CONSUMER HOT TOPICS
American Bankruptcy Institute Roundtable #5

Panelists

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I. Hot Topic: Is a mortgage removed from anti-modification under § 1322(b)(2) if the mortgage grants a security interest in the mortgage escrow account (personal property)?

A) Why is this topic "hot"? Bifurcation is one of the most fundamental tenets of bankruptcy law. The exception provided for in § 1322(b)(2), referred to commonly as the "anti-modification provision," defines a narrow subset of claims to which traditional bifurcation does not apply. Determining the exact boundaries of that exception has taken center stage in recent years as victims of the real estate bubble and predatory mortgages continue to seek relief in bankruptcy court.

B) Recent Case: *In re Capretta*, 542 B.R. 774 (Bankr. N.D. Ohio 2015). Now on appeal to 6th Circuit BAP.

C) Code Sections at Issue

i) Bifurcation, § 506(a): "An allowed claim of a creditor secured by a lien on property in which the estate has an interest…is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property…and is an unsecured claim to the extent that the value of such creditor's interest…is less than the amount of such allowed claim…."

ii) Anti-modification, § 1322(b)(2): "[T]he plan may… modify the rights of holders of secured claims, ***other than a claim secured only by a security interest in real property that is the debtor's principal residence***, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims…"

iii) Definitions

(1) Debtor's Principal Residence, § 101(13A) "[M]eans a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property…"

(2) Incidental Property, § 101(27B): "[M]eans, with respect to a debtor's principal residence—
(A) property commonly conveyed with a principal residence in the area where the real property is located;
(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and
(C) all replacements or additions."

D) Select cited cases:

i) *Reinhardt v. Vanderbilt Mortg. & Fin., Inc. (In re Reinhardt)*, 563 F.3d 558, 562 (6th Cir. 2009).

ii) *Allied Credit corp. v. Davis (In re Davis)*, 989 F.2d 208 (6th Cir. 1993).

iii) *Stevens v. Suntrust Mortg., Inc. (In re Stevens)*, 2015 Bankr. LEXIS 4338 (Bankr. N.D. Ohio Feb. 5, 2015)

E) Debtors' argument on appeal:

*(Quick aside: appeals from confirmation)

i) Modification of secured debts supports the purposes of Chapter 13 by maximizing likelihood of completion of the reorganization and creating more favorable treatment of unsecured claims.

ii) Anti-modification, on the other hand, has been limited both by § 1322(c)(2) for mortgages with final payment coming due during the plan term; and by the uniform acceptance of "lien stripping" of wholly unsecured mortgages.

iii) *Reinhardt* decision establishes that two (2) elements required to trigger the anti-modification provision: 1) only security interest in real property and 2) only security interest in debtor's principal residence.

(1) 2005 amendment expanded number of claims that meet definition of "debtor's principal residence" in second part.

(2) Even after the 2005 amendments, first element must still be met so no matter how broad the definition "debtor's principal residence" must still only be a security interest in real property.

iv) *Capretta* distinct from prior cases in that it deals with security interest in separate personal property in which the Debtors retain an ownership interest, as opposed to:

(1) *Davis*: requirement in deed of trust for owner to maintain fire insurance did not convey security interest until a loss occurs; and rents, royalties, profits and fixtures, all inextricably linked to the real property not separate personal property, and so did not nullify the exception. Opinion distinguishes from *Reeves* which did deal with separable personal property.

(2) *Mullins*: escrow account contractually mandated but no security interest granted.

(3) *Ferandos*: under New Jersey law homeowners retain no ownership interest in escrow account, which is treated as a prepayment belonging to lender.

v) Escrow account is separate personal property, not fixtures like in *Davis* that are inextricably linked to the real estate and it is not produced by the real estate like rents and proceeds, sale wouldn't transfer escrow account with real estate so escrow account is personal property under Ohio law.

F) Creditor's brief currently due on or before August 26, 2016.

II. Hot Topic: Can a debtor apply the homestead exemption of a state that the debtor lived in for the greater part of the time between 24 and 30 months prior to filing, to the debtor's present home in a different state?

A) Why is this topic "hot"? Society is more mobile than ever before. Bankruptcy code provides uniform set of exemptions, but states may "opt out" limiting available exemptions to those of the state. In order to avoid abuse, the Bankruptcy Code provided a mathematical formula for determining which state's exemptions are applicable. However, application of a state's exemptions to property no longer in that state raises the issue of extraterritoriality.

   i) Recent Case: *In re Keith D. Ash and Phyllis J. Ash*, Case No. 15-bk-00718 (Bankr. N.D.W.Va.)(Overruling Trustee's objection to Debtors' claim of exemption based on application of Louisiana exemptions to property located outside the boarders of Louisiana under § 523(b)(3)(A)). Now on appeal to District Court as *Martin P. Sheehan, trustee v. Keith Doyle Ash and Phyllis Jean Ash*, Case No. 16-cv-00109.

B) Select cited cases:

   i) *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (U.S. 2013)(Reaffirming presumption against extraterritoriality based on foreign policy concerns).

   ii) *In re Jevne*, 387 B.R. 301 (Bankr. S.D. Fla. 2008)(Creating analytical framework for determining when state exemption laws may be applied extraterritorially under federal bankruptcy law).

C) Trustee's argument on appeal:

   i) Louisiana law does not operate extraterritorially and the federal exemptions are only available where no property may be exempted under state law.

   ii) Presumption against extraterritoriality applies equally between individual states as between the United States and foreign nations because sovereigns of either stripe lack the "power" to legislate beyond their boarders.

   iii) Outside of bankruptcy context, there is precedent for applying the exemptions of a single state only to assets within that state.

iv) Bankruptcy Code does not transform state exemption laws into federal laws such that the issue of extraterritoriality is inapplicable.

v) Bankruptcy Court's reliance on law review article primarily addressing "conflict of laws" provisions was misplaced because Congress set forth a bright line rule for determining domicile.

vi) Although some states have expressly limited exemptions, doing so is simply codifying the long understood principal such that failure to codify such language should not be read as intention to apply a state's exemptions extraterritorially.

vii) Absent specific legislative intent to have extraterritoriality, there should be none.

viii) Exception proves the rule: Tenancy by the Entirety exemption is based on situs of the property not domicile.

ix) Louisiana exemption does not, on its face, apply to worker's compensation award under West Virginia law.

D) Debtors' brief currently due on or before September 30, 2016.

III. Hot Topic: Surrender in chapter 7 – a lender's paradise?

A Chapter 7 debtor marked "surrender" on his Statement of Intention with respect to his homestead property. The trustee never administered the property. The secured creditor obtained stay relief during the course of the bankruptcy case but took no other action in the bankruptcy case. After the debtor received his discharge the Debtor continued to defend the foreclosure action. Three years after the Debtor received his discharge the lender came back to bankruptcy court seeking an order of the bankruptcy court (a) reopening the bankruptcy case; (b) compelling the debtor to stop fighting the foreclosure case; and (c) seeking sanctions against the debtor. Who wins?

