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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Honorable John D. Bates, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: December 7, 2020

I. Introduction

The Advisory Committee on Bankruptcy Rules met by videoconference on September 22, 2020. The draft minutes of that meeting are attached.

At the meeting, the Advisory Committee approved amendments to Official Forms 309A - I (Notice of Bankruptcy Case), using the authority granted to it by the Judicial Conference in 2016 to make “non-substantive, technical, or conforming” changes to the Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. The Advisory Committee seeks the Standing Committee’s retroactive approval of these technical changes.

The Advisory Committee also voted to seek publication for comment of amendments to Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases); Rule 8003 (Appeal as of

Right—How Taken; Docketing the Appeal); and Official Form 417A (Notice of Appeal and Statement of Election).

Part II of this report presents those action items. They are organized as follows:

- A. Items for Final Approval
 - Official Forms 309A - I
- B. Items for Publication
 - Rule 3011;
 - Rule 8003; and
 - Official Form 417A.

Part III of this report presents information items. The first concerns a revision to the instructions for Official Form 410A (Proof of Claim, Attachment A). The second information item, regarding the bankruptcy emergency rule, is included in the agenda book with the memorandum from Professors Capra and Struve. The third information item provides an update on the restyling of the Bankruptcy Rules.

II. Action Items

A. Items for Final Approval

Action Item 1. The Advisory Committee recommends that the Standing Committee retroactively approve and provide notice to the Judicial Conference of the amendments to Official Forms 309A – I that are discussed below. Official Form 309A, as amended, is in Bankruptcy Appendix A. Retroactive approval of the same technical amendments is also sought for Official Forms 309B – I.

Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) has been changed from pacer.gov to pacer.uscourts.gov. Because the old PACER address is incorporated in several places on the 11 versions of the “Meeting of Creditors” forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the staff’s concern that users will experience broken links in the year or so it would take to update the forms in the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses using the authority granted to it by the Judicial Conference to make technical changes to the Official Forms immediately, subject to later approval by the Standing Committee and notice to the Judicial Conference.

B. Items for Publication

The Advisory Committee recommends that the following rule and form amendments be published for public comment in August 2021. The rules and the Official Form in this group appear in Bankruptcy Appendix B.

Action Item 2. Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer’s Debt Adjustment, and Chapter 13 Individual’s Debt Adjustment Cases). The proposed amendments, which were suggested by the Committee on Administration of the Bankruptcy System (“the Bankruptcy Committee”), redesignate the current text of the rule as paragraph (a), and add a new paragraph (b) that requires the clerk of court to provide searchable access on the court’s website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The Bankruptcy Committee’s suggestion is consistent with its past efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds.

The Advisory Committee decided to include an additional sentence that permits a court to limit access to information in the unclaimed funds database with respect to a specific case for cause shown. The clerk of the court that hosts the unclaimed funds locator indicated that some courts do not post information on unclaimed funds that are subject to a sealing order. A second category of cases in which a limitation on access might be appropriate is that of very old cases (apparently there are some over 50 years old) that lack good information about the underlying claims.

Action Item 3. Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal). The proposed amendments revise Rule 8003(a) in several respects to conform to pending amendments to FRAP 3, which clarify that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment or appealable order. The Advisory Committee has generally tried to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules so that procedures are consistent throughout two stages of a bankruptcy appeal.

Rule 8003(a)(3)(B) would be amended to avoid the misconception that it is necessary or appropriate to identify every order or decree of the bankruptcy court that the appellant may wish to challenge on appeal. It requires the attachment of “the judgment—or the appealable order or decree—from which the appeal is taken,” and the phrase “or part thereof” is deleted.

Subdivision (a)(4) calls attention to the merger principle, and (a)(5) would clarify that a notice of appeal that identifies only the order disposing of a post-judgment motion is not limited to that order, but instead brings the final judgment before the appellate court for review.

