

Ever More Advice and Thoughts from Judge Starzynski
prepared for
BANKRUPTCY 2006: The 22nd Annual Year in Review
March 9, 2007

The Honorable James S. Starzynski
United States Bankruptcy Judge
District of New Mexico

[This version reflects corrections and oral comments from the live program.]

The following continues my “More than You Probably Wanted to Know” monologues 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 website. 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 website. To get to my chambers website, go to www.nmcourt.fed.us, then click on “U.S. Bankruptcy Court”, then on “Judges”, then on Judge Starzynski's “homepage”, 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 Judge Starzynski's decisions (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 chambers website as well, such as a “matters pending” list and the court calendar for the upcoming six 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. **Cell phones:** As past editions of these Year in Review materials point out (2003 YIR ¶ 19; 2004 YIR ¶ 19), continuing research is increasingly demonstrating that the use of a cell phone while driving, regardless of whether it is “hands free” or not, significantly impairs reaction time. In consequence, I have previously insisted that if you are driving and we call you for a hearing, we will call you back within a few minutes so you hang up, find a place to park, take the call and then concentrate on the contents of the hearing. The City of Albuquerque's new cell phone ordinance, incomplete as it is (it allows the use of hands-free cell phones, when the real problem is that it is the brain that is occupied, not so much the hands), has prompted me to revise our procedure slightly. From now on, if you are driving and your cell phone rings, you do not need to answer it right away. Rather, you should find a place to stop safely and wait for us to call again. On our end, if you do not answer your cell phone right away, we will wait a minute or two and then call again.

2. **Reaffirmation agreements under BAPCPA:** BAPCPA has changed the reaffirmation process, but there appears to be some confusion about those changes. To begin with, the general rule is still that if the debtor was represented by an attorney

during the course of negotiating a reaffirmation agreement, the court need not conduct a hearing to make the decision whether the agreement is in the best interests of the debtor and the debtor's dependents. BAPCPA's exception to this rule arises from the "presumption of hardship" that arises "if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt." §524(m)(1). Note first that where you look to make this determination is Part D of the reaffirmation agreement, not Schedules I and J. In other words, a debtor can file a budget that shows the debtor does not have sufficient income to make the monthly payments on the reaffirmed debt but it makes no difference if Part D has a different set of numbers that don't show the deficit. It is true that New Mexico Interim Bankruptcy Rule 4008 requires that the Schedule I and J numbers be shown *as additional information*, but these are not the numbers that determine whether the presumption arises. Therefore, if the opening paragraph of Part D does not show the deficit, there will be no court hearing, regardless of what Schedules I and J show. (Some counsel have worked with their debtors to further refine their budgets, by coming up with other sources of income or further reducing expenses, or both, to avoid showing a deficit in Part D. They do that because they believe that the reaffirmation agreement provides the debtor with as least as good a deal as the debtor could get otherwise; e.g., reaffirming an agreement on a needed vehicle with a low interest rate and a fair market value for the vehicle. The advantage of taking this approach is that it precludes the possibility that a judge will overrule the decision made by counsel and client.)

Also, as you may be aware from the Year in Review 2003 program (§ 5), I have conducted hearings to approve or not approve reaffirmation agreements when the debtor is represented by counsel but the attorney does not sign off on the reaffirmation agreement despite the debtor's insistence on entering into the agreement. (Note that some courts do not rely on whether the agreement was signed by counsel; those courts consider that if the debtor received just about any bankruptcy advice from counsel, the advice will have had to have included information about the discharge and the effect of reaffirmation. Other courts read the statute fairly literally: as long as the debtor is represented by counsel at the time the debtor is negotiating a reaffirmation agreement, there is no call for court intervention. Under either approach, the result is the same: no court hearing.) I need to emphasize that this practice is intended to be the exception to the way things are usually done, and a rare exception at that; the attorney has an obligation to firmly counsel the client on this issue and not request a hearing as an easy way of getting out of saying "no" to the client. I don't have any evidence this is actually happening; I just want to make sure that it does not start.

3. **"Separate filing" requirements of CM/ECF:** Because of the technical requirements of CM/ECF, the chapter 13 "combo" plan implemented years ago will very shortly no longer be acceptable. In other words, very soon a chapter 13 debtor will have to file as separate documents the plan, and any motions to value collateral, void liens, assume or reject executory contracts, etc. The certificate of service, notice of deadline, order granting (or confirming) or denying, etc. will also have to be filed separately for

each of those items. ~~Some goes for multiple claims objections in, say, chapter 11 cases; you the attorney (or, more likely, the attorney's paralegal or secretary) will have to make a separate docket entry for each claim objected to.~~ The chapter 13 trustee's office will be conducting a set of "brown bag" CLEs on the new form chapter 13 plan that will address this issue, but bottom line, the court has to implement this change to conform with CM/ECF. (Note: none of this is intended to change the procedures whereby the first confirmation hearing on a chapter 13 plan is a final hearing for Judge McFeeley's chambers *for ABQ, SF and Farmington cases* and a preliminary hearing for Judge Starzynski's chambers *and for ROS and LC cases for Judge McFeeley.*)

4. **Case numbers:** One of the problems with CM/ECF is that it does not have enough "fields" in the case number to tell us what part of the District the case is assigned to. In consequence we can no longer tell just by the case number whether the case is one assigned to Albuquerque, Roswell or Las Cruces, which makes a difference when we give you a hearing date on a motion for stay relief or other motions. If you can tell us when you call which location it is, we can give you a date more quickly; otherwise, we will look it up while you are on the phone and then give you the date, which will take more of your time (and ours).

