MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

SUBJECT: IMPACT OF *WELLNESS INTERNATIONAL NETWORK, LTD. v. SHARIF* ON PREVIOUSLY PROPOSED *STERN* AMENDMENTS

DATE: SEPTEMBER 7, 2015

In *Wellness International Network, Ltd. v. Sharif*, decided by the Supreme Court on May 26, the Court held that the Constitution permits a bankruptcy judge to adjudicate claims otherwise requiring an Article III adjudication if the parties knowingly and voluntarily consent to determination by the bankruptcy judge. 135 S. Ct. 1932. By so ruling, the Court upheld the constitutional validity of 28 U.S.C. § 157(c)(2), which authorizes bankruptcy judges to hear and determine non-core proceedings with the consent of the parties. The Court also held that the knowing and voluntary consent required by the Constitution and the statute need not be express, although it added that it is a good practice to require an express statement regarding consent.

As a result of the resolution of the consent issue, the Committee is now in a position to decide whether a previously proposed set of Bankruptcy Rules amendments—the "*Stern* amendments"—should be sent forward to the Supreme Court as originally proposed, or whether revised or additional amendments should be proposed in light of *Wellness*. This memorandum provides background information about the *Stern* amendments and addresses several options for responding to *Wellness* that the Committee may want to consider. The Subcommittee discussed these issues during its conference call on August 12, and it recommends that the Committee request that the previously submitted amendments be sent to the Supreme Court for its approval.

The *Stern* Amendments

In *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the Supreme Court held—in a case in which both parties had not consented to the bankruptcy court's adjudication—that the bankruptcy court lacked authority under Article III to hear and enter a final judgment on a state-law counterclaim by the estate against a creditor who had filed a claim against the estate. Such adjudication is expressly authorized by 28 U.S.C. § 157(b)(2), which classifies it as a core proceeding, but the Court concluded that the exercise of that authority in this case by the non-Article III bankruptcy judge was constitutionally impermissible because the proceeding did not fall within the "public rights" exception to Article III and the bankruptcy judge was not a mere adjunct of the Article III courts.

In 2011 the Committee began considering whether the Bankruptcy Rules needed to be amended in response to *Stern*. Existing Rules 7008 (General Rules of Pleading) and 7012 (Defenses and Objections) require parties to adversary proceedings to state in the complaint and the responsive pleading whether the proceeding is core or non-core and, if non-core, whether the pleader consents to entry of final judgment by the bankruptcy judge.[1] Rule 7012(b) further states that 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."

The Committee concluded that *Stern* had created an ambiguity concerning the meaning of the terms core and non-core. The case demonstrated that a proceeding might be designated core by the statute but be beyond the constitutional authority of a bankruptcy court to hear and

[1] Rule 7008(a) provides in part: "In an adversary proceeding before a bankruptcy judge, 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 nor does not consent to entry of final orders or judgment by the bankruptcy judge." Rule 7012(b) provides in part: "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."

determine, at least without the parties' consent. Thus it would be constitutionally non-core. The Committee therefore decided to propose amendments to Bankruptcy Rules 7008(a) and 7012(b) that would eliminate the distinction between core and non-core proceedings and would require parties in all proceedings to state in their pleadings whether they do or do not consent to entry of a final judgment or order by the bankruptcy judge. A similar amendment was proposed to Rule 9027(a) and (e) (Removal). The sentence in Rule 7012(b) prohibiting a bankruptcy court from entering a final order or judgment in a non-core proceeding without the express consent of the parties was proposed to be deleted. The Committee also proposed amendments to Rule 7016 (Pre-Trial Procedures), which would direct the bankruptcy court to determine the authority it would exercise in a proceeding—whether it would hear and determine it, hear and issue proposed findings of fact and conclusions of law, or take some other action. The final amendment included in the *Stern* package was to Rule 9033 (Proposed Findings of Fact and Conclusions of Law), which would omit the rule's limitation to non-core proceedings. These amendments, which follow in the agenda book, were published for public comment in August 2012.

The *Stern* amendments were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013. Later in the fall of 2013, the Judicial Conference withdrew the amendments from the Supreme Court due to the Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). That case presented the issue, among others, of whether Article III permits a bankruptcy court, with the express or implied consent of the parties, to enter final judgment on a *Stern* claim. Because the proposed rule amendments rely on the validity of consent, it was determined that the Court should not be asked to approve them while that issue was pending before it.

The Supreme Court decided *Arkinson* in June 2014 without reaching the consent issue.[2] But a few weeks later, the Court granted *certiorari* in *Wellness*, which also presented the issue of the constitutional validity of party consent to the adjudication by a bankruptcy judge of a *Stern* claim. As a result, the *Stern* amendments remained on hold awaiting a decision in *Wellness*.