A) Surrender to whom:

1. Surrender in a chapter 7 case is to the trustee. *In re Elkouby,* No. 14-23934, 2016 WL 798177 at *3, *7 (S.D. Fla. Bankr. Feb. 29, 2016) ("Section 521(a)(4) of the Bankruptcy Code directs any debtor to surrender all property of the estate to the trustee, if a trustee has been appointed. While chapters 11, 12, and 13 specifically excuse the individual debtor from this obligation, there is no exception for a chapter 7 debtor other than, implicitly, the property that the debtor seeks to retain whether by reaffirmation, redemption, or exemption. . . . [T]here is no Bankruptcy Code section that provides that if a chapter 7 trustee doesn't administer surrendered real property what follows is a second surrender—surrender to the lienholder. Rather, what the Bankruptcy Code specifically provides is that what follows is the property is abandoned to the debtor."); *In re Kasper*, 309 B.R. 82 (Bankr. D.D.C. 2004).

2. Surrender in a chapter 7 case means surrender to a secured creditor. *In re Failla,* 529 B.R. 786, 790 (Bankr. S.D. Fla. 2014), *aff'd sub nom. Failla v. Citibank, N.A. (In re Failla),* 542 B.R. 606 (S.D. Fla. 2015) ("'Under *Taylor*, a debtor unwilling to reaffirm and unable to pay off the mortgage obligation is required to indicate an intent to surrender the home and to tender the property to the mortgagee.'" *citing In re Steinberg*, 447 B.R. 355, 358 (Bankr. S.D. Fla. 2011)).

3. Surrender in a chapter 7 case means surrender to the trustee but if the trustee doesn't administer the property then the surrender is to the secured lender. *Failla v. Citibank, N.A.,* 542 B.R. at 610 ("[O]nce the debtor decides to "surrender" secured property, the debtor has abandoned any interest or claim that he may have had to the property as against the trustee, if the trustee decides to administer the property, or against any secured creditor the debtor listed in the filed schedules as having a valid, undisputed, non-contingent and enforceable secured lien on the property."); *In re Elowitz,* 550 B.R. 603, 607 (Bankr. S.D. Fla. 2016)("All debtors have an obligation to surrender property of the estate in their possession to the trustee. See 11 U.S.C § 521(a)(4) (mandating that the debtor must 'surrender to the trustee all property of the estate'). Thus, in order for surrender to mean anything in the context of § 521(a)(2), it has to mean that

the debtor must surrender the property to the lienholder and must not contest the efforts of the lienholder to foreclose on the property.").

B. Consequences of surrender:

1. You can't fight the foreclosure action. *Failla v. Citibank, N.A.,* 542 B.R. at 610 ("While the debtor need not physically deliver the property to the secured party, the debtor is precluded from taking any action which would interfere with the secured creditor's ability to obtain legal title to, and possession of, the property through legal means. Defending against a foreclosure proceeding relating to the secured property would be inconsistent with the debtor's stated intention to surrender the property within the meaning of 11 U.S.C. § 521(a)(2)*); In re Elowitz*, 550 B.R. 603.

2. Of course you can fight foreclosure. *In re Rodriguez*, No. 12-12043, 2015 WL 4872343 at *4 (Bankr. S.D. Fla. August 13, 2015) (Failure to surrender entitles a lienholder to stay relief; surrender is "not a bar by injunction to defending a foreclosure action which would be unconstitutional, inequitable and unjust.").

3. You could lose your discharge. *In re Failla,* 529 B.R. at 792 ("[I]f the Debtors persist in their refusal to 'surrender' the Property pursuant to 11 U.S.C. § 521(a)(2), their discharge will be in jeopardy pursuant to 11 U.S.C. § 105. The Debtors' refusal to effectively surrender the Property to CitiBank could be considered not only a fraud on the Court, but also a violation of 11 U.S.C. § 521(a)(2)(B), which requires that 'within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30–day period fixes, perform his intention with respect to such property.'").

4. No you can't. *In re Elkouby,* 2016 WL 798177, n. 22. ("The Bankruptcy Code addresses when and under what circumstances a debtor may lose his discharge. Failure to fully perform a statement of intention is not among them. . . . [T]he Supreme Court has made very clear that the bankruptcy courts may not use their equitable powers to override express provisions of the Bankruptcy Code, no matter how badly a debtor has behaved. *Law v. Siegel,* 134 S.Ct. 1188 (2014).").

C. Laches:

1. Barred by laches. A creditor shouldn't wait three years to come back to the Bankruptcy Court to seek relief arising from a debtor's failure to perform his statement of intention. *In re Rodriguez*, 2015 WL 4872343.

2. Laches doesn't apply. Laches does not apply to a creditor seeking to reopen a bankruptcy case after three years to address a debtor's delaying a foreclosure action since laches bars relief when "a party unreasonably delays taking action and the

affected party is prejudiced by the delay." In this case the debtor is not prejudiced, but only benefitted, by the lender's delay in seeking to reopen the bankruptcy case. *Bank of America, N.A. v. Rodriguez* (*In re Rodriguez*), No. 15-23609-CIV-Moreno (S.D. Fla. July 7, 2016) (Order Directing Bankruptcy Court to Reopen Case and Compel Debtor to Surrender Property).

Hot Topic IV: Can debtors transfer the an underwater home to the mortgage holder to stop ongoing expenses? Two theories, mixed results.

A. Surrender/vesting.

1.§ 1325(a)(5)(C) permits confirmation of a plan that "surrenders" collateral to the lien holder.

2. § 1322(b)(9): allows a plan to "provide for the vesting of property of the estate . . . in . . . any . . . entity."

3. Thirteen decisions deal with surrender/vesting; all accept that vesting transfers ownership, but they disagree about whether "surrender" lets a plan impose vesting on an unwilling mortgagee. Ultimate question: does surrender confer a right on the secured creditor to refuse a transfer of the collateral under § 1322(b)(9), or is it neutral on that question.

B. Payment of the claim with estate property.

1. § 1322(b)(8): a plan may "provide for the payment of . . . a claim . . . from property of the estate . . . ."

2. § 1325(a)(5)(B): allows payment of a secured claim with property having a value "not less than the allowed amount of such claim."

3. Two conflicting opinions: *In re Lemming*, 532 B.R. 398 (Bankr. N.D. Ga. 2015), and *In re Kerwin*, 996 F.2d 552 (2d Cir. 1993).

C. Attached slides present details

V. Hot Topic: Bankruptcy and the FDCPA

A creditor who qualifies as a "bill collector" filed a proof of claim for a debt the collection of which the creditor knows is barred by the statute of limitations. Has the creditor violated the Federal Debt Collection and Practices Act? Does the Bankruptcy Code preempt the Federal Debt Collection and Practices Act?

A. The filing of the Claim as a violation:

1. The filing of a stale claim violates the FDCPA: The filing of a proof of claim that the creditor knows is time barred is a violation of the FDCPA. "[A] debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt. The 'least sophisticated' Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to object to the claim. Given the Bankruptcy Code's automatic allowance provision, the otherwise unenforceable time-barred debt will be paid from the debtor's future wages as part of his Chapter 13 repayment plan." *Crawford v. LVNV Funding, LLC,* 758 F. 3d 1254, 1261 (11th Cir. 2014); .

