

MINUTES OF THE
BANKRUPTCY PRACTICE COMMITTEE
March 29, 2023 – Zoom Conference

Judge Kruse called the Zoom conference meeting to order at 12:02 p.m. on March 29, 2023. Those in attendance included Judge Brian S. Kruse, Clerk of the Court Eva Roeber, Lisa Smith, Deb Kalamaja, U.S. Trustee Jerry Jensen, Chapter 13 Trustee Erin McCartney, Chapter 7 Trustee John Stalnaker, NSBA Bankruptcy Section Chair Thomas Ashby, NSBA Bankruptcy Section Past-Chair David Koukol, Becky Abell-Brown, Alexis Davidson, Matt Pederson, and Trev Peterson.

Approval of Minutes from Committee Meeting October 5, 2022

The meeting minutes from October 5, 2022, were approved.

Term length on Bankruptcy Practice Committee

The committee discussed the composition and term length of committee membership. There was unanimous agreement by the committee members present on the size, composition, and term of service. The NSBA Bankruptcy Chair will appoint two committee members to serve two-year terms to fill the vacancies at the end of the 2023 terms of Ms. Abell-Brown, Ms. Davidson, and Mr. Peterson.

General Order 22-10 Advance Deposit to the SubChapter V Trustee Effective January 1, 2023

Judge Kruse inquired about the status of the advance deposits to SubChapter V Trustees under General Order 22-10. Jerry Jensen reported since January 1, 2023, one SubChapter V case was filed. In that case, a SubChapter V trustee was appointed, the deposit to the trustee was not paid, and the case was dismissed within 30 days of its filing date. The court and the U.S. Trustee will monitor trustee deposits on newly filed SubChapter V cases and report on General Order 22-10 at the fall committee meeting.

General Order 22-11 Neb. R. Bankr. P 3015-3 (C) Effective January 1, 2023

Erin McCartney reported the court entered a few text orders confirming Chapter 13 Plans which were subject to stipulations settling objections to confirmation. General Order 22-11 will be reviewed again at the fall meeting.

Judge Kruse informed the committee the provisions of General Order 22-06 Amendment to Local Rule 3015-3(C) were mistakenly omitted when General Order 22-11 was crafted. General order 22-06 provided that:

In cases under Subchapter V of Chapter 11 and under Chapter 12, if a debtor files an amended plan, the debtor must also electronically file on the CM/ECF System, but is not required to otherwise serve, a notice of modified or amended plan and include a version of the amended plan

with all changes clearly and conspicuously indicated (such as track changes, redline, or other similar method).

Mr. Overcash requested that amendments to plans under Chapter 12 and SubChapter V would be accompanied by a redlined version. Judge Kruse will work on a revised general order incorporating General Order 22-6 and General Order 22-11 with amendments to Neb. R. Bankr. P. 3015-3(C).

Judge Kruse requested if committee members had other amendments to Neb. R. Bankr. P. 3015-3(C) to send an email to the committee as soon as possible so any further modifications can be included with the revised general order.

Frequency of Amending Local Rules

The committee discussed the frequency of updating the local rules to codify the general orders. There can be confusion for the unwary if they are looking only at the local rule and not the general order superseding it. This can be especially troublesome for out-of-state attorneys.

Judge Kruse and Eva explained there is no set timeframe for amending the local rules and formal amendment to the local rules is a timely process. The court will wait until several general orders have been entered before beginning the amendment process. Judge Kruse indicated 2024 may be the time to amend the local rules. In the meantime, the court will work on providing clarity between the local rules and general orders. Examples suggested were creating hyperlinks from the local rules to the general orders or creating an addendum to the local rules listing the general orders and the local rules affected.

Report from NSBA Bankruptcy Chair – Tom Ashby and – Past Chair David Koukol

Mr. Ashby and Mr. Koukol reported the NSBA Bankruptcy Section is organizing a one-day joint seminar with the Business Banking Section and maybe the Ag Section. The Bankruptcy Section extended invitations to Judge Saladino and Judge Kruse to participate. The seminar organizing committee is seeking the judges' opinions on the seminar dates and venue. At the most recent section meeting, members discussed having the seminar in Kearney rather than Omaha or Lincoln to attract more members from western Nebraska. Additionally, Mr. Ashby stated the idea was proposed to time the seminar in Kearney to coincide with the Sandhill Crane migration in the spring or late autumn, giving a further incentive for participants to attend. The judges will discuss dates and locations and provide feedback to Mr. Ashby and Mr. Koukol as soon as possible.