The Upholding of Consent in *Wellness*

In ruling on the constitutional validity of consent, the Court in *Wellness* looked to its decision in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), for guidance. There the Court held that Article III's "guarantee of an impartial and independent federal adjudication" serves two functions: (1) protection of the personal rights of litigants and (2) maintenance of the separation of powers of the branches of the federal government. *Schor* held that, as a personal right, the protection is freely waivable. But, as the Court explained in *Wellness*, *Schor* also held that "'[t]o the extent that this structural principle is implicated in a given case'—but only to that extent—'the parties cannot by consent cure the constitutional difficulty.'" 135 S. Ct. at 1943.

The Court in *Wellness* therefore examined "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threate[n] the institutional integrity of the Judicial Branch.'" *Id.* at 1944. It concluded that there was no such threat, based on its examination of the degree of control Article III courts exercise over bankruptcy judges and the absence of evidence that Congress sought to "aggrandize itself or humble the Judiciary." *Id.* at 1945. As a

[2] *Arkison* did, however, confirm that *Stern* claims could be treated as non-core under § 157(c), as the rule amendments had assumed. *See* 134 S. Ct. at 2174 ("Accordingly, because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*.").

result, the Court held that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent." *Id.* at 1949.

In Part III of the opinion, the Court examined the nature of the consent required. It concluded that neither the Constitution nor § 157(c)(2) requires the parties' consent to bankruptcy court adjudication to be expressly given. But whether such consent is express or implied, the Court stated, it must be knowing and voluntary. Thus the "key inquiry" in determining whether there is implied consent, said the Court, "is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator." *Id.* at 1948. The Court emphasized that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" *Id.*

Although the Court rejected the debtor's argument that consent to bankruptcy court adjudication must be express, it noted that Bankruptcy Rules 7008 and 7012 require parties to state in their pleadings whether or not they consent to bankruptcy court adjudication of non-core proceedings. The Court said that it is a "good practice" for courts to seek such express statements and that "[s]tatutes or judicial rules may require express consent where the Constitution does not." *Id.* at 1948 n.13.[3]

Justice Alito, in a separate opinion, concurred with the majority opinion in part and concurred in the judgment. 135 S. Ct. at 1949. He agreed that Article III permits a bankruptcy judge to adjudicate a *Stern* claim with the consent of the parties, but he thought that the majority

[3] As originally issued, footnote 13 of the Court's opinion went on to note (in connection with approval of courts seeking express consent) that the Court had recently approved and sent to Congress amendments to Rule 7008 and 7012 that would require parties to all adversary proceedings, not just non-core, to state expressly whether they consent to the bankruptcy court's entry of a final judgment. This description of the status of the *Stern* amendments was in error, and two days later the opinion was corrected to delete that sentence.

should not have addressed implied consent. Instead, he concluded that "respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below." *Stern* claims, he wrote, are not "exempt from ordinary principles of appellate procedure." *Id.* Although the majority opinion did not discuss forfeiture, the Court did remand for the Seventh Circuit to decide "whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below." *Id.*

Because the Court in *Wellness* did not decide whether the claim in question was a *Stern* claim, it provided no further guidance about the scope of *Stern* or how to determine whether a claim listed as core under § 157(b)(2) is beyond the bankruptcy court's authority to adjudicate without the consent of the parties. *Id.* at 1942 n.7 (noting that the opinion "does not address, and expresses no view on, . . . [whether] the Seventh Circuit erred in concluding the claim in count V of [the] complaint was a *Stern* claim").[4] *Wellness*, however, is significant because it answered the other major question that had divided the lower courts in the aftermath of *Stern*—whether parties can consent to allow a bankruptcy judge to enter a judgment in a proceeding that would otherwise require entry of judgment by an Article III court. By declaring that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge," *id.* at 1939, the Court left open a means for bankruptcy courts to resolve proceedings without the need to determine whether they are statutorily and constitutionally core. It also avoided a major shift of adjudicative responsibilities to the district courts, a result of apparent importance to the Court.[5]

[4] The Court did emphasize that the *Stern* opinion "took pains to note that the question before it was 'a narrow one,' and that its answer did 'not change all the much' about the division of labor between district courts and bankruptcy courts." *Id.* at 1946-47.

[5] *See id.* at 1938-39 (noting that without the service of magistrate and bankruptcy judges, "the work of the federal court system would grind nearly to a halt"); *id.* at 1946 (pointing out that elimination of the use of non-Article III judges "would require a substantial increase in the number of district judgeships").

Possible Rule Amendments in Response to *Wellness*

The Subcommittee considered three possible approaches for amending the Bankruptcy Rules to authorize bankruptcy courts, with the parties' consent, to adjudicate proceedings that would otherwise require Article III adjudication: (1) the pending *Stern* amendments; (2) the magistrate judge model; and (3) the Seventh Amendment model.

