eliminated from the Part VII rules all provisions relating to contested matters, and he cautions against allowing contested matter rules to creep back into this part of the rules. Former reporter and Committee member Alan Resnick has expressed similar views in informal comments given to the chair and the reporter. Bankruptcy Judge Robert Grant (N.D. Ind.), who submitted **Comment 08-BK-003** (discussed further below), concurs with Judge Kressel's comment about the misplacement of Rule 7001(b).

Because Rule 7001 currently includes as adversary proceedings all proceedings objecting to discharge, that rule must be amended to carve out an exception for the three identified objections. As suggested by Judge Kressel, that could be done by including an exception in Rule 7001(4), similar to the exceptions expressed in Rule 7001(1), (2), (7), and (8). If subdivision (b) were eliminated and its provisions moved to Rule 4004, existing Rule 7001 would not have to be redesignated as subdivision (a). Retaining the current organization and numbering of the rule would avoid creating confusion for those researching the rule electronically by clause or

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(c) GRANT OF DISCHARGE.

(1) In a chapter 7 case, on expiration of the ~~time~~
~~times~~ fixed for ~~filing a complaint~~ objecting to discharge and the
~~times fixed~~ for filing a motion to dismiss the case under Rule
1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual;

(B) a complaint, or a motion under §§ 727(a)(8),
(a)(9), or 1328(f), objecting to the discharge has been filed and not
decided in the debtor's favor;

* * * * *

(4) In a chapter 11 case in which the debtor is an
individual, or in a chapter 13 case, the court shall not grant a
discharge if the debtor has not filed any required statement of
completion of a course concerning personal financial management
under Rule 1007(b)(7).

(d) APPLICABILITY OF RULES IN PART VII AND
RULE 9014. An objection to discharge ~~A proceeding commenced~~
~~by a complaint objecting to discharge~~ is governed by Part VII of
these rules, except that an objection to discharge under §§
727(a)(8), (a)(9), or 1328(f) is commenced by motion and
governed by Rule 9014.

* * * * *

COMMITTEE NOTE

Subdivision (a). Subdivision (a) is amended to include a [new]¹ deadline for the filing of motions objecting to a debtor's discharge under §§ 727(a)(8), (a)(9), and 1328(f). These sections establish time limits on the issuance of discharges in successive bankruptcy cases by the same debtor. The period for providing notice of the deadline is also changed from 25 days to 28 days.

Subdivision (c). Subdivision (c)(1) is amended because a corresponding amendment to subdivision (d) directs certain objections to discharge to be brought by motion rather than by complaint. Subparagraph (c)(1)(B) directs the court not to grant a discharge if a motion or complaint objecting to discharge has been filed unless the objection has been decided in the debtor's favor.

Subdivision (c)(4) is new. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7).

Subdivision (d). Subdivision (d) is amended to direct that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) be commenced by motion rather than by complaint. Objections under the specified provisions are contested matters governed by Rule 9014. The title of the subdivision is amended to reflect this change.

Comment 08-BK-003, submitted by Bankruptcy Judge Robert Grant, raises substantive objections to the published amendments to Rules 7001 and 4004. He opposes the treatment of objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) as contested matters and urges that those objections continue to be included with other objections to discharge as adversary proceedings. His main concern is that treating some objections to discharge as contested matters, while others are still adversary proceedings, will add to the confusion that already exists among

¹ I recommend deleting the word "new" because it suggests that there previously was a different deadline for motions objecting to discharge.

creditors and their lawyers about whether an objection must be raised by complaint or by motion, and as a result it will impose greater burdens on courts, which will have to decide how to deal with improperly commenced objections. Judge Grant further states that, if the substance of proposed Rule 7001(b) is retained, the rule should provide greater procedural guidance about how such motions are to be resolved. He thinks that merely stating that Rule 9014 governs is not sufficient.

When the Advisory Committee approved the preliminary draft of the amendments to Rules 7001 and 4004, one of the reasons articulated in support of the amendments was that there is a lack of uniformity of practice in courts around the country concerning objections to discharge based on the timing of a prior discharge. Some courts automatically withhold the discharge when they note a prior discharge in a case filed too recently, some require the filing of a motion to raise the objection, and some require the filing of a complaint to commence an adversary proceeding. The proposed amendments, by clarifying when an objection to discharge is raised by motion and when by complaint, should contribute to the uniformity of practice nationwide and reduce, not increase, confusion in individual courts. As to Judge Grant's suggestion that more procedural detail should be provided, the statement that a particular matter is governed by Rule 9014 is the manner in which the rules typically designate contested matters and prescribe the procedures for them. See, e.g., Rules 3015(f), 3020(b)(1), 4001(b)(1)(A), and 5011(b).

I therefore recommend that the distinctions drawn by the proposed amendments between objections to discharge that are adversary proceedings and those that are contested matters be retained and that the Advisory Committee approve the amendments to Rules 7001 and 4004 set out above.

Rule 5009

Judge Grant also commented on Rule 5009. Proposed Rule 5009(b), which is new, applies when a debtor has not filed a statement of completion of a personal financial management course within 45 days after the first date set for the meeting of creditors. It requires the clerk to notify the debtor that the case will be closed without a discharge unless the statement is filed within the time limit specified in Rule 1007(c).

Judge Grant objects that this requirement would place an unnecessary burden on the clerk's office and that it might appear to be overly solicitous of debtors. He suggests that the reminder of the deadline be included in § 341 notice, along with other deadlines.

While the proposed amendment does place a new noticing obligation on the clerk's office, a number of courts are already sending such notices to debtors. Jim Waldron is conducting a survey of clerks to determine how common this practice is and whether they think a requirement that a notice be sent would be unduly burdensome. He will report his findings at the meeting of the Advisory Committee. The effect of the addition of Rule 5009(b) would be to make this the uniform practice in all courts. Without the provision of this reminder to debtors, some will overlook the requirement of completion of a personal financial management course, and their cases will be closed without the entry of a discharge. In order to obtain one, they will have to pay a fee to reopen their cases, and the reopening of cases will impose additional work on the clerk's office. Inclusion of the deadline in the § 341 meeting notice is much less likely to attract the debtor's attention than is a notice specifically addressed to the requirement and sent to the debtor at a later point.

Accordingly, I recommend that the Advisory Committee approve Rule 5009(b) as

published.

New Rule 1004.2

Proposed Rule 1004.2, which governs the Petition in Chapter 15 Cases, provides in subdivision (b) that the U.S. trustee or a party in interest may challenge the designation in the petition of the debtor's center of main interests ("COMI"). The rule provides that this challenge must be made by motion "filed no later than 60 days after the notice of the petition has been given to the movant under Rule 2002(q)(1)." Two comments were submitted that addressed this provision.

Comment 08-BK-002 was submitted by Ms. Una O'Boyle, law clerk to Bankruptcy Judge Burton Lifland (S.D.N.Y.). Ms. O'Boyle says that the 60-day time period for challenging the COMI designation is too long and is unworkable. Determining the debtor's COMI is a necessary step in deciding the petition for recognition, and § 1517(c) requires a petition for recognition of a foreign proceeding to be "decided upon at the earliest possible time." Ms. O'Boyle argues that the 60-day provision is inconsistent with the statutory command and that most ancillary cases have achieved the purpose for which the petition was filed, usually the seeking of injunctive relief, well before 60 days have passed. She also says that Rule 1004.2(b)'s 60-day time period is inconsistent with Rule 2002(q)(1), which requires only 20 days' notice of the hearing on the petition for recognition.

The other comment on proposed Rule 1004.2(b) is **Comment 08-BK-004**, which was submitted by Ms. Ellie M. Bertwell of CompuLaw in Los Angeles. Ms. Bertwell expresses the concern that the requirement that the motion be filed "no later than 60 days after notice of the petition has been given" does not clearly define what event constitutes the giving of notice.

Because the triggering point for the commencement of the time period might be the movant's receipt of the notice, the mailing of the notice, or service of the notice, parties will not know how to calculate the deadline for filing a challenge to the COMI. She further notes that Rule 1004.2(b) refers to the giving of "notice of the petition . . . under Rule 2002(q)(1)," whereas, despite its title, the latter rule requires the giving of notice of the *hearing* on the petition for recognition. She therefore suggests that Rule 1004.2(b) likewise refer to the notice of the hearing on the petition. Finally, similar to the point made by Ms. O'Boyle, Ms. Bertwell states that it is possible that the hearing on the petition may occur before the period for filing a challenge to the COMI has expired.

I believe that the points made in the two comments merit the Advisory Committee's consideration of possible adjustments to the wording of Rule 1004.2(b). Using the "giving" of notice as the starting point for a time period is somewhat less precise than other rule provisions that prescribe a deadline for objecting or taking other action. Rule 4001(d)(2), for example, says that "objections may be filed within 15 days of the mailing of the notice." Since Rule 2002(q)(1) requires the clerk to give notice of the hearing on the petition by mail, Rule 1004.2(b) might be revised similarly to start the running of the time period for challenging the COMI at the mailing of the notice. Ms. Bertwell is also correct that the notice referred to in Rule 2002(q)(1) is of the hearing on the petition for recognition of a foreign proceeding, rather than notice of the petition itself. Thus, if the current notice requirement is retained, the rule might be revised to require the motion to be filed "no later than 60 days after the notice of the hearing on the petition has been mailed to the movant under Rule 2002(q)(1)."

The more significant issue, however, concerns the appropriate length of time for filing a

motion challenging the COMI. The two comments assume that the purpose of Rule 1004.2(b) is to set a deadline for raising an issue that the court will decide when it rules on the petition for recognition of a foreign proceeding. If there is a dispute over the designation in the petition of the country in which the debtor's COMI is located, that issue needs to be resolved before the petition for recognition is ruled on. Under that view, the 60-day time limit in proposed Rule 1004.2(b) is out of synch with the 20-day notice requirement for the hearing in Rule 2002(q)(1).

A possible way to address this problem might be to require the motion to be filed no later than a certain number of days before the hearing. That is the approach taken in Rule 56 (and thus Rule 7056). It currently requires a motion for summary judgment to be filed "at least 10 days before the day set for the hearing" and the opposing party to serve opposing affidavits "before the hearing date." Given the likely short time span between the filing of the petition commencing a chapter 15 case and the hearing, a party challenging the COMI designation should be permitted to file its motion relatively close to the hearing date. Under the new time computation rules, that period may need to be 7 days, rather than something shorter. Accordingly, proposed Rule 1004.2(b) could be revised as follows:

Rule 1004.2. Petition in Chapter 15 Cases

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(b) CHALLENGING DESIGNATION. The United States trustee or a party in interest may file a motion for a determination that the debtor's center of main interests is other than as stated in the petition for recognition commencing the chapter 15 case. The motion shall be filed at least 7 days before the date set for the

7 hearing on the petition for recognition. The motion shall be
8 transmitted to the United States trustee and served on the debtor,
9 all persons or bodies authorized to administer foreign proceedings
10 of the debtor, all entities against whom provisional relief is being
11 sought under § 1519 of the Code, all parties to litigation pending in
12 the United States in which the debtor was a party at the time of the
13 filing of the petition, and such other entities as the court may
14 direct.

COMMITTEE NOTE

* * * * *

Subdivision (b) sets a deadline of 7 days before the hearing on the petition for recognition for filing a motion to challenge the statement in the petition as to the country in which the debtor's center of main interests is located.

The deadline in Rule 1004.2(b), however, may have been intended to serve purpose different from that assumed in the comments. Section 1517(d) of the Code allows modification or termination of recognition "if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist." Former reporter Jeff Morris has indicated that the 60-day time limit in the proposed rule was intended to impose an outer limit on the time for challenging a recognition order based on a dispute over the COMI designation. Rather than allowing the possibility of such a challenge to hang over the case indefinitely, the proposed rule would set a finite period for filing such a motion. Though finite, it would be a sufficiently long period to allow parties in interest in other countries to learn of the United States proceeding and the court's

ruling on the petition before the deadline for raising their challenge expired.

As a latecomer to the proposal of this rule, I think that time limits may be useful for both purposes. As drafted, Rule 1004.2(b) appears to be addressed to a challenge to the debtor's designation of its COMI, rather than to the court's order granting recognition based in part on that designation. Thus I can understand the suggestion that the time limit for the motion should not extend beyond the time for the hearing. The revision suggested above would respond to that concern.

