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Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court

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I. INTRODUCTION

Bankruptcy procedure is governed by the Federal Rules of Civil Procedure ("FRCP"), the Federal Rules of Bankruptcy Procedure ("federal bankruptcy rules" or "FRBP") and the Official Bankruptcy Forms.[1] In addition, bankruptcy courts may formulate their own local rules as long as those rules are not inconsistent with the Bankruptcy Code ("the Code") or the federal bankruptcy rules.[2] Bankruptcy courts throughout the nation have promulgated local procedural rules. Local bankruptcy rules promote uniformity of practice within districts and bolster the credibility and integrity of the bankruptcy courts.[3]

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1. FED. R. BANKR. P. 1001.

2. FED. R. BANKR. P. 9029.

3. *See* Peter J. Antoszyk, *An Overview of Local Rule-making in Bankruptcy Court*, AM. BANKR. INST. J., 31 May 1993, at 31 (observing that some "believe that extensive local rules advance the practical administration of the courts and the practice of law").

Although local bankruptcy rules serve several useful purposes, their widespread proliferation might present certain problems: First, local bankruptcy rules might violate the well-established policy of rule consistency. FRBP 9029 mandates that local bankruptcy rules not be inconsistent with the federal bankruptcy rules, and local rules may not limit or prohibit the use of Official Forms.[4] Inconsistent rules violate the letter and spirit of Rule 9029. Second, local bankruptcy rules might hamper the inexpensive and speedy resolution of bankruptcy cases.[5] The proliferation of local bankruptcy rules

4. FED. R. BANKR. P. 9029; *see* Burger King Corp. v. Wilkinson (*In re* Wilkinson), 923 F.2d 154, 155 (10th. Cir. 1991) (holding that a local rule that eliminated motions for rehearing unless the district court granted leave to file such motions was invalid because it was inconsistent with FRBP 8015); Bersher Investments v. Imperial Savings Assoc. (*In re* Bersher Investments), 95 B.R. 126, 129 (Bankr. 9th Cir. 1988) (holding that a local bankruptcy rule providing authority for sanctions was consistent with FRBP 9029 and FRBP 9011); McDonald v. Home State Bank & Trust Co. (*In re* McDonald), 161 B.R. 697, 701 (Bankr. D. Kan. 1993) (holding that a local rule that provided that any motion to avoid a nonpossessory, nonpurchase money lien must be filed at least five days before date initially set for debtor's discharge was invalid because it conflicted with 11 U.S.C. §§ 350(b) and 522(f) of the Code); *In re* Salisbury Flower Markets, Inc., Bankr. No. 4-89-3142, 1991 WL 26597 (Bankr. D. Minn. Feb. 22, 1991) (mem.) (holding that a local rule providing that a sale of property of the estate may be consummated on four days notice and without general notice when the value of the property had a value of less than $1500 was consistent with § 363 of the Code); Industrial Fin. Corp. v. Falk (*In re* Falk), 96 B.R. 901, 905 (Bankr. D. Minn. 1989) (mem.) (en banc) (holding that a local rule extending time to file dischargeability complaints conflicted with FRBP 4007(c)); *In re* Leach, 102 B.R. 805, 807 (Bankr. D. Kan. 1989) (mem.) (holding that local district court rule that required timely response to motions did not conflict with FRBP 9014 which states, "No response [to a motion filed in a contested matter] is required under this rule unless the Court orders an answer to a motion."); *In re* Walat, 87 B.R. 408, 412-14 (Bankr. E.D. Va. 1988) (mem.) (en banc), *aff'd*, 89 B.R. 11 (E.D. Va. 1988) (mem.) (holding that a local bankruptcy rule requiring Chapter 13 plans to be in approved form and providing for confirmation hearing only if party timely files objection to confirmation was not inconsistent with Article 1 of the Constitution, 28 U.S.C. § 2075, FRBP 9029 or FRBP 9009); *In re* Shop-N-Go, 38 B.R. 731, 734 (Bankr. D. Me. 1984) (holding that a local bankruptcy rule that required de novo review of bankruptcy court decisions conflicted with FRBP 8013); *In re* South Portland Shipyard & Marine Rys. Corp., 32 B.R. 1012, 1021 (Bankr. D. Me. 1983), *vacated sub. nom.* Romeo J. Roy, Inc. v. Northern Nat'l Bank, 740 F.2d 111 (1st Cir. 1984) (per curiam) (holding that a district court rule providing for referral of bankruptcy matters to bankruptcy judges was invalid because it was inconsistent with FCRP 53 and FRBP 513). For a recent application of the policy of rule consistency outside of the bankruptcy context, see Martel v. County of Los Angeles, 21 F.3d 940, 946-47 (9th Cir.), *withdrawn*, 34 F.3d 731 (9th Cir. 1994) (superseded on dismissal of rehearing) (holding that a district court judge's "rocket docket" regimen, which required setting a case for trial within three months of filing the answer, violated FRCP 83, which states that district judges "may regulate their practices in any manner not inconsistent with these . . . rules or those of the district in which they act").