Amendments to Venue Statutes

Mr. Ashby mentioned there is momentum pushing for amendments to the venue statutes and that now is the time to contact your congressional representative if you are interested in weighing in on this.

Inter-Court Communications – Tom Ashby

Mr. Ashby brought to the committee's attention a Douglas County District Court practice that may violate the automatic stay provisions of 11 U.S.C. § 362 and be inconsistent with Neb. Ct. R. § 6-1506. After a case is filed in Douglas County District Court a form "Proposed Scheduling Order" is generated by the District Court Administrator requiring the parties to set progression deadlines. Failure to timely submit the proposed progression order results in the dismissal of the case. If a party to the case files for bankruptcy relief, the district court does not the case, and the bankruptcy filing does not stop the dismissal of the case.

Mr. Ashby inquired if Judge Saladino and Judge Kruse could address Douglas County's Local Rule and its inconsistency with Neb. Ct. R. § 6-1506 with the Douglas County District Court Judges or the Court Administrator. The attorneys would like to see if there is a way to preclude dismissal until there is a determination of whether the district court case can proceed while a party is in bankruptcy. Eva Roeber, Clerk of the Bankruptcy Court, will contact the Douglas County Court Administrator and provide a follow-up report to the committee. *(Post-meeting note: See March 31, 2023, Memo to Eva Roeber, Bankruptcy Clerk of Court, from Judges Saladino and Judge Kruse regarding Douglas County Progress Rules and Forms, the Douglas County District Court Form Proposed Scheduling Order, and the June 2, 2023 Memo from Chief Deputy Packer of the Douglas County District Court attached to these minutes)*

LR1007-2 Mailing List or Filing Matrix – Lisa Smith

Judge Kruse asked committee members to inform other attorneys of the requirement under Neb. R. Bankr. P. 1007-2 to add the IRS and Nebraska Department of Revenue to the creditor matrix when filing a new case. When contacted by the bankruptcy clerk about this, many attorneys were surprised and did not realize the requirement under Nebr. R. Bankr. P. 1007-2 has been in place for several years.

John Stalnaker also mentioned the requirement that county treasurers and county attorneys are to be included on the creditor matrix. Potential claim issues can arise for claimants who hold tax liens on real estate. If the county attorney and treasurer do not file claims and tax certificates are sold, the county may not always inform the certificate holder that a claim may need to be filed in the bankruptcy case.

Report from Clerk of the Court – Eva Roeber - Interplay of FRPB 1005 and 2002(n) – Petition Captions Official Form 416B

Eva Roeber reported the 8th Circuit Bankruptcy Clerks conduct a monthly conference call to discuss new implementations and what is happening in their respective districts. The clerks look at common practices and how, and if they differ. They try to come together so it can be seamless for attorneys who practice circuit-wide. At a recent meeting, the clerks discussed the South Dakota rule regarding

captions and strict enforcement. Most courts in the 8th Circuit do not issue a notice of non-compliance if the caption does not contain all the information outlined in FRPB 1005. In researching the rules, the clerks felt it was an interplay with the language of Rules FRPB 1005 and 2002(n). The clerks have co-authored a letter to the Rules Committee suggesting there is no reason other than the 341 notice to have a caption requiring all the information in FRBP 1005 which results in a half page case caption. Eva will keep the BK Practice Committee informed if the Rules Committee takes any action on this.

Other business

Mr. Koukol suggested it was time to reinstitute the Brown Bag Luncheons. Judge Kruse indicated he would take the lead in getting a Brown Bag Luncheon scheduled in Lincoln and Omaha yet this year.

The meeting concluded at 1:02 p.m.

MEMO

Date: March 31, 2023
To: Eva Roeber, Bankruptcy Clerk
From: Thomas Saladino and Brian Kruse, Bankruptcy Judges
Subject: Douglas County Progression Rules and Forms

During our last Bankruptcy Practice Committee meeting, questions were raised as to whether Douglas County is violating the automatic stay of 11 U.S.C. § 362 with its case progression rules and forms. As a general rule, federal courts cannot issue advisory opinions. But we will summarize the legal issues the committee discussed.

