

2017-2018 Attorneys' Fee Summit

Business Law Section ◇ Bankruptcy Judicial Liaison Committee

General Issues – September 1, 2017

1. How do local rules addressing fees differ in the ND, MD and SD? Can they be harmonized?

- All Districts have “no-look” Chapter 13 fees but the amounts are different
 - In the Southern District, there is a separate “no-look” fee for post-confirmation issues
- No Districts have fixed chapter 7 fees or uniform procedures, but:
 - In the Middle District, there is a fixed rate of \$650 to a secured creditor for a relief from stay motion unless there are special circumstances
 - In the Southern District, there is no “unbundling” of the services included in a basic fee
- JUDGE: With respect to attorney fee requests from secured creditors in motions for relief from stay, if no party objects, the judge will usually grant the motion and the claim can be amended to include those fees. However, such fees are granted on an in rem basis for state court purposes only, and only if the specific fee is requested. Also, granting such a motion is not a “gotcha” to establish that the creditor is oversecured.
 - ATTY/JUDGE: Is state foreclosure court the proper place to ask for fees from a foreclosure (even the bankruptcy portion of such fees)? Mixed reviews. Some state courts refuse to address fees incurred before a different court. *See Sanchez case.*
 - ATTY: Not an issue in panhandle courts
- JUDGE: In the Southern District, no attorneys’ fees will be awarded if not in the prayer for relief.
- JUDGE: There is an issue in the Middle District regarding estimates of debtors’ attorneys’ fees in Chapter 11 cases going into the confirmation hearing. Attorneys need to make sure they estimate high enough.
- ATTY: What is recoverable for secured creditors? Some functions deemed “ministerial” but it is important for attorneys to make sure fees are right before filing motions/proofs of claim

2. When is the deadline for disclosure of payment? When does the duty to disclose end?

- JUDGE: Under Rule 2016b, attorneys have a duty to disclose actual payment of fees to the United States Trustee's Office within 14 days of payment using the 329 form, even after an order awarding the fees is granted and the case is confirmed. *See Howard Avenue Station case.*

3. Does a bankruptcy court has jurisdiction to award a creditor's attorney's fee after a case has been dismissed?

4. Can lawyers be retained and paid pursuant to section 328?

- ATTY: The best practice is to specifically reference section 328 in the motion. The appellate circuits are split on how strict this requirement is.
- ATTY: Are alternative fee arrangements the wave of the future?
 - JUDGES: It is ok to switch from an hourly fee to a contingency fee if that arrangement is disclosed up front, such as hourly fees for an investigative phase or capping hourly fees.

5. Is expert testimony helpful in fee disputes?

- JUDGES: Not usually in normal bankruptcy cases but they can be helpful in extraordinary cases

Consumer/Chapter 13 & Chapter 7 Issues – January 17, 2018

1. How can attorneys permissibly finance attorneys' fees/costs in consumer cases?

- Post-dated checks? (e.g. \$250 pre-petition, \$1000 post-petition)
 - TRUSTEE: violates 362 because its actually a post-petition payment with pre-petition liability, which creates a conflict
 - JUDGE: violates the automatic stay to deposit the post-petition check
- Two Contract Retention? (Pre-petition contract for pre-petition services & optional post-petition contract if the debtor wants representation post-petition)
 - JUDGE: debtor needs breathing room to decide and attorneys are on the hook until then, more disclosures are needed
 - Has become a national business
- Financing Arrangement?
 - debtor ends up paying \$2k to pay an attorney \$1,250 because of interest (illegal interest? insufficient disclosures?)

- JUDGE: against forcing poor people trying to get a fresh start into incurring more debt
 - ATTY: What if they don't pay? Isn't conflict issue revived?
 - JUDGE: conflict issue is always there
 - monthly payments for years before filing but debts may be stale by then?
2. What are the permissible no-look fees for chapter 13 throughout the state?
 3. Can chapter 13 trustees distribute fees to debtors' counsel after dismissal of a chapter 13?
 4. Can attorneys represent chapter 7 trustees on a contingency fee basis?
 5. To what extent can legal services be unbundled to reduce attorneys' fees?
 - JUDGE: all comes back to what is core
 - ATTY: hard for attorneys to know without clear guidelines/local rules
 - ATTY: may need local inquiry to determine what is core, maybe limited time for 2004 exam?

Commercial/Chapter 11 Issues – June 13, 2018

1. Dealing with abusive objections to fees after *Baker Botts*.
 - Retention Agreements allowing defense fees – DE v. NM
2. What is the preference for interim applications in chapter 11s?
3. How can fee applications be streamlined and still comply with statutory and rule requirements?
4. How are reasonable hourly rates determined for local and out of town attorneys? Should there be a difference?

