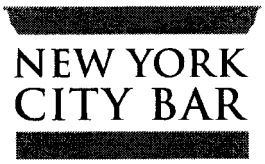

COMMITTEE ON
BANKRUPTCY & CORPORATE REORGANIZATION

ALAN W. KORNBERG
CHAIR
1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019
Phone: (212) 373-3000
Fax: (212) 373-2053
akornberg@paulweiss.com

ELIZABETH R. MCCOLM
SECRETARY
1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019
Phone: (212) 373-3524
Fax: (212) 492-0524
emccolm@paulweiss.com

COMMENTS OF COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION TO PROPOSED AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York (the "**ABCNY**") hereby submits to the Advisory Committee on Bankruptcy Rules (the "**Advisory Committee**") the following comments on the Advisory Committee's proposals to amend (i) the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") to adopt a "days-are-days" approach to computing time periods under the Bankruptcy Rules, (ii) Bankruptcy Rule 8002 to extend the deadline for filing a notice of appeal from a judgment, order or decree in bankruptcy cases and (iii) certain other rules.

The Association of the Bar of the City of New York is a professional organization made up of more than 23,000 members. Its Committee on Bankruptcy and Corporate Reorganization comprises 36 members, including practitioners, scholars, bankruptcy court judges and government officials who are committed to improving bankruptcy law and practice.

Proposed Bankruptcy Rule Amendments to Adopt "Days-Are-Days" Approach to Time Computation

For more than 25 years, Bankruptcy Rule 9006(a) has provided that weekends and holidays are to be excluded when computing time periods of fewer than 8 days. All of the time periods in the federal Bankruptcy Code, the Bankruptcy Rules and the myriad local court rules throughout the country have been set based on this computational rule.

The Advisory Committee now proposes a far-reaching overhaul of the Bankruptcy Rules (and other federal rules)[1] in order to adopt a "days-are-days" approach to time computation. Bankruptcy Rule 9006(a) would be amended so that weekends and holidays would always be counted in computing time periods, and more than 50 different Bankruptcy Rule time periods would also be amended to account for this computational change. The Advisory Committee has also compiled a list of statutory time periods that would likewise need to be adjusted (without assurance that the list is a comprehensive one), and it recommends that local rules throughout the country be reconsidered and amended.

There can be little dispute that it would have been more sensible at the outset to draft procedural rules utilizing a "days-are-days" approach to time computation. However, the present computational approach has been in effect for more than 25 years, and countless statutory and rule-based periods have been set based on that approach and used for many years. Moreover, the ABCNY is not aware of any significant problems or confusion related to the present approach – it is a fairly straight-forward and simple rule to remember and apply. Accordingly, the ABCNY believes that any benefit that would be achieved by changing the time computation approach set forth in the Bankruptcy Rules would be far outweighed by the confusion and cost that would result from such a far-reaching set of amendments.

If the proposed amendments were adopted, practitioners, members of the judiciary, court personnel and members of the public who have for years relied on and operated under the present approach would need to take note of and account for the changes. Countless court and private forms, notices and websites would need to be updated at considerable collective expense. A certain amount of confusion would ensue when some forms, notices and websites were updated and others were not.

---

[1] The ABCNY focuses herein on the proposed amendments to the Bankruptcy Rules. With regard to the corresponding amendments to the Federal Rules of Civil Procedure and other federal rules, the ABCNY notes and would direct the Advisory Committee to the similar arguments set forth in the comment letter submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York.

Further confusion would ensue when, inevitably, some local procedural rules were not amended in time (or at all), thereby producing conflicting results and regimes across different jurisdictions. Unfortunate unintended consequences might result from the effective shortening of time periods provided in local rules that are not correspondingly amended (if weekends and holidays were counted when calculating time periods set by local rules that were not lengthened to account for the change). Furthermore, some local courts might decide to retain the present computational approach through the promulgation of local rules, which would of course lead to exponentially more confusion for practitioners and the public.

In short, if the Advisory Committee were working with a blank slate in promulgating the Bankruptcy Rules, the ABCNY would support adoption of a "days-are-days" approach for time computation. However, given the long history of the present approach and the certain and potential collateral effects of changing the approach now, the ABCNY opposes the proposed time computation amendments.

