

**Minutes of the Bench Bar Committee
Topeka Courtroom 210
October 28, 2014**

Members Present: Emily B. Metzger, Chair
Hon. Janice M. Karlin, Judges Representative
Joyce Owen
David Arst
Wendee Elliott-Clement
Laurie B. Williams
Jill A. Michaux
Steven Rebein, Chapter 7 Trustee
Justin W. Whitney
Andrew J. Nazar

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

Members Absent: David Lund

Emily called the meeting to order at 10:04 a.m. She noted that the committee had approved the minutes from the previous meeting via e-mail. She also provided a brief overview of the agenda.

Old Business

Payment Change Notice

Wendee Elliott-Clement reported that the Western District of Missouri had promulgated local rules pertaining to Fed. R. Bankr. P. 3002.1 Notice of Fees to eliminate the need for a trustee to object to a Notice of Payment Change in cases where the mortgage was not being paid through the plan. After a brief discussion, it was decided that no corresponding local rule is necessary at this time because the Chapter 13 Trustees in Kansas handle the process differently.

*Need for Revision to Local Rules Given change in UST Policy
regarding 28 USC 586(e)*

At the last meeting, the Committee recommended a change in the form plan to address the U.S. Trustee's new policy requiring Chapter 13 fee assessment at the time of collection instead of at disbursement. A subcommittee agreed to review our local rules and standing orders to see if any other rules needed amendment due to this change in interpretation. A review of our rules and standing orders identified two rules needing revision: 1) D. Kan. LBR 3015(b).1(g)(2)(ii) (dealing with

adequate protection/plan payments); and 2) D. Kan. Bk. S.O. 11-3 (Conduit Mortgage) Section V paragraph (A) regarding Trustee Duties. The consensus of the group was to avoid amending the conduit rule, since it is referred to in other rules and is commonly known by that number, and instead recommend that the court adopt a new Standing Order that would abrogate recently enacted D. Kan. Bk. S.O. 14-3 (enacted to change language in the Form Chapter 13 Plan relative to these trustee fees) and incorporate its current provisions dealing with the form plan, together with a revision to the previously described section of D. Kan. Bk. S.O. 11-3. In the meantime, Judge Karlin asked members of the committee to review D. Kan. Bk. S.O. 11-3 to determine if other revisions are necessary. That matter will be discussed at the next Bench Bar Meeting unless any member wishes to discuss it earlier by email.

Possible Revisions to D. Kan. Form Chapter 13 Plan

At the June 23, 2014 Meeting, a sub-committee (with Laurie, Jill, Justin, and Emily as members) was appointed to perform a comprehensive review of the Chapter 13 form plan to determine if other modifications were necessary or desired. Laurie noted that, despite multiple requests for comments via the bk-listserv, the subcommittee received very few comments from the bar. One or more members of the sub-committee offered the following recommendations for the full committee's consideration:

- Modify Paragraph 1(a), which deals with whether debtor is above or below median, to have a series of check boxes for each option instead of the current drop-down lists.
- A concern was raised regarding Paragraph 1(b). It was suggested that, if a fixed payment amount and a fixed number of months are specified in the plan and a debtor's circumstances change, the debtor would be locked in to the debtor's disadvantage. Laurie indicated she would prefer to keep this section unchanged. The court can order a change based on changed circumstances and a debtor could initially include non-standard provisions on a case-by-case basis.
- Modify Paragraph 6, which deals with Domestic Support Obligations, and the language following so that, if the plan preparer checks the box indicating there is no DSO, the subsequent language would be collapsed or deleted.
- Modify Paragraph 9(b)(i), which deals with debts secured by a principal residence, and the language following so that, if the debtor checks the box indicating there is no residential mortgage, the language regarding the residential mortgage would be collapsed or deleted. Concern was expressed,

however, that allowing debtors to omit irrelevant provisions may result in non-uniform form plans.

