

**Minutes of the Bankruptcy Bench Bar Committee  
Teleconference  
April 22, 2020**

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

Additional Attendees: Mitchell Herren

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

**Old Business**

*A. Fed. R. Bankr. P. 2002(h) Amendment*

Last meeting, January Bailey had proposed a Standing Order to direct that the reduced noticing countenanced by proposed Fed. R. Bankr. P. 2002(h) is permissible. Since then, the Court issued Standing Order 20-3. The Court also provided a tool in CM/ECF that generates a list of creditors who filed a claim, making it easier to prepare labels that meet the reduced noticing requirements.

Tom Gilman asked if anyone had contacted title companies to learn whether they had concerns about the reduced noticing.

**Standing Order 20-3 (dated March 20, 2020) satisfied this request. Various members of the Committee will contact title companies across the state and report whether the title companies have concerns about reduced noticing.**

*B. Motions to Strike Employees from the Matrix*

At the last meeting, the Committee discussed striking employees from the matrix in Chapter 11 cases after wages are paid, provided employees are sent the 341 notice and copies of the motion and order excluding employees from the matrix.

**The Committee observed that Judge Somers recently issued an order that addressed this issue and provided a practical solution.**

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

At the last meeting, January Bailey proposed changes to D. Kan. LBR 3015(b).1(d) to direct the trustee to pay postpetition mortgage fees, expenses or charges. January would like to be able to consistently advise her clients that they only need pay regular ongoing mortgage payments because extra charges (e.g., a post-petition projected mortgage escrow shortage) will always be 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.

At the committee's request, Carl Davis sought input from the Chapter 13 Trustees concerning the above provision. The Trustees provided the following feedback:

The Chapter 13 Trustees believe it is more practical for the trustee to pay such fees when the mortgage is to be paid as a conduit. If the plan provides that the mortgage is being paid directly by the debtor, then the debtor would pay the Post-Petition fees. The Chapter 13 Trustees believe the suggested modification would be more suitably placed in LBR 3015(b).2(f)(5), and should read as follows:

5. Any notice filed pursuant to Fed. R. Bankr. P. 3002.1(b) or (c) shall be treated as an amendment to the creditor's claim and Debtor's plan. The Trustee is authorized to disburse the new conduit payment or fees as soon as practicable after resolution of any motion under Fed. R. Bankr. P. 3002.1(b)(2) without seeking formal modification of the plan. A timely and allowed Notice of Post-Petition Mortgage Fees, Charges or Expenses will only be paid by the Chapter 13 Trustee in those cases where the ongoing conduit mortgage payments are also being paid by the Chapter 13 Trustee.

The Committee discussed this issue at length. From the debtor's perspective, having the trustee pay postpetition fees through the plan would be simpler, and more likely to result in a truly fresh start at the end of the case because the mortgage could be deemed current without outstanding

fees. From the mortgage company's perspective, the total amount of postpetition fees to be paid is clear because the mortgage companies are limited to the amount of fees noted in their notice of postpetition fees, but having the trustee pay the postpetition fees would result in a clearer accounting of how much of the postpetition fees were actually paid during the bankruptcy case because those payments would show on the trustee's ledger. Trustees are willing to pay the extra charges through the plan whenever the case is or becomes a conduit case, but it would be burdensome for the trustee to pay postpetition fees through the plan if mortgage payments are paid directly by the debtors.

**The Committee did not come to a consensus to recommend a specific rule. Judge Nugent offered to report the Committees' varying views to the other Judges.**

### **New Business**

#### *A. Proposed Changes to LBR 9072.1*

Judge Nugent informed the Committee that the Judges plan to update LBR 9072.1(b) to clarify which parties should mark exhibits with numbers and which parties should use letters, and to indicate that exhibits should be sent to the Clerk's Office rather than to chambers. The revised draft is attached to the minutes as an appendix. The Exhibit Sheet form (also in the appendix) will also be revised. January Bailey suggested indicating whether an electronic copy of the exhibits could take the place of any number of hard copies.