Proposed Amendment to Bankruptcy Rule 8002

In addition to the group of proposed amendments discussed above, the Advisory Committee has also proposed several specific additional amendments to the Bankruptcy Rules. Among these, the Advisory Committee proposes to amend Bankruptcy Rule 8002 to extend the deadline for filing a notice of appeal from a judgment, order or decree in bankruptcy cases from 10 to 14 days (the "**Proposed Extension**"). Pursuant to the Advisory Committee's request for comments, the comments herein would also apply to any proposal to extend the period specified in Bankruptcy Rule 8002 to 30 days.

The ABCNY believes that the Proposed Extension would cause a material disruption in bankruptcy practice for the reasons set forth below. Furthermore, the ABCNY does not believe that the perceived benefits from the Proposed Extension, or from making the deadline coterminous with the deadline in non-bankruptcy litigation, outweigh the harms.

Unlike in general civil litigation, where court orders almost always adjudicate disputes between private litigants involving past conduct, many bankruptcy court orders instead provide the debtor with authority to consummate commercial transactions integral to its ongoing rehabilitation efforts, including asset sales, debt financings, procedures for bidding on assets or voting on restructuring alternatives, and distributions to creditors. The consummation of such commercial transactions is customarily conditioned upon entry of a final, non-appealable order of the bankruptcy court, and it has become the national standard for parties to anticipate – and often require – expeditious closings in bankruptcy cases as soon as the brief appeal window expires. As such, any extension of the time that must pass before a bankruptcy court order becomes final and non-appealable would delay the timing for the consummation of such transactions.

The expeditious consummation of such transactions is often critical to the continued operation of the debtor and to the debtor's successful reorganization. Moreover, due to the potential for changing market conditions, any additional delay in the consummation of significant transactions would occasion significant risk of value degradation to the detriment of all parties in interest in bankruptcy cases. Accordingly, any extension of the present 10-day appeal period provided by Bankruptcy Rule 8002 would disadvantage not only debtors but also their bankruptcy estates and their myriad stakeholders. In some cases, this disadvantage would be severe. Indeed, the original Advisory Committee Note from 1983 in support of the 10-day appeal period for bankruptcy cases recognized these concerns. *See* 10 Collier on Bankruptcy ¶ 8002.RH (quoting original Advisory Committee Note "the time to appeal . . . was shortened from 30 days, as provided in Rule 4(a), to 10 days 'in order to obtain prompt appellate review, often important to the administration of a case under the Code'").

Common practice in bankruptcy cases, and in the financial markets and institutions that are involved in such cases, has developed around the 10-day appeal period provided by Bankruptcy Rule 8002. The 10-day appeal period has been the rule for decades and is well understood as a key feature of the bankruptcy system in which debtors are required to obtain court approval as a condition precedent to consummating certain transactions. Protections for litigants seeking to appeal were already revisited and re-balanced in 1999, when the Federal Rules of Bankruptcy Procedure were amended to maintain the status quo during the 10-day appeal period by imposing a stay on executing significant transactions for 10 days. *See* Fed. R. Bankr. P. 3020(e), 6004(h), 6006(d). Even then, it is commonly understood that circumstances may warrant elimination of this stay given the exigencies of bankruptcy cases. *See* 10 Collier on Bankruptcy ¶ 6004.11 (noting that courts "should eliminate the 10-day stay period and allow the sale or other transaction to close immediately in all cases where there has been no objection" and, even when the transaction was the subject of litigation, "upon a showing that there is a sufficient business need to close the transaction"). Changes in expectations and confusion among bankruptcy participants accustomed to the 10-day period would necessarily result from adoption of the Proposed Extension. Moreover, the foregoing rules imposing an automatic 10-day stay would become disjointed from their intended purpose.

The ABCNY foresees clearly the disadvantage, harm and confusion that would result from adoption of the Proposed Extension. However, the benefits that would follow from such adoption are not at all clear. A notice of appeal from a bankruptcy court order is a short and simple document (often not much more than one page in length). Particularly in today's age of immediate, electronic noticing, the present 10-day period is more than sufficient for the preparation and filing of such a document. Moreover, for those rare instances in which a practitioner inadvertently misses the deadline, Bankruptcy Rule 8002(c)(2) expressly provides a mechanism for a waiver of the 10-day deadline upon a showing of excusable

neglect, if such a request is made prior to the thirtieth day after entry of the relevant judgment, order or decree.

