

**A YEAR IN REFLECTION:  
PRACTICE TIPS FOR CONSUMER BANKRUPTCY PRACTICE AND  
PROCEDURE IN THE UTICA DIVISION OF THE U.S. BANKRUPTCY  
COURT FOR THE NORTHERN DISTRICT OF NEW YORK**

**MAY 27, 2010**

*Presented by:*

**THE HONORABLE DIANE DAVIS, U.S. BANKRUPTCY JUDGE  
KIM F. LEFEBVRE, ESQ., CLERK OF COURT  
GUY A. VAN BAALEN, ESQ., ASSISTANT U.S. TRUSTEE  
MARK W. SWIMELAR, ESQ., STANDING CHAPTER 12 AND 13 TRUSTEE**

*Sponsored by:*

**THE CENTRAL NEW YORK BANKRUPTCY BAR ASSOCIATION**

**I. Service Timeframes**

A. Motions/Answering Papers/Opposition

1. Effective 12/1/09, time limitations have changed to increments of 7 days. Please refer to Fed. R. Bankr. P. 2002 for the specific number of days.
2. LBR 9013-1(f) and LBR 9013-4(a). Answering papers and opposition to a motion must be **received at least 7 calendar days** prior to the scheduled hearing date.
3. LBR 9013-1(e). Answering papers/opposition must be filed **no later than 4 p.m. on the final day**.
4. Timeframes for summary judgment motions have been substantially enlarged. *See* Fed. R. Civ. P. 56(c).

B. Calculation of Time

1. Fed. R. Bankr. P. 9006(a). The day of service or mailing **is excluded** when computing the notice period.

## II. Service of Process

### A. Service Upon an Individual

1. Rule 7004(b)(1) provides for service upon an individual other than an infant or incompetent by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

### B. Service Upon a Domestic or Foreign Corporation or Upon a Partnership or Other Unincorporated Association

1. Rule 7004(b)(3) provides for service upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint **to the attention of** an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

### C. Service Upon the United States, any Officers or Agency of the United States

1. Rule 7004(b)(4) provides for service upon the United States by mailing a copy of the summons and complaint **addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought** **and** by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency.
2. Rule 7004(b)(5) provides for service upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision **and** also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule.

### D. Service Upon a State or Municipal Corporation or Other Governmental Organization Thereof Subject to Suit

1. Rule 7004(b)(6) provides for service upon a state or municipal corporation or other governmental organization thereof subject to suit by mailing a copy of the summons and complaint **to the person or office upon whom process is prescribed to be served by the law of the state in which service is made** when an action is brought against such a defendant in the courts of general jurisdiction of that state, **or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.**

E. Service Upon the Debtor

1. Rule 7004(b)(9) provides for service upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint **to the debtor at the address shown in the petition** or to such other address as the debtor may designate in a filed writing.

F. Service Upon the United States Trustee

1. Rule 7004(b)(10) provides for service upon the United States Trustee, when the United States Trustee is the trustee in the case and service is made upon the United States Trustee solely as trustee, by mailing a copy of the summons and complaint **to an office of the United States Trustee or another place designated by the United States Trustee in the district where the case under the Code is pending.**

G. Service Upon An Insured Depository Institution.

1. Service upon an insured depository institution is governed by Rule 7004(h) (as opposed to Rule 7004(b)). Rule 7004(h) provides that service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by **certified mail addressed to an officer of the institution** unless—
  - (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
  - (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
  - (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

H. Practice Tip

1. Rule 7004 service is **in addition to** serving an individual designated on a proof of claim with an objection to claim, serving a “responsible person” under 11 U.S.C. § 342, and serving the attorney of record who has filed a Notice of Appearance.

