

**Minutes of the Bankruptcy Bench Bar Committee
Teleconference
June 16, 2021**

Members Present: Hon. Robert D. Berger, Judges Representative
J. Christopher Allman, Chair, US Attorney’s Office
Chris Borniger, US Trustee’s Office
Carl Davis, Chapter 12 Trustee and Chapter 13 Trustee
January Bailey
Wendee Elliott-Clement
Jill Michaux
Nancy Skinner
Kevin Grauberger

Court Staff Present: David Zimmerman, Clerk of Court
Stephanie Mickelsen, Chief Deputy Clerk
Doug Burnette, IT Specialist

Members Absent: Christopher Redmond, Chapter 7 Trustee

The meeting commenced at 10:35 am. Chris Allman, the newly appointed Chair of the Committee, conducted the meeting.

A. Recognition of Emily Metzger as the Former Chair of the Bench Bar Committee

David Zimmerman announced that the Bankruptcy Judges issued a formal Certificate of Appreciation for Emily Metzger “in recognition of her selfless and exemplary service as Chair of the Bankruptcy Bench Bar Committee for fourteen years and as a member of the Committee for more than twenty years.” Chris Allman expressed his admiration and appreciation for Emily Metzger as a mentor who has a broad and deep understanding of bankruptcy.

B. Minutes

The Committee had approved the minutes of the December 9, 2020 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. Converting Standing Order 20-2 to a Permanent Local Rule

January Bailey asked whether Standing Order 20-2 (which relaxed the rules requiring wet ink signatures during the pandemic) should be converted to a permanent local rule. Benefits identified by the Committee included: greater convenience for attorneys and debtors, increased speed and reliability when compared to mailing documents for signature, increased accessibility for debtors who live many hours from attorneys’ offices, and reduced cost. Attorneys for

debtors, creditors, and the US Trustee's Office said they have not had any problems with electronically signed documents. Judge Berger said this has been working well from the court's perspective, also.

January Bailey mentioned that CM/ECF does not accept DocuSigned documents without printing and scanning them. David Zimmerman explained that a new version of CM/ECF is coming. To allow the new US Trustee's Office periodic forms to work, it changes the way CM/ECF will treat documents with metadata, preventing pdf documents with certain types of metadata from being filed and relaxing restrictions on other types of documents with metadata. We will learn whether the new version will begin to accept electronically-signed documents without requiring them to be "flattened" to remove metadata.

The Committee unanimously recommended that Standing Order 20-2 be converted to a permanent Local Bankruptcy Rule effective in March 2022.

B. Proposed LBR 2016.2 Claims for Fees by Creditors

The following proposed new local rule was carried over from the December 2020 meeting to afford the committee additional time to review this topic.

Except as provided for in Fed. R. Bankr. P. 3002.1, if a creditor wishes to recover reasonable post-petition fees, post-petition costs, or post-petition charges provided for under the agreement upon which the claim arose as a portion of the creditor's allowed claim, pursuant to 11 U.S.C. 506(b), the professionals retained by such creditor must timely file a fee application in accordance with the standards set forth in 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016(a). Reasonable fees and expenses of such professionals may be allowed by the Court as a portion of the creditor's allowed claim. Prepetition fees, prepetition costs, or prepetition charges incurred prior to the date of debtor filing the bankruptcy petition shall be itemized in the creditor's proof of claim. Post-petition fees and expenses of \$1,500 or less may be added to the claim without court approval and shall be allowed unless a party in interest objects to the claim.

Judge Berger asked why this rule was needed. He observed that the rule is not needed in Chapter 11, 12, or 15 cases and if it is not applicable to mortgagees in Chapter 13 cases then we do not need it. Carl Davis reported that he had circulated the proposal to the other Chapter 13 trustees, and received no response from them. He said he would not support the proposal unless there is an identified problem that this rule would solve.

The Committee unanimously recommended not to adopt the proposed rule.

C. Proposed LBR 3002.2 Government Deadline to File Proof of Claim

The following proposed new local rule was carried over from the December 2020 meeting. January Bailey proposed the following language be adopted as a new LBR 3002.2. Subsection (a) comes from Delaware's local rules. She said a rule is needed because when a

Chapter 7 case converts to Chapter 13, the government's proof of claim deadline is not reset. Under Rule 3002(c)(1) a government claim is timely if it is filed within 180 days of the order for relief. That means that if a no asset Chapter 7 converts six months after being filed, it is too late for the government to file a claim in the Chapter 13 case. This is especially problematic to debtors when student loans do not share in the distribution to unsecured creditors.

