

# TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF: )  
 )  
TESTIMONY OF WITNESSES )  
BEFORE THE BANKRUPTCY )  
RULES COMMITTEE )

Pages: 1 through 43

Place: Washington, D.C.

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## HERITAGE REPORTING CORPORATION

*Official Reporters*

1220 L Street, N.W., Suite 206

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Date: September 27, 2016

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

IN THE MATTER OF: )  
 )  
TESTIMONY OF WITNESSES )  
BEFORE THE BANKRUPTCY )  
RULES COMMITTEE )

Suite 206  
Heritage Reporting Corporation  
1220 L Street, N.W.  
Washington, D.C.

Tuesday,  
September 27, 2016

The parties met, pursuant to the notice, at  
11:09 a.m.

PARTICIPANTS: (Via Telephone)

- JUDGE SANDRA SEGAL IKUTA, Chair
- PROFESSOR S. ELIZABETH GIBSON, Reporter
- PROFESSOR MICHELLE M. HARNER, Assistant Reporter
- JUDGE STUART M. BERNSTEIN, Member
- JUDGE DENNIS R. DOW, Member
- MS. DIANA L. ERBSEN, Esq., Member
- JUDGE A. BENJAMIN GOLDGAR, Member
- MR. JEFFERY J. HARTLEY, Esq., Member
- JUDGE MELVIN S. HOFFMAN, Member
- MR. RICARDO I. KILPATRICK, Esq., Member
- MS. JILL A. MICHAUX, Esq., Member
- JUDGE PAMELA PEPPER, Member
- MS. PATRICIA S. KETCHUM, Esq., Consultant
- MR. JAMES H. WANNAMAKER, Esq., Consultant
- MR. JON WAAGE, Consultant
- JUDGE ERITHE A. SMITH, Liaison
- MS. REBECCA A. WOMELDORF, Secretary, Rules  
Committee
- JUDGE ARTHUR HARRIS

Heritage Reporting Corporation  
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PROFESSOR EDWARD MORRISON  
Mr. ADAM HERRING, Executive Office of the  
U.S. Trustees

PARTICIPANTS: (Cont'd.)

JUDGE EUGENE WEDOFF, Former Member  
MR. SCOTT MYERS, Attorney Advisor  
MR. SAM ANDRE, Law Clerk  
MR. ANDREW GEPPERT, Law Clerk  
MS. BRIDGET HEALY, Attorney Advisor  
MS. JENNY L. DOLING, Esq., Witness  
JUDGE MARVIN ISGUR, Witness  
MS. NORMA HAMMES, Esq., Witness  
JUDGE ROGER L. EFREMSKY, Witness  
MR. JAMES "IKE" SHULMAN, Esq., Witness

I N D E X

<u>WITNESS:</u>	<u>PAGE</u>
Jenny L. Doling, Esq, Doling, Shaw & Hanover, APC	12
Hon. Roger L. Efremsky, U.S. Bankruptcy Court for the Northern District of California	17
Norma Hammes, Esq., Gold and Hammes	20
Hon. Marvin Isgur, U.S. Bankruptcy Court for the Southern District of Texas	27
James "Ike" Shulman, Esq., Shulman Law Offices	33

P R O C E E D I N G S

(11:09 a.m.)

JUDGE IKUTA: Welcome to this public hearing on the proposed amendments to the Federal Rules Bankruptcy Procedure. I'm Sandra Ikuta, the Chair of the Advisory Committee on Bankruptcy Rules.

Today we're hearing five witnesses who have requested to testify regarding the proposed amendments to Bankruptcy Rule 3015 and new Rule 3015.1 which was published in July 2016.

We've also received a number of written comments on the amended rule and new rule. The comment period continues until October 3.

Each of the witnesses will have five minutes to testify, and then there will be five minutes for questions by committee members. I've asked our Rules Support Office Staff to give a four-minute warning to the witnesses to help keep our hearing on schedule, and I'd appreciate the witnesses starting to wrap up when they get the warning. So this will give everyone the same opportunity to be heard.

The Committee has reviewed the written submissions by each of the witnesses, so the witnesses may focus on their key points.

1           So, at this point, I would like to ask Scott  
2           to call roll, starting with the committee members,  
3           liaisons, and reporters who are here today, and then  
4           the other attendees. And when your name is called,  
5           please state your affiliation.

6           Scott?

7           MR. MYERS: Sure. I'm going to go through  
8           the folks that I've got, that I was sort of keeping  
9           track of as we called in, and then at the end of the  
10          members I'll ask if anybody, if I missed anybody. And  
11          that's also going to include our liaisons for anybody  
12          who is on our list. And then I will call the  
13          witnesses and ask you to identify yourselves.

14          So Judge Ikuta?

15          JUDGE IKUTA: Yes, I'm Judge Ikuta, the  
16          Chair of the Bankruptcy Rules Committee.

17          MR. MYERS: Professor Gibson?

18          PROFESSOR GIBSON: Right. I'm Elizabeth  
19          Gibson. I'm the Reporter for the Bankruptcy Rules  
20          Committee.

21          MR. MYERS: Professor Harner?

22          PROFESSOR HARNER: Yes. I'm Michelle  
23          Harner. I am the Assistant Reporter for the Rules  
24          Committee.

1 MR. MYERS: Judge Pepper?

2 JUDGE PEPPER: Yes. I'm Pam Pepper. I'm  
3 one of the members of the Bankruptcy Rules Committee.

4 MR. MYERS: Judge Bernstein?

5 JUDGE BERNSTEIN: Yes, this is Stuart  
6 Bernstein from the Southern District of New York. I'm  
7 a member of the Committee.

8 MR. MYERS: Judge Dow?

9 JUDGE DOW: Dennis Dow. I'm a Bankruptcy  
10 Judge in the Western District of Missouri. I'm the  
11 Chair of the Subcommittee on Forms.

