At the spring meeting of the Bankruptcy Judges Advisory Group, we discussed two issues that the Rules Committee may wish to address. First, the administration of individual chapter 11 cases has become problematic due to the debtor's desire to avoid payment of UST fees during the time the plan is in effect and before the debtor is discharged. Second, the procedure required on objections to claims is cumbersome and inconsistent with many courts' practices of allowing negative notice, i.e., notice of an objection or motion with an opportunity for an interested party to request a hearing.

Individual Chapter 11 cases:

BAPCPA created new provisions for individual chapter 11 cases that appear intended to create a scheme that has certain similarities to a chapter 12 or 13 case, including having earnings included as property of the estate, 11 U.S.C. § 1115, and the delay of the discharge until completion of payments . 11 U.S.C. § 1141(d)(5)(A). However, it is usually administered by the debtor, not by a standing trustee, and the standing trustees are quite good at making sure debtors comply with their plans. Apparently the UST is not obliged to oversee the administer an ongoing individual ch. 11 case - that seemed to be his position when we brought it up - and certainly the UST will not monitor a closed one. *See* 28 U.S.C. § 586.

Some courts, in response to a motion driven by the debtor's reluctance to pay the usual chapter 11 fees in 28 U.S.C. § 1930(6), have closed these cases right after confirmation and then reopened them when payments are complete - another motion by the debtor - so the discharge can be entered. Thus, during the pendency of the plan, we have a case closed without a discharge. This may run afoul of Fed. R. Bankr. P. 3022 because the case has not been fully administered if plan payments are ongoing and the discharge is contemplated but not yet entered. Nevertheless, as was pointed out in *In re Ball*, 2008 WL 2223865 (Bankr. N.D. W.V.), having to pay UST fees for up to five years while the plan is in payment status may affect feasibility if the case is not closed.

The BJAG, being very good at the parade of horribles, noted that the automatic stay is not in effect if the case is closed. 11 U.S.C. § 362(c)(2)(A). And if payments are not being made, what is a creditor to do? Perhaps go to state court to enforce the ch. 11 plan? Piecemeal enforcement is not what bankruptcy is all about. Enforcement in bankruptcy court might be grounded in 11 U.S.C. 1142(b) and Fed. R. Bankr. P. 3020(d), coupled with a motion to reopen by the creditor (who would be charged a fee), and perhaps with a motion to dismiss or convert under 11 U.S.C. § 1112(b)(4)(N). I doubt many practitioners would think to move to reopen a closed case just to dismiss it, and it would not do them any good with respect to reviving pre-confirmation liabilities. Reopening would also be necessary to convert the case. Section 1127(e) allows for modification after confirmation of an individual ch. 11 plan (secured creditors are notably absent from the list entitled to request modification, presumably because of their ability to proceed in state court in the event of default), but our main concern was enforcement by creditors as a whole, and debtor protection from individual creditor actions that sent them into bankruptcy in the first place and might prejudice the rights of other creditors under the plan.

The BJAG took no position on how the Rules might address these problems, but we felt some guidance might be appropriate, such as a streamlined procedure for reopening for enforcement of an individual chapter 11 plan, reopening for discharge, or automatic reopening linked to the term of the plan, with noticing provisions.

Objections to Claims

As noted above, many courts use so-called negative notice in calendaring. Fed. R. Bankr. P 3007(a) seems to require that there be a hearing. This can unnecessarily clog the court's calendar, especially for such objections as being late filed or checking an obviously wrong priority category. Section 502(b) uses the term "after notice and hearing" which is widely interpreted to allow negative notice. *See* 11 U.S.C. § 102(1). Some courts have avoided the requirement by ignoring it altogether, or by scheduling the hearing

with an order requiring a response from the claimant a certain number of days before the hearing, without which the hearing will be cancelled. This requires monitoring by court staff, which can be time consuming. We request that the committee consider modifying the rule to provide that notice of the objection and opportunity for hearing is sufficient on objections to claims.

Thank you for your consideration,

Margaret Dee McGarity
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Member, Bankruptcy Judges Advisory Group