

Ever More Advice and Thoughts from Judge Starzynski  
Prepared for

**BANKRUPTCY 2008: The 24th Annual Year in Review**

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The following continues my “More than You Probably Wanted to Know” monologues and occasional colloquies with practitioners at the Annual Year in Review programs, which deal largely with practice and procedures in my courtroom and chambers.

These practice and procedure tips are in addition to those already listed on my chambers homepage. If you are interested in or need to know about these practice tips, then you need to also review the other practice tips at my chambers homepage, including the Year in Review materials from every previous year that I have been on the bench except 1999. (I have no idea what happened with materials that year.) To get there, go to [www.nmcourt.fed.us](http://www.nmcourt.fed.us) then click on “Bankruptcy Court”, then select “Judge Starzynski” from the “Judges/Opinions” button, and then start clicking on the various topics you want or need to read about. Note that at that site there is a list of all the decisions I have rendered (pdf) filed chronologically and that there is a “last updated” line at the bottom of that page, which will help you remain current on what is filed on that page. There is a wealth of other information on the homepage as well, such as a “matters pending” list and the court calendar for the upcoming two months, which is usually updated once a week and is searchable. Spending some time at that site might be useful, especially if you are new to bankruptcy practice in this district.

1. **Reaffirmation Agreements:** Keep in mind the two different aspects of reaffirmation agreements, based on different subsections of §524, and what my role is in each. The two different aspects are whether the debtor has had the help of an attorney in negotiating the agreement, and, if the creditor is not a credit union, whether the agreement constitutes an undue hardship on the debtor.

First, pursuant to §524(c) and (d), if the debtor “was not represented by an attorney during the course of negotiating such [reaffirmation] agreement”, then I have to hold a hearing to explain to the debtor how the Code works, and how reaffirmation agreements work, and then I am required to make the decision for the debtor about whether to approve the reaffirmation agreement or not, depending on what I find to be in the best interest of the debtor. I assume that if an attorney does not sign off on Part C of

the agreement, the debtor was not represented by an attorney. In that case I will conduct a hearing under subsections (c) and (d) and make the decision for the debtor. On the other hand, if the attorney does sign off on Part C, even if the attorney crosses off part of the recital, I consider that the debtor was represented by counsel. In that case, I will only conduct a §524(m) hearing. As I recite in the standard order denying approval of a reaffirmation agreement, such agreements primarily benefit creditors by converting non-recourse (discharged) debt back into recourse debt, and therefore it will usually not be in the debtor's best interest for me to approve the reaffirmation agreement. And I estimate that, between subsections (c) and (d) and subsection (m), I disapprove about 90% of the reaffirmation agreements that come before me. Just FYI.

**Note:** In last year's Year in Review notes, I stated that if the debtor had counsel but the debtor's counsel did not sign off on the agreement, counsel had to attend the hearing. After thinking about that, I realized that counsel should not be required to attend. (My apologies to all of you debtor's lawyers that did attend hearings.) **So now there is no requirement that debtor's counsel appear at the reaffirmation agreement hearing, unless the notice of the hearing specifically states otherwise.**

Second, §524(m) basically says that if all the debtor's monthly bills exceed the debtor's net income, and the debtor does not have an extra source of income to bring the monthly budget into the black, I am not supposed to approve the agreement. (This subsection is not applicable to credit unions, and so I do not expect Part D of the agreement even to be filled out if the creditor is a credit union.) If I am going to disapprove a reaffirmation agreement under subsection (m), I have to conduct a hearing, This is regardless of whether the debtor was represented by counsel or not (i.e., regardless of whether the attorney has signed off Part C or not). I also have to give notice to the creditor so it can appear if it wants, and I have to have conducted the hearing prior to the entry of the debtor's discharge. Note at least one of the requirements for approval of reaffirmation agreements under subsection (m): Rule 4008 requires that the debtor's statement in Part D of the budget numbers "shall be accompanied by a statement of the total income and expenses stated on schedules I and J", and if there is a difference between the budget numbers the debtor puts in the first paragraph of Part D and the I and J numbers, "the statement required ... shall include an explanation of the difference." This is a requirement of the bankruptcy rules, and with one major exception, I don't think I am at liberty to disregard the requirement. (As I usually explain at reaffirmation hearings – of which all of us bankruptcy judges are conducting many more these days – the one major exception is when the creditor offers the debtor a good deal in the reaffirmation agreement. For example, Wells Fargo New Mexico, pursuant to the advice of Paul Kienzle, will frequently write down the balance of the loan to the value of the vehicle and reduce the interest rate, often at 16% or so, down to 8%, as an inducement for approval of the reaffirmation agreement. That is such a good deal for the debtor that I will usually exercise my discretion pursuant to §105 and approve the reaffirmation agreement, often without a hearing, thereby locking Wells Fargo and the debtor into that deal.) What I frankly do not understand is why so many creditors do not comply with Rule 4008, although it may have something to do with the fact that the "official" B240 form in West's does not incorporate language dealing with Rule 4008, as I read it. **The**

