

**Minutes of the Bankruptcy Bench Bar Committee
Video Conference (via Microsoft Teams)
April, 7, 2023, 10:00 AM**

Members Present: Hon. Robert D. Berger, Judges Representative
Hon. Dale L. Somers, Chief Judge
J. Christopher Allman, Chair, US Attorney's Office
Jordan Sickman, US Trustee's Office
Patricia Hamilton, Chapter 7 Trustee
William Griffin, Chapter 13 Trustee
Kevin Grauberger
Nancy Skinner
Kathryn Sheedy
January Bailey
Jill Michaux

Members Absent: Ryan Blay

Court Staff Present: David Zimmerman, Clerk of Court
Joyce Ridgeway, Chief Deputy Clerk

The meeting commenced at 10:03 am.

Minutes

The Committee reviewed and approved the minutes of the November 9, 2022 meeting by e-mail. They are posted publicly to the court's website.

I. Old Business Carried forward from the Fall 2022 Meeting

A. Mortgage Modification Mediation Program: Nancy Skinner

Nancy Skinner reported that members of the Subcommittee (Nancy Skinner, January Bailey, and Ryan Blay) communicated with Trustee Griffin and other attorneys to get additional input about proposed LBR 3002.1.2 and two proposed forms (Notice of Trial Mortgage Loan Modification and Motion to Approve Permanent Home Mortgage Modification, attached as appendices). The proposed language of the new rule is:

LBR 3002.1.2 – Mortgage Loan Modification

- (a) **Scope of Rule.** This rule applies in Chapters 7, 12, and 13, for consumer loan relationships regarding a mortgage on real property or a lien on personal property that the debtor occupies as the debtor's personal residence.
- (b) **Automatic Stay.** It is not a violation of the automatic stay when:
 - (1) the debtor contacts the secured creditor to request information about a loan modification application and the secured creditor responds with such information;

- (2) the secured creditor communicates directly with the debtor about a loan modification application in process. Debtor's counsel shall be copied on any written correspondence to the debtor.
- (c) **Trial Loan Modification.** If the debtor and the secured creditor reach a trial loan modification, the attorney for either party shall file a Notice of Trial Loan Modification (Local Form XXX).
- (d) **Permanent Loan Modification.** Upon successful negotiation of a loan modification between the parties, counsel for either party shall file a Motion to Approve Loan Modification (Local Form XXX).
 - (1) No objection deadline is necessary if the order is approved by counsel for the debtor and secured creditor, as well as the trustee in chapter 12 and 13 cases.
 - (2) An executed copy of the loan modification should be attached to the Motion.
 - (3) The Motion and Order shall qualify as the Amended Proof of Claim and the Notice of Mortgage Payment Change regarding the modified payment.
 - (4) If the debtor is paying the secured creditor as a conduit through the bankruptcy case, the conduit payment will continue to be paid by the trustee, absent a plan modification by the debtor.
 - (5) Entry of the Order granting approval allows the Trustee to reset the mortgage claim records based on the changes as set forth above.

Chief Judge Somers asked whether this proposal would speed the process of obtaining loan modifications. He voiced his interest in expediting the modification process. Nancy Skinner explained that this is not a mediation program because there was not a lot of support for a mediation program, but this would smooth the process by, for example, explaining that mortgage companies can speak to debtors without violating the automatic stay.

Jill Michaux explained that in many loan modifications the delinquent loan is deemed current because of the modification and the payments are removed from the conduit rule. January Bailey explained that, under the proposed rule, unless the plan is amended the mortgage will remain as a conduit. She asked if the default could be flipped in (d)(4) to have the mortgage brought out of the conduit rule without the need to amend the plan. January Bailey explained that because the modification changes the payment amount, the plan typically needs to be amended and the debtor could move to pay the mortgage payment directly to the Lender outside of the plan as part of the motion to amend the plan.

Judge Berger explained that in some districts there is no requirement for a motion to modify the mortgage. He asked if it was necessary for a motion to be filed rather than simply by notice of modification. Jill Michaux explained that some lenders want a motion and order approving the change. Judge Berger and Judge Somers explained that they don't have a preference about whether the issue is resolved by motion and order or by notice.