2. The filing of a stale claim does not violate the FDCPA. The FDCPA was designed to protect consumers from fraudulent and defective collection practices. The Bankruptcy Code has its own provisions to protect debtors from fraudulent claims. "'While the FDCPA's purpose is to protect unsophisticated consumers from unscrupulous debt collectors, that purpose is not implicated when a debtor is instead protected by the court system and its officers.' Thus debtors are protected in bankruptcy proceedings – and by discharge afterward." *Simmons v. Roundup Funding, LLC,* 622 F. 3d 93 (2d Cir. 2010) (internal citations omitted). Thus, a proof of claim filed in accordance with the Bankruptcy Code cannot be the basis for a claim under the FDCPA. *Accord, Owens v. LVNV Funding, LLC,* 2016 U.S. App. LEXIS 14706 (7th Cir. Aug. 10, 2016).

B. The impact of the Bankruptcy Code on the FDCPA:

1. The Bankruptcy Code and the FDCPA can be read in concert. "The Bankruptcy Code and the FDCPA can be reconciled because they provide different protections and reach different actors. . . . The Code allows all 'creditors' to file proofs of claim . . . while the FDCPA dictates the behavior of only 'debt collectors' both within and outside of bankruptcy. . . . The Code establishes the ability to file a proof of claim . . . while the FDCPA addresses the later ramifications of filing a claim." *Johnson v. Midland Funding, LLC,* 823 F. 3d 1334, 1340 (11th Cir. 2016).

2. The Bankruptcy Code preempts the FDCPA. *Nelson v. Midland Credit Management Inc.,* No. 15-2984, 2016 WL 3672073 (8th Cir. July 11, 2016); *Simmons,* 622 F. 3d at 93.

VI. Hot Topic: Binding effect of a chapter 13 confirmation order – is child support exempt?

The chapter 13 debtor included repayment of his child support arrearages in the chapter 13 plan. Yet the Florida Department of Revenue twice garnished federal refund checks payable to the debtor to pay for the child support arrearages, notwithstanding that the debtor was current on his chapter 13 plan payments. Does the Florida Department of Revenue have a special "out" because of changes in the automatic stay provisions added to 11 U.S.C. §362 in 2005?

A. 11 U.S.C. §362(b)(2)(C) has no impact on the binding effect of a confirmation order. The provisions of 11 U.S.C. § 362(b)(2)(C), which permits a DSO creditor to collect child support arrearages notwithstanding the automatic stay, does not exempt the DSO creditor from the provisions of a confirmed chapter 13 plan. The Florida Department of Revenue argued that the exception to the automatic stay for DSOs applied after the confirmation of the debtor's chapter 13 plan and as such it could intercept a expense refund notwithstanding that the debtor's confirmed chapter 13 plan included repayment of child support arrearages. The court held that although the DOR did not violate the automatic stay when it intercepted the Debtor's reimbursement payment, it did violate the confirmed plan." *In re Rodriguez*, No. 15-14808 (11th Cir. August 11, 2016) (Order Affirming).

B. The Florida Department of Revenue is not bound by the terms of a confirmed chapter 13 plan with respect to child support arrearages. Unless the confirmed plan specifically states that all DOR collections must stop, post confirmation DSO collections may continue. *In re McGrahan*, 459 B.R. 869 (B.A.P. 1st Cir. 2011) (finding confirmed plan's silence as to an agency's ability to intercept tax refunds meant that the agency could intercept tax refunds to pay DSO arrearages.)

VII. Hot Topic: The effect of a default by the debtor in direct payments on a mortgage: dismissal, denial of discharge, or both?

A**.** *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014) **(**dismissal with leave to convert to Chapter 7; no denial of discharge).

B. *Kessler v. Wilson (In re Kessler)*, 2015 U.S. Dist. LEXIS 173961 (N.D. Tex. Nov. 19, 2015), *aff'd* No. 15-11252 (5th Cir. July 8, 2016) (denial of discharge)

VIII. Hot Topic: Non-record communication between Chapter 13 trustees, judges, and the UST.

Report of NCBJ-UST Liaison Committee Task Force, Effective Communication among Judges, United States Trustees, and Standing Trustees (2014) (attached).

Transferring Underwater Property – Vesting/Surrendering or Debt Payment: Does Either One Work?

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What we're going to discuss

The problem: Debtors can't afford their mortgage, but the home isn't worth as much as the mortgage balance—it's "underwater."

The question: Can debtors transfer the home to the mortgage holder to stop ongoing expenses, including maintenance, taxes, and homeowners association assessments?

1. Surrender plus vesting?

- § 1325(a)(5)(C) permits confirmation of a plan that "surrenders" collateral to the lien holder.
- § 1322(b)(9): allows a plan to "provide for the vesting of property of the estate . . . in . . . any . . . entity."
- So far, there are 13 decisions dealing with surrender/vesting; all accept that vesting transfers ownership.
- But they disagree about whether "surrender" lets a plan impose vesting on an unwilling mortgagee.

1. Surrender plus vesting?

Surrender outside of § 1325(a)(5)(C): "surrender value"

521(a)(4): "surrender to the trustee all property"

- The 13 decisions.
- 1. *In re Rosa*, 495 B.R. at 524: "[V]esting in addition to surrender. . . is confirmable only if the first standard [of § 1325(a)(5)] —acceptance—is met."
- Confirms the plan only because the mortgagee did not object.

1. Surrender plus vesting?

The 13 decisions.

- 2. *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014): similar result but greater protection to the mortgagee.
- If the mortgagee does not object to vesting, the debtor must give the mortgagee a quitclaim deed, effective only if the mortgagee fails to take action to refuse the deed within 60 days after receiving it.

1. Surrender plus vesting?

The 13 decisions.

- 3. *In re Watt*, 520 B.R. 834, 839 (Bankr. D. Or. 2014), allows surrender and non-consensual vesting:
- "[N]othing in . . . § 1322(b)(9) requires . . . consent. [A] plan . . . for vesting of property in a secured lender . . . may be confirmed over the lender's objection."
- The good faith requirement of § 1325(a)(5) prevents the transfer of negative-value property.

1. Surrender plus vesting?

The 13 decisions.

- 4. *Bank of New York Mellon v. Watt,* 2015 WL 1879680 (D. Or. 2015), reverses the bankruptcy court:
- "§ 1325(a)(5) . . . states that a plan is confirmable solely where surrender is proposed. . . . Here, debtors'. . . plan did not merely propose the cessation of their interest in the Property, it also forcibly transferred that interest, and the attendant liabilities . . . ."
- Now on appeal to the 9th Circuit.

1. Surrender plus vesting?

The 13 decisions.

- 5. *In re Sagendorph*, 2015 WL 3867955 (Bankr. D. Mass. June 22, 2015), agrees on all points with the bankruptcy court decision in *Watt*: "[A] transfer of property presupposes its surrender by the transferor."
- 6. *In re Zair*, 535 B.R. 15 (Bankr. E.D.N.Y. 2015), agrees with *Sagendorph*, and cites § 1327(a), which vests property in the debtor at confirmation unless the plan provides otherwise. Now on appeal.

1. Surrender plus vesting?

The 13 decisions.

- 7. *In re Stewart,* 536 B.R. 273 (Bankr. D.Minn. 2015): "While the 'surrender' concept . . . and the 'vesting' concept . . . are different, they may nonetheless be used in tandem when providing for the treatment of a secured claim in a chapter 13 plan."
- 8. *In re Williams,* 542 B.R. 514 (Bankr. D. Kan. 2015): agrees with the *Watt* reversal. Notes unpublished contrary opinion from another judge in the district.

1. Surrender plus vesting?

The 13 decisions.

