

**Minutes of the Bench Bar Committee  
Topeka Courtroom 210  
June 23, 2014**

Members Present: Emily B. Metzger, Chair  
Hon. Janice M. Karlin, Judges Representative  
Joyce Owen  
Gary E. Hinck  
David J. Lund (new member July 1, 2014)  
Paul D. Post  
Laurie B. Williams  
Jill A. Michaux (new member July 1, 2014)  
Eric L. Johnson  
Robert L. Baer, Chapter 7 Trustee  
Justin W. Whitney (new member July 1, 2014)  
Andrew J. Nazar (new member July 1, 2014)

Court Staff Present: David Zimmerman, Clerk  
Hugh Zavadil, Chief Deputy Clerk

Guests: Michael K. Grigsby and Jorge M. De Hoyos Court Externs

Members Absent: Dana M. Milby, David G. Arst, and Wendee Elliott-Clement

Emily Metzger called the meeting to order at 10:00 a.m. She noted that the minutes from the previous meeting had been approved via e-mail. She also provided a brief overview of the agenda.

**Old Business**

Emily reported that D. Kan. Bk. S.O. 14-1 regarding Limited Scope Representation was adopted by the Court. There has been no reported feedback on the Standing Order. She also noted that D. Kan. Bk. S.O. 14-2 regarding Extensions or Imposition of the Automatic Stay will become effective July 1. Again, no feedback has been received.

Emily also shared that the minutes from the previous meeting reflected that Wendee Elliott-Clement was going to work with Laurie Williams to draft proposed language regarding Fed. R. Bankr. P. 3002.1. Given Ms. Clement's absence from the meeting, no proposal was considered.

**Proposed Modification to the Kansas Form Chapter 13 Plan**

The Executive Office of the U.S. Trustees (EOUST) will implement a new policy on October 1, 2014, that will require the standing chapter 13 trustees to

assess the trustee fee on all receipts. Presently, the trustee fees are taken only when money is disbursed. The EOUST change is the result of a more literal interpretation of 28 U.S.C. 586(e)(2), and will mainly impact cases that are closed without a plan having ever been confirmed. Presently, when a Chapter 13 is dismissed without a confirmed plan, the funds are returned to the debtor and the Chapter 13 trustees take no fee on those returned funds.

The District of Kansas' current Chapter 13 form plan does not accord with the new EOUST policy. It states, in Section 3 on Administrative Fees, as follows: "The Chapter 13 Trustee will be paid up to 10% on all funds disbursed." The group unanimously supported amending paragraph 3a of the form plan to read: "The Chapter 13 Trustee will be paid a floating percentage fee pursuant to 28 U.S.C. § 586 (e) from payments the trustee receives." [Note: The Chapter 13 Trustees subsequently proposed to change paragraph 3a of the Form Chapter 13 Plan to read: "The Chapter 13 Trustee will be paid a floating percentage fee pursuant to 28 U.S.C. § 586(e)." This change would account for the fact that the Trustee receives some payments on which no fee will be taken, such as refunds of overpayments once the case has completed.]

Next, the committee discussed how to deal with plans that have already been confirmed with the existing "on disbursements" language in paragraph 3a. The chapter 13 trustees proposed a notice to debtors and debtors' attorneys to notify them of the change in EOUST policy. After considerable discussion, it was decided this is not a substantive change in confirmed plans because no one is negatively impacted by the change. Laurie Williams emphasized that, when this new policy is put into effect, debtors will still pay the same amount of money and creditors will still receive the same amount of money. Nevertheless, the group suggested the chapter 13 trustees post a notice of the revised policy on the their payment website and provide an explanation of the change and include an explanation in the next interim report or any other regularly mailed information they send to the debtors (annually or semi-annually) even if the next report is not mailed until after the change becomes effective. It was also suggested that the chapter 13 trustees should present the information to debtors' attorneys via local bankruptcy bar groups.

The third facet of the anticipated change deals with unconfirmed plans that are dismissed or converted prior to confirmation. In those cases, trustee fees will be assessed upon receipt, whatever their source [e.g., debtor payments or receipts such as a tax refund], and any refunds to debtors will be reduced by the floating percentage fee. The chapter 13 trustees proposed filing a notice in every unconfirmed case pending as of September 30, which notice will outline the fee assessment changes.

It was also noted that D. Kan. LBR 3015(b).1(g)(2)(ii) [Chapter 13 Plan and Pre-Confirmation Adequate Protection Payments] refers to trustee fees being paid on distributions. As a result, the committee thought it appropriate to systematically review all the local rules and standing orders to insure consistency with this proposed change in the plan required by the UST fee policy. As a result, a subcommittee consisting of Laurie, Emily, Joyce, and David Lund agreed to do that comprehensive review of all local rules and standing orders to determine if anything else needs to be changed to conform to the new policy.

