AMENDING FEDERAL RULE OF BANKRUPTCY PROCEDURE 9031: A MEASURED APPROACH

by

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Introduction

Federal courts appoint Special Masters to assist their conduct of complex litigation, especially when there are multiple parties to the dispute, such as in mass tort multidistrict litigation ("MDL") but also in other burdensome procedural or substantive contexts. Federal courts cite Federal Rule of Civil Procedure 53 ("Rule 53") as procedural authority to appoint a Special Master. Federal Rule of Bankruptcy Procedure 9031 ("Bankruptcy Rule 9031") provides, however, that Rule 53 does not apply in cases under the Bankruptcy Code,[1] leaving the implication that no federal court—regardless of whether it is empowered under Article I or Article III of the Constitution—can appoint a Special Master when exercising bankruptcy jurisdiction.[2]

Some commentators have discussed whether Rule 53 is in fact a source of power to appoint a Special Master or, instead, merely puts parameters around a court's inherent ability to manage its docket.[3] The latter view might suggest that federal courts exercising bankruptcy jurisdiction can appoint a Special Master without Rule 53's limitations, but that result is clearly not intended by Bankruptcy Rule 9031. The Advisory Committee's Note ("Committee Note") to Bankruptcy Rule 9031 states that "[t]his rule precludes the appointment of masters in cases and proceedings under the Code."[4]

With bankruptcy's increased complexity after enactment of the Bankruptcy Code, the Advisory Committee on Bankruptcy Rules (the "Rules Committee") and commentators have from time to time considered replacing

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[1] FED. R. BANKR. P. 9031 ("Fed. R. Civ. P. 53 does not apply in a bankruptcy case.").

[2] It is worth repeating: under Bankruptcy Rule 9031, even Article III courts lack the power to appoint Special Masters when exercising bankruptcy jurisdiction.

[3] *See, e.g.*, Merril Hirsh & Sylvia Mayer, *It Is Way Past Time to Allow Bankruptcy Judges to Use Court-Appointed "Masters"*, 61 THE JUDGES' J. 22, 22 (2022).

[4] *See* FED. R. BANKR. P. 9031 advisory committee's note (1983).

Bankruptcy Rule 9031 with some form of Rule 53 to allow for the appointment of Special Masters in bankruptcy cases. For example, the Rules Committee considered but rejected in 1996 amending Bankruptcy Rule 9031 to permit the appointment of Special Masters in bankruptcy cases and proceedings.[5] Recently, the ABA and others have advocated reconsideration of that decision,[6] which reportedly again is under consideration by the Rules Committee.

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[5] Bankruptcy Rule 9031 was promulgated in 1983. *See* Memorandum from the Subcomm. on Bus. Issues to the Advisory Comm. on Bankr. Rules (Mar. 19, 2024) (on file with authors). Members of the Rules Committee explained that the rule was intended to prevent cronyism and keep bankruptcy judges closely involved in bankruptcy cases. *Id.* In 1991, the Case Management Subcommittee of the Bankruptcy Administration Committee inquired into the reason for prohibiting Special Masters. *Id.* One member of the Rules Committee then explained that the rule prevented the dilution of bankruptcy judges' powers by district courts appointing Special Masters. *Id.* Another explained that the rule prevented the referral of bankruptcy appeals to magistrate judges. *Id.* Still another noted that bankruptcy judges were appointing examiners to act as Special Masters. *Id.* The sense of the Rules Committee at the time was to further study the issue.

Then, in 1995, the Rules Committee rejected a suggestion from the Bankruptcy Administration Committee to allow the appointment of Special Masters. *Id.* The Rules Committee's consensus was that a Special Master was too reminiscent of the former bankruptcy referee and that adequate alternatives existed in the authority to appoint a trustee or examiner. *Id.* In 1996, the Bankruptcy Administration Committee asked the Rules Committee to reconsider, and the Federal Judicial Center ("FJC") was asked to study the use of Special Masters in bankruptcy. *Id.* The FJC recommended amending Bankruptcy Rule 9031 to allow Special Masters in "rare and unusually complex cases and proceedings under the Bankruptcy Code," noting that trustees or examiners could not perform all the functions of a Special Master. *Id.* Nevertheless, the Rules Committee voted 8-5 not to amend the rule, after a full discussion of competing views, including concerns about patronage, the sufficiency of existing alternatives, and the potential for unnecessary expense and delay. *Id.*

In 2002, Bankruptcy Judge David Kennedy suggested the need for Special Masters in complex bankruptcy cases, especially in light of large company filings presenting complex issues. *Id.* He argued that the time had come to provide this case management tool for appropriate bankruptcy cases and proceedings. *Id.* The Rules Committee again declined to amend Bankruptcy Rule 9031, citing concerns about the adjudicatory role of Special Masters, constitutional questions regarding appointment by non-Article III judges, and the standard of review of a Special Master's findings. *Id.* The Rules Committee also noted the possibility of using court-appointed experts under Federal Rule of Evidence 706 and questioned the propriety and authority for compensating a Special Master from estate assets. *Id.* Then, in 2009, Bankruptcy Judges Kennedy and Geraldine Mund submitted suggestions to amend Bankruptcy Rule 9031 to allow the appointment of Special Masters. *Id.* After careful deliberation, the Rules Committee again declined to amend the rule, expressing concern about adding another level of review to the bankruptcy system, which already involves multiple levels of review. *Id.*

[6] *See* Letter from Mary Smith, President, Am. Bar Ass'n, to H. Thomas Byron III, Sec'y,

A thoughtful analysis by the Rules Committee's prior reporter, Professor Alan N. Resnick, is a key starting place for any discussion of proposals to amend Bankruptcy Rule 9031.[7] He cautioned against deleting Bankruptcy Rule 9031 and adopting Rule 53 mostly because of his belief that such an appointment power (1) could in practice reduce the statutory role and independence of bankruptcy judges and (2) might lead to the return of cronyism that the Bankruptcy Code was designed to end. There is, in addition, a third reason to proceed cautiously when considering such an amendment. A broad power to appoint Special Masters in bankruptcy cases could also materially change the Bankruptcy Code's conferral of power to the debtor in possession in chapter 11 cases, as well as, perhaps, the role played by trustees in chapter 7, 12, and 13 cases and by the "facilitative" trustees in cases under subchapter V of chapter 11 of the Bankruptcy Code.

