2015-2016 FEDERAL CIVIL AND BANKRUPTCY RULES CHANGES

Presented By:

ROB COLWELL
Chief Deputy Clerk
United States Bankruptcy Court
Northern District of Texas

Authored By:

LAURIE DAHL REA
Career Clerk to the Honorable Russell F. Nelms
501 W. Tenth, Room 206
Fort Worth, Texas 76102

2014 Northern District of Texas
Bankruptcy Bench/Bar Conference
May 20, 2016
Dallas, TX

TABLE OF CONTENTS

I. Rule Amendments Effective December 1, 2015

The 2015 amendments impacted the following rules: FRCP 4(m), 16, 26, 30, 31, 34, 37, and 55, all of which apply in adversary proceedings and some of which apply in contested matters. In his 2015 Year-End Report on the Federal Judiciary,[1] Chief Justice Roberts explained that the 2015 rule amendments are significant, both because of the time and effort expended and the intended effect.

The genesis of the 2015 amendments was a 2010 symposium on civil litigation held by the Advisory Committee on Civil Rules. The symposium—made up of judges, lawyers, professors, and others—concluded that civil litigation had become overly expensive, inefficient and contentious.[2]The symposium encouraged rule reform that would foster greater cooperation, reduce discovery burdens, engage judges early in a case, and address electronic discovery problems.[3]

After three years, 2,300 written comments, three public hearings, and input from over 120 witnesses, the Advisory Committee on Civil Rules proposed the 2015 changes. After being scrutinized by the public, the Standing Committee, the Judicial Conference, and the Supreme Court, those changes became law on December 1, 2015.[4]

The amendment to FRCP 1 expresses the general intent of the 2015 amendments. "These rules…should be construed, administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[5]

1. FRCP 4(m): Shortening of Summons Service Deadlines

FRCP 4(m), which is made applicable in adversary proceedings by BR 7004(a), was revised as follows:

> FRCP 4(m) If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

The primary change to this rule is that the time for serving the defendant is shortened from 120 days to 90 days, although that period can be lengthened by the court. The motivation behind the rule change was to reduce delay at the beginning of litigation.[6] The last phrase of the rule change deals with condemnation notices under FRCP 71.1, which does not apply in bankruptcy cases.[7]

2. FRCP 16: Quicker Scheduling Orders

FRCP 16, which is made applicable to adversary proceedings by BR 7016, deals with pretrial conferences, scheduling and case management.

---

[1] http://www.uscourts.gov/news/2015/12/31/chief-justice-roberts-issues-2015-year-end-report.
[2] Id.
[3] Id.
[4] Id.
[5] FRCP 1. Note: Throughout the paper, amended rules are shown with new language underlined and deleted language with a strike through.
[6] Committee Notes to FRCP 4(m)(2015). The complete Committee Notes for the 2015 Amendments are available at http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure.
[7] Id.

One of the changes to this rule is the shortening of time in which the court must issue a scheduling order. Like the amendment to FRCP 4(m), this amendment was intended to reduce delay at the beginning of litigation.[8] The change to FRCP 16(b)(2) is:

> FRCP 16(b)(2) The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless the judge finds good cause for delay, the judge must issue it within the earlier of ~~120~~90 days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

The other change is in FRCP 16(b)(3)(B) and pertains to additional discovery information that can be included in a pretrial order. This change seems to be intended to facilitate early consideration of and cooperation in discovery issues.

It reads as follows:

> FRCP 16(b)(3)(B) The scheduling order may:…(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502; (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;…

3. FRCP 26: Discovery Changes

The many changes to FRCP 26 are all geared toward reducing "the problem of over-discovery."[9]

a. FRCP 26(b)(1): Scope of Discovery

The first changes appear in FRCP 26(b)(1) regarding the scope of discovery.

> FRCP 26(b)(1) Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

The amendment redefines the scope of discovery, getting rid of the concept that discovery includes requests for information "that appears reasonably calculated to lead to the discovery of admissible evidence."

[8] Committee Notes to FRCP 16 (2015).
[9] Committee Notes to FRCP 26 (2015).