Under the Bankruptcy Code, as a general matter, the filing of a bankruptcy petition stays the “*continuation*, including the issuance or employment of process, *of a judicial ... action* or proceeding against the debtor”. 11 U.S.C. § 362(a)(1) (emphasis added).

Apparently recognizing the effect of the automatic stay, the Nebraska state courts have a rule applicable to bankruptcies. It states when a suggestion in bankruptcy is filed “*no further action will be taken in the case by the court or by the parties until* it can be shown to the satisfaction of the court that the automatic stay imposed by 11 U.S.C. § 362 does not apply.” “Such a showing shall be made by motion.” Neb. Ct. R. § 6-1506 (emphasis added).

Douglas County has additional rules governing case progression. One rule requires parties to file a proposed scheduling order with the District Court Administrator within four months after the case is filed. Under the rule, the Douglas County District Court Administrator issues a progression form, a copy of which is attached. The form requires the parties set a number of deadlines, including deadlines to complete discovery, to complete ADR, and to file pretrial motions and trial exhibits. It also requires the parties set a trial date. If it is not timely submitted, the case will be automatically dismissed. *See* Local Rule 4-10. We are told that parties who have filed a suggestion in bankruptcy are not given any relief from this rule and are subject to potential dismissal.

The attorneys at the bankruptcy practice committee meeting pointed out the apparent inconsistency between Neb. Ct. R. § 6-1506 (which requires no further action until it is shown that the automatic stay no longer applies) and the Douglas County Local Rule 4-10 (requiring issuance of a progression order under threat of dismissal). They question whether Douglas County’s rule and form, and dismissal for non-compliance, constitutes “continuation” of a legal action in violation of the automatic stay of 11 U.S.C. § 362(a)(1).

To our knowledge, no counsel has yet sought to hold Douglas County or its officials in contempt for a bankruptcy stay violation over the case progression rules or form. But the debtors' bar would contend both that federal law prohibits requiring debtors make these decisions, and that doing so (and dismissing the case for non-compliance) raises to a knowing violation of the automatic stay.

Since federal courts are prohibited from issuing advisory opinions, we cannot opine at this time on the issues raised. However, in the interest of full disclosure we ask that the Clerk of the United States Bankruptcy Court share this memorandum with her counterpart at the Douglas County District Court to share with the appropriate parties to consider the issues. We are also available to discuss this further if requested.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

_____,
Plaintiff/Petitioner,
vs.
_____,
Defendant/Respondent.

PROPOSED SCHEDULING ORDER

CASE # _____
OLD CASE # _____
JUDGE _____

TYPE OF CASE: ____ LAW ____ EQUITY

CHOOSE EITHER A, B, OR C:

A. The parties have been unable to agree upon a Proposed Scheduling Order and are required to appear at a scheduling Conference hearing which has been set for _____, 20__ at ____:____. The party submitting this form shall properly notify the other party or parties.

B. Trial Scheduled/Trial Held Date: _____

C. The parties to this action have conferred and agree as follows:

- 1. The parties are requesting a pre-trial conference ____ yes ____ no. If so, the parties have contacted the Court and it is set for _____, 20__ at ____:____.
- 2. The parties shall complete fact discovery on _____.
- 3. The parties shall file any amended pleadings and shall join any additional parties to the action by not later than _____.
- 4. The parties shall designate expert witnesses, if any, including curriculum vitae, and the subject matter about which each such expert is expected to testify by the following dates unless the parties mutually agree otherwise to extend deadlines for expert witnesses. **Plaintiff expert(s)** by: _____. All discovery shall be completed on such expert witnesses, including depositions, by not later than _____. **Defendant's expert(s)** by: _____. All discovery shall be completed on such expert witnesses, including Depositions, by not later than _____.
- 5. The parties shall complete all agreed-upon means/methods of alternative dispute resolution by not later than _____.
- 6. The parties shall file all non-dispositive pre-trial motions by not later than _____, and the parties shall file all dispositive pre-trial motions by not later than _____.
- 7. The parties shall identify (a) all documents which may be offered in evidence, and (b) all witnesses who may be called to testify, including each witness's name and address, by not later than _____.
- 8. The parties are requesting a ____ jury trial ____ non-jury/bench trial.
- 9. Local Rule 4-3 shall be complied with no later than (90) days from the date this form is presented to the Court Administrator. Parties shall be responsible to report to Conciliation Court for compliance.
- 10. The parties must be prepared for trial by not later than _____.
- 11. The anticipated length of the trial will be _____.
- 12. The original has been presented to the Court Administrator for review. Dated this ____ day of _____, 20__.