There are, however, strong countervailing arguments. First, even with the tools that courts exercising bankruptcy jurisdiction already have to manage complex disputes, such as their ability to estimate claims against the debtor's estate for various purposes,[8] appoint examiners,[9] appoint expert witnesses for the court,[10] and appoint mediators under the court's general case management authority,[11] there are unique benefits to using Special Masters in bankruptcy cases.[12] Second, the previously identified risks may well have

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Comm. on Rules of Prac. & Proc., Jud. Conf. of U.S., re: Amend. of the Fed. Rules of Bankr. Proc. to Permit the Use of the Phrase "Court-Appointed Neutrals" Rather Than "Court-Appointed Masters" in Bankr. Proc. (Feb. 12, 2024), https://www.courtappointedneutrals.org/resource-center/aba-president-letter-requesting-bankruptcy-rule-change/; Letter from Hon. Michael B. Kaplan, C.J., Bankr. D.N.J., to H. Thomas Byron, III, Esq., Sec'y, Comm. on Rules of Prac. & Proc., re: Rule Suggestion—Amend. to Fed. R. Bank. P. 9031, at 2 (Jan. 10, 2024), https://rabiejcenter.org/wp-content/uploads/2024/01/Bk-Rule-9031.pdf.

[7] Memorandum from Alan N. Resnick, Reporter, to Advisory Comm. on Bankr. Rules, re: Special Masters and Bankr. Rule 9031 (Aug. 24, 1996) [hereinafter Resnick, Special Masters], https://rabiejcenter.org/wp-content/uploads/2024/01/Bk-Rule-9031.pdf.

[8] *See* 11 U.S.C. § 502(c).

[9] *See id.* § 1104(c).

[10] *See* FED. R. EVID. 706; FED. R. BANKR. P. 9017.

[11] *See* 11 U.S.C. § 105(a); FED. R. BANKR. P. 1001.

[12] *See, e.g.*, Hirsh & Mayer, *supra* note 3, at 22; Paulette J. Delk, *Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031*, 61 MO. L. REV. 29, 57 (2002); Mark Conlan & Noel L. Hillman, *Bankruptcy Rule 9031: Out of Date and Out of Touch—Why an Amendment is Long Overdue*, LAW.COM (June 7, 2024), https://www.law.com/2024/06/07/bankruptcy-rule-9031-out-of-date-and-out-of-touch-why-an-amendment-is-long-overdue/.

decreased over time. Proponents thus argue that district courts today would not use the Special Master appointment power to alter the generally well established division of labor between district and bankruptcy judges; that bankruptcy judges would not appoint Special Masters in order to shirk their responsibility to preside over unusually complex cases; and that forty-five years of experience under the Bankruptcy Code have de-risked the type of cronyism sometimes experienced in pre-Code practice. In sum, they contend that courts exercising bankruptcy jurisdiction would use Special Masters responsibly in the rare instances when such an appointment would complement the tools already available for case management.

We generally agree with such arguments. However, considering the risk of intruding on the Bankruptcy Code's substantive provisions pertaining to the role of the debtor in possession and the limited circumstances in which the debtor in possession can be replaced (as well as, arguably, the role of statutory trustees), we believe the power to appoint a Special Master in bankruptcy cases should be limited to rare circumstances and then upon only the court's invocation, not a motion by parties in interest. Moreover, we recommend that any change to Bankruptcy Rule 9031 highlight either in the Rule itself or the related Committee Note that the foregoing concerns should inform the court's exercise of discretion when considering such an appointment.

This article thus concludes that Special Masters have a role to play in bankruptcy. The article also highlights the pros and cons of such an appointment power, including in the light of already available alternatives, and proposes a more limited amendment to Bankruptcy Rule 9031 than its simple replacement, with conforming changes, by Rule 53. We hope that the balancing suggested by this article and the related analysis assist not only in the rule-making process but also in the ongoing conversation regarding the use and value of Special Masters in bankruptcy.

We proceed in three Parts. Part I examines the multiple productive roles that Special Masters play in federal courts generally. Part II discusses our concerns with a proposed amendment that simply would delete Bankruptcy Rule 9031 and incorporate Rule 53 into the Bankruptcy Rules, as well as the countervailing arguments for permitting the appointment of Special Masters in bankruptcy cases. Part III discusses our conclusion that Special Masters are warranted for certain purposes in such cases but that those purposes are more limited than the permissible functions contemplated by Rule 53. Reflecting that analysis, we propose an amendment to Bankruptcy Rule 9031 that recognizes congressional policy choices in favor

of existing fiduciaries and other neutrals when the court is contemplating the appointment of a Special Master in a bankruptcy case.

I. The Appointment and Roles of Special Masters Under the Federal Rules of Civil Procedure

A. Qualifications and Appointment of Special Masters Under Rule 53

Rule 53 authorizes courts to appoint Special Masters for a wide variety of purposes. For example, Special Masters may be referred pretrial matters; they may hold trial proceedings; they may act as mediators or settlement facilitators; and they may serve as a court-appointed investigator, administrator (such as to run sale or settlement distribution processes), or technical advisor (such as with respect to a complex scientific or other issue requiring special expertise).[13]

Indeed, the Federal Rules of Civil Procedure do not limit the duties that a Special Master may perform with the parties' consent.[14] And even without party consent, the court may appoint a Special Master to hold trial proceedings and make or recommend findings of fact if warranted either by "some exceptional condition" or the need to perform an accounting or difficult damages computation.[15] A Special Master also may be appointed without the parties' consent to address "pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[16] Unless the appointment order otherwise provides, a Special Master may order or impose non-contempt sanctions provided by Federal Rule of Civil Procedure 37 or 45 against a party and may recommend a contempt sanction against a party and sanctions against a nonparty.[17]

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[13] *See* Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21, 383 F. Supp. 699, 764 (E.D.N.Y. 1974) ("[Rule 53] is broad enough to allow appointment of expert advisors."), *aff'd sub nom.* Hart v. Cmty. Sch. Bd. of Educ., N.Y. Sch. Dist. No. 21, 512 F.2d 37 (2d Cir. 1975); Danville Tobacco Ass'n v. Bryant-Buckner Assocs., 333 F.2d 202, 208 (4th Cir. 1964) (finding trial court did not abuse its discretion by appointing expert under Rule 53 to assist the court in understanding the tobacco marketing industry).

[14] *See* FED. R. CIV. P. 53(a)(1)(A).

[15] FED. R. CIV. P. 53(a)(1)(B). If conducting an evidentiary hearing, the Special Master may "exercise the appointing court's power to compel, take, and record evidence," unless the appointment order provides otherwise. FED. R. CIV. P. 53(c)(1)(C).

[16] FED. R. CIV. P. 53(a)(1)(C).