With respect to the concern that there should be a deadline for bringing a challenge under § 1517(d), perhaps another subdivision should be added to the rule. It might provide as follows:

1 (c) CHALLENGING RECOGNITION. The United States
2 trustee or a party in interest may file a motion seeking modification
3 or termination of recognition under § 1517(d) of the Code no later
4 than 60 days after the notice of the hearing on the petition has been
5 mailed to the movant under Rule 2002(q)(1). The motion shall be
6 transmitted to the United States trustee and served on the debtor,
7 all persons or bodies authorized to administer foreign proceedings
8 of the debtor, all entities against whom provisional relief is being
9 sought under § 1519 of the Code, all parties to litigation pending in
10 the United States in which the debtor was a party at the time of the
11 filing of the petition, and such other entities as the court may
12 direct.

COMMITTEE NOTE

Subdivision (c) sets a deadline for filing a motion seeking modification or termination of an order granting recognition of a foreign proceeding. Such a motion under § 1517(d) of the Code must be filed no later than 60 days after the clerk mails to the movant notice of the hearing on the petition for recognition.

Should the Advisory Committee favor making either or both of the suggested changes to proposed Rule 1004.2, the proposed rule as revised would need to be submitted again to the Standing Committee for publication. Either change would be sufficiently substantial to require a further opportunity for public comment.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: ELIZABETH GIBSON, REPORTER
RE: CONFORMING AMENDMENT OF OFFICIAL FORM 23
DATE: FEBRUARY 23, 2009

A proposed amendment of Rule 1007(c), which was published for comment in August 2008, would change the deadline for a chapter 7 debtor to file a statement of completion of a personal financial management course from 45 days to 60 days after the first date set for the meeting of creditors. This change is related to the proposed amendment of Rule 5009(b), which would require the clerk to send the debtor a notice of the need to file the statement in order to obtain a discharge if the debtor has not filed the statement within 45 days after the first date set for the meeting of creditors. Both amendments are before the Advisory Committee at the March meeting for approval as published. If these amendments are approved and sent to the Standing Committee, they will be on track for a December 1, 2010 effective date.

Should the deadline change in Rule 1007(c) go into effect, a conforming amendment will need to be made to Official Form 23 (Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management). Information at the bottom of the form concerning filing deadlines instructs a chapter 7 debtor to file it "within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code." The reference to 45 days will need to be changed to 60 days. The attached form shows the proposed amendment.

Because this change is being proposed merely to make the form consistent with the amended rule, it does not need to be published for comment. I recommend that the amendment

of Form 23 be approved and sent to the Standing Committee with the request that it take effect upon the effective date of the amendment of Rule 1007(c).

UNITED STATES BANKRUPTCY COURT

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

DEBTOR'S CERTIFICATION OF COMPLETION OF POSTPETITION INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

Every individual debtor in a chapter 7, chapter 11 in which § 1141(d)(3) applies, or chapter 13 case must file this certification. If a joint petition is filed, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below.

I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)

certify that on _____ (Date), I completed an instructional course in personal financial management provided by _____, an approved personal financial management provider
(Name of Provider)

Certificate No (if any): _____

I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)

certify that no personal financial management course is required because of [Check the appropriate box]:

- Incapacity or disability, as defined in 11 U.S.C. § 109(h),
- Active military duty in a military combat zone; or

Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions: Use this form only to certify whether you completed a course in personal financial management. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within _____ of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(e).)

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: ELIZABETH GIBSON, REPORTER
RE: TIME COMPUTATION CHANGES FOR RULE 4001(d)(2) AND (d)(3)
DATE: FEBRUARY 16, 2009

Judge Susan Kelley (Bankr. E.D. Wis.) has called to the attention of the Advisory Committee two inadvertent omissions from the list of time computation changes in the Bankruptcy Rules. Rule 4001(d)(2) provides a 15-day objection period for motions seeking approval of various agreements, unless the court fixes a different time. Rule 4001(d)(3) requires that the court give no less than five days' notice to the objector before holding a hearing. Through oversight, the 15-day time period in Rule 4001(d)(2) and the five-day notice period in Rule 4001(d)(3) were not proposed for change to 14 and seven days respectively.

The entire time computation package has now been approved by the Judicial Conference and sent to the Supreme Court. Assuming the Court's approval and no action to the contrary by Congress, the submitted time changes are on track to take effect on December 1, 2009. Unfortunately, by the time that it was determined that the Rule 4001(d) time periods had been overlooked, it was too late to include them in package with all the other time changes.

My recommendation is that the Advisory Committee approve the amendments set forth below and submit them to the Standing Committee with the request that they be approved without publication. Because the amendments merely conform to the time computation template already approved and applied throughout the Bankruptcy Rules, they are not controversial. If approved by the Standing Committee in June 2009 and sent forward to the Judicial Conference in

the fall of 2009, they could take effect on December 1, 2010, just a year behind the other changes. In the meantime, bankruptcy courts could be alerted to the fact that these changes are in the pipeline. Should the new method of computing time, once it takes effect, cause any hardships with respect to the Rule 4001(d) time provisions prior to their amendment, courts will have authority under the rule itself to alter those time periods (“Unless the court fixes a different time;” “no less than five days’ notice”).

Proposed Amendments

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

1 (d) AGREEMENT RELATING TO RELIEF FROM THE
2 AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE
3 USE, SALE, OR LEASE OF PROPERTY, PROVIDING
4 ADEQUATE PROTECTION, USE OF CASH COLLATERAL,
5 AND OBTAINING CREDIT.

* * * * *

7 (2) *Objection.* Notice of the motion and the time within
8 which objections may be filed and served on the debtor in
9 possession or trustee shall be mailed to the parties on whom
10 service is required by paragraph (1) of this subdivision and to such
11 other entities as the court may direct. Unless the court fixes a
12 different time, objections may be filed within ~~15~~ 14 days of the

13 mailing of the notice.
14 (3) *Disposition; hearing.* If no objection is filed, the
15 court may enter an order approving or disapproving the agreement
16 without conducting a hearing. If an objection is filed or if the court
17 determines a hearing is appropriate, the court shall hold a hearing
18 on no less than ~~five~~ seven days' notice to the objector, the movant,
19 the parties on whom service is required by paragraph (1) of this
20 subdivision and such other entities as the court may direct.

21 * * * * *

COMMITTEE NOTE

Subdivision (d) is amended to implement changes in connection with the 2009 amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadlines in subdivision (d)(2) and (d)(3) are amended to substitute deadlines that are multiples of seven days. Throughout the rules, deadlines have been amended in the following manner:

- 5 day periods become 7 day periods
- 10 day periods become 14 day periods
- 15 day periods become 14 day periods
- 20 day periods become 21 day periods
- 25 day periods become 28 day periods

Item 12 will be an oral report.

Letters by Mr. Kohn and Judge Wedoff will be distributed separately.

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules
FROM: Gene Wedoff
RE: Proposed Changes to Fed. R. Civ. P. 56
DATE: February 12, 2009

The Advisory Committee on Civil Rules has published a very extensive proposal for amending Fed. R. Civ. P. 56, dealing with summary judgment. An excerpt from the committee's report, setting out and describing the proposal, is attached.

Based on the comments and hearings to date, the Civil Rules Committee has tentatively decided to recommend adoption of the amendment to Rule 56, largely as proposed. The only significant modification likely to be made is the elimination of mandatory point-by-point statements of uncontested facts and responses. There is general consensus among the committee members that the other changes proposed are helpful in clarifying the summary judgment procedure.

Bankruptcy Rule 7056 makes Civil Rule 56 applicable in all adversary proceedings, without qualification, and Bankruptcy Rule 9014(c) makes Rule 7056 applicable to all contested matters unless the court directs otherwise. Therefore, unless the bankruptcy rules are changed, the amended version of Civil Rule

56 would be generally applicable to all matters requiring decision by bankruptcy judges.

As the bankruptcy liaison to the Civil Rules Committee, I have raised one concern related to bankruptcy practice: a change in the deadline for presenting the motion. Current Rule 56(c) states that a motion for summary judgment "must be served at least 10 days before the date set for the hearing." This has the effect, in bankruptcy, of preventing last minute summary judgment motions, filed for the purpose of delaying scheduled hearings. The proposed amendment to the rule would remove this limitation and replace it with the following:

(b) Time to File a Motion, Response, and Reply. These times apply unless a different time is set by local rule or the court orders otherwise in the case:

(1) a party may file a motion for summary judgment at any time until 30 days after the close of all discovery

The change from a deadline measured in time before hearing to a deadline measured in time after close of discovery would have the effect of allowing timely summary judgment motions with respect to any bankruptcy hearing in which discovery did not close more than thirty days before trial.

This potential problem can be removed by local rules providing for a different deadline, but this would diminish uniformity. Also, the fact that a motion is timely does not

necessarily require that it be ruled on before trial. However, the Civil Rules Committee is likely to revert to an earlier formulation of Rule 56, providing that if a motion is meritorious, judgment "shall" be rendered in favor of the movant.

Our committee may wish to consider whether, in the event that the proposed changes to Civil Rule 56 are adopted, Bankruptcy Rule 7056 should be changed to retain a filing deadline based on the scheduled hearing date, rather than the close of discovery. If such a change is thought desirable, Rule 7056 might be amended to read: "Rule 56 F.R. Civ. P. applies in adversary proceedings, except that any motion for summary judgment must be filed and served no later than 14 days before an evidentiary hearing scheduled in the proceeding to which the motion applies."

Item 14 will be an oral report.

Item 15 will be an oral report.

Item 16 will be an oral report.

111TH CONGRESS
1ST SESSION

H. R. 1106

To prevent mortgage foreclosures and enhance mortgage credit availability.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 23, 2009

Mr CONYERS (for himself, Mr. FRANK of Massachusetts, Mr. BERMAN, Mr. BLUMENAUER, Mr. COHEN, Mr. DELAHUNT, Ms. EDWARDS of Maryland, Mr. ELLISON, Mr. GONZALEZ, Mr. GUTIERREZ, Ms. JACKSON-LEE of Texas, Mr. JOHNSON of Georgia, Mr. LEWIS of Georgia, Ms. ZOE LOFGREN of California, Mr. MILLER of North Carolina, Mr. NADLER of New York, Ms. LINDA T SÁNCHEZ of California, Ms. WASSERMAN SCHULTZ, Ms. WATERS, and Mr. MARSHALL) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committees on the Judiciary and Veterans' Affairs, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To prevent mortgage foreclosures and enhance mortgage credit availability.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as “Help-
5 ing Families Save Their Homes Act of 2009”.

1 (b) TABLE OF CONTENTS.—The table of contents of
 2 this Act is the following:

Sec 1 Short title, table of contents

TITLE I—PREVENTION OF MORTGAGE FORECLOSURES

Subtitle A—Modification of Residential Mortgages

- Sec 101 Eligibility for relief
 Sec 102 Prohibiting claims arising from violations of the Truth in Lending Act
 Sec 103 Authority to modify certain mortgages
 Sec 104 Combating excessive fees
 Sec 105 Confirmation of plan
 Sec 106 Discharge
 Sec 107 Standing trustee fees
 Sec 108 Effective date, application of amendments

Subtitle B—Related Mortgage Modification Provisions

- Sec. 121 Adjustments as a result of modification in bankruptcy of housing loans guaranteed by the department of veterans affairs
 Sec. 122 Payment of FHA mortgage insurance benefits.
 Sec 123 Adjustments as result of modification of rural single family housing loans in bankruptcy
 Sec 124 Unenforceability of certain provision as being contrary to public policy

TITLE II—FORECLOSURE MITIGATION AND CREDIT AVAILABILITY

- Sec 201 Servicer safe harbor for mortgage loan modifications.
 Sec 202 Changes to HOPE for Homeowners Program.
 Sec 203 Requirements for FHA-approved mortgagees
 Sec 204 Enhancement of liquidity and stability of insured depository institutions to ensure availability of credit and reduction of foreclosures

3 **TITLE I—PREVENTION OF** 4 **MORTGAGE FORECLOSURES**

5 **Subtitle A—Modification of** 6 **Residential Mortgages**

7 **SEC. 101. ELIGIBILITY FOR RELIEF.**

8 Section 109 of title 11, United States Code, is
 9 amended—

1 (1) by adding at the end of subsection (e) the
2 following: “For purposes of this subsection, the com-
3 putation of debts shall not include the secured or
4 unsecured portions of—

5 “(1) debts secured by the debtor’s principal res-
6 idence if the value of such residence as of the date
7 of the order for relief under chapter 13 is less than
8 the applicable maximum amount of noncontingent,
9 liquidated, secured debts specified in this subsection;
10 or

11 “(2) debts secured or formerly secured by what
12 was the debtor’s principal residence that was sold in
13 foreclosure or that the debtor surrendered to the
14 creditor if the value of such real property as of the
15 date of the order for relief under chapter 13 was less
16 than the applicable maximum amount of noncontin-
17 gent, liquidated, secured debts specified in this sub-
18 section.”, and

19 (2) by adding at the end of subsection (h) the
20 following:

21 “(5) The requirements of paragraph (1) shall not
22 apply in a case under chapter 13 with respect to a debtor
23 who submits to the court a certification that the debtor
24 has received notice that the holder of a claim secured by

1 the debtor's principal residence may commence a fore-
2 closure on the debtor's principal residence.”.

