PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Bankruptcy Procedure

I. Bankruptcy Rules 1005, 1007, and 2002

A. Brief Description

The proposed amendments implement the policy adopted by the Judicial Conference in September/October 2001 protecting the privacy of debtors filing for relief by ensuring that debtors' social security numbers may not be electronically accessed by the public (JCUS-SEPT/OCT 01, pp. 48-50). Under the changes, only the last four digits of a social security number would be displayed on documents filed in a bankruptcy case that can be accessed electronically by the public. The full social security number, however, would be submitted to the court for its records and included on the initial notice transmitted to creditors. Moreover, law enforcement agencies can obtain access to the full number from creditors, the trustee, and by application to the bankruptcy court.

B. Arguments in Favor

- The amendments are consistent with the newly adopted Judicial Conference policy protecting the privacy of debtors seeking relief in the courts.
- The amendments permit only the display of a truncated social security number on documents filed with the court, which then may become available to the public through electronic access.
- Creditors will receive an initial notice of the case that includes the debtor's full social security number.
- Creditors who have a debtor's social security number will be able to conduct electronic searches of the bankruptcy case record.
- Courts will continue to have access to the debtor's full social security number, and law enforcement agencies can obtain access to the information from creditors, the trustee, and by application to the bankruptcy court.

C. Objections

- Creditors and law enforcement agencies opposed the originally proposed amendments that would have denied them access to a debtor's full social security number. (They later withdrew their objections when the proposal was revised to accommodate their concerns.)

- Credit bureaus and private investigation organizations object to the proposals. These groups rely heavily on electronic searches of large databases to identify specific individuals. They argued that the number of persons bearing the same surname, first name, and last four digits of a social security number could be significant. Searching databases relying only on this limited information can lead to misidentifications, requiring development of costly alternative and redundant means of identifications.

D. Rules Committees' Consideration

The rules committees modified the originally proposed amendments to provide access to a debtor's full social security number to courts, creditors, and the trustee, while restricting the public's electronic access only to the last four digits of the social security number. Law enforcement agencies can obtain access to the full number from the creditors or the trustee, and they can always apply for such information from the bankruptcy court. Credit bureaus would also have access to the full social security number from their customers who extend credit and possess the debtor's full social security number.

The rules committees concluded that the modified proposed amendments were consistent with the recently adopted Judicial Conference privacy policy, while at the same time accommodating the legitimate concerns of creditors, law enforcement agencies, and other interested parties.

Federal Rules of Civil Procedure

I. Civil Rule 23

A. Brief Description

The rules committees were directed by the Judicial Conference in 1991 to undertake a study of Rule 23 governing class actions. Early on, the rules committees devoted their attention to possible substantive rule changes, which ultimately resulted in a rule that established a right to petition for an interlocutory appeal of a certification decision. The proposed amendments now under consideration focus on class-action

procedures rather than on substantive certification standards. They primarily deal with four areas: the timing of the certification decision and notice; judicial oversight of settlements; attorney appointment; and attorney compensation. Most of the proposed amendments are designed to codify best practices used by the courts and to provide the judicial discretion required to oversee class-action litigation and settlements. The proposed amendments drew relatively little adverse comment, and in most cases were positively received.

Several concerns were raised, however, about the proposed amendments originally published for comment involving the disclosure of side agreements; appointment of class counsel in a case in which only a single lawyer or firm seeks to represent the class; mandatory notice in all (b)(1) and (b)(2) actions; and a second opportunity to opt out from a (b)(3) class if settlement is reached after the original opt-out period expires. The proposed amendments were modified to eliminate most of these concerns. In brief, the revised amendments clarify that the parties to a proposed settlement must identify any agreement made in connection with the settlement without awaiting a court order. The attorney-appointment provision was revised to clarify that when there is only one applicant a court must focus on the applicant's qualifications and need not wait to see whether other attorneys and firms may apply. The notice provision was revised to delete the requirement that certification notice be provided in all (b)(1) or (b)(2) classes, leaving notice to the court's discretion.

B. Second Opt-Out Opportunity

New Rule 23(e)(3) would expressly authorize a judge to refuse to approve a proposed class-action settlement unless the class members are given a second opportunity to request exclusion from a (b)(3) class after the settlement terms are made known. Under the proposal, a district judge has complete discretion in making this determination.

C. Arguments in Favor

- The proposed amendments provide the court with an added means of ensuring that a proposed class-action settlement is "fair, reasonable, and adequate." There is no presumption that a second opt-out opportunity should be afforded. The question is left entirely to the court's discretion and will depend on various considerations, including the nature and timing of the settlement.

- The proposed amendments eliminate any uncertainty whether a judge can reject a proposed settlement if no second opt-out opportunity is included in its terms.

- Putative class members may have limited meaningful information available to them at the initial opportunity to make a decision to request exclusion. The second opt-

out opportunity gives them a new opportunity to request exclusion at a time when they can make an informed decision based on the proposed settlement terms.

- The second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits.

