

Cheat Sheet for Litigating in Bankruptcy Court

By Scott A. Wolfson

The most seasoned litigators can find themselves out of sorts in bankruptcy court. The language is different. The feel is different. And yes, despite some litigators closing their eyes and pretending it isn't so, the rules of procedure are different.

This article aims to assist litigators by alerting them to the bankruptcy court's unique procedures so the judge can focus on the litigators' arguments, not their noncompliance.

The rules

The procedural rules governing litigation in the bankruptcy courts are primarily the Federal Rules of Civil Procedure; however, some rules apply, some do not, and some are modified by the Federal Rules of Bankruptcy Procedure and the relevant bankruptcy court's local rules, electronic filing procedures, and administrative orders. For example, Local Rule 9029-1(a) of the Local Rules of the U.S. Bankruptcy Court for the Eastern District of Michigan provides:

The rules of procedure in cases and proceedings in this court will be as prescribed by the laws of the United States, the rules promulgated by the Supreme Court of the United States, any applicable rules of the United States Court of Appeals for the Sixth Circuit, any applicable Local Rules of the United States District Court for the Eastern District of Michigan, these rules and the court's ECF Procedures.

The bankruptcy court supplements its local rules with administrative orders (62 as of

this article),¹ and has adopted the U.S. District Court for the Eastern District of Michigan's Civility Principles.²

The font

Yes, the font. Like the U.S. District Court for the Eastern District of Michigan, the bankruptcy court recently adopted a local rule requiring a 14-point proportional font.³ There is no quicker way to show the court you are an outsider than by filing in a smaller font.

Adversary proceedings

Adversary proceedings are lawsuits within the bankruptcy case begun by filing a complaint.⁴ Part VII (Rules 7001–7087) of the Federal Rules of Bankruptcy Procedure contain most of the rules governing adversary proceedings.⁵ These rules generally incorporate the Federal Rules of Civil Procedure. For example, Bankruptcy Rule 7003 simply states, "Rule 3 F.R.Civ.P. applies in adversary proceedings." But some of the bankruptcy rules differ from the federal rules, with the modifications ranging from slight to dramatic.

Bankruptcy Rule 7001 provides that the following are adversary proceedings:

- Recovering money or property
- Determining the validity, priority, or extent of a lien or other interest in property

- Obtaining approval for the sale of both the interest of the estate and of a co-owner in property
- Objecting to or revoking a discharge
- Revoking an order of confirmation of a plan
- Determining dischargeability of a debt
- Obtaining an injunction or other equitable relief
- Subordinating any allowed claim or interest
- Obtaining a declaratory judgment relating to any of the foregoing
- Determining a claim or cause of action removed under 28 USC 1452

Seeking relief of the type specified by Bankruptcy Rule 7001 by motion rather than by filing a complaint is a common mistake.

Contested matters

"Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."⁶ Most bankruptcy court litigation is conducted through contested matters. For example, a motion for relief from the automatic stay imposed by 11 USC 362 is a contested matter.

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"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

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Bankruptcy Rule 9014 outlines the procedures applicable to contested matters. Relief must be requested by motion in the bankruptcy case. Importantly, discovery in a contested matter is permitted only upon a court order for cause shown.⁷

Electronic filing

Michigan's bankruptcy courts have been at the forefront of electronic filing. The U.S. Bankruptcy Court for the Eastern District of Michigan has detailed administrative procedures for electronic case filing on its website. The court accepts only electronic case filings unless, upon motion showing good cause, a paper filing is authorized.⁸ Attorneys need a login and password to access the electronic case filing system.

Disclosures required on first filing

A corporation that is a party to an adversary proceeding or a contested matter must include a corporate ownership statement with its first filing, identifying any corporation that directly or indirectly owns 10 percent or more of any class of the corporation's equity interests.⁹ This filing allows the bankruptcy judge to make an informed disqualification decision.¹⁰

Motion practice

You've set your font to 14 and prepared a motion. Now what?

First, make sure you file your motion in the correct case. Unlike a contested matter, each adversary proceeding has its own case number and docket separate from the underlying bankruptcy case. Both the adversary proceeding number and bankruptcy case number appear on the adversary proceeding caption, so filing adversary proceeding motions in the underlying

bankruptcy case is a common mistake. Practitioners should also remember there may be dozens of adversary proceedings relating to a bankruptcy case and make sure they file in the proceeding in which their client is a party.

Attorneys cannot simply schedule a hearing on their motion by praecipe or notice of hearing. A notice of motion and opportunity to object must accompany any motion filed in the bankruptcy court, which generally provides 14 days' notice¹¹ to interested parties to object. In addition, a proposed order granting the motion is required, as is a brief with any motion in an adversary proceeding and in other circumstances.¹² The electronic case filing procedures specify how the motion and its related documents are to be filed, down to indicating the exhibit number for labeling each document.¹³

If a response is not filed in a timely fashion, the movant may file a certification of no response with the court and upload the proposed order granting the motion through the bankruptcy court's order submission process. The court may enter the submitted proposed order without a hearing. If an objection is filed, the court will schedule a hearing with notice to the movant and all respondents.¹⁴

Motion hearing

Unlike many Michigan circuit courts, you do not have to check in with the bankruptcy court when you arrive for a hearing on your motion. The court presumes you will be present when your motion is called.

