Don't Have Egg on Your Face: Breakfast with the Judges

Hon. Laurel Myerson Isicoff
Moderator
U.S. Bankruptcy Court (S.D. Fla.); Miami

Hon. Mary Grace Diehl
U.S. Bankruptcy Court (N.D. Ga.); Atlanta

Hon. Benjamin A. Kahn
U.S. Bankruptcy Court (M.D.N.C.); Greensboro

Hon. C. Ray Mullins
U.S. Bankruptcy Court (N.D. Ga.); Atlanta

Hon. James J. Robinson
U.S. Bankruptcy Court (N.D. Ala.); Anniston

Hon. Gregory R. Schaaf
U.S. Bankruptcy Court (E.D. Ky.); Lexington

Hon. John E. Waites
U.S. Bankruptcy Court (D. S.C.); Columbia

DON'T HAVE EGG ON YOUR FACE: BREAKFAST WITH THE JUDGES

AMERICAN BANKRUPTCY INSTITUTE
2015 SOUTHEAST BANKRUPTCY WORKSHOP

Hon. Laurel M. Isicoff, Moderator
Hon. Mary Grace Diehl
Hon. Benjamin A. Kahn
Hon. C. Ray Mullins
Hon. James J. Robinson
Hon. Gregory R. Schaaf
Hon. John E. Waites

Oral Argument Dos and Don'ts

Hon. Mary Grace Diehl

DOS

1. Be flexible. The advantage to be gained in oral advocacy is the ability to respond to any issues that the Court may have concern with. Thus, it is important to be able to "go with the flow" in the argument. This is not about giving a speech. It is about persuading a court to adopt your position.

2. Answer immediately any question asked by the judge. I suggest that when you have finished your answer or the dialogue that may follow you ask: "Did that address your concerns, your honor?" You don't want to leave the issue until the judge is satisfied. Don't ever say "I'll get to that later, Judge."

3. Be a little passionate about your position. If you don't sound like you believe your argument, I am not likely to believe it either.

4. Know the record. This is particularly important on summary judgment motions since the court will often want to know "Where is that in the record" both to support an undisputed fact of to provide a reference for a disputed fact.

5. Have copies of your most important/persuasive cases available for the court. Even in this electronic age, it is helpful to give the court what you want them to read.

6. Make your argument interesting and engaging. Be a good story teller.

DON'TS

1. Do not read your argument or rely too heavily on a written form. While this is not a jury, it is important that you be able to focus on the judge's reaction to your argument.

2. Do not interrupt the court or your opponent. It is not only rude but it derails the court's concentration and it makes it very difficult for the court to have an accurate audio record if reference will be needed in the future.

3. Don't be afraid to concede the obvious - it helps your credibility and streamlines

the argument.

4. Do not repeat everything that is in your papers. Assume (unless you know to the contrary) that the judge has read the papers. It is fine to summarize the basic facts so the court can ask questions if clarification or augmentation is desired. If you are tracking your motion/brief, the court will be tempted to follow along rather than listen to your argument.

5. Don't continue to argue a point where the court has indicated its agreement with your position. When you are winning, sit down!

6. Do not avoid addressing any weaknesses in your case. These are really the most important areas to prepare for and argue. Know what argument you can't afford to lose and make sure you nail it down.

TEN THINGS I LIKE ABOUT YOU

PRACTICE TIPS FROM JUDGE ISICOFF

ONE

I LIKE THAT YOU AND YOUR STAFF REVIEW LOCAL RULES AND MY PROCEDURES RATHER THAN CALL MY JA OR LAW CLERK TO FIND OUT THE PROPER WAY TO DO SOMETHING, OR TO FIND OUT WHAT I DO AND DO NOT EXPECT OR ALLOW WITH RESPECT TO CERTAIN MOTIONS OR HEARINGS.

All the judges have taken the time to write and post procedural preferences and guidelines on their individual webpages. Moreover, the judges and the clerk have spent a great deal of time putting together local rules and local forms with a detailed index to make it easy for you to find information. You need to make sure your staff are aware of these resources and use them.

TWO

I LIKE THAT, IF YOU ARE NOT OPPOSING A MOTION, YOU PICK UP THE PHONE OR SEND AN EMAIL, ADVISING OPPOSING COUNSEL THAT YOU ARE NOT OPPOSING, RATHER THAN JUST NOT SHOWING UP FOR A HEARING.

If you are not opposing a motion, or you are agreeing to relief, let the movant know so that the movant can come up at the beginning of motion calendar, OR even avoid coming to court. **Don't just NOT show up.** That will mean that you have caused opposing counsel unnecessary time and expense and second, that you have used up valuable court time on a motion that could have been resolved easily. Moreover, if you don't show up, I will assume you missed the hearing by accident or carelessness, and I will issue an order to show cause requiring you to respond, and, perhaps, show up and explain to me in person why you missed the hearing.

THREE

I LIKE THAT YOU REMEMBER TO REACH OUT TO OPPOSING COUNSEL BEFORE YOU FILE A MOTION IN ORDER TO SAVE TIME AND COST.

Local Rule 9073-1(D) states "***Conference With Opposing Attorneys Required. If a motion seeks relief involving a debtor that is represented by an attorney, the trustee, or another particular adverse party that is represented by an attorney, the certificate of service for the notice of hearing shall include a certification that movant's attorney has contacted counsel for all adverse parties to attempt to resolve the matter without hearing***." (NOTE: this is in addition to the meet and confer requirements of Fed.R.Bankr.P. 7037 relating to discovery disputes). If possible you must try to resolve matters without filing a motion. This will save you and your client time and money. It will also save court time.

FOUR

I LIKE THAT YOU DO NOT FILE AN EX PARTE MOTION TO CONTINUE A HEARING OR A DEADLINE WITHOUT GETTING AGREEMENT FROM THE OTHER SIDE AND REPRESENTING IN THE MOTION THAT THE EXTENSION OR CONTINUANCE IS AGREED.

In the absence of a true emergency that does not allow time to confer with the other side (and long planned family vacations, or hearings or trials in other courts that have been previously set are NOT

emergencies), I will not continue a matter without a hearing, unless 1) the basis for the continuance is set out in the motion; 2) it is not requested at the last minute; and 3) the motion reflects that you have conferred with the other side before filing a motion that is not agreed. If the matter IS agreed, please call the Courtroom Deputy to get the new hearing date and include that date in the proposed order (uploaded with the motion).

FIVE

I LIKE THAT THE MOTIONS AND ORDERS YOU SUBMIT HAVE BEEN REVIEWED FOR ACCURACY, TYPOS, GRAMMAR AND PUNCTUATION ERRORS, PERSONALLY IDENTIFIABLE INFORMATION AND COMPLETENESS.

Please read everything you submit. Please make sure all of your motions have the required exhibits, the proper titles, the proper party names, are in English (as opposed to incomplete sentences that sound like gibberish), and otherwise look professional. If the motions are ex-parte motions, please make sure that you submit orders with the motions and that the orders match the motions.

Please make sure you upload orders that include any exhibits that are referred to in the order, and also contain full sentences, make sense, match the relief requested in the motion, and otherwise look professional. If the orders stem from ex-parte motions make sure that you file the CNR before uploading the order and make sure the word "Proposed" or "Exhibit __" has been taken off the order you want me to sign. If there is a form order – USE IT (but modify it if necessary).

SIX

I LIKE IT WHEN YOU MAKE SURE THAT YOU PROPERLY SERVE ANY MOTION OR COMPLAINT THAT YOU FILE (COMPLYING WITH RULE 7004 SERVICE WHEN NECESSARY, SERVING OBJECTIONS TO CLAIM IN ACCORDANCE WITH THE ADDRESS INDICATED ON THE PROOF OF CLAIM, AND SERVING ALL THE PARTIES REQUIRED BY RULE 2002 TO BE SERVED WITH A PARTICULAR PLEADING). I ALSO LIKE IT WHEN YOU TIMELY FILE A CERTIFICATE OF SERVICE THAT SHOWS THAT THE PLEADING AND NOTICE OF HEARING, IF APPLICABLE, WERE PROPERLY SERVED.

Service of motions is governed primarily by Bankruptcy Rules 2002 and 7004. Make sure you serve everyone who needs to be served in the manner that they are required to be served in the timeframe they are required to be served. If you don't have enough time, then file a motion seeking to shorten the required time periods. Our Local Rules require that you serve any order or notice of hearing within two days after receiving the order or notice of hearing from the court, and that you immediately file a certificate of service reflecting who you served and how you served them.

SEVEN

I LIKE THAT YOU AND YOUR STAFF TAKE THE TIME TO READ THE EMAIL FROM CM/ECF (WHICH IS ACTUALLY SENT BY CHAMBER'S STAFF) EXPLAINING WHY AN ORDER HAS BEEN RETURNED TO YOU.

There is absolutely no reason whatsoever to call my JA or law clerk and ask WHY an order was returned. Every order returned includes an email WHY the order was returned. READ IT. This is one of the many reasons why it is important that your email is correct on any order you submit.

(You should, by the way, always remember to keep current in the court's case management system (CM/ECF), your primary and secondary email addresses. Additionally, if you are changing your U.S. Mail address you must also file a Notice of Change of Address in each case or proceeding in which the change is to be effected [See Local Rule 2002-1(G)(1).We had one lawyer who failed to provide a

notice of change of address and he had to respond to an order of contempt for failing to appear at several hearings that he didn't know about because he forgot to update his information with the clerk.)

EIGHT

I LIKE THAT YOU MAKE SURE YOUR CLIENTS KNOW WELL IN ADVANCE WHEN THEY DO OR DO NOT NEED TO SHOW UP FOR SOMETHING AND WHEN A MATTER HAS BEEN RESOLVED.

Something special about our bar is that so many disputes can be resolved amicably. However, many times clients show up for a hearing (a) which hearing the debtor did not need to attend even if there was no agreement or (b) that has been resolved by agreement ahead of time but without the client knowing the hearing has been canceled. Your client's time is as valuable as your time. Please make sure your client always understands when he or she needs to show up and if you do resolve something in advance of a hearing let your client know so he or she doesn't have to come to court for nothing.

NINE

I LIKE THAT YOU PROPERLY PREPARE FOR EVIDENTIARY HEARINGS AND BRING THE APPRORIATE EXHIBITS, PROPERLY TABBED AND MARKED WITH THE CORRECT FORM OF EXHIBIT REGISTER, AND THAT YOU BRING ENOUGH COPIES, AND THAT YOUR WITNESSES KNOW WAY IN ADVANCE THEY NEED TO BE AT A HEARING.

Every adversary proceeding and evidentiary hearing has a procedures order that sets forth what the parties must do prior to the scheduled trial or hearing and what must be brought to the trial or hearing. Calendar these deadlines as soon as you get the order! And make sure any witnesses you need, including your client, know the hearing or trial date as soon as you do. That includes appraisers. YOU may know that something has been scheduled and put it on your calendar. Everyone else needs to get it on their calendar as well. In this way, if a necessary witness or your client will be unavailable on a scheduled trial or hearing date, you will know well in advance and can file a motion to reschedule, giving opposing counsel, and the court, plenty of time to adjust their schedules as well. And whatever you do DON'T show up for a trial or evidentiary hearing unprepared.

TEN

I LIKE THE FACT THAT YOU ALWAYS REMEMBER THAT LAW IS A PROFESSION, NOT A JOB. EVERYTHING I LIKE ABOUT YOU REFLECTS YOUR RECOGNITION OF THAT IMPORTANT DISTINCTION.

