UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
U.S. COURTHOUSE
402 E. STATE STREET
TRENTON, NEW JERSEY 08608

Hon. Michael B. Kaplan **609-858-9360**
Chief Judge, United States Bankruptcy Court

January 10, 2024

H. Thomas Byron, III, Esq.
Secretary, Committee on Rules of Practice and Procedure
Office of General Counsel
Thurgood Marshall Federal Building
One Columbus Cir., N.E.
Washington, D.C. 20544

Re: Rule Suggestion- Amendment to Fed. R. Bank. P. 9031

Dear Mr. Byron and Members of the Committee:

I have been active with the Rabiej Litigation Law Center, and of course, John Rabiej, studying the intersection of bankruptcy and MDL's. The Center held a recent conference at Northwestern University Law School and many of those in attendance were engaged in discussions on several issues, including the benefits of amending Fed R. Bank P. 9031 as it relates to the prohibition on appointment of special masters. I write this letter in support of a request that the Advisory Committee on Bankruptcy Rules revisit whether the absolute prohibition upon the appointment of a special master remains warranted and beneficial to the administration of justice. We recommend the following changes to the rule:

> Rule 9031. Masters ~~Not~~ Authorized
>
> Rule 53 F.R.Civ.P. ~~does not apply~~ applies in cases or proceedings under the Code.

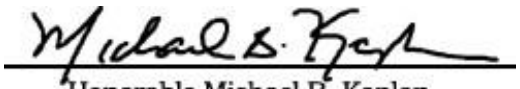
Fed R. Bank. P. 9031 provides that Fed. R. of Civ. P. 53 does not apply in cases under the Code. As explained in the detailed Memorandum prepared by John Rabiej and accompanying this rule suggestion, the central issue as to whether bankruptcy judges or district court judges hearing cases or proceedings under Title 11[1] should have the ability to appoint a special master was last studied by the Judicial Conference nearly three decades ago. Pertinently, in response to a request

[1] Respectfully, Rule 9031's bar against a district court judge's authority in a Title 11 case to appoint a special master, alone, warrants review once more.

by the Bankruptcy Administration Committee in 1996, the Federal Judicial Center studied the issue, published a report in June of 1996 and recommended that Rule 9031 be amended to authorize the appointment of a special master. The report concluded that the "roles, duties, and responsibilities of bankruptcy trustees and examiners are significantly different from those of special masters and are not adequate alternatives to the appointment of special masters (and vice versa)." Notwithstanding, the Advisory Committee on Bankruptcy Rules declined to amend Rule 9031 to apply Federal Rules of Civil Procedure 53 to cases under the Code by a divided vote of 8-5. The decision rested significantly on the opposition expressed by Professor Alan Resnick, the Committee's Reporter. As analyzed in the accompanying Rabiej Memorandum, over time, Professor Resnick's primary concerns have been addressed by subsequent changes to Fed. R. Civ. P. 53. Moreover, the complexities and volume of litigation associated with chapter 11 cases have escalated significantly in the near thirty years since the issue was last addressed.

On a personal level with my current caseload, as well as observing other complex chapter 11 cases across the country, I find it evident that bankruptcy judges handling mass tort chapter 11 bankruptcies, together with large financial institution and cryptocurrency filings, have struggled to employ the tools available under the Code and bankruptcy rules to address complex issues such as corporate asset valuations, claim estimations, fraudulent transfer litigation and challenges to pre-filing liability management transactions. These tools include the appointment of mediators, Rule 706 experts and examiners; yet, each of these options can give rise to significant costs and have inherent limitations- ultimately tort victims, equity holders and other creditors are forced to finance the costs associated with endless discovery battles and challenges to these appointments, along with the substantive underlying litigation. The appointment of a special master would relieve the burden on the bankruptcy courts, allowing the chapter 11 case to proceed without being held hostage to litigation/discovery "overload". By way of limited example, the excessive court time and professional costs associated with litigation over straightforward issues such as the language used in victim questionnaires or proofs of claim would clearly benefit from the independent oversight of a special master.

I will defer further argument at this time in favor of John Rabiej's thoughtful analysis and thank you and the Advisory Committee for your time and consideration.