- Add a plan paragraph estimating the anticipated dividend to non-priority unsecured creditors. Laurie noted that the Chapter 13 Trustees oppose any attempt to specify a dividend amount since there are too many unknown or variable factors to allow debtors to accurately predict the dividend at the time of plan preparation. Therefore, objections and subsequent litigation would be more likely. Some members of the committee suggested that unsecured creditors cannot reasonably interpret most plans without some estimation. Consequently, they do not have a basis to evaluate the plan. Concern was expressed that debtors should disclose when there is little likelihood that unsecured creditors will receive a dividend. It was suggested that such a provision might fit best under Paragraph 14 as a checkbox provision.
- Paragraph 9(c)—“Other Debts Secured by non-residential Real Estate Liens”—purports to only apply to non-residential real estate, but ¶9(c)(iii) describes mortgages that are being modified. This provision under limited circumstances could also apply to residential mortgage debts. If and when the plan is modified, the subcommittee unanimously recommends that subparagraph (c)(iii) be moved to a new subparagraph (d) and subparagraph (c)(iv) be similarly moved to a new subparagraph (e) and stated “any creditor treated under Paragraph 9(c)(ii) and 9(d).” In addition, all references to subparagraph 9(c)(iii) should be changed to 9(d). Likewise, references in the non-standard provision for Paragraph 9(c)(iv) should be changed to 9(e). The consensus of the committee was to accept these changes.
- The third sentence of Paragraph 8 has a grammatical error, it states, “nothing in this section operates to permit in personam relief, modify any applicable co-debtor stay or to abrogate Debtor’s rights and remedies under non-bankruptcy law.” The second clause should add a “to” so it will read “to modify any applicable co-Debtor stay.” The consensus of the committee was to accept this change.
- Paragraph 8—Relief from Stay Regarding Property to be Surrendered”—states that “...any creditor may repossess, foreclose upon, sell or obtain possession of the property the Plan proposes to surrender without obtaining stay relief.” It was suggested that this should be revised to state that “...any creditor and its successors in interest or assigns....” should also not have to seek stay relief after a surrender.
- There was discussion about whether to place all non-standard provisions in

a single paragraph rather than after each specific paragraph in the form plan. Various committee members were concerned that this may cause the non-standard provision to be ambiguous because it may not be clear which form plan paragraph is being amended by the non-standard language.

Upon completion of the review of the above items the group discussed whether the proposed changes were significant enough to warrant modification of the Standing Order and the form plan at this time. Given the uncertainty surrounding the possible adoption of a mandatory national plan, the consensus was that any action on these items be deferred until the status of the national form plan becomes clearer.

D. Kan. SO 8-4 and possible email notice to Debtor Attorney

Jill introduced a discussion of D. Kan. Bk. S.O. 8-4, dealing with information a creditor must supply consumer debtors who are paying their debt to mortgagees or auto lenders directly. At the June meeting, Jill suggested adding a requirement to the notice provision contained in D. Kan. Bk. S.O. 08-4(b)(5). That subsection presently requires a mortgage creditor to notify the debtor (and counsel) by letter, if the creditor believes the debtor is in default, before moving for relief from stay. Because of mail delays, Jill recommends creditors also be required to provide that notice by email to a debtor's counsel. Her rationale is that, because of our district's conduit rule, if a stay relief motion gets filed, the trustees will typically insist on compliance by amending the plan to make it conduit—which she wants to avoid if her client is not really delinquent or could quickly become current. In addition, her review of existing rules and standing orders reflected no other changes are necessitated to existing rules or standing orders if this change is adopted.