12 MR. MYERS: Judge Goldgar?

13 JUDGE GOLDGAR: Ben Goldgar. I'm a  
14 Bankruptcy Judge in the Northern District of Illinois  
15 and a member of the Committee.

16 MR. MYERS: Judge Harris?

17 JUDGE HARRIS: Hi. Judge Arthur Harris from  
18 Bankruptcy Court, Northern District of Ohio. I'm a  
19 member of the Committee for the next three days.

20 MR. MYERS: Judge Hoffman?

21 MR. HOFFMAN: Melvin Hoffman, Bankruptcy  
22 Court, District of Massachusetts. And I think I'm a  
23 member when Art is not a member.

24 MR. MYERS: Professor Morrison?

1                   PROFESSOR MORRISON: Hi. I teach at  
2 Columbia Law School and like Judge Harris, I am a  
3 member for the next three days, a member of the  
4 Committee.

5                   MR. MYERS: Judge Wedoff?

6                   (No response.)

7                   MR. MYERS: Judge Wedoff?

8                   (No response.)

9                   MALE VOICE: You lost him. He doesn't  
10 recognize "judge" anymore.

11                  MR. MYERS: That's probably it. Gene  
12 Wedoff?

13                  (No response.)

14                  MR. MYERS: Well, I'll move on. I'm sure  
15 we'll get him back.

16                  Ricardo Kilpatrick?

17                  MR. KILPATRICK: Ricardo Kilpatrick, a  
18 bankruptcy practitioner and member of the Committee.

19                  MR. MYERS: Jeff Hartley?

20                  MR. HARTLEY: I'm Jeffery Hartley. I'm a  
21 Committee member and an attorney in private practice.

22                  MR. MYERS: Jill Michaux?

23                  MS. MICHAUX: I'm Jill Michaux. I'm a  
24 member of the Committee from Kansas. I'm a bankruptcy

1 practitioner.

2 MR. MYERS: Diana Erbsen?

3 MS. ERBSEN: Hi. This is Diana Erbsen. I  
4 am a member of the Committee representing the  
5 Department of Justice.

6 MR. MYERS: Adam Herring?

7 JUDGE HERRING: I'm Adam Herring with the  
8 Executive Office of U.S. Trustees.

9 MR. MYERS: Pat Ketchum?

10 MS. KETCHUM: Pat Ketchum. Consultant to  
11 the Committee, former Counsel to the Committee, and  
12 I'm back from a long sick leave and happy to be here.

13 MR. MYERS: Welcome back, Pat.

14 MS. KETCHUM: Thank you.

15 MR. MYERS: Jim Wannamaker?

16 MR. WANNAMAKER: Jim Wannamaker, Consultant  
17 to the Committee and former Staff Support.

18 MR. MYERS: Rebecca Womeldorf?

19 MS. WOMELDORF: Rebecca Womeldorf, Chief of  
20 the Rules Committee Support Office.

21 MR. MYERS: Bridget Healy?

22 MS. HEALY: I'm Bridget Healy and I'm an  
23 attorney in the Rules Support Office and I staff the  
24 Bankruptcy Committee.

1 MR. MYERS: Jon Waage (phonetic)?

2 MR. WAAGE: Yeah. Jon Waage, a 13 trustee,  
3 a Plan Consultant.

4 MR. MYERS: Thanks, Jon. Is there anybody  
5 here who's a member or a liaison for the Committee  
6 that I have not called?

7 JUDGE WEDOFF: Scott, I mistakenly hit my  
8 mute button and that's why I was not able to talk to  
9 you earlier, but I am here. This is Eugene Wedoff, a  
10 former Bankruptcy Judge from the Northern District of  
11 Illinois and a Consultant to the Committee right now.

12 MR. MYERS: Thanks, Judge Wedoff.

13 JUDGE SMITH: This is Erithe Smith,  
14 Bankruptcy Judge from the Central District of  
15 California. I'm Liaison from the Bankruptcy  
16 Committee.

17 MR. MYERS: Hi, Judge Smith. Thank you.

18 Okay. I'm going to go through our witnesses  
19 right now. Jenny Doling?

20 MS. DOLING: Good morning. I'm Jenny Doling  
21 from the Central District of California. I'm the  
22 State Chair for NACBA for the Central District of  
23 California, and also I serve on the Bar Advisory  
24 Committee to our Central District of California

1 Judges. Thank you for having me.

2 MR. MYERS: Welcome.

3 Judge Efremsky?

4 JUDGE EFREMSKY: Yes. Judge Roger Efremsky,  
5 Bankruptcy Judge, Northern District of California.

6 MR. MYERS: Norma Hammes?

7 MS. HAMMES: Yes. This is Norma Hammes, and  
8 I'm a consumer bankruptcy attorney, debtor's attorney,  
9 from San Jose, California. Former President of NACBA  
10 and still on the Committee of NACBA that deals with  
11 the rules, including this one.

12 MR. MYERS: Welcome.

13 Judge Isgur, sir?

14 JUDGE ISGUR: Marvin Isgur, I-S-G-U-R.  
15 Bankruptcy Judge from the Southern District of Texas.

16 MR. MYERS: Welcome, Judge Isgur.

17 JUDGE ISGUR: Thank you.

18 MR. MYERS: James Ike Shulman?

19 MR. SHULMAN: Yes, good morning. This is  
20 Ike Shulman. I'm a dual practitioner in San Jose,  
21 California, and the first President of NACBA.

22 MR. MYERS: Welcome.

23 I understand we may have Judge Isgur's two  
24 law clerks on also. I'm going to call your names out.

1 Please call in. Is Sam Andre on?

2 MR. ANDRE: Yes.

3 MR. MYERS: Welcome, Sam.

4 Andrew Geppert?

5 MR. GEPPERT: Yes, Andrew Geppert here.

6 MR. MYERS: Good morning, Andrew.

7 MR. GEPPERT: Good morning.

8 MR. MYERS: Judge Ikuta, I think that I've  
9 gone through the roll.

10 JUDGE IKUTA: All right. If there's nobody  
11 else who hasn't been called?

12 (No response.)