____ DOMESTIC RELATIONS
____ Dissolution
____ Separate Maintenance
____ Annulment
____ Other/Explain: _____
____ MINOR CHILDREN (Rule 4-3 Applicable)

____ MODIFICATION
____ Alimony
____ Child Support
____ Parenting Time

____ Check if Additional parties, and identify on back of this form.

JUDGE USE ONLY
Scheduling Conference: _____
Pre-Trial Conference: _____
Ready for Trial Date: _____
Trial Date: _____
Jury Instructions Due: _____
Exhibits due to Court Reporter: _____

Plaintiff's/Petitioner's Attorney [Sign and Print Name]
Address
Telephone Number

Defendant's/Respondent's Attorney [Sign and Print Name]
Address
Telephone Number

IT IS SO ORDERED this ____ day of _____, 20__.
BY THE COURT:

District Court Judge

CRYSTAL RHOADES
CLERK OF THE DISTRICT COURT
DOUGLAS COUNTY
SCOTT J. PACKER, CHIEF DEPUTY
1701 FARNAM STREET, HALL OF JUSTICE #300
OMAHA, NEBRASKA 68183

Memo

To: Eva Roeber, Bankruptcy Clerk,
From: Scott Packer, Chief Deputy CDC
Re: Douglas County Progression Rules and Bankruptcy
Date: 6.2.23

On April 3rd, my office received a memo from your office regarding the application of Local Court Rule § 4-10 to cases in our court in which a Suggestion in Bankruptcy has been filed. Specifically, you had noted that some attorneys in the local bankruptcy bar had indicated that cases in which a Suggestion in Bankruptcy was filed were still being subjected to the progression rules, in spite of the bankruptcy protections contained in 11 U.S.C. § 362.

When a Suggestion in Bankruptcy is filed in our court, we process the filing using a specific code, SUGBANK. This code, when activated in our online case management program, the Judicial Users System to Improve Court Efficiency (JUSTICE) system, will automatically turn progression on the case off.

While I have not conducted an exhaustive search of all cases filed in our court, I did look at all the cases in which a Suggestion in Bankruptcy was filed in the calendar year 2022, with the assistance of the District Court Administrators office. There were seventy-six (76) such cases in the Douglas County District Court in 2022. Notices of Intent to Dismiss consistent with Local Court Rule § 4-10 were filed in twelve (12) of those cases.

In all but one of those cases, the Notice was filed before the Suggestion in Bankruptcy was filed, and once the Suggestion was filed, progression on the case was stopped. In the one case in which the Notice was filed after the Suggestion was

filed, progression was subsequently turned off on the case, and the case was not subjected to a dismissal or other further proceeding.

There were four cases in which a Notice was filed before the Suggestion in Bankruptcy was filed, but in which progression continued after the Suggestion was filed. Two of those cases were domestic relations cases that dealt with the entry of alimony and a Qualified Domestic Relations Order, respectively. I believe these cases are excepted from the general rule in 11 U.S.C. § 362(a) by subsection (b)(2)(A) of that same section. In the third case, the action only proceeded as it regarded other co-defendants not named in the Suggestion of Bankruptcy, but progression with regard to the Defendant filing the Suggestion was stopped. In the final case, the only subsequent order entered by the court was to cancel a debtor's exam in which the party filing the Suggestion had previously been ordered to participate.

In the event an attorney in the local bar has a case in our court in which a Suggestion is filed, but in which a subsequent Notice of Intent to Dismiss is also filed, the attorney should contact the Clerk of the District Court's office to apprise us of this error. If there is a Suggestion in Bankruptcy filed, we will ensure that the progression on the case is turned off administratively, and enter a Clerk's note indicating that the case should not be dismissed pursuant to the Suggestion, so that no further action should be required by the attorney.