

Minutes of Lawyers Advisory Committee Meeting
March 5, 2013

Location: Steakhouse 85, New Brunswick, NJ

Members in Attendance: Honorable Gloria M. Burns, Chief Judge, Honorable Kathryn C. Ferguson, Honorable Raymond T. Lyons, Chris Gravelle, Chair, Mark Hall, Vice Chair, Michael Viscount, Chapter 11 Subcommittee Chair, Henry Karwowski, Local Rules Subcommittee Chair, Al Russo, Chapter 13 Subcommittee Chair, Virginia Fortunato, Jerry Poslusny, Scott Liddle, David Beslow, Wendy Gardner, Andy Finberg, Martha Hildebrandt, Jeanne Naughton, Shoshana Schiff, Stacy Meisel, Ellen McDowell, Raman Chawla

I. Call to Order and Introduction – Chris Gravelle, as Chair of the Lawyers Advisory Committee (“LAC”), called the meeting to order.

Chris asked for approval of the minutes from the January 8, 2013 meeting. Stacey moved for the approval and Shoshana seconded the motion. The minutes from the January 8, 2013 meeting were approved; no objections were lodged.

II. Chapter 13 Subcommittee, Al Russo, Chair – Al reported that his Subcommittee is working on the following issues:

There were two matters up for recommendation; and three for discussion.

(1) Application and Order to Discharge Mortgage Lien – the Chapter 13 Subcommittee recommend that the Application be submitted on 14 day negative notice. If opposition to the Application is filed, a hearing date will be scheduled. On behalf of the State Attorney General’s Office, Judge Lyons relayed the comment that a debtor may obtain a partial discharge.

Noting that construction liens are frequently at issue in chapter 13 cases, the consensus of the Subcommittee was that a separate motion should be required to obtain such relief.

The Debtor would need to file this Application and Order to Discharge Mortgage Lien. Jeanne commented that there needs to be consistency with the terms used. Jeanne noted that a new local rule may be required and solicited comment. Al responded that the recommendations were consistent with the current practice and a new local rule was not required.

Judge Lyons asked why the Application should be presented on negative notice instead of by way of regular motion practice, complete with a hearing date. Al responded that the purpose of this Application was to clean up the record/assist the recorder of deeds. Judge Lyons emphasized that the national rules require that motions be filed to obtain orders. Al noted that the plan already includes a motion, but that an order specifically discharging a lien is not entered by way of plan approval. Judge Burns and Judge Lyons noted that the difference between a motion and an application is minor. David remarked that it is asking a lot of the debtor/debtor’s

counsel to incur the additional costs associated with a motion versus an application. Judge Lyons noted that the forms are similar and did not see a real difference in costs between a motion and an application. There was a group discussion focusing on the ease/cost savings of a standard application. Judge Lyons remarked that we could have a standard motion that is included on the website; it does not have to be a standard application.

Al moves to have this Application submitted to the BOJ, subject to Jeanne's earlier comments. Jeanne also noted a change in paragraph 8. Ellen seconded the motion brought by Al. No objections; motion passes.

(2) Chapter 13 Transmittal Letter – this Chapter 13 Transmittal Letter is a form letter used to address Chapter 13 Plan confirmation issues. The letter proposed by the Subcommittee will replace the existing letter. When filing a chapter 13 case, this transmittal letter is required whenever a motion is included in the plan. Any party affected by the motion (i.e. secured creditors) will receive notice. Chris asked Brian Nichols if this will have an impact on secured creditors. Brian said it will help to know the basis for the debtor's valuation so that it can more easily/accurately be evaluated. Raman noted that this letter/notice will be very helpful for the State. David noted that this will expedite the process and while initially opposed to the suggestion now understands the benefit to both debtors and creditors. Ginny agreed that the transmittal letter was helpful to her clients.

Mike Viscount moves to submit the transmittal letter to the BOJ. Ginny seconded. No opposition; motion passes.

(3) Fee Applications in a Chapter 13 – Judge Ferguson noted that the statute sets the minimum, so Al to revisit the statute's requirements.

(4) Initial pay letters – primarily for the benefit of pro se filers. Subcommittee to discuss whether the initial pay letter form should be tweaked.

Judge Burns thanked the Chapter 13 Subcommittee for their hard work.

III. Local Rules Subcommittee, Henry Karwowski, Chair –

Henry discussed his memo re: Stern v. Marshall, dated January 8, 2013, and the amended version circulated on March 4, 2013, as well as his memo on this case from a couple years ago.

Henry noted that the Bankruptcy Court for the SDNY promulgated a new local rule (Rule 7008-1) requiring parties to note whether they consent to entry of final orders or judgments by the bankruptcy court in adversary proceedings. Henry also reported that there is a consideration at the national level to remove all references to core/noncore in the national Bankruptcy Rules.

The question Henry posed is whether the Board of Judges (the "BOJ") should promulgate a NJ local rule pending any clarification of the issue at the national level. Henry recommends that the BOJ should consider this issue in the form of a standing order.

The judges present noted that they have not had to deal with this issue in any practical sense yet. Mike Viscount suggested that parties should be required to consent (or not) to the Bankruptcy Court's jurisdiction to adjudicate these issues in final form. Stacey asked, though, what happens after you indicate you do not consent to the Bankruptcy Court's final jurisdiction. Judge Lyons responded that there is nothing to do at that point unless someone moves before the Court – i.e. to abstain, withdraw the reference, etc.

Judge Lyons agreed with Henry's recommendation that the parties should be compelled to consent or not at the outset of the adversary proceeding. According to Henry, the case law majority view is that if parties consent, then you have effectively waived the right to challenge the constitutionality of the bankruptcy court's jurisdiction.