- 9. *In re Weller*, 2016 WL 164645 (Bankr. D. Mass. Jan. 13, 2016). "This Court agrees with the conclusion in *Sagendorf* that §§ 1325(a)(5) and 1322(b)(9) are not in conflict," but holds that the provisions of § 1322(b) only are effective with creditor consent.
- 10. *In re Sherwood,* 2016 WL 355520 (Bankr. S.D.N.Y. Jan. 28, 2016). Agrees with the anti-vesting decisions.

1. Surrender plus vesting?

The 13 decisions.

- 11. *In re Tosi*, 2016 WL 859034 (Bankr. D. Mass. March 4, 2016). "[s]urrender [does] not merely . . . cede possessory rights, but . . . permit[s] the creditor to exercise its preexisting property rights as to the collateral."
- 12. *In re Brown,* No. 14-12357-JNF (Bankr. D. Mass. March 4, 2016). Allows vesting as payment: "[N]othing in § 1325(a)(5)(C) undercuts a debtor's ability to rely on the permissive provisions in § 1322(b)."

1. Surrender plus vesting?

The 13 decisions.

- 13. *In re Zair,* 2016 WL 1448647 (E.D.N.Y. April 12, 2016). Summarizes prior decisions; reverses bankruptcy court.
- Current score: 5 decisions allow nonconsensual vesting; 8 don't.
- But note the effect of *Bullard.*
- Why pro bono appellate counsel can help.

2. Debt Payment?

- § 1322(b)(8): a plan may "provide for the payment of . . . a claim . . . from property of the estate . . . ."
- § 1325(a)(5)(B): allows payment of a secured claim with property having a value "not less than the allowed amount of such claim."
- Two conflicting opinions.

2. Debt Payment?

- *In re Lemming*, 532 B.R. 398, 410 (Bankr. N.D. Ga. 2015), says not in Chapter 13: § 1322(b)(8) "was enacted to enable payment of claims from property . . . only after such property was liquidated."
- But—cites questionable legislative history and does not explain interaction with § 1325(a)(5)(B)—which must allow direct payments of property without liquidation, otherwise no need to "value" the estate property used to pay the claim.

2. Debt Payment?

- *In re Kerwin*, 996 F.2d 552, 557 (2d Cir. 1993).
- Under a [1225(a)(5)](B) distribution of property a creditor's claim may be deemed fully satisfied provided the property 'to be distributed' has been valued as at least equal to the amount of that claim."
- So an objecting creditor is required to accept payment of its claim through the conveyance of all of its collateral.
- The language of § 1325(a)(5)(B) is identical.

2. Debt Payment?

- If collateral can be transferred to pay a secured claim under § 1325(a)(5)(B), the meaning of "surrender" under (5)(C) would no longer be relevant.
- Property would only be "surrendered" to junior lienholders, while the allowed secured claim of the first mortgagee would be fully satisfied by the transfer of the collateral, with the lien satisfied at discharge.
- State law property rights would be expressly preempted.

EFFECTIVE COMMUNICATION AMONG JUDGES, UNITED STATES TRUSTEES, AND STANDING TRUSTEES

NCBJ-UST Liaison Committee Task Force

APPROVED BY NCBJ BOARD ON OCTOBER 9, 2014

Federal Rule of Bankruptcy Procedure 9003 prohibits attorneys from having *ex parte* contact with judges concerning matters affecting a particular case or proceeding, but "does not preclude communications with the court to discuss general problems of administration and improvement of the bankruptcy administration, including the operation of the United States Trustee system" by the United States Trustees ("U.S. Trustees"), assistants to, employees, and agents of the U.S. Trustees. Fed. R. Bankr. P. 9003(b). In June 2014, the National Conference of Bankruptcy Judges ("NCBJ")'s NCBJ-UST Liaison Committee created a task force (the "Task Force") to explore ways to maximize effective communications between Chapter 12 and 13 trustees, U.S. Trustees and bankruptcy judges within the parameters of Federal Rule of Bankruptcy Procedure 9003 and ethical canons.

The Task Force[1] worked collaboratively to develop an Effective Communications Guide (the "Guide") that articulates best practices, with the intent it would be shared among the various bankruptcy constituencies to improve Chapter 12 and Chapter 13 case administration. The ultimate goal of the Guide is to enhance case administration through direct communication and productive professional relationships among the judge, U.S. Trustee, and trustee communities, within the ethical parameters of the Rules of Professional Conduct, the Code of Conduct for United States Judges, and Bankruptcy Rule 9003.

THE ETHICAL RULES AND STATUTORY AUTHORITY

The Task Force recognizes that when a judge is asked to meet with a party who appears in his or her court, the judge must comply with the judicial conduct rules, and also that bankruptcy judges will want to ensure that their assessment of when, how, and with whom to communicate about case administration issues fits within the scope of conduct authorized by the controlling ethical guidelines. In this regard, the Model Rules of Professional Conduct and the Code of Conduct for United States Judges are especially crucial. Rule 3.5 of the Model Rules of Professional Conduct provides, in pertinent part:

> *Rule 3.5 - Impartiality and Decorum of the Tribunal*
>
> *A lawyer shall not:*
> *(a) seek to influence a judge, . . by means prohibited by law;*
> *(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;*
> ...

In the Code of Conduct for United States Judges, Canon 1 requires judges

> *to uphold the integrity and independence of the judiciary*

and Canon 2A provides that

> *[a] judge should ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.*

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[1] The members of the Task Force are: Judge Colleen A. Brown, Chair, and Judge Laura S. Taylor, representing the bankruptcy judges, on behalf of the NCBJ; U.S. Trustee and Acting Deputy Director William Neary and U.S. Trustee Nancy Gargula, on behalf of the United States Trustee Program; Jan Sensenich, Chapter 12 and 13 Trustee, on behalf of the Chapter 12 Trustees; Joyce Babin and Marge Burks, Chapter 13 Trustees, on behalf of the Chapter 13 Trustees / National Association of Chapter Thirteen Trustees ("NACTT").

Additionally, Bankruptcy Rule 9003(a) is essential to the analysis. It prohibits *ex parte* communication, and specifically recognizes the unique role of the U.S. Trustee professionals and their agents in the administration of bankruptcy cases, the corollary need for direct communication with bankruptcy judges. It provides as follows:

Rule 9003 Prohibition of Ex Parte Contacts

(a) General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

(b) United States Trustee. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communication with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

COMMUNICATION BETWEEN JUDGES AND TRUSTEES - WHY?

The notion that communication about bankruptcy administration is essential is inherent in the final sentence of Rule 9003(b). It makes absolutely clear that the general prohibition against judges talking with parties who appear in bankruptcy matters about cases does not apply when the discussion is about general administrative matters: "*This rule does not preclude communication with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system*."

Many judges and trustees have found that direct and regular communication about procedural and policy matters improves case administration. This increases efficiency, and benefits the courts, trustees, debtors, and creditors, as well as their representatives.