13 JUDGE IKUTA: Okay. Thank you.

14 We'll have a transcript prepared of the  
15 hearing so that the members of the Committee who  
16 weren't able to attend today will be able to read  
17 through all the testimony. And our court reporter is  
18 Stephen Grider. This transcript will be posted on the  
19 U.S. Courts Rules website, and I'd appreciate it if  
20 witnesses and Committee members asking questions would  
21 identify themselves by name before speaking to make it  
22 a little easier on our court reporter.

23 So we have one change to the confirmed  
24 witness less. Judge Efremsky will be the second

1 witness, and Judge Isgur will be the fourth witness.

2 I will call the witnesses in order and after  
3 each witness finishes speaking, Judge Dow, who's the  
4 Chair of our Subcommittee on Forms, will be in charge  
5 of fielding the questions.

6 Our first witness today is Jenny Doling from  
7 Doling, Shaw & Hanover. Ms. Doling?

8 MR. MYERS: Judge, I'm interrupting only  
9 because I just, I want to make one announcement that I  
10 always make when we have a large group of folks  
11 calling in. Please mute your phone when you're not  
12 speaking so that we can hear everybody who is speaking  
13 going forward. Thanks.

14 JUDGE IKUTA: Thank you, Scott.

15 All right, Ms. Doling, are you ready?

16 MS. DOLING: I am.

17 JUDGE IKUTA: Please proceed.

18 MS. DOLING: Thank you. Thank you for  
19 having me. Good morning. This is Jenny Doling.

20 As I set forth in my written submission of  
21 the testimony, I do have concerns about Rule 3015.1,  
22 the proposed change. One of the main concerns that I  
23 have is that I don't believe the rule sets out any  
24 type of remedy available to either debtors or

1 creditors if the local practice in the district does  
2 not conform to the changes proposed by the rule, and  
3 this is I think exceptionally important in the larger  
4 districts. In the Central District of California, we  
5 have five divisions with Chapter 13 trustees  
6 throughout those divisions, and much of the rules for  
7 the practice in our division were promulgated by the  
8 Chapter 13 trustees.

9 One of the main issues that we come across  
10 is that the Chapter 13 plan that's proposed in the  
11 Central District proposes an estimated percentage to  
12 be paid back in a Chapter 13 plan. The problem with  
13 that estimated percentage is that our order confirming  
14 the plan actually changes that percentage from an  
15 estimate to a fixed term of the plan, and that's not  
16 compliant with the U.S. Bankruptcy Code.

17 As we all know, the rules may not enlarge,  
18 abridge, or modify any substantive rights, and by  
19 having Rule 3015.1 out there requiring compliance with  
20 the code but no remedy other than appeal, it makes it  
21 very difficult for debtors or creditors to ever make  
22 changes when it comes time to adjust the standard plan  
23 that is set forth because much of the, like I said  
24 before, because much of the practice in the divisions

1 is really left up to the Chapter 13 trustees, without  
2 any input from debtors or creditors, and sometimes the  
3 court in this, a lot of things go on behind the  
4 background scenes that I don't think that the courts  
5 are aware of.

6 I would suggest that Rule 3015.1 also put  
7 forth not only a remedy but maybe a process for the  
8 trustees to include input from debtors' and creditors'  
9 counsel in how the rules and plan forms are carried  
10 out in practice.

11 We have a couple other issues that come up  
12 regularly in the Central District, and one of them is  
13 when we propose a non-standard provision in a plan,  
14 and in that case, our trustee in the Riverside  
15 Division asks to strike every single non-standard  
16 provision without regard to what that provision stands  
17 for, without regards to discussing it with the court,  
18 and it's kind of a strong-arm tactic, and I'd like to  
19 see that changed so that these issues are put before  
20 the judges more frequently.

21 My goal in testifying today, it's my first  
22 time testifying before one of the Rules Committees, is  
23 to hopefully put out the concerns of consumer debtors'  
24 attorneys as well as creditors who have raised these

1 issues. I have been asked to be on the Chapter 13  
2 Committee to address our plan in the Central District,  
3 so I am hoping to make some progress there. But I  
4 think something needs to be done at this level when  
5 we're promulgating a new rule change such as  
6 3015.1(c).

7 I'm happy to answer any questions if anyone  
8 has any questions.

9 JUDGE DOW: All right. Thank you. This is  
10 Judge Dow. Does anybody have any questions of the  
11 witness?

12 JUDGE BERNSTEIN: This is Judge Bernstein.  
13 I just have one question, and that is, what is the  
14 remedy that you would like to see?

15 MS. DOLING: Honestly, I think it's  
16 something that's going to need to be brainstormed a  
17 little more. I just want something that's a little  
18 less obtrusive and expensive, such as an appeal,  
19 because if everything has to be appealed we don't  
20 change things at this level. So, if there is a non-  
21 compliant plan provision, maybe a type of a hearing  
22 that we can bring forth before our Chief Judge and  
23 address it there globally, not just on a case-by-case  
24 basis.

1           JUDGE PEPPER: This is Judge Pepper. I just  
2 have a question. You indicated, Ms. Doling, that in  
3 your district, whenever a debtor proposes a non-  
4 standard provision in the plan, the trustee strikes it  
5 and you would rather have that come before the judges  
6 more frequently. Is there not a mechanism whereby the  
7 debtor can politely decline the invitation to strike  
8 and get the issue in front of the Judge?

9           MS. DOLING: Yes, we can do that, but the  
10 problem is when I've done that and we've raised it up  
11 to the judges, they say this is really something that  
12 needs to be handled by the Chapter 13 Judges Committee  
13 or the Forms Committee and then we don't go any  
14 further. So it's not really, unless I appeal at that  
15 point, it's not really a remedy. It's not really a  
16 solution.