Tips on Practicing Before the Courts

Shared by

Hon. Ray Mullins

I. PRACTICE POINTS IN DRAFTING AND GENERAL PROCESS ISSUES

- Check the Court's website for most up-to-date forms and familiarize yourself with the particular Court's filing system
- Prose should be clean and short
- Is the pleading or court intervention necessary or can you work with the counter party to resolve the issue consensually?

2

I. PRACTICE POINTS IN DRAFTING AND GENERAL PROCESS ISSUES (Cont.)

- Relief requested should be front and center; do not make the Judge wait until the middle of the motion until s/he understands what relief you are requesting
  - Use preliminary statements to outline for the Judge the direction of the argument
- Avoid hyperbole, drama and outrage in your pleadings unless it is warranted; the Court is not as invested emotionally as you are in the issues
- Do not be over-zealous about string cites

3

I. PRACTICE POINTS IN DRAFTING AND GENERAL PROCESS ISSUES (Cont.)

- Ask yourself: Does the motion explain your story and how you arrived at the relief you are requesting? Does the motion explain the business reasons behind your decisions?
  - If you are asking to pay $5 million in critical vendor payments, does the motion explain how you arrived at the $5 million number?
  - Have you considered what needs to be paid in the interim period versus the final period?
  - If you are assuming a contract, have you explained why it makes sense from the perspective of the business, and not just that it is in the "best interests of the estate"?

4

I. PRACTICE POINTS IN DRAFTING AND GENERAL PROCESS ISSUES (Cont.)

- Know your cases and know your precedent: do not pull quotes from cases where the holding stands for the opposite proposition of what you want to argue and be sure to read the entire case
- Cite to and distinguish precedential cases that do not support your position
- Subject to the rules of the Court, make use of the opportunity to submit a reply brief to tie everything together
- If any objection is filed, contact the objector to try to resolve the objection

5

II. MAKING THE BEST CASE IN COURT

- Create a narrative of the case to tell your story to the Court in the most compelling terms possible
- Know your facts and issues: be prepared to answer questions beyond what is stated in your motions
- Do not read your notes, consider preparing an outline so that you are not inclined to read
- Practice out loud in advance of the hearing

6

II. MAKING THE BEST CASE IN COURT (Cont.)

- Talk with colleagues who have appeared before your Judge
- Tie your relief to the Bankruptcy Code, and recite the applicable standard as well as how you plan to meet the standard
- Speak with your adversaries in advance of the hearing to map out the course of the hearing
  - Try to agree on exhibits and order of witnesses

7

II. MAKING THE BEST CASE IN COURT (Cont.)

- Tenor of Court
  - Listen to the Judge and consider the tone of the discussion
  - Listen to the Judge's questions of counsel for the other parties and be prepared to answer those questions with respect to your client
  - Do not be so focused on what you think you should say ahead of the hearing; go in to the hearing with a plan, but be prepared to depart from that plan
  - Offer the Judge the opportunity to go straight to the issue at hand, without reciting what's in your pleading: ("I'm prepared to give the court a brief background, or I can just go straight to the issue at hand")

8

II. MAKING THE BEST CASE IN COURT (Cont.)

- Make your remarks into the microphone and to the Court, not to your adversary
- Avoid ad hominem attacks and open hostility with your adversary; avoid interrupting your adversary's presentation, unless it is necessary

9

III. BANKRUPTCY FUNDAMENTALS

- Work closely with the Judge's clerks to understand how the Judge likes things done
- Coordinate efforts with all professionals in the case or cases to insure the process runs smoothly for the Court and the parties

10

III. BANKRUPTCY FUNDAMENTALS (Cont.)

A. RETENTION APPLICATIONS/ ENGAGEMENT AGREEMENTS/CONFLICTS

- Retention/Engagement Issues
  - Consider roles of key professionals (such as financial advisors, accountants, experts, etc.); think creatively about the various roles that can be played by financial advisors beyond the traditional valuation role
  - Provide a clear presentation of current and prospective billing rates
  - Consider whether transaction fees (consummation fees, sale transaction fees, restructuring fees, etc.) are reasonably tailored to the scope of the services being performed and tied to certain performance metrics
  - Credibility of financial advisor should be considered at retention stage and consider how terms of the financial advisor's engagement may impact credibility

11

III. BANKRUPTCY FUNDAMENTALS (Cont.)

A. RETENTION APPLICATIONS/ ENGAGEMENT AGREEMENTS/CONFLICTS (Cont.)

- Conflicts Issues
  - Report ALL connections and conflicts of interest
  - Update conflicts checks on regular basis and based on case developments
  - Consider having a team member in charge of overseeing the entire process and keeping a master list so that the process is streamlined

12

III. BANKRUPTCY FUNDAMENTALS (Cont.)

B. TESTIFYING IN COURT

- Identify and pick the right people to testify – who knows the subject matter best?
- Be clear on the point of the testimony – what is the purpose and what information needs to be conveyed to the Court?
- Witnesses should be prepared – know the facts and what needs to be said
- Be focused – witnesses should stay on point and speak in accessible and user-friendly terms
- Demeanor counts – speak loudly and clearly, be polite to the Court and don't come across as a know-it-all

13

III. BANKRUPTCY FUNDAMENTALS (Cont.)

C. NOTICE ISSUES

- Judges pay attention to process and notice requirements; requires heightened sensitivity by counsel
- Consider having a team member in charge of coordinating with the claims agent for the case so that the process is streamlined
- Constantly ensure that all relevant parties are receiving notice
- Be sensitive to the addition of new parties to the Master Service List
- Consider circumstances in which broadest notice is best
- Serious implications for failing to meet these requirements: consider 363 sale scenario where all contract counter-parties are not noticed: result could be that certain contracts might be rendered unassumable or unassignable

14

III. BANKRUPTCY FUNDAMENTALS (Cont.)

D. VALUATION

- Primary responsibility of financial advisor
- Judges are not experts in valuation
- Financial advisors and counsel have to explain valuation conclusions
- Make sure to explain the bases underlying valuation conclusions
- Demonstrate to Judge that a rigorous and balanced approach was utilized to arrive at valuation conclusions

15

III. BANKRUPTCY FUNDAMENTALS (Cont.)

E. DIP FINANCING/363 SALES/ CHAPTER 11 PLANS

- Consider the dynamics of the situation before you ask the Judge to push the edges
- Contemplate the burden you will need to meet in order to receive the relief you are requesting; are you going to be able to make a strong enough showing in Court?
- Know the recent case law – both in the relevant circuit and in the specific jurisdiction – because these key issues have been dealt with in many cases in the recent years:
  - Roll-ups, cross-collateralization, etc.
  - *Lyondell*, *GM*, etc.

16

III. BANKRUPTCY FUNDAMENTALS (Cont.)

F. BANKRUPTCY LITIGATION

- Procedure and process is imperative
- Know your rules of evidence and rules of adversary procedures
- Know when to involve litigators
- Do not lose the forest for the trees; showing the Judge a nasty email from counsel to the other side is not going to win your case

17

IV. SEPARATING YOURSELF FROM THE PACK

- Be up to date on recent case law on key bankruptcy topics
- Know your local rules
- Listen to the Judge during hearings
- Ask the partners to let you present in court, ask to start first with procedural motions
- Utilize your resources:
  - Discuss the issues in your cases with experienced practitioners
  - Attend hearings and review related pleadings from other cases covering similar issues arising in your case
  - Review daily and weekly bankruptcy journals and blogs for updated news and outcomes of key hearings

18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

ROBERT ALLEN O'HAIR, Plaintiff, V. WINCHESTER POLICE DEPARTMENT, et al., Defendants.	))))))))))	Civil Action No. 5: 15-097-DCR **ORDER RE: COURTROOM DECORUM AND TRIAL PROCEDURES**

*** *** *** ***

To promote efficiency and professionalism, it is hereby

ORDERED as follows:

1. Counsel and the parties shall strictly adhere to the Court's trial and hearing schedules and shall be present at the time set for the beginning of any proceeding, as well as the resumption of any proceeding, following any recess. Preparation for any proceeding should be completed prior to the matter being called.

2. Counsel shall refrain from engaging in or employing dilatory tactics or tactics that are intended or designed, directly or indirectly, to cause unnecessary expense or prevent the orderly administration of justice.

3. Counsel shall stand when Court sessions are opened, recessed or adjourned. Likewise, counsel shall stand when addressing, or being addressed by, the Court. Absent leave of Court, counsel shall stand at the lectern/podium while examining witnesses or while

making opening statements, closing arguments, or questioning potential jurors during voir dire proceedings.

4. Counsel shall refrain from assuming an undignified posture in the Courtroom. Counsel should be properly attired in a proper and dignified manner and should abstain from any apparel or ornament calculated to attract attention to himself or herself.

5. No food or drinks may be brought into the Courtroom by parties, witnesses or attorneys. Likewise, counsel and parties may not chew gum or use any type of tobacco product during proceedings and may not have such items present in the Courtroom.

6. Counsel, parties, and witnesses shall avoid unnecessary talking and conversation during proceedings. This includes discussions occurring prior to or following proceedings in which counsel, parties and witnesses are present in, or adjacent to, the Courtroom in which proceedings are occurring.

7. Counsel shall address all remarks to the Court, rather than to opposing counsel.

8. Counsel shall avoid disparaging personal remarks or acrimony toward opposing counsel and shall remain wholly detached from harboring ill feelings toward the litigants or witnesses.

9. Counsel shall refer to all persons, including witnesses, parties, and opposing counsel by surnames only.

10. Only one attorney for each party may examine or cross-examine each witness. The attorney stating objections during direct examination shall be the only attorney recognized for cross-examination.

11. Counsel must receive permission before approaching any witness during his or her testimony. Likewise, counsel must receive permission before approaching the bench.

12. Counsel shall not publish any exhibit to the jury prior to that exhibit being admitted into evidence by the Court. Any paper, item or exhibit not previously marked for identification must first be handed to the Deputy Clerk of the Court to be marked for identification before being tendered to a witness for his or her examination. Likewise, any paper, item, or exhibit to be shown to a witness for identification and/or offered into evidence must first be presented to opposing counsel for examination.

13. Counsel shall state only the legal grounds for objections and must withhold further comment or elaboration unless directed by the Court. While the jury is present in the Courtroom, all argument and discussion regarding objections shall occur at the bench unless otherwise directed by the Court.

14. Offers of or requests for stipulations must be made at the bench.

15. During opening statements, closing arguments and other matters during which a jury is present, counsel shall not express personal knowledge of or opinions concerning any matter in issue. In this regard, attorneys shall absolutely refrain from stating personal beliefs regarding the truthfulness or falsity of any testimony. Further, counsel shall absolutely refrain from vouching for the credibility of witnesses. In criminal proceedings, counsel may not express personal opinions regarding the guilt or innocence of the accused or personal opinions regarding the merits of the case or evidence presented.

16. Counsel shall refrain from making gestures, facial expressions, audible comments, or similar expressions which could be construed as manifestations of approval or

disapproval during the testimony of witnesses or arguments of opposing counsel. This directive also applies to all persons seated at or adjacent to counsel table.

17. Any witness called by a party is deemed to be under the control of that party and the witness may be excused if said calling party so desires or announces. Should opposing counsel desire the witness to be available for testimony at a later time during the proceeding, counsel must so state and shall be responsible for securing the subsequent attendance of the witness.

