

**U.S. Bankruptcy Court for the Middle District of Pennsylvania
Attorney Liaison Committee
September 27, 2012**

Minutes

Attendance:

Bar: Brenda Bishop, Bob Chernicoff, Anne Fiorenza, Steve Gurdin, Jim Jones, Lisa Rynard, Joe Schalk, Jill Spott, Ann Swartz, Tracy Updike, Adam Weaver and Elliott Weiss

Clerk's Office: Terry Miller, Sheila Booth, Sue Frisch, Mike McHugh and Belinda Wagner

Chambers: Judge Mary France, Judge John Thomas, Judge Robert Opel and Lindsay Weber

The meeting was convened at 3:00 pm and concluded at 5:00 pm. Judge France welcomed the members of the Committee and Clerk's Office.

I. Old Business

A. Mortgage Modification Task Force update (Joe Schalk)

Attorney Schalk reported the task force held a conference call to discuss the comments from the July Attorney Liaison Committee meeting. The bar is interested in using this program and there should be plenty of mediators. A proposed local rule is being drafted for the new mortgage modification process which will be modeled after the program used in the US Bankruptcy Court for the Middle District of Florida. Judge Opel requested the proposed local rule be numbered as Rule 9019-3. Attorney Schalk will submit the proposed local rule and comments the task force received from the bar to the Court by October 15, 2012.

Judge Opel inquired if there was a resolution to the concerns raised at the July meeting regarding what happens if the mediation is unsuccessful. Attorney Schalk advised it was discussed and everyone agrees that it should be either a notice or certificate of default process. It will be important for this mechanism to be included in the local rule so that borrowers and lenders know what happens if the mortgage is not modified.

Attorney Spott inquired if the local rule will address what happens if someone has previously participated in a mortgage modification process at the county court level. Can they participate in the Bankruptcy Court program? Attorney Schalk stated the borrower will need to opt into the program and the bank will have the option to oppose it. It is possible the borrower's circumstances may have changed and they would have better success this time around.

Judge France noted that the new mortgage modification process will create a number of administrative issues that will need to be addressed. One example is that something

will need to be sent to the mediators on the Mediation Panel asking them if they would like to participate. Ideally a copy of the proposed local rule should accompany this so that they can make an informed decision. Another administrative issue will be the creation of docket entries in CM/ECF for the mortgage modification process. In preparation for the new local rule, Sue Frisch will check with the US Bankruptcy Court for the Middle District of Florida to see what CM/ECF events they created for their mortgage modification program.

Attorney Weiss stated he has concerns with the language of eligibility used in the FL-M program and requested there be a good deal of flexibility when determining eligibility. Attorney Schalk mentioned the task force decided not to make any changes to this section because the Court cannot reduce the principal value of a house. Judge Opel reminded everyone that before the local rule is adopted it will be put out for public comment. The judges will give all comments consideration and work something out. The judges are appreciative of the efforts the bar has taken to bring this mortgage modification program to fruition.

A question was raised regarding what impact the mortgage modification program will have on the confirmation hearing process. Attorney Schalk stated this was not specifically discussed but if someone is going to pursue this program, it will happen in the first 60 to 90 days of the case. Provided all benchmarks in the program are met, there should be a decision made before or close to the claims bar date. At the first confirmation hearing, an approximate date of a decision can be provided or a request to push the confirmation hearing until after the claims bar date will be made. The confirmation hearing will need to post date a decision on the modification.

Attorney Updike volunteered to send a letter to the mediators when the time was right. The pool of perspective mediators will be those involved in mediating matters in this Court and also other federal courts. Judge Thomas asked if mediators who are associated with the Court or US Trustee would be allowed to participate as mediators? Anne Fiorenza stated she would not be in favor of her staff being mediators because it may give them information that they would not necessarily have access to.

Judge Opel suggested the proposed local rule contain non-disclosure provisions and provisions that a mediator cannot be called to testify, similar to what is in the local rules for general mediation.

B. Results of MDBBA poll of practitioners regarding use of a Mortgage Modification Mediation Program (Tracy Updike)

Attorney Updike reported a poll was circulated to the Middle District Bankruptcy Bar Association. There were 66 respondents of which 77% indicated they would be interested in using the program. Of these respondents, slightly more than half of them indicated they would use it every few months. There is an interest but not an overwhelming interest which would raise concerns of not enough mediators.

II. New Business

- A. **LBR 4001-1 modified the payment history form last year (1/2011) and removed the attorney signature line. Relief from stay motions are still being filed with histories signed by counsel. Should the rule itself be modified to state that a bank signature is required? Also what impact does the multi-state AG Settlement have – the major lenders have agreed to submit certifications of account status on Chapter 13 relief from stay motions. If all lenders adopt this practice, would that moot the need to have the local rule? (Joe Schalk)**

Attorney Schalk stated these are two separate issues that pertain to the same local rule.