(a) After Conversion to Chapter 7 Asset Case. If notice of insufficient assets to pay a dividend was given to creditors under the Federal Rules or these Local Rules, and subsequently the trustee notifies the court that payment of a dividend appears possible, the Clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed. In such case, the proof of claim deadline for governmental entities shall be the longer of 180 days after the petition was filed or 90 days after the notice of assets was served or as otherwise provided in the Federal Rules.

(b) After Conversion to Chapter 12 or Chapter 13 Case. If a case is converted from chapter 7 to chapter 12 or chapter 13, a proof of claim is timely filed if it is filed not later than 70 days after the date of the order of conversion. In such case, the proof of claim deadline for governmental entities shall be the longer of 180 days after the petition was filed or 70 days after the order of conversion was served or as otherwise provided in the Federal Rules.

During the last meeting, there were questions about whether the government's deadline could be extended by adopting a local rule if it is not provided in the statute or national rules and whether the order of conversion is a new order of relief that would set a new 180 day deadline. It was noted that Section 348(a) states that conversion from one chapter to another constitutes an order for relief under the chapter to which the case is converted. Judge Berger observed that in a Chapter 7 no asset case, there is no claims deadline. The Committee also considered Rule 3002(c)(5), but there remained a question about student loans if they are treated as a special class that does not receive a dividend. Judge Berger suggested that the Delaware rule provided a practical solution to clearly provide the government a new proof of claim deadline. He observed that the Code trumps the national rules, so it makes sense to create a local rule to fill the gap in the national rules because the deadlines governing claims are brutal and impractical if they are missed and there is an objection to the claim. There was no opposition to the idea that a local rule on this topic is permissible.

Jill Michaux recommended the deadlines should be 70 and 180 days rather than 90 days. She was a member of the national rules advisory committee when the deadline was reduced from 90 days to 70 days, and she explained that the purpose was so that as many claims as possible would be filed by confirmation so feasibility could be analyzed. She also recommended that it would be better to have the same deadlines apply in a converted case. It was noted that Rule 3002(c)(5) provides for at least 90 days to file a claim in a converted case.

Judge Berger noted that the Delaware rule deals with conversion, and he thought it would be helpful to also address late-discovered assets in the local rule that the court adopts. He also recommended that subsection (a) should more explicitly indicate that it addresses conversion from a Chapter 7 no asset case to a Chapter 7 asset case.

Carl Davis also asked whether the local rule should include a reference to the 30-day period for the debtor to file a claim after the creditor's deadline expired. There was also a discussion about when late-filed priority claims are subordinated to timely-filed general unsecured claims.

The Committee agreed that there is support for the rule in principle. Jill Michaux and January Bailey will coordinate with Judge Berger and refine the draft rule, then circulate the draft to the full Committee so it can make a recommendation to the Judges.

New Business

A. KSB.USCourts.gov Website

Stephanie Mickelsen reported that the Court added a page to its public website that will identify new and updated CM/ECF filing events. It is at <https://www.ksb.uscourts.gov/cmecf> and can be accessed through the website's menu at <https://www.ksb.uscourts.gov> under the "For Attorneys" tab at the "CM/ECF" page. Currently, the "CM/ECF Event Updates" page gives a brief explanation about the "Certificate of Compliance and Motion for Entry of Discharge Pursuant to 1328(i)" event.

Carl Davis reported that a few attorneys have mistakenly used that new event to file a request for a regular discharge. David Zimmerman explained that the Clerk's Office can, where helpful, add instructions to CM/ECF events to help filers be sure they are not using an incorrect event. For example, the screen could ask filers if they are seeking the special 1328(i) discharge and redirect them to the correct event if they are not. *[Editor's Note: This enhancement to CM/ECF was implemented locally on June 28, 2021, and the event was renamed "Certificate of Compliance and Motion for Entry of Discharge Pursuant to 1328(i)/CARES Act" to further reduce confusion.]*

David Zimmerman added that the Clerk's Office will be sharing instructions about how to use the search feature in CM/ECF to help attorneys identify the correct events. Often attorneys use the "Generic Motion" event when there is a specific event that should be used. The court invites attorneys to sign up for gov.Delivery by clicking the link at the bottom of the home page. That allows subscribers to receive email notifications of news announcements from the court. At the recommendation of January Bailey, the court will add a link from the new page into CM/ECF. *[Editor's Note: The Clerk sent an announcement to the bklistserv with instructions on how to use the search feature. Also, the link directly to CM/ECF has been added to the top of the CM/ECF Event Updates page (<https://www.ksb.uscourts.gov/cmecf-event-updates>).]*