The U.S. Trustee has a unique role in the bankruptcy system as an administrator, regulator, and enforcer. Rule 9003 speaks to the U.S. Trustee's role as administrator. The Bankruptcy Reform Act of 1978 removed the bankruptcy judge from the responsibilities for day-to-day administration of cases. Debtors, creditors, and third parties with adverse interests to the trustee were concerned that the Court, which previously appointed and supervised the trustee, might not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated with the result that many of the administrative functions formerly performed by the court were placed within the Department of Justice through the creation of the Program. The Program became permanent and was expanded nationwide by the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986. Pub. L. No. 99-554, 100 Stat. 3088 (1986). Section 586 of title 28 sets forth the statutory duties of each U.S. Trustee. Included in the administrative functions assigned to the U.S. Trustee were the appointment and supervision of Chapter 12 and Chapter 13 trustees. 28 U.S.C. § 586(b), (c), (d), (e). Communications with the Court were undoubtedly anticipated as essential

when the U.S. Trustee assumed responsibility for these administrative functions as evidenced by the clear language of Rule 9003.

There are a number of administrative matters for which the U.S. Trustee provides guidance and oversight relating to the administration of Chapter 12 and Chapter 13 cases by the Chapter 12 and Chapter 13 standing trustees.[2] These include but are not limited to: designating the standing trustee as the presiding officer at the meeting of creditors (11 U.S.C., § 341, 28 U.S.C. § 586(b)); requiring standing trustees to work with the U.S. Trustee and Clerk of Court to ensure prompt scheduling and noticing of the meetings of creditors within the time frame of Rule 2003; approving standing trustees as providers of personal financial management education courses for debtors pursuant to 11 U.S.C. § 111, in addition to overseeing the performance of their statutory duties as set forth in the Code. Coordinating the calendars for § 341 meetings, debtor personal financial education courses and confirmation hearings among the U.S. Trustee, standing trustees and the Court is but one example of where communication among these parties will improve case administration. It has also proved very effective to include trustees and the U.S. Trustee in discussions of Local Rules or Standing Orders that impact the practices within a District to bring about uniformity, about what services should be included in any "presumed reasonable fee" or "no look fee" a District may adopt for debtors' counsel, as well as the planning and presentation of attorney training about, for example, new forms, model plans, and case administration.

In addition to the administrative functions of appointing and supervising Chapter 12 and Chapter 13 trustees, the U.S. Trustee also takes actions in bankruptcy cases to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public. The Program monitors the conduct of bankruptcy parties and acts to ensure compliance with applicable laws and procedures. Communications relating to matters in which the U.S. Trustee is taking such supervisory or regulatory actions in bankruptcy cases should not occur with the judges, as these guidelines make clear.

Judges and trustees also have unique and complementary roles in Chapter 12 and 13 case administration. There is no question that disputes in individual cases must be addressed by court hearings and decisions. However, there are many procedural and/or policy decisions that affect large numbers of cases, e.g., procedures for confirmation hearings, routine orders, calendar procedures, and hearing schedules, which are effectively and appropriately addressed through judge – trustee – U.S. Trustee conversations. If Chapter 12/13 case administration is viewed as an integrated system involving judges, trustees, attorneys, debtors, and creditors, it must also be recognized that each of these players has a unique perspective. It is also true that there are many different configurations of meetings that are available for the conversations about Chapter 12/13 procedures, depending on the nature of the topic under consideration. Small meetings, bench – bar meetings, as well as CLE seminars, are all tools through which productive communication may occur. Often, when one participant hears the perspective of another, he or she may become persuaded to do something different, in order to increase efficiency, save money, redirect scarce economic resources, and/or improve service to debtors, creditors, their representatives, and the court. Post-BAPCPA, the roles of bankruptcy judge, U.S. Trustee and trustees are connected and complementary in many facets of case administration. If they are in regular communication, each can learn more about the other participants' priorities, operating constraints, and long-term vision – and they can do this within the

[2] See *Handbook for Chapter 12 Trustees*, July 1, 2013, and *Handbook for Chapter 13 Standing Trustees*, October 1, 2012 located on the United States Trustee Program's website at: http//www.justice.gov/ust.

parameters of Bankruptcy Rule 9003(b), as long as all participants comply with the controlling ethical canons.

SUGGESTIONS FOR COMMUNICATION AMONG BANKRUPTCY JUDGES, STANDING TRUSTEES, AND U.S. TRUSTEES

Meetings to discuss administrative matters between judges, the U.S. Trustee, and trustees are encouraged. The first parameter to put in place is that substantive issues pending before the Court must never be discussed at an administrative meeting. All parties must take care to conduct the meeting in a way that does not create even the appearance of impropriety. Transparency is an excellent tool for accomplishing this. Transparency can be created by publicizing the fact that a trustee, group of trustees and/or U.S. Trustee representatives holds regular meetings with the Judge(s).

It is also helpful to be intentional about who attends the administrative meetings, depending upon the topic to be discussed. Some topics might be most appropriately discussed at a meeting of a standing trustee and the judge before whom s/he appears. For other topics, it might be appropriate to include all of the standing trustees and judges of a district. And for yet other topics, it would be most effective and appropriate to invite representatives of the United States Trustee Program. The Judge(s) will need to decide that. In some instances, individual meetings may serve a specific purpose which would be difficult to facilitate in a larger meeting or by written communication. For example, there may be practices that are not "visible" to the debtor/creditor bar that may help or hinder effective administration, e.g., the needs of case trustees to administer cases on a wide scale using specialized software with some limitations, the administrative parameters for court chambers and clerks for CM/ECF, and the needs of the United States Trustee Program to consider policies affecting consistent administration of all chapters or cases, which will be most expeditiously addressed by the court and trustee alone.

It may also be helpful for a judge to provide direct feedback to a trustee about his or her operational approach to certain types of matters in order to improve case administration, and that can be delivered more effectively in a small one-on-one meeting. A judge or trustee may also want to meet alone in order to share the early concept of an idea for an administrative change before the change is distributed for public comment and/or implementation, to explore if both think it worthy of further consideration. If they agree it may have merit, then they can decide how and when to share it with others in the bankruptcy community, so all constituents who will be affected by it have an opportunity for input before it takes a final shape.

Under Rule 9003, and the ethical canons, it is permissible for a judge, the U.S. Trustee and trustee(s) within a district to meet as long as only administrative issues are discussed. In order to be sure that all parties are comfortable with the topics to be discussed – and can have time to prepare in advance – the Task Force recommends that meetings be scheduled, and the person initiating the meeting circulates a proposed agenda, in advance. If a court opts not to meet with just a trustee, utilizing an advisory council or other group to discuss case administrative matters may be an effective vehicle for obtaining input from all constituents, e.g., debtor bar, creditor bar, standing trustees, U.S. Trustees, and the court, and therefore that is also encouraged.

COMMUNICATION CONSIDERATIONS AND PITFALLS TO AVOID IN COMMUNICATIONS AMONG JUDGES, TRUSTEES, AND U.S. TRUSTEES

The overarching objective in the administrative meeting is two-fold: to improve case administration and avoid the appearance of impropriety. To do this requires that all participants focus on both the opportunities for improving effective case administration and the confines of the Rules of Professional Conduct, the Canons of the Code of Conduct for United States Judges, and Bankruptcy Rule 9003, at all times. The following list is provided to help trustee and U.S. Trustee participants to achieve that dual objective:

- Be careful not to engage in communications or make comments that lead to the perception that the trustee or U.S. Trustee enjoys special access or influence because of the communication or his/her role as a standing trustee/U.S. Trustee.

- Be careful not to reference pending cases or issues that are before the court during direct communications with a bankruptcy judge.