5. Expeditious litigation is particularly crucial in bankruptcy because resources devoted to case administration siphon assets from the pool of assets that will be available to creditors. *See* Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 113 S. Ct. 1489, 1505 (1993) (O'Connor, J., dissenting) ("An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see.").

means that attorneys who intend to practice before certain courts must expend time and effort to learn the local rules or hire local counsel familiar with the local practice.[6] Moreover, local bankruptcy rules add a layer of procedural hurdles that can form the basis for time-consuming appeals and other controversies. Third, local bankruptcy rules might impose unreasonable barriers to access for some litigants.[7]

Bankruptcy scholars have not paid enough attention to bankruptcy's procedural aspects,[8] and procedural issues rarely receive sufficient attention in bankruptcy courses.[9] Academics have neglected this important area to the detriment of the bankruptcy community. Members of the bankruptcy bench and bar have strongly indicated their concern with the growing prominence of local procedural rules in bankruptcy courts. For example, recent proposed amendments to FRBP 9029 require all local bankruptcy rules to be consistent with federal procedural rules and acts of Congress.[10] The amendments also expressly mandate that local bankruptcy rules not duplicate federal procedural

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6. *See* Frazier v. Heebe, 482 U.S. 641, 649 (1987) (holding that a local rule requiring attorneys to maintain a law office or continuous residence within the state in order to have eligibility for the bar of that state was invalid because it was "unnecessary and irrational").

7. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1263 (1967) (criticizing a local district court rule that provided for the "discretionary imposition of costs upon a party prior to his taking a deposition more than 100 miles from the courthouse" on the ground that such a rule might "prevent an impoverished litigant from taking an important deposition").

8. For an exception, see Frank R. Kennedy, *Some Comments About the Rules of Bankruptcy Procedure Under the Bankruptcy Reform Act*, 85 COM. L.J. 125 (1980). Judge Clark has offered one possible explanation for this tendency. *See* Leif M. Clark, *Bankruptcy Litigation*, AM. BANKR. INST. J., 31 May 1993, at 14 ("Bankruptcy courts are trial courts. Bankruptcy judges are judicial officers, as opposed to administrators. But it is an accepted tenet in most circles that the Bankruptcy Code is designed to foster negotiations and compromise. For decades, the bankruptcy laws have been viewed as a subspecies of equity jurisprudence.").

9. Jonathan M. Landers & Kathryn A. Dunwoody, *Things We're Afraid to Teach: Jurisdiction, Venue and Procedure*, Address Before the American Association of Law Schools' Workshop on Bankruptcy (October 19, 1991) (observing that procedural issues often get neglected in bankruptcy courses because there are so many substantive topics to cover and professors feel uneasy about teaching "procedure" in a "substantive" course).