B. Acceptance of Credit Cards and ACH Payments for Debtor's Filing Fee Installment Payments

January Bailey asked whether the court should accept credit cards and ACH (automated clearinghouse) payments for Chapter 7 fee installment payments. She shared an article in the

ABI Journal written by the Clerk of Court for the Northern District of West Virginia Bankruptcy Court. David Zimmerman shared that some Bankruptcy Courts in the Tenth Circuit have accepted credit card and debit card payments. Some of the concerns that have arisen in the past include: if the court accepts credit card payments for fees when the case is filed, that could make the court a pre-filing creditor; and if a payment is reversed, that could create problems collecting the fee. Some courts with experience have reported that problems have been rare. Benefits include increased accessibility for debtors. Committee members raised other questions and concerns: how are credit card fees handled; should the court be encouraging debtors to use credit cards while they are in bankruptcy; does using a credit card to make a prepetition fee payment imperil a debtor's ability to obtain a discharge because it would be presumptively fraudulent; if the case converted and converted back then the court could become a creditor if the charge did not go through; if the charge does not fully go through then it could create an asset of the Chapter 7 estate; and even a debit card becomes a credit product if it provides overdraft protection. It was proposed that a solution to some of the concerns would be to only accept post-petition payments beginning two weeks after the case was filed. A question was raised about whether credit card payments would be accepted the Clerk's Office over the phone. Mr. Zimmerman expressed concerns about accepting card information by phone and he also explained that court staff never see credit card information for payments made by attorneys through Pay.gov.

The question was asked whether there is a problem that accepting credit card payments would solve. None was identified.

The Committee agreed to table the issue and carry it forward to the next meeting so more information could be gathered.

C. Automatic Claims Bar Date in Chapter 11 Subchapter V Cases

January Bailey shared a bar member's recommendation that there be an automatic claims bar date for subchapter V cases so there would be no need for a motion. She shared examples of rules adopted in the districts of Central California and Arizona.

District of Arizona:

In a case under subchapter V of chapter 11, and unless otherwise ordered by the Court, creditors other than governmental units shall file a proof of claim or interest not later than 70 days following entry of the order for relief. 11 U.S.C. § 502(b)(9) and Fed. R. Bankr. P. 3002(c)(1) shall govern the timing of the filing of proofs of claim by governmental units.

District of Central California:

Subchapter V Cases. In subchapter V cases, unless otherwise ordered, the claims bar date will be 70 days after, and for claims by governmental units 180 days after, the latest of: (1) the date of entry of the order for relief, (2) the date of conversion of the case to chapter 11, subchapter V, or (3) the date of the amendment of the petition to designate the

case as a subchapter V case. In the case of conversion or re-designation of a case to subchapter V, any previously set bar date will govern, unless otherwise ordered.

Judge Berger thought the concept was a good idea because subchapter V cases are designed to be streamlined and efficient and it did not seem to run afoul of any rules. He praised the success of subchapter V. Chris Borniger said the US Trustee does not object to a rule like this. Carl Davis asked if there was any reason a debtor might want to delay setting a claims bar date in a case. Judge Berger noted that the rule would keep the case moving, relieve debtor's attorneys of a burden, and provide clarity to the creditor's bar. The Committee interpreted the California rule to mean that the filing deadline would be calculated from the later of the three events listed: (1) the date of entry of the order for relief, (2) the date of conversion of the case to chapter 11, subchapter V, or (3) the date of the amendment of the petition to designate the case as a subchapter V case. Jill Michaux recommended that the rule be initially adopted as a Standing Order rather than as a local rule.

Judge Berger said the proposed rule will be presented to the Judges and they will discuss whether to adopt it initially as a Standing Order.

D. Other Topics

Chris Borniger briefly discussed the new regulation governing periodic operating reports [28 C.F.R. § 58.8]. The new regulation will require non-small business debtors in Chapter 11 to electronically file periodic reports using data enabled forms. He said the Executive Office of the US Trustee is recommending a new local rule. The local US Trustee's Office has been asked to circulate it to the local Judges.

Judge Berger thanked those whose terms of service on the Bankruptcy Bench Bar Committee were concluding. He also shared that during the last two years there were a large number of high quality applications for Committee vacancies. He encouraged attorneys to continue to apply if they were not selected this year to become members. He explained that selections consider diversity of geography, experience, and practice areas, and that the Judges put great thought into the selections.

The meeting concluded at 12:35 pm.