- Avoid making statements that imply, or leave the perception, that the issue before the court in a particular case was previously discussed privately with the judge.

- Remember that perceptions are often based on what is observed, what is said, or what is not said. Be mindful of where your interactions occur, when your interactions occur, with whom your interactions occur, and the words you use to avoid even an appearance of impropriety or an inference the judge may lack impartiality.

- Limit discussion during administrative meetings to only matters that involve case administration, improvement of bankruptcy administration, or trustee operational matters, such as, staffing matters that directly impact the administration of Chapter 12 and Chapter 13 bankruptcy cases, United States Trustee Program Chapter 12 and Chapter 13 Handbook and policy changes that impact case administration, and administrative challenges of, and potential assistance to, *pro se* Chapter 12 and Chapter 13 debtors.

- Avoid the appearance of engaging in any communication that is or could be perceived as an *ex parte* communication, i.e., about a specific case or open matter.

- Be transparent that meetings with the bankruptcy judge(s) are held to discuss matters related to case administration, and share the outcome of the meetings with the bar, to the extent it will have an impact on the bar or bankruptcy practice generally in that court.

- Schedule meetings in advance, prepare an agenda if it will facilitate the purpose of the meeting, share the agenda with all who will attend the meeting, and stick to the agenda (so no one is caught by surprise or faced with a topic that might raise some ethical concern).

- Consider utilizing an advisory council or other group as a sounding board to discuss case administration matters which includes all bankruptcy constituents, e.g. debtor bar, creditor bar, standing trustees, U.S. Trustee, and the Court, either in lieu of the smaller meetings or as a next step after such meetings.

- Participate in activities of the bar association, bankruptcy section, or other organized groups of attorneys who practice bankruptcy law, but scrupulously avoid discussing pending cases or issues during conversations there when any bankruptcy judge is present.

- In a multi-judge district, take into account whether, given the agenda, it would be appropriate to include all judges.

- Bear in mind that administrative meetings are not intended to short-cut processes already in place for addressing changes to local rules or procedures; for example, if a change that is agreed upon at an administrative meeting would typically require a 30-day notice and comment period, that should still happen.

- Be cognizant of, and do not run afoul of, the mandates the ethical rules, the applicable Codes of Conduct, and Rule 9003 impose on all parties.

SUGGESTIONS FOR LEVELS OF INCLUSIVENESS	
PARTICIPANTS	***NATURE OF ADMINISTRATIVE TOPICS***
Judge and Standing Trustee	Discrete issues re specific Judge/Trustee processes
All Judges and Standing Trustees in a District	Preliminary discussions of issues in common to procedures within a District, with subsequent notice to the U.S. Trustee
Judges, Trustees and U.S. Trustee	Preliminary discussion of issues in common to local procedures in a district which directly impact Trustee/U.S. Trustee policy or responsibilities
Judges, Trustees, U.S. Trustee and Bar Representatives	Issues which could possibly have a broad impact on practice within a District
Open Bench-Bar Meeting	Issues which are likely to have a broad impact on practice within a District
CLE Seminar	Changes which will impact on practice within a District

EFFECTIVE COMMUNICATION AMONG JUDGES, UNITED STATES TRUSTEES, AND STANDING TRUSTEES

NCBJ-UST Liaison Committee Task Force

APPROVED BY NCBJ BOARD ON OCTOBER 9, 2014

Federal Rule of Bankruptcy Procedure 9003 prohibits attorneys from having *ex parte* contact with judges concerning matters affecting a particular case or proceeding, but "does not preclude communications with the court to discuss general problems of administration and improvement of the bankruptcy administration, including the operation of the United States Trustee system" by the United States Trustees ("U.S. Trustees"), assistants to, employees, and agents of the U.S. Trustees. Fed. R. Bankr. P. 9003(b). In June 2014, the National Conference of Bankruptcy Judges ("NCBJ")'s NCBJ-UST Liaison Committee created a task force (the "Task Force") to explore ways to maximize effective communications between Chapter 12 and 13 trustees, U.S. Trustees and bankruptcy judges within the parameters of Federal Rule of Bankruptcy Procedure 9003 and ethical canons.

The Task Force[1] worked collaboratively to develop an Effective Communications Guide (the "Guide") that articulates best practices, with the intent it would be shared among the various bankruptcy constituencies to improve Chapter 12 and Chapter 13 case administration. The ultimate goal of the Guide is to enhance case administration through direct communication and productive professional relationships among the judge, U.S. Trustee, and trustee communities, within the ethical parameters of the Rules of Professional Conduct, the Code of Conduct for United States Judges, and Bankruptcy Rule 9003.

THE ETHICAL RULES AND STATUTORY AUTHORITY

The Task Force recognizes that when a judge is asked to meet with a party who appears in his or her court, the judge must comply with the judicial conduct rules, and also that bankruptcy judges will want to ensure that their assessment of when, how, and with whom to communicate about case administration issues fits within the scope of conduct authorized by the controlling ethical guidelines. In this regard, the Model Rules of Professional Conduct and the Code of Conduct for United States Judges are especially crucial. Rule 3.5 of the Model Rules of Professional Conduct provides, in pertinent part:

> *Rule 3.5 - Impartiality and Decorum of the Tribunal*
>
> *A lawyer shall not:*
> *(a) seek to influence a judge, . . by means prohibited by law;*
> *(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;*
> ...

In the Code of Conduct for United States Judges, Canon 1 requires judges

> *to uphold the integrity and independence of the judiciary*

and Canon 2A provides that

> *[a] judge should ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.*

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[1] The members of the Task Force are: Judge Colleen A. Brown, Chair, and Judge Laura S. Taylor, representing the bankruptcy judges, on behalf of the NCBJ; U.S. Trustee and Acting Deputy Director William Neary and U.S. Trustee Nancy Gargula, on behalf of the United States Trustee Program; Jan Sensenich, Chapter 12 and 13 Trustee, on behalf of the Chapter 12 Trustees; Joyce Babin and Marge Burks, Chapter 13 Trustees, on behalf of the Chapter 13 Trustees / National Association of Chapter Thirteen Trustees ("NACTT").

Additionally, Bankruptcy Rule 9003(a) is essential to the analysis. It prohibits *ex parte* communication, and specifically recognizes the unique role of the U.S. Trustee professionals and their agents in the administration of bankruptcy cases, the corollary need for direct communication with bankruptcy judges. It provides as follows:

Rule 9003 Prohibition of Ex Parte Contacts

(a) General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

(b) United States Trustee. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communication with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

COMMUNICATION BETWEEN JUDGES AND TRUSTEES - WHY?

The notion that communication about bankruptcy administration is essential is inherent in the final sentence of Rule 9003(b). It makes absolutely clear that the general prohibition against judges talking with parties who appear in bankruptcy matters about cases does not apply when the discussion is about general administrative matters: "*This rule does not preclude communication with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system*."

Many judges and trustees have found that direct and regular communication about procedural and policy matters improves case administration. This increases efficiency, and benefits the courts, trustees, debtors, and creditors, as well as their representatives.