The Advisory Committee's notice mentions disadvantage to practitioners inexperienced in bankruptcy practice as a possible reason for the Proposed Extension. However, practitioners need to familiarize themselves with the framework of the rules governing the types of cases that they accept and the reasons for such rules, and the Bankruptcy Rule 8002 appeal period is just one example of the ways that the procedures and timing in bankruptcy differ from general civil litigation because of the different context, expectations and issues in bankruptcy cases. For example, initial notice of a hearing for approval of transactions in bankruptcy, even for contested hearings where discovery may be sought, is routinely only required to be given 20 or 25 days before the hearing, see Fed. R. Bankr. P. 2002, and many courts' local rules shorten this period further. The 10-day appeal deadline was designed to fit within the overall framework of bankruptcy procedure and should not be recalibrated with non-bankruptcy rules.

The other principal reason set forth by the Advisory Committee for the Proposed Extension is a desire to conform the Bankruptcy Rule 8002 period to a multiple of seven days. The ABCNY respectfully submits to the Advisory Committee that any intangible benefit perceived from this conformity is heavily outweighed by the very real and significant disadvantage, harm and confusion that would result from adoption of the Proposed Extension.

In sum, the ABCNY believes that the existing 10-day period provided by Bankruptcy Rule 8002 accommodates the interests of debtors, their bankruptcy estates and other parties in permitting necessary actions in a timely manner, while respecting the interests of potential appellants in having sufficient time to file their notices of appeal. The 10-day period was based upon sound reasoning of the Advisory Committee when adopted, and that reasoning continues with even greater force now, given the customs, conventions and other related bankruptcy rules that have subsequently developed. The Proposed Extension would result in great detriment to debtors and other parties in interest in bankruptcy cases while providing little, if any, incremental benefit to potential appellants.

For all of the foregoing reasons, the ABCNY opposes the Proposed Extension and any other extension of the Bankruptcy Rule 8002 appeal period.

Additional Comments

In addition to those discussed in detail above, the ABCNY respectfully submits the following comments on other aspects of the Advisory Committee's proposed amendments:

- The Advisory Committee proposes to amend rules 52 and 59 of the Federal Rules of Civil Procedure (the "**Federal Rules**") to extend the time periods for certain post-judgment motions from 10 days to 30 days. The ABCNY takes

no position with respect to these proposed amendments. However, these Federal Rules are incorporated into the Bankruptcy Rules by Bankruptcy Rules 7052 and 9023, respectively. If these Federal Rules are amended as proposed and are therefore incorporated into the Bankruptcy Rules in their amended form, it would cause an anomalous and presumably unintended result – namely, the period for filing a motion seeking amended findings or reconsideration of a judgment would run for 30 days, while the period for appealing the same judgment would expire after 10 days (or, if the Proposed Extension were adopted, 14 days). Accordingly, an appeal from a bankruptcy court decision could be commenced only to have it arguably mooted by another party's subsequent motion for reconsideration. Alternatively, a potential appellant that had missed the appeal deadline with respect to a given bankruptcy court decision might later file a motion for reconsideration and then argue that the bankruptcy court's resolution of the motion for reconsideration revives the appeal deadline. For these reasons, if Federal Rules 52 and 59 are amended as proposed, the corresponding Bankruptcy Rules should be amended to limit the time periods so that they correspond to the appeal period provided in Bankruptcy Rule 8002.

- The proposed amendments to Bankruptcy Rule 9006 include a reference in proposed rule 9006(a)(3)(A) to "Rule 6(a)(1)." The ABCNY believes that the Advisory Committee may have intended a reference to "Rule 9006(a)(1)."

- The proposed amendments to Bankruptcy Rule 9006 include a new provision clarifying that, with respect to events requiring electronic filing, any applicable time period would end at "midnight in the court's time zone." *See* Proposed Rule 9006(a)(4). "Midnight" is often defined as 12:00 a.m., or the beginning of a given day. The ABCNY believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day.

- The proposed amendment to Bankruptcy Rule 9023 would require that an order or judgment in an adversary proceeding be set forth in a separate document, but would eliminate the current requirement that all orders and judgments (whether in an adversary proceeding, a contested matter or otherwise) be set forth in a separate document. We do not believe that there is good reason to make this change. The entry of a separate order provides clear guidance as to when appeal periods begin and expire, and the elimination of that requirement could lead to confusion.

