Minutes of the Bankruptcy Bench Bar Committee
Teleconference
December 9, 2020

Members Present:	Hon. Robert D. Berger, Judges Representative Emily B. Metzger, Chair, US Attorney's Office Chris Borniger, US Trustee's Office Carl Davis, Chapter 12 Trustee and Chapter 13 Trustee January Bailey J. Christopher Allman 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 1:30 pm. 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. Proposal to Convert Standing Order 20-3 (Mar. 20, 2020) to Permanent LBR 2002.3

As a follow-up to discussions in prior meetings about this topic, January Bailey proposed that Standing Order 20-3 should be abrogated and replaced by a permanent local rule. She recommended the following language.

> (1) Voluntary Case. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the Court directs that all notices required by FRBP 2002(a) may be mailed only to:
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> - the debtor;
> - the trustee;
> - all indenture trustees;
> - creditors that hold claims for which proofs of claim have been filed; and
> - creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(2) Involuntary Case. In an involuntary chapter 7 case, after 90 days following the order for relief under that chapter, the Court directs that all notices required by FRBP 2002(a) may be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(3) Insufficient Assets. In a case where notice of insufficient assets to pay a dividend has been given to creditors under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims under Rule 3002(c)(5), the Court directs that all notices required by FRBP 2002(a) may be mailed only to the entities specified in the preceding sentence.

Jill Michaux offered the following additional observation of commentator (John Rao of NCLC):

> While it would have been helpful if the amendment to Rule 2002(h) avoided any ambiguity by referring to Rule 3015(h), it would seem that the more specific language in Rule 2002(h) as to notice to creditors whose claims are filed should control. Moreover, Rule 3015(h) gives a court authority to direct that the clerk or debtor do not need to serve the notice of a proposed modification and amended plan on "creditors who are not affected by the proposed modification." This should arguably include creditors who have not timely filed a proof of claim, since they are not able to receive distributions under the plan. Thus, courts who implement the amendment to Rule 2002(h) should also direct in the same local rule or standing order that motions to modify and copies of an amended plan do not need to be mailed to creditors who have not filed a timely claim.

Emily Metzger observed that the proposed language did not include noticing to "parties in interest expressly requesting notice," which is a category of recipients that is included in Standing Order 20-3. There was discussion about whether the rule should also require notice to parties whose property interests are affected, or whether the notice required by the new local rule should include only those contemplated in the national rule, Fed. R. Bankr. P. 2002(h). Committee members commented that even if the rule does not list parties whose interests are affected by a particular motion, it would be a best practice to send notice to those affected parties (such as codebtors and leaseholders whose lease terms might be impacted) in order to assure that due process is provided. Judge Berger added that attorneys have the responsibility to determine when notice should be given to interested parties to provide due process.

The Committee unanimously agreed to recommend that Standing Order 20-3 be converted to a local rule and that a revised draft should be circulated among the Committee so the language could be refined before it is submitted to the court.

[Editor's Note: After the meeting, a revised draft of LBR 2002.3 was circulated to the Committee that, in addition to some other minor edits, added "parties in interest expressly requesting notice" as recipients. The Committee approved the revised draft without opposition and it was recommended to the Court. The new rule was adopted effective March 17, 2021.]

B. Proposed LBR 4004-1 Discharge in Chapter 12 and Chapter 13 Cases

This topic was discussed during the April 22, 2020 meeting. Following that meeting, Jill Michaux shared additional comments: "Following up on our discussion about the process for chapter 13 discharge today, I have received replies from Oregon, Chicago, St. Louis and Philadelphia. In those places, no motion for discharge is filed. The trustee files the notice of completion then the debtor files the form 2830 certification. I have requested examples of pleadings and orders."

January Bailey and Jill Michaux proposed the following language be adopted as new LBR 4004-1:

> Debtor shall file with the Court a combined Certification of Debtor and Motion for Entry of Discharge in order to obtain a discharge upon completion of all plan payments.
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> (a) Timing. The Certification and Motion shall not be filed until after the trustee has filed the Notice of Plan Completion.
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> (b) Content. The certification shall be signed by the debtor under penalty of perjury and must substantially comply with the Local Form.
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> (c) Notice. The Certification and Motion shall be filed with the Court on CM/ECF and provide 21 days' notice to the following:
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> (1) Parties requesting electronic noticing through CM/ECF; and
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> (2) Any DSO claim holder and the State child support enforcement agency, if applicable.