17           I've been putting in my plans for probably  
18 five years now that the Chapter 13 plan proposes an  
19 estimated percentage, but the order confirming plan  
20 changes that to a plan term, and then you have debtors  
21 who don't meet a certain percentage but who have paid  
22 in all of their disposable monthly income for the  
23 entire plan length, and then the trustee is filing  
24 motions to dismiss saying the plan is infeasible

1 because it's not going to reach this now fixed  
2 percentage. And that's not what the code requires.  
3 That's not what the code says. So it's the problem  
4 with our plan and our order confirming plan is taking  
5 away debtors' rights.

6 JUDGE DOW: All right. This is Judge Dow.  
7 I have a question. Maybe it's a two-part question.  
8 But it seems to me that what you're describing is with  
9 the present system, not the one that would be in  
10 existence after adoption of these rules, and what  
11 you're complaining about is decisions by judges on  
12 substantive issues of bankruptcy law, not procedures.

13 So my question to you I guess is, how is the  
14 situation you described somehow made worse by the  
15 adoption of these rules, if it is? And how would  
16 adopting a national mandatory plan form, which you  
17 seem to support, solve the problem?

18 MS. DOLING: I actually do not support a  
19 national plan. At first I thought it would be a good  
20 idea. I believe that the rule change is not a bad  
21 rule change. I just think it needs some tweak to it,  
22 like I said, some kind of remedy where we can address  
23 globally in our districts problems with the plan form  
24 or problems with how the plan is being implemented or

1 approved or confirmed in our districts. And this rule  
2 leaves out any kind of request for a hearing to  
3 address those issues in our districts.

4 JUDGE DOW: Are there any other questions of  
5 Ms. Doling?

6 (No response.)

7 JUDGE DOW: All right. If not, then I guess  
8 we can move on to our next witness. Judge Ikuta?

9 JUDGE IKUTA: Yes. Our next witness is  
10 Judge Efremsky.

11 JUDGE EFREMSKY: All right. Good morning.  
12 This is Roger Efremsky, Chief Judge of the Bankruptcy  
13 Court in the Northern District of California.

14 Judge Ikuta, Judge Dow, and members of the  
15 Committee, Judge Isgur and I will testify in our  
16 individual capacities today. Judge Isgur and I thank  
17 you for this opportunity to testify regarding the  
18 proposed bankruptcy rules 3015 and 3015.1. We  
19 strongly support their passage as drafted without  
20 further amendments.

21 As you know, the two of us were part of the  
22 group that authored the November 18, 2014 letter that  
23 was signed by 144 bankruptcy judges opposing the  
24 adoption of the national form plan. We were also two

1 of the signatories to the February 10, 2015 compromise  
2 proposal submitted to the Committee that formed the  
3 genesis for these proposed bankruptcy rules. That  
4 compromise was and is supported by bankruptcy judges,  
5 13 trustees, and creditors alike.

6 These proposed bankruptcy rules incorporate  
7 the spirit of the compromise, recognize the benefit of  
8 eliminating multiple plans within a district to just  
9 one uniform plan per district, while at the same time  
10 respecting the concerns of judges, 13 trustees,  
11 debtors' counsel, and creditors alike in preserving  
12 their ability to collaborate in crafting a single plan  
13 per district that meets demographics, economics, and  
14 cultural differences within a district.

15 Moreover, the adoption of these rules will  
16 avoid the broad opposition amongst bankruptcy judges  
17 and 13 trustees which would likely prove problematic  
18 to implementation of a single national form plan.

19 With regard to the comments made to the  
20 Committee by debtors' counsel voicing concerns that a  
21 mandatory model plan would allegedly run afoul of the  
22 code and abridge the rights of debtors and/or prepares  
23 non-standard plan provisions that are allegedly  
24 disapproved by judges simply because they are non-

1 standard plan provisions, I offer the following, which  
2 is the same thing I would say to a disgruntled 13  
3 trustee or creditor. If you believe the judge has  
4 committed legal error, file an appeal and let the  
5 appellate process play out. That is the simplistic  
6 beauty and design of our judicial system. Thank you.

7 JUDGE IKUTA: Thank you.

8 JUDGE DOW: All right. Does anyone have any  
9 questions of Judge Efremsky? This is Judge Dow again.  
10 I'm sorry.

11 (No response.)

12 JUDGE DOW: No questions of Roger?

13 (No response.)

14 JUDGE DOW: All right. Then I guess we can  
15 move on to our third witness.

16 JUDGE IKUTA: This is Sandra Ikuta. Our  
17 next witness is Norma Hammes. Ms. Hammes?

18 MS. HAMMES: Good morning, Judge Ikuta and  
19 members of the Committee. My name is Norma Hammes.  
20 Thank you for this opportunity.

21 I am here to speak against the adoption of  
22 the proposed compromise rule amendment that would  
23 allow local districts to opt out of using the national  
24 Chapter 13 plan, instead mandating use of a single

1 local plan adopted by the district.

2 Certainly, there is a justifiable purpose in  
3 having a model plan. It can lay out a standard  
4 structure within which the debtor can express his or  
5 her proposed plan which must meet the test of Sections  
6 1322 and 1325(a). However, when a model plan goes  
7 beyond providing a structure for provisions to  
8 mandating content of the provisions, that is when  
9 things go wrong.

10 NACBA recently undertook a project to review  
11 local plans because, if the opt-out rule is approved,  
12 these are the plans which are likely to be locally  
13 mandated. Leading the task, I reviewed the content of  
14 about 70 local plans, and earlier this month NACBA  
15 surveyed its members about their experiences with  
16 their local plans. We received 128 detailed responses  
17 from 39 states, Puerto Rico, and the District of  
18 Columbia, totaling 60 separate districts. I want to  
19 mention also that NACBA will be filing comments before  
20 the deadline that will describe more of the results of  
21 the survey.

22 What I found was disheartening and revealed  
23 that many required provisions and procedures  
24 substantially abridge debtors' bankruptcy rights and

1 enlarge creditors' rights, in violation of 28 U.S.C.  
2 2075 and FRBP 9029. If a Chapter 13 debtor passes the  
3 Form 122C means test and the best interest of  
4 creditors test under the code, that debtor is entitled  
5 to propose a Chapter 13 plan that pays nothing on  
6 general unsecured claims.

