

2018 DAYTON CHAPTER 13 SEMINAR

Hon. Beth A. Buchanan
Hon. Guy R. Humphrey

VIEWS FROM THE BENCH

I. ETHICS, PROFESSIONALISM & CIVILITY

A. Professionalism & Civility

Email – Time & place for it - don't use email for emotionally charged situations

Phone - Pick up phone & call & return calls

Discuss clients' positions respectfully & explore all solutions with opposing counsel

Take the high road!

B. Rule 11/BR 9011 Obligations

RULE 11 APPLIES TO BANKRUPTCY FILINGS

Read what you are going to file before filing it - does it make sense in the context?

Is it complete?

Boilerplate

Don't use boilerplate that makes no sense for the context

Clash between use of boilerplate to be cost-effective & efficient vs. obligations under BR 9011

Use proper explanations for mods, motions to use tax refunds & insurance money & SS payments, workers comp, etc.

C. Telephone Conferences

Be available at the designated time – don't make courtroom deputy track you down

Use landlines whenever possible

Never participate when driving in a car

Participate from a quiet location

Do not conduct settlement discussions when judge is on the line

II. CHAPTER 13 GENERAL PRACTICE

A. Don't Make Us the Maytag Repairman & Repairwoman

Don't be afraid to raise and bring issues before us

B. How to conduct a Hearing or Trial

1. Be prepared. Outline your opening statements, arguments, and examinations of witnesses in advance of the hearing or trial. Be prepared to address any evidentiary issues at the hearing (e.g. hearsay, etc.)
2. Be prepared to use a document camera for all of your exhibits at the hearing or trial.
3. All exhibits should be exchanged in advance of the hearing or trial, but prior to the commencement of the hearing or trial, counsel should make sure that opposing counsel has seen copies of all of the proposed exhibits. Try to make sure all of your exhibits are as "readable" and clear as possible. Do not put exhibit labels over or punch holes through text or images on your exhibits.
4. Provide the courtroom deputy and opposing counsel with hard copies of all of your exhibits (labeled in advance of the hearing) prior to the commencement of the hearing or trial.
5. Try to obtain stipulations or agreement of counsel as to the admission of exhibits in advance of the hearing. Advise the court at the commencement of the hearing as to the exhibits which counsel agree may be admitted.
6. Move for admission of your exhibits at the conclusion of your case, before you close your case.
7. At the commencement of the hearing, each attorney should stand and state their appearance on the record and introduce any client representatives in attendance with them. In addition, if counsel has witnesses present in the courtroom, counsel should introduce any witnesses at that time.
8. Other than for very brief statements to the court or brief objections to the introduction of evidence, counsel should make all verbal presentations and examinations of witnesses from the lectern. Always stand when addressing the court.
9. All persons, whether counsel, parties, or witnesses, shall be formally addressed by the surnames whenever possible. Be respectful to all counsel and all parties and witnesses, including pro se parties. You do not score points with the court by being brash with counsel, witnesses, or pro se parties. You do score points with the court when you are professional and courteous in all of your dealings.

10. All arguments and objections should be directed to the court.
 11. Do not speak over opposing counsel or a witness, unless you must interject an objection to a question at the appropriate time.
 12. If you or a witness need a break, do not be afraid to ask for a break.
 13. If you need to call a witness out of order, discuss it with opposing counsel before the hearing starts or during a break and let the courtroom deputy know. The court will do what it can (within reason) to accommodate the schedules of witnesses.
 14. Be confident in all of your arguments and do not state or intimate that you are only making the argument “because your client wants you to” do so.
- C. **We can only know what is provided to us in writing** – we don’t know something you told the Chapter 13 Trustee or just provided to the Chapter 13 Trustee
- Give us the information we need to make an informed decision as to the relief you are seeking (preferably before we set it for hearing) & why we should grant that relief
- D. ***Espinosa* & the Court’s *Sua Sponte* Duty to Apply and Enforce the Bankruptcy Code & Rules**

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378-81 (2010):

Bankruptcy courts are only to confirm “those plans that comply with ‘the . . . applicable provisions’ of the Code”

“[T]he Code makes plain that bankruptcy courts have the authority – indeed, the obligation – to direct a debtor to conform his plan to the requirements of [the Code].”

