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

**State of the Court**

**Steven Rhodes**
**Chief United States Bankruptcy Judge**

**November 9, 2006**

## Introduction

Since my last state of the court address on September 20, 2005: the new law became effective; electronic filing became mandatory; we have a new judge; we have a new clerk; and our filings dropped dramatically, if only temporarily. I hope that sometime soon we get a year of stability in our operations, and I can give a really *brief* state of the court address. Not this year. . .

## Our New Judge and Our New Clerk

Judge Opperman was sworn in as our newest bankruptcy judge on July 13, 2006. I can report based on first-hand knowledge that he is a wonderful colleague. I can also report, based on reliable hearsay, not necessarily legally admissible, that he is a wonderful judge who has really taken well to his new responsibilities. I look forward to his collegiality for many years.

Katherine Gullo was sworn in as our new clerk on June 2, 2006. She has done an outstanding job. I am very excited about her ideas for the Court. She is committed to increased staff training and opportunities, and in building on Sheila's superlative record of efficiency in operations.

## The New Law

Our transition under the new law has been fairly smooth, not perfect, but fairly smooth. In the six weeks before the new law became effective, from September 1 to October 17, 2005, there were 27,388 cases filed. More than half of those - 15,385 - were filed in the seven days before the new law. You remember the long lines on the street as the effective date approached. Sheila's staff performed amazing well under demanding and stressful circumstances in that time period, working long hours for little more than the unheralded reward of public service. The Court is most grateful for it.

In managing the transition, the Court spent a good amount of time discussing and finalizing the necessary new procedures. More importantly, the bar spent the time and effort necessary to study both the new law and our new procedures. We had terrific attendance at each of our three major local seminars - last year in June and on Veterans Day and this year on Columbus Day. And the Consumer Bankruptcy

Association dinner series on the new law was outstanding and impressive. The work of those members of the bar who were involved in organizing those seminars demonstrates dedication to the profession, from which we all benefitted and for which we are all grateful. As a result the bar has been well prepared to advocate on the legal issues arising form the new law, and that advocacy has been extraordinary.

Interpreting and applying the new law has been challenging. We have had to resolve such issues as:

- Is a debtor who owns a vehicle without monthly payments entitled under the means test to a monthly ownership expense?

- Might a debtor whose vehicle is inoperable entitled to a monthly expense for the operation of the vehicle?

- Can a chapter 13 debtor surrender a vehicle in full satisfaction of the secured creditor's claim?

- Does the phrase "projected disposable income" precisely describe the income that an over-median chapter 13 debtor must use in calculating the net disposable income to be paid to creditors?

- Is a debtor eligible to file later on the same day after obtaining the required credit counseling?

- Is a family farmer required to obtain credit counseling?

- Can a chapter 13 debtor deduct contractual payments on secured claims when proposing to surrender the collateral?

For me the answer to each of these questions has been "yes," although I understand that on some of these questions, we do not have uniformity in the district. It has been an altogether wonderful exercise in learning to control common sense, which is, of course, every judge's dream.

A couple of other issues have arisen elsewhere, but so far I have evaded them:

- Should a petition filed by an ineligible debtor be dismissed or stricken?

- Can a chapter 13 debtor with above-median income deduct charitable contributions in the means test?

I am in the school that holds that it is now a year and a half to late for judges to criticize the law, at least publicly. Regardless, it is fair to agree with Professor Howard's view that this law seems to have caused more than its fair share of unintended consequences. It also seems appropriate to ask Congress to fix those unintended consequences and to persist on that. On this point, in defense of Congress I should point out one fix that is in process. The Senate has passed a fix to its failure to provide for charitable contributions by over-median chapter 13 debtors. The prospects for passage of this fix in the House are uncertain at this time, however, given the results of the election, its many other priorities, and its very limited time left

in this session.

At some point, some group somewhere will undoubtedly collect all of the issues and the answers so far provided by the courts, with the intent of asking Congress if those are the answers it wants, or should want as a matter of policy. Most importantly, wherever and whenever that process occurs, we who are charged to implement the law have to figure out a way to participate in that process.

