Minutes of the Bankruptcy Bench Bar Committee
Topeka Courthouse
November 18, 2019

Members Present:	Hon. Robert E. Nugent III, Judges Representative Emily B. Metzger, Chair, US Attorney's Office Chris Borniger, US Trustee's Office Christopher Redmond, Chapter 7 Trustee Carl Davis, Chapter 12 Trustee January Bailey Thomas Gilman Colin Gotham J. Christopher Allman Wendee Elliott-Clement Jill Michaux
Court Staff Present:	David Zimmerman, Clerk of Court Stephanie Mickelsen, Chief Deputy Clerk
Members Absent:	None

The meeting commenced at 10:00 am. Emily Metzger conducted the meeting. The Committee had approved the minutes of the previous meeting via e-mail and the minutes are posted on the Court's public website for the bar at large to review.

Emily Metzger began the meeting by recognizing the service and contributions of Judge Nugent during his years on the bench.

Old Business

A. CourtSpeak Update (pdf with embedded ECRO recording) and NextGen CM/ECF

Mr. Zimmerman reported that the Clerk's Office implementation of CourtSpeak has been placed on hold while the court prepares to convert to NextGen. That is scheduled to take place in early June 2020. When the Committee asked how the conversion to NextGen will impact attorneys, Mr. Zimmerman explained that it will have very little impact on attorneys who already file documents in jurisdictions where NextGen has already been implemented, such as the U.S. District Court in Kansas and Western Missouri or in the Tenth Circuit. The only step required for those attorneys will be to have filing rights granted to them by the Bankruptcy Court in Kansas. Attorneys who have not filed recently in a jurisdiction that has already converted to NextGen will need to update their PACER account and have their CM/ECF account linked to their updated PACER account. The court will be providing simple, step-by-step instructions to attorneys as the time grows closer to walk them through the process.

Chris Borniger asked whether there is a way that attorneys can open a document and all attachments in CM/ECF with a single click when accessing a document using the free look. Other Committee members explained that, in their experience, when accessing the document using the free look feature each document must be opened one at a time. David Zimmerman offered to investigate whether there is a way for attorneys to open all documents at once using the "view all" feature that is available to court users. [Editor's Note: David Zimmerman inquired of the PACER Service Center and learned that a view all feature is not available for attorneys using the free look.]

Judge Nugent noted that there is ongoing litigation about how the Judiciary uses PACER fees and depending upon the outcome of the cases, there may be changes in the services available through PACER.

New Business

A. Should an Attorney Be Required to File an Entry of Appearance When Filing a Proof of Claim via ePOC (the electronic proof of claim feature)

Jill Michaux asked whether attorneys should be required to enter their appearance when filing a proof of claim form using ePOC so that, parties could serve them via CM/ECF using the automatic Notice of Electronic Filing (NEF) feature and avoid having to send notice by mail.

Colin Gotham recommended that attorneys should continue to have the opportunity to file claims without entering their appearance so that they can avoid receiving NEFs of every document filed in the case, particularly in large Chapter 11 cases where there are many notices sent that may not pertain to their client.

As background, David Zimmerman explained that the court offers ePOC [an electronic proof of claim feature available at https://www.ksb.uscourts.gov/epoc] to allow creditors to electronically file a proof of claim without entering an appearance and without requiring an electronic filing account. Judge Nugent also observed that non-lawyers and lawyers who are not licensed in Kansas are permitted to file claims without entering an appearance in the case.

This issue of how to provide electronic notice to persons who do not enter an appearance will be carried forward for further consideration in the future.

January Bailey asked whether ePOC could include a question asking whether the filer wanted to receive notice by mail or electronically. David Zimmerman explained that Fed. R. Bankr. P. 9036 will be changing in December 2021[1] to allow party-to-party electronic noticing when a party has agreed in writing to accept notice electronically. It was noted that if desirable, the court could adopt party-to-party electronic noticing as a local rule before the national rule change takes effect.

[1] During the meeting the effective date of this amendment was erroneously stated as December 2020.