I. *Pond* Motions - 11 U.S.C. § 506(d)

1. Adversary Proceeding versus Motion. This Court follows the majority view that the validity, priority, or extent of the lien are not implicated when a debtor seeks to declare a lien unsecured on the basis that there is insufficient equity in the collateral to cover any portion of the lien. Issues regarding

enforceability (i.e., the existence or legitimacy of the lien itself), superiority in rank or position, and identification of the property encompassed by or subject to the lien, rather than the extent to which the claims of the mortgagee are secured, require commencement of an adversary proceeding. *In re Robert*, 313 B.R. 545, 549-50 (Bankr. N.D.N.Y. 2004).

- J. Discharge of Student Loans in Chapter 13 Cases – 11 U.S.C. §§ 523(a)(8) and 1328(a)(2), and Discharge of Liens Generally
1. Notwithstanding the Supreme Court’s recent ruling in *United Student Aid Funds, Inc. v. Espinosa*, No. 08-1134 (U.S. Mar. 23, 2010), the Court will not knowingly confirm a plan which language includes discharge of debts. Since plans are not served in accordance with Fed. R. Bankr. P. 7004 and 11 U.S.C. §§ 342 and 521, the Court is not convinced that language in a plan satisfies traditional notions of due process. Therefore, motions seeking to, *inter alia*, *Pond* second mortgages, avoid liens as impairing the homestead exemption, discharge student loans, etc. **must be brought by separate motion/adversary proceeding** at the appropriate time during the case.
  2. In addition, the Trustee should not be administratively burdened with having to review each and every plan to ensure that such relief is not embedded in a language of a proposed plan.

### III. Orders to Show Cause (“OSC”) and Orders on Shortened Notice (“OSN”)

#### A. LBR 9013-5(d) & (e)

1. Please note that prior approval from Chambers is required before proceeding with the submission of an OSC or an OSN.
2. Submission of an OSC:
  - (1) electronically file the underlying affidavit; and
  - (2) submit the proposed OSC in either Word or WordPerfect format by email to the Judicial Assistant. In the proposed OSC, it will be necessary to specify the proposed manner of service. Please **do not file the proposed order** on the docket.
3. Submission of an OSN:
  - (1) electronically file the underlying motion; and
  - (2) electronically file the application for an OSN and link it to the motion; and

- (3) submit the proposed order to shorten notice in either Word or WordPerfect format by email to the Judicial Assistant. In the proposed order shortening time, it will be necessary to specify the proposed manner of service. Please **do not file the proposed order** on the docket.

B. Temporary Restraining Order (“TRO”)

1. As incorporated by Fed. R. Bankr. P. 7065, Fed. R. Civ. P. 65(b)(2) shall be strictly adhered to in any case in which a TRO is sought.
2. **Prior Notice.** Unless the purpose of an OSC would be defeated by prior notice, any party seeking an OSC which contains temporary restraining relief shall give an opposing party or, if known, counsel for an opposing party, **at least 24 hours** prior notice, if possible, of the presentation of the application and order and shall notify an opposing party, via counsel, if known, of the date and time of the proposed presentment of said OSC to the Court.

**IV. General Rules – Motions**

A. Captions

1. LBR 9013-1(b). In addition to being placed within the body of the Notice of Hearing, information regarding the hearing date, time, and location also must appear on the first page of the motion papers.

B. Grounds for Relief

1. LBR 9013-1(i). A request for relief **must contain the rule, statutory basis, or basis in law** upon which it is predicated, again within the body of both the Notice of Motion and Motion.

**V. Compliance with Scheduling Orders**

A. Adjournments and Amendments

1. Require a showing of “good cause” and will be granted only in exceptional circumstances.
2. Please note that the dates set forth in the Scheduling Order can be changed, if the request is made within 15 days from the date of the Scheduling Order. Parties may request a Status Conference within that time period, via written request on notice to the other party, regarding the terms of the Scheduling Order.