Honorable Michael B. Kaplan
United States Bankruptcy Judge

cc: Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure
Hon. William L. Osteen, Jr., Chair, Committee on Administration of Bankruptcy System
Hon. Rebecca B. Connelly, Chair, Advisory Committee on Bankruptcy Rules
Scott Myers, Esq. Staff, Advisory Committee on Bankruptcy Rules
Prof. S. Elizabeth Gibson, Committee Reporter
John Rabiej, Rabiej Litigation Law Center

RABIEJ LITIGATION
LAW CENTER

ANALYSIS SUPPORTING REQUEST TO AMEND
FEDERAL RULE OF BANKRUPTCY PROCEDURE 9031
January 8, 2024

Special masters appointed under Federal Rule of Civil Procedure 53 provide indispensable assistance to district courts, facilitating settlements and handling discovery disputes as well as other case-management functions, in a small, but growing, number of cases, particularly in complex litigation, most notably mass-tort MDLs. The comprehensive revision of Rule 53 in 2003 led to a resurgence in special-master appointments because it significantly expanded the special master's functions, which "from the beginning in 1938 ... focused primarily (on the performance of) trial functions."[1] Importantly, the standard of review of all factual and legal objections to a master's findings was changed from "clearly erroneous" to "de novo" review.[2]

District judges have found special-master assistance helpful and a useful case-management resource. But Rule 53 does not apply to a bankruptcy case under Federal Rule of Bankruptcy Procedure 9031. In 1995, eight years before the amendment of Rule 53, the Advisory Committee on Bankruptcy Rules declined the request of its sister Committee on the Administration of the Bankruptcy System to amend Rule 9031 to apply Rule 53 to bankruptcy cases and proceedings and permit the appointment of a special master.[3] The Bankruptcy Rules Committee concluded that a special master "is too reminiscent of the former bankruptcy referee and that adequate alternatives exist in the authority to appoint a trustee and an examiner."[4]

In 1996, the Bankruptcy Rules Committee on a divided 8-5 vote rejected the renewed request of the Bankruptcy Administration Committee, which the Federal Judicial Center also supported, to amend Rule 9031.[5] The Committee's decision was based on the analysis of its reporter, Professor Alan Resnick, who questioned whether the "clearly erroneous" standard was consistent with 28 U.S.C. § 157's vesting authority in the bankruptcy judge and concluded that "(u)nless and until it is demonstrated that there is a need for special masters to assist district courts in the

[1] Fed. R. Civ. P. 53, Committee Note (2003).
[2] Fed.R. Civ. P. 53(f)(3) and (4)
[3] Appendix A -- Letter to Peter McCabe, Rules Committee secretary from Judge Paul Magnuson, Chair of the Committee on the Administration of the Bankruptcy System (June 22, 1995). As part of the Judicial Conference's Long-Range Planning report, the Committee on the Administration of the Bankruptcy System proposed several recommendations, including that "the court be permitted in its discretion to appoint a special master who would, among other things, observe and assess management's performance in the handling of the case." Special masters would provide assistance in chapter 11 cases to perform functions similar to those performed by a trustee in a chapter 12 or 13 cases. The trustee in those cases was 'responsible for expediting the administration of the case in routine, undisputed matters that ordinarily do not end up in front of the bankruptcy judges.'"
[4] Before the 1978 Bankruptcy Code there was history of patronage in bankruptcy cases and proceedings.
[5] Appendix B -- Minutes of Advisory Committee on Bankruptcy Rules Meeting, September 26-27, 1996.

trial of these matters, I would not recommend abrogating or amending Rule 9031."[6] Resnick's recommendations were based on a literal reading of Rule 53 as it stood in 1996 before the 2003 amendments and the rise in complex litigation, *e.g.,* mass-torts litigation.

Four years later in 2000, the Federal Judicial Center issued its "Report on Special Masters' Incidence and Activity" to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittees on Special Masters.[7] The Civil Rules Committee had "indicated its awareness that special master activity had expanded beyond its traditional boundaries" and requested the FJC to study the matter. The Center found that the use of special masters "covered a full spectrum of civil case management and fact-finding at the pretrial, trial, and posttrial stages. Judges appointed special masters to quell discovery disputes, address technical issues of fact, provide accountings, manage routine Tilte VII cases, administer class settlements, and implement and monitor consent decrees, including some calling for long-term institutional change."[8]

The comprehensive amendment of Rule 53 in 2003 addressed the concerns and objections raised by Resnick in 1996. It also expanded the special master's functions, codifying the trend described by the Federal Judicial Center in its 2000 report, which accelerated the number of appointments of special masters in general.