Moreover, you need not drag your witnesses to the initial hearing on your motion. "Unless the court orders otherwise, the initial hearing on a contested matter will not be an evidentiary hearing."¹⁵ I have known litigators to spend hours preparing witnesses for the initial motion hearing, either because

counsel intended to present testimony or feared the judge may request it, not knowing of this local rule. If the judge wants testimony, an evidentiary hearing will be scheduled at the initial hearing.¹⁶

Mediation

There is no equivalent to case evaluation in the bankruptcy court. Mediation is typically voluntary, but a judge has the power under the local rules to require the parties to mediate.¹⁷ Generally, if mediation is agreed to or ordered, the parties must pick a mediator from the court's mediation panel.¹⁸ Mediation is facilitative, and there is no possibility for sanctions in connection with the mediation if parties participate in accordance with the mediation rules.¹⁹ The 2013 Administrative Order Authorizing Judicial Mediation authorizes the district's judicial officers to act as mediators for matters in cases over which they are not presiding.²⁰ This procedure is also nonbinding unless the parties agree otherwise.²¹

Rules of evidence

The Federal Rules of Evidence apply in cases under the Bankruptcy Code.²² Attorneys who litigate in bankruptcy courts as well as federal and state trial courts would likely agree that the rules of evidence are not as strictly enforced in bankruptcy courts. The reason for the less stringent enforcement may be that most matters are tried to the bankruptcy judge, not a jury. Offers of proof are often used in lieu of testimony, particularly in contested matters.

Jury trial rights and waiver

Jury trials are rare in bankruptcy matters, but litigators intent on preserving their clients' jury trial rights must be vigilant. Since the Supreme Court's decision in *Stern v Marshall*,²³ there has been extensive litigation over the last five years about which matters can be decided by bankruptcy courts. The case and its progeny seem to leave undisturbed the rule that, when a creditor files a proof of claim, any right the creditor had to a jury trial is *waived*. The reasoning behind the rule is that the filing of a claim initiates

the process of allowance and disallowance of claims, such that the filer is deemed to have submitted to the equitable powers of the bankruptcy court.²⁴

Conclusion

Even the most experienced trial attorneys can stumble over bankruptcy court litigation nuances. Knowing them is key to maintaining credibility and maximizing your persuasiveness. ■



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ENDNOTES

1. ED Mich LBR 9029-2. As of February 25, 2016, there were 62 administrative orders posted on the bankruptcy court's website at <<http://www.mieb.uscourts.gov/court-info/local-rules-and-orders/general-orders>> [accessed April 12, 2016].
2. ED Mich LBR 9029-3.
3. ED Mich LBR 9029-1(h).
4. FR Bankr P 7003.
5. FR Bankr P 7001 states that "[a]n adversary proceeding is governed by the rules of this Part VII."
6. FR Bankr P 9014 Advisory Committee Note.
7. ED Mich LBR 7026-3.
8. ECF Procedure 3 <<http://www.mieb.uscourts.gov/sites/default/files/courtinfo/ECFAdminProc.pdf>> [accessed April 12, 2016].
9. FR Bankr P 7007.1 requires this in adversary proceedings, while ED Mich LBR 9013-3 requires the filing in contested matters. This statement must be filed as a separate paper, not as an attachment to another paper, and must be updated to reflect any change in circumstances. ED Mich LBR 7007.1-1; ED Mich LBR 9013-3.
10. FR Bankr P 7007.1 Advisory Committee Note, 2003 Amendment.
11. Notice must be 21 days for matters covered by FR Bankr P 2002(a). ED Mich LBR 9014-1. There are also procedures for shortening notice time for cause. See ED Mich LBR 9006-1.
12. ED Mich LBR 9014-1(f).
13. ECF Procedure 6(a) provides that a party filing a motion under ED Mich LBR 9014-1 must file the following exhibits with the motion:
Exhibit 1—The Proposed Order
Exhibit 2—The Notice of Opportunity to Respond
Exhibit 3—The Brief in Support
Exhibit 4—The Proof of Service
Exhibit 5—Affidavits
Exhibit 6—Documentary Exhibits, beginning with a list of the exhibits (See Exhibit A of these Administrative Procedures) and with each exhibit separately bookmarked by an identifying tab in the PDF file.
14. ED Mich LBR 9014-1(d).
15. ED Mich LBR 9014-1(k).
16. *Id.*
17. ED Mich LBR 7016-2.
18. *Id.*
19. *Id.*
20. Administrative Order No. 13-AO-011, ED Mich (2013).
21. *Id.*
22. FR Bankr P 9017.
23. *Stern v Marshall*, ___ US ___; 131 S Ct 2594; 180 L Ed 2d 475 (2011).
24. See *Granfinanciera, SA v Nordberg*, 492 US 33, 51-57; 109 S Ct 2782; 106 L Ed 2d 26 (1989).

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