## B. Submission of Exhibits

1. Must occur by the date provided in the Scheduling Order. Each party must provide the Court with (1) **an original and 2 hard copies of the exhibit binders** marked with tabs it intends to offer into evidence at the evidentiary hearing or trial and (2) a list of the exhibits that can be stipulated into evidence or that will be offered without objection as to foundation.
2. The chambers' copy must be marked in accordance with LBR 9070-1(b).
3. Parties should also endeavor, to the extent possible, to submit a stipulation of facts by the date set forth in the Scheduling Order.

## C. Notice of Settlement

1. The movant/plaintiff should promptly advise Chambers of the same, via telephone, as soon as a settlement is reached. The parties will need to file a fully executed settlement document, to be so ordered, **no later than 4 p.m.** on the day **before** the actual trial date. (Consider this another deadline.)

## D. Non-Compliance

1. Please note: Resolution of a dispute either on the merits or by way of settlement is always preferred.
2. Fed. R. Bankr. P. 7016, which incorporates Fed. R. Civ. P. 16, is applicable in all adversary proceedings. The Court's standard form Scheduling Order provides notice of the Rule's applicability to contested matters. Rule 16(f) empowers the Court to sanction parties for failing to obey a scheduling or pretrial order and authorizes application of the discovery sanctions provided in Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii). "Sanctions under this Rule are designed 'to punish lawyers and parties for conduct which unreasonably delays or otherwise interferes with the expeditious management of trial preparation.'" *Textron Fin. Corp. v. RV Having Fun Yet, Inc.*, 2010 U.S. Dist. LEXIS 25917, at \*12 (M.D. Fla. Mar. 19, 2010) (citing *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985)). Sanctions are viewed by the Court as a last resort. In an effort to provide all parties evenhanded access to the Court's calendar, adherence to dates, absent "unusual circumstances," is expected.
3. Fed. R. Bankr. P. 7041, which incorporates Fed. R. Civ. P. 41, is applicable in all adversary proceedings. Rule 41(b) empowers the Court to dismiss an action or claim upon the defendant's motion if the plaintiff fails to prosecute or comply with a court order. Again, absent unusual circumstances, parties are expected to adhere to the timeframes provided in a Scheduling Order.

4. If your own compliance with the Scheduling Order is jeopardized or impossible due to the other party's noncompliance, the Court encourages you to bring the appropriate application in a timely fashion.

## **VI. Contested Matters on Reserve**

- A. For contested matters that are placed on the Court's reserve decisions list, such as objections to confirmation, parties should endeavor, to the extent possible, to file a stipulation of facts and a **written statement of the issue presented**. The Court may from time to time direct the same before placing the matter under submission.

## **VII. Calendaring – Chapter 11 Motion Term**

- A. **Effective July 1, 2010**, all Chapter 11 motions in the Utica Division, whether on the Utica calendar, Utica Court Call calendar, or Binghamton calendar, will be heard at a Chapter 11 motion term to be held once a month in Utica, New York. Personal appearances will be required.

## **VIII. Chapter 13 Attorneys' Fees**

### A. Flat Fee

1. AO 09-07, effective for all Chapter 13 cases filed in the Utica Division on or after September 1, 2009, establishes a "flat fee" that is the lesser of \$3,700.00, to be adjusted at regular 3-year intervals, or 50% of the amount to be funded through the debtor's Chapter 13 plan. The flat fee includes all services enumerated within the *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys* form ("RR Form"), with the exception of adversary proceedings, attached to the Albany Division AO 08-01. The 2016(b) Statement and the RR Form must be filed contemporaneously with the debtor's petition.

### B. Hourly Fee

1. Attorneys may elect the hourly fee option at the outset of the case, which will require the submission of a fee application and contemporaneous time records with all subsequent motions for relief sought. The Court will review hourly fee requests on a case-by-case basis and in accordance with 11 U.S.C. §§ 329(b) and 330.

C. Disclosure

1. 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b). The debtor's counsel is obligated to file a statement disclosing the amount of compensation paid or to be paid for services rendered by such attorney in contemplation of or in connection with the debtor's bankruptcy case.

