

DEBTOR/CREDITOR RIGHTS COMMITTEE REPORT
PREPARED FOR THE DECEMBER 3, 2016 COUNCIL MEETING

1. Next Scheduled Meeting of the Committee:

The Committee has not yet scheduled its next meeting. We anticipate that it will be a joint meeting with the Debtor/Creditor Committee of the Oakland County Bar Association (“OCBA”) to be held in January or February 2017, at which time the two groups hope to have recently retired Bankruptcy Judge Walter Shapero address the groups.

The Committee held its last meeting on Wednesday, November 16, 2016 at the offices of David Ruskin, 26555 Evergreen Road, Suite 1101, Southfield, Michigan. Dinner was provided, followed by a business meeting. Approximately twenty (20) people attended the meeting.

The Committee discussed the proposed amendments to the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for which written comments are due by February 15, 2017. Michael Leib and Donald Visser discussed the proposed amendments.

The Committee decided not to submit comments to the majority of the proposed amendments, but did resolve to provide comments with respect to the newly-proposed Bankruptcy Rule 8018.1. The Committee’s comments are summarized below:

The Debtor Creditor Committee discussed the proposed rule change that allows the District Court to treat a judgment entered by the Bankruptcy Court as proposed findings of fact and conclusions of law if it is determined that the Bankruptcy Court lacked Article III jurisdiction to enter the judgment (order or decree). Our committee felt there was significant uncertainty as to whether the parties would then be able to file objections to the proposed finding of fact and conclusions of law or whether the District Court would treat the previous appellate briefs as if they were objections. The following language is suggested to be added after the proposed Rule:

"Upon the Court determining that the judgment, order or decree is to be treated as proposed findings of fact and conclusions of law, the district court shall allow the parties to file written objections to specific findings of fact and conclusions of law and to respond to another party’s objections."

The process described in Rule 9033 could be followed. *Executive Benefits Insurance Agency v Arkison*, 134 S.Ct. 2165 (2014) did not resolve the issue of whether parties can object to the proposed findings of fact or conclusions of law. There, the district court did conduct a review *de novo* and, therefore, treated the judgment as proposed findings of fact and conclusions of law. That case does not appear to discuss whether the parties filed anything other than appellate briefs. Our committee is looking for clarity and certainty as to a process to be followed.

The Committee is seeking approval from the Council to advance the position articulated above with the Rules Committee prior to the deadline in February 2017.

The Committee also discussed a proposed change to Bankruptcy Rule 3002.1 (dealing with home equity line of credit issues “HELOCs”) The Committee authorized Michael Leib to consult with Bankruptcy Judge Phillip J. Shefferly to determine whether our local bankruptcy rules adequately address concerns with respect to the proposed revision or, alternatively, whether the Committee should provide comments with respect to the proposed amendments to Bankruptcy Rule 3002.1.

The Committee also continued to monitor a pending Michigan Senate Bill to replace Michigan’s Uniform Fraudulent Transfer Act, MCL 566.31 *et. seq.* with the Uniform Voidable Transactions Act (“UVTA”), which has been approved by the Michigan Senate and pending in the Michigan House of Representatives. Discussion regarding the UVTA was led by Thomas Morris. The Committee decided not to submit comments with respect to the enactment of the UVTA.

Finally, Paul R. Hage, the Committee Vice-Chair, led a discussion of *Midland Funding v. Johnson*, a bankruptcy case where the Supreme Court recently granted certiorari, as well as other recent bankruptcy and appellate court decisions of note.

2. Council Approval

The Council previously approved the Committee advocating amendments to MCL 600.6023 so that exemptions outside bankruptcy are not limited to only one IRA or one college savings plan, but apply to all eligible IRAs and college savings plan. A subcommittee of Kal Goren and Tom Morris, along with the assistance, until recently, by Seth Drucker, have been working on this, and obtained the support of the Probate and Employee Benefits Sections of the State Bar. They have been in discussions with the OCBA. The lobbyist for the OCBA recommended waiting until the next legislative session before beginning to contact legislators. The wording of the proposed amendment has changed somewhat as a result of those decisions. The current version is attached and, therefore, the Committee is requesting that the Council confirm and approve the new revised version of the proposed statutory amendment.

The Committee is seeking Council approval for submitting comments to the proposed amendments to the Bankruptcy Rules prior to the February 2017 deadline, as set forth in Paragraph 1, above.

