



BUSINESS LAW SECTION

INSOLVENCY LAW COMMITTEE

THE STATE BAR OF CALIFORNIA

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COMMENTS TO PROPOSED AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

TO: Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

FROM: Insolvency Law Committee, State Bar of California Business Law Section
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DATE: February 13, 2013

RE: FRBP 7004, 8004, 9027 and Official Form 22A-2

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INTRODUCTION

The mission statement of the Insolvency Law Committee of the Business Law Section of the State Bar of California (the "ILC") provides that it shall seek "to promote predictability, efficiency and consistency in the administration of the federal and California laws governing insolvency and the rights and duties of creditors and debtors." The mission statement further provides that the ILC "evaluates and advocates changes in federal and state statutes and regulations affecting creditors and debtors." The proposed changes to Federal Rules of Bankruptcy Procedure 7004, 8004, 9027 and Official Form 22A-2

affect both creditors and debtors. The ILC has concluded that it is consistent with its mission to submit the following comments and recommendations regarding the proposed amendments.

The ILC believes that its members have the special knowledge, training, experience, and technical expertise to provide helpful comments on the proposed Rule changes and that the positions advocated herein are in the best interests of both creditors and debtors.

COMMENTS

Rule to be Amended	Summary of Proposed Change	Recommendation
7004. Process; Service of Summons, Complaint	Shortens the time limit for service from 14 days after summons is issued to 7 days after summons is issued.	Comment. The time limit was shortened on the basis that a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond. However, service within 7 days may be onerous under certain circumstances. For example, some judges require service of a scheduling order, which may not issue until a few days after the case is filed and summons issued. We also recognize that because the rules provide for nationwide service of process by mail, there is generally a delay on receipt of the summons and complaint as compared to a lawsuit filed in the district court and personally served, and a defendant should be provided a reasonable amount of time to respond. We therefore recommend keeping the time limit for service of summons and complaint at 14 days after the summons is issued, and revising Rule 7012(a) to provide the defendant 28 days to respond after service of the summons and complaint on the defendant.

Rule to be Amended	Summary of Proposed Change	Recommendation
8004. Appeal by Leave – How Taken; Docketing the Appeal	<p>This rule is derived from Rule 8001(b) and 8003 and F.R.App.P. 5. Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal. Subdivision (b) retains the requirements of former Rule 8003(a). However, the cross-motion or response to the motion must be filed in the district court or BAP, rather than the bankruptcy court as the former rule required. Subdivision (c) requires the bankruptcy clerk to transmit promptly to the district court or BAP the notice of appeal and the motion for leave to appeal. Like proposed Rule 8003, upon receipt of the notice of appeal, the district or BAP clerk must docket the appeal. Subdivision (d) is former Rule 8003(c). Subdivision (e) treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. 158(a)(3) if the district court or BAP has not already granted leave.</p>	<p>Comment. The Committee Notes state that because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the district court or BAP, rather than in the bankruptcy court as the former rule required. This may cause confusion if the original motion for leave is filed in the bankruptcy court. We recommend revising Rule 8004(b)(2) as follows: A party may file with the district or BAP clerk a response in opposition or a cross-motion within 14 days after the motion is served <u>bankruptcy clerk transmits the notice of appeal pursuant to Rule 8003.</u></p>
9027. Removal	<p>Deletes the requirement for parties to a removed action to provide a statement that the proceeding is core or non-core, and requires in all actions a statement as to whether the party consents or does not consent to the entry of final orders or judgment by the bankruptcy court. As with the old rule, the removing party includes the statement in the notice of removal. Other parties have 14 days to file their notice.</p>	<p>Comment. The Committee Notes state that if a party to the removed claim has not yet filed a pleading prior to removal, then it does not need to file a separate statement, because the statement will be included in its responsive pleading filed in accordance with FRBP 7012. However, (1) if a party files a motion instead of a pleading, then a party would seemingly still need to file a separate statement to comply with 9027; (2) even if a party files a pleading within the 14 days, the language of this rule seems to imply that a separate statement must still be filed. We recommend that the rule specify whether a statement included in a party's first pleading or motion satisfies the requirement, or whether a separately filed statement is required.</p>

Rule to be Amended	Summary of Proposed Change	Recommendation
Official Form 22A-2. Chapter 7 Means Test Calculation	Now contains the presumption of abuse calculation in separate form.	<p>Comment 1: Line 25 seeks to identify how much of any health savings account deduction is actually spent. It is now confusingly meshed in with payments for health insurance. The HSA calculation should be an independent calculation, similar to the car expense calculation at line 13b, for example.</p> <p>Comment 2: At line 33, the debtor enters the average monthly payments on secured debts contractually due in the next 60 months. Sec. 707(b)(2)(A)(iii). We believe that the instruction should state that where a loan has a variable interest rate, projected changes in the loan should be factored into the entry here. Debtors and their attorneys deserve more guidance on this point. Given that house payments are very determinative of an abuse designation, this entry is critical. In sum, the instructions should explain what the statute calls for more explicitly. Lines 26 -31 do this nicely; line 33 is far more important and deserves similar language. Once interest rates begin to rise, this will be even more important.</p>

DISCLAIMER

This position is only that of the Insolvency Law Committee of the Business Law Section of the State Bar of California. This position has not been adopted by the State Bar’s Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Insolvency Law Committee and in the Business Law Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.