**Court's website does have a form that incorporates the requirements of Rule 4008, which can easily be downloaded and used.**

2. **Trustees' (Non)Abandonment:** Recall previous discussions at the Year in Review that attempted to make it clear that a trustee's No Distribution Report entered at the conclusion of the §341 meeting does not constitute an abandonment of property from the estate until the closing of the case. §554(c). So if you file a motion for stay relief, you need to obtain the consent or the default of the trustee, even if the trustee has filed a NDR. If a trustee is willing to give you a blanket permission to treat the NDR as the trustee's consent to the stay relief, I suppose you can do that (note the "suppose"), but you need to recite that when you send in your stay modification order. Otherwise, I will send the order back to you.

3. **Emergency Orders/Orders in General:** If you need an order entered quickly or on an emergency basis, send the order in but be sure to call us to let us know what you need. It does not do much good if we only find out you have an emergency when we get to the order in the queue.

And just to be clear, we do try to enter orders on the day they are sent or the next business day. (We understand, for example, that some creditors' counsel get "graded" on how quickly stay orders get entered.) Our efforts include chambers e-mailing orders to me if I am out of the office.

And in an excess of clarity (or an attempt at it), you also need to know that orders processed by chambers for entry by about 3.00 pm will generally be docketed that day; orders processed after 3.00 pm will be docketed the next business day. But if you have an order that really needs to be entered that day, and it is after 3.00 pm, call us (well, not me; call someone in chambers who can actually help you) because frequently the order can be entered that day by queuing it up ahead of other orders. (This of course would be an excellent thing not to abuse.)

4. **Obtaining Hearings:** Recall that the local rules (currently NM LBR 9013-1(c); proposed NM LBR 9013-1.1(c)) tell you how to and when to request a hearing. One can obtain a hearing before sending out the motion which would be the subject of the hearing, but this should not be done routinely, since there may not be a need for a hearing if there is no timely objection to the requested relief. On the other hand, a notice of stay motion which also has the final hearing date in it is useful for everyone, so that practice should continue. (I am also aware that some creditors measure counsel's performance by how quickly hearings are obtained and take place.)

5. **Calculating Deadlines:** (I am indebted to Margaret Grammer Gay for pointing this out to me.) Below is a portion (somewhat edited) of an e-mail colloquy that I had with a law firm about how deadlines are calculated under Rule 9006 when mailing notices:

"Here is the problem: Rule 9006 provides for an additional three days "after the prescribed period would otherwise expire under Rule 9006(a)." Rule 9006(a) provides that if the last day falls on a Sunday (inter alia), "the period runs until the end of the next day which not one of the aforementioned days." In consequence, a twenty-day notice period which begins on a Monday (say, Nov 24[, 2008]) cannot end on a Sunday 20 days later (Dec 14), but must instead end on Monday, Dec 15. This is the "prescribed period"

contemplated by 9006(f). Thus, the three days are added to Dec 15, so that the deadline is Dec 18, not Dec 17 (and of course you are aware that Dec 18 is really Dec 19 at 7.59 am by virtue of the Court's drop box rule). So that is the issue, and I merely wanted your proposed order to reflect the deadline accurately, since as I mentioned there are other lawyers who make this mistake and who get their orders back for correction.