The Judicial Committee has long viewed that phrase as a problem, because when it is used to define the scope of discovery, it has the tendency to "swallow any other limitation."[10]

The 2015 amendments define the scope of discovery using a proportionality concept. Under this concept, the discovery must be proportional to the needs of the case after considering the importance of the issues, the amount involved, the parties' relative access to information and resources, the importance of the discovery to resolve the issues, and the burdens and benefits.[11]

The proportionality concept isn't completely new. For the most part, it comes from FRCP 26(b)(2), which permitted a court to limit discovery using the same considerations. The amendments to FRCP 26(b)(1) added the concept of "the parties' relative access to relevant information" to the proportionality determination to encourage consideration of the "information asymmetry" that most often occurs when an individual faces a large business entity in litigation.[12]

The change in defining the scope of discovery was intended to reinforce the idea in FRCP 26(g) that all parties have a responsibility to consider the proportionality factors when making discovery requests, responding to them, or objecting to them.[13]

It was not intended to change the existing duties of the parties.[14] For example, the party propounding discovery does not have the sole responsibility to address proportionality, nor does the respondent get to simply object with a boilerplate objection that the requests are not proportional.[15]

b. FRCP 26(b)(2): Limitations on Discovery

FRCP 26(b)(2) was revised to delete the language that was moved to FRCP 26(b)(1).

FRCP 26 (b)(2)(C) On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: ... (iii) the ~~burden or expense of the~~ proposed discovery <u>is outside the scope permitted by Rule 26(b)(1)</u>~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.

[10] Id.
[11] FRCP 26(b)(1).
[12] FRCP 26(b)(1) and Committee Notes to FRCP 26 (2015).
[13] Committee Notes to FRCP 26 (2015).
[14] Id.
[15] Id.

c. FRCP 26(c): Expenses of Discovery

The change to FRCP 26(c) gives the court express authority to allocate expenses in a discovery dispute if it is warranted.[16]

The amendment to that rule is as follows:

FRCP 26(c) (1) A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:…(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;….

d. FRCP 26(d) & (f): Early Requests for Production and Expanded Discovery Plans

These amendments are intended to get the parties focused on important discovery issues earlier in the case.[17] FRCP 26(d)(2)-(3) permits a party to send earlier requests for document production to encourage more focused discussions at the FRCP 26(f) conference. And FRCP 26(f)(3) adds preserving electronic information and handling privilege claims to the list of things that must be addressed in a discovery plan. The amended rules are:

FRCP 26(d)(2) *Early Rule 34 Requests.* (A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered: (i) to that party by any other party, and (ii) by that party to any plaintiff or to any other party that has been served. (B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference. (~~2~~3) *Sequence.* Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: (A) methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery.

FRCP 26(f)(3) *Discovery Plan*. A discovery plan must state the parties' views and proposals on:…(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

4. FRCP 30, 31 and 33: Small Changes

These changes are small, in that they simply incorporate the proportionality standard by requiring consistency with FRCP 26(b)(1).

[16] Id.
[17] Id.

5. FRCP 34: Responses to Early Requests for Production and Specific Objections

The amendments to FRCP 34 are threefold. The first change deals with the response time for any early request served under FRCP 26(d)(2). A party who is served for production with such a request must respond 30 days after the first FRCP (26)(f) conference. The change to FRCP 34(b)(2)(A) is as follows:

> FRCP 34(b)(2)(A) The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

The second change, which is in Rule 34(b)(2)(B), recognizes the common practice of producing copies of documents rather than permitting inspection.[18]

The third set of changes, in Rule 34(b)(2)(B) and (C), relate to the quality of responses. The amendments require a party to make specific objections to document requests and state whether documents are being withheld based on a particular objection. Although the amendment was not intended to require a detailed log of what has been withheld, it was intended that the responding party alert other parties that documents have been withheld so they can have an informed discussion about the objection. The Committee Notes say that the objector should use the word "withheld" when describing what is not produced. But the Committee Notes also say that stating the limits used to search material should suffice (for example that the party only searched for correspondence for a certain time period, but not others).[19] The text of the changes to FRCP 34(b)(2)(B) and (C) are as follows:

> FRCP 34(b)(2)(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.
>
> (C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

6. FRCP 37: E-Discovery Preservation and Sanctions

The first change to FRCP 37(a)(3)(B) is in keeping with the change to FRCP 34(b)(2)(B), which simply recognizes the practice of producing copies of documents rather than permitting inspection. That change is as follows:

> FRCP 37 (a)(3)(B) A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:…(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

[18] Committee Notes to FRCP 34 (2015).
[19] Id.

