

Federal Rules Update: The Times They Are a-Changin'¹

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Effective Dec. 1, 2009, the rules for computing time in federal courts will change, absent contrary congressional action. The principal conceptual change is the adoption of a “days are days” approach to computing all time periods. This article discusses the time-computation changes as well as the new procedure for the amendment of pleadings as a matter of right and the new default deadlines for summary judgment motions, among other changes relevant to bankruptcy practitioners.

The Time-Computation Project



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Several years ago, the Judicial Conference’s Committee on Rules of Practice and Procedure launched a time-computation project in response to complaints about the time, energy and anxiety expended in calculating time

periods, the potential for error and the anomalous results of the current computation provisions.² The Appellate, Bankruptcy, Civil and Criminal Rules Advisory Committees proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6 and Criminal Rule 45³ to simplify the method of computing time. Each advisory committee also proposed changes to the time periods in all of the rules so that changing the time-computation method would not have the effect of shortening existing time periods.

In September 2008, the Judicial Conference adopted and recommended to the Supreme Court changes to the federal civil rules, criminal rules, appellate rules and bankruptcy rules as part of the time-computation project.⁴ The conference also recommended changes to several

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rules unrelated to the time-computation project, including Civil Rules 15 and 56, as well as Bankruptcy Rules 4008, 7052 and 9021. The Supreme Court adopted the proposed changes on March 26, 2009, and transmitted the new and amended rules to Congress.⁵ The new and amended rules will apply to all pending proceedings unless such application would be infeasible or would work an injustice.⁶

In tandem with the time-computation project, Congress enacted technical amendments to the Bankruptcy Code.⁷ These amendments change nine statutory deadlines from five days to seven days. The changes affect 11 U.S.C. §§109(h)(3) (A), 322(a) 332(a), 342(e)(2), 521(e)(3)

intermediate weekends and holidays, virtually all short time deadlines are extended by two or more days. Periods of seven, 14, 21 and 28 days are adopted when possible so that deadlines will usually fall on weekdays. In particular:

- The five-day periods in Rules 2006, 2007, 2008, 2015.3, 6004, 9006 and 9027 become seven-day periods;
- The 10-day periods in Rules 1007, 2003, 2015.1, 2015.2, 2016, 3020, 4001, 6004, 6006, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9023, 9027 and 9033 become 14-day periods;
- The 15-day periods in Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007 and 8009 become 14-day periods;
- The 20-day periods in Rules 1011, 2002, 2003, 2007.2, 2015, 2015.3, 3001, 3015, 3019, 6003, 6003, 7012, 8002, 9027 and 9033 become 21-day periods; and

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(B), 521(i)(2), 704(b)(1)(B), 749(b) and 764(b). The changes, like the changes to the rules, become effective Dec. 1, 2009.

Time-Computation Amendments to the Bankruptcy Rules

Under current Bankruptcy Rule 9006(a), time is relative if the period is less than eight days. Seven days is always more than seven calendar days because of the intervening weekend. Ten days, however, means 10 calendar days. As part of the time-computation project, Bankruptcy Rule 9006(a) has been rewritten, now paralleling the computation of time in general civil litigation under new Civil Rule 6(a).

Under new Bankruptcy Rule 9006(a), days are days. Intermediate weekends and holidays are counted regardless of the length of the specified period. In order to adjust for the effect of including

- The 25-day periods in Rules 2002, 3017 and 4004 become 28-day periods.

New Bankruptcy Rule 9006(a) applies by its terms to any bankruptcy rule, civil rule, local rule, court order or statute that does not specify a different method of computing time, and does not apply when a fixed time to act is set by, for example, a court order. The Advisory Committee Note expressly rejects the approach taken in *In re American Healthcare Management Inc.*, 900 F.2d 827 832 (5th Cir. 1990), in which the Fifth Circuit held that Bankruptcy Rule 9006(a) governed a date-certain deadline set by court order.

In calculating the time to act under new Bankruptcy Rule 9006(a), the day that triggers the event is excluded and every day thereafter is counted, including intermediate Saturdays, Sundays and legal holidays. The period continues to run until the “next day that is not a Saturday, Sunday or legal holiday.” New Bankruptcy Rule 9006(a)(4) provides that the “‘next day’ is determined by

¹ Bob Dylan, “The Times They Are A-Changin’,” on *The Times They Are A-Changin’* (Columbia Records 1964).

² See Report of the Judicial Conference Committee on Rules of Practice and Procedure, p. 2 (September 2008), available at www.uscourts.gov/rules/supreme%20Court%202008/ST09-2008.pdf (hereinafter the Final Report).

³ These terms refer to, respectively, the Federal Rules of Appellate Procedures, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

⁴ See Final Report.

⁵ See U.S. Supreme Court transmittal letters and orders dated March 26, 2009, available at www.uscourts.gov/rules/SC_March_2009.pdf.

⁶ See 28 U.S.C. §2074 (2006 and Supp. 2009).