The U.S. Trustee has a unique role in the bankruptcy system as an administrator, regulator, and enforcer. Rule 9003 speaks to the U.S. Trustee's role as administrator. The Bankruptcy Reform Act of 1978 removed the bankruptcy judge from the responsibilities for day-to-day administration of cases. Debtors, creditors, and third parties with adverse interests to the trustee were concerned that the Court, which previously appointed and supervised the trustee, might not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated with the result that many of the administrative functions formerly performed by the court were placed within the Department of Justice through the creation of the Program. The Program became permanent and was expanded nationwide by the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986. Pub. L. No. 99-554, 100 Stat. 3088 (1986). Section 586 of title 28 sets forth the statutory duties of each U.S. Trustee. Included in the administrative functions assigned to the U.S. Trustee were the appointment and supervision of Chapter 12 and Chapter 13 trustees. 28 U.S.C. § 586(b), (c), (d), (e). Communications with the Court were undoubtedly anticipated as essential

when the U.S. Trustee assumed responsibility for these administrative functions as evidenced by the clear language of Rule 9003.

There are a number of administrative matters for which the U.S. Trustee provides guidance and oversight relating to the administration of Chapter 12 and Chapter 13 cases by the Chapter 12 and Chapter 13 standing trustees.[2] These include but are not limited to: designating the standing trustee as the presiding officer at the meeting of creditors (11 U.S.C., § 341, 28 U.S.C. § 586(b)); requiring standing trustees to work with the U.S. Trustee and Clerk of Court to ensure prompt scheduling and noticing of the meetings of creditors within the time frame of Rule 2003; approving standing trustees as providers of personal financial management education courses for debtors pursuant to 11 U.S.C. § 111, in addition to overseeing the performance of their statutory duties as set forth in the Code. Coordinating the calendars for § 341 meetings, debtor personal financial education courses and confirmation hearings among the U.S. Trustee, standing trustees and the Court is but one example of where communication among these parties will improve case administration. It has also proved very effective to include trustees and the U.S. Trustee in discussions of Local Rules or Standing Orders that impact the practices within a District to bring about uniformity, about what services should be included in any "presumed reasonable fee" or "no look fee" a District may adopt for debtors' counsel, as well as the planning and presentation of attorney training about, for example, new forms, model plans, and case administration.

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Judges and trustees also have unique and complementary roles in Chapter 12 and 13 case administration. There is no question that disputes in individual cases must be addressed by court hearings and decisions. However, there are many procedural and/or policy decisions that affect large numbers of cases, e.g., procedures for confirmation hearings, routine orders, calendar procedures, and hearing schedules, which are effectively and appropriately addressed through judge – trustee – U.S. Trustee conversations. If Chapter 12/13 case administration is viewed as an integrated system involving judges, trustees, attorneys, debtors, and creditors, it must also be recognized that each of these players has a unique perspective. It is also true that there are many different configurations of meetings that are available for the conversations about Chapter 12/13 procedures, depending on the nature of the topic under consideration. Small meetings, bench – bar meetings, as well as CLE seminars, are all tools through which productive communication may occur. Often, when one participant hears the perspective of another, he or she may become persuaded to do something different, in order to increase efficiency, save money, redirect scarce economic resources, and/or improve service to debtors, creditors, their representatives, and the court. Post-BAPCPA, the roles of bankruptcy judge, U.S. Trustee and trustees are connected and complementary in many facets of case administration. If they are in regular communication, each can learn more about the other participants' priorities, operating constraints, and long-term vision – and they can do this within the

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parameters of Bankruptcy Rule 9003(b), as long as all participants comply with the controlling ethical canons.

SUGGESTIONS FOR COMMUNICATION AMONG BANKRUPTCY JUDGES, STANDING TRUSTEES, AND U.S. TRUSTEES

Meetings to discuss administrative matters between judges, the U.S. Trustee, and trustees are encouraged. The first parameter to put in place is that substantive issues pending before the Court must never be discussed at an administrative meeting. All parties must take care to conduct the meeting in a way that does not create even the appearance of impropriety. Transparency is an excellent tool for accomplishing this. Transparency can be created by publicizing the fact that a trustee, group of trustees and/or U.S. Trustee representatives holds regular meetings with the Judge(s).

It is also helpful to be intentional about who attends the administrative meetings, depending upon the topic to be discussed. Some topics might be most appropriately discussed at a meeting of a standing trustee and the judge before whom s/he appears. For other topics, it might be appropriate to include all of the standing trustees and judges of a district. And for yet other topics, it would be most effective and appropriate to invite representatives of the United States Trustee Program. The Judge(s) will need to decide that. In some instances, individual meetings may serve a specific purpose which would be difficult to facilitate in a larger meeting or by written communication. For example, there may be practices that are not "visible" to the debtor/creditor bar that may help or hinder effective administration, e.g., the needs of case trustees to administer cases on a wide scale using specialized software with some limitations, the administrative parameters for court chambers and clerks for CM/ECF, and the needs of the United States Trustee Program to consider policies affecting consistent administration of all chapters or cases, which will be most expeditiously addressed by the court and trustee alone.

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COMMUNICATION CONSIDERATIONS AND PITFALLS TO AVOID IN COMMUNICATIONS AMONG JUDGES, TRUSTEES, AND U.S. TRUSTEES

The overarching objective in the administrative meeting is two-fold: to improve case administration and avoid the appearance of impropriety. To do this requires that all participants focus on both the opportunities for improving effective case administration and the confines of the Rules of Professional Conduct, the Canons of the Code of Conduct for United States Judges, and Bankruptcy Rule 9003, at all times. The following list is provided to help trustee and U.S. Trustee participants to achieve that dual objective:

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- Be careful not to reference pending cases or issues that are before the court during direct communications with a bankruptcy judge.

- Avoid making statements that imply, or leave the perception, that the issue before the court in a particular case was previously discussed privately with the judge.

- Remember that perceptions are often based on what is observed, what is said, or what is not said. Be mindful of where your interactions occur, when your interactions occur, with whom your interactions occur, and the words you use to avoid even an appearance of impropriety or an inference the judge may lack impartiality.

- Limit discussion during administrative meetings to only matters that involve case administration, improvement of bankruptcy administration, or trustee operational matters, such as, staffing matters that directly impact the administration of Chapter 12 and Chapter 13 bankruptcy cases, United States Trustee Program Chapter 12 and Chapter 13 Handbook and policy changes that impact case administration, and administrative challenges of, and potential assistance to, *pro se* Chapter 12 and Chapter 13 debtors.

- Avoid the appearance of engaging in any communication that is or could be perceived as an *ex parte* communication, i.e., about a specific case or open matter.

- Be transparent that meetings with the bankruptcy judge(s) are held to discuss matters related to case administration, and share the outcome of the meetings with the bar, to the extent it will have an impact on the bar or bankruptcy practice generally in that court.

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- Consider utilizing an advisory council or other group as a sounding board to discuss case administration matters which includes all bankruptcy constituents, e.g. debtor bar, creditor bar, standing trustees, U.S. Trustee, and the Court, either in lieu of the smaller meetings or as a next step after such meetings.

- Participate in activities of the bar association, bankruptcy section, or other organized groups of attorneys who practice bankruptcy law, but scrupulously avoid discussing pending cases or issues during conversations there when any bankruptcy judge is present.

- In a multi-judge district, take into account whether, given the agenda, it would be appropriate to include all judges.

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- Be cognizant of, and do not run afoul of, the mandates the ethical rules, the applicable Codes of Conduct, and Rule 9003 impose on all parties.