The second change to FRCP 37(e) deals with electronic discovery, preserving it, losing it, and appropriate sanctions for its loss.

The Advisory Committee believed that the prior language, adopted in 2006, did not account for the massive (and growing) volume of electronic information. And, it was concerned that courts were coming up with very different standards for when and how to sanction parties for lost information. Those differences caused uncertainty, which in turn caused parties to spend a lot of time and money on preservation so they would not be sanctioned later for failing to do enough.[20]

The changes are intended to give specific kinds of consequences for lost electronic information and to specify the findings a court must make to justify the consequence.[21]

The rule applies if: (1) the information is electronic; (2) it is lost; (3) it should have been preserved in anticipation or conduct of litigation; and (4) a party failed to take reasonable steps to preserve it. The first and second factors seem pretty easy to identify. The third and fourth could be more difficult and fact intensive.

As to the third factor, the Advisory Committee says that it did not intend to create a new duty to preserve evidence, but only to have courts decide whether and when that duty arises under existing common law or some other existing statute or regulation.[22] But, the amendments to FRCP 16(b)(3)(B)(iii) and 26(f)(3)(C), which encourage discovery plans that deal with preservation of electronic information, may remove some uncertainty about when parties have a duty to preserve.[23]

With regard to the fourth factor—reasonableness of efforts to preserve the electronic information—the Advisory Committee makes several noteworthy points about reasonableness: (1) perfection is impossible given the volume of electronic information; (2) reasonable steps does not equal perfection; (3) courts should be sensitive to a party's sophistication; and (4) courts should employ the proportionality concept in its reasonableness determination.[24]

If all four of the factors are present, the next step is to determine whether the lost information can be restored or replaced. If so, that is the end of the inquiry.[25]

If the information is truly lost, the next step is to determine whether the loss causes prejudice to the other party; in other words, whether the information is important.[26]

Once the court finds prejudice, the court may order a broad range of consequences that are "no greater than necessary to cure the prejudice," but not as severe as the consequences of a loss intended to deprive the other party of discovery.[27]

If the court finds that the loss was because the party acted with intent to deprive the other party of information in the litigation—even if there is no finding of prejudice—the court can impose the most severe sanctions of presuming the evidence is unfavorable or dismissing the action.[28]

---

[20] Committee Notes to FRCP 37 (2015).
[21] Id.
[22] Id.
[23] Id.
[24] Id.
[25] Id.
[26] Id.
[27] Id.
[28] Id.

The change to FRCP 37(e) is as follows:

FRCP 37(e) Failure to ~~Provide~~ Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

7. FRCP 55(c): Final Default Judgments

The change to FRCP 55 is just one word, but is intended to clarify that the more demanding standards in FRCP 60(b) (or BR 9024) only apply when setting aside a final default judgment.[29] A judgment is final if it disposes of all claims and all parties, or, if it does not, but the court directs entry of a final judgment as to part of the claims or parties under FRCP 54(b).[30]

The new FCRP 55(c) reads as follows:

FRCP 55(e) The court may set aside an entry of a default for good cause, and it may set aside a final judgment under Rule 60(b).

[29] Committee Notes to FRCP 55 (2016).
[30] FRCP 54(b).