B. Fed. R. Bankr. P. 2002(h) Amendment

Fed. R. Bankr. P. 2002(h) is expected to be amended effective December 1, 2020, to provide that 70 days after commencement of a case under chapter 7, 12, or 13 "the court may direct that all notices required by subdivision (a) of this rule be mailed only to" the debtor, trustee, indenture trustees, and creditors who have filed a proof of claim or who are still permitted to file a proof of claim because an extension was granted under Rule 3002(c)(1) or (c)(2). January Bailey recommended that the court adopt a local rule that would direct limited notice permitted by the revised rule without the need for a case-specific order allowing the limited notice. Alternatively, she suggested this could be made part of the local Chapter 13 Plan form. It was observed that some debtor attorneys already include this as a non-standard Chapter 13 Plan provision.

January Bailey will draft a proposed Standing Order to (1) adopt the provisions of proposed Fed. R. Bankr. P. 2002(h) before the national rule takes effect and (2) direct that reduced noticing countenanced by proposed Fed. R. Bankr. P. 2002(h) is permissible. She will also draft a local rule that would take effect contemporaneously with Fed. R. Bankr. P. 2002(h) and will direct that that reduced noticing countenanced by proposed Fed. R. Bankr. P. 2002(h) is permissible.

Jill Michaux shared that it would be helpful if the matrix could be sorted to separate claimants from non-claimants. That would make it easier for attorneys to send notices only to creditors who filed claims. David Zimmerman explained that this might be a new feature that could be added in CM/ECF or by the Bankruptcy Noticing Center, and offered to investigate this possibility through the staff that supports the Bankruptcy Noticing Working Group. [Editor's note: David Zimmerman shared the suggestion with the Administrative Office of the U.S. Courts.]

C. In Chapter 11 Cases Should Debtors Be Permitted to Omit from the Schedules Employees Who Are Owed Only Accrued but Unpaid Wages?

Tom Gilman explained that in Chapter 11 cases it has been long-standing practice in Wichita and Kansas City that employees of a business debtor not be listed on the schedules as creditors because, after a first day order is entered, their accrued wages and benefits are paid in full and they have no other pre-petition claims. Listing employees in the schedules and having them receive all notices mailed to creditors potentially causes unrest among the employees and hampers reorganization efforts. He asked if a local rule could authorize that practice.

Chris Borniger opposed a rule that would give a debtor discretion about whether to schedule a creditor, including an employee that has accrued but unpaid wages. Employees are similar to critical vendors who receive notice. He recommended filing a motion asking that employees be stricken from the matrix after wages have been paid. David Zimmerman confirmed that deletions from the matrix could be done manually by the Clerk's Office. [Editor's note: A creditor may not be deleted from the matrix after the creditor filed a claim.]

Chris Borniger also explained that the U.S. Trustee's Office has been content in cases where employees were not scheduled as creditors and were not listed on the matrix, but the employees were sent the 341 notice along with a copy of the motion to pay pre-petition employee payroll and the order granting the motion. That way the employees received formal notice of the bankruptcy in case there were any claims in addition to unpaid wages that the employee would want to file.

Judge Nugent observed that resolving employees' concerns when they receive notice of a bankruptcy is a management issue for the business to handle.

January Bailey asked whether it would be acceptable to file a supplemental schedule that lists employees who would not be included on the matrix and would only receive initial notice. Chris Borniger reiterated that as long as employees were sent the 341 notice along with a copy of the motion to pay pre-petition employee payroll and the order granting the motion, they would not have to be included in the initial matrix and would, therefore, not have to be deleted later.

After discussion, the Committee agreed that no local rule is required and concluded that if the Judges concur with this approach, it would be a helpful practice tip to share with the bar. Judge Nugent offered to consult with the Judges about the subject.

D. Proposed Amendment to D. Kan. LBR 3015(b).1(d)

January Bailey recommended a change to D. Kan. LBR 3015(b).1(d) so the trustee would pay postpetition mortgage fees, expenses or charges. She would like to be able to consistently advise her clients that they only need to pay regular ongoing mortgage payments because extra charges (e.g., a post-petition projected mortgage escrow shortage) are paid by the trustee. She recommended the following change:

> **(d) Treatment of Real Estate Mortgage Arrearage Claims and Continuing Payments.** A timely claim for mortgage payments, ~~or~~ mortgage arrearages, or Notice of Postpetition Mortgage Fees, Expenses, or Charges will be paid by the Chapter 13 trustee, as filed and allowed, and the amount stated in the proof of claim will control over any plan, unless an order, stipulation, or specific language in the Order of Confirmation directs otherwise.

