

JUDGE'S CORNER
NOTES FROM THE BENCH

October 30, 2009 Update

1. LOCAL RULE AMENDMENTS

Proposed local rule amendments are on the court website for review and comment. The changes are redlined and were made to coincide with FRBP changes effective December 1, 2009. Please review the changes and email comments to the address listed on the website.

2. DEFICIENCY NOTICES

Effective December 1, 2009, the clerk will no longer send out deficiency notices to members of the bar for failure to file:

- a. schedules
- b. statements of financial affairs
- c. means test
- d. payment advices
- e. chapter 13 plans
- f. electronic declarations
- g. financial management course certificates

The clerk will continue to send deficiencies for certificates of service and numerous other problems including incorrect PDF's, incorrect event selection when filing in CM/ECF.

The clerk will continue to send to *pro se* debtors deficiency notices by United States mail.

3. REAFFIRMATION AGREEMENTS

- a. Effective December 1, 2009, reaffirmation agreements must be accompanied by a new cover sheet prescribed by the Judicial Conference.
- b. The form (official Form B27) is available through links on our website, and on the U.S. Courts website.
- c. If you know of clients who will be filing those on their own at the clerk's office, please remind them so they can get the information they need to file the documents.

4. ENFORCEMENT OF CONFIRMATION DEADLINES

- a. Especially in chapter 13 cases, continued delays are impeding progress of confirmation. Frequent problems include:
 - (i) late filed plans
 - (ii) late filed amended schedules I & J and other documents
 - (iii) items on the trustee's status report incomplete
 - (iv) payments due
 - (v) Debtor Verification of Payments not filed (or filed but show that the debtor has not made mortgage payments).
- b. It is not always fair to penalize debtors for these delays by dismissing or converting their cases, which could be the remedy when a case is not ready despite advance notice, and in some cases repeated continuances to allow counsel time to do the work necessary for confirmation.
- c. To discourage tardiness in having matters ready for confirmation, the trustee will object to counsel's compensation in cases when a plan comes before the court and is not ready for confirmation, **where the delay is attributable to neglect or other fault of debtor's counsel.**
- d. As a last resort, counsel can move to continue the confirmation hearing to obtain more time to finish preparing the case.

5. MOTIONS TO DISMISS FOR INCURRING UNPAID POST-PETITION TAX DEBT

- a. Debtors who fail to withhold enough federal or state income tax or to make estimated tax payments should assume that failure to pay post-petition taxes will lead to the dismissal or conversion of their cases.

6. MOTIONS TO RECONSIDER

- a. In the future the court will not routinely grant motions to reconsider dismissal or conversion or relief from the automatic stay.
- b. FRBP 9023 and 9024 govern reconsideration of matters that have been decided. Please do not file motions unless you have grounds under those rules.

7. DEADLINES FOR AMENDED PLANS ETC.

- a. Under Local Rule 3015-4(3), plans amended before confirmation shall be filed and served no later than six days before the scheduled confirmation hearing, on the chapter 13 trustee and every party entitled to notice as a result of the effect of

the amended plan on its claim, to give the trustee and chambers enough time to review late filings.

- b. The court may continue without notice matters in which amended plans and other documents are filed after the deadline under the Local Rules.

8. CHANGE IN NOTICING OF THE CHAPTER 13 PLANS

- a. BEGINNING SEPTEMBER 1, 2009, debtor's counsel will be required to serve the original Chapter 13 Plan on all creditors when it is filed.
- b. FRBP 3015(d) requires service of the plan or a summary of the plan on all creditors with the notice of the confirmation hearing. However, plans often have not been filed by the date the clerk issues the notice of the confirmation hearing. Therefore, to ensure that creditors receive the plan, debtor's counsel must serve it. We will incorporate that change into the Local Rules.
- c. Remember to file a certificate of service for the plan to avoid receiving a deficiency.
- d. Local Rules already require any amended or modified plan to be served by debtor's counsel on all creditors.

9. CHANGE IN PRO SE REAFFIRMATION AGREEMENT HEARINGS

- a. Due to an increase in the number of reaffirmation agreements being filed, the Court will now hold reaffirmation hearings one Wednesday a month at 11:00 a.m. Orders setting reaffirmation agreements for hearing will be prepared by the court, so debtors do not need to notice them.

