

**United States Bankruptcy Court
Eastern District of Michigan**

State of the Court

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Chief United States Bankruptcy Judge**

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Introduction

At last week's Federal Bar Association lunch, Detroit Chapter President Dennis Barnes announced that our chapter is receiving several national FBA awards, including one that you should know about. The national organization is recognizing the success of our very own bankruptcy section luncheon series, and all of the credit for this award belongs to the organizers - David Lerner and Claretta Evans. So on behalf of the Court, I want to thank them for their efforts and congratulate them for this national award.

On behalf of myself and my colleagues, I also want to thank the attorneys who rendered pro bono service to the Court, as recognized here today, and second the remarks of Judge Hood to them.

The state of the Court remains good, though we live in interesting and challenging times. Today we will do the usual statistical review, talk about judgeships, all the news you need, several upcoming events, our challenges in chapter 13 and what we are doing about it, of course CM/ECF and then your questions.

Let me begin by raving about my three new colleagues. They have worked into their new positions over the last year and a half with great skill, enthusiasm and energy, and I personally enjoy working with each of them. It is truly their efforts that permit me today to conclude that the state of

the Court remains good.

Statistics & New Judgeships

For the year ending June 30, 2004, our total filings were 46,066. This is a 4.4% increase over last year and is the fifth highest filing rate in the nation, up from sixth last year. Our record of filings per authorized judgeship remains first in the nation.

Last year our weighted caseload of 3,248 per judge was fourth in the nation. This year our weighted caseload climbed 11% to 3,612. This is now third in the nation, behind only Delaware and Southern New York, both of which are challenged by unique chapter 11 caseloads. This weighted caseload of 3,612 is 2.3 times the national average weighted caseload of 1,557. Unfortunately we don't get 2.3 times the average judge's salary.

Like last year, if we were to have the average bankruptcy judge's weighted caseload, we would still need nine bankruptcy judges in this district. We have requested approval of an additional four judgeships, including the two previously recommended to Congress, and that request appears to be proceeding without difficulty.

There has been some movement on the matter of providing additional judgeships in this district. The Senate has passed a bill creating additional district and bankruptcy judgeships including two additional bankruptcy judgeships for our district. Unfortunately, before passing it, the House removed the bankruptcy judgeships from the bill, because they want to maintain the link between the new bankruptcy judgeships and the Bankruptcy Reform Act. So the judgeship bill is now in a conference committee. Sen. Biden of Delaware has announced his intent to try to get the bankruptcy judgeships back into the bill in conference, since there are four judgeships for his district in the bill.

Speaking of the Bankruptcy Reform Act, it is still dead, as far as I can tell. Recall that it

passed the House last year. However, nothing suggests that the Senate will have any time available this year to deal with it, given everything else more important on its calendar.

Despite our continued onslaught of cases, we continue to out-perform not only other bankruptcy courts but also any possible reasonable expectations. The average age of our pending chapter 7 cases remains about 6 months, compared to the national average of 8 months. The average age of our pending chapter 11 cases is 17 months, compared to the national average of 23. Similarly for adversary proceedings, our median disposition time beats the national average by one month, and the average age of our pending cases beats the national average by 3-4 months.

New Room for Meetings of Creditors

The US Trustee's program has leased and is constructing new space in our building for meetings of creditors in chapter 7 and 13 cases. It is on the third floor and will be ready soon. The US Trustee's Office has asked the Court to change our form notice of the meeting of creditors to specify the new location beginning with notices that are sent out on Friday, October 1, so it will be effective for meetings scheduled in about 3-6 weeks. I saw the space in construction last week and was impressed with its design and layout. It will be much more conducive to proper meetings and will give the trustees a much better opportunity to carry out their responsibilities. More on this in a moment. We in Detroit owe a special thanks to our very own Larry Friedman for this wonderful new addition to our operations.

Chapter 13

Soon all of us judges in Detroit will be hearing chapter 13 cases. Yes, I am returning to this

docket. This will obviously result in some changes to our present schedule of chapter 13 matters, but this is yet to be determined. We will soon confer with the US Trustee's Office, the chapter 13 trustees and the bar on how to organize this.

In contrast to the extraordinary record of achievement in chapter 7 cases, chapter 11 cases and adversary proceedings, we have some real challenges in our chapter 13 cases that need immediate attention. We still have significant civility issues, and our percentage of discharged cases is too low.

Only 31% of our chapter 13 cases are discharged; the balance of 69% are dismissed or converted to chapter 7 before discharge. The national average rate for chapter 13 discharges is 46% and we rank 74th in the country in the percent of cases that are discharged.

Obviously, there will always be some percentage of chapter 13 debtors that will not get a discharge. But why should our percentage of discharges be so much lower than the national average? No local economic or social answer appears to me.

I recently saw a study of chapter 13 confirmation rates by attorneys who had filed ten or more cases assigned to Judge McIvor's docket in 2003. This study disclosed that ten of these attorneys had confirmation rates under 50%. Indeed one of these attorneys had a confirmation rate of 6%, which was lower than the confirmation rate of pro se debtors! On the other hand, the same study disclosed that nine attorneys had confirmation rates exceeding 80%, including two attorneys whose confirmation rates were an amazing and highly commendable 100%.