Seth Drucker had been serving as the Co-Vice Chair for the Committee. As a result of a recent employment change, he notified the Co-Chairs that he was unable to continue to serve in this position. The Co-Chairs have selected Marc Swanson, a principal in the Detroit Office of Miller Canfield Paddock and Stone, as the proposed candidate to succeed Seth Drucker and to become the next Co-Vice Chair of the Committee. Marc Swanson has been an active participant of the Committee and his Firm will be able to provide support and assistance, as and when needed, for the activities of the Committee. The Co-Chairs are therefore seeking Council approval for the appointment of Marc Swanson, effective immediately, as the new Co-Vice Chair of the Committee.

3. Membership

The Committee communicates regularly with its membership through its list serve, with announcements of Committee events, case law alerts, and announcements of events of interest to bankruptcy and insolvency law practitioners. This increases the Committee's profile. In addition, holding regular meetings and educational events increases the interest of the bar in becoming members. We regularly receive inquiries from bar members about joining the Committee and respond immediately to reach out to the individuals.

The Committee works with other bankruptcy/insolvency bar groups, which exposes the members of those groups to the Committee and its activities, also increasing interest in the committee.

The Committee has healthy attendance at its meetings and events.

4. Accomplishments Toward Committee Objectives

The Committee held three meetings this year.

Our May 11, 2016 joint meeting with the Bankruptcy Committee of the Real Estate Section of the State Bar featured a presentation by Kay Kress on the Uniform Commercial Real Estate Receivership Act from the National Conference of Commissioners on Uniform State Laws, by Michael Leib on the recently adopted SCAO forms for receivership cases, and Michelle C. Harrell on the issues presented in her article co-authored with Scott Garrison, entitled *The Reports Runneth Over: A Practical Approach for the Bench and Bar to Address an Overflow of Receivership Reports*, Michigan Bar Journal, Vol. 95, at 34 (March 2016).

Our August 17, 2016 meeting included discussions on the changes to the Federal Rules of Bankruptcy Procedure which will become effective December 1, 2016, and proposed rule

changes sent out for public comment, as well as a discussion of recent bankruptcy appellate case law.

The November 16, 2016 meeting is described above in Section 1.

The Committee presented a seminar on January 13, 2016 with the Bench of the Eastern District of Michigan Bankruptcy Court on recent amendments to the Federal Rules of Bankruptcy Procedure and on Local Bankruptcy Rules, which was well attended and increased the Committee's profile. Committee members had worked with the Bench in drafting the local court rules amendments which became effective February 1, 2016.

The Committee organized and co-sponsored a September 14, 2016 reception at the Rattlesnake Club in Detroit to honor Bankruptcy Judge Walter Shapero on his retirement and to welcome incoming Bankruptcy Judge Maria Oxholm (formerly a Judge of the Wayne County Circuit Court). The event had over 300 attendees, including several federal district court judges, bankruptcy court judges and Wayne County Circuit Court judges.

As described above, the Committee is advocating amendments to MCL 600.2023.

A subcommittee of the Committee continues to work with SCAO on creating a form motion to appoint a receiver.

5. Meetings and Programs

In addition to the meetings and programs described above, the Committee held a reception on September 29, 2016 to honor long-time co-chair Judy Calton upon her becoming Chair of the Business Law Section. Judy Miller made a presentation honoring Judy Calton and her accomplishments at the reception. Approximately 60 people attended the event at Jaffe's Southfield Office.

6. Publications

The Summer 2016 Michigan Business Law Journal published an article, *New Ruling by U.S. Supreme Court on Standing to Pursue Litigation-Alleging a “Mere Statutory Violation” is Not Sufficient to Confer Article III Standing for Federal Cause of Action* by Co-Chair Judith Greenstone Miller and her colleague, Jonathan Sriro.

7. Methods of Monitoring Legislative/Judicial/Administrative Developments and Recommended Action

The Committee leadership is active in monitoring new statutes, rules and cases of interest to our members. Co Vice-Chair Paul R Hage writes case notes for the American Bankruptcy Institute’s monthly magazine, and also keeps the Committee apprised of new case law developments.

8. Miscellaneous

The Committee discusses legislative developments and case law at its meetings, many of which are brought to our attention by our members.

Judy B. Calton, Co-Chair

Judith Greenstone Miller, Co-Chair

Paul R. Hage, Vice Chair