## Undisclosed Assets Under the New Law

My 1999 study of undisclosed assets revealed that debtors had failed to disclose 38% of administered assets. I pointed out in my address to you last year that two aspects of the new law appear to focus on this problem - first, the increased responsibility of the debtor's attorney for asset disclosure, and second, debtor audits. The debtor audit program is just now starting, so we will have to wait to measure its effectiveness.

The question whether the provisions for increased attorney responsibility for asset disclosure are having any impact is, however, capable of investigation and empirical study now. So I am reviving my asset study, this time for chapter 7 asset cases filed after October 17, 2005. At this point, I have looked at every asset administered by chapter 7 trustees in these cases that I could find in ECF through

about two weeks ago.

The percentage of undisclosed assets in the new study is a 39%. That's 20 of 51, which is virtually identical to the 1999 study.

Eleven of the 20 undisclosed assets were either tax refunds or preferences. Five of 8 preferences were undisclosed, and 6 of 8 tax refunds were undisclosed. In fairness, 4 mortgage preferences were not counted because commonly debtors would not have the information available to identify them as preferences.

Assuming this percentage holds for the balance of my study, this evidence would establish that the Congressional intent of improving asset disclosure by increasing attorney responsibility has yet to be realized.

Why not?

I think part of the answer, perhaps a big part, is that although the law has created that increased responsibility, the law of course does not enforce itself. As far as I can determine, there has yet been no enforcement of that responsibility, in our district or anywhere. And everyone knows that. The consequence is that a still unacceptable 39% of administered assets are still undisclosed.

I have always been concerned about how this ignominious record of non-disclosure in our district compares with other districts, but until now I did not have the means to investigate that. Now, however, through ECF, I can make that comparison

and plan to do so. In any event, more on this study later.

## Statistics and New Judgeships

In each of the first two quarters of this calendar year, our district has been the highest filing district in the country, surpassing previously higher filing districts such as Central California, Northern Illinois, Middle Florida and Northern Georgia. Our numbers are of course down from last year, but the Administrative Office of United States Courts, the American Bankruptcy Institute and others predicted our return to normalcy by next year.

In the face of that record of filings this year, and the record of filings before October 17, 2005, the Court has performed admirably well in disposing of cases. For the year ended June 30, 2006, which included eight and a half post-BAPCPA months, we had 50,125 filings. That is down by only 284 filings from the prior year. Our filings per authorized judgeship were 10,025, which was first in the nation, again.

Our weighted filings per authorized judgeship were 2,717, which was also first in the nation. This means that for our court to have an average bankruptcy judge's weighted caseload, we would need 12 bankruptcy judges in our district. Stated another way, our weighted caseload is 2.3 times the averages judge's weighted caseload.

The district court and Sixth Circuit Judicial Council have again given their full support to our request for 3 additional judgeships. This request has been a part of a package of 25 new bankruptcy judgeships that has been pending in Congress - H.R. 4093. Indeed those requests were part of the manager's amendment to BAPCPA, which the leadership on Congress would not allow to be brought to the floor for a vote when BAPCPA was adopted. As far as I know, no one in Congress has voiced any opposition to the bankruptcy judgeship package, and there seems to be general support for it. Nevertheless, until the election this week, it was tied to the proposed split of the Ninth Circuit, which is highly controversial and now highly unlikely to be adopted. I have no idea where this will leave our judgeship request in the new Congress next year.

Some have asked me where would we put them? My answer is, I don't know and don't plan to spend any time thinking about it until the judgeship bill is signed into law.

Unfortunately, the combination of implementing ECF and the huge jump in filings last year caused our previously outstanding record of promptly closing chapter 7 cases to deteriorate. Our median disposition time for chapter 7 cases ballooned from 127 days in 2005, to 180 days, which is 88th of 90 districts in the country. This was a direct result of the period of time from October into January when we had to delay

issuing discharges and closing cases just to process the onslaught of new filings. Curiously, as of June 30, the average age of our then pending chapter 7 cases was 12 months, which is 2 months less than the national median of 14 months. This appears to suggest that by then the problem had been resolved.

The balance of our case disposition record for this past year is fine. The median disposition time of our chapter 13 cases was 36 months which is also the national median. The average age of our pending chapter 11 cases is 20 months, which is 9 months less than the national average. Similarly, the median disposition time of our adversary proceedings is 1-2 months less than the national median.

