



Federal Bar Association

February 15, 2019

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

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

Dear Ms. Womeldorf:

The Judicial Conference Advisory Committee on Bankruptcy Rules (the “Committee”) has proposed changes to Bankruptcy Rules 2002(f), 2004(c), and 8012, and has requested that the proposals be circulated to the bench, bar, and public for comment. Generally, the proposed changes are not substantive in nature and are intended to harmonize different provisions in the Rules.

The leadership of the Federal Bar Association’s (FBA) Bankruptcy Section recently considered these proposed amendments and, based upon its review, offers these formal comments. Members of the Bankruptcy Section include more than 1,000 of the nation’s leading bankruptcy lawyers, bankruptcy judges, federal lawyers, general counsel and law professors. And we are geographically diverse, with members in 41 states, the District of Columbia, and Puerto Rico. The views expressed in this submission constitute the views of the Bankruptcy Section’s Chair, board members, and officers, and not necessarily the views or opinions of all FBA Bankruptcy Section members.

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Committee seeks comment on amendments to three of the rule’s subdivisions. The proposed amendments would: (i) require giving notice of the entry of an order confirming a chapter 13 plan; (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

The Bankruptcy Section questions the necessity of a rule requiring notice of an order confirming plan and whether it would be helpful to parties in the case. For example, in the Western District of Texas, the clerk’s office is responsible for publishing the order confirming

plan through its Bankruptcy Notice Center (“BNC”). Service is accomplished by first class mail, and, where applicable, electronic mail. As such, there appears to be little benefit requiring a notice of an order confirming plan that has already been served on parties in interest. Further, who would bear the added costs of sending that notice – BNC or debtor’s counsel? While including a chapter 13 plan notice requirement in Rule 2002(f) might be viewed as harmonizing the rule between chapters 9, 11, 12, and 13, there is no readily apparent benefit in doing so. The proposal appears to add an unnecessary administrative burden in a chapter 13 case.

The costs in consumer cases are affected by the number of pleadings filed and the number of parties who must be served. The Bankruptcy Section supports an amendment to Rule 2002(h) that would allow parties not to serve creditors who fail to timely file proofs of claims in chapter 12 and 13 cases as a cost saving measure. Notably, the failure to file a timely proof of claim precludes a creditor from being paid through a chapter 12 or 13 plan. As such, there would be no reason to serve parties who are not claimants in a case. The relocation of the deadline for objecting to a chapter 13 plan in the rules simply makes the rules consistent and has no substantive effect.

The Committee discussed, but did not approve, that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (“ESI”). The Committee considered whether proportionality is appropriate for Rule 2004 examinations and what factors a bankruptcy court should consider in assessing proportionality. Further, the Committee unanimously approved seeking publication of amendments to Rule 2004(c) that would add a reference to electronically stored information to the title and first sentence of the subdivision. The Committee also unanimously approved publication of the revised subpoena provisions of Rule 2004(c), which eliminates the reference to “the court for the district in which the examination is to be held.” This change conforms the rule to the current provisions of Civil Rule 45 and Bankruptcy Rule 9016, under which a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. The Bankruptcy Section supports the proposed changes to Rule 2004(c) conforming it to Rule 45.

The Bankruptcy Section urges caution before imposing a standard for proportionality in ESI production for 2004 examinations because applying any standard might result in more litigation regarding application of the standard, as opposed to a court using its discretion to fashion relief based upon the facts and circumstances of a case. The parties are free to adopt an ESI protocol for the 2004 examination without the necessity of imposing any proportionality standard.

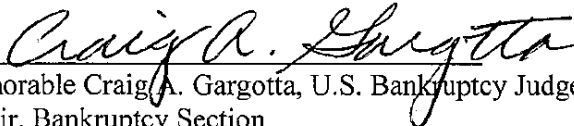
Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of the party’s stock (or file a statement that there is no such corporation). The Committee considered and approved for publication amendments to Rule 8012 that track the relevant amendments to FRAP 26.1 for which final approval is being sought. These amendments would add a new subdivision (b) to Rule 8012, addressing disclosure about the debtor. This subdivision would require the disclosure of the names of any debtors in the underlying bankruptcy case that are not revealed by the caption of an appeal and, for any corporate debtors in the underlying bankruptcy case, the disclosure of the

information required of corporations under subdivision (a) of the rule. Other amendments tracking FRAP 26.1 would add a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal and would make stylistic changes to what would become subdivision (c), regarding supplemental disclosure statements. The Bankruptcy Section supports the proposed amendment to Rule 8012 to conform it to FRAP 26.1.

The Bankruptcy Section appreciates your consideration of these comments. On behalf of the Bankruptcy Section, I would be happy to respond to any questions or concerns that you or other members of the Committee may have with regard to these comments.

Respectfully yours,

The Bankruptcy Section of the Federal Bar Association

By: 
Honorable Craig A. Gargotta, U.S. Bankruptcy Judge
Chair, Bankruptcy Section

cc:
FBA Government Relations Committee
Bruce Moyer, Esq.
Benjamin J. Robinson, Esq.

CG/bm