⁷ See Statutory Time-Periods Technical Amendments Act of 2009, H.R. 1626, 111th Cong. (2009), available at www.uscourts.gov/rules/HR1626.pdf.

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continuing to count forward when the period is measured after an event and backward when measured before an event.” For electronic filing, new Bankruptcy Rule 9006(a)(4)(A) provides that the “last day” ends at midnight in the court’s time zone.

New Bankruptcy Rule 9006(a)(2) contains a provision for the computation of time when the period is stated in hours. A deadline stated in hours begins to run immediately, and every hour thereafter is counted, including intermediate Saturdays, Sundays and legal holidays. The period continues to run until the same time on the next “day that is not a Saturday, Sunday or legal holiday.”

The so-called “mailbox rule” of Bankruptcy Rule 9006(f), which provides a party with an additional three days to act when the prescribed period is triggered by service, remains unchanged. In addition, the two-day periods in Bankruptcy Rules 1007(d) and 4001(a)(2), the five-day periods in Bankruptcy Rules 4001(d)(3) and 7054(b), and the seven-day period in Bankruptcy Rule 8011(a) remain unchanged.

Bankruptcy Appeals

A 10-day appeal period has governed bankruptcy appeals since the enactment of the Bankruptcy Act of 1898.⁸ The Advisory Committee Note for current Bankruptcy Rule 8002 acknowledges that this period is shorter than the 30 days provided for appeals in general civil practice. However, it states that “[t]he shortened time is specified in order to obtain a prompt appellate review, often important to the administration of a case under the [Bankruptcy] Code.”

Before 1987, Bankruptcy Rule 9006(a) provided that Saturdays, Sundays and legal holidays were excluded if the time period to act was less than seven days. Thus, “parties could wait 10 days from the date of the entry of an order approving a sale of property and proceed to close on the second business day after the ninth day of the entry of the order which approved the sale.”⁹ In 1987, Bankruptcy Rule 9006(a) was amended to conform to Civil Rule 6(a), which excludes Saturday, Sunday and legal

holidays, when the time period to act is less than 11 days.

The amendment of Bankruptcy Rule 9006(a) in 1987 “had a profound and unexpected effect on appeals.”¹⁰ Following the amendment to Bankruptcy Rule 9006(a), a notice of appeal could be filed within a minimum of 14 calendar days due to the exclusion of Saturdays, Sundays and legal holidays from the calculation of the 10-day time period in Bankruptcy Rule 8002. In response to the ensuing complaints, Bankruptcy Rule 9006(a) was amended on an expedited basis effective Aug. 1, 1989, to change the time for which weekends and holidays are excluded to periods of less than eight days.

In connection with the current time-computation project, the proposed extension of the deadline for bankruptcy appeals elicited the most comments from bankruptcy practitioners.¹¹ Some of the comments expressed concern that the proposed changes risked confusing practitioners without providing any real benefit. The Judicial Conference ultimately recommended, and the Supreme Court approved, an extension of the deadline to 14 calendar days.

Bankruptcy Rules 9015 and 9023 are amended to conform to the extension of the period for bankruptcy appeals. The amendments to these rules and the amendments to Bankruptcy Rule 8002(a) and (b) set a 14-day deadline to file certain post-judgment motions. In general civil litigation, however, the deadline for appeals and certain post-trial motions is 28 days.

The Separate-Judgment Rule

Civil Rule 58, as applied to bankruptcy cases by current Bankruptcy Rule 9021, requires that every final order entered in an adversary proceeding or contested matter be set forth in a separate writing. The purpose of the separate-judgment rule is to clearly define the time period in which a party has to file an appeal.¹² The application of this rule to bankruptcy cases has proven awkward, as many bankruptcy courts routinely enter short orders that contain factual

recitals. In bankruptcy appeals, some courts have treated “a short order that clearly constitutes a final decision [as one which] meets the separate judgment rule.”¹³ Other courts have held that the separate-document requirement can be waived by a party who appeals without requesting the entry of a separate judgment.¹⁴

The amendments to Bankruptcy Rules 7052 and 9021 and new Bankruptcy Rule 7058 resolve problems that arise when applying the separate-judgment rule to all bankruptcy matters. New Bankruptcy Rule 7058 makes Civil Rule 58, including its separate-document requirement and 150-day default appeal period, applicable only to adversary proceedings. The amendment to Bankruptcy Rule 9021 makes clear that the separate-document requirement does not apply outside of adversary proceedings.

Amendment as a Matter of Right

Civil Rule 15, as adopted and applied to adversary cases by Bankruptcy Rule 7015, is substantially amended.¹⁵ The amendment eliminates the distinction drawn by the current Civil Rule 15(a), under which a responsive pleading immediately cuts off the right to amend, while motion under Civil Rule 12 does not cut off the right and prolongs the time to amend a pleading until the motion is resolved.