3 **SEC. 102. PROHIBITING CLAIMS ARISING FROM VIOLA-**
4 **TIONS OF THE TRUTH IN LENDING ACT.**

5 Section 502(b) of title 11, United States Code, is
6 amended—

7 (1) in paragraph (8) by striking “or” at the
8 end,

9 (2) in paragraph (9) by striking the period at
10 the end and inserting “; or”, and

11 (3) by adding at the end the following: .

12 “(10) the claim for a loan secured by a security
13 interest in the debtor's principal residence is subject
14 to a remedy for rescission under the Truth in Lend-
15 ing Act notwithstanding the prior entry of a fore-
16 closure judgment, except that nothing in this para-
17 graph shall be construed to modify, impair, or super-
18 sede any other right of the debtor.”.

19 **SEC. 103. AUTHORITY TO MODIFY CERTAIN MORTGAGES.**

20 Section 1322 of title 11, United States Code, is
21 amended—

22 (1) in subsection (b)—

23 (A) by redesignating paragraph (11) as
24 paragraph (12),

1 (B) in paragraph (10) by striking “and” at
2 the end, and

3 (C) by inserting after paragraph (10) the
4 following:

5 “(11) notwithstanding paragraph (2), with re-
6 spect to a claim for a loan originated before the ef-
7 fective date of this paragraph and secured by a secu-
8 rity interest in the debtor’s principal residence that
9 is the subject of a notice that a foreclosure may be
10 commenced with respect to such loan, modify the
11 rights of the holder of such claim (and the rights of
12 the holder of any claim secured by a subordinate se-
13 curity interest in such residence)—

14 “(A) by providing for payment of the
15 amount of the allowed secured claim as deter-
16 mined under section 506(a)(1);

17 “(B) if any applicable rate of interest is
18 adjustable under the terms of such loan by pro-
19 hibiting, reducing, or delaying adjustments to
20 such rate of interest applicable on and after the
21 date of filing of the plan;

22 “(C) by modifying the terms and condi-
23 tions of such loan—

24 “(i) to extend the repayment period
25 for a period that is no longer than the

1 longer of 40 years (reduced by the period
2 for which such loan has been outstanding)
3 or the remaining term of such loan, begin-
4 ning on the date of the order for relief
5 under this chapter; and

6 “(ii) to provide for the payment of in-
7 terest accruing after the date of the order
8 for relief under this chapter at a fixed an-
9 nual rate equal to the currently applicable
10 average prime offer rate as of the date of
11 the order for relief under this chapter, cor-
12 responding to the repayment term deter-
13 mined under the preceding paragraph, as
14 published by the Federal Financial Institu-
15 tions Examination Council in its table enti-
16 tled ‘Average Prime Offer Rates—Fixed’,
17 plus a reasonable premium for risk; and

18 “(D) by providing for payments of such
19 modified loan directly to the holder of the claim
20 or, at the discretion of the court, through the
21 trustee during the term of the plan; and”, and
22 (2) by adding at the end the following:

23 “(g) A claim may be reduced under subsection
24 (b)(11)(A) only on the condition that if the debtor sells
25 the principal residence securing such claim, before com-

1 pleting all payments under the plan (or, if applicable, be-
2 fore receiving a discharge under section 1328(b)) and re-
3 ceives net proceeds from the sale of such residence, then
4 the debtor agrees to pay to such holder not later than 15
5 days after receiving such proceeds—

6 “(1) if such residence is sold in the 1st year oc-
7 ccurring after the effective date of the plan, 80 per-
8 cent of the amount of the difference between the
9 sales price and the amount of such claim as origi-
10 nally determined under section 1322(b)(11) (plus
11 costs of sale and improvements), but not to exceed
12 the unpaid amount of the allowed secured claim de-
13 termined as if such claim had not been reduced
14 under such subsection;

15 “(2) if such residence is sold in the 2d year oc-
16 ccurring after the effective date of the plan, 60 per-
17 cent of the amount of the difference between the
18 sales price and the amount of such claim as origi-
19 nally determined under section 1322(b)(11) (plus
20 costs of sale and improvements), but not to exceed
21 the unpaid amount of the allowed secured claim de-
22 termined as if such claim had not been reduced
23 under such subsection;

24 “(3) if such residence is sold in the 3d year oc-
25 ccurring after the effective date of the plan, 40 per-

1 cent of the amount of the difference between the
2 sales price and the amount of such claim as origi-
3 nally determined under section 1322(b)(11) (plus
4 costs of sale and improvements), but not to exceed
5 the unpaid amount of the allowed secured claim de-
6 termined as if such claim had not been reduced
7 under such subsection; and

8 “(4) if such residence is sold in the 4th year oc-
9 ccurring after the effective date of the plan, 20 per-
10 cent of the amount of the difference between the
11 sales price and the amount of such claim as origi-
12 nally determined under section 1322(b)(11) (plus
13 costs of sale and improvements), but not to exceed
14 the unpaid amount of the allowed secured claim de-
15 termined as if such claim had not been reduced
16 under such subsection.

17 “(h) With respect to a claim of the kind described
18 in subsection (b)(11), the plan may not contain a modi-
19 fication under the authority of subsection (b)(11)—

20 “(1) in a case commenced under this chapter
21 after the expiration of the 15-day period beginning
22 on the effective date of this subsection, unless—

23 “(A) the debtor certifies that the debtor
24 attempted, not less than 15 days before the
25 commencement of the case, to contact the hold-

1 er of such claim (or the entity collecting pay-
2 ments on behalf of such holder) regarding
3 modification of the loan that is the subject of
4 such claim; or

5 “(B) a foreclosure sale is scheduled to
6 occur on a date in the 30-day period beginning
7 on the date the case is commenced; and

8 “(2) in any other case pending under this chap-
9 ter, unless the debtor certifies that the debtor at-
10 tempted to contact the holder of such claim (or the
11 entity collecting payments on behalf of such holder)
12 regarding modification of the loan that is the subject
13 of such claim, before—

14 “(A) filing a plan under section 1321 that
15 contains a modification under the authority of
16 subsection (b)(11); or

17 “(B) modifying a plan under section 1323
18 or 1329 to contain a modification under the au-
19 thority of subsection (b)(11).

20 “(i) In determining the holder’s allowed secured claim
21 under section 506(a)(1) for purposes of subsection
22 (b)(11)(A), the value of the debtor’s principal residence
23 shall be the fair market value of such residence on the
24 date such value is determined.”.

1 **SEC. 104. COMBATING EXCESSIVE FEES.**

2 Section 1322(c) of title 11, United States Code, is
3 amended—

4 (1) in paragraph (1) by striking “and” at the
5 end,

6 (2) in paragraph (2) by striking the period at
7 the end and inserting a semicolon, and

8 (3) by adding at the end the following:

9 “(3) the debtor, the debtor’s property, and
10 property of the estate are not liable for a fee, cost,
11 or charge that is incurred while the case is pending
12 and arises from a debt that is secured by the debt-
13 or’s principal residence except to the extent that—

14 “(A) the holder of the claim for such debt
15 files with the court and serves on the trustee,
16 the debtor, and the debtor’s attorney (annually
17 or, in order to permit filing consistent with
18 clause (ii), at such more frequent periodicity as
19 the court determines necessary) notice of such
20 fee, cost, or charge before the earlier of—

21 “(i) 1 year after such fee, cost, or
22 charge is incurred; or

23 “(ii) 60 days before the closing of the
24 case; and

25 “(B) such fee, cost, or charge—

1 “(i) is lawful under applicable non-
2 bankruptcy law, reasonable, and provided
3 for in the applicable security agreement;
4 and

5 “(ii) is secured by property the value
6 of which is greater than the amount of
7 such claim, including such fee, cost, or
8 charge;

9 “(4) the failure of a party to give notice de-
10 scribed in paragraph (3) shall be deemed a waiver
11 of any claim for fees, costs, or charges described in
12 paragraph (3) for all purposes, and any attempt to
13 collect such fees, costs, or charges shall constitute a
14 violation of section 524(a)(2) or, if the violation oc-
15 curs before the date of discharge, of section 362(a);
16 and

17 “(5) a plan may provide for the waiver of any
18 prepayment penalty on a claim secured by the debt-
19 or’s principal residence.”.

20 **SEC. 105. CONFIRMATION OF PLAN.**

21 Section 1325(a) of title 11, United States Code, is
22 amended—

23 (1) in paragraph (5) by inserting “except as
24 otherwise provided in section 1322(b)(11),” after
25 “(5)”,

1 (2) in paragraph (8) by striking “and” at the
2 end,

3 (3) in paragraph (9) by striking the period at
4 the end and inserting a semicolon, and

5 (4) by inserting after paragraph (9) the fol-
6 lowing:

7 “(10) notwithstanding subclause (I) of para-
8 graph (5)(B)(i), whenever the plan modifies a claim
9 in accordance with section 1322(b)(11), the holder
10 of a claim whose rights are modified pursuant to
11 section 1322(b)(11) shall retain the lien until the
12 later of—

13 “(A) the payment of such holder’s allowed
14 secured claim; or

15 “(B) completion of all payments under the
16 plan (or, if applicable, receipt of a discharge
17 under section 1328(b)); and

18 “(11) whenever the plan modifies a claim in ac-
19 cordance with section 1322(b)(11), the court finds
20 that such modification is in good faith and does not
21 find that the debtor has been convicted of obtaining
22 by actual fraud the extension, renewal, or refi-
23 nancing of credit that gives rise to a modified
24 claim.”.

1 **SEC. 106. DISCHARGE.**

2 Section 1328(a) of title 11, United States Code, is
3 amended—

4 (1) by inserting “(other than payments to hold-
5 ers of claims whose rights are modified under sec-
6 tion 1322(b)(11))” after “paid”, and

7 (2) in paragraph (1) by inserting “or, to the ex-
8 tent of the unpaid portion of an allowed secured
9 claim, provided for in section 1322(b)(11)” after
10 “1322(b)(5)”.

11 **SEC. 107. STANDING TRUSTEE FEES.**

12 (a) AMENDMENT TO TITLE 28.—Section
13 586(e)(1)(B)(i) of title 28, United States Code, is amend-
14 ed—

15 (1) by inserting “(I) except as provided in sub-
16 paragraph (II)” after “(i)”,

17 (2) by striking “or” at the end and inserting
18 “and”, and

19 (3) by adding at the end the following:

20 “(II) 4 percent with respect to pay-
21 ments received under section 1322(b)(11)
22 of title 11 by the individual as a result of
23 the operation of section 1322(b)(11)(D) of
24 title 11, unless the bankruptcy court
25 waives all fees with respect to such pay-
26 ments based on a determination that such

1 individual has income less than 150 per-
2 cent of the income official poverty line (as
3 defined by the Office of Management and
4 Budget, and revised annually in accord-
5 ance with section 673(2) of the Omnibus
6 Budget Reconciliation Act of 1981) appli-
7 cable to a family of the size involved and
8 payment of such fees would render the
9 debtor's plan infeasible."

10 (b) CONFORMING PROVISION.—The amendments
11 made by this section shall apply to any trustee to whom
12 the provisions of section 302(d)(3) of the Bankruptcy
13 Judges, United States Trustees, and Family Farmer
14 Bankruptcy Act of 1986 (Public Law 99-554; 100 Stat.
15 3121) apply.

16 **SEC. 108. EFFECTIVE DATE; APPLICATION OF AMEND-**
17 **MENTS.**

18 (a) EFFECTIVE DATE.—Except as provided in sub-
19 section (b), this subtitle and the amendments made by this
20 subtitle shall take effect on the date of the enactment of
21 this Act.