Chris recommended Henry draft a standing order. Chris recommended that Judge Burns suggest to the BOJ whether a rule on this issue would be required. Henry to forward Judge Burns the SDNY order/rule and Judge Burns will present it to the BOJ.

IV. Local Rules Committee Update – Judge Ferguson reported that the Local Rules Committee is making slow but steady progress.

V. Chapter 11 Subcommittee, Michael Viscount, Chair –

Mike reported that Ellen met with members of the consumer bar on their input to the four issues that were raised at the previous meeting.

Ellen reported that she met with Chris, Martha Hildebrandt, and David Beslow and reviewed the proposed combined individual Chapter 11 plan and disclosure statement. Ellen noted that this team did not identify any issues other than those previously raised by the Chapter 11 subcommittee. As to those issues, the following was agreed to:

1. Yes, there should be anti-modification language added as to claims secured only by a lien on the debtor's primary residence due to the language of Section 1123(b)(5). We propose the following revision to the first paragraph of Section 2.2:

Allowed Secured Claims are Claims secured by property of the Debtor's bankruptcy estate (or that are subject to set off) to the extent allowed as secured Claims under § 506 of the Code. If the value of the collateral or setoffs securing the Creditor's Claim is less than the amount of the Creditor's Allowed Claim, the deficiency will be classified as a general unsecured Claim; provided, however, that the Debtor may not modify a claim secured only by a security interest in real property that is his or her principal residence.

2. There is insufficient precedent to know if Section 503(b)(9) applies other than in the context of business operations. We suspect it does not based on the plain language of the statute. We believe the language in Section 2.1 relating to Section 503(b)(9) is adequate - it gives sufficient

disclosure as to the possibility of these claims existing and the opportunity for the plan proponent to add these claims to the list of administrative claims.

3. We do not believe the Chapter 13 means test is applicable to an individual Chapter 11 and do not believe the Plan/Disclosure statement should provide for mandatory funding of disposable income for 5 years. This is something that creditors can raise if they see fit but debtors' counsel should not be expected to propose this in a typical plan.

4. Question 4 relates to Article 5 - Discharge - which suggests that if the plan is a liquidating plan the plan proponent should include language "describing debtor's post-confirmation engagement in business . . ." We recommend that this paragraph be deleted from the draft plan as Section 1141(d)(3) provides that the Debtor cannot be discharged if the plan is a liquidating plan, the Debtor does not engage in business after confirmation AND the debtor is not entitled to a discharge under Section 727(a). Since the likelihood of those three factors occurring in any given case is very remote, we do not believe it is necessary to include this language in a form plan/disclosure statement.

Mike noted that in the next week or two he will adopt these changes and circulate to the LAC at large for consideration prior to the June meeting.

VI. Status Report on Website Update, Stacy Meisel, Chair –

Stacey reported that the Court's website now has an updated list of members, an updated title for Chief Judge Burns and will soon include a message from Judge Burns to the Bar.

VII. Clerk's Report, Jim Waldron –

Scott had two items to report: (1) congrats to Chris on being chosen as NJ's next bankruptcy judge; and (2) the sequester at the national federal level will fester over time (i.e. a cancer) to impact the Clerk's office. Last year the clerk's office "took its medicine" by letting 17 people go at a cost savings of \$750,000.

Judge Ferguson noted that the Court's office may be closed on certain days even though the judges will be working. No hearings will be held when the Court's office is closed.

VIII. Liaison's Reports

a. District Court, Mike Sirota – No report.

b. U.S. Trustee, Martha Hildebrandt –

Martha reported that the US Trustee already received a furlough notice from Washington, DC. Martha also noted that Chapter 13 trustee training is regional this year – on April 11/12 in

Delaware. There is another national meeting planned, and there will be no Section 341 meetings conducted on those dates.

c. IRS, Wendy D. Gardner –

Wendy suggested that federal tax returns should be filed with evidence of mailing, and that the IRS should be guided by what “insolvency” says.

d. NJ Attorney General, Ramanjit Chawla –

Raman noted that she had nothing significant to report but thanked Al (and the Chapter 13 trustees) for always looking out for the state.

Raman also noted that the POCs she filed on behalf of the state are generally more explanatory than the general POC forms and plans to continue to file them as such unless the judges disagree. Chris agreed that they provide more information and are helpful.

e. NJ State Bar, Jerry Poslusny –

The annual Bench/Bar conference is April 5 – Chris encouraged folks to attend/spread the word.

IX. Old Business – No report

X. New Business –

Mediation – Judge Burns said nothing on mediation has been completed since the last BOJ meeting, but the BOJ will consider it at the next meeting. Judge Lyons noted that the ABI has formed a committee to formulate model rules re: mediation. Therefore, the BOJ is holding off on implementing its own rules pending the ABI rules (the ABI Rules Committee has been working for approximately 6 months on this project). Also, Judge Lyons reported that he joined the Justice Garibaldi Inn of Court which focuses on mediation. The BOJ has also said that a mediation training program for NJ attorneys is under consideration as it relates to the presumptive mediation in adversary proceedings

Brian Nicholas moved to adjourn the meeting; Al seconded the motion. No opposition.

Post-meeting/new business issues – (1) automatic extension of time related to responding to complaint – not necessary because District Court Local Rule already exists and pursuant to Bankruptcy Local Rules, we have to follow the District Court Local Rules. (2) Chris spoke with Mary Ellen Tully about Bench/Bar conference – volunteers for booth: Chris, Henry, Al, Mark, and Brian.

XI. Next Meeting Date – **June 4, 2013 at 6:00 p.m.** (Steakhouse 85, New Brunswick, NJ)