10. Proposed amendments to FRBP 9029 require that: "(i) local rules must be *consistent* with and *not duplicative* of Acts of Congress as well as the national rules; (ii) the numbering of local rules 'must conform to any uniform numbering system' that may in future be prescribed; (iii) '[a] local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of negligent failure to comply with the requirement'; and (iv) '[n]o sanction or other disadvantage may be imposed for noncompliance' with local, internal directives not known to an affected particular litigant or attorney." FED. R. BANKR. P. 9029 (proposed Oct. 15, 1993) (preliminary draft) (emphasis added) (alterations in original). The committee notes to the amendments read: "This rule is amended to reflect the requirement that local rules be consistent not only with applicable national rules but also with Acts of Congress. The amendment also states that local rules should not repeat applicable national rules and Acts of Congress." *Id.* at committee note.

rules or acts of Congress.[11] Additionally, the amendments limit the extent to which sanctions may be imposed for noncompliance with a local bankruptcy rule.[12]

This Article examines the recent proliferation of local bankruptcy rules of procedure and explores the role that these rules play in bankruptcy law. The Article traces the origins of the federal bankruptcy rule that authorizes bankruptcy courts to promulgate local rules. Current formulation of this rule gives bankruptcy courts such power. Is that rulemaking power being exercised in accordance with sound policy? The Article posits three fundamental values implicated by the local rulemaking procedure: consistency, efficiency, and fairness. Part III demonstrates how certain local bankruptcy rules might impair these core values. A recent comprehensive analysis of local rulemaking illustrates many inherent difficulties.[13] Finally, assuming that limited local rulemaking is inevitable and desirable,[14] the Article offers suggestions for improving the local rulemaking process in bankruptcy courts.

II. THE ORIGINS OF FRBP 9029

An analysis of rulemaking in bankruptcy courts must begin with FRCP 83[15] and FRBP 9029:

> Rule 83. Rules by District Courts
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> Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in

11. *Id.*

12. *Id.*

13. 1 NINTH CIRCUIT JUDICIAL COUNCIL, REVIEW AND ANALYSIS OF LOCAL BANKRUPTCY RULES OF PROCEDURE (1994).

14. *Id.* at 8 ("[D]uring the course of this study, many local [bankruptcy] rules that supplement or elaborate on existing federal law were encountered. Rules that supplement or elaborate are useful and appropriate as local rules.").

15. For a useful and detailed description of the origins of F.R.C.P. 83, see Note, *supra* note 7, at 1253-59.

any manner not inconsistent with these rules or those of the district in which they act.[16]

Rule 9029. Local Bankruptcy Rules

Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are not inconsistent with these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make rules of practice and procedure which are not inconsistent with these rules and which do not prohibit or limit the use of the Official Forms. In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.[17]

Before 1973, the Federal Rules of Civil Procedure and a series of general orders governed procedure in bankruptcy courts.[18] The earliest predecessor of FRBP 9029 was General Order 56.[19] General Order 56 provided as follows:

Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be distributed as follows . . . .[20]

General Order 56 was similar to the present rule in that it conferred rulemaking power on the bankruptcy judges. However, there is one major difference between General Order 56 and FRBP 9029. General Order 56 constituted a *direct* grant of authority to the bankruptcy courts. FRBP 9029 contains no such direct grant. Under FRBP 9029, bankruptcy judges have rulemaking authority only if district courts delegate it to them.[21]

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16. FED. R. CIV. P. 83.

17. FED. R. BANKR. P. 9029.

18. *See generally* HAROLD REMINGTON, TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES 457-615 (6th ed. 1955).

19. 4B COLLIER ON BANKRUPTCY, 1557 (14th ed. 1978).

20. *Id.*

21. FED. R. BANKR. P. 9029. This provisions states:

In 1973 General Order 56 was abrogated and replaced by Rule 927:[22]

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedures under the Act not inconsistent with these rules. Copies of rules and amendments so made shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of such rules available to members of the public who may request them. In all cases not provided for by rule, the district court may regulate its practice in any manner not inconsistent with these rules.[23]

The most noteworthy aspect of Rule 927 is that, like FRBP 9029, it gave the district courts the authority to make local rules for bankruptcy cases. But unlike FRBP 9029, Rule 927 made no mention of bankruptcy courts in that process.