22 (b) APPLICATION OF AMENDMENTS.—

23 (1) IN GENERAL.—Except as provided in para-
24 graph (2), the amendments made by this subtitle
25 shall apply with respect to cases commenced under

1 title 11 of the United States Code before, on, or
2 after the date of the enactment of this Act.

3 (2) LIMITATION.—Paragraph (1) shall not
4 apply with respect to cases closed under title 11 of
5 the United States Code as of the date of the enact-
6 ment of this Act that are neither pending on appeal
7 in, nor appealable to, any court of the United
8 States.

9 **Subtitle B—Related Mortgage** 10 **Modification Provisions**

11 **SEC. 121. ADJUSTMENTS AS A RESULT OF MODIFICATION** 12 **IN BANKRUPTCY OF HOUSING LOANS GUAR-** 13 **ANTEED BY THE DEPARTMENT OF VETERANS** 14 **AFFAIRS.**

15 (a) IN GENERAL.—Subsection (a) of section 3732 of
16 title 38, United States Code is amended—

17 (1) in subsection (a)—

18 (A) by redesignating paragraph (2) as sub-
19 paragraph (A) of paragraph (2), and

20 (2) by inserting after subparagraph (A) the fol-
21 lowing new subparagraph:

22 “(B) In the event that a housing loan
23 guaranteed under this chapter is modified
24 under the authority provided under section
25 1322(b) of title 11, United States Code, the

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: ELIZABETH GIBSON, REPORTER
RE: SUGGESTION OF NEW FORMS FOR HOME MORTGAGE CLAIMS
DATE: FEBRUARY 19, 2009

Bankruptcy Judges Marvin Isgur (S.D. Tex.), Elizabeth Magner (E.D. La), and Jeff Bohm (S.D. Tex.) have submitted a suggestion (08-BK-K) for two new official forms relating to claims secured by a debtor's principal residence. The forms they have developed are (1) an addendum to the proof of claim for debts secured by home mortgages and (2) a mortgage payment change notice. They are designed to reveal how the debtor's past payments have been applied by the mortgagee, the charges that have been assessed, if any payments have been placed in suspense, and how the escrow account has been handled. They would require the attachment of a loan history to both forms in a standardized format.

The attachment to the proof of claim would require a home mortgage claimant to provide more detailed information than is currently required by the proof of claim form so that the accuracy of amounts demanded to cure a default could be determined. From the information provided by the claimant, the form would automatically calculate the principal and interest cure amount based on what the judges consider to be the appropriate methodology: it would subtract from the actual principal balance (based on the lender's application of prepetition payments) what the principal balance would have been if the debtor had made all the principal and interest payments. The form would also calculate, based on the data provided, the escrow balance at the petition date and the required RESPA reserve.

The mortgage payment change form would require the lender to provide information regarding changes in the interest rate and escrow adjustments. Like the proof of claim attachment, this form also would require the lender to provide a complete loan history in a standardized format. The lender would have to state how all payments had been applied, including application to specific types of fees and expenses and escrow disbursements.

The judges state that development of national forms for the reporting of information on which mortgage payments in chapter 13 cases are based would be beneficial to the parties in interest and the courts. Mortgage companies, they say, favor uniform, national forms since they generally administer chapter 13 cases using centralized, national accounting systems. Having to comply with various claim and payment change requirements in different courts is unwieldy and expensive for them. Requiring the lender to provide more data in a consistent format will also make it easier for debtors and trustees to verify cure amounts, payment changes, escrow calculations, and assessments for fees and charges. Finally, greater transparency and uniform methodology of calculations should reduce litigation over mortgage issues in chapter 13 cases.

Recommendation

Judges Isgur, Magner, and Bohm have clearly put a great deal of thought into their proposal, and they make a persuasive argument for the value of national forms to implement requirements for the chapter 13 home mortgage payments. Should the Advisory Committee decide to pursue this suggestion further, the content and timing of any such forms should be coordinated with the proposed amendments to Rule 3001(c) and new Rule 3002.1. Those rule amendments, if they go forward, are on a track to become effective in December 2011.

Publication of proposed new forms for public comment in August 2010 would permit the forms

also to go into effect in 2011. That time frame would allow a subcommittee to consider the proposal carefully, during which time there is the possibility of action by Congress that might affect the content of both the rules and any implementing forms.

I therefore recommend that the judges' suggestion be referred to the Subcommittee on Forms for further consideration.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
515 RUSK AVENUE, STE 4636
HOUSTON, TEXAS 77002

08-BK-K



CHAMBERS OF
MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

November 25, 2008

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

Dear Mr. McCabe and Members of the Committee:

Judges Isgur, Magner, and Bohm jointly propose the adoption of two new official bankruptcy forms designed to address problems related to claims secured by a debtor's principal residence. The first form is proposed as an addendum to the proof of claim. The proposed addendum provides a full loan history and a calculation of the mortgage arrearage. The second form is a payment change notice to be filed by mortgage holders during the course of a chapter 13 case. The payment change notice reflects changes in escrow payments or adjustments in interest rates.

The three of us have large chapter 13 dockets, each with well over 3,000 pending chapter 13 cases. In the course of administering our dockets, we have each written opinions explaining structural problems that commonly arise with chapter 13 home mortgage claims and payments. The proposed forms are our attempt to address some of the issues that we have observed.

We believe that the present proof of claim form inadequately addresses the claims asserted by mortgage companies because it can often result in the filing of claims that omit material information or that incorrectly calculate amounts due. In addition to providing a better understanding of the amount needed to cure a mortgage arrearage, we believe that the new addendum will provide necessary information on the types of charges incorporated into the claim and when they occurred. It is also designed to provide improved escrow accounting, a critical component in calculating both the allowed arrearage claim and the monthly installment amount due from a debtor postpetition. Moreover, the new form will expedite the claims objection process by setting forth the lender's claim and backup data in a standard form. This standard form will obviate the need for substantial, expensive and time consuming discovery that now occurs in many chapter 13 cases.

Moreover, we have observed increasing difficulties in administering chapter 13 cases because of payment changes that arise in mortgage loans. Adjustable rate mortgages often have interest rate and payment adjustments during the course of a chapter 13 case. Escrow payment

adjustments arise in almost every case. Our experience is that these adjustments often generate issues that are time consuming and expensive for all parties to resolve.

We believe that placing separate district-by-district demands on mortgage companies is unwieldy and expensive to implement. Since most mortgage servicing companies administer chapter 13 cases with centralized, national accounting computer systems, the use of national forms should result in a substantially improved accounting system to the court as well as provide a predictable cost for the mortgage servicing companies. We are told in public seminars that many mortgage servicing companies would welcome such standardization. Given the diverse treatment of chapter 13 mortgages throughout the nation, we believe that a uniform approach is most sensible. This will best "secure the just, speedy, and inexpensive determination" of chapter 13 mortgage matters. See FED. R. BANKR. P. 1001.

The underlying accounting in chapter 13 mortgage cases is complex. Accordingly, we have designed forms that provide for computerized calculations based on standard input. The inputs to the forms are relatively simple. The complexities arise in the calculations that are automated within the forms.

An example may be helpful. Section 1322(b)(5) allows debtors to cure defaults on home mortgages. It is typical that a debtor has missed several mortgage payments prior to filing bankruptcy. These missed payments will often include amounts that (if timely made) would have been applied to principal, interest and escrow. When received, the mortgage servicing companies may apply the payments to pre-petition legal fees, appraisal costs and other charges that are not included in the principal, interest and escrow accounting. When mortgage servicing companies receive payments that are inadequate to cover outstanding fees and make a full application to the principal, accrued interest and escrow payments that are due, it is common for the payments to be held by the lender rather than applied to the loan as a partial payment. The funds are typically placed in a holding or suspense account until applied by the lender. Both prior to and following a bankruptcy, the amount held in suspense is often not apparent. The same is true of many of the fees and charges assessed against an account during its administration. Lenders do not always provide borrowers the following: (1) accountings disclosing payments received, (2) the application of the amounts received; or (3) the amount and date of fees, charges or expenses assessed against the account.

Proofs of claim provide only the total amount due separated into broad categories of components. As a result, it is difficult to determine from a proof of claim how payments have been applied, what charges might have been assessed against an account, if any payments have been placed in suspense, and whether or not the escrow account has been properly handled. Even assuming the accuracy of the lender's accounting, it is usually not possible for a debtor or his counsel to understand the basis of the calculations used by the lender. Without this understanding, one cannot verify the amount demanded to cure a default.

In our proposed forms, the loan's history is provided in a simple and understandable format designed to answer the initial questions any debtor's counsel would pose. Through a simple loan history, all interested parties can verify the amounts paid by a borrower on a loan

and the application of the payments by the lender to fees and expenses charged including the date of charge and type of charge imposed, and the calculation of escrow. Because the forms are based off of the lender's own loan history, it is information that the lender should have readily available. The information supplied is also the minimum necessary for a debtor or trustee to review the claim for accuracy. Since these home mortgage claims are usually the largest in the case, it is critical to the success of a debtor's rehabilitation that the information be accurate and timely. By requiring the loan history in a standardized format, challenges that are incorrect but that are filed because of the inadequacy of current proofs of claim can be avoided.

The calculations that are required to arrive at the statutorily mandated result are too complex to expect proofs of claim and mortgage payment changes to be correct without providing a form that incorporates the appropriate methodology. One of the more difficult concepts is the proper calculation of the total amount of the principal and interest cure claim. In the form, the principal and interest cure amount is calculated by determining the contractual principal balance on the mortgage as if the debtor had made all required principal and interest payments in accordance with the terms of the mortgage contract. The form separately calculates the actual principal balance based on the lender's actual application of the funds. The difference between these two amounts is the amount required to cure a principal and interest payment default. These calculations are done automatically. Of course, the lender's application of the funds may be challenged by the debtor, but the form will allow that challenge to be made when it is appropriate. Similar calculations are required for mortgage payment changes.

Separate portions of the calculations are provided for escrow accounting. Those calculations determine the escrow balance as of the petition date and also calculate the required RESPA¹ reserve amount. See *Campbell v Countrywide*, --F.3d -- 2008 WL 4542843 (5th Cir. Oct. 13, 2008) (holding that pre-petition escrow deposits that were contractually collectible by the lender constitute a pre-petition claim). Although different districts may allow for different treatment of these pre-petition claims in plans, the form will allow a uniform method of documenting the amounts that must be treated.

The forms are divided into two pages. Page 1 is a general input form. Section 1 is for data regarding the case. Section 2 is for data regarding the mortgage contract itself (i.e., the original amount of the loan, the date of the loan, and the last date on which payments are due). Section 3 requires the lender to forecast escrow disbursements. These forecasts are necessary to do a RESPA cushion calculation on the amount of escrow reserves that must be established. Section 4 is for a signature.

Page 2 is a loan history form. It is intended to draw information from a data base or to allow manual input from a loan history. Our experience is that loan histories are usually difficult to understand. This form takes all of the data for each month of the loan. The number of months that will appear will be the number of months that have lapsed from the origination date of the loan (data taken from page 1) and the petition date (also taken from page 1). The background calculations on page 2 are imbedded in the forms and therefore not visible to the user. The

¹ See 12 U.S.C. § 2601 *et seq.*

Letter to Peter G. McCabe
From Judges Isgur, Magner and Bohm
Page 4

calculations can be reviewed by the Committee and public with some modest instructions. Most importantly, the loan history captures all of the economic data and is in a readable form.

Although we assume that a professional forms designer will redesign the form, you may wish to test the form by starting on page 1 and tabbing through the sections. When page 1 is completed, please go to page 2 and also tab through the sections.

Copies of the forms are attached with sample data in PDF for printing and review. A working copy of the forms is also attached. We also attach a brief set of instructions on use of the forms and a set of forms with accessible formulae.

We urge the Committee to adopt standard forms for home mortgage calculations in chapter 13 bankruptcy cases. If the Committee has any questions about anything set forth in this letter, please do not hesitate to contact us. We would be happy to discuss any issue with you.