18. Counsel who calls a witness may confer with the witness during recesses of Court proceedings during direct (or re-direct) examination only. This does not apply to a defendant who testifies in his or her own behalf, nor shall it apply to the government's designated case agent.

19. Prior to, during, and following trials and other proceedings, neither counsel, parties, nor witnesses may speak to nor associate with jurors.

20. All counsel shall assist the Court in protecting the sanctity and security of the jury and shall not disclose in the presence of the jury any information or material extraneous to the evidence admitted into the record. Disclosure before the jury of significant information extraneous to the evidence admitted will be considered misconduct which obstructs the Court in the performance of its judicial duties and shall be subject to contempt under Rule 42 of the Federal Rules of Criminal Procedure. Counsel shall cooperate in seeking to secure jurors from contact with the lawyers in the case, defendants, case agents, and other trial participants.

21. Should any party invoke Rule 615 of the Federal Rules of Evidence regarding exclusion of witnesses, counsel and all parties shall assist the Court, the Deputy United

States Marshals, the Courtroom Security Officers, and the Deputy Clerk of the Court, in keeping any witness who is expected to testify outside the Courtroom during the subject trial, hearing, or proceeding in which the rule is invoked.

22. Counsel should avoid unnecessary bench conferences to the extent possible. In this regard, counsel should exercise professional judgment in anticipating disputed issues or questions which might likely arise during trial and address those issues or questions with opposing counsel and, if necessary, with the Court, outside the presence of the jury.

23. All persons, including but not limited to counsel for the parties, are expected to strictly and absolutely comply with all orders or directives of Deputy United States Marshals and Court Security Officers prior to, during, and following all Court proceedings.

** ** **

Failure to comply with any of the aforementioned rules and procedures may result in the imposition of sanctions, monetary or otherwise.

This 1st day of June, 2015.

Signed By:
Danny C. Reeves DCR
United States District Judge

Practice Pointers for Debtors' Counsel

James J. Robinson, Bankruptcy Judge

Northern District of Alabama – Eastern Division[1]

Debtors' attorneys face the daunting task of walking their clients through the bankruptcy process, with all of its attendant twists and turns. The goal at the end of the journey, with very few exceptions, is to gain for their clients a discharge from their debts. Both the Supreme Court and the Eleventh Circuit have spoken to the overarching importance of the discharge in bankruptcy: "To begin with, the [Supreme] Court provided guidance by setting forth the three *critical* in rem functions of bankruptcy courts: '[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a "fresh start" by releasing him, her, or it from further liability for old debt.=@ *State of Florida v. Diaz (In re Diaz)*, 647 F.3d 1073, 1084 (11th Cir. 2011) (quoting *Central Virginia Community College v. Katz*, 546 U.S. 356, 363-64 (2006) (emphasis added)). *See also In re Wald*, 208 B.R. 516, 561 (Bankr. N.D. Ala. 1997) ("Bankruptcy courts must jealously guard the debtor's right to a discharge which, in the final analysis, is the primary purpose of bankruptcy.").

Implicit in an attorney's duty to represent a debtor competently in the quest for a discharge is the obligation to ensure that you are diligently providing your client as much benefit from the bankruptcy case as possible. In other words, you need to make sure the bankruptcy strategy you are advocating and advancing is in your debtor's best interest and is moving your client closer to a discharge whenever possible. While by no means exhaustive, the following is a

[1] Judge Robinson greatly appreciates the hard work and assistance of his law clerk, Alyssa Ross, with respect to the preparation of these materials.

list based upon my observation of some recurring situations in which debtor attorneys could do their clients a favor, and better improve the benefits of bankruptcy for their clients.

(1) Know your client, and know when to bring your client to court. It goes without saying that you, as the attorney, should be doing the legal work in your office, including meeting with your client and examining the relevant facts, prior to the case ever being filed. However, it is also the case that in many firms, one lawyer may conduct the initial consultation and handle the signing and filing matters, another lawyer may cover the 341 meeting, and yet another lawyer may attend hearings on particular contested matters. The result: a lawyer who spends an hour sitting through an entire docket call, three feet away from his client, which client came into the courtroom a few minutes after his case was called and has no clue he is three feet away from his lawyer. Aside from the real cost and inconvenience to the client who may be missing work already to be in court, this situation just does not look good. Consider keeping a photocopy of your client's photo ID with your file, and refer to it as needed.

On a related note, there are times when you know the court will want to hear from your client. In those instances, bring your debtor to court at the first hearing on the matter (e.g. confirmation) and have him or her prepared to testify or support your proffer. Notify the trustee and any opposing parties that you will be prepared to prosecute your position, including with testimony from the debtor. Such notification may counter any request by the opposition that they were surprised and need a continuance to rebut your debtor's testimony. A plea to the judge that a continuance will require your hard working debtor to take another day off work may be sufficient to overcome your opposition's request for a continuance. Having your client present will also demonstrate you are prepared, and cause any opposition to rethink their position.

Perhaps most important, it will make your judge happy, and with a happy judge you are more likely to achieve the result you want.

(2) Check for prior cases. Competent representation begins before the bankruptcy case is even filed. Regardless of which chapter of the Code your client may file under, the existence and timing of prior cases can have enormous ramifications. Always check the national PACER directory for prior filings. If your client is a repeat filer, you must discuss with your client BEFORE filing the case whether the client is eligible for discharge, and whether an extend- or impose-stay motion will be needed. It is unfortunately common that discharge eligibility issues are overlooked until after the case is filed. When a chapter 7 case is filed where the debtor is not eligible for a discharge, it is standard practice in the Northern District for the court to order the attorney to reimburse any fees received for the case and refund the debtor's filing fees. If the existence or duration of the stay is at issue due to repeat filings, remember that a thirty-day clock is ticking. Extend- or impose-stay motions should be filed immediately upon commencement of the case.

(3) Schedules are more important that credit reports. If your firm uses a credit report as the starting point for completing the schedules, *always* review that information with your client for accuracy and relevancy. This issue looms particularly large in extend- and impose-stay cases, and in chapter 13 cases where no discharge is available under 1328(f), in which cases the dates debts were incurred may be examined by the Court very closely in determining whether a change in circumstances exists, and whether the debtor is acting in good faith in invoking bankruptcy protection. As explained in *In re Beasley*, 2011 WL 4498942 (Bankr. N.D. Ala. 2011), "When presented with a chapter 13 case . . . in which no discharge is attainable, a critical element of the ' 1325(a)(7) good faith analysis is consideration of whether the case furthers the

intended, legitimate functions of the bankruptcy system. In a case that cannot provide the debtors with a financial fresh start, perhaps the most critical function of bankruptcy for individual debtors, because a discharge is statutorily prohibited, the reasons for nonetheless invoking the court's jurisdiction and protection under the Code must be closely examined."

In particular, remember that the date a debt was sold to a servicer or collector was not the date the debt was incurred by the debtor. Sloppy schedules can make things much worse for your debtor, when the dates used make it appear that debts are recent, and possibly even purchase money secured. Similar logic applies to refinance situations: you may show the most recent refinance date, but do so in a way that indicates it was a refinance and not a new obligation. Also, avoid "notice only" items on the schedules. Failure to list an actual creditor as such, instead showing them as only a "notice" recipient, could possibly deprive the debtor of discharge as to that creditor. (Does such a "notice only" listing equate to being "provided for by the plan" for purposes of Code § 1328(a)? – probably not).

(4) Keep your eye on the goal: discharge. It bears repeating: one of the critical purposes of bankruptcy relief is to attain for the debtor a discharge of debts. The "breathing room" provided by the automatic stay and the sense of relief when the collectors stop calling will be respite without result if the debtor cannot stay the course and achieve a discharge (with a few rare exceptions). This focus must be particularly intense in chapter 13 cases. Section 1322(d)(2) provides that for below-median debtors, "the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years." Rather than automatically put every debtor into a 5-year plan on the theory that payments being lower will make it easier to complete the plan, discuss with your client a shorter plan commitment when at all possible. This means

more than saying "do you want to pay $50 a week or do you want to pay $65 a week." This means spending some time analyzing what can be done to shorten the plan life and get the debtor to discharge as expeditiously as possible, including surrendering unnecessary collateral to secured creditors.

That will lead, inevitably, to a hard discussion on what the word "unnecessary" means. You should explain to your clients that being *in* bankruptcy is not as advantageous to them as being *out of* bankruptcy with a discharge and fresh start in hand. A less-than-five-year plan may mean a lower percentage to unsecured creditors. Some debtors may honestly be motivated by a desire to pay as much as possible to their unsecured creditors, and may want to stay in the case longer in order to accomplish that goal. Remind your clients that they can repay their debts voluntarily at any time, notwithstanding the discharge, if that truly is a concern. Section 524(f) of the Bankruptcy Code explicitly provides, "Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." Saddling a debtor with a 5-year plan when a 3-year plan will do is simply not in your client's best interest and delays, by years, the discharge.

The same can be said of invoking chapter 13 when chapter 7 relief better serves your client's needs. Strongly consider chapter 7 for below-median debtors. This consideration may require you to call secured creditors prior to filing and see if they would be willing to reaffirm, and on what terms. When your client is below median income, has little or no equity to protect, has no secured debt, and is chapter 7 eligible, is it in your client's best interest to nonetheless commit to a 3-year minimum sentence in chapter 13 as a means of paying your attorney fees? This is a difficult question that requires consideration of the totality of the circumstances, and which leads to my next point.

(5) Your client's best interest must come first. You practice law to make money. That is reality. It is also reality that a constant tension exists between your need to get paid, and the obligation you have to put your client's need for a discharge (not just stopping collection calls and letters during a temporary respite in a doomed chapter 13 case) ahead of your need to get paid. Rarely will a "fee only" chapter 13 case, in which the primary purpose is to finance attorney fees rather than accomplish a meaningful adjustment of debt or protection of assets, satisfy the good faith requirements for confirmation. The majority of courts to address the issue of such "fee only" plans have agreed that in most circumstances, they abuse the purpose and spirit of Chapter 13 and do not satisfy the good faith standard. *See, e.g., Brown v. Gore (In re Brown),* 742 F.3d 1309 (11th Cir. 2014) (no error in finding lack of good faith in a chapter 13 plan and case filed strictly to finance attorney fees when the debtor would have been much better served in chapter 7 but-for the inability to finance attorney fees in chapter 7); *In re Puffer,* 453 B.R. 14 (D. Mass. 2011), *rev'd and remanded,* 674 F.3d 78, 2012 WL 954860 at 83 (1st Cir. 2012) (reversing on grounds that a *per se* rule against fee only plans was inappropriate; but confirming that such plans must be analyzed in light of the totality of the circumstances on a case-by-case basis for good faith, that the "fundamental purpose" of chapter 13 is to pay creditors over time, and that fee only plans should be considered only in "special circumstances, albeit relatively rare, in which this type of odd arrangement is justified"). On remand, the Bankruptcy Court in *Puffer* considered the totality of the circumstances and found that harassing phone calls and letters from creditors, the resulting stress on the debtor, and the inability of the debtor to pay an attorney to file chapter 7 did not amount to rare or special circumstances, and therefore did not justify a "fee only" chapter 13 under the facts of that case. *In re Puffer*, 478 B.R. 101, (Bankr. D. Mass. 2012); *aff'd in part and rev'd in part*, 494 B.R. 1 (D. Mass. 2013)

(affirming that there were no special circumstances to justify a fee-only chapter 13 case, but reversing bankruptcy court's denial of debtor's attorney's fee). *See also In re Buck*, 432 B.R. 13 (Bankr. D. Mass. 2010) (collecting cases); *In re Jackson*, 2012 WL 909782 (Bankr. N.D. Ala. 2012), *In re Nelson*, 2009 WL 2241567 (Bankr. M.D. Ala. 2009); *but see In re Crager*, 691 F.3d 671, 2012 WL 3518473 (5th Cir. 2012) (upholding as not clear error bankruptcy court's finding of good faith in "fee only" case).

