

U.S. Bankruptcy Court for the Middle District of Pennsylvania
Attorney Advisory Committee
May 16, 2024, at 1:00 PM

Attendance: Judge Van Eck; Judge Conway; Terry Miller; Seth Eisenberg; Troy Sellars; Jack Zaharopoulos; Mario Hanyon; Gary Imblum; Kara Gendron; David Harris; Bob Chernicoff; Jill Manuel-Coughlin; Bob Kidwell; Lisa Doran; Jim Jones; Jill Durkin; Leigh Nazzario; Karen Muroski; Rick Thompson

OLD BUSINESS:

1. Discussion Regarding how to Better Utilize Technology to Serve the Bar (Judge Van Eck)
 - Judge Van Eck: We left this on the agenda from last month to see if anyone has any ideas. Is anyone using or has anyone tried AI for their practice?
 - Jack Zaharopoulos: Our office does not use AI, but there will be a session on it at the MDBBA conference in June.
 - Judge Van Eck: Is anyone familiar with Westlaw or Lexis AI?
 - Leigh Nazzario: We used ChatGPT in our legal writing class. There were some issues with the software.
 - Judge Van Eck: I have experimented with AI and noted that it can be quirky.
 - Troy Sellars: There are UST policies that restrict AI use.
 - Kara Gendron: Texas has local rules implemented regarding AI use. In some instances there, AI came up with fake case cites.
 - Troy Sellars: There is a place for it since it can generate useful statistics. But the UST has severe limits on using it for drafting.
 - Rick Thompson: We are working on a new 341 notice with a new link setup, but we are more limited in terms of our ability to put a direct link on the notice. The new notice would direct people to the Court's website, and from there, it would only be one more click to the 341. We are working on a QR code to make the process more efficient.
 - Troy Sellars: If there is interest, you can also bookmark the page to make access to 341 meetings a one-button click.

NEW BUSINESS:

1. Discussion Regarding New NTFP Procedures (Seth Eisenberg)
 - Seth Eisenberg: NTFP stands for notice to filing party. These are issued if some action taken does not comply with the Court's filing procedures. The new process will be to issue a NTFP; then a text order; then deny whatever relief is being requested if there is no compliance.

- Terry Miller: How is the new process different from the old process?
- Seth Eisenberg: We have added an extra layer of warning such that there is more opportunity for compliance. We have also standardized the NTFP. Before, some NTFPs were different than others. However, under the new process, if the attorney fails to file a certificate of service, they do not get same number of tries. The new process will be an initial NTFP with a 7-day warning period; then a text order setting a 3-day warning period; then the matter will be referred to chambers to decide how to handle the issue. This may sometimes result in denial of the requested relief.
- Bob Chernicoff: The Clerk's office maybe has an outdated list of procedures for noticing; specifically with respect to active versus passive notices, etc.
- Seth Eisenberg: Each event should be updated, but unsure of whether the master list is. We will review. If you are repeatedly having issues or conflicts with the procedures versus NTFPs, please reach out.
- Terry Miller: Is the new order a text order?
- Seth Eisenberg: Yes, the new order is text order. There is no clickable docket entry for text orders, sort of like a proceeding memo.
- Judge Van Eck: The thought process behind the new procedure is that most people fix the mistakes once they are brought to the attention of the attorney. However, for those who do not comply, we need a clean-up mechanism for the docket. Otherwise, matters can linger in perpetuity. We expect that the vast majority of people will comply with the first NTFP, as is currently the case.