1. Pending *Stern* amendments. As discussed above, the pending amendments are based on the constitutional validity of party consent to non-Article III adjudication of *Stern* and non-core claims, which *Wellness* upholds. They provide for express consent in the parties' pleadings. If all the parties to a proceeding consent to bankruptcy court adjudication, no court would have to determine whether the proceeding is one that the bankruptcy court could have heard and determined in the absence of consent. On the other hand, if all of the parties do not consent in their pleadings, the bankruptcy court under amended Rule 7016 would have to determine whether the proceeding is constitutionally and statutorily core—in which case it could enter a final judgment—or a *Stern* or non-core proceeding—in which case it could do no more than submit proposed findings of fact and conclusions of law to the district court.

Requiring express consent goes beyond the constitutional minimum announced in *Wellness*. An express consent approach could result in more non-core and *Stern* claims being adjudicated in the district court by removing them from bankruptcy court adjudication. This is because parties who might decline to give express consent (if it is required) might otherwise be deemed to have implicitly consented to bankruptcy court adjudication of non-core and *Stern* claims under an implied consent approach. The express consent approach has the advantage, however, of clarity. Pleadings can be examined to determine if the parties in fact consented, thereby eliminating a more uncertain, retrospective determination of whether one or more parties

voluntarily and knowingly gave implied consent. Furthermore, it is a procedure that the Court in *Wellness* declared to be a good practice even if implied consent otherwise suffices. *See id.* at 1948 n.13 (explaining that express statements of consent "ensure irrefutably that any waiver of the right to consent to Article III adjudication is knowing and voluntary and . . . limit subsequent litigation over the consent issue").

2. Magistrate judge model. The Court in *Wellness* seemed to accept that a statement of consent in a party's pleading would constitute an express, knowing and voluntary waiver of the right to an Article III adjudication. *See* 135 S. Ct. at 1948 n.13. A more cautious approach, however, would be first to inform a party of the right to choose between an Article III and non-Article III adjudication of certain proceedings and then allow the party to make an affirmative choice. This is the procedure followed in the case of magistrate judge adjudications of civil proceedings under 28 U.S.C. § 636(c) and one that has been suggested to the Committee as the best way to respond to *Stern* and *Wellness*. *See* Suggestion 15-BK-F.

Federal Rule of Civil Procedure 73(b)(1) requires that the clerk give parties "written notice of their opportunity to consent under 28 U.S.C. § 636(c)." Parties indicate their consent by filing a statement affirmatively consenting to the referral. The rule provides that the district judge and magistrate judge may be informed of a party's choice only if all parties consent to the referral. Rule 73(b)(2) states that parties may be reminded of the availability of a magistrate judge but they must be advised that "they are free to withhold consent without adverse substantive consequences."

AO Form 85 implements Rule 73. It informs a party that a "United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment" and will exercise that authority only if

all parties to the case consent. It then provides the assurances required by Rule 73: "You may consent to have your case heard by a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case."

Attorneys Ben Logan and Peter Friedman of O'Melveny & Myers LLP submitted Suggestion 15-BK-F, which requests the Committee to adopt this approach. They state that adopting a rule similar to Civil Rule 73 will ensure that a party's consent is in fact knowing and voluntary. They also argue that adopting safeguards like those in Rule 73 will protect parties in a bankruptcy case, who may have numerous proceedings before the bankruptcy court, from any adverse consequences of declining to consent to bankruptcy court adjudication of a particular proceeding.

The magistrate approach is much more elaborate and cautious than the current consent procedures under Rules 7008 and 7012. Because *Wellness* held that neither Article III nor 28 U.S.C. § 157 requires express consent, one might question the reason for making such a significant change in the consent procedure in response to that decision. Furthermore, the wording of a similar consent form for bankruptcy proceedings would need to be modified to indicate that there are some proceedings—constitutionally and statutorily core proceedings—in which a bankruptcy judge may enter a final judgment regardless of the parties' decision on consent. Because of the continuing uncertainty regarding the scope of *Stern*, it would be difficult, if not impossible, for a form to describe in a meaningful way when consent is required. As a result, this approach of notifying a party of its right to choose an Article III adjudication or to consent to a non-Article III adjudication would likely be less effective than in the magistrate-judge context, and it could create greater confusion.