Sometimes your would-be debtor's best interest is served when you just say no, come back when you have the money to file chapter 7, because chapter 13 does nothing for you but temporarily stop the phone calls, and needlessly delay the discharge. The respite provided by chapter 13 is too often a brief one for debtors under those circumstances, who will, upon dismissal, be right back in the pay-day lender, title-loan whirlwind having accomplished nothing in terms of debt adjustment but to get further behind. Perpetuating that cycle with ill-advised fee only chapter 13 cases is not in your client's best interest.

(6) Examine the claims filed and object when necessary and appropriate. An effective chapter 13 practice requires debtors' counsel to examine the claims filed in your client's case and file objections and lien avoidance motions early. Also consider checking the probate office for recorded certificates of judgment. If you see perfection issues that could give rise to avoidance actions, flag those for the trustee. *See In re Mitrano*, 486 B.R. 795 (E.D. Va. 2012) (discussing lines of cases and finding that the majority of cases, as well as the cases decided by higher courts, find that debtors do not have access to the trustee's avoidance powers, as such powers are not included within Code § 1303). Avoid judgment liens while the case is open--the first time. Reopening a case in order to file a lien avoidance motion will cost your client more money, and may not be successful in any event if the judge is not sympathetic to

omitted lien avoidance motions that should have been filed when the case was open the first time.

Early in a case, review claim attachments and your client's own records. For example, examine mortgages, security agreements, financing statements (UCC-1's), promissory notes, deeds, certificates of title (for autos and mobile homes), deferred deposit agreements (pay-day lenders' contracts), title pawn documents, etc. From time to time you will discover defects, anomalies, and other flaws that may open the door to voiding or reducing a claim, or defeat a secured position. Better yet, it may give your debtor an affirmative cause of action or set-off, or at a minimum, give you leverage in negotiating with a creditor.

(7) File claim objections prudently. Notwithstanding the preceding paragraph, do not waste the court's time or your client's by objecting to claims that the debtor does not dispute owing, simply on grounds that the claimant did not attach sufficient supporting documents. If your client has scheduled the debt as undisputed, no other creditor has filed a claim for that debt, your client has no evidence to dispute the ownership of the debt, and the claim has enough information for you to match the claim with your client's schedules, an objection to that claim is not only inappropriate, but may lead to sanctions under Bankr. Rule 9011. This scenario was recently analyzed in detail in *In re Velez*, 465 B.R. 912 (Bankr. S.D. Fla. 2012) (sanctioning attorney for filing claim objections on technical grounds when the debtor had admitted owing the debts under penalty of perjury.) *See also In re Reynolds*, 470 B.R. 138 (Bankr. D. Colo. 2012) (allowing claims over debtors' objection despite noncompliance with revised Bankr. Rule 3001(c)(1) based on remedy of disallowance not being authorized by the Rule, and alternatively on judicial estoppels grounds based upon debtors' scheduling the claims as being undisputed).

(8) File claims yourself. Although it may sound counterintuitive, sometimes the best thing you can do for your debtor is to file a claim for a creditor that fails to do so on its own behalf. Bankr. Rule 3004 provides in relevant part, "If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable." We all know this is the case with secured collateral that the debtor wants to pay for and keep, but far fewer seem to take that step for nondischargeable unsecured claimants. You may not be acting in your client's best interest if you fail to file claims for student loan claimants, tax claimants and long-term mortgage claimants, for instance, which will not be discharged. In a related vein, do not offer interest on mortgage arrears unless you are certain the underlying contract allows for interest on amounts in default.

Mortgages entered into after October 22, 1994 (the effective date of the Bankruptcy Reform Act of 1994)[2] are governed by Code § 1322(e), which provides in relevant part that "if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Most courts analyzing whether interest is required to be paid on mortgage arrears being cured over the life of the plan look to the language of the contract and state law, and require something more specific than simply saying "interest continues to accrue until paid in full." *See, e.g., In re Trabal*, 254 B.R. 99 (D.N.J. 2000) (discussing timing and effect of § 1322(e), and Congressional intent to overrule the result in *Rake*, 508 U.S. 464).

[2] For mortgages entered into prior to October 23, 1994, *Rake v. Wade*, 508 U.S. 464 (1993) still controls and requires the payment of interest on arrears and other charges for an oversecured mortgage creditor, regardless of whether the contract so provides.

In practical experience, that will rarely be the case in most residential real estate note and mortgage forms. Treat lease-to-own or installment land sale contracts on residential real estate as secured mortgage debt when you can. Use the chapter 13 plan to cure arrears and maintain ongoing payments. Unless and until you are faced with a ruling to the contrary, your debtor's best interest is served by the binding effect of confirmation of a plan that treats those arrangements as long-term debt when applicable.

(9) Represent your client in negotiating reaffirmations. As the debtor's attorney in chapter 7, you have a duty to advise your client about the consequences of reaffirming versus not reaffirming, and the math behind the reaffirmation decision. The statement of intent cannot be completed without your having that conversation. Even if you cannot sign the form reaffirmation agreement certifying that you believe the debtor can make the required payments, you should nonetheless represent the debtor in the negotiations and at the hearing on court approval, where such hearing is required. Consider the following recitation of the duties that should be performed by attorneys in chapter 7 cases, quoted from *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008):

> Attorneys representing individual debtors in consumer cases filed under Chapter 7 of the Bankruptcy Code have certain essential duties they must perform. They must help debtors file the necessary petition, schedules, statements, and pleadings. They must attend the scheduled meeting of creditors. Most relevant here, attorneys representing consumer debtors must advise and assist their clients in complying with their responsibilities assigned by Section 521 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead to reaffirm or to redeem secured debts. This obligation is one of a debtor's attorney's primary and essential responsibilities, particularly after the passage of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, which made the decision more difficult and more complicated. If a hearing is scheduled on a reaffirmation agreement, the attorney must attend the hearing with his or her clients. If an attorney cannot perform these necessary duties, the attorney should not accept bankruptcy cases.

(10) File for fee waivers. Remember to move for in forma pauperis waivers of the filing fee and other fees in chapter 7 when the debtor qualifies. 28 U.S.C. § 1930 establishes the formula for such waivers. The limits change annually, and a chart of household size and income levels may be found at www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources under the "Poverty Guidelines" section.

(11) Prepare, proffer and protect. There are certain scenarios, usually in routine matters such as claim objection, valuation, and extend stay hearings in my court, under which attorneys regularly proffer their client's would-be testimony. The proffer serves an important function in saving time while establishing a record of matters not in dispute. However, the proffer can be a problem when it becomes evident that the information proffered was false. Alabama Rule of Professional Conduct 3.3, Candor Toward the Tribunal, requires the bankruptcy attorney to persuade the client to immediately disclose the false nature of the evidence to the court. If the client refuses, the attorney must disclose the false nature of the evidence to the court and avoid being a party to a fraud upon the court.

Preparation can prevent such predicaments. Review with your client, before the hearing, what the client's testimony will be and have your client confirm for you (ideally in writing, and not just in quick whispers at the podium) that the facts you are going to proffer are indeed what your client would testify to under oath. This not only protects you from offering information that is inaccurate, it also forces the client to consider the relevant information and get it straight for you before you are put on the record.[3]

[3] I recently began a new procedure for proffers in my court. As has always been the case, the debtor must be present in court. I have the debtor sworn and explain that the attorney will be proffering what the debtor's testimony would be. After the proffer, I ask the debtor to confirm

(12) Strip off underwater inferior mortgages before signing off on a first mortgage modification. If your client has an underwater second mortgage, subject to strip off, the balance owing on the first mortgage is an important part of your case-in-chief in the strip off adversary proceeding. Be aware that some mortgage modifications may reduce principal amounts owing on the modified first mortgage, and could thereby prove fatal to a strip off if the reduction is enough to leave any amount of equity for the second mortgage. The better practice is to file and prosecute the strip-off adversary proceeding to its conclusion before modifying the first mortgage, to avoid this potential pitfall.

(13) Read stay relief motions. It may appear to be a waste of time to read a three- or four-page stay relief motion when you know your client is surrendering the collateral at issue, and you have no objection to the lifting of the automatic stay. Be aware, however, that some creditors also include Rule 3002.1 compliance "waivers" as well as proof of claim allowance language in their motions for relief. Announcing "no objection" and receiving an order that simply "grants" the motion will arguably accomplish the waiver and allowance relief requested in addition to the stay relief. Avoid those arguments down the road by reading the motions before agreeing to the relief requested therein, and insist upon an agreed order that will spell out how long the creditor may have to file a deficiency claim, for example, when the creditor seeks ancillary relief in conjunction with relief from the automatic stay. While I appreciate your courtesy in informing the court when you have no objection to stay relief, be diligent in reading those motions before you express lack of objection or consent.

---

the accuracy of the proffer and give the debtor an opportunity to add anything that might have been omitted from the proffer.

(14) Proofread before you proceed with filing. Everyone makes mistakes. Judges and lawyers are certainly not exceptions to that rule. Unfortunately, conspicuous mistakes in your documents do not inspire confidence in the quality of your position. Repeat offenders in particular lose credibility quickly. If you have been made aware of a problem with a "form" you are using, make sure the word processor gets the message. If your staff has great independence in generating and filing documents with the court, you should nevertheless proofread those documents before filing—even if it is only a quick once-over. Some mistakes are so painfully obvious, it is apparent that no lawyer even looked at the document before it was filed. Nothing speaks to a lawyer's diligence more directly than the quality of the work bearing that lawyer's signature. If your name is going on it, please make sure your eyes have reviewed it before it is filed. Take responsibility for the quality of your written work.

10 THINGS I DO NOT WANT TO HEAR

Hon. Gregory Schaaf

1. **"WITH ALL DUE RESPECT …"**
    a. MIGHT AS WELL SAY, "JUDGE, YOU'RE AN IDIOT."
    b. TRY: "I DISAGREE IN THIS REGARD …"
    c. OR "I UNDERSTAND YOUR REASONING, BUT CONSIDER A DIFFERENT WAY TO APPROACH IT."
2. **"GIVE ME A MINUTE." OR "WHERE ARE MY NOTES?"**
    a. AT THE START: GRAB MY ATTENTION – BE READY.
    b. IN THE MIDDLE: KEEP MY ATTENTION – BE PREPARED.
    c. DISORGANIZATION . . .
3. **"YOUR HONOR, I'M NOT SURE."**
    a. WHEN I ASK – "WHAT DO YOU WANT?" KNOW WHAT YOU WANT.
    b. NOT JUST WHAT THE LAW IS.
    c. EXPLAIN TO THE COURT WHY THE RELIEF IS NECESSARY.
    d. KEEP MOVING THE CASE FORWARD.
4. **"BUZZ; BUZZ"**
    a. WHATEVER THE SOUND IS WHEN A TEXT COMES IN AND YOUR DEVICE VIBRATES (AS IT BOUNCES ACROSS THE TABLE).
    b. VIBRATE IS NOT SILENT.
5. **"THERE IS NO OTHER WAY TO LOOK AT THIS" OR "THERE IS NO WAY TO RULE AGAINST THIS."**
    a. REALLY, BECAUSE IF YOU ARE IN COURT, YOU PROBABLY ARE OPPOSED.
    b. REMEMBER CREDIBILITY – DON'T WASTE YOUR CREDIBILITY W/ THE COURT.
6. **"THIS IS THE WAY WE HAVE ALWAYS DONE IT."**
    a. WHAT IS THE CODE SECTION?
    b. IF I MAKE A MISTAKE 10X AND FIND OUT, I WILL NOT MAKE AN 11TH.