[17] FED. R. CIV. P. 53(c)(2).

Some of the foregoing roles overlap with other ways in which a federal court can be assisted by a magistrate judge or a third-party neutral such as a mediator or a court-appointed expert, sometimes, however, with important differences. For example, a Special Master serving as a technical advisor, unlike a court-appointed expert under Federal Rule of Evidence 706, might not be subject to discovery and examination.[18] And one might even serve in a dual role as a Special Master and an expert witness.[19] In addition, while the Committee Note states that a Special Master's ability to communicate ex parte with the court and the parties "present[s] troubling questions,"[20] Rule 53 contemplates the possibility of such communications by a Special Master, provided that the appointment order must state the circumstances, if any, in which the Special Master may communicate ex parte with the court or a party.[21] The Committee Note also recognizes the possibility of ex parte communications by the Special Master if permitted by the court's order appointing the Special Master and ties the benefits and detriments of the ability to communicate ex parte to the Special Master's particular role.[22] In sum, the court has considerable discretion generally to

[18] Although there is not much case law in this area, Special Masters are likely shielded from discovery if acting in a judicial capacity and called to testify to actions taken within such capacity. *See* Gary W. v. La. Dep't of Health & Hum. Res., 861 F.2d 1366, 1369 (5th Cir. 1988) (Special Master not subject to discovery because her duties as factfinder, monitor, and hearing officer in overseeing compliance with a protective order were "quasi-judicial function[s]"). Special Masters conducting non-judicial functions, however, such as apportioning class action settlement funds among plaintiffs according to the terms of a settlement agreement, have been subject to discovery. *See* Booth v. Davis, No. 10-4010-RDR, 2011 WL 2008284, at *5 (D. Kan. May 23, 2011). The line between judicial and non-judicial functions is not always clear. *See* United States v. Yonkers Bd. of Educ., 946 F.2d 180, 184 (2d Cir. 1991) (finding that discovery of court-appointed expert housing advisor's ex parte communications with the court would be inappropriate); *see also* Cobell v. Norton, 237 F. Supp. 2d 71, 101 (D.D.C. 2003) (finding that allowing the deposition of a court-appointed investigator would raise issues as to whether the presiding judge must recuse himself).

[19] The Committee Note observes only that "difficulties . . . [may] arise" when a person serves as both a Special Master and an expert witness. FED. R. CIV. P. 53(a)(1) advisory committee's note to 2003 amendments. *But see* Danville Tobacco Ass'n v. Bryant-Buckner Assocs., 333 F.2d 202, 208 (4th Cir. 1964) (sustaining district court's appointment of tobacco marketing expert as Special Master notwithstanding that he was called as an expert witness both before and after his appointment as a Special Master).

[20] FED. R. CIV. P. 53(b)(2) advisory committee's note to 2003 amendments.

[21] FED. R. CIV. P. 53(b)(2)(B).

[22] FED. R. CIV. P. 53(b)(2) advisory committee's note to 2003 amendments. Thus, the Committee Note recognizes the risks of permitting ex parte contacts with the court—or with the parties—while discussing the benefits of such communications with the court over

tailor a Special Master's powers in its appointment order, after due notice to parties in interest and the opportunity to object.[23]

A Special Master's actions are subject to review by the appointing court. For legal conclusions, the appointing court will review objections de novo.[24] De novo review also applies to factual findings unless the parties, with the court's approval, stipulate that the Special Master's factual findings shall be reviewed for (a) clear error, or (b) except in the case of an appointment to hold trial proceedings and make or recommend findings of fact, that such findings can be final.[25] Any procedural ruling will be reviewed for abuse of discretion unless the appointment order sets a different standard.[26]

Lastly, compensation for Special Masters and their professionals must be fixed by the court's appointment order,[27] which may provide for periodic court review or reserve the court's ability to review such compensation in the court's discretion. Such fees and expenses are to be paid either by a party or parties, or "from a fund or subject matter of the action within the court's control."[28]

"logistical matters" by a Special Master appointed to coordinate multiple proceedings and communications and with the parties by a Special Master appointed to facilitate negotiations and for in camera review of documents. Finally, "[t]he rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment." *Id.*

[23] *See* FED. R. CIV. P. 53(b); S. Agency Co. v. LaSalle Cas. Co., 393 F.2d 907, 914–15 (8th Cir. 1968) (finding discretion to appoint Special Master "particularly broad" when accounting issues are involved, and that district court's limitation of master's audit to a specified period was proper).

[24] FED. R. CIV. P. 53(f)(4).

[25] FED. R. CIV. P. 53(f)(3). A Special Master appointed on the parties' consent or to address pretrial or post-trial matters may make final findings of fact. Finality agreements typically arise in pretrial matters. *See, e.g.*, Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373 MLV, 03-2055 MLV, 2004 WL 2905401, at *1 (W.D. Tenn. Apr. 19, 2004) (parties stipulated that Special Master's findings on the discoverability of documents would be final). Note, however, that the district court retains discretion to withdraw its consent to a finality agreement and decide the factual issue de novo. *See* FED. R. CIV. P. 53(f)(3) advisory committee's note to 2003 amendments; *Medtronic Sofamor Danek, Inc.*, 2004 WL 2905401, at *2 (court referenced its discretion provided under the Committee Note to Rule 53 and exercised such discretion not to review Special Master's findings).

[26] FED. R. CIV. P. 53(f)(5).

[27] FED. R. CIV. P. 53(b)(2)(E).

[28] FED. R. CIV. P. 53(g)(2).

B. Roles of Special Masters Under Rule 53

As noted, Special Masters can serve many different functions, but we identify four main roles for which district courts appoint Special Masters: as a pretrial case manager, administrator, investigator/expert, and mediator.

Special Masters can provide critical assistance with pretrial matters, especially in complex and multiparty litigations where the efficient coordination of discovery can be essential—although such matters are not the only times that a trial court's resources, including access to magistrate judges, can be strained and thus warrant a Special Master's appointment.[29] A Special Master's pretrial case management function can include developing an understanding of the key issues; evaluating proposals for sequencing discovery; and forming a discovery plan after taking into account, for example, whether, in what manner, and at what time individual claim sheets should be required of plaintiffs, the staging of the determination of and possible discovery related to key causation or other legal issues, and the staging of discovery and trials for different types of injury and plaintiffs (for example, types of personal injury claims, property damage claims, and environmental claims asserted by legally distinguishable plaintiffs such as individuals and governmental entities). A Special Master's pretrial duties might also include examining large quantities of information to determine privilege claims,[30] generally responding to discovery-related issues as they arise, and interacting with other courts that might be addressing overlapping issues. Of course, magistrate judges also are adept in managing most pretrial issues; indeed, the Federal Judicial Center's Manual for Complex Litigation, Fourth expresses a preference for magistrate judges assisting the district court in general pretrial matters.[31] On the other hand, available magistrate judges may lack a Special Master's expertise in the subject matter of a particular litigation, which can facilitate a more streamlined pretrial process. Even more important for our purposes, magistrate judges are not available to assist bankruptcy judges.