On January 10, 2024, Chief Bankruptcy Judge Michael Kaplan submitted a request to the Bankruptcy Rules Committee that Rule 9031 be amended to apply Rule 53 and allow the appointment of a special master in a bankruptcy case or proceeding. The judge described the obstacles he faced because of Rule 9031's prohibition in obtaining assistance from experts in estimating the value of more than 50,000 individual tort actions for purposes of voting and development of a reorganization-plan in presiding over the bankruptcy of a high-profile mass-tort bankruptcy.[9]

This paper analyzes whether the 2003 amendment of Civil Rule 53 and the increase in complex litigation, where the assistance of a special master can be most useful, are sufficient reasons to reconsider the Bankruptcy Rules Committee's divided vote of 8-5 not to amend Rule 9031 in 1996 and initiate the rulemaking process to amend Rule 9031 to permit the appointment of a special master in a bankruptcy case or proceeding.

Rationale for Committee's Declining to Amend Rule 9031 in 1996

In an extensive analysis included in the Bankruptcy Rules Committee's September 26-27, 1996, agenda book, Reporter Alan Resnick raised several concerns and objections about appointing a special master in a bankruptcy case.[10] In the main, the objections were based primarily on two

[6] Appendix C -- Memorandum from Alan Resnick, Reporter, to Advisory Committee on Bankruptcy Rules, p.14 (August 24, 1996) included in the Advisory Committee on Bankruptcy Rules Meeting on September 26-27, 1995.
[7] Appendix D -- Special Masters' Incidence and Activity, Report to the Advisory Committee on Civil Rules and Its Subcommittee on Special Masters, Willging, Hooper, Leary, Miletich, Reagan, and Shapard, Federal Judicial Center (2000).
[8] Appendix D at p. 4.
[9] *In re: LTL Management, LLC,* Case No. 23-12825 (MBK), D. N.J. (2023).
[10] *See* Appendix D.

grounds: (1) appointments of special masters improperly infringed on the bankruptcy judge's authority; and (2) special masters were unnecessary and inefficient.[11]

Infringement on a Bankruptcy Court's Authority

Resnick's analysis objected to a provision in then Rule 53, which would have required a bankruptcy judge to accept a master's finding of fact in a nonjury action unless "clearly erroneous." Resnick's analysis questioned whether that standard of review "is consistent with 28 U.S.C. § 157's requirement that the bankruptcy judge hear the matter and make proposed findings."[12] If adopted by the bankruptcy judge, the master's findings would be reviewed by the district court judge under a "de novo" standard of review, which according to the argument would further attenuate the bankruptcy judge's authority.

The 2003 amendments to Rule 53 eliminated the highly deferential clearly-erroneous standard of review, which Resnick found objectionable. Instead, Rule 53 now provides the judge with authority to review "de novo" any objections to the master's findings. The bankruptcy judge would retain full authority under an amended Rule 9031 applying Rule 53. In addition, appointments of special masters in bankruptcy cases and proceedings would be controllable because Rule 53's "prescription that appointment of a master must be the exception and not the rule" was retained from the original rule.[13]

Prohibiting a District Judge from Appointing a Special Master

The Resnick analysis applied as well to the appointment of a special master by a district judge. He concluded that "a district court should [not] be able to bypass 28 USC § 157 by referring a complex proceeding – whether core or noncore – to a special master."[14]

But not only Rule 53, but also circumstances, have changed since 1996, which underscore the justification for a district judge to appoint a special master in a bankruptcy case or proceeding. District judges have routinely appointed special masters to serve in multiple roles in complex litigation and mass-tort MDLs, including most importantly facilitating settlements. Although the number of defendants subject to a mass-tort MDL, which are filed in a bankruptcy court, is relatively low, the incidence is growing, and each such matter can involve tens of thousands of individual tort actions. Denying a district judge the option of appointing a special master in a case withdrawn from the bankruptcy judge in one of these mass-tort bankruptcies, which implicates an existing MDL, would impose a significant hardship on the judge.[15]

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[11] *See* Appendix D.
[12] Appendix C at p. 8.
[13] Fed. R. Civ. P. 53, Committee Note (2003).
[14] Appendix C at p. 11.
[15] *See* Appendix E – Memorandum to the Committee on the Administration of the Bankruptcy System on Appointment of Special Masters in Bankruptcy Cases and Proceedings, Federal Judicial Center (June 1996 Agenda Item B.3, Attachment A, at p.10: "Assume for discussion that the United States district court withdraws the reference of a bankruptcy case or proceeding under 28 U.S.C. § 157(d) and Fed. R. Bank. P. 5011(a) and further assume that such case or proceeding otherwise clearly warrants the appointment of a special master, but not a trustee or an examiner under the Bankruptcy Code. The district judge, like the bankruptcy judge, is prohibited from appointing a special master because Fed. R. Bankr. P. 9031 is tantamount to a blanket prohibition by anyone, district judge or bankruptcy judge, from appointing a special master in a case under the Code."