January Bailey explained that since the last meeting she had reviewed local rules in several other courts. Some require a motion for entry of discharge. Others do not. In Delaware, for instance, after the Notice of Plan Completion is filed, the debtor files the Certification and the court enters the discharge. The proposed language of this new rule is intended to reduce notice from 30 days to 21 days and limit the breadth of required notice. Judge Somers, she noted, currently requires the motion for entry of discharge to be served to the matrix, but a local rule could change that practice. Judge Berger suggested that the Judges were unlikely to oppose the proposed change.

Jill Michaux observed that motions for discharge are filed 3 to 5 years after the case began and consequently generate a huge volume of returned mail. The proposed rule would reduce cost and speed up the process. She also explained that it is rare for objections to be filed to entry of discharge.

The Committee unanimously agreed to recommend adoption of LBR 4004-1.

January Bailey offered to coordinate with the trustees and Committee members to recommend a local form. Jill Michaux said she uses Form B2830 [Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)].

[Editor's note: After the meeting a subgroup of the Committee coordinated some modifications to the proposed language and discussed using Form B2830 as the certification. The court adopted LBR 4004.1, effective March 17, 2021.]

New Business

A. Proposed LBR 2016.2 Claims for Fees by Creditors

At the request of a creditor's attorney, January Bailey reviewed other courts' local rules governing procedures that creditors follow to obtain payment of fees under Section 506(b). She proposed adoption of a rule similar to Montana Local Bankruptcy Rule 2016-1(f):

> 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.

This rule is not intended to apply to mortgage creditors. Jill Michaux expressed her opinion that the amount in the rule should be $1,000 rather than $1,500. Kevin Grauberger asked whether a deadline to apply for the fees should be included in the rule. January Bailey observed that when a motion to sell is pending then resolving fees would need to be immediate, whereas in the context of confirmation a 180-day deadline could be appropriate.

Carl Davis preferred to have time to consider the rule's implications and to circulate this to the other Chapter 13 trustees for their comments. January Bailey also recommended that the bar as a whole should also have the opportunity to review it.

Wendee Elliott-Clement observed that this rule appeared to be acceptable from her creditor clients' standpoint.

Because the proposed rule as written would apply in all chapters, Judge Berger said he wanted time to look at this more closely, including the implications of this rule being used in

cases where there are large fees, as in some Chapter 11 cases. He also observed that the deadline for fee applications in Chapter 11 cases is commonly set by the plan confirmation order.

The Committee will carry proposed LBR 2016.2 forward to a future meeting for further consideration.

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

January Bailey proposed the following language be adopted as a new LBR 3002.2, which she copied in part from Delaware's local rules:

> (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.
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> (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.

January Bailey said that in a case that converts from Chapter 7 to Chapter 13, the government proof of claim deadline is 180 days after the case was filed, so if the case is converted several months after it was filed, then the government proof of claim deadline can be relatively short after conversion. This is because a new deadline is set for ordinary creditors to file claims, but does not reset the government claim deadline, she said. She recommended giving government entities a longer time to file a claim after conversion. An abbreviated claim deadline can cause complications in particular for student loan claims. Emily Metzger said she did not have any objections to the proposal at this time, but requested some time for the US Attorney's Office to consider the issue. Judge Berger asked whether the proof of claim deadline can be extended by local rule. The Committee considered whether under Section 348 the order of conversion is a new order for relief and whether conversion changes the date of the order for relief. It was noted that a claim is generally allowed and paid if it is late but there is no objection to it.

In support of subsection (b) of the proposed rule, January Bailey shared an example of why she considered it helpful to extend the government's deadline to file a claim after the case becomes a Chapter 7 asset case. In a Chapter 7 no asset case filed in June that converts to a Chapter 7 asset case after the debtor receives tax refunds, the government's 180 days to file a claim would have expired and the government would not have time to file a claim. Jill Michaux

added that it is more problematic because the creditor would have been told in writing not to file a claim in the no-asset case. Judge Berger noted that when he was a practicing attorney he filed claims early in the case on behalf of creditors if the debtor wanted them to be paid, and a claim later filed by the creditor would supersede the claim filed by the debtor.