“Another aspect of this colloquy is that if the paralegal does not understand the problem immediately, he or she should go to the attorney who is supposed to be supervising the work and get instruction or training on fixing the problem from the attorney. As I told Mr. S\_\_\_\_, I don't have a problem dealing with paralegals -- I do it all the time, in this context and in others -- but I do want to deal with the attorney when it comes to making sure the rules, procedures, etc., are concerned, since it is important that the attorney understand what is going on so that she or he can instruct everyone in the office, including that paralegal, what the proper procedure, etc. is. In this case the attorney did not understand either, as it turns out, but I did not know that from dealing only with Mr. S\_\_\_\_; for all I knew, you knew what the proper interpretation of the rule was but he was thinking he would just bother the judge instead of his boss to find out what the problem was. In addition, when I tell him that a careful reading of the rule will explain the problem, I assume either he has sufficient training to do that (many paralegals do) or that he will go to someone who does; ie, his boss.”

Please take heed.

6. **Concurrence of Opposing Counsel/Party:** Please note carefully that in the proposed NM LBR 9013-1.1(b), the **only** exceptions for not seeking concurrence of opposing counsel/parties in your requested relief are when you need to send notice to everyone in the case or when the Court says you don't have to – period. So now you need to ask before you seek stay relief (as most of you do already) or before you file a motion for summary judgment (since it is possible the other side will agree to some relief or at least to a set of stipulated facts). Motions can be denied on this ground alone.

7. **Calendar Appearances:** Just because someone is listed on the calendar does not necessarily mean we expect the person to appear – it depends on the role counsel may play in the hearing. For example, often the chapter 7 trustee is listed on the calendar, but ordinarily the trustee will not appear, with very good reason. If a debtor responds to a motion for stay relief or wants to be heard at the preliminary hearing, and the debtor's attorney has not contracted to represent the debtor at a motion for stay relief, then presumably the debtor may appear pro se, and the attorney presumably has no obligation to appear, even though the attorney will almost certainly be listed on the calendar. (This is not intended as an endorsement of the unbundling of legal services so much as that chapter 7 debtor representation does not always include stay relief representation, except if the debtor pays extra; that is just a reality that is [currently] happening in some cases. But see proposed NM LBR 2090-1.2(a), providing that the attorney “is deemed to be the debtor's attorney for all administrative and contested proceeding in the bankruptcy case,....”)

8. **Motions to Alter or Amend Judgment vs. Appeal:** A motion to amend or alter a judgment (aka “motion for reconsideration”) may be a cheaper solution to the problem of me having gotten something wrong than an appeal, although maybe the

appealing party wants something other than a cheap solution. But recall that such a motion has certain standards, such as that I failed to recite my reasons for the decision, or I committed clear error or the ruling results in manifest injustice, etc. Regardless, if I really messed something up, don't hesitate to let us know by filing a motion.

9. **Accurate CM/ECF Filing:** Review CM/ECF materials carefully before filing and then be careful to get the numbers right, all the aliases, etc. and if the Clerk's office calls you to fix something, and you can't explain to them why they are in error, then fix the problem. Don't get yourself in a position where an order to show cause gets issued, since that will result in (1) a hearing -- even if you fix the problem before the hearing -- at which one of the judges will crab at you like your mother used to do, and (2) getting you put on a list that we maintain for the likely imposition of a monetary sanction the next time you appear for a nagging hearing.

10. **Creed of Professionalism:** Even though neither the current local rules nor the proposed local rules for the Bankruptcy Court contain a reference to "A Creed of Professionalism of the New Mexico Bench and Bar" **as of the date of preparation of these materials** (note that the U.S. District Court local rules do contain such a reference -- D.N.M.LR-Civ. 83.9), I expect that every attorney appearing before me will be familiar with the Creed and will comply with it. As a matter of fact, that is happening right now: the vast majority of counsel do comport themselves in accordance with the tenets of the Creed, without even thinking about it, I believe, and that standard of highly professional conduct is one of the reasons that the rest of the New Mexico bar is so envious of the level of civility of bankruptcy practice in this district. For those of you who do not comport with the standards of the Creed, or for whom your word is **not** your bond, you need to improve your professionalism, starting right now.