

**NOTICE RE United States Judicial Conference’s Advisory Committee on  
Bankruptcy Rules’ Proposed Amendments to Bankruptcy Rules 7008, 7012, 7016,  
9027, and 9033 In Response to Stern v. Marshall, 131 S.Ct. 2594 (2011)  
(INFORMATIONAL ONLY)**

**NOTICE IS HEREBY GIVEN** that the United States Judicial Conference’s Advisory Committee on Bankruptcy Rules has proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 of the Federal Rules of Bankruptcy Procedure in an attempt to reduce some of the actual and/or perceived uncertainty/ambiguity/inefficiencies that have resulted from *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

These *Stern v. Marshall* related proposed amendments, along with numerous other proposed rule amendments, were published in the Federal Register on August 17, 2012, for public comment. Public hearings on the proposed amendments will be held in Chicago, Illinois, on January 18, 2013, and Washington, D.C., on February 1, 2013. The public comment period ends February 15, 2013. If ultimately approved as drafted, the proposed amended Rules will take effect on December 1, 2014.

There is wide variance in how the lower federal courts are substantively interpreting the *Stern v. Marshall* decision and resultingly how some local bankruptcy courts have procedurally responded to *Stern v. Marshall*. To date, over 500 cases have cited *Stern v. Marshall*. These proposed *Stern v. Marshall* amendments would, among other things, delete references in the Federal Rules of Bankruptcy Procedure to the existing core and non-core proceeding dichotomy; they will require the parties in all adversary proceedings to state at the early pleading stages whether they do or do not consent to entry of final orders or judgments by the bankruptcy court; and they will create a motion practice procedure for the bankruptcy court to state on its own motion or on motion of a party whether the bankruptcy court intends to enter a final judgment or issue a report and recommendation in any given proceeding. It is noted, however, that a party may respond to the bankruptcy court’s decision regarding its authority by appealing the decision to the district court under 28 U.S.C. § 158(a), by moving to withdraw the reference under 28 U.S.C. § 157(d), or by requesting proceeding abstention under 28 U.S.C. § 1334(c).

The proposed *Stern v. Marshall* related changes to Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 are illustrated with additions being underlined and deletions being struck through. The Committee Note accompanies the respective Rule as follows:

**Rule 7008. General Rules of Pleading**

(a) ~~APPLICABILITY OF RULE 8 F.R.CIV.P.~~ Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge court, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or non-core and, if non-core,~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge court.

~~(b) ATTORNEY'S FEES.—A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.~~

#### COMMITTEE NOTE

Former subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

The rule is also amended to delete subdivision (b), which required a request for attorney's fees always be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

#### **Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings**

~~(b) APPLICABILITY OF RULE 12(b)—(i) F.R.CIV.P. Rule 12(b)—(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge court. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.~~

#### COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of

the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

### **Rule 7016 Pre-Trial Procedures; Formulating Issues**

(a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) DETERMINING PROCEDURE. The bankruptcy court shall decide, on its own motion or a party's timely motion whether:

(1) to hear and determine the proceeding;

(2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or

(3) to take some other action

### **COMMITTEE NOTE**

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the extent of the district court's order of reference to the bankruptcy court and by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

### **Rule 9027. Removal**

#### **(a) NOTICE OF REMOVAL.**

(1) *Where Filed; Form and Content.* A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or noncore and, if non-core, that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court, and be accompanied by a copy of all process and pleadings.

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#### **(e) PROCEDURE AFTER REMOVAL**

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(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that~~ the party does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not

later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action. If the statement required by this paragraph is not timely filed, the party will be deemed to have consented to the bankruptcy judge's authority to enter final orders and judgments in the particular removed claim or cause of action.

### **Committee Note**

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

### **Rule 9033. ~~Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings~~**

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1) In a proceeding in which the bankruptcy court has issued the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law, ~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.~~

### **Committee Note**

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

### **CONCLUSION**

Stay tuned!

Prepared by:  
Chief Judge David S. Kennedy  
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