FRBP 9029 represents an improvement on General Order 56 and Rule 927 for several reasons. First, unlike Rule 927, it clarifies the bankruptcy courts' authority to promulgate local rules in the event of a delegation by the district court. Second, it makes explicit reference to FRCP 83.[24] This integrates the bankruptcy local rulemaking process into the larger, federal local rulemaking process. Finally, the last sentence of FRBP 9029 gives bankruptcy judges decision-making power to deal with situations not provided for in the federal procedural rules.[25] This decision-making power does not appear to require a delegation by the district court.[26]

There is no question that FRBP 9029 gives the bankruptcy courts the authority to formulate and adopt local rules in their respective districts. The more important and difficult issue is whether these courts are exercising their

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> A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make rules of practice and procedure which are not inconsistent with these rules and which do not prohibit or limit the use of the Official Forms.

Id.

22. FED. R. BANKR. P. 9029; Sup. Ct. R. Bankr. P. 927.

23. Sup. Ct. R. Bankr. P. 927.

24. FED. R. BANKR. R. 9029 (stating that "[r]ule 83 F.R.Civ.P. governs the procedure for making local rules").

25. *Id.* ("[I]n all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.").

26. FED. R. BANKR. P. 9029 advisory committee's note ("[T]he term 'court' in the last sentence of the rule includes the judges of the district court and the bankruptcy judges of the district.") (citation omitted).

rulemaking authority rationally. Commentators have addressed this question in the context of local district court rules,[27] but much less attention has been paid to local bankruptcy court rules.[28] Of course, judges confront this question routinely when they are asked to assess the validity of a local bankruptcy rule in the context of a particular case.[29] However, this Article approaches this inquiry in a more systematic way by examining the present uses of FRBP 9029 against a backdrop of fundamental values that are key to the legitimacy of the federal court system.

III. LOCAL RULES AND FUNDAMENTAL VALUES

A. Consistency

Local bankruptcy rules might violate the well-established policy of rule consistency. FRBP 9029 mandates that local bankruptcy rules may not be inconsistent with the federal bankruptcy rules. Inconsistent rules violate the letter and spirit of FRBP 9029.[30] For purposes of this analysis, "inconsistent" rules are rules that differ from the federal bankruptcy rules or the Code.[31] These differences can be obvious or subtle. Moreover, "inconsistent" rules are rules that restrict rights, privileges, or discretion that the federal bankruptcy rules specifically bestow on judges or litigants.[32]

A survey of local bankruptcy rules in the Ninth Circuit reveals some conflict with the federal bankruptcy rules and the Bankruptcy Code. For example, Local Rule 3002-2(a) of the Bankruptcy Court for the Southern District of California provides that proofs of claim in a Chapter 13 case shall be filed with the Chapter 13 trustee.[33] This local rule differs from FRBP 3002(b). FRBP 3002(b) requires that a proof of claim be filed in accordance with FRBP 5005,[34] which states that proofs of claim are to be filed with the bankruptcy clerk.[35] Local Rule 3002-2(a) might be helpful in running an

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27. *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 84-87 (1977); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3152 (1973); Raymond C. Caballero, *Is There an Over-Exercise of Local Rule-Making Powers By the United States District Courts?*, 24 FED. B. NEWS 325 (1977); Comment, *The Local Rules of Civil Procedure in the Federal District Courts - A Survey*, DUKE L.J. 1011 (1966).

28. *See supra* note 8.

29. *See* cases cited *supra* note 4.

30. *See* cases cited *supra* note 4.

31. *But see* 1 NINTH CIRCUIT JUDICIAL COUNCIL, REVIEW AND ANALYSIS OF LOCAL BANKRUPTCY RULES OF PROCEDURE 9-12 (1994) (describing various definitions of "inconsistent"").

32. *Id.* at 9.

33. BLR S.D. CAL. 3002-2(a).

34. FED. R. BANKR. P. 3002 (b).

35. FED. R. BANKR. P. 5005(a).

efficient system throughout the district because bankruptcy clerks are spared the job of processing proofs of claim in Chapter 13 cases.[36] The problem is that the federal bankruptcy rules contemplate a central filing system.[37] Central filing makes discovery easier and less costly for creditors and other interested parties.