Conclusion

The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York appreciates the opportunity provided by the Advisory Committee to comment on the proposed Bankruptcy Rule amendments and, for the reasons set forth herein, would respectfully recommend that the Advisory Committee (i) disapprove the proposed "days-are-days" amendments to the Bankruptcy Rules, (ii) disapprove the separate proposed amendment to Bankruptcy Rule 8002 and (iii) consider the other suggestions discussed above in connection with any adoption of the other proposed amendments discussed herein.

February 14, 2008
New York, New York

COMMENTS OF THE COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ON THE PROPOSED TIME-COMPUTATION AMENDMENTS

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York respectfully submits the following comments on the proposed time-computation amendments which were circulated for public comment in August 2007 by the Standing Committee on Rules of Practice and Procedure.

1. The Proposed Time-Computation Amendments Would Cause Serious Practical Disruptions That Would Outweigh Their Theoretical Benefits

By changing the current rule under which intermediate Saturdays, Sundays, and holidays are not counted in computing time period of ten days or less, the proposed time-computation amendments would cause serious practical problems. Judicial officers, court personnel, and practitioners have become familiar with the existing time-computation rule over the course of many years. They have learned to rely upon it as a default rule which will apply unless other specific dates are set by the court. Statutes, local rules, standard-form orders, and practitioners' forms have all evolved against the backdrop of the current rule. Any change in the current time-computation rule would lead to significant disruptions while the new rule is promulgated, disseminated, absorbed, and assimilated into practice. The new rule would continue to be a trap for the unwary for an extended period.

The Committee does not believe that there are significant problems in practice under the current time-computation rule. It is simple and easy to apply

for lawyers and nonlawyers alike. To the extent that the current rule requires resort to a calendar to determine which intermediate days fall on weekends or holidays, the same would also be true under the proposed amended rule, under which time periods that end on a weekend or a holiday are extended to the next business day.

To the extent that there is any concern that some lawyers and court personnel may have difficulty making the necessary computations under the existing time-computation rule – which we have not observed to be the case – a more efficient solution would be to incorporate the necessary software for making such computations directly into the Electronic Case Filing system, thus providing an authoritative means of making and recording the necessary computations.

2. The Proposed Time-Computation Amendments Do Not Adequately Mitigate the Adverse Effects That Would Be Caused by Their Introduction

The Committee recognizes that the drafters of the proposed time-computation amendments have sought to mitigate their adverse effects by, for example, lengthening most five-day periods to seven days and lengthening most ten-day periods to fourteen days. These changes, however, would only offset the adverse effects caused by including weekend days in the new time computations. They would not offset other significant adverse effects of the new rule, including its application to holiday periods and its effect on time periods prescribed by statutes and by local rules.

A. Time Periods That Include Holidays

One would like to believe that motions served on the eve of holiday

periods would be a problem seldom met with and easily solved. Sadly, the Committee's experience teaches that this is not always the case. By including intervening holidays in the time computation, the proposed amendments would exacerbate this problem.

Consider, for example, a motion with a ten-day response period (which, as noted below, is more reflective of current practice than the four-day period prescribed by Fed. R. Civ. P. 6(d)) which is served by hand at 5:00 P.M. on Christmas Eve. Even the current exclusion of holidays does not begin to offset the burden and disruption of responding to such a motion during the year-end holiday period. Including holidays in the time computation would make matters even worse.

B. Time Periods Prescribed by Statute

Large numbers of short time periods are prescribed by statutes that have been enacted against the backdrop of the present time-computation rule. With commendable industry, the Standing Committee has tabulated some (but not all) of these statutes in a 108-page attachment to its proposal. Our Committee believes that, if the proposed amendments are transmitted to Congress (which our Committee hopes will not occur), they should be transmitted with a provision that they will only become effective if Congress passes and the President signs a technical corrections bill making corresponding changes in all the statutory time periods listed by the Standing Committee, as well as in all other litigation-related statutory time periods of ten days or less that can be unearthed by exhaustive research. Otherwise, these statutory time periods will cause persons relying upon

the existing time-computation rule that they have known and used for many years to incur a serious risk of losing substantive rights.