**Judge Nugent offered to carry the suggestion to the Judges about whether electronic copies of exhibits could take the place of some of the hard copies that are submitted.**

#### *B. Powers of Attorney*

January Bailey asked whether there should be a local rule or policy governing powers of attorney, such as a requirement that when one is used then an affidavit be filed explaining why the power of attorney is needed. She reported that in a pair of recent cases involving a power of attorney for debtor, the trustee did not conclude the 341 meeting until it obtained approval from the US Trustee's Office because of the potential for bankruptcy abuse. Chris Borniger observed that a power of attorney is a creation of state law and he reported that the US Trustee's program has not given guidance on this issue other than to indicate they should be evaluated on a case-by-case basis. Several Committee members agreed that evaluating suspicious cases on a case-by-case basis would be best rather than having a rule.

**Chris Borniger suggested discussing this with Jordan Sickman and providing guidance during the annual training that the US Trustee's Office provides to the trustees.**

*C. Motions for Entry of Discharge in Chapter 13 Cases*

January Bailey explained that there is no federal rule requiring a motion requesting entry of discharge or requiring notice to the matrix but Judge Karlin had required a motion in the *Church* case (Kan. Bankr. Court No. 12-40210) and local practice requires notice to the matrix with a 30 day objection deadline. She shared that the Western District of Missouri has a local rule requiring debtor to file a motion for entry of discharge and a local form with a 21-day objection deadline. Carl Davis said he would be fine with a local rule on this and suggested that if one is adopted then it should apply to both Chapter 12 and Chapter 13 cases because discharge provisions are so similar. Jill Michaux noted that not all districts require a motion and questioned whether a motion should be required at all or, alternatively, suggested either providing an affidavit that support payments are current or limiting notice to the child support recipient. Carl Davis noted that the motion provides a vehicle for the debtor to place certifications in the record (such as certifications about child support) and invites the court to enter an order. Judge Nugent asked whether, other than the domestic support obligation issue, all other issues governing discharge will have already been addressed earlier in the case or whether there may be other reasons why a motion for discharge might serve a purpose.

**Judge Nugent offered to discuss this issue with the other Judges. If the Judges request further input then the Committee will provide it.**

*D. Possible Adoption of a Rule Governing Signatures and Document Retention*

January Bailey shared a Nebraska rule with the Committee. Since she raised the issue, the court issued Standing Order 20-2 governing signatures that resolved the issue. She proposed making the Standing Order a permanent local rule. Judge Nugent noted that the Nebraska rule goes beyond the Standing Order by addressing document retention. He cautioned that the District Court appears to have strong views about document retention and their Rules Committee is scrutinizing this issue.

**Judge Nugent offered to report this issue to the Judges.**

*E. How to Provide Electronic Notice to Persons Who Do Not Enter an Appearance*

Emily Metzger asked whether further discussion was needed about how to provide electronic notice to persons who do not enter an appearance. There was no further discussion.

*F. 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 the language recently added to the confirmation order in paragraph 17, which states that “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 failing to advise creditors of this provision while they have an opportunity to object may create a due process problem, at least until the issue is settled by controlling

authority. Judge Nugent stated that the Judges are not yet ready to reopen the Chapter 13 Plan form, and that by including the language in the confirmation order the Judges are stating their view of the law, although that might change as the composition of the court changes. He observed that if a creditor wishes to challenge the language then it can.

*G. Some State District Courts Require Entry of Appearance in the State Court with an Electronic Filing of Notice of Bankruptcy*

Jill Michaux reported that some attorneys around the state had successfully filed an notice of bankruptcy without entering their appearance while others reported that their counties required an entry of an appearance. She also reported that she had spoken with Chief Judge Somers and he wanted a specific proposal if the bankruptcy bar wanted to act on this issue. Several Committee members reported that in their experience they have never been required to enter their appearance, even in rural counties. Emily Metzger observed that the Committee itself could not remedy the issue but could make a recommendation to the Kansas Supreme Court. This appears to be an issue primarily in some rural counties, rather than in Sedgwick, Shawnee, or Johnson Counties.