After a brief discussion, including a query whether this scenario actually occurs often enough for email notice to really make a difference, Jill agreed to monitor the frequency of occurrence and report at the next meeting. Each member of the committee was also asked to review D. Kan. Bk. S.O. 8-4 to see if any additional changes are warranted if a requirement for email notice is added in the future. This review is to occur prior to the next meeting. **In the meantime, creditors' counsel are strongly encouraged to provide email notice of the alleged debtor default, in addition to the surface mail requirement contained in the local rule.**

New Business

D. Kan. Bk. S.O. 14-2 re Extensions of the Stay under § 362

Emily introduced a discussion of D. Kan. Bk. S.O. 14-2, a recently effective

standing order dealing with procedures that should be followed when seeking an extension of the stay under § 362(c). Judge Karlin shared the concerns of the judges that the motions, affidavit/declarations, and scheduling of these matters are often defective in these areas: 1) failing to allow 14 days for objections by setting a hearing to occur before the expiration of 14 days; 2) setting the hearing, if an objection, on the 14th or 15th day, making it more difficult for the clerk to catch the pleading in time to actually “set” a hearing; 3) failing to attach an affidavit, and/or failing to have the affidavit sworn under penalty of perjury (or a 28 USC 1746 declaration under penalty of perjury); 4) confusion over the “48 hour” provision for conducting a hearing if the order is not entered earlier than 48 hours prior to the hearing; and 5) confusion over whether the order must be approved by the Chapter 13 Trustee prior to being uploaded. The group discussed a draft revision presented by Judge Karlin, which clarified the requirements for a Motion to Extend Stay and proposed additional revisions. Judge Karlin will prepare a revised proposal based on comments of the committee and circulate the draft at a later date.

*December 1, 2014 changes to Federal Rules Appellate Procedure
and Fed. R. Bankr. P. 8000 series*

Judge Karlin explained that new Federal Rules of Appellate Procedure become effective December 1, 2014, which significantly alter procedures for bankruptcy appeals. As a result, the Bankruptcy Appellate Panel local rules are being amended, as well. Judge Karlin suggests a proposed revision to our district’s single local rule dealing with appeals. She recommends eliminating D. Kan. LBR 8006.1 dealing with the record and issues on appeal, and replacing it, instead, with new D. Kan. LBR 8009.1 (the renumbering is consistent with the national rules) as follows:

LBR 8009.1

RECORD AND ISSUES ON APPEAL

Designation of Record. After filing the notice of appeal, the appellant must file by formal pleading within 14 days from the date the notice of appeal is effective pursuant to Fed. R. Bankr. P. 8002, a designation of the items to be included in the record on appeal and a statement of issues. The designation of the record must include the pleading numbers and file date of those pleadings designated. Parties must perfect their appeal pursuant to Fed. R. Bankr. P. 8009.

After discussing whether inclusion of new D. Kan. LBR 8009.1 is the local rules is truly necessary, since it only reiterates the content of the applicable federal rules themselves, the committee voted to recommend to the judges that D. Kan. LBR 8006.1 instead be eliminated from local rules without replacement.

David Zimmerman and Judge Karlin also noted that U.S. District Court D.

Kan. Rule 83.8.10 will likely need amendment to conform to some rule and style changes, and that the District Court Clerk seeks our guidance on local rule changes impacting bankruptcy. As a result, David agreed to draft a memo for Judge Nugent's signature that outlines the proposed changes and recommends new language.

David Zimmerman introduced a discussion regarding the pending update to Fed. R. Bankr. P. 7054, which changes the procedure for seeking attorney's fees in bankruptcy proceedings. New Rule 7054 includes much of the substance of Civil Procedure Rule 54(d)(2) and Rule 7008(b), which currently addresses attorney's fees, will be deleted. David noted that D. Kan. Rule 54.1 and 54.2 govern some of the same topics as the new federal rule, and are not entirely consistent with the pending federal rule. David was asked to incorporate any specific recommendations into draft rules for the committee's review.

David Zimmerman introduced a discussion regarding the pending update to Fed. R. Bankr. P. 8001(c), which now provides for service of the notice of appeal electronically instead of by mail. After a brief discussion, it was decided that no local rule was necessary at this time. It was suggested that David also incorporate any additional suggestions into either draft rules or his memorandum for Judge Nugent to the U.S. District Court and, if desired, the same could be circulated to the committee for review and comment.