7. **"I'M NOT TRYING TO HIDE THE BALL …"**
    a. THEN WHY DO YOU HAVE TO TELL ME YOU'RE NOT.
    b. YOU MUST THINK I AM SUSPICIOUS ABOUT SOMETHING.
    c. I MIGHT NOT HAVE BEEN SUSPICIOUS, BUT I AM NOW.
8. **"I AM SURE YOU ALREADY KNOW THIS …"**
    a. IF I DO, WHY ARE YOU TELLING ME.
    b. IF I DO NOT, YOU JUST MADE ME FEEL INSECURE.
    c. DON'T GROVEL TOO MUCH.
    d. ARGUE TO THE COURT – CANNOT ARGUE LIKE YOU MIGHT WITH YOUR BEST FRIEND OVER THE FOOTBALL GAME, BUT YOU CAN STILL STATE YOUR OPINION.
9. **"LET ME ANSWER THAT QUESTION WITH A QUESTION."**
    a. NO – MY JOB IS TO ASK QUESTIONS AND MAKE DECISIONS BASED ON YOUR ANSWERS.
    b. BE DIRECT; ANSWER THE QUESTION.
    c. OKAY TO GET CLARIFICATION; SOMETIMES THE JUDGE IS THINKING OUT LOUD.
10. **"FINALLY, …"**
    a. DON'T TEASE ME.
    b. IF IT REALLY IS FINALLY, OKAY.
    c. TOO MANY TIMES FINALLY PRECEDES 5 MORE POINTS OR 5 MORE MINUTES OF ARGUMENT.
11. **"SORRY I'M LATE …"**
    a. DO AS I SAY; NOT AS I DO.
    b. EVERYONE IS LATE ONCE IN A WHILE.
    c. DON'T MAKE IT A HABIT.

EXTRA CREDIT DISCUSSION POINTS:

- IT IS SURPRISING WHAT PEOPLE WILL PUT THEIR NAMES ON (PERMANENTLY)
- SHOW COURTESY (TO THE CLIENT, OTHER LAWYERS AND THE COURT)

APPEARING IN COURT:
ADVICE TO YOUNG/NEW ATTORNEYS

Hon. John E. Waites

1. There is no substitute for preparation.
   - Know the facts & applicable law.
   - Prepare your client & witnesses (yes, rehearse) so they are comfortable in the courtroom - explain the players, setting and what will happen.
   - If you will present expert testimony, know what your expert will say.
   - Anticipate what the judge would like to know. At the outset of the trial, ask the judge if s/he would like a brief background of the case. The answer often depends upon the thoroughness of your pleadings.
   - Supply copies in advance. Organize your file for easy reference.
   - Use stipulations, motions in limine & pre-trial motions to save trial time.
   - Read pretrial orders and meet requirements.

2. There is no substitute for prehearing communication.
   - Communicate with opposing counsel – explore settlement and stipulate to facts & exhibits.
   - Communicate with client on possible outcomes and settlements.
   - Communicate with the courtroom deputy regarding exhibits and anything unusual about the hearing.
   - Communicate with chambers if there is anything really unusual about the hearing, especially if a lengthy hearing is expected.

3. The courtroom is an empty box in which you must deposit evidence.
   - Outline the points you need to present to win & match them with the evidence.
   - Recognize the burden of proof and mention it in your closing argument.
   - Know how to properly introduce your exhibits into evidence.

4. Strive to reduce your argument to three points or less.
   - Foreshadow your three points in your opening argument.
   - Include a clear statement of the relief you are seeking.

5. Don't speak unnecessarily.
   - Don't ask questions unnecessarily or just because you think it is expected by the judge or your client
   - Don't object unless you have to – if you do object, know the grounds for your objection and speak timely.
   - Don't ask to confer at length with your client or anyone while the judge is on the bench.

6. Don't make it personal.
   - Don't mistreat or disparage opposing party or counsel.
   - A sharp tone is not necessarily effective. You cannot be too nice, civil or patient.
   - Don't fuss with opposing counsel or be snide, critical, make faces or gestures.

7. Always make it personal.
   - Personalize your client – even a corporate client – in a sentence or two.

8. If you are winning, stop talking. If the ruling is against you, stop talking.
   - After the judge rules, the correct response is "Thank you, your honor" and stop talking. Do not engage in questioning of the judge, especially during the ruling.

9. Brevity is appreciated.
   - All argument and writings (memoranda and orders) should be concise but contain the necessary substantive information.

10. Concede to other side's strengths or winning points if you can still win on your necessary element.

11. Be formal in the courtroom.
   - The courtroom is a place of respect, like church, and you should refrain from making noise or causing distraction.
   - Communication should be directed to the bench.
   - Always speak slowly and distinctly.

12. Be Sensitive to the Judge's Workload.
   - Know the court's calendar for the day. Communicate with chambers if a lengthy hearing is expected. The judge may want to reschedule the hearing for another time.
   - If you settle in advance and timely advise chambers, the matter may be removed from the calendar and it relieves the court of unnecessary preparation.
   - If the matter is one of the only matters scheduled for that day and the hearing requires travel by the judge and court staff, you should advise chambers as soon as possible if you expect to settle to avoid unnecessary travel expenses by the Court.

13. Cite the best authority.
   - Supreme Court, Fourth Circuit, S.C. District Court, prior cases of judge.
   - Don't use brief bank type citations (make sure your case law is the most relevant and up to date) and ensure your citations are correct.
   - Use the single best case with similar facts and emphasize it.

- Never use a judge's prior case or colleague's cases to try and corner the judge.

14. Listen.
    - Listen to opposing counsel & to the witnesses answers.
    - Listen to judge's questions & hints about rulings.

15. On cross examination, only ask leading questions, but allow witness to fully answer. On direct, never lead; instead, rehearse client's testimony so it is unnecessary. Unless the introduction of evidence is unduly lengthening the trial, its relevance is relative- let the judge sort it out.

"The 3-3-3 Rule"

By Judge Michael G. Williamson

"Judge is the 3-3-3 Rule in effect for this case or is this a 10-10-10 case?" Those of you who have appeared in my courtroom may have heard this question asked, or you have probably heard me discuss these rules. But just in case, let me explain: Keep it Short! Few motions need to exceed three pages—thus **the first "3" in the Rule stands for 3 pages. That's the length that works best for most routine motions.** Even if it is a really complex matter, try to keep the page count down to 10 pages (get it? 10-10-10). The more succinct your writing the better. Don't drag your motion out to the maximum page limit if you have nothing left to say. In the words of Chief Justice Roberts, "I've yet to put down a brief and say, 'I wish that were longer.'"

The second "3" relates to the maximum number of cases that you should cite for any proposition of law. Simply put: Avoid Excessive Case Citations! If there is a novel legal issue, cite a case or two that supports your position. One or two cases are ordinarily sufficient. Avoid long string cites unless you are trying to make a point. And citation of well-settled law is not helpful. For example, taking two pages to review the standards for summary judgment is a waste of space. These comments apply equally to bigger cases in which the 10-10-10 Rule applies (I know--it should be the 10-3-10 Rule--but that doesn't sound very good so I'm exercising some artistic license on the name of the Rule).

The third "3" applies to the length of your argument on most routine matters. Believe it or not, we bankruptcy judges have probably seen the type of motion that you have filed before (like maybe a 1000 times). So if it's just a motion for relief from stay on a car with no insurance and no payments have been made for four months--we get it. That's all we need to know. Three minutes of oral argument should be more than sufficient. We don't need a primer on the constitutional underpinnings of adequate protection.

While I've got the floor, here are some other practice pointers on oral argument and drafting of motions and memoranda for the court (I know I'm breaking the 3-3-3 Rule by going on at this point, so I'll *sua sponte* invoke the 10-10-10 Rule).

Preview Relief Sought. Explain at the beginning of your argument and in the introductory paragraphs of the motion the relief you are seeking before you lay out the factual and legal bases for the relief requested. Let us know what you want at the front end so we know where you're heading and will understand the relevance of the facts you proffer in support.

Avoid Legalese. Plain language is easier to understand. As Justice Scalia once said, "A good test is, if you use the word at a cocktail party, will people look at you funny?"

Avoid Minutiae. When drafting your motion or making your argument, first ask yourself what the court needs to know, then include that information in the motion or argument. You need to communicate the big picture in a fashion that it can be understood quickly by the reader or listener. Avoid minutiae. For example, a tedious recitation in a motion of every document in the loan file is neither needed nor helpful. In a similar vein, do not cut and paste the identical case history and introductory paragraphs from earlier motions into later ones.

Never Disparage Your Opponent. As Justice Ginsburg once said, "You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side." Using words such as "outrageous," "disingenuous," and the like reflects poorly on you. If the opposing counsel makes disparaging remarks about you or your client avoid responding in kind. Keep the high road!

Be Intellectually Honest. If you have weaknesses in your position, "pull the teeth" by addressing them in your motion or up front in your oral argument explaining that while you concede that these weaknesses exist, they should not compel a different result. Similarly, address your opponent's best argument in your motion.

Provide Copies of Cases. Many judges welcome the filing of cases that will be relied on at the hearing so long as the cases are furnished to opposing counsel. Depending on a judge's practice, it is often useful to highlight the

portions of the cases that you will be relying upon. Include those highlights in the cases you provide to opposing counsel.

File Your Memo of Law Well Before Hearing. When you do file briefs or cases, they are of very little use to the court unless they are filed in a timely manner so as to allow sufficient opportunity for their review in advance of the hearing (delivery to chambers at the end of business hours on the eve of a hearing or on the day of the hearing is not timely). You should assume that the judge will rule from the bench, and briefs or cases filed at or immediately before the hearing will not be reviewed prior to the court's making its ruling.

(You'll note that I covered exactly 10 points in compliance with my 10-10-10 Rule.) See you in court.

The Functional Approach to Installment Land Sales Contracts in Chapter 13

James J. Robinson
United States Bankruptcy Judge
Northern District of Alabama, Eastern Division[1]

Installment land sales contracts, often called agreements for deed or bonds for title, are strange, hybrid creatures that combine some aspects of a purchase-money mortgage with those of a residential lease. The treatment of such an arrangement in chapter 13 will usually be one of two options: as an executory contract, which must be assumed or rejected under Code §§ 365 and 1322(b)(7), or as a secured transaction for which defaults may be cured and payments maintained over the life of the plan pursuant to Code § 1322(b)(5).[2]

The issue is further complicated if termination notices sent prepetition are sufficient under state law to destroy any right the debtor may have had to include the debtor's interest in the homestead as property of the bankruptcy estate under Code § 541, despite the fact that the debtor remains in possession. When the debtor is the purchaser / tenant and wants to keep the property and cure any arrears, the Eleventh Circuit's functional approach may well mean the agreement can be treated as a secured transaction under the debtor's plan, so long as the debtor has remained in possession.[3]

Installment land sales contracts are often structured to provide for the secured, purchase-money-financing of the debtor's homestead, and serve the same purpose for both parties as would a typical purchase-money note and mortgage. The arrangement is often used by relatively unsophisticated parties, and is a means of financing home purchases for buyers who would not

[1] I wish to thank my law clerk, Alyssa Ross, for her help with this material.