- Circumstances may change materially from the time of certification to the time when the settlement terms are proposed, which can result in unforeseen consequences that unfairly affect class members who would otherwise be bound by an earlier decision to remain in the class.

- Many (b)(3) actions settle before certification, demonstrating that settlements can be reached when it is not known how many class members will request exclusion.

D. Objections

- A second opt-out opportunity might inject additional uncertainty into settlement and create opportunities unrelated to the purpose of the second opt out, potentially defeating some settlements and making others more costly.

- The proposal might create an opportunity for dissatisfied or mercenary counsel to woo class members away from the settlement with promises of a superior alternative settlement award.

E. Rules Committees' Consideration

Although the possibility that the court may decline to approve a settlement that does not include a second opt-out opportunity for class members in a (b)(3) class may change the dynamics of the negotiation process in some cases, the rules committees believe that ensuring the fairness of the process outweighs any potential loss in efficiency.

The rules committees also believe that providing a second opt-out opportunity in a limited number of cases, when warranted, will not be unduly disruptive to settlement. It will make a difference only in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. It is irrelevant in the many cases in which a settlement agreement is submitted to the court simultaneously with a request that a class be certified. In the cases in which it might be used, moreover, the court retains broad discretion in determining whether the particular circumstances warrant a second opt-out opportunity before approving a settlement. In this regard, the committee recognizes that the second opt-out opportunity is not novel in certain kinds of class-action litigation (particularly involving large individual claims) and extending the opportunity

generally has not been detrimental to these class-action settlements and likely will have no different consequences in other class actions.

Much of the concern initially raised about the proposal published for comment was directed at language that expressly authorized a court to require that the settlement terms include a second opt-out opportunity, a requirement that has now been eliminated. The proposal now focuses solely on the court's authority to accept or reject a particular proposed settlement if the parties do — or do not — include a second opt out, without implying that a court may dictate settlement terms. A judge is given complete discretion whether to condition approval on a second opt out.

II. Civil Rule 53

A. Brief Description

Present Rule 53 addresses trial masters who hear testimony and report recommended findings. But it does not describe the uses of special masters that have grown up over the years since it was first promulgated in 1937 and revised in 1983 to account for magistrate judges. Masters have come to be used increasingly for pretrial and post-trial purposes. The proposed amendments bring pretrial and post-trial masters expressly into the rule, establishing the standard of, and procedures governing, appointment.

The amendments carry forward the demanding standard established by the Supreme Court for appointment of trial masters and eliminate trial masters from jury-tried cases except upon consent of the parties. The proposal establishes that a master's findings or recommendations for findings of fact are reviewed de novo by the court, with limited exceptions adopted with the parties' consent and the court's approval.

The public comment on the proposed rule was favorable. Various suggestions of a technical nature were adopted in the final proposal.

B. Arguments in Favor

- The proposed amendments would expressly authorize a court to appoint a special master to handle pretrial or post-trial matters, recognizing the present practices of the many courts that make such appointments.

- The proposed amendments regularize and establish national uniform appointment standards and procedures, requiring that the appointment order include the master's duties, the circumstances (if any) when ex parte communications are permitted, the records to be maintained, the terms of compensation for the master,

and the procedures and standards for reviewing the master's findings and recommendations.

- The proposed amendments require de novo review by the court unless the parties agree to a more deferential standard on findings of fact.

C. Objections

- Recognition of pretrial and post-trial masters under the proposed amendments will promote the use of special masters to perform duties customarily handled by Article III judges.

- The published proposal seeking to describe standards for appointment of a magistrate judge as a special master undertook to regulate matters affected by statutes. These were eliminated as too complicated to be captured in a rule.

- The elimination of special masters in cases tried to a jury will decrease the flexibility of the district court in handling certain kinds of cases, particularly class actions and mass torts.

D. Rules Committees' Consideration

The proposed amendments are designed neither to encourage nor discourage use of special masters. The rules committees recognized that several appellate decisions have expressed reservations about the authority of an Article III judge to delegate responsibility to a master. The proposed amendments deal with these concerns by limiting appointment of a special master only to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. The proposal also increases the court's responsibility for fact matters and requires de novo determinations of objections to fact findings unless the parties stipulate with the court's consent that review is for clear error, or that the findings of a master appointed by consent or for pretrial or post-trial matters will be final. The Committee Note includes a reminder that a court may determine fact issues de novo even if no party objects. A master's conclusions of law will continue to be reviewed de novo by the court.

The published provision addressing appointment of magistrate judges as special masters was scaled back, so that it now simply carries forward the provisions of present Rule 53(f).

The elimination of special masters in jury trials reflects the committees' view that, in the absence of the parties' consent, such a procedure is unfair because the master does not testify and thus the master's report and findings are not subject to cross examination.

But the rule does not hinder a court from appointing an expert under Federal Rule of Evidence 706 who may also receive an appointment as a special master, if needed. The benefit of this procedure is that the expert will testify and be subject to cross examination.