II. Rule Changes Pending for December 1, 2016

The following rules have been approved by the Supreme Court and were submitted to Congress on April 28, 2016.[31] These rules will become effective on December 1, 2016, if Congress does not act.[32]

1. FRCP 4(m): A Clarification on Time for Foreign Service

The text of the rule with the proposed changes is:

> Rule 4(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The proposed amendment to FRCP 4(m) is small and is intended to resolve a possible ambiguity about the time for service on corporations, partnerships, or other unincorporated associations not within a judicial district of the United States.[33] The 90-day limit does not apply to service on individuals in foreign states (by virtue of the exception for service under Rule 4(f)) or to service on a foreign state (by virtue of the exception for service under Rule 4(j)(2)), but there is confusion about whether the 90-day service deadline applies to service of business entities in foreign states.[34] This amendment would eliminate that confusion by exempting service on a business entity in a foreign jurisdiction from the 90-day deadline.[35]

2. FRCP 6: Eliminating the Extra Three Days after Electronic Service

The text of the rule with proposed changes is:

> Rule 6(d) When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Rule 5(b)(2)(E) permits service by electronic means.[36] By striking Rule 5(b)(2)(E) from FRCP 6, this amendment would eliminate the need to add three days to computing time periods under Rule 6(a) if service is by electronic means.[37]

The Judicial Committee cited several reasons for making this change. First, in the early days of electronic service there were concerns about delay in electronic transmission, whether from incompatible systems or lack of skill. With advances in technology and more widespread use of electronic service, the

---

[31] www.supremecourt.gov/orders/ordersofthecourt15. This paper only discusses rule changes that impact most bankruptcy practice. The Supreme Court has also recommended changes to the following rules that are not discussed in this paper: (1) Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40; (2) Appellate Forms 1, 5, and 6, proposed new Form 7; (3) Criminal Rules 4, 41, and 45; and (4) FRCP 82 which relates to a admiralty or maritime claims.

[32] www.uscourts.gov/rules-policies. 28 U.S.C. §§ 2074, 2075.

[33] Committee Notes to FRCP 4 (2016). The Committee Notes to the proposed 2016 amendments are available at http://www.uscourts.gov/rules-policies/pending-rules-amendments.

[34] Id.

[35] Id.

[36] FRCP 5(b)(2)(E).

[37] Committee Notes to FRCP 6 (2016).

advisory committees determined there is no longer cause to be concerned about delays in electronic service.[38] Second, many of the rules have been amended to allow easier "day-of-the-week" counting—using 7, 14, 21, and 28-day periods—and the addition of 3 days complicates counting.[39]

3. Bankruptcy Rule Amendments

The proposed amendments to the Federal Rules of Bankruptcy Procedure are to BR 1010, 1011, 1012 (new), 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033. The proposals fall into four general subject categories: (a) chapter 15 procedure; (b) chapter 13 mortgage notices; (c) elimination of the 3-day rule; and (d) the "Stern Amendments."

a. BR 1010, 1011, 1012 (new), and 2002: Chapter 15 Procedures

This set of proposed rule changes would reorganize and clarify the procedures related to the filing of a chapter 15 petition.

In summary, the proposed changes would do the following: (1) delete from BR 1010 references to summons, service and notice in chapter 15 cases and put them in BR 2002(q); (2) delete from BR 1011 references to responses and corporate ownership statements in chapter 15 cases and put them in proposed new Rule 1012; (3) create a new Rule 1012 to consolidate rules about responding to a chapter 15 petition; and (4) in Rule 2002(q), clarify notice procedures and provide for prompt hearings on chapter 15 petitions, as well as the consolidation of hearings on the petition with hearings for provisional relief on shortened notice.[40]

The text of the proposed changes to existing rules and proposed new rule is:

BR 1010. Service of Involuntary Petition and Summons~~; Petition for Recognition of a Foreign Nonmain Proceeding~~ (a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS~~; SERVICE OF PETITION FOR RECOGNITION OF FOREIGN NONMAIN PROCEEDING~~. On the filing of an involuntary petition ~~or a petition for recognition of a foreign nonmain proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct.~~ The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l) Fed.R.Civ.P. apply when service is made or attempted under this rule.