New Judicial Conference Policy regarding Motions to Redact

Judge Karlin explained the new judiciary redaction policies concerning personal identifiers, which will become effective December 1. Those policies make clear that one need not reopen a closed bankruptcy case (with the attendant reopening fee) to seek redaction, but impose a new \$25 redaction fee per case affected. Judge Karlin also presented a draft local rule governing such requests. After extensive discussion, it was decided that David and Judge Karlin will revise the proposed rule to reflect the input provided by the committee.

Possible Extension of D. Kan. LBR 2014.1 Application For Employment of Professionals to Chapter 13s

Jill suggested the addition of a new subsection (i) that would limit notice of the employment of a professional to only the UST and the Chapter 13 Trustee in Chapter 13 cases. After an extended discussion, the majority of the committee opposed this proposal.

Proposal to allow corporate creditors to appear without counsel to defend a claim

Mike Munson requested a local rule permitting corporate creditors to appear without counsel when responding to a claim objection, suggesting a similar rule exists in the Western District of Missouri. Committee members researching this proposal determined that there is no such local rule in the WDMO; that the proposal is contrary to D. Kan. 9010.1, which prohibits the practice;, and found it would be impractical for a number of reasons. The committee took no action.

Text Orders

Emily raised a concern expressed at a recent Wichita Bankruptcy Council meeting that text orders could be used on a more widespread basis. Hugh was asked to make sure that the minutes reflect that the Court is receptive to use of text orders, and that the following text orders are available:

- Borrow by Debtor-Denied
- Borrow by Debtor-Granted
- Ch 13 Trustee Dismissal-Denied
- Commence Distribution
- Compel-Denied
- Continue Hearing
- Objection to Claim-Denied
- Objection to Exemptions-Denied
- Objection to Exemptions-Granted
- Relief from Stay-Denied
- Relief from Stay-Granted
- Sell by Debtor-Denied
- Sell by Debtor-Granted
- Suspend Plan Pmts-Denied
- Suspend Plan Pmts-Granted
- Terminating Show Cause Order - Compliance
- Terminating Show Cause Order - No Compliance

Report of National Rules Committee

Jill provided a report of the meeting of the national rules committee. The members, at the most recent meeting of that committee, acted on very few issues because most of the items were still out for public comment. She did share that attorneys should submit new public comments on the revised form plan and attendant rules at this address:

<http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>).

Only Anew@public comments are showing on the commenting website, www.regulations.gov<<http://www.regulations.gov/>>. If you have previously commented, and the Rules Committee did not adopt your recommended change, or,

if you were opposed to and still remain opposed to a national mandatory plan, you should make the comment again or it may not be considered. Further, the committee may interpret failure to comment as a signal that the revised mandatory plan is now desired. At the time of the Bench-Bar committee meeting, only six public comments had been received on the revised form plan and related rules. The public comment period runs to February 17, 2015.

The Hon. Sandra Ikuta of the Ninth Circuit Court of Appeals is the newly appointed chair of the committee. Bankruptcy Judge Eugene Wedoff (ND Ill.), the outgoing chair, has been invited to continue to participate in group meetings.

Jill also reminded the committee of the other rules that become effective December 1. Among the changes are:

- Extensive revision of appellate rules and forms,
- Changes in the time available for service of summons,
- Changes in how cases are processed when multiple petitions are filed in multiple districts,
- Changes in the way attorney fees are awarded,
- Revised means test forms, and,
- Revised Motion/Order to Waive Chapter 7 Filing Fee.

Finally, Jill reported that the next big project for the national rules committee will be an extensive review of noticing requirements. The committee hopes to modernize the noticing process to take advantage of the technological advances that have occurred since the existing rules were enacted. It is anticipated that this process will last several years.

Departure of Chief Deputy Clerk Hugh Zavadil

Judge Karlin informed the committee that long-time Chief Deputy Hugh Zavadil had taken a new position and was leaving our Court November 7. The Committee extended their thanks and congratulations to Mr. Zavadil and gave him a standing ovation for his long-standing service to the Bench Bar Committee and to the Court.

The meeting was adjourned at 2:43 p.m.