Another local bankruptcy rule that differs from its corre-sponding federal bankruptcy rule is Local Rule 745(2) of the Hawaii Bankruptcy Court for the District of Hawaii. Local Rule 745(2) provides that interrogatories served on a party shall not exceed thirty.[38] This rule is inconsistent with the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure, which limit interrogatories to twenty-five.[39] The reason for this difference is puzzling. It is difficult to discern how expanding the number of interrogatories from twenty-five to thirty will substantially improve the discovery process for litigants in Hawaii.[40]

More subtle deviations also exist. For example, Local Rule 8(c) of the Bankruptcy Court for the District of Montana provides as follows: "Unless otherwise ordered by the Court, a petition may not be amended to add a spouse as a joint petitioner after the order for relief has been entered. In no case shall such amendment be allowed after the Clerk has mailed notice of the bankruptcy to creditors."[41] This local bankruptcy rule is inconsistent with § 302 of the Bankruptcy Code.[42] Local Rule 8(c) implies that a petition can be amended to add a new debtor if the court in its discretion deems it appropriate. However, whether bankruptcy judges have the legal authority to convert retroactively a single filing into a joint case is unclear.[43]

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36. This process' efficiency is questionable, however, because Local Rule 3002-2(b) provides that original proof of claims will be filed with the court at the time of the filing of the final report. Thus, the proofs of claims do find their way into the judicial docket eventually. *See* BLR S.D. CAL. 3002-2(b).

37. *See* FED. R. CIV. P. 5(e).

38. HBLR 745(2).

39. *See* FED. R. CIV. P. 33(a); FED. R. BANKR. P. 7033. The December 1993 amendments to the Federal Rules of Civil Procedure on discovery allow courts to modify, limit, or opt out of the amendments to Rule 33. If the district of Hawaii decides to opt out of the amendments to Rule 33, then HBLR 745(2) is not problematic. If the district decides not to opt out, then HBLR 745(2) is inconsistent. So far, the district has not chosen to opt out of the amendments. *See FRCP Amendments Chart*, WEST'S BANKR. NEWSL., Oct. 26, 1994, at 20, 33.

40. Some opt out districts have interrogatory limits of forty or fifty. *See id.* at 20-38.

41. MONT. LBR 8(c).

42. *See* 11 U.S.C. § 302 (1988); *see also* LBR W.D. WASH. 1009(c).

43. *See In re Clinton*, 166 B.R. 195, 196 (Bankr. N.D. Ga. 1994) ("[N]othing in section 302 suggests that a debtor may amend a petition to add a spouse as a debtor and thereby retroactively commence a case for that spouse. [Thus] it is not surprising that in every reported case dealing with such an amendment, the motion to amend was denied." (citations omitted)); *see also In re Sobin*, 99 B.R. 483 (Bankr. M.D. Fla. 1989) (concluding that section 302 does not permit the amendment of a petition to add a spouse); *In re Woodell*, 96 B.R. 614, 615 (Bankr. E.D. Va.

Local bankruptcy rules that restrict the rights of litigants or the discretion of individual judges are particularly trouble-some. Local Rule 508 of the Bankruptcy Court for the Eastern District of California mandates that the funds of Chapter 11 estates be "maintained in a federally insured depository."[44] This rule is inconsistent with 11 U.S.C. § 345,[45] which provides that the trustee may deposit or invest money of the estate with either an entity that is insured or guaranteed by the United States or an entity that provides a bond in favor of the United States that is conditioned on a proper accounting, prompt repayment, and faithful performance of duties as a depository.[46] Local Rule 508 permits accounts to be maintained only at "federally insured depositories," thus apparently limiting the impact of 11 U.S.C. § 345.

Another example is Local Rule 4001.2(e) of the Bankruptcy Court for the District of Idaho.[47] This rule requires that a party filing a § 362(d)(2) motion[48] alert the served party of the requirements contained in § 362(e).[49] Failure to inform the served party of these requirements waives the protection of § 362(e). This means that the stay will not automatically be terminated as § 362(e) requires. This rule is inconsistent with FRBP 4001 and § 362(e). Neither the federal bankruptcy rules nor the Bankruptcy Code create a waiver of the protection of § 362(e) in the event that the movant does not inform the served party of its requirements.