Bill Griffin recommended changing the notice to add the word "mortgage" in the highlighted sentence so it reads: "The current ongoing mortgage payment is higher than the trial period payment. The trustee shall pay the trial period payment."

The question about whether notice would be sufficient if it is sent only to adversely affected creditors and the debtor and trustee, rather than to the matrix.

The Committee preferred to make the forms official local forms rather than mere resources. The reasoning was that if they are forms then all parties know what information is required as part of the process.

There was discussion about whether it would be best to incorporate plan modification into the forms.

The topic was continued to the next meeting to allow the Committee to evaluate whether to change the form to include modification of the plan as part of the proposed process, or whether mortgage modification and plan modification should be separate procedures.

B. Proposed Changes to LBR 3002.1.1(d) and LBR 4070.1(b): Jill Michaux

Because mail delivery has become slower and less reliable, it was proposed that the local rules should be amended to require a creditor to send a notice of default or a written demand for proof of insurance to the debtor's attorney by email. Consequently, there was support for the idea of requiring notice by email. There was no opposition.

The topic was continued to the next meeting for Jill Michaux to draft proposed language and circulate it.

C. Proposed Amendment to LBR 1009.1: Jill Michaux

Jill Michaux recommended changes to conform the Notice of Amendment of Schedules D, E/F, G or H (Addition of Creditor(s)) form to new rule 3002(c) and to remove text that requires unnecessary work and mail expense for debtor's attorneys. The form (rev. 3/2020) is available at https://www.ksb.uscourts.gov/sites/ksb/files/KSBOF_NoticeAmdSched.pdf.

Jill Michaux also proposed a review of rules and forms because of changes to rule 3002(c), including subsection (6), which states:

(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

Jill Michaux said the form lulls the unsophisticated creditor into believing they have more time to file a claim than they do. It was observed that the form no longer contains a reference to a 30-day period. The question was raised about how clearly the form must state the deadline for filing a claim and whether some of the information in the form should be removed.

Judge Berger explained that he preferred clearer notice so that creditors receive due process, which also protects debtors.

Jill Michaux withdrew the request and the topic was resolved.

D. Expanded Use of Text Orders

Last meeting's action items: "The Clerk will post the list of text orders to the court's website. This topic will be continued to the next meeting for further discussion." The list of available text orders and sample language for each order is posted at <https://www.ksb.uscourts.gov/text-orders>.

Chris Allman observed that text orders are being used increasingly for more substantive orders in District Court. Judge Berger said he had reviewed the text orders that are being used in Missouri. He said he prefers to issue Memorandum and Order for substantive decisions rather than a text order. But he observed that text orders increase efficiency in many contexts where issues frequently arise.

January Bailey suggested using a text order for resolving motions to employ the Chapter 7 trustee. Patricia Hamilton and Jordan Sickman agreed that a text order would be appropriate. David Zimmerman will review Clerk's Office procedures to determine whether preapproval has been given by the Judges to approve such orders, and he said procedures could be modified if they are not already allowed and the Judges approve it. Judge Berger said he supports improvements that streamline the bankruptcy process.

David Zimmerman will coordinate this topic with the Judges and report to the Committee what the Judges want to do about text orders approving employment of the attorney for the trustee. [Editor's note: The Judges declined to adopt text orders to resolve motions to employ the Chapter 13 trustee.]

E. Chapter 11 Subchapter V Plan Form: Ryan Blay

Last meeting's action items: "This topic will be continued for further consideration after Missouri finishes drafting a form plan. Ryan Blay will advise the Committee when the form plan is ready."

Ryan Blay reports that "the subcommittee of the Western District of Missouri Attorney Advisory Group is working on recommendation for a proposed model plan and proposed order to accompany it that would provide a suggested but not mandatory form to use. We hope to have that ready by May 2023." Ryan Blay was unable to attend the meeting and he recommended that this topic be continued to the next meeting for an update on that progress.

This topic was continued for discussion at the next meeting.

F. Model Forms for the District of Kansas: Ryan Blay

It was noted that the Eastern District of Wisconsin's website has posted numerous forms, including a model Subchapter V Plan and others for sample motions and forms. *See* <https://www.wieb.uscourts.gov/local-sample-forms>. Many attorneys prefer to draft their own orders, but it was suggested that forms could be helpful for motions for relief from stay and specific orders.