The first issue is that a member of the bar recently contacted him regarding LBR 4001-1 and LBF 4001-1. Last year the local form was modified to have the signature line state it was to be signed by the bank and not counsel. However, no changes were made to the corresponding local rule and forms are still being signed by counsel. A discussion was had regarding whether the local rule should be modified to clearly state a bank signature is required. It was agreed that the local rule should be modified. Judge Opel will see that this is added to the proposed amendments to the local rules.

The second issue pertains to the Settlement Agreement entered into by the 49 State Attorneys General, the Federal Government and 5 of the major lenders. Information about this settlement agreement can be found on the website www.nationalmortgagesettlement.com. As part of the settlement agreement, these lenders agreed to a set of national servicing standards of which one pertains to the area of bankruptcy. In this settlement agreement, the lenders agreed to provide an exhaustive amount of information regarding mortgages through a Declaration/Affidavit which is a sworn statement that will be used nationwide. Since LBF 4001-1 is not a sworn statement, some of his clients have inquired if they will need to provide both forms with the Court.

Judge Thomas stated that if the information in the Declaration/Affidavit was more than what was being requested in the local form, then that form would certainly comply with the local rule. Attorney Schalk pointed out that his clients are concerned because the local rule states the local form is to be used.

Judge France suggested possibly modifying the local rule to state the local form is to be used or one that substantially conforms to it.

Judge Opel mentioned he would like some time to think about this matter. If multiple forms were to be used, someone on his staff would need to review the content of the various forms which can be time consuming.

This issue was deferred to the judges who will discuss it further at their quarterly Judges Meeting next week.

B. Should the Model Chapter 13 Plan be revised in light of the amendments to FRBP 3002.1, and to reflect any changes in local practice? (Judge Opel)

Judge Opel inquired if the Model Chapter 13 Plan should be revised in light of the amendments to FRBP 3002.1.

The Committee reviewed the draft of proposed amendments to 2.H of the Model Chapter 13 Plan which was circulated by Attorney Jones. The proposed amendments delete sub-paragraphs (4) and (5) since they are addressed in the Federal Rules. Sub-paragraph (6) was deleted as being duplicative of the Notice of Final Cure and minor clarifications were made to sub-paragraphs (1) and (2).

Attorney Updike expressed concern regarding the elimination of sub-paragraph (6). This section provided information on how payments were applied for principal and escrow. She is not sure the Notice of Final Cure adequately provides for this. Attorney Jones added that the information is available through the Real Estate Protection Act (RESPA). He is also not aware of any requests to the Trustee under sub-paragraph (6) of the Model Plan since it has been in existence.

Judge Opel requested clarification of sub-paragraph (1). He stated he has read the proposed changes to the third sentence several times and each time draws a different conclusion. Attorney Jones explained the purpose of this sub-paragraph is to ensure the mortgage company applies the money received from the trustee appropriately. Attorney Updike would like to see this sub-paragraph remain so there is a mechanism in place for how the money is to be applied.

After discussing the proposed changes, Judge France requested Attorney Jones revise the proposed amendments and resubmit them to the Court for review. Judge Opel added that caution be taken when revising the Model Plan to ensure the information does not conflict with the wording of FRBP 3002.1.

C. Local Rule implementation of the Mortgage Modification Mediation Program. (Judge Opel)

Judge Opel stated the Court is working on drafting some modest amendments to the local rules. Rule 9019-3 has been added as a placeholder for this new program. Provided the amendments are out for comment in a sufficient amount of time, the proposed local rules will be effective January 1, 2013.

As stated earlier in the meeting, Attorney Schalk will submit the proposed local rule for the mortgage modification program and comments the task force received from the bar to the Court by October 15, 2012.

D. Fee applications in Chapter 13. (Judge France)

Judge France requested this topic be listed because recently several issues have come up during confirmation hearings regarding fee applications in Ch. 13 cases. The Ch. 13

Trustee's no look fee policy is being applied in different manners by attorneys. For example, some attorneys use it as a retainer, others it covers all of their services and yet others it only covers select services. The question was posed what is the purpose of having a no look fee if there is not a standard of what it means. Terry Miller stated that some Courts have local rules that define services. Judge France added that a few years ago, the judges tried to establish a rule but could not find a consensus.

The current system is promoting inefficiency. Revised fee applications require revised plans which require noticing. There are complex Ch. 13 cases but it is becoming routine to see fees ranging from \$7,000 to \$9,000. There are jurisdictions larger than us with higher standard of living that are doing it for less. Trustee DeHart is also not happy with how the current system is working.

Anne Fiorenza stated the US Trustee's Office is interested in participating. They are currently looking at this from the client's perspective and how high fees can get when attorney bill by the hour. It is understood that cases may require different demands, but there is a concern whether the clients understand that when they retain their counsel.