BR 1011 (a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition~~, or a party in interest to a petition for recognition of a foreign proceeding,~~ may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition…(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition ~~or the petition for recognition of a foreign proceeding~~ is a corporation, the entity shall file with its first

[38] Id.
[39] Id.
[40] Committee Notes to BR 1010, 1011, 1012, and 2002 (2016).

appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

BR 1012. Responsive Pleading in Cross-Border Cases
(a) WHO MAY CONTEST PETITION. The debtor or any party in interest may contest a petition for recognition of a foreign proceeding.
(b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections and other responses to the petition shall be presented no later than seven days before the date set for the hearing on the petition, unless the court prescribes some other time or manner for responses.
(c) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the petition is a corporation, then the entity shall file a corporate ownership statement containing the information described in Rule 7007.1 with its first appearance, pleading, motion, response, or other request addressed to the court.

BR 2002(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.
(1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing ~~on the petition for recognition of a foreign proceeding~~. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.

b. BR. 3002.1: Chapter 13 Residential Mortgage Notice

Rule 3002.1 only applies in chapter 13 cases to claims secured by the debtor's principal residence.[41] It requires lenders to give certain notices about changes in payment amounts and to provide an itemized list of fees, expenses or charges that are incurred during the bankruptcy case and that are recoverable from the debtor or the principal residence.[42] Rule 3002.1 also sets up a procedure to make sure the debtor, the trustee and the court are aware of any deficiencies in the mortgage payments, so the debtor is not surprised by an unexpected deficiency at the end of the chapter 13 case.[43]

These proposed changes would make two clarifications. The first would be to clarify that the rule applies whenever mortgage payments will be maintained throughout the life of the plan, *regardless* of whether there is an arrearage being cured or whether the monthly payments are being made through the plan or directly by the debtor.[44] The second change clarifies that the rule would no longer apply once the stay is terminated as to the principal residence, unless the court orders otherwise.[45]

[41] BR 3002.1(a).
[42] BR 3002.1(b), (c), and (i).
[43] BR 3002.1(e)-(h). Collier's on Bankruptcy [16th Ed.], P 3002.1.01.
[44] Committee Notes on BR 3002.1 (2016).
[45] Id.

The text of the proposed changes are:

BR 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence
(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments ~~provided for under § 1322(b)(5) of the Code in the debtor's plan~~. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

c. 9006(f): Eliminating the Three Day Rule for Electronic Service

The proposed amendment to BR 9006 would eliminate the additional three days added to time periods when service is by electronic means. The reasoning behind this rule change is the same as the reason for the proposed changes to FRCP 6 discussed above.[46]

The proposed text of the amended rule is:

BR 9006 (f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D)~~, (E),~~ OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service~~being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other means consented to) Fed.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

d. BR 7008, 7012, 7016, 9027 and 9033: The *Stern* Amendments

This set of proposed amendments was drafted in response to the Supreme Court decisions in *Stern v. Marshall*, 131 S.Ct. 2594 (2011) and *Wellness International Network v. Sharif*, 135 S.Ct. 1932 (2015).[47]

BR 7008, 7012, and 9027 have long-required that pleadings contain a statement that the proceeding is core or non core, and whether the pleader consents to a final adjudication of any non core matters by the bankruptcy court. These rules implement 28 U.S.C. § 157(b) and (c). Section 157(b) includes a list of core proceedings and permits the bankruptcy court to issue final judgments and orders on core matters. Section 157(c) requires the bankruptcy court to submit proposed findings of fact and conclusions of law to the District Court on non core matters unless parties consent to bankruptcy court adjudication.

But, in *Stern*, the Supreme Court held that a proceeding statutorily defined as core under 28 U.S.C. § 157(b)(2)(C)—a counterclaim—was beyond the constitutional authority of the bankruptcy court to adjudicate finally.[48] In *Stern*¸ the proceeding was a state law counterclaim made by the debtor's estate against a creditor who had filed a proof of claim in the bankruptcy case.[49] The Supreme Court determined that the counterclaim was not necessarily resolved in the adjudication of the creditor's claim against the estate, and the counterclaim was not within the "public rights" exception to Article III of the Constitution.[50]

[46] Part II.c.2.
[47] October 14, 2015 Memorandum from the Advisory Committee on Bankruptcy Rules to the Standing Committee available at http://www.uscourts.gov/rules-policies/pending-rules-amendments.
[48] *Stern v. Marshall*, 131 S.Ct. 2594, 2608 (2011).
[49] Id. at 2598.
[50] Id. at 2597, 2611.