2. Discussion Regarding the Presumptively Reasonable Fee in the Middle District (Kara Gendron)

- Kara Gendron: Across the nation, it appears that courts are revisiting rates for flat fees/presumptively reasonable fees. California and a state in the midwest just increased their rates. However, the fee in the Middle District doesn't appear to match inflation. We have noticed that profit margins are lower on debtor cases. Postage, paper, and other costs have increased, but the flat fee has remained the same. We may also want to revisit whether plan modifications should be increased. The UST used to set the fees, but Local Rules are now the standard for modification instead.
- Judge Van Eck: We agree that things are costing more. Is there a proposal/number in mind?
- Jack Zaharopoulos: Some states have recently increased their rates: Idaho presumptively reasonable fee increased from \$4,000 to \$5,500. Wisconsin went from \$4,500 to \$5,500. Western District of Tennessee went from \$3,800 to \$4,750. There is a national association of 13 trustees that plan to update their database on the presumptively reasonable fees nationwide this summer. I am trying to be on the committee to see what these fees are nationwide.
- Kara Gendron: It has been 4 years for the current PRF rate. Historically, it has been raised by \$500. As such, the proposed increase would be \$4,500 to \$5,000 for nonbusiness cases. Business cases would increase from \$5,500 to \$6,000. Maybe we would like to revisit this issue every 3 years or so?
- Judge Van Eck: Does anyone have a different idea of what the increase should be?

- Jill Durkin: I would like to reinforce that the MDBBA board has heard the request and supports it. It was also discussed to increase the modification rate from \$500 to \$600.
 - Judge Conway: The presumptively reasonable fee should probably increase periodically due to inflation. \$500 appears reasonable.
 - Judge Van Eck: How many people knew these figures before the meeting today?
 - Jill Durkin: This number was discussed during the most recent MDBBA meeting.
 - Terry Miller: Is there some kind of database for the PRF nationwide?
 - Seth Eisenberg: The Middle District of PA is largely in the middle of the pack. Some reports on the PRF nationwide are helpful, but with significant caveats since they are not a 1:1 comparison
 - Kara Gendron: Using the history within our district is probably a better metric. The PRF can be subject to reconsideration if attorneys are not performing appropriately.
 - Jill Durkin: \$500 is not a lot compared to rising inflation. The MDBBA board is concerned that attorneys may leave the district if the fee is not increased. Attorneys may also not be doing 100% if the rate doesn't increase.
 - Kara Gendron: There is no attraction for new attorneys if the fees don't keep pace with other practice areas.
 - Judge Van Eck: What is the process to get the increase in the works?
 - Seth Eisenberg: The MDBBA can submit a proposal. Judges can approve that proposal and then the local rules can be amended.
 - Jim Jones: I can run this through the rules committee.
 - Seth Eisenberg: There will need to be a public notice period.
 - Judge Van Eck: This will be a special provision, so there is no need to wait until fall for the proposal. We want to make sure all interests are being represented.
 - Troy Sellars: UST takes no position on the PRF. However, we would note the lack of young practitioners in the bankruptcy space. Law school graduates are coming out with significant debt. We need to make sure the practice here is lucrative enough for them if we want new attorneys.
3. Discussion Regarding Proposed Changes to the Chapter 13 Model Plan (Jack Zaharopoulos)
- Jack Zaharopoulos: Legal fees operate within marketplace, but bankruptcy involves the judicial review of fees when attorneys file fee apps instead of taking the flat fee. Fees are usually paid before all other claims. With the proposed amendment, we are seeking some sort of guidelines for attorneys fees. In other districts, fees are paid pro rata with secured claims until those claims are paid in full. This was prompted by a 2018 case in which the attorney was on their 9th fee app requesting \$6,000 in fees where \$32,000 had already been paid to the attorney; other creditors had been minimally paid. To prevent this scenario in the future, we are proposing the amendment to the Chapter 13 model plan. The PRF would be paid first. Anything over and above this amount would be paid after priority and secured creditors.
 - Troy Sellars: We also want to ensure that fees are paid exclusively during the life of the plan.