Sincerely,



Marvin Isgur
Marvin_Isgur@txs.uscourts.gov
713-250-5635

Elizabeth Magner (by permission)

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- c. Hon Lec H. Rosenthal
Hon Laura Taylor Swain
Hon. Eugene Wedoff
Prof S. Elizabeth Gibson

IN THE UNITED STATES BANKRUPTCY COURT
Southern District of Texas—Houston Division

In re: **John and Mary Debtor**

Case No **08-99111**

Debtor(s)

Official Form

Statement by Lender of Calculation of Amount Required to Cure Default
On Claim Secured Solely by a Security Interest On the Debtor's Principal Residence

Section 1 Background Information

1 A Lender name **Acme Mortgage and Loan**
 B Lender address to which notices should be sent **111 Main Street, Houston, Texas 77002**
 C Lender address to which payments should be sent **P.O. Box 1234, Nashville, TN 32222**
 D Last four digits of any number by which creditor identifies debtor **9911**
 E Debtor's Name **John and Mary Debtor**
 F Case Number **08-99111**
 G Court **Southern District of Texas—Houston Division**
 H Petition Date
 Month **10** Day **10** Year **2008** **10/1/2008**

Section 2 Loan Information

2 A Original Amount of Loan **\$150,000.00**
 B Original Date of Loan
 Month **8** Day **15** Year **2007** **8/15/2007**
 C Escrow deposit at closing **\$800.00**
 D Last date of each month on which payment can be made without penalty **10/1**
 E Amount of all reimburseable charges (excluding any escrow items listed in Section 3 below) incurred by lender prior to petition date, but not listed on the attached loan history. Attach a complete schedule **\$250.00**
 F **PRINCIPAL AND INTEREST ARREARS** **\$5,421.15**
(The difference between the contractual principal balance and the actual principal balance as of the petition date)

Section 3. Escrow Information

FOR LAST ESCROW DISBURSEMENTS BETWEEN 10/3/2008 AND 12/2/2009

Date of Forecast Disbursement	Amount	Purpose	Date for Reserve Purposes	# of Expected Deposits	Required Reserve at Petition Date	Amount Due Within 1 Year
A 10/15/2008	\$800.00	Insurance	10/16/2008	0	\$800.00	\$800.00
B 11/15/2008	\$2,500.00	Ad Valorem Taxes	11/16/2008	1	\$2,291.67	\$2,500.00
C 1/15/2009	\$800.00	Insurance	1/16/2009	6	\$400.00	\$800.00
D						
E						
F						
G						
H						
I						
J						
K						
L						
M						
TOTAL					\$3,491.67	\$4,100.00

N Required Escrow Reserves at Petition Date **\$3,491.67**
 O Balance in Escrow Account at Petition Date **-\$300.00**
 P Escrow Deficiency at Petition Date **\$3,791.67**

Section 4 Future Payment Information

4 A Monthly principal and interest payment per contract **\$1,100.00**
 B If interest rate varies, next mortgage payment change date (or n/a) **11/15/2008**
 C Monthly escrow deposit **\$341.67**
 D Total monthly payment **\$1,441.67**
 E Lender address to which payments should be sent **P.O. Box 1234, Nashville, TN 32222**
THE MORTGAGE PAYMENT AMOUNT MAY NOT BE CHANGED UNLESS A TIMELY NOTICE OF CHANGE IS FILED

Section 5. Signature Information

Date signed **11/13/08** Signature

Printed Name and Title of Signer **John Doe, Vice President**

A COMPLETE LOAN HISTORY, IN THE OFFICIAL FORM, MUST BE ATTACHED

(Click on Green Tab Below to Complete Loan History)

Period	Beginning of pay period	End of pay period	Contract Interest Rate on Loan This Period	Contractuality Due Principal and Interest this Period	Total Payments Received from Borrower this Period	Payment Applied to Escrow	Legal Fees Charged to account	Appraisal Fees charged to account	Late fees charged to account	Inspection fees charged to account	Other Charges against account (attach detail)	Interest charged to account	Applied (advanced) to principal	Escrow Disbursement for Taxes	Escrow Disbursement for Insurance	Other Disbursements (attach detail)	Contractual Principal Balance if all Payments Had Been Made per Contract	Actual Principal Balance	Actual Cash Balance in Escrow
1	8/15/2007	10/10/2007	7.800000%	\$1,400.00	\$1,400.00	\$1,300.00	\$1,300.00	\$80.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$149,900.00	\$149,900.00	\$1,100.00
2	10/11/2007	11/10/2007	8.000000%	\$1,400.00	\$3,140.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$998.33	\$100.67	\$1,400.00	\$1,400.00	\$1,400.00	\$148,789.33	\$148,789.33	\$1,400.00
3	11/11/2007	12/10/2007	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$998.66	\$101.34	\$1,400.00	\$1,400.00	\$1,400.00	\$148,688.00	\$148,688.00	\$1,700.00
4	12/11/2007	1/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$997.89	\$102.01	\$2,500.00	\$1,400.00	\$1,400.00	\$148,585.88	\$148,585.88	\$500.00
5	1/11/2008	2/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$997.31	\$102.69	\$1,400.00	\$1,400.00	\$1,400.00	\$148,483.29	\$148,483.29	\$700.00
6	2/11/2008	3/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$996.62	\$103.38	\$1,400.00	\$1,400.00	\$1,400.00	\$148,380.91	\$148,380.91	\$400.00
7	3/11/2008	4/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$995.93	\$104.07	\$1,400.00	\$1,400.00	\$1,400.00	\$148,285.84	\$148,285.84	\$300.00
8	4/11/2008	5/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$995.24	\$104.76	\$1,400.00	\$1,400.00	\$1,400.00	\$148,181.08	\$148,181.08	\$300.00
9	5/11/2008	6/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$994.54	\$105.44	\$1,400.00	\$1,400.00	\$1,400.00	\$148,075.62	\$148,075.62	\$300.00
10	6/11/2008	7/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$993.84	\$106.12	\$1,400.00	\$1,400.00	\$1,400.00	\$147,969.48	\$147,969.48	\$300.00
11	7/11/2008	8/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$993.14	\$106.80	\$1,400.00	\$1,400.00	\$1,400.00	\$147,862.59	\$147,862.59	\$300.00
12	8/11/2008	9/10/2008	8.000000%	\$1,400.00	\$1,400.00	\$3,300.00	\$3,300.00	\$100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$992.44	\$107.48	\$1,400.00	\$1,400.00	\$1,400.00	\$147,755.01	\$147,755.01	\$300.00
13	9/11/2008	10/3/2008	8.000000%	\$1,100.00	\$1,100.00	\$1,100.00	\$1,100.00	\$100.00	\$1,100.00	\$1,100.00	\$1,100.00	\$1,018.30	\$1,073.30	\$1,100.00	\$1,100.00	\$1,100.00	\$148,648.71	\$148,648.71	\$300.00

IN THE UNITED STATES BANKRUPTCY COURT

In re

§
§
§ Case No
§

Debtor(s)

Official Form
Statement by Lender of Calculation of Amount Required to Cure Default
On Claim Secured Solely by a Security Interest On the Debtor's Principal Residence

Section 1 Background Information

1 A Lender name _____
 B Lender address to which notices should be sent _____
 C Lender address to which payments should be sent _____
 D Last four digits of any number by which creditor identifies debtor _____
 E Debtor's Name _____
 F Case Number _____
 G Court _____
 H Petition Date

Month	Day	Year	
1	1	2000	1/1/2000

Section 2 Loan Information

2 A Original Amount of Loan _____
 B Original Date of Loan

Month	Day	Year	
1	1	2000	1/1/2000

C Escrow deposit at closing \$0 00
 D Last date of each month on which payment can be made without penalty 10
 E Amount of all reimbursable charges (excluding any escrow items listed in Section 3 below) incurred by lender prior to petition date, but not listed on the attached loan history. Attach a complete schedule \$0 00
 F **PRINCIPAL AND INTEREST ARREARS** \$0 00
(The difference between the contractual principal balance and the actual principal balance as of the petition date.)

Section 3 Escrow Information

FORECAST ESCROW DISBURSEMENTS BETWEEN 1/1/2000 AND 3/1/2001									
	Date of Forecast Disbursement			Amount	Purpose	Date for Reserve Purposes	# of Expected Deposits	Required Reserve at Petition Date	Amounts Due Within 1 Year
	Month	Day	Year						
A									
B									
C									
D									
E									
F									
G									
H									
I									
J									
K									
L									
M									
TOTAL								\$0 00	\$0 00

N Required Escrow Reserves at Petition Date \$0 00
 O Balance in Escrow Account at Petition Date \$0 00
 P Escrow Deficiency at Petition Date \$0 00

Section 4 Future Payment Information

4 A Monthly principal and interest payment per contract _____
 B If interest rate varies next mortgage payment change date (or n/a) _____ n/a
 C Monthly escrow deposit \$0 00
 D Total monthly payment \$0 00
 E Lender address to which payments should be sent _____
THE MORTGAGE PAYMENT AMOUNT MAY NOT BE CHANGED UNLESS A TIMELY NOTICE OF CHANGE IS FILED

Section 5 Signature Information

Date signed _____ Signature _____
 Printed Name and Title of Signer _____

A COMPLETE LOAN HISTORY, IN THE OFFICIAL FORM, MUST BE ATTACHED

Instructions for Completion of Proof of Claim Addendum

- 1 Download the Excel file to your computer and save the file before using it
- 2 To move through the areas on the form, please complete the requested information and then press TAB You need only complete the shaded areas Other areas of the form will be automatically completed by the computer
- 3 Complete page one of the form first
- 4 When completing section 3, please include only forecast disbursements for the requested time period set forth on the form. Do NOT include a RESPA reserve. The form will calculate a RESPA reserve. Include all forecast escrow disbursements, whether or not cash is available in the escrow account.
- 5 When page one is complete, click on the green Excel worksheet tab at the bottom of the page The tab reads "Loan History". Clicking on this tab will take you to page 2.
- 6 Page 2 is a loan history. The date ranges on the loan history are automatically created based on the information completed on page 1. When placing data onto the loan history, it should be placed in the time period in which the transaction actually occurred. For example, if a payment was received by the lender on April 15, but applied by the lender to a payment due on February 1, the payment should be shown only in the April 15 date range and should not be shown on February 1 The entire loan history must be completed from the commencement of the loan If no data is placed in a field, the computer will treat the amount as \$0.00 Accordingly, you need not place \$0 00 in a field if there was no activity
- 7 When completing the loan history, the form will require you to state the initial interest rate and the initial contractual payment amount. For convenience, the computer will assume that these amounts do not change. However, you should change these amounts as appropriate to reflect the contracts between the parties
- 8 The data from page 2 is used by the computer to complete the calculations on page 1.
- 9 When the loan history is completed, click on the red Excel worksheet tab at the bottom of the page. The tab reads "Cover Sheet" Clicking on this tab will take you to page 1.
- 10 The form is now complete You may print the form or review it on your screen Print page 1 from page 1. Print page 2 by clicking on the green tab and then printing.

IN THE UNITED STATES BANKRUPTCY COURT
Southern District of Texas—Houston Division

In re John and Mary Debtor
Debtor(s)

Case No 08-99111

Official Form
Statement by Lender of Mortgage Payment Change
On Claim Secured Solely by a Security Interest On the Debtor's Principal Residence

Section 1 Background Information

1 A Lender name Acme Mortgage and Loan
B Lender address to which notices should be sent 111 Main Street, Houston, Texas 77002
C Lender address to which payments should be sent P.O. Box 1234, Nashville, TN 37222
D Last four digits of any number by which creditor identifies debtor 9911
E Debtor's Name John and Mary Debtor
F Case Number 08-99111
G Court Southern District of Texas—Houston Division

Section 2 Loan Information

2 A Original Amount of Loan \$150,000.00
B If mortgage payment change is solely based on an escrow change enter the interest rate and monthly payment
C Original Date of Loan Month: 12, Day: 15, Year: 2007
D Effective Date of Proposed Payment Change Month: 02, Day: 01, Year: 2009
E Date through which the attached loan history is current Month: 12, Day: 31, Year: 2008
F Escrow deposit at closing \$800.00
G Last date of each month on which payment can be made without penalty 10
H Reference rate contained in loan for resetting of payment amount LIBOR + 3.2500%
I Reference date contained in loan documents for resetting payment amount Every 5 months starting 2/1/2008
J Add on Percentage contained in loan documents for resetting payment amount 3.7500%
K Number of months of amortization for payment reset 360
L Loan balance at reset date \$148,317.48
M New monthly principal payment \$1,059.31

Section 3 Escrow Information

FORECAST ESCROW DISBURSEMENTS BETWEEN 12/31/2008 AND 2/1/2010								
Date of Escrow Disbursement	Amount	Purpose	Date for Reserve Purposes	# of Expected Deposits	Required Reserve at Reset Date	Arrears Due Within One Year		
								Month
12/31/2008	\$2,300.00	At Year-End Transfer	11/6/2008	0	\$2,300.00	\$1,100.00		
1/15/2009	\$2,300.00	Insurance	4/16/2009	3	\$400.00	\$400.00		
2/15/2009	\$2,300.00	Insurance	10/16/2009	9	\$200.00	\$100.00		
TOTAL							\$3,300.00	\$4,100.00