The *Stern* decision essentially created a third kind of proceeding—a core proceeding beyond the constitutional authority of the bankruptcy court, in other words, a constitutionally non-core proceeding.[51]

Until the *Wellness* decision in 2015, it was unclear whether parties could consent to a bankruptcy court's adjudication of a "*Stern* claim." In *Wellness*, the Supreme Court held that bankruptcy court can finally adjudicate *Stern* claims if the parties give knowing and voluntary consent.[52] The Court did not require express consent, but noted that it may be a good practice to get it and to require it by rule.[53]

The proposed amendments eliminate the need to say whether a proceeding is core or non-core, but require the pleader to say whether it consents to final adjudication in bankruptcy court. If all parties consent, then the core/non-core distinction doesn't matter.[54] If a party does not consent, then the bankruptcy court must go through the process under the proposed Rule 7016(b) to decide whether the matter is within its core jurisdiction and constitutional authority, and determine whether to issue final judgments and orders, submit proposed findings of fact and conclusions of law, or do something else.[55]

The text of the proposed *Stern* Amendments are as follows:

BR 7008. Rule 8 Fed.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.

BR 7012(b) Rule 12(b)-(i) Fed.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.~~

BR 7016 (a) PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT. Rule 16 Fed.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.

BR 9027 (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

[51] See *Executive Benefits Insurance Agency v. Arkinson*, 134 S.Ct. 2165, 2174 (2014)(treating statutorily core claims that are outside of the bankruptcy court's constitutional authority like non core claims under 28 U.S.C. § 157(c)(1)).
[52] *Wellness International Network v. Sharif*, 135 S.Ct. 1932, 1948-49 (2015).
[53] Id. at 1948.
[54] October 14, 2015 Memorandum from the Advisory Committee on Bankruptcy Rules to the Standing Committee available at http://www.uscourts.gov/rules-policies/pending-rules-amendments.
[55] Committee Notes to BR 7016(b) (2016).

orders or judgment by the bankruptcy ~~judge~~ court, and be accompanied by a copy of all process and pleadings…(e) PROCEDURE AFTER REMOVAL…(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.

BR 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.8.C. § 157(c)(l).~~ 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.

Rob Colwell
Chief Deputy
U.S. Bankruptcy Court–Northern District of Texas
1100 Commerce Street - Room 1254
Dallas, Texas 75242-1496
214/753-2017
Rob_Colwell@txnb.uscourts.gov

Rob has served as the Chief Deputy for the U.S. Bankruptcy Court, Northern District of Texas since June 30, 2014. Prior to accepting this position, he practiced law for two years in Dallas, and served as a career law clerk to two separate Bankruptcy Judges, Abramson and Hale, for a total of 18 years.

Rob earned a B.B.A. in Accounting and a B.S. in Economics, with an emphasis in International Economics from Texas Christian University in Fort Worth in 1991, and a J.D. from Southern Methodist University in Dallas in 1994.

Rob has been married to his wonderful wife, Tina, for twenty two years. They currently live in Fort Worth, and spend most of their free time enjoying their two children, Emma and Pearce, ages 17 and 15. Both of the kids love to act, and have roped Rob into sharing the stage with them in *"Annie*," *"The Sound of Music,"* and most recently *"Oliver!*" where he got to sport some mutton chops (think middle-aged Wolverine without the exoskeleton), for which Judge Hale took great pleasure in ribbing him.

Rob is a Master in the John C. Ford American Inn of Court, and is a member of the Bankruptcy Section of the State Bar of Texas. He teaches Creditors' Rights at the SMU Dedman School of Law and is a contributing author to BLOOMBERG LAW ON BANKRUPTCY. He has presented papers and spoken at various bankruptcy conferences and bar association meetings, and has taught the William J. Rochelle, Jr. Course, *The Practice of Corporate Bankruptcy Reorganization Law*.