As pretrial case managers, Special Masters with requisite expertise also may be appointed to handle issues surrounding electronically stored information, including whether such information was properly managed,

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[29] *See* RABIEJ LITIG. L. CTR., ANALYSIS SUPPORTING REQUEST TO AMEND FEDERAL RULE OF BANKRUPTCY PROCEDURE 9031, at 1 (Jan. 8, 2024) [hereinafter RABIEJ MEMO], https://rabiejcenter.org/wpcontent/uploads/2024/01/Bk-Rule-9031.pdf.

[30] *See* Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 482 (2009).

[31] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.14 (2004) ("FJC MANUAL").

determining where responsive information to discovery requests is stored, ensuring the recovery and preservation of such information, and managing search terms.[32] One also can foresee a role in the near future in overseeing the parties' use of generative artificial intelligence in pretrial matters (as well as in settlement negotiations).

Courts also use Special Masters as administrators for any number of ongoing functions beyond pretrial matters, such as monitoring compliance with and effectuating injunctions and other orders;[33] running a sales process under ultimate court supervision in a proceeding under Federal Rule of Civil Procedure 69[34] ("Rule 69") with the assistance of professional advisors; and managing compliance with, and the reconciliation and distribution of the proceeds of, an aggregate claims settlement.[35]

A Special Master can also serve as an investigator and independent expert. Thus, where a Special Master's expertise may shorten the time and reduce the cost of inquiring into disputed issues, courts may accord Special Masters quasi-judicial powers to decide issues or recommend a result to the court after briefing or fact development. For example, a Special Master may be appointed to determine how to implement an injunction in a technical field, to conduct a claims construction hearing in a complex patent case,[36] or to consider the current state of knowledge and experience regarding the proof of damages for a mass tort and a related claims reconciliation process.

A court might also deploy a Special Master as a mediator. Class actions in particular might call for the appointment of a settlement master to conduct negotiations apart from the court, because should a settlement be

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[32] Scheindlin, *supra* note 30, at 483.

[33] Scheindlin, *supra* note 30, at 482; *see also* Cronin v. Browner, 90 F. Supp. 2d 364, 377 (S.D.N.Y. 2000) (collecting cases).

[34] *See* Stearns Bank Nat'l Ass'n v. Marrick Props., LLC, No. 8:11–cv–2305–T–30AEP, 2012 WL 1155657, at *3 (M.D. Fla. Apr. 5, 2012) ("Absent a basis for disqualification, federal courts routinely appoint [S]pecial [M]asters to conduct foreclosure sales."); *see also* TracFone Wireless, Inc. v. LaMarsh, 98 F. Supp. 3d 828, 831–32 (W.D. Pa. 2015) (appointing Special Master to conduct sale process after a party failed to pay $800,000 judgment and the court ordered a final judgment of foreclosure). Note that, while courts do not typically cite Rule 69 when appointing a Special Master to oversee a sale process, Rule 69 provides considerable discretion regarding how to enforce federal judgments. *See* FED. R. CIV. P. 69.

[35] *See* FJC MANUAL, *supra* note 31, §§ 11.52, 21.661 (2004).

[36] *See* Scheindlin, *supra* note 30, at 485; *see also* Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566 (Fed. Cir. 1988) (finding that Special Masters have the power to assist courts in evaluating patent validity on a summary judgment motion).

proposed, the court itself must hold a fairness hearing. With a Special Master acting as mediator, the court preserves its neutrality to evaluate a proposed settlement and protect the interests of absent parties.[37]

Each of the foregoing roles is used in mass tort cases.[38] Judges presiding over such cases frequently appoint Special Masters to determine discovery issues and the consideration of complex causation and claims reconciliation procedures, assist in the settlement process, coordinate fund distribution, and assist in determining attorneys' fee awards.[39]

II. Concerns and Responses Regarding the Deletion of Bankruptcy Rule 9031 in Favor of Incorporating Rule 53

A. Concerns over Broad Power to Appoint Special Masters in Bankruptcy Cases

(1) Statutory Role and Independence of Bankruptcy Judges

Congress gave bankruptcy judges extraordinary power, subject to the district courts' control under 28 U.S.C. §§ 157 and 1334.[40] That power ultimately stems from bankruptcy cases' centralization of almost all the debtor's assets and liabilities in one forum for the fair and equitable determination of claims against the debtor's estate and distributions to parties in interest consistent with Congress' statutory scheme.[41] Especially in chapter 11 cases, that scheme is flexible. Because Congress recognized the value of maintaining an ongoing business, as well as that no business and its constituents are the same, it put the inherently uncertain concepts of valuation and claims reconciliation at the center of chapter 11 practice, thereby encouraging parties in interest to compromise. It did so, moreover, by placing the bankruptcy judge as both the person overseeing this often complex,

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[37] *See* Scheindlin, *supra* note 30, at 486; *see also* FJC MANUAL, *supra* note 31, § 11.52 (2004).

[38] *See* RABIEJ MEMO, *supra* note 29, at 1 (Special Master appointments "provide indispensable assistance to district Courts . . . particularly in complex litigation, most notably mass-tort MDLs").

[39] *See* Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW360 (Aug. 15, 2017, 11:36 AM), https://www.law360.com/articles/950395/.

[40] 28 U.S.C. § 157(a) allows district courts to refer bankruptcy cases to bankruptcy judges—with general orders of reference of all such cases to bankruptcy judges having been entered by the district courts, which are subject to withdrawal by the district court—and determinations made by the bankruptcy judge are subject to district court appellate review.