## Chapter 13 Discharge Rate

Last year, and the year before, I complained to you about our sinking chapter 13 discharge rate. It has sunk again to a new low. In 2004 it was 31%. Last year it dropped to 29%. This year it dropped to 27%. Our ranking on this performance measure has slipped from 74th in 2004 to 79th last year, and now to 80th. It was unacceptable then, and it is unacceptable now.

With the Court's support, I have convened a committee to examine the causes of this and to recommend solutions. The committee has met twice now and has had spirited and informed debates. We have come to a general consensus on some ideas.

For example, a significantly higher portion of cases without pay orders may succeed if we can implement a process for automatic bank payments. Also, a significantly higher percentage of all cases may succeed if we can put in place a procedure for the IRS to pay tax refunds directly to the trustee. I remain convinced, however, that yet more progress can be made with more careful screening of chapter 13 cases by debtors' attorneys in the first instance, and our committee will discuss ways to properly motivate that too.

I expect that the work of that committee will be concluded with 1 or 2 more meetings. If you have any ideas about the causes of failure in chapter 13 cases that we might be able to something about, please let me know.

## The Michigan Supreme Court Decision

As many of you know, last April, the Bankruptcy Court and the parties in four selected preference adversary proceedings certified to the Michigan Supreme Court this question: When is a mortgage deemed recorded when the county register of deeds does not maintain an entry book as required by state statute? We had then and still have about 90 adversary proceedings in which that question is a controlling question.

Most unfortunately, on October 20, the Michigan Supreme Court denied our certification. Four justices wrote opinions, three against accepting the case and one

in favor. Two of the three justices against accepting the case argued that the statute provided no basis for decision and that fixing the unlawful practices of local registers of deed is a political problem in which the judiciary should not become involved. The problem with those views is that our certification did not ask the court to fix anything; indeed, I am pretty sure that trustees don't want the problem fixed! Rather, our certification asked for a resolution of an issue of state property law that, under principles of federalism and comity, we thought it was best to let the state court resolve, and that is necessary to resolve 90 real cases. Now this important issue of state property law will have to be decided by the federal courts.

In any event, we and the parties in those cases will now have to determine the best way to get this issue resolved. We have solicited comments on this from the attorneys involved, and I hope we can come to a conclusion regarding the procedure for this at our judges meeting on Monday.

## **High Tech Courtroom**

Sometime next year, my courtroom will be outfitted with certain high tech equipment. This will include flat-screen monitors for the attorneys and the witness, and the presentation of pleadings, papers and documentary exhibits on those monitors. It also includes an enhanced projection monitor for the pull-down screen on the side

wall.

This is not as sophisticated as the high tech courtroom in the district court, which offers the capability of handling documents on cd's, but I look forward to working with it. When we master this intermediate step, we can then think about how to expand our capabilities.

This upgrade will also bring an enhanced sound system and assisted listening facilities for the hearing challenged.

## Electronic Case Filing

Speaking of high-tech, as everyone knows, on January 1 of this year ECF became mandatory. On behalf of the bench and the court staff, I again want to thank the bar for its cooperation in implementing ECF. What an extraordinary achievement! We get virtually no motions for conventional filings anymore. And I love that I can see your papers and sign your proposed orders anyplace I have a computer and an internet connection. I expect that we may continue to tweak our ECF procedures, and we certainly still solicit your ideas on the subject.

There has been one major loophole in our effort to be a paperless filing court. Until now we have permitted paper submissions of orders confirming plans in chapter 13 cases. Krispen Carroll and I have implemented an experimental procedure to

submit these orders electronically. That experiment has proven successful and efficient for all concerned. As a result, very shortly this procedure will be expanded to all of the judges and trustees, with details to follow.

## Local Rules

Looking ahead to the coming year, the major initiative is on local rules. The bar is now engaged in the monumental task of examining our local rules with a view toward making recommendations to the Court. That review includes: looking for rules that we no longer need or that should be modified; integrating administrative orders into the local rules as appropriate; and reviewing the experimental chapter 11 local rules package. Our goal is to process these new rules for adoption during the third quarter of next year. Again, we solicit any suggestions that you might have on this important task.