

**PUBLICATION UPDATE**

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# Collier on Bankruptcy

Publication 219      Release 132

December 2014

## HIGHLIGHTS

### 2014 Amendments to the Federal Rules of Bankruptcy Procedure.

- The 2014 amendments to the Federal Rules of Bankruptcy Procedure, effective December 1, 2014, made changes to Rules 1014, 7004, 7008, 7054, 9023 and 9024. In addition, all of the rules governing bankruptcy appeals were revised and rearranged, with both stylistic and substantive changes. Part VIII of the Bankruptcy Rules now comprises Rules 8001 through 8028.

### Bankruptcy Taxation.

- Volume 11 includes updated discussion of the tax aspects of bankruptcy.

### Commercial and Consumer Forms.

- New and revised commercial forms are featured in volumes 14 through 19, including amended and new Official Forms..

**Stern-Type Core Proceedings.** In *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, 189 L. Ed. 2d 83, 71 C.B.C.2d 875 (2014), the Supreme Court

addressed the applicability of section 157(c)(1) to *Stern*-type core proceedings (that is, core proceedings that cannot be determined by a bankruptcy judge). It held that when a bankruptcy court is presented with a *Stern* claim (the Court's term), the proper course is to issue proposed findings of fact and conclusions of law. The district court will then review the claim de novo and issue judgment. According to the Court, "[t]his approach accords with the bankruptcy statute and does not implicate the constitutional defect identified by *Stern*." In so ruling, the Court resolved a circuit conflict. *Arkison* is discussed in Chapter 3 (§ 3.03[6]) in detail, as well as in Chapter 7056. As pointed out in the latter, after *Stern* and *Arkison*, the bankruptcy court may be the ultimate trier of fact in fewer cases, though the extent to which that is so may turn on whether litigants can consent to the entry of a final order by a bankruptcy judge—a matter not determined by the Court in *Arkison*, but as to which the Supreme Court has granted certiorari in another case.

**2014 Bankruptcy Rule Amendments.** Effective December 1, 2014, six rules have

been amended—1014, 7004, 7008, 7054, 9023 and 9024—and all of the Part VIII rules have been revised, restyled and renumbered. There are now 28 Part VIII rules, as described in more detail below.

Under amended subdivision (b) of Rule 2014, the procedure has been changed for dealing with petitions filed in more than one district relating to the same debtor or closely related debtors. Instead of automatically staying all proceedings except those in the district where the first such petition was filed, the amended rule gives the court in that district the power to stay proceedings in other districts if it chooses to do so.

Subdivision (e) of Rule 7004 was amended to provide that the service of summons must be made within seven days after the summons is issued, rather than the 14 days previously permitted. The change was prompted by a concern that a 14-day delay before service of a summons may unduly limit the defendant's time to answer, which is calculated from the date the summons is issued under Rule 7012 and not, as is the case under the Civil Rules, the date of service.

Rule 7008 was amended to delete subdivision (b), which required that a request for an award of attorney's fees be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer or reply as may be appropriate. The procedure for seeking attorney's fees is now contained in amended Rule 7054(b)(2), incorporating Civil Rule 54(d)(2).

Amended Rule 7054(b) prescribes the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It incorporates subdivisions (d)(2)(A)–(C) and (E) of Federal Rule of Civil Procedure 54, except for the reference in (d)(2)(C) to Rule 78.