Objections to Special Masters as "Inefficient"

Resnick's analysis objected to the inefficiency of using a special master, which would add another layer of review: "If the bankruptcy court adopts the special master's findings, they would be submitted to the district court as the bankruptcy judge's finding subject to *de novo* review at the district court level. In essence, after two hearings (one before the special master, and one before the bankruptcy judge reviewing the special master's findings), the parties could be starting all over again in a *de novo* hearing before the district court."[16]

Similar objections were raised and rejected about potential inefficiencies in having a district judge review the recommendations of a magistrate judge under 28 U.S.C. § 636(b)(1)(B). Experience has shown that district judges most often accept the magistrate judge's recommendations. Similar results were experienced with special masters as described by the Federal Judicial Center in its Special Master's Incidence and Activity Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters (2000), which explained the results of its national random sample of cases and interviews and found that:

1. "judges generally accepted the reports of special masters;"
2. "almost all of the judges and attorneys told us that the special masters were effective;"
3. "several judges said that 'the special master helped them understand complex issues, saved the parties' money, made the case settle faster, or saved the appointing judge's time;'" and
4. "several attorneys told us that although a judge could have performed the master's pretrial or trial-related activities, the appointment saved judicial resources in that the master was able to handle the activities more efficiently -- and in some cases more effectively – than a judge because the master had the time to devote to them."[17]

In addition, the *de novo* standard of review adopted in the 2003 amendments of Rule 53 limits the judge's review to specific matters that a party objects to in a master's findings. The limitation narrows the scope of the potential review and makes the review more efficient.

Objections to Special Masters as "Unnecessary"

The "types of issues that would be referred to a special master in bankruptcy proceedings" were not described in the original request to amend Rule 9031 in 1995.[18] At that time, the functions of a special master were limited to making findings of fact and conclusions of law at a trial, and the benefits of the expanded special master's functions after the 2003 amendments were not considered when Resnick concluded that masters were unnecessary.

Trial Function of Special Masters

Resnick's analysis addressed two conceivable candidates for the use of special masters. His surmises were based on the principal trial function of a special master in 1996, which dealt with "findings of fact" and "conclusions of law" submitted to the court at trial and not, for example,

[16] Appendix C at p.8.
[17] Appendix D at pp. 8-9.
[18] Appendix C at p. 10.

settlement facilitation or other case-management functions. He concluded that special masters, limited as they were to trial functions, were not needed at that time because "reorganization plans could provide for claims resolution procedures, nonjudicial tribunals, or trust mechanisms that greatly reduce or eliminate the volume of jury trials."[19]

But since 1996 and the 2003 Rule 53 amendments, the roles of special masters have expanded from trial functions to a variety of case-management functions, including facilitating settlements. Appointing neutral court-appointed officers to promote settlements in complex litigation are now common, *e.g*., mass-tort MDLs, and do not necessarily involve findings of fact or conclusions of law.[20] Nonetheless, the same resource is denied in a bankruptcy case, where it can prove most useful.

Judicial Estimation

Resnick's analysis correctly foresaw the need for a special master to assist a bankruptcy court in the judicial estimation of claims. But he concluded that "the use of a special master in connection with the allowance of numerous or complex claims against the estate may not be warranted because of § 502(c) of the Code." He questioned the need of a special master because "bankruptcy courts may hold limited mini-trials or use other abbreviated procedures for the purpose of estimation of claims to avoid delays."[21] The report cited procedures in a single case involving judicial estimation of contribution and indemnity with regard to annuity holders of claims.[22]

The Resnick analysis did not anticipate the emergence of mass-tort bankruptcies, which involve tens of thousands of individual tort actions. Unlike the summary-jury trials envisioned in the Resnick analysis making judicial estimations in short order, bankruptcy judges and parties have devoted months and spent enormous sums of money developing ways to efficiently estimate the value of tort claims. In addition, the lack of clear guidance on the authority of a bankruptcy judge to appoint neutral officers to assist in the judicial estimation exacerbates the delays and expense.