Amended Civil Rule 15(a)(1) provides that a party may file an amended pleading without leave of court within 21 days after service of a responsive pleading or 21 days after service of a Rule 12 motion, whichever is earlier. After that, a party may file an amended pleading only with leave of court. Amended Civil Rule 15(a)(3) extends the period to respond to an amended pleading from 10 to 14 days.

Under the current rules, significant delays can occur when a party files an amended pleading as a matter of right on the eve of a court’s ruling on a dispositive Civil Rule 12 motion. The Advisory Committee Note for amended Civil Rule 15 anticipates that the amendments “will force the pleader to consider carefully

¹⁰ *Id.*

¹¹ See 2007 Bankruptcy Rule 8002 Comments Chart, available at www.uscourts.gov/rules/2007_Bankruptcy_Rule_8002_Comments_Chart.htm.

¹² See *In re Schimmels*, 85 F.3d 416, 421 (9th Cir. 1996) (“A separate judgment is required in order to eliminate ‘uncertainties as to when a judgment is entered’ and when the time for appeal begins.” (quoting *United States v. Indrelunas*, 411 U.S. 216, 219, 93 S.Ct. 1562, 1563, 36 L.Ed.2d 202 (1973)).

¹³ *Id.* See also *Matter of Seiscom Delta Inc.*, 857 F.2d 279 (5th Cir. 1988) (concluding that five-page opinion and order entered by bankruptcy court did not comply with Civil Rule 58).

¹⁴ See *Matter of Colley*, 818 F.2d 443, 444-45 (5th Cir. 1987) (citing authority).

¹⁵ See Fed. R. Civ. P. 15(a)(2) (effective Dec. 1, 2009).

⁸ See, e.g., *Williams Bros. v. Savage*, 120 F. 497 (4th Cir. 1983) (enforcing 10-day appeal period in §25 of Bankruptcy Act of 1898).

⁹ 11 *Norton Bankr. L. & Prac. 3d*, Fed. R. Bankr. P. 8002 (editor’s comment).

and promptly the wisdom of amending to meet the arguments in the motion.” It further states that a “responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised *seriatim*.”

The Timing of Summary-Judgment Motions

Current Civil Rule 56(c), as adopted and applied to bankruptcy cases by Bankruptcy Rules 7056 and 9015, provides that a summary-judgment motion “must be served at least 10 days before the date set for the hearing.” What hearing? If no date is ever set for the hearing, when is the motion due to be filed? Most courts have resolved these questions through scheduling orders in which deadlines are set for pretrial activities, including the filing of summary-judgment motions.

The timing provisions in current Civil Rule 56(a) and (c) are replaced by new provisions that recognize a court’s authority to set deadlines for summary judgment motions by local rule or by court order. In default of a local rule or court order, new Civil Rule 56(a) and (c) allow a motion to be made at any time until 30 days after the close of all discovery. The new provisions also

establish default times for response and reply. Responses are due at the later of 21 days after the motion is served or a responsive pleading is due, and a reply is due 14 days after the response is served.

New Requirements for Reaffirmation Agreements

Amended Bankruptcy Rule 4008 requires an entity filing a reaffirmation agreement to also file a cover sheet, prepared as prescribed by new Official Form 27. New Official Form 27 requires the disclosure of financial information necessary for the court to determine whether a reaffirmation agreement creates a presumption of undue hardship for the debtor under 11 U.S.C. §524(m). It also requires the debtor to identify and explain any differences between the income and expenses reported on Schedules I and J and the income and expenses reported in the debtor’s statement in support of the reaffirmation agreement.

Indicative Rulings

New Civil Rule 62.1 addresses requests for “indicative rulings” in the district courts. Although a district court loses jurisdiction to entertain a Civil Rule 60(b) motion once an appeal is filed, most circuits allow the district court to indicate whether it

would be inclined to grant the motion if the matter were remanded for that purpose.¹⁶ It standardizes the procedure for indicative rulings.

The district court may defer ruling on such a motion, deny the motion or either indicate that it would be inclined to grant the motion if the case were remanded (the so-called “indicative ruling”) or state that the motion raises a substantial issue. Civil Rule 61.1(b) requires the movant to promptly notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue.

A Look Forward

Practitioners can expect to see courts changing their local rules to conform to the time-computation changes in the national rules. The amended national rules will trump to the extent there is a conflict with the local rules in a particular district.¹⁷ Any necessary adjustments to local rules or practices are likely to take effect on Dec. 1, 2009, the same day the national rules change.¹⁸ ■

¹⁶ See, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976) (describing procedure for indicative rulings in Fifth Circuit); *Aune v. Reynders*, 344 F.2d 835 (10th Cir. 1965) (discussing procedure for indicative rulings in Tenth Circuit).

¹⁷ See Fed. R. Bankr. P. 9029(a)(1). See also Fed. R. Bankr. P. 9006(a) (effective Dec. 1, 2009).

¹⁸ See “Time Changes Coming to Federal Rules,” *The Third Branch*, Vol. 41, No. 6 (June 2009), available at www.uscourts.gov/ttb/2009-06/article02.cfm.

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