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Amended Federal Rules Effective Dec. 1, 2017

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Several new amendments to the Federal Rules of Bankruptcy Procedure (FRBP) and an Official Bankruptcy Form are set to become effective Dec. 1, 2017. The amendments to Rules 1001 and 1006(b) were published for comment in August 2015. Amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001 and 9009 and Official Form 113 were published for comment in August 2013 and again in August 2014. Amended Rule 3015 was published for commenting a third time, along with new Rule 3015.1, on July 1, 2016. Because of the limited and conforming nature of the amendment to Rule 1015(b), it was not published for comment. In addition, amendments to Federal Rules of Evidence (FRE) 803(16) and 902 will also be effective Dec. 1, 2017.

Rule 1001

The amendment to Rule 1001 simply changes the last sentence to conform to the language of Federal Rules of Civil Procedure 1[1] and states, "These rules should be construed, *administered, and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."

Rule 1006

Rule 1006(b) allows an individual debtor to pay the bankruptcy filing fee in installments, as authorized by 28 U.S.C. § 1930(a). Previously, the individual bankruptcy courts had inconsistent local procedures regarding the payment of the filing fees. Some courts refused to accept a petition or summarily dismissed a case if an installment payment was not made at the time the case was filed.[2] Other courts accepted petitions without any payment.

An informal survey of the bankruptcy courts[3] found that 32 percent have historically required a payment of some minimum amount of fee for filing a bankruptcy petition to accept the filing. Those required amounts ranged from $40 to 50 percent of the relevant fee at the time of filing. Sixty-eight percent of courts did not require any payment at the time of filing.

Rule 1006(b)(1) now requires that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments — even if an initial installment payment is not made at the same time. The change was made by the Bankruptcy Rules Advisory Committee after it concluded that requiring a minimum payment at the time of filing was inconsistent with Rules 1006(b)(1) and 1017(b)(1). Rule 1017(b)(1) allows for a dismissal of the case for the failure to pay any installment of the filing fee only "after a hearing on notice to the debtor and the trustee."

Rule 1015

Rule 1015(b) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors formerly covered by the rule were "a husband and wife."[4] The 2017 amendment replaces "husband and wife" with "spouses." The change was considered by the Advisory Committee in light of the U.S. Supreme Court's decisions in *United States v. Windsor*,[5] which held § 3 of the Defense of Marriage Act to be unconstitutional, and *Obergefell v. Hodges*,[6] which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right.[7] The *Obergefell* Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples.[8]

Rule 3015 and New Rule 3015.1

Rule 3015, which provides for the filing of, objection to, and effect and modification of a plan in a chapter 12 or a 13 case, now requires the use of a national official form for chapter 13 plans, unless a district requires the use of a local form that

1 Amendments to Federal Rule of Civil Procedure 1 became effective Dec. 1, 2015.

2 *See* Local Rules of the U.S. Bankruptcy Court for the Eastern District of Missouri, L.R. 1006: Payment of Filing Fees in Installments or Waiver of Filing Fee ("General Requirements. All applications to pay filing fees in installments shall be filed using a form in substantial conformity with Local Form 1... Fifty percent of the filing fee shall be due at the time the petition is filed for debtors applying to pay the filing fee in installments."); Local Rules of the U.S. Bankruptcy Court for the District of Delaware, Former L.R. 1006-1(b) ("Payment of Filing Fee in Installments. Individual filers may file with the petition an Application to Pay Filing Fee in Installments substantially in conformity with the form provided by the Clerk's Office. The application must be accompanied by a minimum payment of 25% of the filing fee.").

3 Sixty courts responded to a Survey Monkey survey distributed by the author on Aug. 15, 2017.

4 Also covered by the rule are a partnership and one or more of its general partners, two or more general partners, and a debtor and an affiliate.

5 570 U.S. __, 133 S. Ct. 2675 (2013).

6 576 U.S. __, 135 S. Ct. 2584 (2015).

7 *Id.* at 2599.

8 *Id.* at 2604.

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ests in the consigned inventory. With respect to the proposed sale, the bankruptcy court provided Sports Authority with the following options: (1) settle with the consignors; (2) return the consigned goods to the consignors; or (3) continue selling the consigned goods in accordance with the consignment agreements — with the payments made to the consignors being subject to clawbacks by the term lenders in the event that the term lenders held senior interests in the consigned goods.

On July 7, 2016, after various attempts at settlement, the bankruptcy court approved a settlement agreement among Sports Authority, many of the consignors and the term lenders.[14] Among other things, the settlement agreement provided for the settling consignors to receive a percentage of proceeds from the sale of their consigned inventory. The percentage was determined based on the strength of each consignor's arguments with respect to its priority under the terms of its consignment agreement.

14 *TSAWD Holdings*, No. 16-10527 (MFW), D.I. 2434 (Bankr. D. Del. July 7, 2016).

Conclusion

Despite the leverage gained by consignors in these and other decisions, and the fact that many debtors cannot afford the disruption and delay associated with challenging unperfected consignment interests, consignors would be wise not to become complacent, relying on the likelihood that they will receive at least some recovery even if they make no effort to perfect their interests. Failure to satisfy the UCC requirements can — at a minimum — result in significant legal and other expense to the consignor to defend its interest in the consigned goods, and, unless the consignor and party challenging the consignment interest reach a settlement, the consignor might lose not only its defense costs, but the entirety of its ownership interest, and be relegated to an unsecured creditor (receiving, at best, pennies on the dollar in exchange for the value of the consigned goods). These risks and costs could easily be avoided by simply filing a financing statement and sending the requisite notice under Article 9 at the outset of the consignment relationship. **abi**

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meets the requirements set out in new Rule 3015.1.[9] The Advisory Committee first considered a chapter 13 official plan form in 2011 shortly after the Supreme Court's decision in *Espinosa*,[10] which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

With different plans in each district, it was difficult for creditors to know where to look for their treatment. The Advisory Committee saw the adoption of a national form for chapter 13 plans as bringing uniformity to chapter 13 practice and thus simplifying review of chapter 13 plans by debtors, courts, trustees and creditors.