7 I found that a high number of plans did not  
8 allow debtors to do that. Rather than allowing the  
9 debtor to select a dollar amount, including zero, for  
10 a dividend on general unsecured claims, which the  
11 national plan does allow, these local plans often  
12 hard-wire an overestimation of the trustee's fees into  
13 the plan payments and create a surplus which is paid  
14 to unsecured creditors. There's absolutely no way the  
15 debtor can avoid doing that by using that model plan.

16 I believe this is a violation of 28 U.S.C. 2075.

17 Thirty-four percent of the respondents to  
18 NACBA's survey said that they are prohibited from  
19 filing any zero dividend plans by rules or enforced  
20 preferences of either the judge or the trustee, and  
21 many respondents expressed deep regret about this,  
22 knowing that their clients really could not afford to  
23 pay the dividend which was not, in fact, required by  
24 law.

1           It is argued that the debtor's right to  
2     propose the plan under Section 1321 is protected  
3     because most local plans have a separate section where  
4     the debtor can propose additional provisions that may  
5     deviate from the model plan. However, in many courts  
6     around the country, including my own, that right is  
7     illusory since the debtor who proposes additional  
8     provisions is subjected to significant procedural  
9     hurdles.

10           In my own experience, since the district  
11     model plan became mandatory in our division in  
12     February 2016, the judges in our division have refused  
13     to confirm any plans, including uncontested plans,  
14     with no objections to them. No creditor has objected,  
15     the trustee hasn't objected. There's absolutely no  
16     objection to them. But because they contained  
17     additional provisions, no matter how insignificant --

18           MS. HEALY: I'm sorry to interrupt, but this  
19     is your one-minute warning. Thank you.

20           MS. HAMMES: These cases remain unconfirmed  
21     despite the fact that the only remarkable aspect about  
22     them is the debtor has the temerity to propose  
23     additional provisions.

24           Since most debtors' attorneys do not begin

1 receiving payment on their allowed fees until their  
2 cases are confirmed, this is a pretty effective way to  
3 punish the debtors' bar for conscientiously  
4 representing their clients.

5 It is crucial that under either the national  
6 plan or local plans debtors be protected from  
7 procedural burdens or call it what it is, punishment,  
8 for exercising their rights to propose additional  
9 provisions which comply with the code. I'm reminded  
10 of Henry Ford's quote, "They can have any color car  
11 they want as long as it's black."

12 A one-size-fits-all local Chapter 13 plan  
13 that the debtor is required to sign in order to avoid  
14 punishment, particularly a plan which abridges the  
15 debtor's rights, cannot possibly meet the test of  
16 having been proposed by the debtor under 1321. And as  
17 Judge Efremsky just mentioned, if the consequence of  
18 including any additional provisions is that you have  
19 to appeal every case, that is proof of exactly what I  
20 was saying. Thank you for your time.

21 JUDGE IKUTA: Thank you.

22 JUDGE DOW: All right. This is Judge Dow  
23 again. Does anyone have questions of Ms. Hammes?

24 JUDGE GOLDGAR: This is Ben Goldgar. I have

1 a question. I'm not entirely clear on what your  
2 position is on the proposed rules. You seem to have  
3 grievances with local practice, but I couldn't tell  
4 whether you thought that having the option of local  
5 plans as long as they met certain requirements was a  
6 bad one, or are you proposing that we should have a  
7 mandatory national plan with no sort of opt-out?  
8 Apart from your problems with local practice, I  
9 couldn't really tell what your position was on the  
10 rules.

11 MS. HAMMES: Well, my position on the rule  
12 is, as I started out, I said I'm speaking against the  
13 adoption of the so-called compromise rule. I'm  
14 absolutely opposed to that. And at this point, NACBA  
15 has been conflicted over the time that the related  
16 rules have been considered because some local plans  
17 are decent plans, but many are not. And that's the  
18 reason why we undertook the survey, to find out what  
19 exactly is the state of plans out there.

20 And the fact of the matter is the plans are  
21 so bad out there that the national model plan, which  
22 has been improved significantly over the time that  
23 it's been considered, is absolutely the preferable  
24 option, in fact, would benefit many debtors across the

1 country appropriately because they have been --

2 JUDGE GOLDGAR: Okay.

3 MS. HAMMES: Okay.

4 JUDGE GOLDGAR: So, in other words, your  
5 view is that the opt-out is not good and you would  
6 like to see a mandatory national plan period.

7 MS. HAMMES: Yes.

8 JUDGE GOLDGAR: Okay. Thank you.

9 MS. HAMMES: Thank you.

10 JUDGE DOW: Other questions of Ms. Hammes?

11 (No response.)

12 JUDGE DOW: All right. I have one. I'll  
13 ask you the same question I asked the last witness who  
14 testified in opposition to the rule.

15 Once again, it seems to me that what you're  
16 complaining about is certain decisions by bankruptcy  
17 judges on substantive issues of bankruptcy law that  
18 you believe are not supported by the code. So how  
19 does adopting a national plan form solve that problem?

20 And aren't you asking us to essentially go even  
21 further than we are now in proposing not only a  
22 mandatory national plan form but a plan form that  
23 prescribes certain substantive issues, such as, for  
24 example, whether there's a required dividend? And how

1 can that be done by a form or a procedural rule?

2 MS. HAMMES: Well, I think the Supreme Court  
3 has actually answered that particular question.  
4 Lanning is pretty definitive on the topic of, you  
5 know, how you calculate a dividend for general  
6 unsecured claims. I don't think there's any question  
7 about that. So I think there's no substantive concern  
8 about that.