N Required Escrow Reserves at 12/31/2008 \$3,300.00
O Balance in Escrow Account at 12/31/2008 80.00
P Escrow Deficiency at 12/31/2008 \$3,300.00
Q Initial escrow arrears payable through plan \$3,751.57
R Escrow arrears plan payments received as of 12/31/2008 \$500.00
S Balance in escrow account adjusted for amount of unpaid, prepetition arrears \$3,291.67
T Monthly Escrow Deposit \$342.36
U TOTAL MONTHLY PAYMENT \$1,401.67
Lender address to which payment should be sent P.O. Box 1234, Nashville, TN 37222

Section 4 Signature Information

Date signed 12/01/08; Signature
Printed Name and Title of Signer

A COMPLETE LOAN HISTORY, IN THE OFFICIAL FORM, MUST BE ATTACHED

Period	Beginnig of pay period	End of pay period	Contract Interest Rate on Loan This Period	Contractually Due Principal and Interest this Period	Total Payments Received this Period	Escrow amounts of petition date	Payment Applied to Escrow Arrears	Payment Applied to Escrow	Legal Fees Charged to account	Appraisal Fees charged to account	Late fees charged to account	Inspection fees charged to account	Other Charges against account (attach detail)	Interest charged to account	Applied (advanced) to principal	Escrow Disbursements for Taxes	Escrow Disbursements for Insurance	Other Disbursements (attach detail)	Contractual Balance if all Payments Had Been Made per Contract	Actual Cash Balance in Escrow
1	01/15/2007	01/15/2007	8.00000%	\$1,100.00	\$1,400.00	\$1,791.67	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,900.00	\$1,49,900.00
2	01/15/2007	11/15/2007	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,799.33	\$1,49,799.33
3	11/15/2007	11/15/2007	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,698.00	\$1,49,698.00
4	12/15/2007	11/15/2008	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,595.98	\$1,49,595.98
5	11/15/2008	2/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,493.29	\$1,49,493.29
6	2/15/2009	3/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,389.91	\$1,49,389.91
7	3/15/2009	4/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,285.84	\$1,49,285.84
8	4/15/2009	5/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,181.08	\$1,49,181.08
9	5/15/2009	6/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,49,075.62	\$1,49,075.62
10	6/15/2009	7/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,969.46	\$1,48,969.46
11	7/15/2009	8/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,862.58	\$1,48,862.58
12	8/15/2009	9/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,755.01	\$1,48,755.01
13	9/15/2009	10/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,646.71	\$1,48,646.71
14	10/15/2009	11/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,537.69	\$1,48,537.69
15	11/15/2009	12/15/2009	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,427.94	\$1,48,427.94
16	12/15/2009	1/15/2010	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,317.48	\$1,48,317.48
17	1/15/2010	2/15/2010	8.00000%	\$1,100.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,000.00	\$1,48,206.24	\$1,48,206.24

IN THE UNITED STATES BANKRUPTCY COURT

In re _____
 Debtor(s) _____ Case No _____

Official Form _____
 Statement by Lender of Mortgage Payment Change
 On Claim Secured Solely by a Security Interest On the Debtor's Principal Residence

Section 1 Background Information

- 1 A Lender name _____
- B Lender address to which notices should be sent _____
- C Lender address to which payments should be sent _____
- D Last four digits of any number by which creditor identifies debtor _____
- E Debtor's Name _____
- F Case Number _____
- G Court _____

Section 2 Loan Information

- 2 A Original Amount of Loan _____
- B If mortgage payment change is solely based on an escrow change, enter the interest rate and monthly payment _____
- C Original Date of Loan _____
- D Effective Date of Proposed Payment Change _____
- E Date through which the attached loan history is current _____
- F Escrow deposit at closing _____
- G Last date of each month on which payment can be made without penalty _____

Rate	Payment

Month	Day	Year	
12	1	2000	12/1/2000
Month	Day	Year	
12	1	2000	12/1/2000
Month	Day	Year	
12	1	2000	12/1/2000

Narrative Description of Method of selecting Rate or Date summarized from Loan Documents	Amount
	0.0000%
	12/1/2000
	0.0000%
	1
	\$0.00
	\$0.00

- H Reference rate contained in loan for resetting of payment amount _____
- I Reference date contained in loan documents for resetting payment amount _____
- J Add on Percentage contained in loan documents for resetting payment amount _____
- K Number of months of amortization for payment reset _____
- L Loan balance at reset date _____
- M New monthly principal payment _____

Section 3 Escrow Information

FORECAST FROM DISBURSEMENTS BE TWEEN 12/1/2000 AND 1/31/2002								
Date of Forecast Disbursement			Amount	Purpose	Date for Reserve Purpose	# of Expected Deposits	Required Reserve at Resd Date	Amount Due Within One Year
Month	Day	Year						
A								
B								
C								
D								
E								
F								
G								
H								
I								
J								
K								
L								
M								
TOTAL							\$0.00	\$0.00

- N Required Escrow Reserve as of 12/1/2000 \$0.00
- O Balance in Escrow Account as of 12/1/2000 \$0.00
- P Escrow Deficiency as of 12/1/2000 \$0.00
- Q Initial escrow arrears payable through plan \$0.00
- R Escrow arrears plan payments received as of 12/1/2000 \$0.00
- S Balance in escrow account adjusted for amount of unpaid prepetition arrears \$0.00
- T Monthly Escrow Deposit \$0.00
- TOTAL MONTHLY PAYMENT \$0.00
- U Lender address to which payment should be sent _____

Section 4 Signature Information

Date signed _____ Signature _____
 Printed Name and Title of Signer _____

A COMPLETE LOAN HISTORY, IN THE OFFICIAL FORM, MUST BE ATTACHED

IN THE UNITED STATES BANKRUPTCY COURT

In re
Debtor(s).

§
§ Case No
§

Official Form
Statement by Lender of Calculation of Amount Required to Cure Default
On Claim Secured Solely by a Security Interest On the Debtor's Principal Residence

Section 1 Background Information

1 A Lender name _____
 B Lender address to which notices should be sent _____
 C Lender address to which payments should be sent _____
 D Last four digits of any number by which creditor identifies debtor _____
 E Debtor's Name _____
 F Case Number _____
 G Court _____
 H Petition Date _____

Month	Day	Year	
1	1	2000	1/1/2000

Section 2 Loan Information

2 A Original Amount of Loan _____
 B Original Date of Loan _____

Month	Day	Year	
1	1	2000	1/1/2000

C Escrow deposit at closing \$0 00
 D Last date of each month on which payment can be made without penalty TO _____
 E Amount of all reimburseable charges (excluding any escrow items listed in Section 3 below) incurred by lender prior to petition date, but not listed on the attached loan history Attach a complete schedule \$0 00
 F **PRINCIPAL AND INTEREST ARREARS** \$0 00
(The difference between the contractual principal balance and the actual principal balance as of the petition date)

Section 3 Escrow Information

FORECAST ESCROW DISBURSEMENTS BETWEEN 1/1/2000 AND 3/1/2001										
	Date of Forecast Disbursement			Amount	Purpose	Date for Reserve Purposes	# of Expected Deposits	Required Reserves at Petition Date	Amounts Due Within 1 Year	
	Month	Day	Year							
A										
B										
C										
D										
E										
F										
G										
H										
I										
J										
K										
L										
M										
	TOTAL								\$0 00	\$0 00

N Required Escrow Reserves at Petition Date \$0 00
 O Balance in Escrow Account at Petition Date \$0 00
 P Escrow Deficiency at Petition Date \$0 00

Section 4 Future Payment Information

4 A Monthly principal and interest payment per contract _____
 B If interest rate varies, next mortgage payment change date (or n/a) _____ n/a
 C Monthly escrow deposit \$0 00
 D Total monthly payment \$0 00
 E Lender address to which payments should be sent _____
THE MORTGAGE PAYMENT AMOUNT MAY NOT BE CHANGED UNLESS A TIMELY NOTICE OF CHANGE IS FILED

Section 5 Signature Information

Date signed _____ Signature _____
 Printed Name and Title of Signor _____

A COMPLETE LOAN HISTORY, IN THE OFFICIAL FORM, MUST BE ATTACHED

Instructions for Completion of Notice of Mortgage Payment Change

- 1 Download the Excel file to your computer and save the file before using it.
- 2 To move through the areas on the form, please complete the requested information and then press TAB. You need only complete the shaded areas. Other areas of the form will be automatically completed by the computer.
- 3 Complete page one of the form first
- 4 When completing section 2, please complete section 2B only if the payment change is based solely on an escrow payment adjustment. If you complete section 2B, the form will instruct you NOT to complete sections H and I.
- 5 When completing section 3, please include only forecast disbursements for the requested time period set forth on the form. Do NOT include a RESPA reserve. The form will calculate a RESPA reserve. Include all forecast escrow disbursements, whether or not cash is available in the escrow account
- 6 When page one is complete, click on the green Excel worksheet tab at the bottom of the page. The tab reads "Loan History". Clicking on this tab will take you to page 2
- 7 Page 2 is a loan history. The date ranges on the loan history are automatically created based on the information completed on page 1. When placing data onto the loan history, it should be placed in the time period in which the transaction actually occurred. For example, if a payment was received by the lender on April 15, but applied by the lender to a payment due on February 1, the payment should be shown only in the April 15 date range and should not be shown on February 1. The entire loan history must be completed from the commencement of the loan. If no data is placed in a field, the computer will treat the amount as \$0.00. Accordingly, you need not place \$0.00 in a field if there was no activity.
- 8 When completing the loan history, the form will require you to state the initial interest rate and the initial contractual payment amount. For convenience, the computer will assume that these amounts do not change. However, you should change these amounts as appropriate to reflect the contracts between the parties.
- 9 The data from page 2 is used by the computer to complete the calculations on page 1.
- 10 When the loan history is completed, click on the red Excel worksheet tab at the bottom of the page. The tab reads "Cover Sheet". Clicking on this tab will take you to page 1.
- 11 The form is now complete. You may print the form or review it on your screen. Print page 1 from page 1. Print page 2 by clicking on the green tab and then printing

IN THE UNITED STATES BANKRUPTCY COURT

In re

Case No

Debtor(s)

Official Form

Statement by Lender of Mortgage Payment Change
On Claim Secured Solely by a Security Interest On the Debtor's Principal Residence

Section 1 Background Information

1

A Lender name _____

B Lender address to which notices should be sent _____

C Lender address to which payments should be sent _____

D Last four digits of any number by which creditor identifies debtor _____

E Debtor's Name _____

F Case Number _____

G Court _____

Section 2 Loan Information

2

A Original Amount of Loan _____

B If mortgage payment change is solely based on an escrow change enter the interest rate and monthly payment

Rate	Payment

C Original Date of Loan

Month	Day	Year
12	1	2000
12	1	2000
12	1	2000

12/1/2000

D Effective Date of Proposed Payment Change

Month	Day	Year
12	1	2000
12	1	2000
12	1	2000

12/1/2000

F Date through which the attached loan history is current

Month	Day	Year
12	1	2000
12	1	2000
12	1	2000

12/1/2000

I Escrow deposit at closing _____

G Last date of each month on which payment can be made without penalty _____

H Reference rate contained in loan for resetting of payment amount

I Reference date contained in loan documents for resetting payment amount

J Add on Percentage contained in loan documents for resetting payment amount

K Number of months of amortization for payment reset

L Loan balance at reset date

M New monthly principal payment

Narrative Description of Method of Selecting Rate or Date summarized from Loan Documents		Amount
		0.0000%
		12/1/2000
		0.0000%
		1
		\$0.00
		NI (H)

Section 3 Escrow Information

FUTURE ESCROW DISBURSEMENTS BETWEEN 12/1/2000 AND 1/31/2002									
Date of Escrow Disbursement				Amount	Purpose	Date for Review Purpose	# of Expected Deposits	Required Review Date	Amount Due Within One Year
	Month	Day	Year						
A									
B									
C									
D									
E									
F									
G									
H									
I									
J									
K									
L									
M									
TOTAL								\$0.00	\$0.00

N Required Escrow Reserve at 12/1/2000 \$0.00

O Balance in Escrow Account at 12/1/2000 \$0.00

P Escrow Disbursements at 12/1/2000 \$0.00

Q Initial escrow arrears payable through plan \$0.00

R Escrow arrears plan payments received as of 12/1/2000 \$0.00

S Balance in escrow account adjusted for amount of unpaid prepetition arrears \$0.00

T Monthly Escrow Deposit \$0.00

U TOTAL MONTHLY PAYMENT \$0.00

U Lender address to which payment should be sent _____

Section 4 Signature Information

Date signed _____ Signature _____

Printed Name and Title of Signer _____

A COMPLETE LOAN HISTORY, IN THE OFFICIAL FORM, MUST BE ATTACHED

Item 19 will be an oral report.