- Jack Zaharopoulos: Fee apps sometimes indicate that debtors can pay outside of the plan. This proposed amendment limits payment of fees to the plan term to allow a fresh start for debtors.
- Judge Van Eck: Was the proposed amendment circulated?
- Jack Zaharopoulos: This was not circulated beyond the agenda for this meeting yet.
- Judge Van Eck: Does this account for special circumstances? The local rules state that all fees are to be paid through the plan except in special circumstances.
- Jack Zaharopoulos: The amendment says that fees are to be paid through the plan “unless otherwise ordered.”
- Judge Van Eck: There may be issues with § 1327. Under this section, the plan would likely control instead of a subsequent order approving fees. The court appreciates the proposal. Does anyone have thoughts?
- Kara Gendron: The amendment is in direct conflict with § 1326(b)(1), et al. Attorneys fees must be paid before or at the same time as other creditors. This priority is set by the code. Perhaps we are pursuing a few attorneys in lieu of taking a more targeted approach. We should allow secured creditors or the court to review attorneys fees on a case by case basis. We can’t de-prioritize attorneys fees.
- Jack Zaharopoulos: Section 1322(b)(4) allows this scheme. That’s how other districts are doing this.
- Troy Sellars: Other districts are offering pro rata distributions of attorneys fees with secured creditors.
- Kara Gendron: Some cases get dismissed before the fee gets paid in full. This amendment makes it even less likely to get fees paid.
- Troy Sellars: The PRF gets paid first.
- Kara Gendron: If there are any modifications to the plan, then there is no incentive to do more work on the case. We couldn’t afford to practice.
- Troy Sellars: There are a significant number of cases where, four years into the case, debtors haven’t paid anything to their mortgage arrears, but the attorneys have been paid lots of money.
- Kara Gendron: But whose responsibility is that? The debtor’s attorney did the work.
- Judge Van Eck: The UST, Chapter 13 Trustee and the court are obligated to review fee apps. Other districts doing things like this makes it not unique to us. The Court in this district has attempted to make progress in this space by the fee app review process. From the Court’s perspective, the problem has been minimized. At the beginning of the process, these problem were more prevalent. However, it is important to note that the review process takes a little time to implement because cases can last up to 5 years, and some longer due to COVID extensions. We’re getting there.
- Kara Gendron: Would the “PRF,” as defined in the amendment, include fees for modified plans?
- Jack Zaharopoulos: The original intent was not to include any amounts for modified plans in the PRF in the proposed plan amendment. We are trying to ensure that payments to attorneys are reasonable.
- Judge Van Eck: Is the problem widespread enough to justify making this change to the plan?

- Judge Conway: I am still working on understanding the proposed amendments. I have seen cases where attorneys are more concerned with their fees than helping their client. We have seen the cases where there are \$20,000-30,000 in legal fees, but nothing has been paid toward the debtor's mortgage. We are trying to prevent these sorts of scenarios.
- Judge Van Eck: This broad of a proposal is perhaps creating more problems than are being resolved.
- Troy Sellars: The amendments wouldn't affect the vast majority of the bar who take the PRF.
- Kara Gendron: Why should attorneys be limited to the PRF when they might have more complex cases? There are hearings on every fee app. If the UST or the court are seeing attorneys fees that are unreasonable, then they should be addressed on case by case basis with the specific offending attorneys. These amendments will likely have a broader impact on fees.
- Bob Chernicoff: In Chapter 11 cases, you must be mindful of what you're doing in the case. This involves a consideration of what the client can afford to pay. Sometimes it's just easier to cut the fees.
- Kara Gendron: Most attorneys are mindful of their fees' impact on a case.
- Troy Sellars: Lots of times, if a case fails, it does so in the fourth year when the attorneys are the only ones who have gotten paid and it is too late to fix anything.
- Judge Van Eck: Section 510 of code deals with equitable subordination. I would like to reemphasize Bob's point, which is administrative insolvency. The Court's concern is jeopardizing the debtor's goals. Wage attachments put debtors in a particularly vulnerable position compared to their attorneys. Attorneys have the power to perpetuate cases that are otherwise potentially administratively insolvent. In addition, creditors have a right to expect that they will be made whole during the term of the plan and that attorneys won't prevent this with their fees.
- Kara Gendron: If cases get dismissed, our fees are already risk of not getting paid. These amendments exacerbate that risk.
- Bob Chernicoff: If there is risk for anything above the PRF, some attorneys may just let the case get dismissed.
- Judge Van Eck: So there would be an incentive to refile a new case rather than help existing cases.
- Lisa Doran: Do fees come in and blow up the plan midway through? Or do we not want to pay attorneys first?
- Jack Zaharopoulos: We want to pay attorneys, but a reasonable amount.
- Lisa Doran: If fees are not unreasonable, then it seems like we're just trying to pay attorneys last.
- Bob Chernicoff: If fees are causing a plan to fail, the court won't allow them.
- Troy Sellars: What we're seeing is that fees accrue, get approved by the court, and then the attorney files a modified plan. This happens incrementally, but then suddenly, the debtor can't pay anyone other than their attorney anything.
- Jim Jones: If the debtor can't afford the fees, then the fee app shouldn't be approved.
- Judge Van Eck: The level of pushback here may require more discussion. The proposed modification should go to rules committee.