[41] *See* Resnick, Special Masters, *supra* note 7, at 11–12.

multiparty, forward-looking process and as the trial court to decide any issues that are not compromised. Such unresolved issues can be as complex as any civil disputes brought to the federal courts: on the claim side, regulatory disputes, patent and anti-trust disputes, ERISA disputes, maritime disputes, labor and employment disputes, and class actions, to name a few; and, on the asset side, the forward-looking valuation of, for example, multiple business units—on both going concern and liquidation bases—of unique assets like radio spectrum, of assets capable of great fluctuations in value (such as oil and gas reserves), and of cutting edge businesses (such as in the biotech and crypto industries). Finally, the bankruptcy judge oversees and ultimately must rule on all actions taken by the chapter 11 debtor out of the ordinary course, such as proposed sales and settlements. Given the interlocking nature of many of these issues, even the bankruptcy judge's more customary plaintiff-versus-defendant, backward looking determinations (such as of breach of contract or transfer-avoidance disputes) will materially affect the ongoing chapter 11 case beyond the parties to the discrete litigation and thus may require an understanding of how to sequence the determination of such issues.

Importantly, Congress left these tasks to one person, the bankruptcy judge overseeing the overall bankruptcy case. Magistrate judges, for example, are not available to assist bankruptcy judges, who are left to supervise discovery and all other aspects of bankruptcy cases and proceedings themselves, subject only to the possible withdrawal of the reference by the district court and, perhaps, the assignment by the district's chief bankruptcy judge to another bankruptcy judge of discrete proceedings within the case.

One can see why this burden was placed on the bankruptcy judge: the chapter 11 case could easily become atomized if its judicial oversight were shared or delegated. One can also reasonably infer that, within the limits of 28 U.S.C. §§ 157 and 1334, Congress charged specialist judges with presiding over bankruptcy cases (which requires broad, generalized commercial litigation skills combined with bankruptcy-specific case management skills), not the district courts (with their own unique generalized litigation skills). Naturally there will be times when juggling all these functions is burdensome, but we must take seriously Congress' decision to place the responsibility as it has. Anything that would move the focal point from the bankruptcy judge to another performing a quasi-judicial role, regardless of whether the bankruptcy judge appointed a Special Master or the

district court were to do so, risks unduly diluting the bankruptcy judge's congressionally prescribed power.

(2) Cronyism

Even at the district court level, the drafters of Rule 53 expressed concerns about Special Masters usurping a judge's role. For example, Rule 53 and its accompanying Committee Note state that, absent the consent of both parties, magistrate judges are preferred over Special Masters when the district court delegates pretrial matters.[42] Rule 53 also expresses a similar concern over delegating trial proceedings to a Special Master; that is, unless the parties consent, such delegation should be made only if warranted by "some exceptional condition."[43]

When enacting the Bankruptcy Code, Congress not only gave bankruptcy judges a unique role, moreover. In response to concerns about cronyism between bankruptcy judges and trustees that was reported under the prior Bankruptcy Act, Congress also curtailed bankruptcy judges' direct role that existed under the Act in appointing and communicating with bankruptcy professionals. Thus, under the Bankruptcy Code, while the bankruptcy court decides whether the appointment of a trustee or examiner is warranted, the United States Trustee, not the bankruptcy judge, selects the individual to serve after consultation with parties in interest. The Federal Rules of Bankruptcy Procedure specify the United States Trustee's procedures required for such appointments.[44] Under Rule 53, on the other hand, Special Masters are appointed by the court itself,[45] although such appointment must be on notice with the opportunity to be heard and the parties may nominate candidates.[46] The Bankruptcy Code also contains detailed provisions for the

[42] *See* FED. R. CIV. P. 53(a)(1) advisory committee's note to 2003 amendments ("Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.").

[43] FED. R. CIV. P. 53(a)(1)(B)(i); *see also* FED. R. CIV. P. 53(a)(1)(B) advisory committee's note to 2003 amendments ("District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances.").

[44] *See* 11 U.S.C. § 1104(a), (b), and (d); FED. R. BANKR. P. 2007.1; Resnick, Special Masters, *supra* note 7, at 6–7.

[45] *See* FED. R. CIV. P. 53(a).

[46] FED. R. CIV. P. 53(b)(1). The FJC Manual also cautions district courts to engage in a transparent process to appoint truly neutral Special Masters. *See* FJC MANUAL, *supra* note

allowance of estate-compensated professionals' fees and expenses. There is no such statutory procedure for the compensation of Special Masters and their professionals, the basic terms of which are to be governed by the appointment order.[47]

(3) Pressure on the Role of Debtor in Possession and Other Fiduciaries and Neutrals

In addition to re-balancing and enhancing the independence of bankruptcy judges, the Bankruptcy Code contained another, even more important innovation: the grant to the debtor in possession in chapter 11 cases of substantially all the rights, powers, and duties of a trustee,[48] coupled with the grant to the debtor in possession of the exclusive power to file and solicit acceptances of a chapter 11 plan for a significant period.[49] Relatedly, the Bankruptcy Code limited the circumstances under which a debtor in possession may be replaced by a chapter 11 trustee, such that there is a "strong presumption" that the debtor in possession should have a fair opportunity to reorganize, and its replacement with a trustee is viewed as "an extraordinary remedy."[50]

Granting the power to appoint a Special Master in bankruptcy cases limited only by the constraints of Rule 53 could at times unduly challenge the unique role of the chapter 11 debtor in possession (and, at times, the roles of bankruptcy trustees and the investigatory role of official creditors' committees and examiners). Of course, not all functions of Special Masters would impinge on such roles. Managing pretrial matters, serving as a post-confirmation or post-settlement administrator, and, in most cases, serving as an investigator or expert, would not appear to do so, for example. But any

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31, § 11.52 (2004).

[47] FED. R. CIV. P. 53(b)(2)(E).

[48] *See* 11 U.S.C. § 1107(a). The Bankruptcy Code also granted significant status to an official committee of unsecured creditors (which is appointed by the United States Trustee), including to perform the main trustee power that is not conferred by § 1107 of the Bankruptcy Code on a debtor in possession: the power to investigate the debtor under 11 U.S.C. § 1103(c)(2), although the court can also direct the appointment of an examiner under 11 U.S.C. § 1104(c) "to conduct such an investigation of the debtor as is appropriate."

[49] *See id.* § 1121.