Amended Rules 9023 and 9024 now

contain cross-references to Rule 8008, which governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

The 2014 amendments to the Bankruptcy Rules also include new Rules 8001 through 8028. These rules are a comprehensive revision of the rules governing bankruptcy appeals and result from a multiyear project (i) to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure, (ii) to incorporate a presumption favoring the electronic transmission, filing and service of court documents and (iii) to adopt a clearer style. No existing Part VIII rule was left untouched. Even the rules with no substantive changes were reorganized and renumbered. Some of the former rules were combined, and provisions of other rules were moved to new locations. The following is a list of the new Part VIII rules:

- 8001, Scope of Part VIII Rules; Definition of “BAP”; Method of Transmission
- 8002, Time for Filing Notice of Appeal
- 8003, Appeal as of Right—How Taken; Docketing the Appeal
- 8004, Appeal by Leave—How Taken; Docketing the Appeal;
- 8005, Election to Have an Appeal Heard by the District Court Instead of the BAP
- 8006, Certifying a Direct Appeal to the Court of Appeals
- 8007, Stay Pending Appeal; Bonds; Suspension of Proceedings
- 8008, Indicative Rulings
- 8009, Record on Appeal; Sealed Documents

- 8010, Completing and Transmitting the Record
- 8011, Filing and Service; Signature
- 8012, Corporate Disclosure Statement
- 8013, Motions; Intervention
- 8014, Briefs
- 8015, Form and Length of Briefs; Form of Appendices and Other Papers
- 8016, Cross-Appeals
- 8017, Brief of an Amicus Curiae
- 8018, Serving and Filing Briefs; Appendices
- 8019, Oral Argument
- 8020, Frivolous Appeal and Other Misconduct
- 8021, Costs
- 8022, Motion for Rehearing
- 8023, Voluntary Dismissal
- 8024, Clerk’s Duties on Disposition of the Appeal
- 8025, Stay of a District Court or BAP Judgment
- 8026, Rules by Circuit Councils and District Courts; Procedure When There Is No Controlling Law
- 8027, Notice of a Mediation Procedure
- 8028, Suspension of Rules in Part VIII.

The amended and new rules, along with the Advisory Committee Notes, are reprinted and described in new Chapters 8001–8028. The Judicial Conference materials are reprinted in Appendix Part 2(b). Appendix Part 2(c) contains the amended text of the Bankruptcy Rules in their entirety. Note that new Chapter 8000 contains a correlation table between the new Part VIII rules and the former rules. Appendix

8000 contains the text of the former rules and their Advisory Committee Notes.

**Confirmation of Chapter 11 Plan.** Code section 1129 provides the requirements for confirmation of a plan of reorganization in a chapter 11 case. Revised Chapter 1129 features synthesized discussion of credit bidding under section 1129(b)(2)(A)(ii) (§ 1129.06[1][c][ii]), and explores the issue of the absolute priority requirement in individual chapter 11 cases (§ 1129.04[3][d]). *See In re Lively*, 717 F.3d 406, 410, 69 C.B.C.2d 1423 (5th Cir. 2013) (“But if ambiguity exists, the consequence of the ‘broad view’ is that the ‘except’ clause abrogates the absolute priority rule for individual debtors. This is a startling, and most indirect, way for Congress to have effected partial implicit repeal of the very provision that the section amended. As a matter of standard statutory construction, this result is unacceptable.”); *Dill Oil Co., LLC v. Stephens (In re Stephens)*, 704 F.3d 1279, 1287, 68 C.B.C.2d 1760 (10th Cir. 2013) (“[T]he statutory language and legislative history lack any clear indication that Congress intended to erode a pillar of creditor bankruptcy protection.”).

**Bankruptcy Taxation (vol. 11).** Added to Chapter TX12, State and Local Tax Aspects of Bankruptcy,” are new sections on nondischargeable taxes (§ TX12.03[2][a][ii]), rate of interest on property tax claims (§ TX12.04[4][b][ii]), successor liability for debtor’s experience rating (§ TX12.04[5][b]) and ownership of refunds pursuant to a tax sharing agreement (§ TX12.05[5]). Chapter TX13 is updated with an overview of the proposed regulations relating to the treatment of partnership liabilities. In Chapter TX3, § TX3.09[1], “FATCA Regulations, Intergovernmental Agreements and Other Guidance,” covers the temporary FATCA regu-

lations released on February 20, 2014, Coordinating Regulations that became effective July 1, 2014, and the Model Intergovernmental Agreement to Improve Tax Compliance and Implement FATCA, released by the United States in conjunction with the five original FATCA partner countries.