Given that we need to amend the form Chapter 13 Plan to accommodate the change in paragraph 3a, the committee discussed whether it should do a top to bottom assessment of the existing form plan to determine if any additional changes are desired by the bench or bar. The form plan has been in use for several years, and some noted that there are parts of the national form plan that may be worded better than our plan, which we may wish to adopt. The national plan is also nicely formatted, which formatting might be added to any revision of our existing form plan. Finally, the trustees and attorneys who have been using this plan have likely identified language, over time, that could use tweaking. As a result, a subcommittee consisting of Laurie, Jill, Justin, and Emily was appointed to review any other possible modifications to the Kansas form plan. Laurie agreed to chair the sub-committee. Judge Karlin proposed this subcommittee post an announcement to the bk-listserv announcing the creation of the subcommittee and soliciting input from the bar. It was also suggested that the cutoff for solicitation of language changes be kept relatively short to ensure that the subcommittee can complete its work and report back to the full committee within a couple of months. That would allow any suggested revisions to be reviewed by the judges, and then if approved, made available for public comment, which we typically request in the November/December time frame. Using this timetable would allow a form plan to be part of the new rules that appear in or around March 17 of each year.

### **Report on National Rules Committee**

Jill reported that there are two major rule-related initiatives at the federal level. First is a forms modernization program, which will revise national forms. The second major initiative is the development and implementation of a nationwide form plan. Currently, there is a segment of the creditor community who insist that the form plan and the related federal rule changes be enacted simultaneously. Because the rule-making process takes two years and the form revision process only takes one year, the earliest the proposed plan would become effective is December 2016.

Jill reported that December 1, 2014 form changes include all of the B-22 forms, including a “short-form” for below median debtors. In addition, the forms and

rules pertaining to appeals will be changing December 1.

All petition and schedule forms will be updated similar to the current schedules I and J. The new forms will be generally longer than current forms. All captions will change. Separate forms will be designed for individual and non-individual debtors. These form modifications are scheduled to go into effect December 1, 2015, but may be delayed to coincide with the availability of “data scraping” features in NextGen (the judiciary’s CM/ECF replacement system).

Jill noted that because of an unprecedented volume of comments, the Rules Committee will “re-publish” the proposed Chapter 13 form plan and related rules. She encouraged attorneys who submitted comments on the earlier draft to submit new comments on the revisions. The new related rules will permit lien avoidance, lien stripping, and require the use of the official form.

Finally, Jill shared the new composition of the Rules Committee. The Hon. Sandra Ikuta becomes the new chair of the committee on October 1, 2014. A number of new members will also take office at that time.

### **Appellate Rules**

Judge Karlin shared that fairly extensive changes to the Federal Rules of Appellate Procedure will likely become effective December 1, 2014. She is chairing a committee that is revising the local rules for the Tenth Circuit Bankruptcy Appellate Panel (BAP) to conform to the national rules. What is currently D. Kan. LBR 8006.1 will likely be re-numbered to D. Kan. LBR 8009.1. She also indicated the D. Kan. Rule 83.8.10 may need to be revised as it pertains to bankruptcy appeals. She indicated that this committee will need to recommend whether the judges adopt a standing order to implement the changes, or merely allow the revisions to become effective at the normal March effective date.

### **Stern II**

#### ***Executive Benefits Insurance Agency v. Arkison (Trustee of Estate of Bellingham Insurance Agency)***

Eric shared some details of one of his cases that involved some considerations that *Bellingham* failed to address. In his case, the deadline to object to Proposed Findings of Fact and Conclusions of Law (Fed. R. Bankr. P. 9033) was problematic because the underlying decision did not indicate whether the order was meant to be a final order or proposed findings of fact and conclusions of law. Although his client intends to appeal to the BAP, he was concerned the BAP might not have jurisdiction (and in no event could it deem the order as merely findings of fact, as the BAP is also made up of Article I judges). After a brief discussion, it was decided that it

would probably be premature to attempt a rule-based solution to his client's issues.

#### **D. Kan. LBR 7041.1**

A practitioner from the Kansas City area proposed modification of the LBR 7041.1 (Dismissal of Bankruptcy Code § 727 Complaints Objecting to Discharge) to broaden paragraph (a) to include references to “. . . any motion, *notice, or stipulation* to dismiss . . . .” The present language, which requires that parties seeking dismissal of a 727 complaint file an affidavit that no consideration was promised or given to effect the withdrawal of a 727 complaint, requires a motion. After a brief discussion, the group concluded that Fed. R. Bankr. P. 7041 requires an order of the court, and thus the filing of a notice or stipulation, which do not contemplate receipt of a court order, would not meet that rule's requirements.

#### **D. Kan. Bk. S.O. 08-4**

Jill suggested adding a requirement to a notice provision contained in D. Kan. Bk. S.O. 08-4(b)(5). That subsection requires a mortgage creditor to notify the debtor (and counsel) by letter if it believes the debtor is in default, before moving for relief from stay. Jill requests this be changed to also require email notice to any counsel of record because of the delays in surface mailing. But Committee members noted that a number of other rules and Standing Orders reference D. Kan. Bk. S.O. 08-4 and so while the group did not necessarily disagree with Jill's recommendation, there was concern that by revising (and thus renumbering) that Standing Order to make that small change, a number of additional modifications would be required in other rules or standing orders. Jill agreed to review all other rules or orders that reference D. Kan. Bk. S.O. 08-4 so we can better assess the impact of her recommendation.

#### **Recognition of Outgoing Members**

On behalf of all four bankruptcy judges, Judge Karlin thanked the committee members whose terms are ending, and presented each with a certificate of appreciation.

The meeting was adjourned at 1:12 p.m.