[2] References to the "Code" and "Bankruptcy Code" are to 11 U.S.C. § 101, *et seq.*

[3] This Court recently addressed this issue in *In re Curtis*, 500 B.R. 122 (Bankr. N.D. Ala. 2013).

qualify for traditional credit, while avoiding the expense and formality of executing and recording a full-fledged mortgage. The flip side is that, under state law, such agreements are also a means of avoiding the expense and delay of foreclosure and its attendant procedural protections and redemptive rights for the purchaser.

Like a standard mortgage, such agreements often grant the debtor-vendee the right to possession, obligate the debtor to pay taxes and maintain insurance, provide that the debtor assumes risk of loss and all liability, and bestow all other incidences of ownership but-for legal title. Installment land sale contracts do not typically contain the usual granting, habendum and defeasance clauses, or power of sale foreclosure provisions found in a mortgage. Upon completion of the payments under the agreement, the creditor-vendor is routinely required to deliver "a good and sufficient deed" for the property to the Debtor – the functional equivalent of defeasance of a mortgagee's legal title upon payment of the secured debt. Typical creditor-vendor remedies upon the occurrence of default seek to convert the debtor-vendee's interest in the property to a month-to-month tenancy that may be followed by eviction through an unlawful detainer action – similar to strict foreclosure followed by an ejectment.

The law applicable to the treatment of such agreements in bankruptcy is not uniform. Among other variations, the cases differ in their deference to state law, the language used in the transaction documents, and the relationship and history between the parties. Even within each of the two main lines of cases— those finding an executory contract and those finding a secured transaction—the reasoning behind the results varies.

In the Eleventh Circuit, guidance can be found in *Sipes v. Atlantic Gulf Communities Corp. (In re General Development Corp.)*, 84 F.3d 1364 (11th Cir. 1996). In that chapter 11 case, the debtor was a developer and seller of real estate, who had entered into installment land

sales contracts as vendor for various residential lots in Florida. In analyzing whether the debtor-vendor could treat the installment sales contracts as executory contracts subject to rejection, or must instead treat them as secured obligations (the objecting vendees' preferred result), the circuit court adopted the district court's decision allowing rejection, and incorporated large excerpts of the district court's opinion as an appendix to the circuit court's published decision. While the *General Development* decision held that the land installment sales contract in that case could be treated as executory, and therefore subject to assumption or rejection, the court's rationale supports a finding in many consumer chapter 13 cases that the debtor may treat a residential land installment sales contract as a secured transaction, and cure the prepetition defaults through the chapter 13 plan.

The Eleventh Circuit, in approving the district court's opinion, directs that the position of the debtor in the arrangement—as vendor or vendee—is decisive in determining the permitted treatment in bankruptcy. In support of its approval of what has been termed the "functional approach" to determining executoriness, the circuit court cited *In re Booth*, 19 B.R. 53 (Bankr. D. Utah 1982). *Booth* is the seminal case in the line of cases that allow a debtor, as vendee, the option to treat such contracts as secured claims subject to cure and reinstatement rather than as executory contracts that require assumption or rejection. The *General Development* opinion provides as follows:

> GDC concedes that although state law generally governs questions of property rights in bankruptcy in the absence of any conflict between state law and bankruptcy law, this deferral to state law gives way where there is a specific federal interest governing the relationship between the parties in bankruptcy. Such a federal interest exists here, GDC maintains. As recognized by one court "Congress has expressed an overriding federal interest in certain executory contracts, i.e., collective bargaining agreements and *real property sales contracts when the debtor is the seller* ..." *In re Buchert,* 69 B.R. 816 (Bankr.N.D.Ill.1987), *affirmed,* 1987 WL 16019 (N.D.Ill.1987) (emphasis added).

The distinction between a debtor as the seller versus a buyer of real property is fundamental to the determination of whether the sales contract may or may not be deemed executory, GDC asserts. This is because:

> . . . non-debtor vendees, by virtue of Sections 365(i) and 365(j), may receive more favorable treatment in bankruptcy than debtor/vendees. And debtor/vendors, because of other policies and provisions in the Code, may fair better than debtor/vendees. It may be argued that this disparity in treatment is warranted because of the risk of default when debtor is vendor, or because the non-debtor . . . is an innocent victim.

In re Booth, 19 B.R. 53, 63 (Bankr.D.Utah 1982). The court concluded that:

> . . . it is the consequences of applying Section 365 to a party, especially in terms of benefits to the estate and the protection of creditors, not the form of contract between vender (sic) and vendee, which controls.

General Development, 84 F.3d at 1371 (quoting *Booth*, 19 B.R. at 63). The *General Development* opinion also made reference to another Eleventh Circuit case:

> While it does not appear that the Eleventh Circuit has adopted the "functional approach" over the "Countryman approach", the Eleventh Circuit in *In re Martin Brothers Toolmakers, Inc.,* 796 F.2d 1435 (11th Cir.1986) appears more inclined to embrace the "functional approach." In *In re Martin Brothers Toolmakers, Inc.,* the Eleventh Circuit stated in dicta:
>
> > It is true that a real estate lease, as well as an installment sales contract, may be the functional equivalent of a secured financing transaction. [citations omitted] The determination in bankruptcy, however, of whether a particular agreement is in fact a lease or a security agreement for purposes of § 365 often depends on *which characterization will best serve the interests of the estate*. Section 365 enables the bankruptcy trustee to affirm or reject leases and executory contracts, and is based on the trustee's long-standing power to abandon obligations burdensome to the estate.(emphasis added).
>
> *Id.* at 1439. Citing the Sixth Circuit, the Eleventh Circuit continued:
>
> > The key, it seems, to deciphering the meaning of [§ 365's lease-executory contract provision] is to work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, the [agreement] is not [a lease or executory contract] within the meaning of the Bankruptcy Act.

> *Id.* (citing *In re Becknell & Crace Coal Co., Inc.,* 761 F.2d 319, 322 (6th Cir.1985)).

General Development, 84 F.3d at 1375. Accordingly, the Eleventh Circuit has endorsed the functional approach[4] when it comes to the treatment of land installment contracts in a bankruptcy case, and that approach opens the door for chapter 13 debtors to treat such agreements as secured transactions in their chapter 13 cases. Under the functional approach, the court may consider that preserving the chapter 13 consumer-debtor's residence is of utmost importance to the estate, and to the success of the debtor's chapter 13 plan.

On the creditor's side of the case law is *In re Parker*, 2004 Bankr.LEXIS 1128 (Bankr. S.D. Ala. 2004). In the *Parker* case, the "agreement" was purportedly terminated prepetition by the creditor-vendor, and the court found that under Alabama law, the debtor had lost her rights under the agreement's forfeiture provisions and further found that the homestead could not be saved through the debtor's chapter 13 plan or assumption and cure. The court in *Parker* found that the debtor's equitable interest in the property lasted "only so long as the [debtor] performs under the contract" and that default under the contract "stripped her of any equitable interest in it that could have been assumed in her bankruptcy." *Id.* at *14. However, under the functional approach, the inquiry does not begin and end with the application of state law, but as emphasized in *General Development*, with the effect that the application of Code § 365 would have on the estate, as well as the impact on the creditor if its claim were treated as secured.

Other cases on the executory contract side are *In re Dunn*, 2006 WL 3079632 (Bankr. N.D. Ala. 2006) and *Taunton v. Reding (In re Taunton)*, 306 B.R. 1 (M.D. Ala. 2004), which

[4] In *Thompkins v. Lil' Joe Records*, 476 F.3d 1294 (11th Cir. 2007), the Eleventh Circuit stated, "We note that the bankruptcy court's approval of the rejection of the 1989 Agreement would be consistent with the 'functional approach' to 'executoriness' that we have tacitly approved in our precedent." (citing *General Development*, 84 F.3d 1364).

support the position that an installment land sale contract should be treated as an executory contract under Alabama law. The *Taunton* case dealt with a debtor in the position of vendor in a land installment sale contract, which distinguishes the outcome of that case under the functional approach adopted by the Eleventh Circuit in *General Development*. In addition, the *Dunn* opinion cites both *Taunton* and *General Development* for the proposition that installment land sale contracts should be treated as executory contracts in bankruptcy. *See Dunn*, 2006 WL 3079632 at *3. However, such a broad characterization, while technically accurate under the facts of those two cases in which the debtor was the vendor, does not account for the fact that the Eleventh Circuit in *General Development* established an approach that centers the inquiry on the effect of such treatment on the bankruptcy estate, as opposed to developing a rule that such contracts are always to be treated as executory. *General Development*'s functional approach means that the effect will vary depending upon whether the debtor is the vendor or vendee, and the appended district court opinion quotes extensively in support of its rationale from a bankruptcy case finding that the result is indeed the opposite and allowing treatment as a secured claim when the debtor is in the position of vendee in a residential installment land sale contract.

The effect in a typical chapter 13 case of treating an installment land sale contract as an executory contract that must be assumed or rejected under Code § 365 would be to require that the debtor promptly cure the arrears (or provide adequate assurance that such prompt cure is forthcoming) or lose the home. The net effect, then, would be the loss of the home, since most debtors will not have the ability to cure the default at confirmation of the plan or to provide assurances of a cure soon thereafter. In contrast, treating an installment land sale contract as a secured claim gives the debtor the option to cure the arrears over the life of the plan, while

making the ongoing payments as they come due. This is exactly the opportunity Congress afforded financially distressed homeowners under Code § 1322(b)(5).

In the *Booth* case, the debtor-vendee was a real estate broker who had purchased property from the objecting sellers under a contract for deed controlled by Utah real estate law. 19 B.R. at 54. The debtor wanted to treat the contract for deed, which required regular payments and withheld delivery of the deed until the payments were completed, as a secured transaction, and the sellers objected, insisting the arrangement was an executory contract that must be assumed or rejected. *Id.* The bankruptcy court in *Booth* allowed the debtor-vendee to treat the contract as a secured transaction, and explained the rationale behind its use of the functional approach:

> [I]n the final analysis, executory contracts are measured not by a mutuality of commitment but by the nature of the parties and the goals of reorganization. A debtor as vendee is free from the constraints of Section 365, and is thereby afforded flexibility in proposing a plan, but meanwhile must provide, upon request, adequate protection to vendors. A debtor as vendor may use Section 365 as a springboard to rehabilitation, but not at the expense of vendees. Thus, it is the consequences of applying Section 365 to a party, especially in terms of benefit to the estate and the protection of creditors, not the form of contract between vendor and vendee, which controls. This conclusion is supported by many statutory provisions and much judicial gloss.