9 My concern is, at least as I've seen here  
10 locally and also nationwide, is less the substance,  
11 although the substance is certainly important, but  
12 primarily the fact that if you do propose any  
13 additional provisions you are seriously, seriously  
14 punished by the system because the judges, including  
15 Judge Efremsky, is absolutely not going to be allowing  
16 additional provisions. He just put forth, you know,  
17 appeal it. Okay, what are we supposed to appeal?  
18 Every single case?

19 JUDGE DOW: So my follow-up question to you  
20 is then, how does the approach that we're proposing  
21 somehow make that problem worse, or how can that  
22 problem be solved by a procedural rule or plan form?

23 MS. HAMMES: Well, the --

24 JUDGE DOW: You said debtors need procedural

1       protections from these decisions of bankruptcy judges,  
2       but you don't tell us what those protections are.  
3       What are they?

4                   MS. HAMMES: Well, I think one thing is to  
5       require substantive hearings on proposed plans during  
6       the time required by the code, which is 20 to 45 days  
7       after the 341 meeting. There has to be a substantive  
8       hearing on confirmation, which is not being properly  
9       abided by in our district nor in many other districts.  
10       That's part of the process of punishing debtors for  
11       actually filing a plan with additional provisions, is  
12       that they are not set for confirmation in any possible  
13       way, including ours. I mean, this is what we've  
14       undergone since February of 2016.

15                   JUDGE DOW: All right. Well, thank you for  
16       addressing my questions. I appreciate it.

17                   Are there any more questions of Ms. Hammes?

18                   (No response.)

19                   JUDGE DOW: All right. If not, then we can  
20       go on to our next witness.

21                   JUDGE IKUTA: Okay. Our next witness is  
22       Judge Marvin Isgur.

23                   JUDGE ISGUR: Thank you, Judge Ikuta and  
24       Judge Dow, both for your patience and willingness in

1 working to improve the Chapter 13 process in the  
2 United States and for today's hearing. Your efforts  
3 are recognized and applauded not only by me but my  
4 colleagues throughout the country.

5 I'd like to spend my time addressing the  
6 specific comments from the opposition.

7 First, public comment will be ignored,  
8 judges will do as they wish, and local plans will  
9 curtail a debtor's rights. That's not been my  
10 experience, but that's not an opt-out issue.

11 The very first sentence of the mandatory  
12 form plan is explicit: "The presence of an option on  
13 the form does not indicate that the option is  
14 permissible in your judicial district."

15 Put simply, if the judges of a district have  
16 decided that certain treatments are impermissible, it  
17 will not matter whether those treatments are excluded  
18 from the local form or simply not permitted via the  
19 national form or if we maintain the current system.  
20 The result is the same and, as Judge Efremsky pointed  
21 out, the remedy is to appeal the judge's decision.

22 Now I'm quite sympathetic to the concept  
23 that everyone is entitled to their hearing, and they  
24 ought to be making the argument in the first instance

1 to the bankruptcy judge. But if the bankruptcy judge  
2 rejects it under any of these alternatives, the remedy  
3 is on appeal.

4 The second complaint is that judges won't  
5 allow for special provisions. In my view, a judge  
6 should disallow an impermissible special provision,  
7 but a judge should not disallow a permissible one.  
8 But this problem is identical in the mandatory  
9 national plan and in the opt-out plan. If the  
10 objecting party's fears are realized under any  
11 scenario, the remedy is by appeal. This Committee is  
12 not charged with policing the judiciary, nor do I  
13 believe that any policing is required.

14 The third complaint is that a local plan  
15 might impermissibly require minimum distributions to  
16 the holders of unsecured claims. If a judge wrongly  
17 denies confirmation of a plan on this basis, I think  
18 it should be a matter for interlocutory appeal. This  
19 identical policy of a minimum distribution requirement  
20 will occur with the national form plan. A judge could  
21 simply decide not to confirm a national form plan  
22 unless it provides a minimum distribution.

23 Now I have previously ruled, as has my  
24 circuit, that no minimum distribution can be required

1 under the code. So I'm sympathetic to the point, but  
2 this is not a distinction between current practice,  
3 the national form, and the opt-out plans. It's the  
4 reason why if a judge errs, and it would be an error,  
5 that decision ought to be appealed.

6 Number four. The confirmation will be  
7 delayed by the presence of the opt-out plan. I think  
8 that that is simply not going to be empirically proven  
9 once this is tested. That's a feature that's common  
10 to both the national mandatory plan and the opt-out  
11 plan.

12 The allegation is divided into sub-parts:  
13 one, that the judge will intentionally delay  
14 confirmation or two, that it will delay confirmation  
15 to take time to review plans.

16 With respect to the allegations of  
17 intentional delay, I take some offense. My experience  
18 has been that my judicial colleagues throughout the  
19 country would never intentionally delay a matter for  
20 the purpose of denying justice to a litigant. I think  
21 that the kinds of delays that are being described are  
22 being described as much more likely going to occur  
23 with the national plan than with a local plan.

24 You may recall the testimony given on this

1 matter on January 23, 2015. One of the primary  
2 virtues of the national plan is its flexibility  
3 implemented through a series of check boxes.  
4 Unfortunately, that flexibility mathematically allows  
5 over 1.9 million possible combinations within the  
6 mandatory national plan. Although the vast majority  
7 of permutations will not have dire consequences, some  
8 will, and the time to evaluate the effect of the  
9 option combinations will be much lengthier than the  
10 time required to evaluate a mere special provision in  
11 an opt-out plan.

12 Presuming that the trustee or party in  
13 interest objects, the judge is going to be required to  
14 evaluate --

15 MS. HEALY: I'm sorry to interrupt, but this  
16 is your one-minute warning.

17 JUDGE ISGUR: -- the cross-effects of the  
18 various check boxes.

19 For example, if a debtor checks the second  
20 box in Section 3.3 for the payment of an automobile  
21 debt and Section 3.3 has no lien retention provision  
22 and then checks the first box in Section 8.1 vesting  
23 the automobile with a debtor in confirmation, the  
24 debtor will be vested with a car and the lender will

1 not retain its lien against the car. That combination  
2 would clearly be illegal, but the effect of this and  
3 other permutations may be to cause delay much more  
4 prominently with the national plan than the local one.