E. Cash Collateral

§ 363 -- THERE IS SUCH A THING AS CASH COLLATERAL IN CHAPT. 13

11 U.S.C. § 363(c)(2) & § 1304(b)

In re Kleather, 208 B.R. 406 (Bankr. S.D. Ohio 1997) (J. Clark)

Lyons v. Federal Sav. Bank (In re Lyons), 193 B.R. 637
(Bankr. D. Mass. 1996)

Magee v. Weller, 2013 U.S. Dist. LEXIS 136700 (S.D. Ohio 2013),
aff’g *In re Magee*, Case No. 12-35335, June 13, 2013 (Doc. 95)
(J. Walter) (determining Ohio does not recognize an absolute assignment of rents, only that rents subject to an assignment of rents provision are cash collateral which may be used by the debtor with the lender’s consent or

with an order of the bankruptcy court authorizing use of cash collateral)
(See also In re Cardinal Indus., 118 B.R. 971 (Bankr. S.D. Ohio 1990))

When is there likely to be Cash Collateral in a 13?

When the debtor owns 1 or more rental properties!!

When debtor owns an unincorporated business & has bank financing

Significance – Must obtain consent of lender or court to use cash collateral!!

F. Applications to Employ Special Counsel & 9019 Motions

Who files – Chapter 13 Trustee or Debtor’s counsel – not special counsel

When to file Application for Retention -- timing – front end, not back end
– at time case is filed if counsel already employed; at time counsel is employed if special counsel employed after bankruptcy case is filed (not when matter is settled)

9019 Motion also needs to be filed by 13 Trustee or Debtor’s counsel

Inclusion of request to retain funds by debtor within 9019 motion to approve settlement and distribution of settlement proceeds???

F. Motions to Retain Funds

When -- Only file on expedited basis if there is an urgent need to use the funds
(e.g. have to buy replacement vehicle to get to work, roof is caving in, etc.)

If filing on expedited basis, try not to file on Friday –
if can get it in earlier, get it in earlier

Follow appropriate procedure for filing on expedited basis
& in submitting orders

Be prepared to expedite service to the directly affected parties
(e.g. email, overnight, fax, or hand-delivery) & to provide evidence of such service (e.g. certificate of service, green card, Fed-Ex label)

What -- Explain what the funds are needed for & provide documentation as appropriate (e.g. estimate for roof repair, estimate for dental work, price of tires)

Amend schedules if necessary if circumstances have changed (e.g. originally had no dependents, now grandchildren living with debtors and need to use funds to care for them, etc.)

G. Motions to Modify Plans

What & Why -- Need to explain what is going on in explanation part, why need to modify the plan

Avoid boilerplate as explanation -- Don't just throw in boilerplate that makes no sense, e.g. mod reduces payments & sole explanation is so plan can complete on time (when in fact, reason was payments had to be reduced to meet post-petition medical expenses, etc.)

Is it an appropriate modification or something not appropriate for a modification, such as changing of the treatment of a secured creditor?

In re Hill, 386 B.R. 670 (Bankr. S.D. Ohio 2008) (J. Humphrey) (Chapter 13 plan may be modified when permissible under § 1329, including to increase or reduce the amount of payments on claims of a particular class, extend or reduce the time for payments, & alter the amount of the distribution)

Chrysler Financial Corp. v. Nolan (In re Nolan), 232 F.3d 528 (6th Cir. 2000) (Debtor cannot modify plan by surrendering collateral and paying the deficiency claim as an unsecured claim)

Ruskin v. DaimlerChrysler Servs. N. Am. (In re Adkins), 425 F.3d 296 (6th Cir. 2005) (Debtor cannot modify plan to surrender a car and pay the deficiency claim as an unsecured claim)

Americredit Fin. Servs. v. Nichols (In re Nichols), 440 F.3d 850 (6th Cir. 2006) (Bankruptcy court did not abuse its discretion in approving modification of a plan which resulted in modifying payments to car lender such that payments may not keep pace with the potential depreciation of the car)

H. Splitting a Joint Case vs. Converting One Joint Debtor

Use “Motion to Split Case” docketing event

If severing a joint case and both debtors' individual cases will remain under the same chapter as the joint case.