Item 20 will be an oral report.



JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Deputy Director

WASHINGTON, D.C. 20544

NOEL J. AUGUSTYN
Assistant Director

Office of Court Administration

February 23, 2009

MEMORANDUM

To: Clerks, United States Courts

From: Noel J. Augustyn *Noel J. Augustyn*

RE: PERSONAL DATA IDENTIFIERS (INFORMATION)

It has been a decade since the Judicial Conference began consideration of – and subsequently formulated – a privacy policy for electronic case files, and over a year since the enactment of Federal Rules of Practice and Procedure requiring that certain personal data identifiers not be included in court filings.¹ These policies and rules have been integral to the success of the judiciary's electronic public access program. Adherence to these policies and rules by litigants and attorneys is essential to ensure that personal identifier information is appropriately redacted from court filings. For this reason, two Judicial Conference committees are reviewing the rules and their implementation. In addition, the Administrative Office is taking this opportunity to re-emphasize the responsibility of filers to follow the redaction rules. This memorandum provides courts with additional information on these issues.

In 2001, the Judicial Conference adopted a policy on privacy and public access to electronic case files that allowed internet-based access to civil and bankruptcy case filings, as long as certain personal information (i.e., Social Security numbers, financial account numbers, names of minor children, and dates of birth) had been redacted by the attorney or party filing the document. Following a pilot program and a Federal Judicial Center study on criminal case files, the Conference approved electronic access to criminal

¹ See Fed. R. App. P. 25(a), Fed. R. Bankr. P. 9037, Fed. R. Civ. P. 5.2, and Fed. R. Crim. P. 49.1.

case files, with similar redaction requirements.² The redaction requirements of the Conference's privacy policy were largely incorporated into the Federal Rules of Practice and Procedure, effective December 1, 2007.

As noted above, a key tenet of these rules (as well as the precursor Conference policy) is that the redaction of personal identifiers lies with the filing party. The Advisory Committee Note accompanying Federal Rule of Civil Procedure 5.2 states: "The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing." Nonetheless, the Judicial Conference and the Administrative Office are obviously interested in ensuring that these privacy rules are adequate and appropriately followed.

To this end, the Rules Committee has established a subcommittee (comprised of members of both the Rules Committee and the Committee on Court Administration and Case Management, which initially developed the privacy policy), to revisit the privacy rules, examine how they have worked in practice, and address new issues that have arisen since their implementation.

In addition, the Administrative Office is taking a number of steps to ensure that the privacy protections established in the federal rules can be more easily followed. First, we plan to modify the current CM/ECF system to include a notice reminding litigants of their obligation under the law to redact personal identifier information. Second, the Administrative Office is encouraging courts to stress the rules' redaction requirements with those who file in the court. Options for informing the filers include notifications on CM/ECF log-in screens, and through other communications vehicles, such as court newsletters, listserves, or Continuing Legal Education programs. Third, we are asking individual courts to share information on actions they have taken to ensure compliance with the privacy rules, including promulgation of local rules or standing orders, modifications to local CM/ECF applications, and outreach efforts to the public and bar informing them of the redaction requirements. This type of information can assist us as well as the Rules subcommittee to be better informed of the scope of any non-compliance. Please provide this information to Michel Ishakian, Chief of the Electronic Public Access Program at (202) 502-1500 or via email at Michel Ishakian/DCA/AO/USCOURTS. This review of the rules cannot take place without the courts' assistance, and I thank you in advance for your assistance in this area.

² In addition to the items to be redacted in the civil and bankruptcy case files, the criminal case policy added another: home addresses are to be redacted to the city and state.

Personal Data Identifiers

Page 3

- cc. Chief Judges, United States Courts
Circuit Executives

Michael Fritz/ALMBA/11/USCOURTS
02/13/2009 11:51 AM

To
Rules Support/DCA/AO/USCOURTS@USCOURTS, Peter
McCabe/DCA/AO/USCOURTS@USCOURTS, Mary
Fritsche/DCA/AO/USCOURTS@USCOURTS
cc

Subject
Fw: Suggestion on Missing Information

Mary,

As I am looking at both Ch 7 Means Test and Ch 11 Adequate Protection/Cash Collateral issues I see that there is some information missing from the current schedules. It would help Judges, the BA/UST and creditors to make better decisions if the debtors had to disclose the following on all secured debt:

- 1) Interest Rate,
- 2) Contract Payment Amount,
- 3) Remaining length of the note.

My suggestions would be to request that information on Schedule D or on the Statement of Intent.

Michael A. Fritz, Sr.
Bankruptcy Attorney
Bankruptcy Administrator - Middle District of Alabama
334.954.3908

Bankruptcy Rules Tracking Docket (By Rule or Form Number) 2/25/09

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
<p>Rules 1004.2 (new), 5009, 5012 (new), 9001 Chapter 15 rules</p>	<p>05-BK-B Judge Samuel Bufford 1/20/06 Committee proposal</p>	<p>3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/06 - Subcommittee discussed 6/06 - Subcommittee approved revised amendments 9/06 - Committee approved Rules 1004.2, 5009, 9001 for publication 9/06 - Committee approved Rule 5012 for publication as revision of amendment published 08/06 3/07 - Publication deferred for further study 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 2/08 - Subcommittee discussed 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Rule 1007(a)(2) Creditors list in involuntary case</p>	<p>06-BK-057 Chief Deputy Clerk Margaret Grammar Gay</p>	<p>3/07 - Referred to Subcommittee on Business Matters 6/07 - Subcommittee discussed 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 6/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>

<p>Rules 1007(a), (c),(f),(h), 1011(b), 1019(5), 1020(a), 2002(a),(b),(o), (q), 2003(a),(d), 2006(c), 2007(b), 2007.2(a), 2008, 2015(a),(d), 2015.1(a),(b), 2015.2, 2015.3(b),(e), 2016(b),(c), 3001(e), 3015(b),(g), 3017(a),(f), 3019(b), 3020(e), 4001(a),(b),(c), 4002(b), 4004(a), 6003, 6004(b), (d),(g),(h), 6006(d), 6007(a), 7004(e), 7012(a), 8001(f), 8002(a),(b),(c), 8003(a),(c), 8006, 8009(a), 8015, 8017(a), 9006(d), 9027(e),(g), 9033(b),(c), Change deadlines of less than 30 days to multiples of 7</p>	<p>Committee proposal (Standing Committee's Time Computation Committee)</p>	<p>9/06 - Committee discussed time computation project, small groups to review deadlines in bankruptcy rules 12/06 - Ad hoc group of bankruptcy judges approved 3/07 - Committee approved for publication as revised 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee approved 6/08 - Standing Committee approved 9/09 - Judicial Conference Approved 3/09 - Related statutory changes have been transmitted to Congress</p>	<p>12/1/09</p>
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<p>Rules 1007(c), 4004, 5009 Additional notice that case may be closed without discharge</p>	<p>Committee proposal</p>	<p>3/07 - Committee discussed, referred to Subcommittee on Consumer Matters 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Interim Rule 1007-1, Official Form 22A Implement National Guard and Reservists Debt Relief Act of 2008</p>	<p>Committee Proposal</p>	<p>11/08 - Committee approved by email ballot 11/08 - Standing Committee approved 11/08 - Executive Committee approved on behalf of Judicial Conference</p>	<p>12/19/08</p>
<p>Rules 1014, 1015</p>	<p>Richard Broude</p>	<p>2/08 - Subcommittee on Technology and Cross Border Insolvency considered 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Rule 1017(e) Clarify meaning of “the date of the first meeting of creditors” and applicability of Rule 1017(e) deadline to U.S. trustees</p>	<p>Mark Redmiles for EOUST</p>	<p>10/08 - Committee discussed, referred to Subcommittee on Consumer Matters 12/08 - Withdrawn</p>	

<p>Rules 1017(g) (new), 1019(6) Applications for payment of administrative expenses</p>	<p>Judge Eugene Wedoff Attorney Philip Martino</p>	<p>10/08 - Committee discussed, referred to Subcommittee on Business Matters 12/08 - Subcommittee considered 3/09 - Committee agenda</p>	
<p>Rule 1018 Is injunctive relief under §§ 1519(e), 1521(e) governed by Rule 7065?</p>	<p>05-BR-037 Insolvency Law Committee of the Business Law Section of State Bar of California</p>	<p>3/07 - Referred to Subcommittee on Technology and Cross Border Insolvency 6/07 - Subcommittee considered 9/07 - Committee considered 2/08 - Subcommittee considered 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Rule 1019(2) New filing period for objection to exemptions in converted case</p>	<p>Judge Dennis Montali 06-BK-054, Judge Paul Mannes 07-BK-C</p>	<p>6/07 - Subcommittee on Consumer Matters discussed 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Rule 2003 Procedure for holding open §341 meetings to give chapter 13 debtors more time to file tax returns</p>	<p>Judge Keith Lundin 08-BK-L</p>	<p>1/09 - Subcommittee on Consumer Matters discussed 3/09 - Committee agenda</p>	

<p>Rule 2016(c) Conform to amendment to § 110(h)</p>	<p>Committee proposal (technical amendment)</p>	<p>9/07 - Committee approved 10/07 - Considered by Style Subcommittee 2/08 - Considered by Consumer Subcommittee 3/08 - Committee approved revised amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved</p>	<p>12/1/09</p>
<p>Rule 2019 Repeal the rule as unnecessary</p>	<p>Loan Syndication and Trading Association, Securities Industry and Financial Markets Association 07-BK-G</p>	<p>3/08 - Committee discussed, Chair directed the Assistant Reporter to prepare a review of the case law on Rule 2019 10/08 - Committee discussed, referred to Subcommittee on Business Matters 12/08, 2/09 - Subcommittee considered 3/09 - Committee agenda</p>	<p>12/1/11</p>
<p>Rules 3001(c), 3002.1 (new) Disclosure of postpetition mortgage fees</p>	<p>Committee proposal</p>	<p>5/08 - Subcommittee on Consumer Matters discussed 5/08 - Subcommittee on Consumer Matters discussed 10/08 - Committee considered 12/08 - Subcommittee on Consumer Matters considered 3/09 - Committee agenda</p>	
<p>Rule 3001 Facilitate identification of stale claims and inadequately documented claims filed after bulk transfer of consumer debts</p>	<p>Judge A. Thomas Small 08-BK-J</p>	<p>1/09 - Subcommittee on Consumer Matters discussed 3/09 - Committee agenda</p>	

<p>Rule 3003 Require chapter 11 debtors to notice creditors scheduled as disputed, contingent, or unliquidated</p>	<p>Judge Paul Mannes 08-BK-C</p>	<p>10/08 - Committee considered, no further action</p>	
<p>Rule 4001(d)(2), (3) Additional time computation changes</p>	<p>Chair</p>	<p>3/09 - Committee agenda</p>	
<p>Rules 4004, 7001 Application of sections 1328(f), 727(a)(8),(9); objection to discharge by motion</p>	<p>Judge Neil Olack Committee proposal</p>	<p>9/06 - Referred to Subcommittee on Consumer Matters 12/06 - Subcommittee considered 2/07 - Subcommittee considered 3/07 - Committee considered, referred to Subcommittee 6/07 - Subcommittee considered 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Rule 4004(c) Delay discharge until appellate review is no longer available</p>	<p>Mark Redmiles for EOUST</p>	<p>10/08 - Committee discussed, referred to Subcommittee on Consumer Matters 12/08 - Withdrawn</p>	