Surely the drafters of these local bankruptcy rules did not intend to circumvent federal bankruptcy rules or the Bankruptcy Code. Drafters sometimes promulgate local bankruptcy rules in an effort to instruct litigants and judges on the handling of certain recurring situations. This probably

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1988) (mem.) (stating that granting a motion "to add a spouse to the individual filed spouse's petition by amendment raises serious questions related to the filing date as to the added spouse. These questions are avoided by requiring the spouse to file a separate petition as appears to be contemplated by Sections 301 and 302."); *In re Kirkus*, 97 B.R. 675 (Bankr. N.D. Ga. 1987) (denying a motion to amend on the ground that such motion might adversely affect the rights of creditors); *In re Masterson* 55 B.R. 648, 649 (Bankr. W.D. Pa. 1985) (mem.) (noting in dictum that "there is no apparent procedural device by which an additional party can be made a debtor under that single petition"); *In re Austin*, 46 B.R. 358, 360 (Bankr. E.D. Wis. 1985) (concluding that "[t]he critical import of the filing of a bankruptcy petition and its effect upon the rights of others will not permit a bankruptcy petition . . . to be treated, two weeks after the fact, as a *joint* petition.").

44. LBR E.D. CALIF. 508.

45. 11 U.S.C. § 345(b) (1988), *amended by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, sec. 210, § 345(b), 108 Stat. 4106, 4124 (1994).

46. *See id.*

47. *See* LBR D. IDAHO 4001.2(e).

48. *See* 11 U.S.C. § 362(d)(2) (1988).

49. 11 U.S.C. § 362(e) (1988) provides in pertinent part, "Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request . . . ."

explains Montana Local Rule 8(c) and Eastern District of California Local Rule 508. For example, Local Rule 8(c) makes clear that in Montana's bankruptcy courts petitions cannot be amended to add a spouse or joint petitioner after the order for relief has been entered. This is entirely consistent with the Code.[50] However, Local Rule 8(c) also provides that in particular instances bankruptcy judges will have discretion to order otherwise. While this provision relaxes the absolute tone of Local Rule 8(c), it also renders the rule at odds with the standard interpretation of § 302.[51] Similarly, Local Rule 508 instructs Chapter 12 and Chapter 13 trustees and debtors where to invest estate funds. Nonetheless, in what apparently was an oversight, the local rule restricts investments in a manner not contemplated by § 345.

Local bankruptcy rules have more than merely an instructional function. A district may also formulate a local bankruptcy rule to deal with a specific problem or concern. For example, Southern District of California Local Rule 3002-2(a) and Hawaii Local Rule 745(2) arguably serve this function. Local Rule 3002-2(a) might have been inspired by a desire to reduce the volume of papers filed with the bankruptcy clerk. Such a reduction would conserve judicial and administrative resources. Similarly, Local Rule 745(2) might reflect a concern that twenty-five interrogatories is insufficient for discovery purposes.

Unfortunately, serious problems arise from these types of inconsistencies. First, inconsistencies can lead to the misapplication of federal law. Local Rule 8(c) might lead a judge to grant a retroactive conversion when such an action might be impermissible under the Code or the federal bankruptcy rules. Local Rule 508 might lead a judge to deny a trustee's request to invest money with an entity with whom the trustee has a right to conduct business under § 345. Thus, federal law becomes subordinate to the local rules.

Second, the lack of a uniform approach means that litigants might receive different treatment in different districts. A litigant's rights or privileges provided under the federal scheme (such as the right to invest estate funds in an institution not federally insured) might be denied under the local regime. Options that are not contemplated by the Code (such as retroactive conversion of a single case to a joint case) might be available to debtors in one district simply because of the wording of a local rule. One of the distinct advantages of the federal bankruptcy rules and the Code is some assurance of a uniform approach to most issues. Local rules that are inconsistent with the federal bankruptcy rules undermine that assurance.