The Committee decided that more research on the topic is necessary and will carry this proposal forward to a future meeting for further consideration.

C. Update About the CourtSpeak Feature

Chris Borniger asked whether audio recordings of court proceedings are available on PACER. David Zimmerman explained that this is one of the projects that the Clerk's Office has in the works, but its implementation has been delayed by rolling out NextGen and COVID-19.

D. Discussion of the Chapter 13 Form Plan

Committee members observed that the local Chapter 13 form plan took an unexpected amount of time and effort to create. Judge Berger shared that it took hundreds of hours to draft. Jill Michaux shared that there are some minor edits that she would make if the form plan was currently being drafted, but they are not significant enough to require revision of the form plan. The non-standard provisions section accommodates special provisions that debtors want to include, she said. January Bailey shared that she had heard discussion about two possible changes: (1) to include the provision that was added to the confirmation order stating that non-payment of a debt that is to be paid directly outside the plan does not bar a discharge, and (2) to address the recent Tenth Circuit case about student loans, but she thought that generally a debtor would want to file an adversary proceeding even if the debtor thought the student loans did not fall within Section 523(a)(8). Carl Davis noted that (although it is among one of his least favorite objections to make) he frequently objects to non-standard provisions in a plan because the debtor did not check the box on the first page indicating that there are non-standard provisions in the plan. Judge Berger noted that non-standard provisions are not effective unless that box is checked. Jill Michaux shared that to fix the failure to mark the non-standard provision box, the debtor can amend the plan and re-notice it.

E. Rearranging Local Forms in the Local Bankruptcy Rules

January Bailey suggested removing the local forms out of the Local Bankruptcy Rules, posting them to the court's website, and referencing them in the local rules rather than including them in the rules themselves. She suggested that forms would be easier to amend if not part of the rules themselves. She also commented that several forms on the court's website differ from the forms in the hard copy printed booklet. *[Editor's note: The hard copy booklet was last printed in March 2018 and many forms were amended in March 2020. Therefore, the updated form appears both on the court's public website and in the 2019/2020 Supplement that was electronically published in March 2020. A new hard copy booklet with the cumulative updates is expected to be available in 2021.]* Other Committee members commented that it would be easier to find forms if they were collected together.

Emily Metzger asked if there is a plan to continue printing hard copy local rules booklets. David Zimmerman answered that there is a plan to keep publishing the booklets. He also explained that 2020 would have been the year when the hard copy would typically have been printed, but District Court was in the process of a major update to its local rules. They did not want to print a hard copy and then issue a large number of changes. He said that based on recent coordination with District Court, the next booklet is expected to be printed in March 2021. *[Editor's note: As of May 2021, the District Court's pending rule changes are nearing completion but are not final yet so the publication date is likely to be the summer of 2021.]*

David Zimmerman asked whether the bar still wants hard copy booklets to be printed. Some Committee members answered that they only access the rules online. Others still like the convenience of hard copy booklets.

January Bailey suggested that formatting the local rules on the website as a table of contents with links to each individual rule, similar to the way District Court has them arranged, would be helpful when looking at the electronic version of the rules. Jill Michaux shared that she likes the ability to search the pdf of the complete local rules for a term.

F. Abrogation of the Rule Requiring Retention of Wet-Ink Signed Documents

January Bailey reported that the District Court is planning to entirely eliminate the retention rule, D. Kan. Rule 5.4.7, in the spring. The Committee enthusiastically praised the change.

G. Converting Standing Order 20-2 to a Permanent Local Rule

January Bailey asked whether Standing Order 20-2, which allows electronic signatures rather than wet ink signatures during the pandemic, should be converted to a permanent local rule even after the pandemic ends.

The Committee placed this topic on the agenda for its next meeting.

H. Other Observations

Judge Berger noted that the pandemic was isolating for many. Jill Michaux asked whether the court had considered conducting dockets using Zoom rather than the telephone so participants could see one another. Judge Berger said they had not, but it was a fair suggestion so the Judges could consider it.

It was noted that a number of experienced Chapter 11 and Chapter 12 attorneys are retiring.

The meeting concluded at 3:26 pm.