<p>Rules 4004(d), 7001(4) Classification of proceedings to object to or revoke discharge as adversary proceedings; motions to revoke in gap period</p>	<p>Judge Frank Easterbrook 08-BK-E Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008)</p>	<p>10/08 - Committee considered, no further action on classification, gap period issues referred to Subcommittee on Consumer Matters 12/08, 1/09 - Subcommittee considered 3/09 - Committee agenda</p>	<p>12/1/11</p>
<p>Rule 4008(a) Requires use of Official Form coversheet</p>	<p>Committee proposal</p>	<p>4/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Considered by Consumer Subcommittee 3/08 - Committee approved 6/08 - Standing Committee approved 9/08 - Judicial Conference approved</p>	<p>12/1/09</p>
<p>Rule 5009(b) (new) Closing case without entry of discharge</p>	<p>Committee proposal</p>	<p>6/07 - Committee approved for publication, held for new Rule 5009(c) for chapter 15 cases 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>

<p>Rule 5012 (new) Communications with foreign courts</p>	<p>Interim Rule to implement BAPCPA</p>	<p>8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee deferred for further study 6/07 - Subcommittee discussed 9/07 - Included in package of chapter 15 amendments approved for publication 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment 3/09 - Committee agenda</p>	<p>12/1/10</p>
<p>Rule 6003 Issuance of orders during 20-day cooling off period</p>	<p>Bankruptcy Judges Advisory Group 08-BK-D</p>	<p>3/08 - Committee discussed 8/08 - Subcommittee on Attorney Conduct and Health Care discussed 10/08 - Committee approved for publication 1/09 - Standing Committee approved for publication</p>	
<p>Rule 6003 Start 20-day period with order for relief</p>	<p>Judge Robert Kressel 08-BK-B</p>	<p>3/08 - Committee discussed 8/08 - Subcommittee on Attorney Conduct and Health Care discussed 10/08 - Committee discussed, no further action</p>	

<p>Rules 7052, (new) 7058, 9021 Separate document requirement for judgments in an adversary proceeding or contested matter</p>	<p>04-BK- Judge David Adams Committee proposal</p>	<p>9/04 - Committee considered, referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee approved in principle for contested matters, referred to Subcommittee 9/05 - Referred to Subcommittee 3/06 - Referred to Subcommittee 7/06 - Subcommittee approved alternative amendments 9/06 - Committee approved revised amendment for publication 1/07 - Standing Committee approved in principle 3/07 - Committee approved for publication as submitted 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved</p>	<p>12/1/09</p>
<p>Rules 7052, 9015, 9023 “Decouple” time provisions in the rules from new 30-day periods in Civil Rules 50, 52, 59</p>	<p>Committee proposal</p>	<p>9/07 - Referred to Privacy, Public Access and Appeals Subcommittee 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved</p>	<p>12/1/09</p>

<p>Rules 8001 - 8020 Revise Part VIII of the rules to more closely follow the Appellate Rules</p>	<p>Eric Brunstad</p>	<p>3/08 - Referred to Privacy, Public Access and Appeals Subcommittee 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee discussed 3/09 - Open meeting of Subcommittee on Privacy, Public Access, and Appeals</p>	
<p>Rule 8006 Premature filing of appellant's designation of items in the record on appeal</p>	<p>John Shaffer</p>	<p>12/07 - Subcommittee on Privacy, Public Access, and Appeals discussed 2/08 - Considered by subcommittee 3/08 - Committee took no action with the understanding that the issue could be addressed as part of a comprehensive review of the 800 rules</p>	
<p>Rules 8007.1 (new), 9023, 9024 Indicative rulings</p>	<p>Committee proposal</p>	<p>8/08 - Subcommittee on Privacy, Public Access, and Appeals discussed 10/08 - Committee tentatively approved new Rule 8007.1 and Rule 9024 amendment for publication 3/09 - Committee agenda</p>	

<p>Rule 9006(a) Template rule for time computation</p>	<p>Standing Committee's Time Computation Committee</p>	<p>9/06 - Committee discussed time computation project, small groups to review deadlines in bankruptcy rules 12/06 - Considered by ad hoc group of Committee members 1/07 - Discussed by Standing Committee 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 3/08 - Committee approved revised amendment 6/08 - Standing Committee approved revised amendment 9/08 - Judicial Conference approved</p>	<p>12/1/09</p>
<p>Rule 9006(a)(1) Exclude weekends, holidays from computing 5 days to send creditors a copy of UST's statement on presumption of abuse</p>	<p>Bankruptcy Clerk, Southern District of New York</p>	<p>2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee recommended statutory change of 5-day period in connection with time computation amendments</p>	
<p>Rule 9006(a)(3)(A) Correct reference to Rule 6(a)(1)</p>	<p>Committee proposal</p>	<p>2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee included in time amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved</p>	

<p>Rule 9006(f) Correct cross-reference to Civil Rule 5(b)(2)</p>	<p>Bankruptcy Clerk, Middle District of North Carolina</p>	<p>2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved 9/08 - Judicial Conference approved</p>	
<p>Rule 9014(b) Permit service on debtor's attorney of a motion initiating a contested matter through CM/ECF as provided in Civil Rule 5(b)</p>	<p>Judge Vincent Zurzolo</p>	<p>10/08 - Committee considered, no further action</p>	
<p>New Rule Automatic dismissal under § 521(i)</p>	<p>06-BK-011 Judge Marvin Isgur 06-BK-020 National Association of Consumer Bankruptcy Attorneys</p>	<p>6/07 - Subcommittee on Consumer Matters discussed 9/07 - Committee discussed 2/08 - Considered by Consumer Subcommittee 3/08 - Committee discussed 10/08 - Committee discussed, Reporter to continue monitoring</p>	
<p>Which statutory bankruptcy deadlines should be amended as a result of change in computing time under Rule 9006(a)</p>	<p>Request by Time Computation Subcommittee</p>	<p>02/08 - Discussed by bankruptcy judges on the committee 3/08 - Committee recommended that 5-day deadlines in 11 U.S.C. §§ 109(h)(3)(A)(ii); 322(a); 332(a); 342(e)(2); 521(e)(3)(B); 521(i)(2); 704(b)(1)(B); 764(b), and 749(b) be changed to 7 days</p>	
<p>Review of restyled evidence rules</p>	<p>Chair</p>	<p>10/08 - Committee discussed 3/09 - Committee agenda</p>	

<p>Civil Rule 8(c) Deletion of bankruptcy discharge as affirmative defense</p>	<p>Judge Wedoff, Chair</p>	<p>4/08 - Civil Rules Committee discussed 10/08 - Committee discussed 3/09 - Committee agenda</p>	
<p>Civil Rule 56 Amendment's impact on timing of summary judgment motions in contested matters and adversary proceedings</p>	<p>Judge Wedoff</p>	<p>3/09 - Committee agenda</p>	
<p>Official Form 1 Create a new form for the petition in chapter 15 cases</p>	<p>Judge Laurel M. Isicoff 07-BK-F</p>	<p>3/08 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/08 - Subcommittee considered 8/08 - Subcommittee considered 10/08 - Committee discussed, no further action</p>	
<p>Official Form 3B Require debtors to file more detailed information or delay the court's ruling on the application</p>	<p>Judge Colleen Brown</p>	<p>10/08 - Committee discussed, no further action</p>	
<p>Official Form 6D Additional information for means test</p>	<p>Michael Fritz 09-BK-A</p>	<p>3/09 - Committee agenda</p>	
<p>Official Form 10 Add a space for the general unsecured portion of a claim</p>	<p>Eastern District of Pennsylvania Southern District of New York</p>	<p>10/08 - Committee considered, referred to Subcommittee on Forms 12/08 - Subcommittee considered 3/09 - Committee agenda</p>	

<p>Official Form 22A Use “family” size instead of “household” size for National Standard deduction on line 19A</p>	<p>Judge Eugene Wedoff 3/6/08</p>	<p>3/08 - Referred to Subcommittee on Forms 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee approved 1/09 - Standing Committee questioned wording 1/09 - Subcommittee considered 3/09 - Committee agenda</p>	<p>12/1/09</p>
<p>Official Form 22A If one joint debtor is exempt from the means test, does the other debtor have to file the means test information?</p>	<p>Judge Wedoff</p>	<p>1/09 - Subcommittee on Consumer Matters discussed 3/09 - Committee agenda</p>	
<p>Official Forms 22A, 22B, 22C revise instructions on reporting regular payments of household expenses by another person or entity</p>	<p>Judge Wedoff</p>	<p>1/09 - Subcommittee on Consumer Matters discussed 3/09 - Committee agenda</p>	
<p>Official Form 22C Deduction of business expenses by chapter 13 business debtors</p>	<p><u>Drummond v. Wiegand</u>, 386 B.R. 238 (9th Cir. BAP Apr. 3, 2008)</p>	<p>5/08 - Subcommittee on Consumer Matters discussed 10/08 - Committee discussed, no further action</p>	
<p>Official Form 22C Calculation of disposable income under § 1325(b)</p>	<p>Subcommittee proposal</p>	<p>1/09 - Subcommittee discussed 3/09 - Committee agenda</p>	

<p>Official Form 23 Revise instructions to conform to proposed amendment to Rule 1007(c)</p>		3/09 - Committee agenda	12/1/10
<p>Official Form 27 (new) Cover sheet for reaffirmation or Form 240 as Official Form</p>	Committee proposal	<p>3/06 - Designation as Official Form referred to Forms Subcommittee 8/06 - Subcommittee discussed 9/06 - Committee tabled for 1 year 1/07 - Forms Subcommittee proposed cover sheet 3/07 - Committee approved for publication 6/07 - Standing Committee approved cover sheet for publication 8/07 - Published for comment 2/08 - Forms Subcommittee considered revised form 3/08 - Committee approved revised cover sheet 6/08 - Standing Committee approved 9/08 - Judicial Conference approved cover sheet</p>	12/1/09
<p>Official Form 27 (new) Include § 524(k), Rule 4008(b) statement in Official Form</p>	<p>Bankruptcy Judges Advisory Group Committee proposal</p>	<p>6/07 - Subcommittee on Forms discussed, included in version of new Form 27 for publication 8/07 - Chair approved inclusion in Form 27 published for comment 9/07 - Committee ratified chair's decision to include</p>	12/1/09
<p>Official Forms Two new forms to address problems related to home mortgage claims</p>	Judges Isgur, Magner, and Bohm 08-BK-K	3/09 - Committee agenda	

<p>Official Forms, Director's Forms Review forms for consistency in certifications</p>	<p>Request by the Chair</p>	<p>3/08 - Request during discussion of new Form 283</p>	
<p>Official Forms Alternatives to paper-based format for forms; renumber Official Forms</p>	<p>Judge James D. Walker, Jr. 5/24/06 Judge Marvin Isgur 06-BK-011 Patricia Ketchum 6/9/07</p>	<p>9/06 - Committee will coordinate a study with the Administrative Office 8/07 - Discussion of how to organize the study 9/07 - Committee discussed and authorized chair to create group 1/08 - Organizational meeting for Forms Modernization Project 08 - Subgroups continue work</p>	
<p>Director's Form 240 Reaffirmation agreement</p>	<p>Forms Subcommittee to implement BAPCPA 06-BK-B Kelly Sweeney, CDC, CO bankruptcy court 5/5/06 Judge Paul Mannes 08-BK-A Judges Randall Newsome and Robert Kressel</p>	<p>9/05 - Referred to Forms Subcommittee 10/05 - Amended form issued by Director of Administrative Office 8/06 - Issued by Director of Administrative Office 8/06 - Subcommittee approved further revision 9/06 - Committee approved revised form 12/06 - Issued by Director of Administrative Office 1/07 - Forms Subcommittee approved amendments 2/07 - Amendments deferred 10/08 - Committee discussed, referred to Subcommittee on Forms 12/08, 1/09 - Subcommittee considered revisions 3/09 - Committee agenda</p>	

Items 24 - 28 will be oral reports.

February 2010							April 2010							May 2010						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
	1	2	3	4	5	6					1	2	3							1
7	8	9	10	11	12	13	4	5	6	7	8	9	10	2	3	4	5	6	7	8
14	15	16	17	18	19	20	11	12	13	14	15	16	17	9	10	11	12	13	14	15
21	22	23	24	25	26	27	18	19	20	21	22	23	24	16	17	18	19	20	21	22
28							25	26	27	28	29	30		23 30	24 31	25	26	27	28	29

March 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	10	11	12	13
14 Daylight Savings Begins Spring Forward	15	16	17 St. Patrick's Day	18	19	20 Spring Begins
21	22	23	24	25	26	27
28	29	30 Passover	31			
						U S Federal Holidays are in Red
February 2010	Printfree.com Main Calendars Page					April 2010