Last meeting's action items: "This topic was continued to the next meeting without substantive discussion."

Ryan Blay will be unable to attend the meeting and he recommended that this topic be tabled.

This topic was continued for discussion at the next meeting.

G. Deposition Guidelines

The question was asked during the prior meeting whether the Bankruptcy Court should adopt the District Court's deposition guidelines so they apply to Bankruptcy Court cases.

Judge Somers observed that guidelines are not rules and do not govern in bankruptcy cases. He did not want to adopt all District Court guidelines without serious review. The Committee did not oppose adopting the deposition guidelines. Judge Berger and Judge Somers suggested that if there is a discovery dispute then they should get opposing counsel on the phone and call the Judge to resolve it.

If the Committee wants the court to adopt other District Court guidelines then the Committee will need to review those and make a proposal.

The Committee unanimously recommended to the Judges that the deposition guidelines of the District Court be adopted for proceedings in the Bankruptcy Court.

II. New Business

A. Motions to Abate and Drop Dead Dismissal Deadlines Governing Resumption of Payments: Judge Berger and Ryan Blay

Bill Griffin explained that he has had problems with motions to abate and timely resumption of payments. Bill Griffin said he does not want a rule and he does not plan to request one. It gives him flexibility to accommodate special circumstances (e.g., a check is on its way) because there is not a fixed, hard drop dead date that would dismiss the case if payments did not resume on time.

Bill Griffin will consult with Carl Davis about this topic and make a recommendation if needed.

B. Noticing Addresses Listed in LBR 2002.2: January Bailey

January Bailey suggested that LBR 2002.2 be amended to remove the lists of government noticing addresses and replace it with a web address to the court's website where the list will be posted. That way, when an agency updates its noticing address the Clerk can update the address immediately without the need to amend the local rules. The Committee asked that the local rules include a hyperlink to the address list and David Zimmerman said that could be included.

The Committee unanimously agreed to recommend that the Local Rules be amended to direct people to the public website where noticing addresses will be posted.

C. LBR 6007.1 and Abandonment of Property: Kevin Grauberger

Kevin Grauberger asked whether LBR 6007.1 should be amended to make a trustee's notice of abandonment effective 14 days after the notice of abandonment unless an objection is filed. He described a situation where a Chapter 7 Trustee filed a notice of abandonment of a piece of real estate that was subject to a foreclosure proceeding, allowing the creditor to foreclose without the trustee involvement after abandonment became effective. However, he was concerned that LBR 6007.1(a) could be read to extend the deadline for other creditors and interested parties to object to the proposed abandonment until 75 days after the 341 meeting was concluded.

Patricia Hamilton explained that the beauty of LBR 6007.1 is that a trustee's notice of abandonment does not have to be sent separately to the entire matrix. She said when a creditor asks the trustee to abandon the property when they seek relief from the automatic stay, the trustee does not have to send separate notice because abandonment is covered by the order granting relief from stay. She also explained that the original notice of the meeting of creditors is given at the outset of the case that property may be abandoned without giving notice to the matrix, therefore creditors are on notice that they need to monitor the case and object within the time allowed by LBR 6007.1 if there is a valuable asset that the trustee proposes to abandon.

Committee members proposed that a way to obtain faster resolution of the issue without the need for a change to the local rule would be for the creditor to file a motion for stay relief that also proposes abandonment and give notice the motions, and rely on Rule 6007 to set a 14-day objection deadline.

D. Informational Update About Adversary Cases Seeking Student Loan Discharge: Chris Allman

Chris Allman shared the following information about the approach that the US Attorney's Office is following to resolve student loan discharge matters.

The DOJ [Department of Justice] and DOE [Department of Education] have implemented New Guidance by which the United States Attorney's Office [USAO] can handle adversarial student loan cases in which debtors seek to discharge federal student loans. The USAO and DOE will look at an attestation to be completed by the debtor and will consider whether the DOE will stipulate to full or partial discharge of the federal student loans. From the attestation, DOJ and DOE will look at (1) present ability to pay (2) future ability to pay, and (3) good faith efforts to repay the student loan debt.