SUGGESTIONS FOR LEVELS OF INCLUSIVENESS	
PARTICIPANTS	***NATURE OF ADMINISTRATIVE TOPICS***
Judge and Standing Trustee	Discrete issues re specific Judge/Trustee processes
All Judges and Standing Trustees in a District	Preliminary discussions of issues in common to procedures within a District, with subsequent notice to the U.S. Trustee
Judges, Trustees and U.S. Trustee	Preliminary discussion of issues in common to local procedures in a district which directly impact Trustee/U.S. Trustee policy or responsibilities
Judges, Trustees, U.S. Trustee and Bar Representatives	Issues which could possibly have a broad impact on practice within a District
Open Bench-Bar Meeting	Issues which are likely to have a broad impact on practice within a District
CLE Seminar	Changes which will impact on practice within a District

Transferring Underwater Property – Vesting/Surrendering or Debt Payment: Does Either One Work?

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What we're going to discuss

The problem: Debtors can't afford their mortgage, but the home isn't worth as much as the mortgage balance—it's "underwater."

The question: Can debtors transfer the home to the mortgage holder to stop ongoing expenses, including maintenance, taxes, and homeowners association assessments?

1. Surrender plus vesting?

- § 1325(a)(5)(C) permits confirmation of a plan that "surrenders" collateral to the lien holder.
- § 1322(b)(9): allows a plan to "provide for the vesting of property of the estate . . . in . . . any . . . entity."
- So far, there are 13 decisions dealing with surrender/vesting; all accept that vesting transfers ownership.
- But they disagree about whether "surrender" lets a plan impose vesting on an unwilling mortgagee.

1. Surrender plus vesting?

Surrender outside of § 1325(a)(5)(C): "surrender value"

521(a)(4): "surrender to the trustee all property"

- The 13 decisions.
- 1. *In re Rosa*, 495 B.R. at 524: "[V]esting in addition to surrender. . . is confirmable only if the first standard [of § 1325(a)(5)] —acceptance—is met."
- Confirms the plan only because the mortgagee did not object.

1. Surrender plus vesting?

The 13 decisions.

- 2. *In re Rose*, 512 B.R. 790 (Bankr. W.D.N.C. 2014): similar result but greater protection to the mortgagee.
- If the mortgagee does not object to vesting, the debtor must give the mortgagee a quitclaim deed, effective only if the mortgagee fails to take action to refuse the deed within 60 days after receiving it.

1. Surrender plus vesting?

The 13 decisions.

- 3. *In re Watt*, 520 B.R. 834, 839 (Bankr. D. Or. 2014), allows surrender and non-consensual vesting:
- "[N]othing in . . . § 1322(b)(9) requires . . . consent. [A] plan . . . for vesting of property in a secured lender . . . may be confirmed over the lender's objection."
- The good faith requirement of § 1325(a)(5) prevents the transfer of negative-value property.

1. Surrender plus vesting?

The 13 decisions.

- 4. *Bank of New York Mellon v. Watt,* 2015 WL 1879680 (D. Or. 2015), reverses the bankruptcy court:
- "§ 1325(a)(5) . . . states that a plan is confirmable solely where surrender is proposed. . . . Here, debtors'. . . plan did not merely propose the cessation of their interest in the Property, it also forcibly transferred that interest, and the attendant liabilities . . . ."
- Now on appeal to the 9th Circuit.

1. Surrender plus vesting?

The 13 decisions.

- 5. *In re Sagendorph*, 2015 WL 3867955 (Bankr. D. Mass. June 22, 2015), agrees on all points with the bankruptcy court decision in *Watt*: "[A] transfer of property presupposes its surrender by the transferor."
- 6. *In re Zair*, 535 B.R. 15 (Bankr. E.D.N.Y. 2015), agrees with *Sagendorph*, and cites § 1327(a), which vests property in the debtor at confirmation unless the plan provides otherwise. Now on appeal.

1. Surrender plus vesting?

The 13 decisions.

- 7. *In re Stewart,* 536 B.R. 273 (Bankr. D.Minn. 2015): "While the 'surrender' concept . . . and the 'vesting' concept . . . are different, they may nonetheless be used in tandem when providing for the treatment of a secured claim in a chapter 13 plan."
- 8. *In re Williams,* 542 B.R. 514 (Bankr. D. Kan. 2015): agrees with the *Watt* reversal. Notes unpublished contrary opinion from another judge in the district.

1. Surrender plus vesting?

The 13 decisions.

- 9. *In re Weller*, 2016 WL 164645 (Bankr. D. Mass. Jan. 13, 2016). "This Court agrees with the conclusion in *Sagendorf* that §§ 1325(a)(5) and 1322(b)(9) are not in conflict," but holds that the provisions of § 1322(b) only are effective with creditor consent.
- 10. *In re Sherwood,* 2016 WL 355520 (Bankr. S.D.N.Y. Jan. 28, 2016). Agrees with the anti-vesting decisions.

1. Surrender plus vesting?

The 13 decisions.

- 11. *In re Tosi*, 2016 WL 859034 (Bankr. D. Mass. March 4, 2016). "[s]urrender [does] not merely . . . cede possessory rights, but . . . permit[s] the creditor to exercise its preexisting property rights as to the collateral."
- 12. *In re Brown,* No. 14-12357-JNF (Bankr. D. Mass. March 4, 2016). Allows vesting as payment: "[N]othing in § 1325(a)(5)(C) undercuts a debtor's ability to rely on the permissive provisions in § 1322(b)."

1. Surrender plus vesting?

The 13 decisions.

- 13. *In re Zair,* 2016 WL 1448647 (E.D.N.Y. April 12, 2016). Summarizes prior decisions; reverses bankruptcy court.
- Current score: 5 decisions allow nonconsensual vesting; 8 don't.
- But note the effect of *Bullard.*
- Why pro bono appellate counsel can help.

2. Debt Payment?

- § 1322(b)(8): a plan may "provide for the payment of . . . a claim . . . from property of the estate . . . ."
- § 1325(a)(5)(B): allows payment of a secured claim with property having a value "not less than the allowed amount of such claim."
- Two conflicting opinions.

2. Debt Payment?

- *In re Lemming*, 532 B.R. 398, 410 (Bankr. N.D. Ga. 2015), says not in Chapter 13: § 1322(b)(8) "was enacted to enable payment of claims from property . . . only after such property was liquidated."
- But—cites questionable legislative history and does not explain interaction with § 1325(a)(5)(B)—which must allow direct payments of property without liquidation, otherwise no need to "value" the estate property used to pay the claim.

2. Debt Payment?

- *In re Kerwin*, 996 F.2d 552, 557 (2d Cir. 1993).
- Under a [1225(a)(5)](B) distribution of property a creditor's claim may be deemed fully satisfied provided the property 'to be distributed' has been valued as at least equal to the amount of that claim."
- So an objecting creditor is required to accept payment of its claim through the conveyance of all of its collateral.
- The language of § 1325(a)(5)(B) is identical.

2. Debt Payment?

- If collateral can be transferred to pay a secured claim under § 1325(a)(5)(B), the meaning of "surrender" under (5)(C) would no longer be relevant.
- Property would only be "surrendered" to junior lienholders, while the allowed secured claim of the first mortgagee would be fully satisfied by the transfer of the collateral, with the lien satisfied at discharge.
- State law property rights would be expressly preempted.