As the federal rules lose their influence, interdistrict uniformity decreases. The federal bankruptcy courts might become a procedural Tower of Babel as the courts begin to operate under increasingly varied processes.[52] These local

50. *See* MONT. LBR 8(c).

51. *See* cases cited *supra* note 43.

52. This analogy is not original. *See Crisis in the Federal Courts: Hearings on the*

bankruptcy rules are not drafted on a clean slate, and thus, conflicts such as those described above are inevitable. This is precisely why the drafters of FRCP 83 contemplated that local rulemaking would be used sparingly.[53]

B. Efficiency

The primary threat to the continued efficiency of the bankruptcy courts is the large number of local rules that simply repeat the federal bankruptcy rules and the Code. Recent proposed amendments to FRBP 9029 expressly mandate that local rules not be duplicative of acts of Congress and the federal procedural rules.[54] Prior to these amendments, repetitious rules were, at best, a nuisance. Now, they violate federal law.

For a variety of reasons, many districts have created local bankruptcy rules that merely repeat existing federal law.[55] Idaho Local Rule 1007.3 provides in part, "The debtor(s) shall give notice of an amendment of or to the petition, schedules, statement of affairs, or other lists or documents filed pursuant to Federal Rule of Bankruptcy Procedure 1007 or these rules, to the trustee and to any entity affected thereby."[56]

This rule mimics FRBP 1009(a), which states in part, "The debtor shall give notice of the amendment[, petition, list, schedule, or statement] to the trustee and to any entity affected thereby."[57]

Certain local bankruptcy rules are repetitious and inconsistent. For example, Montana Local Rule 17(a) requires that objections to disclosure statements be served on "debtor's counsel, or trustee, the United States Trustee, the creditors' committee, and any other party in interest requesting notice."[58] FRBP 3017 requires that objections to disclosure statements be served on the debtor, trustee, any committee appointed, or any other entity designated by the court.[59] The service requirements in Local Rule 17(a) are substantially similar to those in the federal rules. This similarity raises a question as to the necessity of the local bankruptcy rule. The local rule also

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Administration of Justice in the Federal Court System, S. 915 and H.R. 6111 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 276, 282 (1967) (statement of Maurice Rosenburg, esq.) (stating that "[t]he Federal courts of this country are becoming a kind of procedural Tower of Babel because of the differences in local rules").

53. *See* Note, *supra* note 7, at 1255-57.

54. FED. R. BANKR. P. 9029 (proposed Oct. 15, 1993).

55. Districts sometimes promulgate repetitious rules to instruct *pro se* debtors, reasoning that such debtors have neither easy access to the federal bankruptcy rules nor the sophistication to understand them.

56. LBR D. IDAHO 1007.3.

57. FED. R. BANKR. P. 1009(a).

58. Mont. LBR 17(a).

59. *See* FED. R. BANKR. P. 3017.

is inconsistent with the federal bankruptcy rules, which raises the possibility that the federal rule will be misapplied.

Repetitious rules impair the efficient operation of the bankruptcy courts in several ways. First, considerable judicial and administrative resources are spent drafting local bankruptcy rules.[60] Why should those resources go toward duplicating rules? Second, bankruptcy court clerks have to distribute local rules to local counsel. Clerks are disseminating redundant local rules. In short, repetitious rules undermine simplicity[61] and increase transaction costs.

C. Fairness

Inconsistent rules also impose unreasonable barriers to access for some litigants. An example is Central District of California Local Rule 133:

> (1) Order for Permission. A voluntary petition under Chapter 7, 11, 12 or Chapter 13 filed by an individual shall be accepted by the Clerk without the filing fees only if accompanied by an order signed by a Judge authorizing payment of the filing fees in installments. The debtor shall personally appear before a designated Judge at the appropriate Court site at a time prescribed by the Court on any Court day to present his or her written application and declaration, and order thereon.[62]

This rule is inconsistent with FRBP 1006(b)(1) because it has stricter requirements than federal law. The local rule requires the debtor to appear before a judge to present an application for payment of fees in installments. Moreover, it directs the clerk not to accept for filing any individual voluntary petition without filing fees unless the petition is accompanied by an order signed by a judge authorizing installment payments. By contrast, FRBP 1006(b)(1) states that the petition shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments.[63] The federal rule makes no mention of a court order requirement. Under the clear language of FRBP 1006(b)(1), the correct procedure is for the debtor to file the petition along with the applica-

60. *See* FED. R. BANKR. P. 9029 advisory committee's note to 1987 amendments ("[E]ffective August 1, 1985, Rule 83 F.R.Civ.P., governing adoption of local rules, was amended to achieve greater participation by the bar, scholars, and the public in the rule making process . . . .").