Another study of the same docket disclosed that in 2003, of the 4016 chapter 13 cases assigned to Judge McIvor, 902 of them were second filings in 2003, 112 were third filings in 2003 and 4 were actually fourth filings in 2003. This study did not look at whether these cases were serial filings from prior years. In any event, it shows that 1018 of 4186, 25% of the cases (at least) were second, third or fourth filings.

So why the difference? Nothing suggests that these two groups of attorneys with such different results somehow attract such different clientele. Rather, my experience suggests these two answers: The attorneys whose cases regularly do not succeed do not screen their cases for viability in chapter 13, and second, these attorneys do not adequately prepare their cases.

So let me focus on the issue of screening chapter 13 cases for a moment.

Rule 2.1 of the Michigan Rules of Professional Conduct states: “In representing a client, a lawyer shall exercise independent professional judgment and shall render candid advice.” And the comment to this rule states, “Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.... However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”

The comment to Rule 1.2, on the scope of representation, is also on point. It states, “[A] lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.”

I have heard debtors’ attorneys assert that if a debtor whose home is in foreclosure wants to file a chapter 13 case to save it, it’s not for them to say no. They are hired to file the case, so they file the case.

But filing a chapter 13 case just because the debtor requests it violates the Rules of Professional Conduct, makes lawyers into typists and runners, and worse, makes the Court a participant in delaying and hindering creditors.

The issue of civility is real too. I recently attended a mediated workshop in which debtor attorneys, creditor attorneys and trustee representatives confronted each other over this issue in an open and honest way, and I was overwhelmed by the level of incivility and hostility at status conferences that the participants discussed and disclosed. It was very discouraging and persuaded

me that we need a new direction in chapter 13

So what do we do? There are of course the usual negative reinforcements - cutting fees and imposing sanctions or discipline. But, I think a more satisfactory answer may also be found in increased education. So I renew my challenge to the Consumer Bankruptcy Association to make more continuing legal education opportunities available to the bar. Indeed I am persuaded that the time has come to consider mandatory continuing legal education. We simply can't have attorneys practicing consumer bankruptcy law who are not familiar with *Patterson v. Shumate*. Perhaps even more importantly, continuing legal education also reinforces the essential concept that the practice of the law is first and foremost a profession and then a business.

We are also changing the chapter 13 process in a significant way. In the new space for meetings of creditors, the time available for each meeting will be significantly expanded by conducting multiple simultaneous meetings. This will allow a more meaningful meeting in which the trustee and the parties in interest can examine the chapter 13 plan with a view toward making changes right there to get the plan confirmable. But of course for this to work, the debtor's attorney must come to the meeting fully prepared and authorized to make necessary plan changes while at the meeting. The days of debtors' attorneys meeting their clients at the meeting of creditors for the first time are over.

Another valuable feature under consideration in this new process for meetings of creditors is a program of debtor orientation about the chapter 13 process.

To address the problem of incivility at status conferences, I have concluded that the best way to eliminate this problem is to eliminate status conferences. So there will be no more status conferences at confirmation in my cases. My colleagues will obviously have to decide for themselves. At my confirmation hearings, I will hear concise legal arguments in every case that is not confirmable by agreement in advance.

The Court did enter a new administrative order affecting some chapter 13 procedures. This order clarifies the procedure for the entry of a proposed order amending a wage deduction order and states that it cannot be submitted ex parte. The administrative order also clarifies the duty of the attorney for the debtor to serve the order confirming the plan, as well as the duty of service when there is a plan modification. This administrative order becomes effective on November 1, 2004. It has been sent to our email list and is also on our website.

CM/ECF

This is finally the year of CM/ECF. We have been talking about it for years, but this is the year. By this time next year, it will be fully implemented and quite probably mandatory. So here is the latest plan:

The Court itself will switch from BANCAP to CM for docketing by March, 2005 and then electronic case filing will begin about three months later in June

Initially, shortly after we switch to CM in March, the Court's attorney advisory and marketing committee, consisting of about 23 volunteers, will be trained and will begin their electronic filing. We will use the feedback they provide for considering necessary changes. Then we will begin implementation of ECF by training attorneys and their staffs for use in chapter 7 & 11 cases beginning in June. Finally, we will open it up to chapter 13 filings. Soon after full implementation, ECF will become mandatory, meaning all papers will have to be filed electronically.

The Court plans to support the bar with full opportunities for training during this implementation, including training for staff people. ECF will change the way you do business and run your office, and soon. Indeed, during and after implementation, the bar should seriously consider offering members support and information opportunities, such as an electronic message board, or even

group therapy.

The Consumer Bankruptcy Association is already in the process of organizing one such opportunity. On March 18, 2005, it will present a CM/ECF Expo at the Troy Marriott. There will be two parts to this. In the first part, there will be presentations. The clerk's office staff will introduce CM/ECF and our local implementation. There will also be a panel of attorneys, trustees and judges who are experienced ECF users to share their advice. In the second part, there will be a vendors' fair in which vendors will have information and displays about their products and services to help you with your CM/ECF hardware and software needs. This part will also include an opportunity to sit at a computer and try ECF first-hand to see how it works. Many thanks to the CBA for taking the initiative on this.

