

To: Bruce Moyer, FBA Government Relations Counsel

From: Judge Craig A. Gargotta, Chair – FBA Bankruptcy Section

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

The Advisory Committee (“Committee”) on Bankruptcy Rules is considering comments on changes to Rules 2002(f), 2004(c), and 8012. Generally, the proposed changes are not substantive in nature and are intended to harmonize different provisions in the Rules.

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Committee seeks publication for public comment of amendments to three of the rule’s subdivisions. This 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.

On behalf of the Bankruptcy Section, we question 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 our 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 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 does not appear to be any 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 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 would caution the Committee's consideration in 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 standard of proportionality.

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.

In closing, the views expressed in this memorandum constitute the views of the Chair and the Board's members and officers.