When looking at present ability to pay, the debtors expenses are considered next to certain IRS collection financial standards, expenses are allowed or not allowed from that analysis, and then the allowed expenses are compared against the debtor's income. The US will look at future ability to pay and consider retirement age, disability or chronic injury, protracted unemployment history, lack of degree, extended repayment status, or any other relevant factor. Under good faith efforts, the US is looking for reasonable efforts to earn income, manage expenses, and repay the student loan debt. The US also looks to determine if there has been contact by the debtor about repayment options.

From the first few cases, there are a few things to share:

1. First, the DOE appears to be inundated with applications, and although the AUSAs are trying to take a load of this analysis, it still requires the DOE's review of the AUSAs' recommendations. The entire process will take time for the debtor to complete the attestation and compile the supporting documents, then for the AUSA assigned to the case will to thoroughly review that information and make a recommendation to the DOE, and then for the DOE to evaluate that recommendation in light of the evidence submitted as well as its own records. If possible, it is best that the USAO receives the attestation from the debtor as early as practicable.

2. The Guidance is guidance and not law or regulation and still affords a great deal of discretion to the AUSA to conduct discovery, make judgment calls, and an AUSA could decide to litigate cases that a discharge is not warranted in whole or in part.

3. The Attestation is an opportunity for the debtor to prove the necessity and propriety of a discharge of their student loan debt to the United States. Debtors that thoroughly explain the need for a discharge, the amount of their income, and the reasonableness of their expenses will speed the process of evaluating the application.

4. These are links to the attestation <https://www.justice.gov/civil/page/file/1552666/download> and the guidance to DOJ attorneys <https://www.justice.gov/civil/page/file/1552681/download>.

Chris Allman reported that 6 attestations in the district have been submitted in the district. One was reviewed and rejected. Filling out the attestation thoroughly will satisfy most if not all of the discovery requests that would come from the USAO. He explained that the US Attorney's Office is working to process these as quickly as possible, subject to the Department of Education turnaround time. Jill Michaux asked how long a stay would be needed to allow the Department of Education to process the attestation. Chris Allman said the DOE takes about 60 days, so a 90 day stay would likely suffice.

Nancy Skinner observed that in Chapter 13 cases, the debtor must wait until the end of the case to file the adversary to obtain a student loan discharge. She asked whether there was any guidance about obtaining relief under the guidelines earlier than that because there is some risk that the guidelines may be withdrawn by the next administration. Judge Berger suggested that the adversary might be filed and stayed pending, for example, a decision by the DOE, rather than stayed for a specific period of time.

The question was raised about how expansively the DOJ Guidelines apply. Jill Michaux observed that they apply to government direct loans made by the government and Federal Family Education Loan (FFEL) loans held by the government, but not loans held by ECMC. Some expect a letter will be issued by the DOE to expand the procedure applicability to ECMC loans. Some are recommending that government-backed loans be consolidated or transferred into the direct loan program so the attestation procedures can be applied.

Jill Michaux explained that a client can ascertain if there are federal student loans from his/her NSLDS file from studentaid.gov. The report should indicate whether the federal loan is held by the government or another entity. Private student loans will not be on this database. Jill Michaux proposed to invite the USAO to do a future CLE on this topic once they have more experience.

E. In-Person Meetings

The Committee considered the benefits of in-person Bankruptcy Bench Bar Committee meetings versus the risk of COVID and the convenience of remote meetings. Most favored in person meetings once per year and some suggested meeting in a central location like Emporia or Cottonwood Falls. David Zimmerman said that the funding would need to come from the Bench Bar Fund and he could request that from the District Court.

The Committee recommended that an in-person meeting be held and that it include an overnight stay, morning meeting, meals and mileage.

The meeting concluded at 12:38 pm.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS**

In re _____, Debtor(s).)))))	Case No. _____ Chapter 13
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NOTICE OF TRIAL MORTGAGE LOAN MODIFICATION

The Debtor(s), _____, provide notice to the Court and all interested parties that:

The Debtor(s) and their current mortgage lender, _____ (the “Lender”), have reached agreement on a trial modification of the loan secured by the Debtor’s(s’) residential real estate located at _____ (the “Loan”). The trial period payments are scheduled as follows:

Trial period payment number date	Trial period payment(\$)	Payment due
1	\$	00/00/2022
2	\$	00/00/2022
3	\$	00/00/2022

Once the Debtor(s) has made all required trial loan payments and a permanent loan modification is approved by the Lender, a motion to approve the permanent loan modification will be filed with the Court and, if necessary, a motion to modify the plan will be filed with the Court.