C. Time Periods Prescribed by Local Rule

For the same reasons, no new time-computation rule should become effective without corresponding changes in time periods of ten days or less that are contained in local rules, standing orders, and standard-form orders. Ensuring that such changes are made in a timely fashion, and are publicized to everyone who needs to be aware of them, would be a monumental task in itself.

In addition, any amendments should clarify whether district courts may continue to have local rules that measure time periods in business days. One such local rule is Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which (in the Committee's experience) has worked satisfactorily for more than a decade since it was adopted in its current form in 1997.

3. The Committee Supports the Proposed Lengthening of Certain Time Periods

As part of the time-computation project, the Rules Committees have reviewed the time periods provided in the existing rules, and have proposed certain changes in those time periods that are independent of the merits of the time-computation project itself. Although our Committee is unable to support the time-computation project generally, it does support some of the independent changes that have been proposed in certain time periods.

The Committee supports the lengthening of the time periods for moving and responding papers in civil motions under Fed. R. Civ. P. 6(d) from five days

and one day to fourteen days and seven days, as a more realistic reflection of the time needed for most motions. Although our Committee is not unanimous on this point, we suggest that the Civil Rules Committee may wish to consider specifying a longer period for substantive motions than for discovery motions, as is done, for example, by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York.

The Committee also supports the lengthening of the time for post-trial motions under Fed. R. Civ. P. 50, 52, and 59 from ten days to 30 days. Again, this is a more realistic time period than is provided by the present rules.

4. Time Periods That Count Backward Should Be Changed to Time Periods That Count Forward

When a time period which counts backward ends on a weekend or holiday, the proposed amendments would continue to count backward until a weekday is reached. This would exacerbate the adverse effects of the proposed amendments by shortening still further a response period that may already be shorter than it would be under the current rules.

In addition, when time periods are counted backward, the rules contain no provisions for giving the other parties extra days when service is made by mail. Nor is it clear how a workable rule could be drafted that would do this.

The way to avoid these and other practical problems caused by counting backward is to amend the rules that currently count backward so that they count forward. As a practical matter, the most important rule that would be affected by this change is Fed. R. Civ. P. 6(d), which currently determines the times for serving motion papers on civil motions by counting backwards from "the time

specified for hearing" (despite the fact that most civil motions today are not determined at a hearing). How Fed. R. Civ. P. 6(d) could be amended to count forward is demonstrated by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which was amended in 1997 to do exactly that, and which has worked smoothly for more than a decade.

5. Conclusion

We thank the Standing Committee for the opportunity to comment on the proposed time-computation amendments. For the reasons set forth above, although we support changes in the time periods in certain rules, we urge the Standing Committee to disapprove the time-computation amendments as a whole.

Guy Miller Struve, Esq. – Chair
Edwin J. Wesely, Esq. – Chair Emeritus
Igou M. Allbray, Esq.
Daniel R. Alonso, Esq.
Peter J. Ausili, Esq.
Ernest T. Bartol, Esq.
Robert L. Begleiter, Esq.
Jonathan B. Behrins, Esq.
Joel Berger, Esq.
Professor Margaret A. Berger
Anton J. Borovina, Esq.
Michael Cardello, III, Esq.
Professor Edward D. Cavanagh
Professor Oscar G. Chase
June Duffy, Esq.
Steven M. Edwards, Esq.
Jerry Fortinsky, Esq.
Muriel Goode-Trufant, Esq.
John C. Gray, Jr., Esq.
James Henly, Esq.
Steven A. Hoffner, Esq.
George F. Hritz, Esq.
Robert N. Kaplan, Esq.
Lewis Liman, Esq.

Loretta Lynch, Esq.
V. Anthony Maggipinto, Esq.
Robert J. Rando, Esq.
Jonathan S. Sack, Esq.
Charles Evan Stewart, Esq.
James M. Wicks, Esq.
Members Emeritus:
Sol Schreiber, Esq.
Ex Officio:
The Honorable Raymond J. Dearie
Chief Magistrate Judge Steven M. Gold
James E. Ward, Jr.
Robert C. Heinemann, Esq.
Lawrence J. Zweifach, Esq.
Professor Susan Herman
Greg Andres, Esq.
Susan Riley, Esq.
Gerald P. Lepp, Esq.