The Advisory Committee considered approximately 120 comments submitted in response to the proposal, many of which (including the joint comments of 144 bankruptcy judges) strongly opposed a mandatory national form for chapter 13 plans. In the face of the substantial opposition by bankruptcy judges and other bankruptcy constituencies, the Advisory Committee decided to proceed with a compromise that involved promulgating a national plan form and related rules, but that allowed districts to opt out of the use of the official form if certain conditions were met.

Amended Rule 3015(c) requires that plans filed in chapter 13 cases must "be prepared as prescribed by the appropriate Official Form," and that provisions deviating from the Official Form are effective only if placed in the part of the form reserved for nonstandard provisions.

9 Requirements for a Local Form for Plans Filed in a Chapter 13 Case.
10 *United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260 (2010).

Amended Rule 3015(f) requires that objections to plan confirmation be made at least seven days before the date set for the confirmation hearing.

Amended Rule 3015(g) makes clear that the valuation of a secured claim in a confirmed plan is binding on the holder of the claim.

Rule 3015.1 is new and sets out features required for all local chapter 13 plan forms. Under this rule, only one local form may be adopted by a district, and adoption of such form must be preceded by public notice and a comment period. Ninety-three percent of the bankruptcy courts surveyed planned on using their own local form.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001 and 9009 were amended to conform to amended Rule 3015 and new Rule 3015.1.

Rule 2002

Amended Rule 2002 requires 21 days' notice of the time to object to confirmation of a chapter 13 plan and 28 days' notice of the date of the confirmation hearing.

Rule 3002

Amended Rule 3002 includes two significant changes. Rule 3002(a) states that the holder of a secured claim must file a proof of claim to have an allowed claim. Amended Rule 3002(c) shortens the bar date in a voluntary chapter 12 or 13 case to 70 days after the petition is filed but provides an additional period of 50 days to allow holders of mortgage claims to file the supplemental documents required by Rule 3001(c)(1) and (d). Upon motion, the court may extend the time to file a proof of a claim for insufficient notice.

Amended Rule 3002 also added language to clarify that the failure of an entity to file a proof of claim does not void a creditor's lien. The Advisory Committee received objections to the addition of this language based on the belief that the provision strayed into an area of substantive law. Nevertheless, the Advisory Committee chose to retain the language, which is drawn directly from § 506(d)(2) of the Bankruptcy Code.

Rule 3007

Under amended Rule 3007(a), service of a claim objection is made on most claimants by mailing a notice to the person listed on the proof of claim. However, service on federal government and insured depository institution claimants must be made according to the applicable provisions of Rule 7004. The amended rule also clarifies that a hearing need not be held on every claim objection so long as the claimant received notice and an opportunity for a hearing.

Rule 3012

Rule 3012 governs the valuation of secured claims and priority claims. Amended Rule 3012(b) provides that a request to determine the amount of a secured claim may be made in a chapter 12 or 13 plan, as well as by a motion or claim objection. The rule requires service in the manner provided in Rule 7004(b) for requests made in a plan, but leaves to Rules 3007(a) and 9014(b) the method of service for claim objections and motions to determine the amount of a secured claim, respectively. Amended Rule 3012(c) clarifies that a request to determine the amount of a secured claim of a government entity may be made only by motion or claim objection after the governmental unit files a claim or its time for filing has expired.

Rule 4003

Amended Rule 4003(d) permits a lien-avoidance proceeding under § 522(f) of the Bankruptcy Code to be commenced through a chapter 13 plan, as well as by motion. Only the creditors affected by the request need to receive the heightened service provided under Rule 7004.

Rule 5009

Amended Rule 5009(d) includes a procedure for the debtor to obtain an order declaring that a secured claim has been satisfied and that the lien has been released under the terms of a confirmed plan.

Rule 7001

Amended Rule 7001 makes clear that requests for determinations of the amount of a secured claim under Rule 3012 or lien avoidance under Rule 4003(d) do not require an adversary proceeding.

Rule 9009

Former Rule 9009, which governed the use and alteration of Official Forms, required only substantive compliance with Official Forms, providing that "[f]orms may be combined and their contents rearranged to permit economies in their use." Amended Rule 9009 is more restrictive and requires the use of Official Forms "without alteration, except as otherwise provided in these rules or in a particular Official Form."

As explained by the Advisory Committee, this more-restrictive version of Rule 9009 was prompted by the confluence of the committee's Forms Modernization Project and the publication of the chapter 13 plan form project. For each project, the Advisory Committee devoted a great deal of attention to the format, sequencing and presentation of information. In particular, the official chapter 13 plan form requires nonstandard provisions to appear only in one portion of the form, and it would defeat the purpose of that feature if the form could be rearranged freely.

However, the rule allows deviations from an Official Form if permitted by the national instructions for the form in addition to those deviations permitted by the Bankruptcy Rules or the form itself. It also allows "minor changes not affecting wording or the order of presenting information" on a form. abi

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