19 B.R. at 56-57 (citations omitted).

The functional approach explained in *Booth* and approved by the Eleventh Circuit is also consistent with a Pennsylvania bankruptcy case in which the creditor-vendor was attempting to dispossess a defaulting debtor-vendee under an installment land sale contract. *In re Fox*, 83 B.R. 290 (Bankr. E.D. Pa. 1988). The court in *Fox* utilized the functional approach espoused in *Booth* and approved by the Eleventh Circuit in *General Development*:

> The novel and determinative issue presented by the matters before us is whether the Debtor is entitled to treat the Agreement in issue, the installment land sale contract . . ., as a security device rather than as an executory contract. Although this is a close issue, and one on which the authorities are split, we are inclined to allow the Debtor to do so, principally because we believe that 11 U.S.C. § 365

> should be conceptualized as a tool of the Debtor, to benefit the estate at the Debtor's option whenever possible, and *should rarely, if ever, be used as a basis to deprive a consumer-debtor of a residence.*

Fox, 83 B.R. at 294 (emphasis added).

The *Fox* opinion outlines several of the various rationales employed in reaching different results, *see* 83 B.R. at 295-298, and also makes the point that state law designation of installment land sales contracts as "executory" is "not determinative of the issue for federal bankruptcy purposes." *Fox,* 83 B.R. at 297-98 (quoting *In re Johnson*, 75 B.R. 927, 930 (Bankr. N.D. Ohio 1987)). In addition, the "Supremacy Clause would prevent the [state] legislature from fixing the status of such contracts in a manner inconsistent with the bankruptcy code." *Id.* at 298.

While competing interests must be considered, preserving homes is an important and worthwhile function of chapter 13. Under the functional approach, a bankruptcy court can consider the effect on the bankruptcy estate in determining whether to allow a cure of defaults over the life of the plan, or to instead give effect to forfeiture provisions in installment land sales contracts that will have the effect of dispossessing the debtor from her home while she remained in possession when her chapter 13 case was commenced and no final judgment for possession has been issued**.** *See In re Mumpfield*, 140 B.R. 578, 580 (Bankr. M.D. Ala. 1991) (discussing rights of debtor as vendee under installment land sale contract and determining that such rights are property of the bankruptcy estate under Code § 541 stating, "It may be argued that it is not property as of the commencement of the case because of the acts of the defendant in terminating the contract and seeking eviction, but the debtor does have some interest since she is still in possession."); *Cf. In re Morgan*, 181 B.R. 579, 584-85 (Bankr. N.D. Ala. 1994) (holding that under Alabama landlord-tenant law, and not in the context of an installment land sale contract, a "possessory toehold" provides sufficient interest in the property to form the basis for assumption,

as "termination" did not "effect some mystical disappearance of the lease which cannot be undone," until such time as a "writ of restitution is finally entered and no appeal is taken or stay of the writ's execution is obtained."). It is a common practice to file a chapter 13 case on the eve of a mortgage foreclosure in order to stop the sale and allow the debtor a chance to cure the default over the life of the chapter 13 plan. The functional approach recognizes that the same opportunity may be afforded a debtor as vendee under an installment land sale contract in order to best serve the bankruptcy estate and save the home which remains in the debtor's possession.

In balancing the competing interests of vendor and vendee, application of the functional approach to an installment land sale contract that is functioning as a purchase-money mortgage is not only beneficial to the debtor, but also protects the interest of the creditor. As the court in *Booth* explained:

> Classifying the contract for deed, where debtor is vendee, as a lien rather than an executory contract benefits the estate by enlarging the value of the estate and furthering the rehabilitation of the debtor. Sellers, as lienors, enjoy adequate protection. This is in harmony with the rationale for Section 365(i) and 365(j). The blessings and burdens of reorganization are fairly distributed between the creditors and the estate.

19 B.R. at 63 (citations omitted).

The court in *Booth* said that "if forfeiture is invoked prepetition, and if no further act is necessary to terminate the contract, the interest of the vendee may expire before a petition can be filed," but then questioned whether the provisions for cure and repayment under a plan would trump such forfeiture under state law. 19 B.R. at 58, n.9. It will almost always be the case that the possessory interest of the debtor in the homestead is sufficient to bring such contracts under the cure and repayment provisions of a chapter 13 plan and thereby avoid the forfeiture of the homestead and the resulting negative impact on the estate. If the property were vacant or a final

judgment awarding possession to the creditor-vendor had been entered in state court when the petition was filed, the result might be different.

By allowing cure and repayment as though the arrangement were a secured transaction, as anticipated by Code § 1322(a)(5), the creditor will retain the economic benefit of its bargain, although that bargain will be modified to allow the arrears to be paid over the life of the chapter 13 plan. In addition, the creditor-vendor always has the right to move for stay relief for cause, including lack of adequate protection based on the typical mortgagee-asserted grounds of failure to provide insurance or pay taxes, as well as for default in the ongoing payments. Treating installment land sales contracts, when the property is the debtor's home and the debtor is the vendee, as a secured claim rather than an executory contract thus preserves the benefits of the bargain for the debtor, the estate, and the creditor-vendor.

In discussing the adequate protection of creditors under such arrangements, the court in *Booth* explains:

> Vendors have two rights under a contract for deed: the right to payment, which is not adequately protected, and the right to hold title as security, which is adequately protected. While the right to payment is suspended, the interest in property is adequately protected. This strikes a balance between vendors, other creditors, and the estate. Vendors are not preferred, for example, in terms of administrative claims, but are treated on a par with other mortgagees, who are protected against any decrease in the value of their liens.

19 B.R. at 61 (citations omitted). *See also Mumpfield*, 140 B.R. at 580 (pointing out that allowing the debtor to maintain the residence and cure the defaults over the life of the plan damages neither party, where the creditor will receive the benefit of its bargain).

When chapter 13 functions as intended, and when the debtor completes a plan that treats an installment land sale contract as a secured claim, the creditor will come out of the bankruptcy whole and in the same position it would have been had no bankruptcy intervened: with all arrears

cured and the debtor on track with the monthly payments If the debtor does not perform, and the odds of default for chapter 13 cases are significant, then the stay can be terminated for cause and the creditor may exercise it remedies to terminate the debtor's interest in the property and gain possession, including dispossession with the assistance of the state courts. The functional approach affords the honest but unfortunate debtor a chance to save the home despite having structured the purchase of the home as an installment sale arrangement.

OBSERVATIONS FROM THE BENCH: SELECT LIEN AVOIDANCE ISSUES UNDER § 522(f)(1)(A) and (f)(1)(B)

James J. Robinson, United States Bankruptcy Judge
Northern District of Alabama, Eastern Division[1]

Lien avoidance motions under § 522(f)(1) of the Code are among the most commonly filed motions in bankruptcy practice. They are routinely filed, rarely draw an objection from creditors, and are granted by the court with little analysis. In most courts, including the Northern District of Alabama, the lien avoidance procedure is one of "negative notice" or "notice and opportunity" with no hearing unless the creditor objects. By far, most of the issues that arise in my court related to lien avoidance motions are problems the court identifies during its review in preparation for entry of an order granting the motion after the notice time has expired with no objection having been filed. While mundane, and frankly not very exciting, lien avoidance can have tremendous implications for both debtors and creditors. I will attempt here to highlight the most common issues encountered in my court, and also look ahead to possible changes in the lien avoidance procedure as set out in the proposed model plan.

Service. Rule 4003(d) provides that lien avoidance under § 522(f) is accomplished by motion, which is a contested matter under Rule 9014, and, therefore, requires service in compliance with Rule 7004. Service on a domestic or foreign corporation, partnership, or other unincorporated association may be accomplished by mailing, but it must be addressed to the attention of an officer or agent. If the lien claimant is an insured depository institution under the Federal Deposit Insurance Act (think bank, savings and loan, or credit union), Rule 7004(h) requires service by certified mail addressed to an officer. Failure to use certified mail when

[1] Judge Robinson appreciates the able assistance of his law clerk, Alyssa Ross, in researching and preparing this article.

required is a very common service mistake. If the institution has appeared by an attorney, the attorney may then be served by first class mail. Remember that some credit card issuers are in fact member banks of the F.D.I.C. A list of F.D.I.C. member institutions can be found at www.fdic.gov. An order granting a motion that was not properly served may, at the end of the day, be a worthless piece of paper.

§ 522(f)(1)(A): Judicial Lien Issues. As an initial matter, the inquiry here begins with whether the lien at issue is, in fact, a "judicial lien" as that term is defined in § 101(36) of the Code, which provides, "The term 'judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Liens that are created by statute, such as tax liens, mechanics liens, and hospital liens, to name a few, are not judicial liens and are not subject to lien avoidance under § 522(f)(1)(A).

It is important to understand (and to train your staff to understand) when a certificate of judgment becomes a lien against real property under Alabama law. I frequently see attorneys reciting in our form motion and declaration that a lien was created on the day judgment was entered, or even on the day the certificate of judgment was issued. That is not correct. Under Alabama law, "Every judgment, a certificate of which has been filed as provided in [Alabama Code] Section 6-9-210, shall be a lien in the county where filed on all property of the defendant which is subject to levy and sale under execution . . ." Ala. Code § 6-9-211. Alabama Code § 6-9-40 then defines the types of property upon which executions may be levied. Accordingly, the judgment becomes a lien against property in the county of recordation when the certificate of judgment is recorded in the probate records. The recording date is the lien date—a fact that becomes even more important when dealing with more than one potentially avoidable lien.

Doing the Math. Here is where lien avoidance goes from boring to confounding. The calculation itself can be confusing and is best accomplished in several discreet increments. First, know the value of the debtor's interest in the property subject to the lien. Second, calculate the sum of the exemption that could be claimed in the absence of any liens, together with all liens against the property (including the lien to be avoided). If the sum of the figures in the second step is greater than the value of the debtor's interest in the first step, then the difference between the two is the extent of impairment and the lien may be avoided to that extent. 11 U.S.C. § 522f)(2)(A). If the value of the debtor's interest is greater than the sum of the figures in the second step, there is no impairment and the lien is not avoidable. There are a couple of scenarios that will require you to refine your calculations, including when more than one lien is subject to avoidance, and when the debtor owns less than 100% of the property subject to the lien.

Under the multiple-liens-subject-to-avoidance scenario, the formula for determining the extent of impairment under § 522(f)(2)(B) instructs, "In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens." As one court has explained:

> In order to comply with Code section 522(f)(2)(B), the formula must be applied consecutively, avoiding one lien at a time. Although the formula makes no explicit reference to the priority position of any of the liens included in the calculation, the iterative nature of the formula . . . implicitly requires a determination of the relative priorities of the judicial liens. Courts purporting to apply the formula literally have implicitly recognized the priority order of liens established under state law by applying the formula consecutively, starting with the most junior of the judicial liens and avoiding one lien at a time, until the formula indicates no further impairment.

In re Napolitano, 2009 WL 2905608 (NDNY 2009) (explaining how the formula works, including mathematical example, and citing *Dolan v. D.A.N. Joint Venture (In re Dolan)*, 230 B.R. 642 (Bankr. D. Conn. 1999); *Bank of America v. Hanger (In re Hanger)*, 217 B.R. 592 (9th Cir. BAP 1997); and *In re Fox*, 353 B.R. 388 (Bankr. D. Conn. 2006) (collecting cases)). What this boils down to is: rank all liens in terms of priority and begin with the lowest (last-recorded) lien, and perform the statutory calculation for each lien, working your way up the chain. Do not include avoided junior liens in the calculations for higher priority liens.