5 And the fifth major complaint is that an  
6 amendment to Rule 3015 should specify certain types of  
7 special provisions as being somehow permissible or  
8 preferable.

9 I think this is a wholly unnecessary  
10 amendment. The true thrust of the draft amendment is  
11 to have this Committee to take a position on whether  
12 temporal provisions in plans can be overridden by  
13 payment caps to the holders of unsecured claims. It's  
14 a matter of substantial debate, and I strongly,  
15 strongly urge the Committee not to venture into an  
16 arena that is the subject of multiple and divergent  
17 opinions. Once again, those remedies lie with an  
18 appeal.

19 I've reviewed the comments that have been  
20 submitted to the committee, I've tried to take them  
21 seriously, but they are comments that go to the heart  
22 of the system and the heart of whether we will have  
23 judges make decisions on Chapter 13 plans. I strongly  
24 urge the Committee to view those comments as being

1 things that need to be taken up on a substantive basis  
2 by appellate courts throughout the United States and  
3 to adopt both Rule 3015 and 3015.1. Thank you.

4 JUDGE IKUTA: Thank you.

5 JUDGE DOW: All right. Thank you, Judge  
6 Isgur.

7 Are there any questions of Judge Isgur about  
8 his testimony?

9 (No response.)

10 JUDGE DOW: No questions of Judge Isgur?

11 (No response.)

12 JUDGE DOW: All right. Then I guess we'll  
13 go on to our fifth and final witness.

14 JUDGE IKUTA: Okay. And that's James Ike  
15 Shulman.

16 MR. SHULMAN: Yes, thank you, Judge Ikuta  
17 and members of the Committee. I want to thank you for  
18 this opportunity to testify today.

19 Initially I along with many of my colleagues  
20 in the debtors bar nationwide believed that the  
21 proposed national form plan would bring many, much  
22 needed changes to bankruptcy courts across the nation.

23 This was particularly true in those jurisdictions  
24 where the existing approved Chapter 13 local form

1 plans unfairly curtailed debtors' rights or created  
2 unjustified burdens, some of which were described by  
3 witnesses earlier on this call.

4 Examples include local form plans that  
5 require valuations of secured claims by separate  
6 motion and not through the plan; restrict the ability  
7 to specify dollar amount dividends for general  
8 unsecured claims; and restrict debtors' vesting rights  
9 that they have under 1322(a)(9).

10 I understood that while the proposed  
11 national form plan didn't include all of the  
12 provisions I personally would have desired as a  
13 debtors' attorney, it did offer an approach which  
14 would provide a much better balance between debtors'  
15 and creditors' rights than is offered by many current  
16 local form plans.

17 The national form plan has the benefit of  
18 having been vetted over a long period of time by all  
19 of the stakeholders in the system: judges, trustees,  
20 creditors' attorneys, debtors' attorneys. Everyone's  
21 weighted in, and as mentioned earlier by one of the  
22 witnesses, it's improved and offers some basic  
23 protections for debtors nationally.

24 Unfortunately, proposed Rule 3015.1 would

1       undo this achievement by permitting individual  
2       bankruptcy districts to ignore the national form plan  
3       and instead substitute a single mandatory local plan  
4       with no built-in safeguards ensuring balance.

5               While the proposed rule does require  
6       adoption of such local district plans be done after  
7       "public notice and opportunity for public comment", my  
8       own experience with such procedures gives an  
9       indication of how such procedures can prove more  
10      illusory than real in protecting debtors' rights.

11              In late 2012, I was invited to participate  
12      in a process to review changes to our local form plans  
13      and make recommendations for the adoption of a new  
14      district-wide local plan in my district. The group  
15      reviewing those proposals included bankruptcy judges,  
16      trustees, and attorneys representing every division  
17      within our district. We held an initial lengthy, in-  
18      person meeting at which many provisions were discussed  
19      in detail. Considerable progress was made towards  
20      consensus in the approaches. At the conclusion, we  
21      were advised that the review would continue and we'd  
22      get details later.

23              However, approximately a month later we were  
24      advised that the process was being closed and many of

1 our provisions that we had suggested were ignored,  
2 some of which had received consensus earlier, did not  
3 end up in the final document.

4 I recount this history not to relitigate  
5 what happened to me locally but rather as an  
6 illustration of I think the problem with having local  
7 districts adopt plans throughout the country. I'm  
8 sure in many cases the inputs of broad sections of the  
9 users of the system will have an impact, but I think,  
10 in others, there's no guarantee of that.

11 I think the overwhelming number of  
12 bankruptcy judges nationwide haven't come from the  
13 consumer bankruptcy world. I think they all have good  
14 intentions, but that doesn't mean that they have the  
15 same experiences. I think the benefit of the national  
16 form plan is that it has had --

17 MS. HEALY: This is your one-minute warning.

18 MR. SHULMAN: Thank you, Judge.

19 That it has had that input and does contain  
20 many safeguards that I believe would be lost.

21 I have mentioned in my written comments,  
22 I've attached a proposed amendment to the rule, and I  
23 think that that goes some way in addressing the  
24 problems debtors' lawyers have in getting approval for

1 non-standard provisions which on their face don't  
2 appear to be prohibited by the code but which my  
3 colleagues earlier mentioned you have to go through a  
4 lot of turmoil and sometimes not have the ability to  
5 get approved. And I think that delays confirmation.  
6 It doesn't have to be intentional. It just is a  
7 matter of fact.

8           So I made my amendment proposals to deal  
9 specifically, to make it easier to specify a dollar  
10 dividend rather than leave it as an estimate or a  
11 rough percentage and also to make clear that the  
12 debtor's attorney proposing a specific vesting  
13 election won't unduly delay confirmation.

