

Time Has Come for Special Masters to Streamline Bankruptcy Cases

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Since the first Johnson & Johnson talc bankruptcy was [filed](#) in 2021, Judge Michael Kaplan has faced countless disagreements in the US Bankruptcy Court. These range from discovery fights, disputes over administration of tens of thousands of individual claims and all-out conflict over the total amount in controversy.

Had Kaplan been a district court judge presiding over a mass tort action, the solution would have been obvious: appoint a special master to efficiently manage the increasingly contentious parties. But there was one problem: Kaplan is a bankruptcy judge, and was therefore barred by the Rules of Bankruptcy Procedure from appointing a special master.

Last month, Kaplan prepared his first broadside against this antiquated rule.

Special Masters

In federal district courts, it's fairly common for judges to appoint special masters — also known as court-appointed neutrals. Retired judges, practicing attorneys and law professors are the conventional candidates to fill these positions.

The powers authorizing appointment of special masters derive from Rule 53 of the Federal Rules of Civil Procedure. Under this rule, the court may appoint a special master to:

- Perform duties “consented to” by the parties;
- Hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by “some exceptional condition” or “the need to perform an accounting or resolve a difficult computation of damages;”
- Address pre-trial and post-trial matters “that cannot be effectively and timely addressed” by a judge of the court.

Many state courts, including in New York, have adopted their own versions of Rule 53. District courts have discretion to appoint special masters to address any role the court believes would expedite the litigation and achieve a just resolution. Some more common uses of special masters include resolving privilege and highly technical e-discovery disputes, managing discovery, general case management, resolving fee disputes, facilitating settlement discussions

and acting as monitors or receivers.

Once appointed, the judge outlines the special master's specific duties and determines the scope of their role in the litigation. The special master can issue orders and recommendations, which the court can choose to adopt reject, or modify. The parties can also choose to contest the special master's determinations.

Bankruptcy Rule 9031

Unlike the Federal Rules of Civil Procedure, Rule 9031 of the Federal Rules of Bankruptcy Procedure pithily prohibits the appointment of special masters in bankruptcy proceedings: "Masters Not Authorized. Rule 53 [of the Federal Rules of Civil Procedure] does not apply in cases under the [Bankruptcy] Code."

Amendments to Rule 9031 were last considered in 1996. At the time, the Advisory Committee on Bankruptcy Rules declined changes, providing two primary rationales: the appointment of special masters would infringe on the bankruptcy judge's authority, and special masters were unnecessary and inefficient.

Kaplan's Fight

Last month, one federal judge decided that the time had finally come to amend Rule 9031. Kaplan, a New Jersey bankruptcy judge who recently made headlines by overseeing the Chapter 11 case of Johnson & Johnson's subsidiary, LTL Management, wrote a letter to the Federal Committee on Rules of Practice and Procedure in support of a change to the Bankruptcy Rules.

In his January 10 [letter](#), Kaplan recommended a simple change — that the title of Bankruptcy Rule 9031 be changed from "Masters Not Authorized" to "Masters Authorized," and the word "not" be struck from the text of the rule. Appending an analysis prepared by the John Rabiej Litigation Law Center, Kaplan argued that allowing special masters in bankruptcy proceedings would relieve some of the burden on bankruptcy courts.

Kaplan's letter provides some relevant flavor of his own personal experience as a bankruptcy judge, painting a picture of an increasingly onerous caseload rife with complex issues like cryptocurrency filings, mass torts and corporate asset valuations. He argues that the current tools available to bankruptcy judges under existing rules are insufficient to address this deluge of filings, causing bankruptcy cases to be "held hostage to litigation/discovery 'overload.'" Special masters, Kaplan says, are essential to lighten the load.

The accompanying Rebiej memorandum specifically addressed the two concerns raised in 1996.

Interim changes to Rule 53 have mooted the concerns of the Advisory Committee. In 2003, amendments provided district judges with authority to review de novo any findings of a special master, in contrast to the previous, highly deferential "clearly erroneous" standard. And the memorandum emphasized the increasing complexity of a subset of bankruptcy cases, which would recognize the same efficiency benefits from special masters that have been amply demonstrated in district court.

Call for Change

Kaplan isn't the only voice calling for change. Last year, the ABA House of Delegates adopted a [resolution](#) urging the amendment of Rule 9031 to permit the use of court-appointed neutrals in bankruptcy proceedings.

And Merril Hirsh, executive director of the Academy of Court-Appointed Neutrals, has repeatedly beaten the drum for updating Rule 9031, calling it a "relic": one that "serves only as an artifact that deprives bankruptcy judges of a useful tool for no genuine [reason](#)." Hirsh announced plans to submit a letter in support of Kaplan's proposal.

As bankruptcy cases become more complex and expensive, combined with the evaporation of the original justifications for Rule 9031, proponents of special masters in bankruptcy proceedings have reason to believe they will succeed this time around.

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