For example, assume a debtor owns a home worth $200,000 that is subject to a mortgage of $175,000, and he is entitled to a $5,000 homestead exemption. Further assume there are three judgment liens against the property (A Bank for $15,000 recorded 1-1-2011; B Bank for $17,000 recorded 2-2-2012; and C Bank for $19,000 recorded 3-3-2013). The formula would work as follows: Starting with the junior-most judgment lien of C Bank, the subject-lien sought to be avoided is $19,000. All other liens on the property total $207,000, which includes the other two judicial liens and the mortgage. The exemption amount is $5,000. The sum of all the liens plus the exemption is $231,000. The value of the property is $200,000. Therefore, the sum of the liens plus the exemption exceeds the value by $31,000 and the exemption is impaired to that extent. Because that impairment ($31,000) exceeds the subject-lien amount ($19,000), the lien is avoidable in its entirety.

The next lien in line is that of B Bank, for $17,000. All other liens on the property (which would NOT include the avoided lien of C Bank) total $190,000. The exemption amount is still $5,000. The sum of all the liens and the exemption is $212,000 ($17,000 + $190,000 + $5,000). The value of the property is still $200,000. Therefore, the sum of the liens and exemption ($212,000) exceeds the value of the property by $12,000 (which is the extent of the

impairment). Thus, the lien of B Bank is avoidable only to that extent, with the remaining $5,000 of the lien continuing to attach to the property.

As for the lien of A Bank, the lien sought to be avoided is $15,000. The value of all other liens is $175,000 for the mortgage plus $5,000 of the B Bank lien that remains attached as being unavoidable under the formula in the prior step. The exemption is $5,000. The sum of all liens plus the exemption is $200,000; which is also the value of the property. There is no impairment under that math ($200,000 minus $200,000 is zero). The lien is therefore unavoidable as not impairing the exemption.

Another thing to remember is that a junior non-judicial lien – thus not subject to avoidance under§ 522(f)(2)(A) – should be included in the calculation under § 522(f)(2)(A). *See The Cadle Co. v. Taras (In re Taras)*, 131 Fed. Appx. 167, 2005 WL 1006870 (11th Cir. 2005) (unpublished decision holding that unavoidable junior tax lien was properly included in the calculation under § 522(f)(2)(A) because the statute did not instruct courts to exclude junior liens that were not subject to avoidance). For example, in the prior scenario, if an unavoidable tax lien had been filed between the liens of C Bank and B Bank, the tax lien would be included in the formula as part of the "other liens against the property" even though it would be inferior to A Bank and B Bank's liens. The fact that the lien is unavoidable by its very nature means it is included in the formula no matter its priority relative to the lien at issue for which avoidance is being sought.

The Eleventh Circuit has also spoken to the issue of how the formula works when the debtor owns less than the full ownership interest in the real property at issue. In *Lehman v.*

VisionSpan (In re Lehman), 205 F.3d 1255 (11th Cir. 2000), the debtor owned the homestead property jointly with a nonfiling spouse as tenants in common. The debtor performed the lien avoidance calculation with regard to the homestead by using the value of his interest (1/2 the value of the property) but then using the entire mortgage balance. The Court of Appeals affirmed the bankruptcy judge's ruling that the entire value of the property, not just the debtor's interest, should be used if the entire mortgage balance were being used to get an accurate picture of the Debtor's equity (and pointing out that the same result could be obtained by using 50% of the value and 50% of the mortgage debt). Otherwise, the debtor could shield far more than his share of the exempt equity—an absurd result in contravention of Congressional intent. *Id.* at 1257. The opinion contains the mathematical calculations performed by the bankruptcy court, and reads in part:

> The value of the entire property is $225,000.00. Deducting the mortgage, $165,000.00, leaves $60,000.00 equity in the property, not accounting for VisionSpan's lien. The Debtor's half-interest in the property is therefore worth $30,000.00. After deducting the Debtor's exemption, $5,312.00, there is remaining in the property $24,688.00. [VisionSpan's] lien is in the amount of $53,879.00, which clearly impairs the Debtor's exemption. [VisionSpan] is, however, entitled to retain its lien on the unencumbered, nonexempt portion of the Debtor's property, in the amount of $24,688.00.

Id.

The circuits are split over whether a debtor who owns property jointly with a non-debtor may nonetheless use the entire amount of the debt secured thereby in performing this calculation. The Eleventh Circuit, First Circuit, Third Circuit, and Ninth Circuit B.A.P. have followed the approach as set out in *Lehman*. *See In re Miller*, 299 F.3d 183 (3d Cir. 2002); *Nelson v. Scala*, 192 F.3d 32 (1st Cir. 1999); and *In re Nielson*, 197 B.R. 665 (9th Cir. B.A.P. 1996). *See also In re Moore*, 495 B.R. 1 (8th Cir. B.A.P. 2013) (citing *Kolich v. Antioch Laurel Veterinary Hospital (In re Kolich*), 328 F.3d 406 (8th Cir.

2003) and including an inferior but unavoidable consensual lien in the formula, as well as approving of proportioning the percentage of the debt to the percentage of the debtor's ownership interest). On the other side of the issue is the Tenth Circuit B.A.P. *See In re Cozad*, 208 B.R. 495 (10th Cir. B.A.P. 1997) (allowing debtor to use percentage of value commensurate with his percentage of ownership, but allowing use of entire amount of mortgage debt in the calculation).

In addition, our form in the Northern District of Alabama requires the inclusion of the date the debt was incurred. It may seem obvious, but in almost every scenario, the debt must have been incurred (e.g., the contractual obligation entered into) some time before the suit was filed, and before the judgment was entered and certificate of judgment issued and recorded. We frequently have motions reciting that a debt reduced to judgment, for example, in April 2012 was incurred in April 2012, which is obviously not correct. A reminder to your staff that the date the debt was incurred in the lien avoidance motion should always match the date the debt was incurred according to the schedules might avoid some of those mistakes and save your office the expense of filing and serving amended motions when such mistakes are made.

Discharge: Requirement or Non-issue for lien avoidance? Once an order has been entered granting a motion to avoid a judicial lien, is that lien avoidance contingent upon discharge? For a good discussion of cases on both sides of that issue, see *In re Harris*, 482 B.R. 899 (Bankr. N.D. Ill. 2012). The court in *Harris* ruled that, when a creditor objects, lien avoidance should be conditioned upon the entry of the discharge in accordance with the majority view that lien avoidance is not self-effectuating given the protection to creditors in § 349 in the

event the case is later dismissed, or closed without a discharge. The practical problems facing creditors who would attempt to reinstate liens in such circumstances could be tremendous, as any real estate lawyer may imagine. And if third parties had acted in reliance on the lien avoidance order in the meantime, the creditor would have to do the legal equivalent of "unringing a bell" in order to return to the status quo—a near impossibility. The *Harris* court also cites the minority line of cases, which stress that § 349 does not apply in the event of a case closing, as opposed to dismissal, without discharge and also stress that nothing in the text of § 522 explicitly hinges lien avoidance upon discharge. Consider also Code §§ 348(f), 1325(a)(5)(B), in support of the majority position.

The Eleventh Circuit currently has ruled in a case involving a related but distinct matter, and has allowed the strip-off of totally unsecured junior mortgages under § 506 even in "no discharge" cases. *Wells Fargo Bank, N.A. vs. Scantling*, 754 F.3d 1323 (11th Cir. 2014). *Scantling* came before the Eleventh Circuit on direct appeal with regard to whether in a chapter 20 case, a lien strip under 506 should be contingent upon discharge. The Bankruptcy Court for the Middle District of Florida, Tampa Division (Judge Michael G. Williamson), ruled that the liens could be stripped even in the absence of discharge. The opinion was published as *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012). There was conflicting authority within that district, and indeed, nationwide, on that issue. The Eleventh Circuit's allowing such lien strips under § 506 as self-effectuating in the absence of discharge may shed some light as to how the circuit court would view lien avoidances under § 522: likely self-effectuating rather than being contingent upon discharge.

§ 522(f)(1)(B): nonpossessory, nonpurchase-money security interests in certain enumerated items. By far the most common issue I encounter with these lien avoidance motions is the failure to describe the item subject to the lien with particularity, so that it could be identified by a third party (say, the sheriff coming to levy and execute). You protect your client by leaving no ambiguity in your item descriptions. "Miscellaneous whatnots" will not pass muster.

Also, consider the impact of an order that avoids a lien in an item of personalty that is not, by definition, subject to lien avoidance—a boat, for example, or a lawn tractor or four-wheeler. While the court reviews for obvious mistakes before entering lien avoidance orders, the court does not police the items for definitional qualification. The court in *In re Weaver*, 2003 WL 22331786 (Bankr. W.D. Tenn. 2003) considered such a scenario, and found that where the creditor had been given proper notice of the lien avoidance motion, and had failed to act to protect its rights, the order was effective even though it avoided a lien that was not on its face properly avoidable, despite the fact that the debtor had filed what the court found to be an unnecessary second motion to avoid the lien after the case converted. The court explained, "Res judicata would also bite at Wells Fargo's effort, since the order granting the first motion is final, involving the same parties and issue, and was actually decided after notice and opportunity for a hearing." *Id.* at *2.

This is a warning to creditors: object if the motion purports to avoid a non-avoidable lien, or you may find your lien avoided if you received proper notice and did nothing. Even if a creditor does not object to the debtor's claimed exemption in a particular item (such as the expensive big-screen television in *Weaver*) within the 30 days allowed under Rule 4003(b), the creditor can still raise that issue at the lien avoidance stage under Rule 4003(d). Unfortunately

for the creditor in *Weaver*, it did not raise the issue at either stage and was bound by the lien avoidance order.

Coming Attractions: Proposed Model Plan Form and Proposed Rule 4003(d) and Rule 5009(d). The proposed Model Plan Form, and Proposed Rules 4003(d) and 5009(d), have been made available for public comment. The plan form at page 1, near the top in the "Notice to Interested Parties" section, contains a check box that should be marked if "[t]he plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4." Section 3.4 then requires that the calculation of the impairment of the exemption be set out on Exhibit A. Draft Rule 4003(d) will allow § 522(f) lien avoidance motions to be accomplished via plan provision, and requires service of such a plan in compliance with Rule 7004. The Bankruptcy Noticing Center typically serves a timely-filed plan by first class mail. The burden of serving a plan containing a lien avoidance provision in accordance with Rule 7004, and of certifying service, will be on the debtor. Consistent with current practice, Draft Rule 4003(d) allows creditors to object to the exemption at the plan stage even if the time to object to the exemption has otherwise expired, as is currently the case when a motion to avoid lien is filed.

Draft Rule 5009(d) sets forth a procedure for chapter 12 and chapter 13 debtors to request an order declaring a lien is satisfied. This can be accomplished by motion, served in accordance with Rule 7004. An order entered thereunder operates as a release of the lien according to the language of the draft rule. By its terms, Draft Rule 5009(d) contemplates that the allowed secured portion of the claim has been paid in full, and that any other portion of the claim has been discharged. See Bankruptcy Code §§ 349(b), 348(f), and 1325(a)(5)(B). The rule seems to

be designed to make it easier for debtors to clear title to encumbered property. Rather than producing a lien avoidance order and a discharge order, they can instead present one order that says both have been accomplished. This procedure seems to apply to valuations or strip-offs under § 506 as well as lien avoidance situations. It also leaves open the question of whether discharge is a requirement for lien avoidance, and lien stripping.

INDEX OF WRITTEN MATERIALS