3. Seventh Amendment model. An alternative approach was suggested to the Committee in 2011 by Judges Benjamin Goldgar, Carol Doyle, and Bruce Black of the Bankruptcy Court for the Northern District of Illinois. Suggestion 11-BK-K. Under this approach a party would have to affirmatively request adjudication before a district judge; otherwise a bankruptcy judge would be authorized to hear the proceeding and enter a final judgment. The proposed procedure is similar to the district court procedure for invoking the Seventh Amendment right to a jury trial. Under Fed. R. Civ. P. 38(b), a party asserting a right to a jury trial on any issue must make a written demand for a jury trial no later than 14 days after service of the last pleading directed to that issue. The failure to do so results in waiver of the jury trial right.

The Bankruptcy Rules already include a rule that requires an affirmative assertion of a right to an Article III court in order to avoid waiver. Under Rule 8005(a) and Official Form 17A, if a Bankruptcy Appellate Panel ("BAP") has been established to hear an appeal from the bankruptcy court, an appeal will be taken to that court unless a party affirmatively elects to have it heard by a district court and makes the election in a timely manner. A failure to act results in the appeal being heard by the non-Article III BAP.[6]

The chief component of the judges' suggestion is a new Rule 7008.1 (Right to a Judgment by the District Court), which would require a party who desires an Article III adjudication to demand a judgment by the district court in its initial pleading. A failure to do so would constitute a waiver of the right. If a demand for a judgment by the district court is made,

[6] The suggestion submitted by Messrs. Logan and Friedman argues for a change in this procedure. They say that the "good practice" of requiring express consent to the non-Article III determination of a *Stern* or non-core matter should be followed here, as well as at the trial level. The Subcommittee, however, was not persuaded of the need to amend Rule 8005(a). The rule follows the statutory directive that if a BAP is established, each bankruptcy appeal "shall be heard" by the BAP "unless—(A) the appellant elects at the time of filing the appeal; or (B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court." 28 U.S.C. § 158(b)(1).

another party, or the bankruptcy court on its own motion, could object to the demand on the ground that the proceeding is not one in which there is such a right or that the right was not demanded in accordance with the rule.

When the Committee proposed the *Stern* amendments, it considered the suggestion but concluded that requiring an express statement of consent to bankruptcy court adjudication was preferable to allowing such adjudication by default unless district court adjudication is affirmatively requested. Several considerations went into the Committee's decision. The existing rules require an express statement of consent. It seemed to some members that it would be an odd response to a Supreme Court decision that emphasized the importance of the Article III safeguards to make waiver of that right easier by allowing it to occur through inaction. Moreover, the constitutional status of consent itself was undecided in the bankruptcy court context, which meant that implied consent was even more questionable.

Now that the Court has upheld implied consent, the Committee could reconsider the earlier determination favoring express consent. The major advantage of the suggested implied consent approach is its efficiency. By the time the pleadings are closed, it can be determined if all of the parties have waived any right they might have to entry of judgment by the district court. If there has been no demand, the bankruptcy court can hear and determine the proceeding. Inaction constitutes consent.

The major question under *Wellness*, however, is whether the suggested procedure satisfies the Court's standard for implied consent, which seems higher in this context than the standard for waiving jury trial rights. Quoting from *Roell v. Withrow*, 538 U.S. 580, 590 n.5 (2003), the *Wellness* Court said that "'notification of the right to refuse' adjudication by a non-Article III court 'is a prerequisite to any inference of consent.'" 135 S. Ct. at 1948. Whether the

proposed demand procedure meets that requirement depends on how precise and direct the notification has to be. It is not clear whether the existence of a Bankruptcy Rule that presents bankruptcy court adjudication as an option that might be declined by demanding judgment by the district court would be a sufficient notification. Perhaps because the Court in *Wellness* was relying on a case involving consent to a magistrate judge adjudication, it had in mind a notice procedure like AO Form 85 (Notice, Consent, and Reference of a Civil Action to a Magistrate Judge) or an oral statement of the right to decline non-Article III adjudication. In *Roell* itself the petitioners appeared without objection and litigated before the magistrate judge after being told by the magistrate judge that they could choose her rather than a district judge and told by the district judge that the referral to the magistrate judge would be withdrawn if they did not consent. 538 U.S. at 582-83.

The Subcommittee's Recommendation

The Subcommittee concluded that the express consent requirement of the previously proposed *Stern* amendments would avoid any uncertainties about whether failure to demand entry of judgment by the district court constitutes implied consent, and it also would avoid the difficulties of attempting to inform parties of when they have a right to an Article III adjudication. The pending amendments have the further advantage of having been endorsed, albeit prematurely, by a majority of the Supreme Court. The Subcommittee therefore recommends proceeding with the *Stern* amendments that were approved by the Judicial Conference in 2013.

The *Stern* Amendments
(as approved by the Judicial Conference in September 2013)

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 noncore 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

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* The amendment deleting subdivision (b) went into effect on December 1, 2014.

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 to 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

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(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-~~T~~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 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 non-core 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.

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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,~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the

docket.

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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.