**IX. Reopening Chapter 7 Cases to File Post-Petition Credit Counseling Certificate – 11 U.S.C. § 350(b)**

- A. A motion to reopen Chapter 7 cases to file the post-petition credit counseling certificate required for issuance of a discharge must be filed within a reasonable time period after the case was closed without discharge. If the debtor did not complete the credit counseling course until after the case was closed, the motion papers should include an affidavit of the debtor stating a reasonable basis for the delay.
- B. A motion may require that the dismissal be vacated in addition to the case being reopened. Refer to the individual case docket.

**X. Automatic Stay and Discharge Injunction Violations – 11 U.S.C. §§ 362(k)(1) and 524(a)(2)**

A. Reasonableness Standard

1. As a general rule, a single post-filing or post-discharge collection letter or communication from a creditor will not be found to be compensable. Since petitions and plans are not served pursuant to Fed. R. Bankr. P. 7004 and 11 U.S.C. §§ 342 and 541, the creditor may not have received immediate notice of the filing in time to suppress all letters or communications to the debtor. The Court expects a modicum of professional courtesy under these circumstances despite the technical violation.

B. Debtor's Affidavit

1. The Court requires an affidavit from the debtor in all cases.

**XI. Reaffirmation Agreements – 11 U.S.C. § 524(c)**

A. Certification by Debtor's Attorney

1. If the debtor is represented by counsel and counsel signs Part C attesting that he or she has reviewed the reaffirmation agreement, the Court will accept counsel's signature as a representation that the agreement does not impose an undue hardship on the debtor or a dependent of the debtor. In such cases, the Court will not schedule a hearing.

## B. Timeliness

1. 11 U.S.C. § 524(c)(1) requires that the reaffirmation agreement be **executed** by the parties **prior to issuance of discharge**, i.e., the agreement must be dated by all parties to the agreement such that the document evidences that the agreement was entered into pre-discharge.
2. Fed. R. Bankr. P. 4008(a) requires that the reaffirmation agreement be filed no later than 60 days after the first date set for the § 341 meeting of creditors.

## C. Forms

1. The Clerk's Office posted new forms, effective April 1, 2010, on the Court's Web site.
2. Parties who wish to use a separate stand alone reaffirmation agreement may continue to use the January 2007 version in order to satisfy the disclosure requirements set forth in 11 U.S.C. § 524(k)(3)(J)(i).

## **XII. Motions to Incur New Debt/Approve Loan Modification – Homeowners Affordable Modification Program (“HAMP”)**

- A. Goal: To reduce the homeowner's monthly payment to 31% of the homeowner's gross income. Criticism: HAMP has not in fact helped homeowners avoid bankruptcy in part because mortgage lenders and servicers are inundated with HAMP applications and unable to process the requests in a timely manner, homeowners failed to submit required documentation, or servicers lost documentation in the process.
- B. Given the highly publicized problems with the administration of HAMP, the options available to a homeowner debtor are to either (1) follow the traditional route of curing arrears and continue to make payments through a Chapter 13 plan, or (2) pursue a HAMP modification and a Chapter 13 plan dependent upon the same.
- C. If the latter course is chosen, considerations for Chapter 13 counsel include, but are not limited to (1) whether the debtor can cure arrears if his or her permanent modification is denied, and (2) whether the debtor will have to pay HAMP savings to unsecured creditors as additional disposable income if he or she is successful in obtaining a permanent modification reducing monthly mortgage payments when the Chapter 13 plan provides for less than a 100% distribution.
- D. If the debtor's Chapter 13 plan has already been confirmed and the debtor is successful in obtaining a permanent reduction under HAMP, the debtor will need to move for plan modification. Prior to approving a plan modification, the Court would look for a final agreement or written approval from the lender or servicer,

confirmation of future mortgage payments, amended schedules, if applicable, etc. (the same information the Court requires for a sale under LR 6004).