- Jim Jones: Could the bench indicate its thoughts here so that the rules committee doesn't invest hours of work just to have no interest later?
- Judge Van Eck: We are effectively asking the debtor's bar to subordinate their claims to others when the code provides otherwise. But based on the discussion here and the strongly-held views on either side, it would be appropriate to send this to the committee and allow them to present it.
- Judge Conway: I am in charge of the rules committee. It may be time to call a meeting within the next few weeks to flesh out these issues.
- Judge Van Eck: We would be seeking wide input from the bar and rules committee. We will leave this topic on for the next meeting in August.

4. Discussion Regarding Nonstandard Provisions in Chapter 13 Plans (Jim Jones)

- Jim Jones: Nonstandard provisions in Chapter 13 plans seems to be a hot topic. Can we get some guidelines from the court as to what nonstandard provisions are appropriate so we don't have to evaluate the provisions in each and every case?
- Judge Conway: We have stated our position on the record many times. Many attorneys accumulated nonstandard provisions that weren't case specific and appeared in every case. Provisions should be case-specific, and serve to enhance the plan and its terms. If the provision reiterates the code or the rules, it is inappropriate. Provisions should be unique to the case.
- Bob Chernicoff: We don't do much 13 work, but we always include a provision stating that the debtor can sell property. Judge France issued a decision that if this provision was not in the plan, the debtor can't sell any assets.
- Judge Conway: We may dislike that provision.
- Jack Zaharopoulos: Both judge's instructions have been clear. Provisions should be non-boilerplate and specific to the plan. If the provision simply states that it is a 100% plan, there will be no issues. Since provisions were piling up, some provisions could easily be snuck into plans.
- Judge Van Eck: Some provisions are more of a concern than others. The Court has provided lots of clarity and intends to provide as much clarity as possible.
- Gary Imblum: If a nonstandard provision has been approved, could the bar somehow be informed of that? I have removed nonstandard provisions because I am not interested in holding up the plan with section 9 things.
- Judge Van Eck: Could Doug or Aggie keep tabs on section 9 provisions that are acceptable?
- Jack Zaharopoulos agrees
- Judge Van Eck: "This is a 100% plan" is the Court's favorite provision. It is helpful and case-specific.
- Jack Zaharopoulos: We are also aware that the Court has allowed a provision stating that objections to claims can be filed post-confirmation.
- Judge Van Eck: I am aware of the 11th Circuit decision regarding objections to claims post-confirmation. If the provision is necessary to protect the client's interest, we will allow attorneys to keep it in. If the rules committee is meeting, you may want to consider

a proposal to amend the model plan to add in some of these “boilerplate” provisions. The plan amendment process would be an option for popular section 9 provisions.

- Jill Manuel-Coughlin: I agree with the model plan amendment process. The Middle District is the only place where section 9 provisions are so popular.
- Judge Conway: As a default, we expect to see nothing in section 9. Attorneys should be prepared to address why a provision is in Section 9 at the confirmation hearing.
- Judge Van Eck: There should be nothing in Section 9 unless the attorney is confident that the Court won’t take issue with it.
- Bob Chernicoff: What about add-ons to the treatment of secured creditors?
- Judges Van Eck and Conway: Those provisions would be case-specific and likely approved.

FUTURE MEETING DATE:

Thursday, August 22, 2024 at 1:00 PM