14           So I'm recommending that the rule not be  
15 adopted and that the national form plan be approved.  
16 But in the absence of that, I'm recommending my  
17 amendment language to deal with a couple of common  
18 concerns around the country. Thank you.

19           JUDGE IKUTA: Thank you.

20           JUDGE DOW: All right. Are there any  
21 questions of Mr. Shulman?

22           PROFESSOR GIBSON: Yes. This is Elizabeth  
23 Gibson.

24           Mr. Shulman, I just want to ask about one

1 point you made, which was that some local plans don't  
2 allow the valuation of secured claims in the plan but  
3 require a motion.

4 The pending amendment to Rule 3012 would  
5 specifically authorize the term and the amount of the  
6 secured claim by motion in a claim objection or in a  
7 plan filed under Chapter 12 or Chapter 13. So would  
8 you expect that if this rule goes into effect, that  
9 would affect the ruling at the local level?

10 MR. SHULMAN: I'm uncertain what will happen  
11 at the local level under that circumstance. I believe  
12 that the national form plan, by permitting valuation,  
13 does give from a debtor's perspective and the  
14 efficiency involved in doing it through the plan a  
15 significant benefit in proposing a plan, and I think  
16 that the weight of that could be helpful to debtors  
17 who attempt to do that.

18 PROFESSOR GIBSON: Right. And so the  
19 proposal would be that the rules would authorize that  
20 presumably even in the local plan form.

21 MR. SHULMAN: Yes.

22 JUDGE DOW: Any other questions of Mr.  
23 Shulman?

24 (No response.)

1           JUDGE DOW: All right. Well, I'll sort of  
2 give you the same opportunity I did the other two  
3 witnesses, maybe a slightly different question because  
4 I think you made your position a little bit clearer.

5           If I understand correctly, what you're  
6 saying is we haven't gone far enough. We should go  
7 back to the proposal of a mandatory national plan  
8 form. Is that correct?

9           MR. SHULMAN: Yes.

10          JUDGE DOW: And once again, it seems to me  
11 that much of what you are concerned about is  
12 bankruptcy judges imposing requirements of substantive  
13 law on confirmations that you believe are not  
14 supported by the code. How does adoption of the  
15 national plan form which we've already approved solve  
16 that problem?

17          MR. SHULMAN: Well, I don't know that any  
18 national plan is going to solve every problem, Judge,  
19 but I believe that the national plan, by laying out  
20 specific provisions that are clear on what they say on  
21 the face, gives all of the parties a better  
22 opportunity to utilize that language without having it  
23 sidetracked by local interpretation.

24          JUDGE DOW: But if your two principal

1 concerns are this issue about dividends and vesting,  
2 they're not held within the form plan that we've  
3 approved, Form 113, other than the provision on  
4 vesting which gives the debtor a variety of options.

5 MR. SHULMAN: Well, Judge, that's exactly my  
6 point. The national plan on both of these accounts  
7 has language that I believe would address the concerns  
8 I put in my amendment. One is it allows the debtor to  
9 specify a dollar dividend the debtor wants to be  
10 placed. Of course, that dividend has to meet the test  
11 of disposable income and the best interests of  
12 creditors. It has to meet all of the code required  
13 tests. But it says if a debtor in a particular case  
14 has to pay \$10,200 on general unsecured claims, you  
15 can put that in the national plan.

16 In local plans, you're prohibited in many  
17 cases from doing that. You have to put no less than  
18 language or estimated to be language, which, as my  
19 colleague, Ms. Hammes, testified, often leads to  
20 debtors having to pay more than the code requires the  
21 debtor to propose. And if the debtor is the one  
22 proposing a plan under 1321, I think the national form  
23 plan goes farther in giving life to that, the meaning  
24 of that by giving him the possibility.

1           On the vesting issue you asked me about,  
2           there are many local plans that don't provide options.

3           I took a look at some of Ms. Hammes' review. I think  
4           in the largest district in the country, the Central  
5           District of California, there's a one-size-fits-all  
6           vesting proposal and anything different requires a  
7           non-standard provision, gets an objection. I think a  
8           lot of those problems that the national plan doesn't  
9           have will continue to be there two, three, four, five,  
10          10 years from now at the local level by not adopting  
11          the national plan and curbing some of those problems  
12          at this time.

13           JUDGE DOW: Okay. Just a technical matter.  
14          You referred to 1322(a)(9), but you're actually  
15          referring to 1322(b)(9), isn't that correct?

16           MR. SHULMAN: I don't have it in front of  
17          me, Judge, but if I'm wrong, I will appreciate that  
18          correction from you.

19           JUDGE DOW: All right. I have no further  
20          questions. Thank you for addressing my questions.

21           Does anyone else have any questions of our  
22          last witness?

23           (No response.)

24           JUDGE DOW: All right. Judge Ikuta?

1           JUDGE IKUTA: Well, I'd like to thank all  
2 the witnesses for their testimony. This information  
3 is extremely important for our process.

4           Our next meeting is in Washington, D.C. this  
5 November, and the information regarding that meeting  
6 will also be posted on the U.S. Courts Rules website.

7           Scott, anything else we need to announce  
8 before adjourning?

9           (No response.)

10          MR. MYERS: Sorry, Judge, I didn't have -- I  
11 couldn't figure out where the mute button was.

12          I know that the Forms Subcommittee wanted to  
13 have a follow-up call this morning. I would suggest  
14 five minutes after the hour.

15          JUDGE IKUTA: Okay. At 9:05?

16          MR. MYERS: Yes.

17          JUDGE IKUTA: And with that, we are  
18 adjourned. Thank you very much.

19          (Whereupon, at 12:08 p.m., the meeting in  
20 the above-entitled matter adjourned.)

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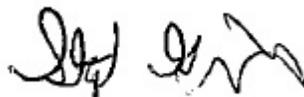
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REPORTER'S CERTIFICATE

DOCKET NO.: N/A  
CASE TITLE: Bankruptcy Rules Committee Meeting  
HEARING DATE: September 27, 2016  
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: September 27, 2016



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