61. Contemporaneous statements by the drafters of Rule 83 show that these drafters preferred a simple scheme with as few local rules as possible. *See* Note, *supra* note 7, at 1255-57.

62. C.D. CAL. LOCAL BANKRUPTCY RULE 133(1).

63. FED. R. BANKR. P. 1006(b)(1).

tion requesting installment payments first and seek permission in the form of an order to pay installments later.[64]

The problem with local bankruptcy rule 133(1) is that it could impair the debtor's right to an immediate filing. An impoverished debtor in the Central District of California who needs to pay the filing fee in installments might be prevented from filing a petition at a time that is most advantageous to him because an appearance before a judge to obtain a court order is mandated.[65] A debtor in another district can file an application to pay in installments along with the petition and the court can later address the installment payment issue. The actual filing is in no way delayed. Local bankruptcy rule 133(1) unfairly restricts immediate access to the bankruptcy courts for debtors in the Central District of California.

The motivation behind local bankruptcy rule 133(1) might have been the perception that debtors were abusing FRBP 1006.[66] In other words, either people not deserving of the privilege were nonetheless using it, or they were not taking the installment payments seriously enough. Perhaps drafters felt the need for some kind of increased judicial oversight. The problem is that this judicial involvement comes at the expense of timely access to the courts for debtors who request payment in installments. Local Rule 133(1) demonstrates an inherent tension in the local rulemaking process. The drafters of local rules are responding to legitimate concerns. However, these parochial concerns must be accommodated to the global demands of the federal bankruptcy rules and the Code.

IV. CONCLUSION

The recent amendments to FRBP 9029 are most welcome. Rules that are not consistent with the federal rules and the Code or that are duplicative of those laws are strictly forbidden. The drafters of local rules must conform their rulemaking behavior to this explicit mandate. How can we further improve the local rulemaking process in the federal bankruptcy courts? Here are a few suggestions.

First, comprehensive studies such as the one undertaken by the Ninth Circuit Court of Appeals[67] should be encouraged throughout the other

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64. *See* FED. R. BANKR. P. 1006(b)(2).

65. The debtor may seek an immediate filing in order to take advantage of the protection of the automatic stay and stop an imminent foreclosure or eviction.

66. Bolstering this view is the fact that the Central District also shortened the time period for paying on installments. FRBP 1006(b)(2) requires that the final payment must be due no later than 120 days after the filing of the petition. Central District of California Local Bankruptcy Rule 133(2) shortens this period to three months.

67. *See supra* note 13.

circuits. Such studies can reveal problems endemic to each district, as well as common themes and patterns that threaten interdistrict uniformity.

Second, districts should keep local rules to a minimum and thus give bankruptcy judges the flexibility to fashion solutions to problems not contemplated by the federal bankruptcy rules. This decision-making power, while not well understood or appreciated, is clearly provided for in FRBP 9029.[68]

Third, when promulgating local rules to deal with specific local problems, the drafters should make sure that the problem is an acute one. Moreover, they should narrowly tailor the rule to address the specific problem, keeping in mind the dictates of any federal bankruptcy rules. The district should regularly revisit the problem to ensure that the local rule is still needed. If it is not, then the rule should be repealed.

Finally, bankruptcy academics should pay more attention to the procedural aspects of bankruptcy law, in scholarship and in teaching. We should not so strictly bifurcate substance from procedure. Nothing less than the viability of our federal bankruptcy courts is at stake.

68. *See supra* text accompanying notes 25-26.