The following are applicable in this case:

- The Debtor(s) are currently making their mortgage payment directly to the Lender. Debtor(s) shall make the trial payment directly to the Lender.

- If the Debtor(s) mortgage payments are made by conduit payments through the Chapter 13 plan, and assuming the trustee has the funds available, then the trustee shall pay the ongoing trial period payment to the Lender. During the trial period, the trustee shall not disburse on any other portion of the Lender’s claim, including the arrearage claims. If no motion to approve permanent loan modification is filed within 60 days of the final trial period payment, the trustee shall resume disbursements to the Lender pursuant to the confirmed plan.
 - The current ongoing mortgage payment is higher than the trial period payment. The trustee shall pay the trial period payment.
 - The current ongoing payment is lower than the trial period payment. The trustee shall continue disbursing the current payment. The Debtor shall directly pay the Lender the difference.

Respectfully Submitted,

(Debtor or attorney signature block)

CERTIFICATE OF SERVICE

I hereby certify that on XX, 2022, a true and correct copy of this notice was electronically filed with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

(Debtor or attorney signature block)

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS**

In re _____, Debtor(s).)))))	Case No. _____ Chapter 13
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MOTION TO APPROVE PERMANENT HOME MORTGAGE MODIFICATION

COME NOW Debtor(s), by and through counsel, file this Motion to Approve Permanent Home Mortgage Modification (the “Motion”), and, in support thereof, state(s) as follows:

1. Debtor(s) file their Chapter 13 petition on 00/00/2022.
2. Debtor(s) have a mortgage with _____ (the “Lender”).
3. Debtor(s) and the Lender have entered into a permanent mortgage modification.

The modification is effective beginning with the 00/2022 mortgage payment.

4. The terms of the permanent mortgage modification are as follows:

	Current Mortgage Terms (prior to modification)	Proposed Mortgage Terms (permanent modification)
Principal Balance		
Interest Rate		
Loan maturity date		
Monthly Principal/Interest		
Monthly Tax/Insurance/PMI		
Total Monthly Payment		

Parties understand that the monthly tax/insurance/PMI and thus the total monthly payment amount will change year to year due to changes in the escrow items.

Unless specifically notated below, all pre- and post- petition arrearage claims and mortgage fees and expenses are being paid through the permanent loan modification and the Debtor is current on all payments as of the effective date of the mortgage modification.

Other Necessary Information regarding the Proposed Mortgage Terms: (e.g., balloon payment, interest only payments, remaining arrearage, etc)

5. Currently, and prior to this permanent loan modification, the ongoing mortgage payment is being paid: Directly by Debtor OR As a conduit payment under L.B.R. 3015(b).2.

6. If the Lender's claim is currently being paid as a conduit claim under L.B.R. 3015(b).2, then the trustee is authorized to disburse the new payment above as the ongoing mortgage payment. Absent arrearages being listed above, the trustee is authorized to cease any further disbursement on any other portion of the claim. With no further arrearage being paid through the plan, the Debtor may file a Motion to Modify Plan to pay the ongoing mortgage payment directly to the Lender outside of the plan. Such Motion must state the final payment to be made by the trustee and the month the Debtor will begin paying directly.

7. The Order approving this Motion may serve as an amendment to the Lender's claim and as the Notice of Mortgage Payment Change regarding the modified payment.

8. Debtor(s) request this Court approve the permanent mortgage modification and authorize the changes set forth above.

WHEREFORE, the Debtor(s) request the Court enter an order approving the foregoing Motion to Approve Permanent Home Mortgage Modification.

Respectfully Submitted,

(Debtor or attorney signature block)

CERTIFICATE OF SERVICE

I hereby certify that on XX, 2022, a true and correct copy of this Motion was electronically filed with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

Copies of the same were also forwarded on this same day via first class mail, to parties listed on the attached matrix.

(Debtor or attorney signature block)