Carl Davis acknowledged that this is a relatively new issue to him. He agreed that it would be helpful if it was more clear when the trustee would pay mortgage fees and when the trustee would not. He shared that his office's practice is to always pay postpetition fees in a conduit case, but not always in direct pay cases. He also suggested it might not make sense for a debtor to have a plan that pays mortgage payments directly and expect the trustee to pay the post-petition fees. He suggested that this issue deserves more study.

January Bailey explained that if debtors are paying all disposable income into the plan, they may not have enough money to pay an additional fee in a lump sum, but might be able to spread the fee over the remaining life of the plan. She also noted that it would make it easier to track payments made by the trustee. Jill Michaux also shared that she considered trustee

payment records more reliable than mortgage company payment records. From the creditor's perspective, Wendee Elliott-Clement shared that it would be preferable for the trustee to pay these fees because it would help debtors to be fully square with the mortgage company at the end of the plan.

Carl Davis will confer with the other Chapter 13 trustees and report back to the Committee.

E. Failure of Debtor to Make Direct Payments to a Creditor and Its Effect on Discharge

Carl Davis recommended that language be added to the Chapter 13 Plan form similar to paragraph 17 that was recently added to the confirmation order:

> 17. Direct Payments. The failure of the debtor to make direct payments to a creditor, with the exception of domestic support obligations, shall not bar entry of discharge or completion of the case.

He was concerned that if the creditors are not advised of this provision when they have an opportunity to object then there may be a due process problem until the issue is settled by controlling authority.

Some members suggested that this provision could apply to both mortgages and automobiles, so it would make sense to add the same language to the form plan as its own section immediately before the non-standard provisions section.

Judge Nugent said he would raise the issue with the other Judges.

F. Electronically Filing Suggestion of Bankruptcy in State Court

On November 4, 2019, the following announcement was sent to the Kansas bankruptcy listserve by John Houston, staff attorney to the Kansas Supreme Court:

> Please remind your membership that Kansas Supreme Court Rule 122 requires that all filings by attorneys intended for the State district courts must be efiled. Still have attorneys sending paper copies of Notice of Bankruptcy Filing to the clerk's office. These will be rejected in the future.
>
> Also, do not include the district court or the district court clerk's office on the bankruptcy matrix unless a debt is owed to the court for something like a fine, restitution, etc. The clerks offices are being flooded with paper from the BNC because the court is being listed for "Notice Only." These will also be rejected in the future.
>
> If you want to have the bankruptcy noted in a State district court case, efile a Notice of Bankruptcy Filing in the state court action. (Caption and case number is

required. The clerk will no longer research case numbers to file in the proper case).

Some attorneys were concerned that electronically filing a notice of bankruptcy would be deemed an appearance in the state court case. Several Committee members reported that they electronically file notices of bankruptcy and they never receive notices in the case, regardless of the county in which they file. Thus, it appeared clear that electronically filing the notice of bankruptcy is not deemed an entry of appearance in Shawnee, Johnson, Wyandotte, or Sedgwick counties. Chief Judge Somers joined the meeting during the discussion of this issue.

Chief Judge Somers will approach the Kansas Supreme Court to request clarification that electronically filing a notice of bankruptcy does not enter the appearance of the bankruptcy attorney in state court in any county.

Judge Nugent suggested that, for now, attorneys could consult with the county court to confirm whether or not electronic filing of a notice of bankruptcy would be deemed an entry of appearance.

G. Additional Discussion Topics

Carl Davis asked whether the no-look Chapter 13 fee is expected to change. Judge Somers responded that there is no no-look fee amount in Kansas City and Topeka. Judge Nugent said that he is open to a case that would allow him to rule that there is no no-look fee in Wichita. He observed that the no-look fee was adopted in Wichita to make it easier for attorneys to raise their fee. Carl Davis noted the shrinking size of the bankruptcy bar and predicted more difficulty finding a Chapter 13 lawyer, so lack of competition may drive up fees due to dwindling supply of lawyers. It was observed that if the court has no no-look fee, then it would fall to the trustee to decide in practice if there is a fee that would not draw an objection.

The meeting concluded at 12:48 pm.