Resources

Local Rules and Administrative Orders for the Northern District

1. Local Rule 2016-1. Compensation of Professionals
2. Local Rule 7054-1. Cost – Taxation/Payment
3. Local Rule 3002.1-1. Notice Relating to Claims Secured by Security Interest in the Debtor’s Principal Residence.
4. Local Rules Addendum B: N.D. Fla. Loc. R. 16.3. Mediation.
5. Administrative Order No. 15-001 - Mortgage Modification Mediation Procedures (dated 9/22/15).
6. Standing Order #19 - Chapter 13 Attorneys Fees, Adequate Protection payments, Annual Statements, Form Plan, and Tax Returns (as amended 9/30/14).

Local Rules and Administrative Orders for Middle District

1. Local Rule 2016-1. Compensation of Professionals
2. Local Rule 9019-2. Alternative Dispute Resolution (ADR); Mediation.
3. Third Amended Administrative Order Prescribing Procedures for Chapter 13 Cases, FLMB-2016-3, dated 9/1/16 (proposed Fourth Amended pending).
4. Second Amended Order Establishing Presumptively Reasonable Debtor's Attorney's Fees in Chapter 13 Cases (07-mp-00002-MGW, dated 8/21/17, effective for cases filed on or after 9/15/17) – Tampa & Fort Myers Divisions.
5. Amended Order Establishing Presumptively Reasonable Debtor's Attorney's Fees in Chapter 13 Cases (07-mp-00002-MGW, dated 9/2/16, effective for cases filed on or before 9/15/17) – Tampa & Fort Myers Divisions.
6. Administrative Order Prescribing Procedures for Mortgage Modification Mediation, FLMB-2017-1, dated 3/9/2017.
7. <http://www.flmb.uscourts.gov/negativenotice/list.pdf> (Local Rule 2002-4)

Local Rules and Administrative Orders for the Southern District

1. Local Rule 2016-1. Compensation for Services Rendered and Reimbursement of Expenses.
2. Local Rule 7054-1. Taxation of Costs by Clerk; Deadline for Motions for Attorney Fees and Motions for Costs Requiring Court Order.
3. Local Rule 9013-1. Motions. (providing, inter alia, for use of negative notice)
4. Local Rule 9019-2. Mediation.
5. Local Rule 2002-1. Notices.
6. Local Rule 3017-1. Disclosure Statement and Confirmation Hearing - Standard Chapter 11 Cases.
7. Local Rule 3017-2. Disclosure Statement Approval and Confirmation - Small Business Cases.

8. AO 2008-02 Order Establishing New Compensation Rate for Mediators and Clarifying Effective Date of New Rate (dated 6/9/08).
9. AO 2013-01 Adoption and Implementation of Loss Mitigation Mediation Program (dated 2/26/13).
10. AO 2014-03 Adoption of Mortgage Modification Mediation Program and Status of Loss Mitigation Mediation Program Adopted Under AO-01 (dated 7/24/14).
11. Mortgage Modification Mediation Program Procedures (Revised December 1, 2015 as provided under Administrative Order 14-03; and Amended on March 29, 2017).

General Order 2017-2 -- U.S.B.C. Southern District of Georgia

Entered July 17, 2017, General Order 2017-2 addresses the compensation of debtors' attorneys in Chapter 13 cases.

Available at <http://www.gasb.uscourts.gov/pdf/GO2017-2.pdf>.

Key Cases

Baker Botts L.L.P. v. Asarco, LLC, 135 S. Ct. 2158 (June 15, 2015) (Thomas, J. [6-3])

In re Stanton, 559 B.R. 781 (Bankr. M.D. Fla. Oct. 26, 2016) (Williamson, J.)

In re Howard Avenue Station, LLC, 568 B.R. 146 (Bankr. M.D. Fla. April 28, 2017) (McEwen, J.)

In re Tuscan Energy LLC, 561 B.R. 910 (Bankr. S.D. Fla. Dec. 30, 2016) (Kimball, J.)

Walton v. Clark & Washington, P.C., 454 B.R. 537 (Bankr. M.D. Fla. 2011) (Williamson, J.)

Walton v. Clark & Washington, P.C., 469 B.R. 383 (Bankr. M.D. Fla. 2012) (Williamson, J.).

In re Ruiz, 515 B.R. 362, 363–64 (Bankr. M.D. Fla. 2014) (Jennemann, J).

Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co., 549 U.S. 443 (2007) (Alito, J., for a unanimous court)

Florida Fed. Sav. & Loan Assoc. v. Sanchez, 553 So. 2d 1254 (Fla. Dist. Ct. App. 1989) (Gersten, J.)

TransUnion Risk & Alt. Data Sols. v. The Best One, Inc. (In re TLFO, LLC), No. 14-01793-PGH, Doc. No. 617 (Bankr. S.D. Fla. May 18, 2017) (Hyman, J.)

Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974)