10. CHAPTER 13 PLAN, SCHEDULE AND OTHER AMENDMENTS

- a. More matters are appearing on the hearing calendar that have been continued to allow debtor's counsel to amend the plan, schedules or file other documents in the record, in which no amendments have been filed.
- b. In some cases the amendments eventually are filed, but too late for the trustee and the court to review them before the continued hearing date. In other cases, they have not been filed.
- c. Counsel's compensation may be reduced where a further continuance is needed because the debtor has not amended the plan or schedules, or completed other work needed to confirm a plan that was the basis for a previous continuance.

11. MOTIONS TO EXTEND OR CONTINUE THE AUTOMATIC STAY

- a. The court will not expedite a hearing on a motion to continue or extend the stay in a repeat filing when it is not possible to give adequate notice of the hearing to parties in interest.
- b. Specifically, the court will not set expedited hearings on those motions when they are filed later than noon the previous Friday.
- c. The mover must submit a proposed order setting an expedited hearing at the time the motion to expedite is filed.
- d. If the motion and proposed order are received too late in the day for the order to be signed, docketed, and issued to allow proper service, the court will not set an expedited hearing.

12. *EX PARTE* MOTIONS FOR STAY RELIEF

- a. Creditors should review local rule 4001-3 regarding *ex parte* motions for stay relief, especially the provisions dealing with relief after a breach of a consent order.
- b. Specific issues relating to recent *ex parte* motions include:
 - (i) Real Party in Interest
 - (a) Loans are assigned, and companies change names.
 - (b) Especially if the creditor's name differs from the name in the consent order, *ex parte* motions must explain why the mover remains the real party in interest.
 - (c) If the mover differs from the party to the consent order, submit authentic documents demonstrating that the mover is the real party in interest.
 - (ii) Notarization
 - (a) Affidavits in support of the *ex parte* motions must reflect that the oaths were made in the presence of a notary public and must be properly executed.
 - (iii) Relief sought
 - (a) *Ex parte* motions and proposed orders should only provide for relief permitted under the local rules.

- (b) Orders providing for the turn over of collateral or other relief will not be signed, and the mover may be ordered to appear and explain the basis for the relief sought.
- (iv) Email from chambers
 - (a) Instead of simply denying the motions, chambers staff sends email requests to the person who submits a proposed order to try to resolve problems.
 - (b) Lawyers should have their secretaries and paralegals copy them on emails to and from court.

13. ORDER SUBMISSION

- a. Please submit orders **promptly** and **properly**, with the correct email subject line and in the correct format. Detailed instructions for submitting orders are in the Administrative Procedures guide on the court's website.
- b. Missing orders can cause problems, for example, orders concerning claims objections.
 - (i) The Trustee cannot pay claims if the debtor prevails on an objection but does not submit an order.
 - (ii) The trustee may submit a request for appropriate relief if the mover does not submit an order on a matter that affects what she does.
- c. If orders are not received **before** a case is dismissed, they will not be signed. Obtaining any relief once a case has been closed will require a motion to reopen and in some cases, payment of filing fees.
- d. The clerk has been instructed not to keep cases open once they have been dismissed.

14. SOME SPECIFIC PROBLEMS WITH LOCAL RULE COMPLIANCE

- a. Local Rule 9013-4 requires a **separate certificate of service**.
 - (i) A certificate of service should be docketed as a separate document in the CM/ECF system **after the pleading requiring service. The certificate of service must be linked to the pleading that is being served.** That spares the court from having to search through your filings to confirm proper service.
 - (a) Including the certificate on the motion or objection, or on the notice of hearing, is not sufficient.

- (b) A certificate should be filed as a separate docket item.
 - (c) If done correctly, the certificate will have a different pleading number on the docket sheet.
- b. Stay relief after breach of a consent order.
 - (i) Local Rule 4001-3 requires a separate motion, affidavit and copy of the consent order. Consent orders should incorporate those requirements.
 - (i) It is no longer permissible for consent orders to recite that relief will be granted on submission of an affidavit only.
 - (ii) Motions for stay relief for violating a consent order require a separate certificate of service. See Local Rule 9013-4.
- c. Incorrect notices of hearing.
 - (i) Local Rule 9013-1 provides that a notice of hearing must state the deadline for filing objections.
 - (ii) Notices stating that a scheduled hearing will be heard "IF AND ONLY IF" an objection to the motion is filed are inaccurate and impermissible.
- d. Many **modified plans lack a statement of the reasons** for the modification, as Local Rule 3015-4 requires.