**Commercial Forms (vols. 14–17).** Revised Part 13 (volume 15) includes two new forms relating to the assumption or rejection of a lease of nonresidential property: Form No. 13.12-3, “Debtor’s Motion for Order Pursuant to Section 365(d)(4) of the Bankruptcy Code Extending the Deadline for the Debtor to Assume or Reject (Unidentified or Uncertain) Unexpired Leases of Nonresidential Real Property”; and Form No. 13.12-4, “Order Pursuant to Section 365(d)(4) of the Bankruptcy Code Extending the Deadline for the Debtor to Assume or Reject (Unidentified or Uncertain) Unexpired Leases of Nonresidential Real Property.” Also featured in Part 13 is new § 13.29, on rejection and modification of collective bargaining agreements. That section contains two forms: Form No. 13.29-1, “Motion of Debtors and Debtors in Possession for Authorization to Reject Certain Collective Bargaining Agreements and Modify Others Pursuant to Sections 1113(c) and 1113(e) of the Bankruptcy Code”; and Form No. 13.29-2, “Order Granting Motion of Debtors and Debtors in Possession Pursuant to Sections 1113(c) and 1113(e) of the Bankruptcy Code.”

**Consumer Forms (vols. 18–19).** Part CS3 (volume 18) has been revised throughout to reflect the new Part VIII Federal Rules of Bankruptcy Procedure and Official Forms 17A–17C, which were effective December 1, 2014. The Notice of Appeal has been renumbered as Official Form 17A (Form No. CS3.02-1). As amended, it includes an optional Statement of Election to

have the appeal heard by the district court rather than the bankruptcy appellate panel. The statement of election is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. New Official Form 17B is the form for an *appellee* to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel (Form No. CS3.02-2). This form, if applicable, must be filed within 30 days of service of the Notice of Appeal. New Official Form 17C, “Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2),” is required when the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages (Form No. 3.09-1).

Included in Part CS10 (volume 18) are new Form No. 10.45-2, “Statement of Exemption from Presumption of Abuse Under § 707(b)(2)” (Official Form 22A-1Supp); Form No.10.45-3, “Chapter 7 Means Test Calculation” (Official Form 22A-2); Form No.10.45-4, “Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period” (Official Form 22C-1); and Form No. 10.45-5, “Chapter 13 Calculation of Disposable Income” (Official Form 22C-2). These forms are new versions of the means test forms used by individuals in chapter 7 and chapter 13. The original forms were substantially revised as part of the Forms Modernization Project. Former Official Form 22A has been renumbered as 22A-1 and is now the chapter 7 statement of current monthly income.

**NEW: Collier Monograph—Insurance Issues in Bankruptcy.** The latest *Collier* monograph (Sept. 2014) covers the full range of insurance issues in bankruptcy cases, including jurisdiction questions, mass tort and asbestos issues, claim and settlement matters, and chapter 11 plan confirmation. It is expected to be a leading

resource in the field, and will be of considerable value to bankruptcy specialists, insurance lawyers and commercial litigators. To date, remarkably little has been written on the interface between insurance and federal bankruptcy law; this volume fills a significant need. The monograph comprises five chapters: Treatment of Insurance in Bankruptcy; Insurance Litigation in Bankruptcy Courts; Insurer Settlements in Bankruptcy; Interface Between Insurance and Debtor's Plan of Reorganization; and Estimation of Claims. The authors are Robert B. Millner and Christopher D. Soper, of Dentons US LLP. To order, call 800.223.1940; Pub. no. 01760, ISBN

9780769858920; \$150; one softbound volume.

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# Collier on Bankruptcy

Publication 219 Release 132

December 2014

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- 2. This Release Number 132 consists of 2 package:
  - Package number 1 contains white page updates to Volumes 1 thru 11.
  - Package number 2 contains white page updates to Volumes 14 thru ★.
- 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

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