[50] *Id.* § 1104(a); *In re* Marvel Ent. Grp., Inc., 140 F.3d 463, 471 (3d Cir. 1998); *see also In re* Adelphia Commc'ns Corp., 336 B.R. 610, 655 n.101 (Bankr. S.D.N.Y.) (collecting cases finding appointment of trustee is "extraordinary remedy"), *aff'd*, 342 B.R. 122 (S.D.N.Y. 2006).

grant of power to a Special Master to perform preconfirmation management-like functions or to serve as a mediator "with special powers" without the parties' consent could unduly remove power that Congress gave to the debtor in possession and bankruptcy trustees. Moreover, the threat that other parties in interest might seek such an appointment could further diminish the debtor in possession's role and negotiating leverage as currently protected by the limited grounds for appointment of a trustee under § 1104(a) of the Bankruptcy Code, to the extent that such a change could appear to present more of a policy choice than is permitted of a procedural rule.[51]

B. Such Concerns May Not Be Dispositive, Although Other Devices May Fulfill a Similar Function

(1) There Are Valid Responses to the Foregoing Concerns

First, one can almost turn on its head the argument that bankruptcy judges are meant to be sole actors: if the only way for a bankruptcy judge to maintain the requisite control over a sprawling bankruptcy case is the appointment of a Special Master to assist with some part of it—that is, if the Special Master enhances rather than reduces the bankruptcy judge's control—the device should be permitted. Like Rule 53(b)'s "exceptional conditions" requirement for the appointment of a Special Master to conduct trial proceedings, or the Committee Note to the 2003 Amendments to Rule 53 that "a master should be appointed only in limited circumstances," the appointment power could be couched as one that should be rarely exercised in explicit recognition of the bankruptcy judge's broad case management responsibilities.

With almost thirty years having passed since Professor Resnick's critique, it also is reasonable to believe that permitting the use of Special Masters in bankruptcy cases would not change the allocation of responsibility between the district and bankruptcy courts. For example, while to some the Supreme Court's decision in *Stern v. Marshall*[52] threatened to alter that balance materially, the district and bankruptcy courts quickly worked through rules and case law that continued, as much as the Court's decision permitted,

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[51] *See In re* Perrotta, 406 B.R. 1, 8 (Bankr. D.N.H. 2009) ("[T]o the extent that the Bankruptcy Rules and the Bankruptcy Code are inconsistent, the statute controls.").

[52] Stern v. Marshall, 564 U.S. 462 (2011) (finding bankruptcy court lacked constitutional authority under Article I to enter final judgment on state law counterclaim that was not resolved in the process of ruling on creditor's proof of claim, despite Congress' purported grant of such authority under 28 U.S.C. § 157(b)(2)(C)).

to let bankruptcy judges function as Congress intended. From that experience—and decades of generally collegial, respectful interaction between the district courts and bankruptcy courts—we see no eagerness among the district courts to usurp the work of the bankruptcy judges, or to punish a disfavored bankruptcy judge, by appointing Special Masters.

As discussed above, it is consistent with congressional intent that the judge usually has control over the whole bankruptcy case and thus over any Special Master, with any delegation of power subject to substantial judicial oversight. It would be important, therefore, that the bankruptcy judge, not the United States Trustee, be empowered to appoint Special Masters. But both the decision to appoint a Special Master and to appoint a particular individual would also need to be transparent and subject to notice and the right to be heard in order to ensure the integrity of the process, consistent with Rule 53.[53] One would expect best practices to be outlined for this, including, perhaps, the suggestion of more than one candidate and, at a minimum, that the parties should be free to suggest candidates, as in Rule 53(b)(1). To thwart cronyism, the criteria for compensation also should be the same as for other estate-compensated professionals—in contrast to Rule 53. While § 330 of the Bankruptcy Code does not contemplate its application to a Special Master, an amendment to Bankruptcy Rule 9031 could provide that the order appointing a Special Master must incorporate § 330's standard for the Special Master's compensation when paid by the estate. In addition, the "no adverse interest" and "disinterested" standards for estate professionals[54] or the "disinterested" standard for appointment of a chapter 11 trustee,[55] also could apply, or—we believe more aptly—the recusal standard under 28 U.S.C. § 455, already applicable under Rule 53,[56] would govern. Finally, Rule 53 already requires a cost-benefit analysis before appointing a Special Master,[57] which also would be an apt element of the court's exercise of discretion in the bankruptcy context.

In addition, any amended rule would need to ensure that the possibility of the appointment of a Special Master not be weaponized to undermine the debtor in possession or otherwise exert undue leverage on the

[53] *See* FED. R. CIV. P. 53(b)(1).
[54] 11 U.S.C. § 327(a).
[55] *Id.* § 1104(d).
[56] FED. R. CIV. P. 53(b)(3)(A).
[57] FED. R. CIV. P. 53(a)(3).

bankruptcy case. Thus, we recommend a limitation on even considering the appointment of a Special Master except on the judge's own initiative.

(2) Similar Functions Are Already Performed by Estate Neutrals or Fiduciaries

The foregoing arguments against Professor Resnick and others' concerns would be easier to accept if there were not roles performable by Special Masters that already are being performed in bankruptcy cases by others without raising similar issues. For example, the mediation,[58] investigation,[59] claims administration,[60] ordinary discovery, and even, perhaps, complex discovery[61] roles of Special Masters are currently performed reasonably efficiently and fairly by bankruptcy judges and others

[58] Mediators may be appointed under 28 U.S.C. § 651 or local rules promulgated thereunder. Congress contemplated the use of alternative dispute resolution processes, such as mediation, in bankruptcy cases. *See* 28 U.S.C. § 651(b) ("Each United States district court shall authorize, by local rule adopted under [28 U.S.C. §] 2071(a), the use of alternative dispute resolution processes in all civil actions, *including adversary proceedings in bankruptcy*, in accordance with this chapter. . . ." (emphasis added)). We have not observed either a lack of independence or cronyism in the bankruptcy courts' use of mediators. The most effective mediators facilitate the parties' own inclinations to compromise, not by bullying but by neutral listening, evaluation, and effective communication. A bully may obtain a settlement or two, but word spreads quickly and parties soon develop countermeasures to such a style.

[59] Some commentators suggest that a Special Master appointed by the court would be more neutral than an examiner or trustee. *See* Letter from Mary Smith, *supra* note 6. But examiners and trustees are chosen by the United States Trustee after consultation with parties in interest; trustees and examiners must be "disinterested persons," *see* 11 U.S.C. §§ 101(14), 1104(d); examiners cannot pursue any claims that they identify, which is designed to ensure their neutrality; and trustees and examiners are constrained to be efficient by the fee application process, as well as, of course, their fiduciary duties. *See, e.g.*, *In re* Hampton Hotel Invs., L.P., 270 B.R. 346, 361 (Bankr. S.D.N.Y. 2001) (discussing fiduciary duties of debtor in possession).

[60] Claims reconciliation and administration is typically handled by post-confirmation trusts with court-approved trust distribution procedures that are a component of the chapter 11 plan.

