

## BANKRUPTCY YEAR IN REVIEW – 2011

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### TOPICS COVERED:

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#### A. Policies Relating to Commencement of Bankruptcy Cases

Counsel should be aware of the following policies relating to the commencement of bankruptcy cases that have been or will be implemented in the United States Bankruptcy Court for the District of New Mexico. **Failure to properly upload a petition for relief executed by the debtor(s) can have material adverse consequences that cannot be fixed by striking the petition and substituting a corrected petition in its place.**

##### 1. Critical Errors Relating to a Defective Petition for Relief

Errors in uploading the petition for relief can result in no case being commenced or inadvertent commencement of a case for the wrong client. These are critical errors because they cannot be fixed by striking the petition and substituting a corrected petition.

##### (a) *Petition Errors Resulting in No Case Being Commenced*

(i) Petition Not Signed by the Debtor (Unsigned or Signed by Someone Else). If a petition for relief is filed that is not signed by the debtor (*e.g.* no signature page is filed as an attachment to the petition or as a separate document immediately after Docket No. 1 is filed), or the wrong signature page for the petition is filed (*i.e.* the purported signature of the debtor is that of someone other than the debtor), no case will have been commenced. Under 11 U.S.C. §301(a), a case is commenced by filing a petition for relief. If the debtor did not sign the petition for relief, the petition is ineffective to commence the case and the electronic file will be closed.

(ii) Uploaded Document Filed to Commence the Case is Not the Petition. If the document uploaded as part of Docket No. 1 that was intended to be the petition is something else (*i.e.* is not the petition), no case will have been commenced. The electronic file will be closed.

(iii) Certain of the Legal Consequences. If the electronic file is closed because no case was commenced, the automatic stay will not have gone into effect, meaning the debtor is not protected from such things as repossession of vehicles or foreclosure sales or retention

of income earned after the date the errant petition for relief was filed. Return of the filing fees is within the Court's discretion. Fees will not be refunded automatically.

Example #1. An attorney intends to commence a chapter 7 case for Client A but in error uploads a petition for relief without a signature page for the debtor, or in error attaches a signature page for a different debtor client. No bankruptcy case has been commenced. The error is not fixable by striking the errant petition because a petition for relief that commences a case cannot be made retroactively effective.

(b) *Petition Errors Resulting in a Case Being Commenced for the Wrong Client*

(i) Signed Petition for the Wrong Debtor Uploaded. If a properly executed petition for relief is uploaded to commence a case, but petition for the wrong debtor client is uploaded in error, it will result in commencement of a bankruptcy case for the wrong debtor. This has the potential effect of adversely affecting a credit rating, and would result in a case being commenced for the correct debtor at time later than originally intended.

(ii) Motion to Strike Petition. If this error occurs, counsel should consider promptly filing a motion to strike the petition requesting that the petition be stricken with the legal effect that no case was commenced, submitting an order granting the motion to strike, and calling Chamber's staff to expedite entry of the order. It is Judge Jacobvitz' view that under Judicial Conference Policy the filing fee may not be refunded even if the petition is stricken.

Example #2. An attorney intends to commence a chapter 7 case for Client A but in error uploads a petition for relief under chapter 7 for Client B who already is a debtor in a chapter 7 case. Client B signed the uploaded petition. Filings subsequent to the filing of the petition for relief relate to Client A. This would result in two pending chapter 7 cases for Client B, no pending chapter 7 case for Client A, and notices of error to the attorney for the subsequent filings.

Example #3. An attorney intends to commence a chapter 7 case for Client A but in error uploads a petition for relief under chapter 7 for Client B. Client B left a signed petition for relief with counsel for filing in the event a decision was made later to commence a bankruptcy case for that client. When the petition signed by Client B was uploaded in error, Client B had not yet decided to commence a bankruptcy case. Filings subsequent to the filing of the petition for relief relate to Client A. This would result in a pending chapter 7 case for Client B, no pending chapter 7 case for Client A, and notices of error to the attorney for the subsequent filings.

2. Errors that Result in a Hold on the Notice of Commencement of Case.

(a) Type of Errors In Question. Certain errors will result in a hold on the Clerk of Court serving the Notice of Commencement of Case. Generally, these errors affect information to be included on the Notice of Commencement of Case. The Notice of Commencement of Case

includes, among other things, notice of the first date set for the Section 341(a) creditors meeting, the time fixed for filing complaints objecting to discharge or dischargeability, and the time to object to claims of exemptions. Errors that will result in a hold on the Clerk of Court serving the Notice of Commencement of Case include such things as failure to include the Debtor's address on the petition for relief; incorrectly indicating on the petition the debtor's status as an individual or corporation; not designating on the petition the chapter under which the case is filed; and in an individual debtor case failure to file a properly completed Statement of Social Security Number signed by the Debtor.