**More information about attorneys' experience in specific counties is needed. Judge Nugent offered to update Chief Judge Somers on the Committee's discussion.**

*H. Rule 4003(c)*

Chris Redmond reminded the Committee that in prior meetings he had raised an issue involving Rule 4003(c). He reported that last week that the Tenth Circuit accepted a direct appeal of the issue. He offered to keep the Committee updated about the progress of the *Lerner* case. [Editor's Note: In *Christopher Redmond v. Michael Lerner*, 10<sup>th</sup> Cir. No. 20-3068, the docketing statement states that the appellant asks the court to find that "where a debtor is claiming an exemption under Kansas law, then the burden of proof is on the debtor to establish the validity of such exemption, notwithstanding Fed. R. Bankr. P. 4003(c)."]

*I. Judge Nugent's Last B-B Meeting*

At the close of business, Judge Nugent noted that it was his last meeting of the Bench and Bar Committee before his retirement on June 30, 2020 and thanked the current and former members of the committee for so faithfully and energetically fulfilling the judges' vision of it as a way for the Bar and the judges to talk informally about conditions and needed changes in the practice.

Emily Metzger then said some very generous things about Judge Nugent—you couldn't see it, but she made him blush. Thank you all for a wonderful professional and collegial experience over 40 years of practice.

The meeting concluded at 11:30 am.

Appendix

**LBR 9072.1  
EXHIBITS**

- (a) **Exhibits to Pleadings or Documents.** Bulky or voluminous materials must not be filed in their entirety or incorporated by reference unless the court finds the materials are essential and grants leave to file them. The court may strike any pleading or document filed in violation of this rule.
- (b) **Preparation of Trial Exhibits.** When practical, all documentary exhibits must be prepared for trial as follows:
- (1) Attorneys or unrepresented parties must pre-mark ~~original~~ exhibits with exhibit stickers. Plaintiffs in adversary proceedings or movants in contested matters must use numerical symbols, e.g., 1, 2, etc. Defendants in adversary proceedings or respondents in contested matters must use alphabetical symbols, e.g., A through Z, AA, BB, etc. If there is more than one plaintiff and/or defendant in the case, the surname or corporate name of the offering party must be placed on the exhibit sticker for further identification.
  - (2) An original and two copies of all exhibits must be delivered to the clerk. The original exhibits (marked with exhibit stickers) will be used by the witness, ~~and must be delivered to the clerk. Two copies of all exhibits must be delivered to chambers.~~ One copy of all exhibits must be delivered to each party participating in the trial or evidentiary hearing. Unless otherwise directed by the court, all exhibits must be delivered as set forth above at least three (3) full business days prior to the scheduled trial or evidentiary hearing date.
  - (3) An exhibit cover sheet in substantial compliance with the form “Exhibit Sheet” prescribed by the clerk and available on the court’s website must be prepared and included with each set of exhibits submitted to the clerk, ~~chambers,~~ and other parties.
  - (4) Unless otherwise directed by the court, the exhibit cover sheet and exhibits shall be submitted in three-ring notebooks with each exhibit separated by dividers or tabs corresponding to the exhibit number or letter. All exhibits must be clearly legible and multiple-page exhibits must be paginated or bates numbered.
  - (5) The court may exclude any exhibit offered in a hearing or trial that is not clearly legible or does not comply with this Rule.
- (c) **Withdrawal of Exhibits.** Exhibits introduced into evidence may be withdrawn from the custody of the clerk with permission of the clerk or upon order of the court. The clerk may destroy or dispose of any exhibit not withdrawn after final disposition of the proceeding.
- (d) **Electronic Filing.** Trial exhibits must not be filed electronically unless the court orders otherwise.

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**EXHIBIT SHEET**

DEBTOR(S): \_\_\_\_\_

CASE NO: \_\_\_\_\_

ADVERSARY CAPTION (if applicable): \_\_\_\_\_

ADVERSARY CASE NO: \_\_\_\_\_

TRIAL DATE: \_\_\_\_\_

EXHIBIT(S) SUBMITTED BY: \_\_\_\_\_

\_\_\_\_\_  
Attorney for: \_\_\_\_\_

**NOTE: Plaintiff(s) in adversary proceedings or Movant(s) in contested matters shall mark Exhibits numerically. Defendant(s) in adversary proceedings or Respondents in contested matters shall mark Exhibits alphabetically.**

NO.	DESCRIPTION	ID	OFF	ADM	DISPOSITION

**Print Form**

**Clear Form**