[61] In our experience, at least, discovery in bankruptcy cases (even under Federal Rule of Bankruptcy Procedure 2004's broad parameters) tends not to take as long and is less unwieldly than in other federal civil litigation. In part, this may be attributed to the fact that both budgets and trial schedules are tighter in bankruptcy, but it also may result from bankruptcy judges having less patience for demands on their time to supervise discovery disputes. Thus, proposals to take twenty depositions, for example, may quickly get reduced by the court saying, "[t]his is bankruptcy—pick the five most important witnesses and we'll see where we are after that."

in bankruptcy cases. Similarly, in cases where a Special Master might be proposed as an expert not acting in a judicial capacity, a simple appointment as an expert under the Federal Rules of Evidence generally should suffice.[62] And in other situations where a bankruptcy trustee or debtor in possession is properly exercising its fiduciary duty, there is no need to appoint a Special Master to perform such tasks.[63] Parties who believe that such fiduciary duties are not being fulfilled should be left with their right to seek standing in place of the debtor in possession or to request the appointment of a trustee or examiner. In such instances, the concerns raised by Professor Resnick could well outweigh the benefits of being able to appoint Special Masters. In addition, taking such alternative approaches avoids the risk of unduly diminishing the roles of the debtor in possession and statutory trustees contemplated by Congress.

III. Special Masters Are Warranted, but in a More Limited Role

Notwithstanding the foregoing concerns, bankruptcy cases and proceedings can be so complex that the judge and the parties could uniquely benefit from the appointment of a Special Master. As Chief Bankruptcy Judge Michael Kaplan has noted, judges overseeing bankruptcy cases driven by mass tort issues, in particular, could at times have productively used a Special Master to address pretrial and tort-litigation-related issues.[64] Fundamentally, it is odd that Special Masters who are used successfully in other federal mass tort litigation, including MDLs, would be denied to courts exercising bankruptcy jurisdiction in a mass tort chapter 11 case. Logically, if a defendant in an MDL where a Special Master already was productively functioning became a debtor in a bankruptcy case, that same person should

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[62] *See* RABIEJ MEMO, *supra* note 29, at 5–6 (finding that appointing expert witnesses under Federal Rule of Evidence 706 is sufficient in many cases); *see also supra* note 18 and accompanying text. To the extent that courts have struggled with interpreting the relevant rules and Bankruptcy Code provisions to appoint experts under Federal Rule of Evidence 706, as suggested by the Rabeij Litigation Law Center Memo, we suggest that replacing these experts with Special Masters appointed under Rule 53 is an imperfect solution that would bring its own interpretation issues. *See* RABIEJ MEMO, *supra* note 29, at 6.

[63] For example, pursuant to Rule 53, the district court presiding over a judgment enforcement action under Rule 69 can appoint a Special Master to run a sale process for a complex asset with the assistance of his retained professionals, but this role normally would be performed by the debtor in possession or a chapter 7 trustee and their professionals in a bankruptcy case.

[64] *See* Letter from Hon. Michael B. Kaplan, *supra* note 6.

be eligible to serve as a Special Master in the bankruptcy case, too. Clearly such cases raise complex discovery and sequencing issues that Special Masters have helped to resolve. Such cases also, at times, raise complex causation and damage calculation issues that dramatically affect settlement discussions, especially where there is not a well-developed settlement or litigation record involving the same type of product or tort. They may also raise complex scientific issues.

In such situations, a Special Master also may be a better facilitator of settlement than a mediator or a bankruptcy examiner.[65] For example, an examiner must file his or her report on the case docket, while a mediator can give only his or her prediction of the litigation alternatives, while Special Masters can address settlement-related issues in more tailored ways, including using their quasi-judicial power either publicly or in the confidential context of settlement discussions. For example, one can foresee the use of generative artificial intelligence in the near future to mimic, at high speed, sample "trials" but only with the oversight of someone both neutral and able to posit the right questions and protocols—an ideal role for a Special Master. In addition, a clear drawback inherent in the collective resolution of mass torts under the Bankruptcy Code is the inability of plaintiffs to be heard, with their "day in court" (although in the mass tort context this is far from unique to bankruptcy cases). But one can envision a Special Master's appointment to include the facilitation of victim impact statements in a non-trial setting.[66]

Mass tort bankruptcy cases also are unique considering Congress' allocation of responsibility between the district courts and the presiding bankruptcy judge. Notwithstanding the general centralization of claims against the debtor in the bankruptcy court, the bankruptcy judge does *not* have the power to decide the merits of personal injury and wrongful death claims for distribution purposes without the parties' consent.[67] Instead,

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[65] *See id.*

[66] Since a settlement hearing in the *Purdue Pharma* chapter 11 case, non-evidentiary victim impact statements have played an important role in mass tort bankruptcy cases. *See, e.g.*, *In re* Purdue Pharma L.P., No. 19-23649(RDD) (Bankr. S.D.N.Y. Mar. 7, 2022) (Notice of Hearing Regarding Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Settlement Term Sheet, Including Portion of Hearing Specifically Allocated for Victim Statements); *In re* Roman Cath. Bishop of Sacramento, 667 B.R. 577 (Bankr. E.D. Cal. 2025). However, having such statements made to a Special Master, rather than to the court, might reduce questions about (a) whether the alleged tortfeasor's advance consent is required and (b) whether such statements might unduly prejudice the court as possible ultimate trier of fact.

[67] *See* 28 U.S.C. § 157(b)(2)(B).

Congress conferred extraordinary power on the *district court* in which the bankruptcy case is pending to decide all personal injury and wrongful death claims against the debtor (or in its discretion to have them be decided in the districts in which the claims arose).[68] In 28 U.S.C. § 157(b)(5), therefore, Congress empowered the district court exercising bankruptcy jurisdiction to centralize before it all federal *and state* personal injury and wrongful death claims against the debtor, whereas MDLs centralize only cases based on federal jurisdiction, and it enables the district court exercising bankruptcy jurisdiction to decide such claims, or as many of such claims in the sequence it chooses, on the merits.[69] Since such a power already exists to deprive the bankruptcy court of jurisdiction, authorizing the appointment of a Special Master to assist the district court in resolving such claims would not raise the types of independence concerns discussed above.

Moreover, appointing a Special Master in such a case where there also are complex non-mass tort bankruptcy issues to be resolved by the bankruptcy judge (which is true for many cases with significant financial and trade creditors in addition to tort creditors), would facilitate the coordination of the rest of the bankruptcy case with the mass tort claims resolution process. For example, one can easily imagine a Special Master and an experienced mediator of more traditional bankruptcy issues being appointed to work jointly to facilitate negotiations over a chapter 11 plan, or a Special Master or Masters being appointed to coordinate the conduct of the mass tort claims process with the general bankruptcy process.[70] As noted by the FJC Manual, the bankruptcy case of a defendant in mass tort litigation may well require nuanced communication and coordination between the bankruptcy judge and the district court presiding over the underlying tort claims, including with

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[68] *Id.* § 157(b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.").