Subdivision (a)(6) would be added to enable deliberate limitations of the notice of appeal. It allows an appellant to identify only part of a judgment or appealable order or decree by expressly stating that the notice of appeal is so limited. Without such an express statement, however, specific identifications would not limit the scope of the notice of appeal.

Finally, subdivision (a)(7) would be added to provide that an appeal must not be dismissed for failure to properly identify the judgment or appealable order or decree if the notice of appeal was filed after entry of the judgment or appealable order or decree and identifies an order that merged into the judgment, order, or decree from which the appeal is taken. In this situation, a court should act as if the notice had properly identified the judgment or appealable order or decree.

Action Item 4. Official Form 417A (Notice of Appeal and Statement of Election). Parts 2 and 3 of the form would be amended to conform to the wording of the proposed amendments to Rule 8003 that were just discussed. This change would parallel pending amendments to Appellate Form 1. If approved, parts 2 and 3 of Official Form 417A would read as follows:

Part 2: Identify the subject of this appeal

1. Describe the judgment, —or the appealable order, or decree —from which the appeal is taken appealed from: _____
2. State the date on which the judgment, —or the appealable order, or decree — was entered:

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, —or the appealable order, or decree —from which the appeal is taken ~~appealed from~~ and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

* * * * *

The Advisory Committee chose not to propose dividing the notice of appeal form into two forms, as is proposed for Appellate Form 1. The purpose underlying the proposed FRAP and appellate form amendments is to eliminate confusion and possible traps in drafting a notice of appeal. In comparison to civil appeals, bankruptcy appeals from orders deemed to be final are common. The Advisory Committee was concerned that having separate notice-of-appeal forms for judgments and for appealable orders and decrees would increase, rather than decrease, confusion. Appellants might select the wrong form, and appellate courts would have to decide if there is any consequence of doing so. Because the Supreme Court has said that filing a notice of appeal is “generally speaking, a simple, nonsubstantive act,” *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019), it seemed unlikely to the Advisory Committee that appeals would be dismissed for filing the wrong, but a similar, form. Rather than creating two forms when it may not matter which one is filed, the Advisory Committee proposes keeping one form for all appeals as of right.

III. Information Items

Information Item 1. Changes to the instructions for Official Form 410A (Proof of Claim, Attachment A). In response to a suggestion from Bankruptcy Judge Eric Frank of the E.D. Pa., the Advisory Committee agreed to insert a new paragraph in the instructions (Instructions

for Mortgage Proof of Claim Attachment) to Form 410A regarding the “Information required in Part 2: Total Debt Calculation.” The concern was that the instructions are unclear when applied to mortgage debts that have been reduced to judgment through a foreclosure proceeding and merge into that judgment under the merger rule.

To deal with this ambiguity, the Advisory Committee approved inserting a new paragraph which reads as follows:

If the secured debt has merged into a prepetition judgment, the principal balance on the debt is the remaining amount of the judgment. Any post-judgment interest due and owing, fees and costs, and escrow deficiency for funds advanced shall be the amounts that are collectible under applicable law.

The change did not require publication and was effective immediately.

Information Item 2. Bankruptcy Emergency Rule. See our report on the emergency rule attached to the joint report.

Information Item 3. Bankruptcy Rules Restyling. Parts I and II of the restyled Federal Rules of Bankruptcy Procedure have been published for comment. The Advisory Committee will be reviewing the comments at its spring meeting.

In its meetings in October 2020, the Restyling Subcommittee completed its initial review of the restyled Parts III and IV, and it has received the reactions of the style consultants to the Subcommittee’s changes and comments. It expects to receive an initial draft of Part V by the end of the year. The style consultants have promised an initial draft of Part VI by February. The Restyling Subcommittee has meetings scheduled in late February to discuss Parts V and VI. The Subcommittee expects to present Parts III and IV to the Advisory Committee for its approval and submission to the Standing Committee for publication at the spring 2021 meeting. If Parts V and VI are ready by that time, they will also be presented.