(b) Effect of Errors That Result in a Hold on the Notice of Commencement of Case (3-business day deadline to correct). If an attorney error results in a hold on the Clerk of Court serving the Notice of Commencement of Case, the attorney will receive a notice of error with an instruction to correct the error within three business days. It is important for the error to be corrected promptly so the Section 341(a) meeting may be timely scheduled, and in a chapter 7 case to avoid the possible need to reassign the chapter 7 trustee assigned to the case to facilitate a timely Section 341(a) meeting.

3. Other Errors to Be Corrected by Counsel (5-business day deadline to correct).

If the Clerk discovers missing information in the petition for relief of a type that will not result in a hold on the Clerk of Court serving the Notice of Commencement of Case, the attorney will receive a notice of error with an instruction to correct the error within five business days. Errors of this type include failure to check a box on the petition designating the Type of Debtor or Nature of the Debtor's Business or failure to include the last four digits of the Debtor's social number on the petition where a Statement of Social Security Number has been properly filed.

4. Errors the Clerk of Court Will Correct Without Giving a Notice of Error.

(a) Docket Entry Changes to Correspond With Filed Documents. If the Clerk discovers discrepancies between information in a document filed of record and information input by counsel on the docket relating to that document, generally the Clerk will change the docket entry to correspond to the document filed of record. Examples include changing on the docket (i) the exact name of the Debtor to correspond to the name on the petition for relief, (ii) the address of the Debtor to correspond to the address on the petition for relief, an (iii) the chapter under which the case was commenced to correspond with the chapter checked on the petition.

(b) Effect of the Clerk's Correction of the Error. Counsel will not receive a notice of error for this type of mistake. If the information input into CM/ECF was actually correct and the information in the document filed of record was wrong, it is up to counsel to discover and correct the document filed of record. This procedure is based on the premise that the purpose of the docket entry is to summarize certain information from a document filed of record, and the operative document is the document filed of record not the docket.

## B. Service and Notice in Contested Matters

1. Notice. Relief is often granted by default “after notice and a hearing” based on the filing of a motion, service of notice of an objection deadline, and not timely objection having been filed. “After notice and a hearing” “means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.” 11 U.S.C. § 102(1)(A). Various rules apply to giving notice, including Bankruptcy Rule 2002 and Local Rule 9004-1.2 (required content of the notice) and 9013.1.1(c)(1) (objection period is 21 days unless otherwise specified). Notice of a motion and objection deadline may be accomplished by mailing or otherwise serving a notice sufficient in form and content to creditors and parties in interest entitled to notice.

2. Service. Bankruptcy Rule 9014(a) provides that in “a contested matter not otherwise governed by the rules, relief shall be requested by motion, and reasonable notice and opportunity for a hearing shall be afforded the party against whom relief is sought.” Bankruptcy Rule 9014(a) provides that the “motion shall be served in the manner provided for service of a summons and complaint by Rule 7004.”

### 3. When is Notice is Required and When is Service Required

#### Example #1. Motion to Sell Property Outside the Ordinary Course of Business.

Serve the Motion and Notice in accordance with Bankruptcy Rule 7004 on parties who have liens or other interests in the property to be sold. Give notice pursuant to Bankruptcy Rule 2002 or any other applicable rule to other parties in interest entitled to notice. *See* Bankruptcy Rules 2002(a)(2), 6004(a), 7004 and 9014.

#### Example #2. Motion Under 11 U.S.C § 522(f) to Avoid Lien against Exempt Property.

Serve the Motion and Notice, in accordance with Bankruptcy Rule 7004, on parties who have liens or other interests in the property. Give notice pursuant to Local Rule 9013.1.1(c)(1) or any other applicable rule to other parties in interest entitled to notice. *See* Bankruptcy Rule 4003(d); Local Rule 9013.1.1(c)(1).

#### Example #3. Motion for Relief From Stay.

Serve the Motion and Notice, in accordance with Bankruptcy Rules 4001(a) and 7004, on the debtor and the debtor’s counsel, and on the trustee if any, and as otherwise required by the rules in chapter 11 cases. Give notice pursuant to Local Rules 4001-1.24 and 9013.1.1(c)(1) or any other applicable rule to other parties in interest entitled to notice. *See* Bankruptcy Rules 4001(a), 7004, and Local Rules 4001-1.24 and 9013.1.1(c)(1).

#### Example #4. Motion to Value Security.

Serve the Motion and Notice, in accordance with Bankruptcy Rule 7004, on all parties with a lien or other interest in the property to be valued. Give notice pursuant to Local Rule 9013.1.1(c)(1) or any other applicable rule to other parties in interest entitled to notice. *See* Bankruptcy Rules 3012, 7004 and 9014; Local Rule 9013.1.1(c)(1).