[69] The exercise of this power in a bankruptcy case can be especially important in that it raises a live case or controversy to which insurers must respond, whereas otherwise insurers may "stay on the fence" of neither accepting nor denying coverage.

[70] While—as noted by the Committee Note to Rule 53's 2003 Amendments—"[t]here is statutory authority to appoint a magistrate judge as a special master [under] 28 U.S.C. § 636(b)(3)," there is no comparable statutory authority for the appointment of a bankruptcy judge as a Special Master. Thus, although the bankruptcy and district courts could communicate directly to coordinate the rest of the bankruptcy case with a mass tort claims process under 28 U.S.C. § 157(b)(5), the appointment of Special Masters to do so could be more efficient.

respect to the interrelation of the tort claims and the negotiation and development of a chapter 11 plan.[71] The courts involved also may well benefit from the MDL court's experience with the litigation in general.[72] A trusted Special Master could facilitate that coordination process among the courts.

Finally, a Special Master in a mass tort bankruptcy case also can facilitate the development and administration of tort claim reconciliation and distribution procedures without much risk of overstepping on the independence of either the bankruptcy judge or the debtor in possession. This is because, typically, these procedures are addressed in bankruptcy cases in the chapter 11 plan after the allocation of value on a general basis between tort claimants, on the one hand (sometimes with distinctions among various types of tort claims), and other creditors, on the other, and are not administered until after plan confirmation. While highly motivated to confirm the chapter 11 plan, and thus in the fairness of the general allocation of value among classes of creditors, the debtor usually has little input in the individual claim reconciliation and distribution procedures to be administered post-confirmation with little or no involvement from the judge. The appointment of a Special Master to oversee the development and/or administration of such procedures may, therefore, help ensure their fairness. As true neutrals with quasi-judicial powers, Special Masters have often performed such a function in the non-bankruptcy context.[73] The appointment of a Special Master for such a task in a mass tort bankruptcy case could similarly promote confidence in the fairness of claims reconciliation and distributions procedures, especially for torts or injuries that do not have a well-developed value in the existing tort system.[74]

On balance, the appointment of Special Masters in bankruptcy cases where mass tort claims play a large role would serve worthwhile and unique purposes and yet not intrude meaningfully on congressional intent with respect to the bankruptcy judge's independence or the debtor in possession's role. Indeed, Professor Resnick considered revising Bankruptcy Rule 9031 to

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[71] *See* FJC MANUAL, *supra* note 31, § 21.727.

[72] *See* FJC MANUAL, *supra* note 31, § 21.727.

[73] *See* FJC MANUAL, *supra* note 31, § 21.661.

[74] *See generally* Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Tort Restructurings*, 91 FORDHAM L. REV. 325, 353–57 (2022) (identifying need to recalibrate formulation and administration of trust distribution procedures for mass tort bankruptcy trusts, beyond reliance on the role of future claims representatives).

permit such an appointment, although he ultimately determined not to recommend it.[75]

We believe, however, that such a change is warranted now, especially to enable the district court in the district where the bankruptcy case is pending to most effectively use its power under 28 U.S.C. § 157(b)(5) to centralize the personal injury and wrongful death claims before it.[76]

We also believe that there may be other instances when the appointment of a Special Master is warranted to fulfill a role that either is not taken already by fiduciaries or could not be taken by more traditional estate neutrals, such as mediators or examiners, in the bankruptcy case, and that would not materially implicate the concerns raised herein. Rather than specifically addressing the circumstances that would warrant appointing a Special Master in such situations, in contrast to our specific recommendation in the mass tort context, we recommend modifying Bankruptcy Rule 9031 to permit the court's exercise of discretion in such other contexts, but only after taking such concerns into account.

We therefore propose the following modification to Bankruptcy Rule 9031:

> (1) A court may not appoint a special master in a bankruptcy case except:
>
> (a) When a district court in the district where such case is pending has exercised its power to try personal injury tort or wrongful death claims pursuant to an order under 28 U.S.C. § 157(b)(5);
>
> (b) In furtherance of the resolution of personal injury tort or wrongful death claims; or
>
> (c) In other circumstances where the appointment of a special master would facilitate the court's conduct

[75] *See* Resnick, Special Masters, *supra* note 7, at 17.

[76] If the Special Master were appointed by the district court, there would not be an extra set of findings and conclusions, because, when called for, they would be issued by the Special Master to the district court without an intervening set of findings and conclusions needing to be issued by the bankruptcy judge.

> of the case or proceedings therein; provided that such appointment in other circumstances
>
> (i) shall be only on the court's initiative; and
>
> (ii) in deciding to appoint a special master, the court has determined that such role cannot be effectively and timely performed by the court itself or performed by an existing fiduciary or another neutral party with less extensive powers.
>
> (2) When the court has so determined that it is authorized hereby to appoint a special master in a bankruptcy case, Federal Rule of Bankruptcy Procedure 7053 [which shall incorporate Rule 53 as modified for the bankruptcy context[77]] shall govern.

The Committee Note to the proposed amendment also could highlight the concerns raised in Part II.A. hereof, and state that they should inform the court's exercise of its discretion under the new rule.

Conclusion

It is time to amend Bankruptcy Rule 9031 to permit the appointment of Special Masters by courts exercising bankruptcy jurisdiction. The grounds for such appointments, however, should be carefully tailored because of issues unique to bankruptcy cases and the bankruptcy system, as well as to highlight the productive role that Special Masters can nevertheless play in that context whether appointed by the bankruptcy court or the district court. Experience shows the value of Special Masters in performing multiple different functions in the federal court system. That expertise can and should be made available to judges exercising bankruptcy jurisdiction to the benefit

[77] Changes to Rule 53 to conform to the bankruptcy context would include the deletion of (i) references to magistrate judges and (ii) Rule 53's treatment of the compensation and reimbursement of Special Masters and their professionals, with replacement by a reference to payment by the estate and a cross-reference to §§ 330 and 331 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016. In addition, a modification of Rule 53's provision for the qualification of the Special Master would be needed, unless (as we suggest) Rule 53's standard under 28 U.S.C. § 455 is followed.

of the parties in bankruptcy cases consistent with congressional intent and the positive evolution of bankruptcy law.

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