Judge France requested a task force of approximately 12 members be established comprising of representatives from the US Trustee, the Ch. 13 Trustee's office and Ch. 13 practitioners. The task force would discuss this issue and review Ch. 13 fees and services. At the conclusion of their review, recommendations would be made as to whether the Court or Trustee should do something to bring more transparency to the process, not necessarily uniformity.

The following Committee members volunteered to participate on this task force: Anne Fiorenza, Steven Gurdin, Jim Jones, Lisa Rynard, Jill Spott and Tracy Updike. (Following the meeting Adam Weaver also volunteered to participate. A request will also be posted on the MDBBA Listserv soliciting other volunteers to participate on this task force.

E. New scheduling procedures and orders in adversary cases. (Judge France)

Judge France announced beginning with cases filed after October 1, 2012 scheduling conferences will be set in her adversary proceedings. The process will be similar to what Judge Fehling of the US Bankruptcy Court for the Eastern District of Pennsylvania is currently doing. A sample of the new "Order Setting Scheduling Conference" and revised "Scheduling Order" were circulated to the Committee prior to this meeting. Input was solicited from the Committee with regards to informing the bar about this change and soliciting comments. A notice regarding this change together with samples of the orders will be posted on the Court's website and also on the MDBBA listservs. The notice will clearly indicate comments are being requested and where they should be sent.

Attorney Chernicoff identified a conflict between the two orders. He pointed out that the scheduling order states that discovery will commence 21 days after the appearance of the first defendant by answer or motion, but that this order is not issued until after the scheduling

conference which is 30 days after the answer or motion is filed by the defendant. Judge France was appreciative of the feedback and will review the two orders.

Attorney Schalk inquired if the parties may appear by phone. Judge France replied that the scheduling conference will be on the record, so parties can appear in person at the Court or by telephone using CourtCall. She will make sure this is noted in the order.

Attorney Updike asked if these would be entered concurrently. Judge France stated they would not. The Order Setting Scheduling Conference will be issued after the appearance of the first defendant by answer or motion. The purpose of the scheduling conference will be to talk about what the timelines will be, what issues exist, what experts are needed and the disclosure of witnesses. The Scheduling Order will be issued immediately after the scheduling conference is held.

Attorney Weiss inquired if parties could forego the scheduling conference and submit an agreed proposed scheduling order. Judge France replied that she may move toward that but initially would like to be involved in the process.

Judge Thomas solicited input from the attendees on the filing trends of adversary proceedings in the Middle District. Historically the southern division has more bankruptcy cases filed than the northern division; however, the northern division has more adversary proceedings filed than the southern division. He is curious if there is something the southern division is doing to allow things to be handled without the necessity of a complaint that the northern division should adopt.

Judge France mentioned that at one time the manner in which lien avoidances were handled varied between the divisions. She also recalled that years ago, the Trustees in the northern division often filed more adversary proceedings than those in the southern division.

Judge Thomas once again requested anyone who figures it out to let him know. The increase is not one specific type of adversary proceeding, just more adversary proceedings than the southern tier which is peculiar since the northern division has fewer Ch. 11's than the southern division.

F. Providing copies of Payment Advices directly to the Trustee. (Judge Opel)

Judge Opel advised that some courts have excused debtors from electronically filing payment advices with the court. These courts have a local rule that states payment advices are to be provided directly to the trustee. The Committee was asked if anyone had an issue with this Court implementing a local rule like this. Would it be a burden on the trustee to receive payment advices directly?

Attorney Jones stated that the Clerk dismisses a case if the payment advices are not filed within 45 days. If they are not filed with the Court, how would the Clerk know if they were submitted? Judge Thomas stated that if the local rule goes into effect then the Clerk would not be authorized to dismiss a case for failure to submit them like is done now.

Attorney Spott stated this would not be an issue for the Trustee as some are already being submitted this way to the Trustee.

Anne Fiorenza mentioned that this would create an issue for the US Trustee's office. In addition to the Trustee, the US Trustee also reviews the payment advices for 707(b) analysis. If they were all submitted directly to the US Trustee, she is not sure their computer system could handle it. She would like to check with other jurisdictions and see how they handle them.

Judge France added that a number of courts have adopted this procedure because of confidential information on the payment advices is not always being redacted. Terry Miller added that FL-M has a local rule that requires payment advices be sent directly to the Trustee and not be filed with the Court.

Judge Opel thanked the attendees for their input. His recommendation is that the judges not implement this local rule if the current process is working.

Sue Frisch added that if there becomes an issue in our Court where payment advices are being e-filed with confidential information, it is possible for the CM/ECF system to automatically restrict the viewing access of the PDF associated with the Payment Advices to only Court and other specific groups (*i.e.*, Trustee, US Trustee). If the situation arises where a case participant also needed access, viewing access could also be granted to that e-filer without having the PDF become viewable to the general public. The judges stated they may consider having this change made instead of a local rule.

G. Next meeting date

The next meeting is scheduled for December 13, 2012 at 3 pm.