- E. Under HAMP, a signed modification will not become permanent until and unless the debtor makes 3 consecutive monthly trial payments. Assuming that the debtor's Chapter 13 plan cannot be confirmed until the modification is finalized, the confirmation process could take several months. As a practical matter, Chapter 13 debtors who face delayed confirmation must remain current on their monthly plan payments.
- F. **Important Practice Tip:** The trial period agreement should be based on verification of actual income and a Net Present Value ("NPV") determination by the lender or servicer. In general, NPV is the risk assessment tool that the lender or servicer uses to determine whether to modify or foreclose. The Treasury has provided standardized guidance and a base NPV model that participating lenders and servicers can—but are not required to—use. Larger servicers have discretion to use a proprietary NPV model, and consumer advocates have criticized this customization, indicating that different NPV models result in varied modification decisions even when borrowers' circumstances appear to be similar. The HAMP modification is much more likely to be approved on a permanent basis if the lender or servicer has taken these verification steps **prior to** the trial period.

### **XIII. Valuation Issues – 11 U.S.C. §§ 362(d)(1), (d)(2)(A), 506(b), (d), and 522(f)(2)(A)**

- A. Parties must submit adequate evidence of value in support of requests for adequate protection, stay relief, recovery of attorneys' fees, *Pond* motions, and avoidance of a judicial lien impairing the debtor's exemption.
- B. The debtor's Schedule A value is **not** conclusive without other evidence, including a broker price opinion, Value4Point Report, or appraisal based on property inspection, full market tax assessment, etc. Evidence of value should, as a matter of course, be obtained immediately prior to commencement of the debtor's bankruptcy case.

### **XIV. Settlement of Adversary Proceedings Objecting to Discharge Pursuant to 11 U.S.C. § 727**

- A. LBR 7090-1. An adversary proceeding objecting to discharge may not be settled, discontinued, or withdrawn except upon court approval and on notice to the UST, case trustee, and **all** creditors.
- B. A settlement of claims brought under 11 U.S.C. § 727 must identify a benefit to **all** creditors of the estate.

**XV. Chapter 12 and 13 Modifications**

- A. LBR 3015-2(b). Motion will not be granted without a timely filed affidavit from the debtor attesting to his or her changed circumstances and ability to satisfy future payment obligations.

**XVI. Chapter 12 and 13 Sale Motions**

- A. LBR 6004-2(a). A debtor who seeks to sell real property must comply with the information requirements set forth in this Local Rule. In addition, a debtor who seeks to partition and sell a portion of real property owned must specifically identify the property subject to sale and provide evidence of value for the same.

**XVII. Tips from the Clerk of Court**

- A. Ten Most Common Deficiencies Identified by Clerk’s Office Review of CM/ECF Docket Entries. *See* Attached Handout.
- B. Courtroom Etiquette – Civility in Bankruptcy Practice. *See* Attached Handout.
- C. United States District Court Biennial Attorney Admission Registration Fee – USDC Local Rule 83.1. Admission to the Bar. *See* Attached Handout.

**XVIII. Tips from the U.S. Trustee**

- A. Practitioners should always file the credit counseling certificates and payment advices at the time of the initial case filing.
- B. In calculating current monthly income (“ CMI”) for the Means Test, don’t base CMI on the 60-day pay stubs (that are required to be filed with the Court), rather than the 180-day period prior to the last day of the month ending prior to the petition date.
- C. Using appearance counsel at 11 U.S.C. § 341 meetings and other court appearances is discouraged by the UST. The UST believes it violates the New York State Rules of Professional Conduct, 11 U.S.C. § 504, and best practices.
- D. Failing to monitor the debtor’s Financial Management Course completion and certificate filing. This leads to many cases being closed without discharge, which requires that the case be reopened at a substantial cost.

**XIX. Tips from the Standing Chapter 12 and 13 Trustee**

A. Trustee Objections

1. Attorneys' Fees
2. *United Student Aid Funds, Inc. v. Espinosa*