The Bankruptcy Administration Committee in its 1996 request also recommended "that bankruptcy judges be encouraged to make use of court-appointed experts to review fee applications for compliance with established submission guidelines, to check for accuracy, and make recommendations to the judge regarding reasonableness."[23] Interestingly, the Bankruptcy Rules Committee noted in response that "the consensus was that use of experts for this purpose (review applications for compensation filed by professionals) is a good idea, and that authority to implement it already exists in Rule 706 of the Federal Rules of Evidence."[24]

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[19] Appendix C at p. 14.
[20] The expanded roles of court-appointed neutrals is expanding. *See* American Bar Association resolution adopted in 2024 which promoted the use of court-appointed neutrals in state court proceedings.
[21] Appendix C at p. 10.
[22] Cited in Appendix C at ft. 4 at p. 10: *Baldwin-United Corp.,* 55 BR 885 (Bankr. S.D. Ohio 1985) (Consistent with the concept of a summary jury trial the procedures "called for no jury, allowed live testimony by one witness per party, set a discovery cutoff date, and allowed two days for the hearing").
[23] *See* Appendix A.
[24] Appendix F – minutes of the meeting of the Advisory Committee on Bankruptcy Rules (September 7-8, 1995.)

In fact, courts have struggled with interpreting the rules and the Code to appoint a Rule 706 expert to provide assistance in a bankruptcy case or proceeding. And the Rule 9031 prohibition against appointing a special master who could work with a court-appointed Rule 706 expert to estimate the value of tort claims in a mass-tort bankruptcy has unreasonably restricted case-management resources that a bankruptcy court needs not only in estimating the value of tort actions but also in using that information to facilitate settlement.

Duplicating Examiner Functions

Under Resnick's analysis, the appointment of an examiner by the trustee, in lieu of a special master, would be "appropriate to make findings in a report to the court" in a chapter 11 case and "would serve the purpose of assisting the court in a way that is similar to the services of a special master."[25] He acknowledged that the "appointment of an examiner under § 1104 is limited to chapter 11 cases in which a trustee has not been appointed, and the powers of an examiner may not be the same as those of a special master under Civil Rule 53, [but] in fact examiners have been appointed" to perform a variety of functions.

The Federal Judicial Center responded to Resnicks' objections stating: "The roles, duties, and responsibilities of bankruptcy trustees and examiners are significantly different from those of special masters and are not adequate alternatives to the appointment of special masters."[26] As importantly, "Unlike the trustee or examiner whose undivided loyalty is to the bankruptcy estate, the special master is a representative of the court, whose conduct is subject to control and supervision of the court. ... Special masters have 'the duties and obligations of a judicial officer.'" [27] The opinion of a neutral court-appointed officer in the judicial estimation of individual tort actions would be more useful, for example, than the opinion of an examiner who represents the interests of the estate. For the same reasons, a neutral special master would be more useful in facilitating settlement than an examiner.

CONCLUSIONS

The Bankruptcy Rules Committee declined to amend Rule 9031 to apply Rule 53 in a bankruptcy case or proceeding in 1996 based on the analysis prepared by its Reporter Alan Resnick. Since 1996, however, Civil Rule 53 was substantially revised, eliminating Resnick's main legal impediment to applying the rule to bankruptcy cases and proceedings. In addition, the number of mass-tort bankruptcies has risen. And the usefulness of special masters has also increased significantly because of the expanded functions sufficient to "demonstrate that there is a need" to amend Rule 9031 to permit a court to appoint special masters in bankruptcy cases and proceedings. There is no longer any good reason to deny bankruptcy courts the same case-management resource that district judges have enjoyed to their benefit for decades.

[25] Appendix C at pp. 9-10.
[26] Appendix E at p. 5.
[27] Appendix E at p. 5.

Attachment Link Containing Appendices A – F:

https://acrobat.adobe.com/id/urn:aaid:sc:US:874f7b39-d3c9-468b-a511-c13616a85c55

- Appendix A - Committee on Administration of the Bankruptcy System Recommending Amendment of Rule 9031, pp. 1-2 (June 22, 1995)
- Appendix B – Meeting Minutes of Advisory Committee on Bankruptcy Rules, pp. 3-5 (Sept. 26-27, 1996)
- Appendix C – Memorandum from Alan Resnick, Reporter, Advisory Committee on Bankruptcy Rules, pp. 6-24 (August 24, 1996)
- Appendix D – Special Masters' Incidence and Activity, Federal Judicial Center, pp. 25-104 (2000)
- Appendix E - Memorandum on Appointment of Special Masters in Bankruptcy Cases and Proceedings, Federal Judicial Center, pp. 105-118 (June 1996)
- Appendix F – Meeting Minutes of Advisory Committee on Bankruptcy Rules, pp. 119-121 (Sept. 7-8, 1995)