Filing Fee is required and is equal to the amount of the filing fee for the chapter under which the joint case was commenced.

Use “Motion Converting One Joint Debtor” docketing event

If severing a joint case and converting one debtor’s individual cases to a different chapter.

Filing Fee is required for the converted case and is the same as the fee for filing a new case under that chapter.

I. Fee Applications

Include appropriate descriptions of the work done

Do not include the contents of communications with clients (nature of the conversation is good (e.g. t/c with client re Trustee objection to MTD), but don’t include specific content of a conversation (e.g. t/c with client re motion to retain funds, client said he hadn’t been to the casino for a while and was feeling lucky)

Include a notation for each item as to who is doing the work (initials are fine if we can determine whose initials they are and we are familiar with/know the person’s position and experience, etc.)

Include the amount of time spent for each itemized entry (UST preference is for items to be billed by the 10th of an hour, e.g. “.3”)

Include a description of the results achieved

If motion or filing is withdrawn, etc., give us enough information to understand why it was appropriate to file in the 1st place, etc.

Assess the value of the work accomplished & reduce the bill when appropriate

File fee app when case is dismissed prior to confirmation – LBR 2016-1(b)(5)

J. Form Motions/Filings

Use the court’s form motions or other form motions when appropriate

Reduces mistakes & helps insure you have the information in the motion we need to rule upon your request

Online Forms & Orders

(link -- <https://www.ohsb.uscourts.gov/local-form-motions-and-orders>)

Category	Motion	Order
Wholly Unsecured and/or Avoidable Liens	<u>Motion for Determination that Mortgage/Lien is Wholly Unsecured and Void [Motion M/L Void (12/17)]</u>	<u>Order Granting Motion for Determination that Mortgage/Lien is Wholly Unsecured and Void [Order M/L Void (12/17)]</u>
	<u>Motion to Avoid Judicial Lien on Real Property Pursuant to 11 U.S.C § 522(f)(1)(A) [Motion 522(f)(1)(A) (12/17)]</u>	<u>Order Granting Motion to Avoid Judicial Lien on Real Property Pursuant to 11 U.S.C § 522(f)(1)(A) [Order 522(f)(1)(A) (12/17)]</u>
	<u>Motion to Avoid Nonpossessory, Nonpurchase-Money Security Interest in Exempt Property of Debtor Pursuant to 11 U.S.C § 522(f)(1)(B) [Motion 522(f)(1)(B) (12/17)]</u>	<u>Order Granting Motion to Avoid Nonpossessory, Nonpurchase-Money Security Interest in Exempt Property of Debtor Pursuant to 11 U.S.C § 522(f)(1)(B) [Order 522(f)(1)(B) (12/17)]</u>
Redemption	<u>Motion to Redeem a Motor Vehicle [Motion 722 (12/17)]</u>	<u>Order Granting Motion to Redeem a Motor Vehicle [Order 722 (12/17)]</u>

The court also hopes to add soon a form motion and order under BR 5009 to effect the release of liens upon completion of the Chapter 13 plan

III. AVOIDANCE OF LIENS

A. Different Types of Liens

1. Mortgage
2. Security Agreement/UCC
 - a. Purchase Money Security Interest/PMSI
 - b. Non-Purchase Money Security Interest
3. Certificate of Judgment/CJ – Judgment Lien
4. Statutory Liens
 - a. Tax Liens
 - b. Mechanic’s Lien

B. Vehicle Liens (noted on Title)

C. Avoidance Provisions & Theories

1. 522(f) – Judgment Lien’s Impairment of an Exemption
2. 522(f) – Nonpurchase Money Security Interest’s Impairment of an Exemption
3. 506 -- Lane – Wholly Unsecured Liens
4. 547 – Preference
5. 548 – Fraudulent Conveyance
6. 549 – Unauthorized Post-Petition Transfer

D. Method of Avoidance

1. Plan
2. Motion or Adversary Proceeding
3. 7004 Service
4. Order/5009

Preference for providing court’s issuance of order authorizing order being recorded, filed, or otherwise provided to agency to obtain release of lien (vs. filing contempt motion, etc. to order creditor to release the lien)

Provide in order that the order may be filed with the appropriate government agency to effect the release of the lien. The court’s preference is to not order a state agency to take action, such as to release or cancel a lien, but to authorize the recording of the order to effect the release or cancellation of the lien.