The Court itself also has an opportunity available now for you to become more familiar with CM/ECF. On the Court's website, there is a link to a CM/ECF tutorial that we strongly encourage you to try. It only takes a few minutes and it gives you a good preview.

Electronic Bankruptcy Noticing

The Administrative Office of the United States Courts now offers electronic bankruptcy noticing. It's simple. You sign up, and then your bankruptcy noticing comes to you by email instead of regular mail. We strongly encourage it because it will get you accustomed to dealing with email from the Court as we move into CM/ECF. You have the brochure, or for more information check the Court's website.

Other Technology Enhancements

We are in the final phases of developing a newer, fresher, more comprehensive website, which should be up by November 3. When that happens we will publicize it and encourage you to have a look.

A handful of attorneys are still accessing our PACER system through slow telephone modems rather than through high speed internet. We found that we are one of only four courts left in the country still offering this service. So for budget reasons, we are going to have to ask these few users to modernize a bit and use our web based PACER so we can terminate our dial up service.

The final technological matter I want to bring to your attention is that a bigger, faster PACER server will be coming on line for your docket viewing enjoyment by October 25.

Chapter 11 Rules

The Court recently received the recommendations of our Attorney Advisory Committee and its Local Rules Subcommittee for certain rules applicable in chapter 11 cases. This effort resulted from a felt need to make our procedures in chapter 11 cases, especially at the beginning of these cases, as uniform and accessible as possible. The proposed rules were recently published to solicit comments, and thanks to those of you that took the time to send us comments.

The Court is now ready to give its final review to the proposals, and we hope to have an administrative order by the end of November. My colleagues and I are enthusiastic about the proposals, and we want to thank all of the members of the subcommittee. We are well aware that they worked very hard on this project and their discussion were not always easy. Nevertheless, their work product demonstrates their commitment and expertise, and these procedures will become an extraordinary and meaningful part of our chapter 11 process.

The rules address procedural issues such as motions for joint administration, the prompt

appointment of creditors' committees in large cases, pre-packaged plans, cash collateral and financing motions, first day motions, fixed hearing dates in large cases, and other similar matters.

A seminar on these rules is presently in the early planning stages, so that you can get some familiarity with the new procedures as they go into effect. Details to follow.

Other Dates to Save

I have two other dates for you to save. On Monday, November 1, Dean Nancy Rapaport will be here speaking to our bankruptcy bar community at the inaugural lunch in the Judge Shapero Symposium series. Dean Rapaport has written widely, courageously and creatively on ethics issues in bankruptcy. Her presentation on legal ethics issues uses movie clips that she shows as a springboard for the discussion. I have seen it and it is fun, entertaining and educational, so I highly recommend it to you.

Finally, the Bankruptcy Section of the FBA is planning an intensive two day trial advocacy program on December 9 & 10. All five bankruptcy judges are participating, as are several district judges. A number of experienced bankruptcy attorneys will serve as faculty. There will be presentations on evidence and trial advocacy and the participants will actually try a mock § 523(a)(2) fraud dischargeability action and get helpful and instructive feedback to improve their skills. This program will be an extraordinary opportunity to improve your trial skills, so return the registration form immediately. To keep the student faculty ratio small, we will have only 40 openings in this program, so it will sell out.

CARE Program

I want to commend my colleague Bankruptcy Judge John Ninfo of Western District of New York as well as Larry Friedman and the US Trustee program for their financial literacy initiative. Everyone here should know about this. It's about giving high school students the information they will need to deal with credit - the true cost of credit, when to use, and what happens if you abuse it. The need for this education is certainly there. In the last ten years, the number of people under age 25 filing for bankruptcy has increased 96%, almost doubled. In 2000, three years ago, the average college student had credit card debt of \$2,748, and nearly 10% owed more than \$7,000.

So Judge Ninfo created the CARE program - Credit Abuse Resistance Education, and the US Trustee program has begun to promote and endorse its use in high schools around the country. Judge Ninfo has created a wonderful and extensive set of materials, including a video on a dvd and the idea is to take this into local high schools.

Last week I attended the first such presentation here in our district at the West Bloomfield High School, and I saw how Judge Ninfo's CARE program works. It is very impressive. The students actually paid attention and appeared to get it. I am returning to that school in November to make an additional presentation. I encourage you to go to the CARE website to learn more about it and get involved. There is a link to the CARE website on our website.

Budget

You may have heard about the severe budget difficulties that the federal judiciary faces this coming fiscal year. As of today, the judiciary has no appropriations for the fiscal year that will begin on October 1, and it does not appear that we will anytime soon. Congress will likely enact a continuing resolution, or a series of them, allowing the courts to operate until we do get our appropriation, likely next year. The Administrative Office has given each court its best estimate of

what to expect, and for some courts it is such a significant cut that difficult personnel decisions have to be made. We are fortunate in that it appears that we will not have to face such difficult issues this year. The credit for this goes entirely to Sheila and her staff who run such an efficient operation.