E. Avoidance/Strip Off vs. Cramdown/Strip Down

Strip Off/Avoidance: Avoiding a lien in its entirety is “stripping off” the lien. *Bank of Am., N.A. v. Caulkett*, 192 L. Ed. 2d 52, 56 (2015).

Strip Down/Cram Down: Limiting the lien to the value of the collateral is stripping down or cramming down the lien. *Dewsnup v. Timm*, 502 U.S. 410, 417 & 429 (1992); *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 461 (1999) (J. Thomas, concurring); *Till v. SCS Credit Corp.*, 541 U.S. 465, 468 (2004); *Assocs. Commer. Corp. v. Rash*, 520 U.S. 953, 956-57 (1997).

F. Lien Avoidance & Cramdown Tables

AVOIDING LIENS OTHER THAN TAX & STATUTORY LIENS

Type of Lien	Strip Off/Avoid or Cram Down Or Stretch Out	Statutory Avoidance § Or Case Authority	Plan §	Avoidance/Modification Procedures
Mortgage With Equity Secured Only by Residence	None	§ 1322(b)(2) <i>Dewsnup</i> <i>Nobelman</i>	5.1.1 Or 6	None
Residential Mortgage w/o Equity	Avoid	<i>Lane</i> , 280 F.3d 663 § 506(a)(1) § 506(d)	5.4.1	Plan or Motion
Residential Mortgage With Equity	Stretch Out	§ 1322(c)(2) & § 1325(a)(5)	5.1.1	Plan
a) Non-Residential Mortgage & b) Mortg. Securing Resid. & Other Prop.	Avoid Or Cram Down	§ 1322(b)(2) & § 506	5.1.2	Plan or Motion
Judgment Lien	Avoid or Cram Down	522(f)(1)(A)	5.4.2	Plan or Motion
Vehicle Lien PMSI - 910	None	§ 506 § 1322(b)(2) §1325(a) hanging ¶	5.1.3	None
Vehicle Lien PMSI – NOT 910	Cram Down	§ 506 § 1322(b)(2)	5.1.4	Plan or Motion
Vehicle Lien PMSI – 910 & non-910 Interest Rate	Cram Down	§ 1325(a)(5)	5.1.3 (910) 5.1.4 (non-910); SPP	Plan
Security Interest Non-Possessory, Non-PMSI	Cram Down Or Avoid	§ 522(f)(1)(B)	5.4.3	Plan or Motion
Liens Avoidable as Preferences, Fraudulent Conveyances, or Post-Petition	Avoid	§ 547, § 548, § 549 § 544/UFCA	5.4.4 SPP	Adv. Proceeding

AVOIDING TAX & STATUTORY LIENS

Type of Lien	Strip Off/Avoid Or Strip Down/Cram Down Or Stretch Out	Statutory Avoidance § Or Case Authority	Plan §	Avoidance/ Modification. Procedures
Tax Lien*	Strip Off/Avoid	§ 522(c)(2)(B) § 1322(b)(2) § 506	5.4.1; SPP	Adv. Proceeding
Statutory** Non-Tax Lien	Strip Off/Avoid	§ 545 § 546(b)	SPP	Adv. Proceeding

* The Court does not take a position in these materials and for purposes of this seminar as to whether a tax lien may be avoided or stripped off in a Chapter 13 case under §§ 1322(b)(2) and 506(d). However, if such a tax lien avoidance is sought, this is the method the court prefers be used to seek such a result. A tax lien is not avoidable using § 522 (see § 522(c)(2)(B)), nor in Chapter 7 (See *Dewsnup v. Timm*, 502 U.S. 410 (1992) and *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015)). Nor may the tax lien be stripped down or crammed down in a Chapter 13. See *Nobelman v. American Sv. Bank*, 508 U.S. 324 (1993).

** 11 U.S.C. § 545 provides situations in which a statutory lien may be avoided and § 546(b) places certain limits on a trustee's ability to avoid liens, including when applicable law permits post-petition perfection of an interest in property.