5. **Addresses in employment orders:** CM/ECF needs to have an address in order to send an order, or other items filed in the case, to persons employed in the case. So if you send in an order to employ an accountant, for example, make sure to include the accountant's address in the order so that person can be associated with the case. On the other hand, a trustee seeking to employ herself or himself as an attorney in the case need not include her or his address, since she or he is already associated with the case (and since the address appears anyway in the signature block).

6. **When CM/ECF (or your filing system) goes down:** Regardless of what day or time of day (or night) it is, if you are trying to access CM/ECF and it appears to have gone down, go to the Bankruptcy Court's main web page for instructions on what to do. Click on "Electronic Services", "then on "Procedures", then on "Electronic Filing Procedures – required reading", and go to § 6.5. (Go to the same place if the problem is that your system has gone down.) Our records show that CM/ECF is seldom down unintentionally (and we announce when we take it down intentionally), but in those rare instances when it is, the procedures outlined will help you deal with the problem so you don't miss any filing deadlines.

7. **"Lost" e-mail notices from the court:** If you suspect that you are not receiving all the e-mail court notices you are supposed to be receiving, check with your internet service provider ("ISP") to ensure that the ISP's spam filters are not trapping those notices. At least two attorneys that we know of have had this problem. Once we have sent out the requisite notice, we consider the notice to have been delivered, and it is your responsibility to make sure the notice traverses your e-mail system and gets to you. One clue that there is a problem is that you have multiple e-mail addresses at which you

are supposed to receive the notices (a device we recommend that you employ) and you do not receive the notice at every address.

8. **13W Calendar:** My chambers (“13W”) is going to begin using different calendar software as of April 1, 2007. One effect of this change is that there may be a period of time, while we are making the transition and getting the new calendar running correctly, when the 13W calendar is not publicly available and displayed on the 13W web page. We will do our best to make that “dark” stretch as short as possible.

And it has recently come to our attention that some people have been relying on the calendar function that comes with CM/ECF to determine if they have a hearing, or what hearings are set before me, etc. **DO NOT RELY ON THE CM/ECF CALENDAR FOR 13W.** It is not complete, at least in part because it relies on some sort of CM/ECF event in order to register a new setting. For example, if we give an attorney a hearing date by telephone and the attorney does not file a notice of hearing (note: that means filed on CM/ECF, not just mailed or e-mailed out to other parties in the case), there will not be a record of that hearing date on the CM/ECF calendar. So, even when 13W “goes dark” for some period, you should not rely on the CM/ECF calendar.

9. **Settlements or going directly to a final hearing:** If you settle a matter, or if you decide to go directly to a final hearing on a stay motion, be sure and notify us as soon as reasonably possible. That means that, for example, if you have a preliminary hearing on a contested motion scheduled for a Monday morning and you get it resolved the previous Friday evening at 6.00 pm, please call chambers (505.348.2420) and leave a message for us telling us that. That will enable us to avoid calling you Monday morning. And of course if you settle before the close of business on Friday evening, **BE SURE** to call us, since, as many of you are aware, I often prepare for Monday hearings over the weekend.

10. **Vehicle insurance/motions for stay relief:** I have refined my procedure for dealing with insurance on vehicles in connection with motions for stay relief. See 2002 YIR, ¶ 12:

In a motion for stay relief concerning non real estate collateral, if there is an allegation of no insurance, the proof of insurance must be attached to the answer (it is not enough to merely deny the allegation) or provided to the creditor’s counsel before or at the preliminary hearing.

Otherwise, I modify the stay at the preliminary hearing.

With the passage of time, I have found that this rule could work unfairly, as when the debtor has the insurance but the attorney has simply failed to provide proof of it to the creditor’s attorney timely. What I am now requiring is that the creditor have some basis for asking for proof of insurance, after checking its own files. In other words, if an examination of the creditor’s files would disclose that the vehicle is insured, then the creditor should not be asking for proof of insurance. On the other hand, if the creditor has examined its own files and has good reason to think that the vehicle might not be

insured, it is entitled to raise that issue in the motion for stay relief. The bottom line is that the creditor should have the assurance that its collateral is insured, but this requirement ought not to be used merely to trap the debtor into losing the protection of the automatic stay. How this translates into practice is that if the creditor has asked for proof of insurance in the motion, and the debtor has not provided it prior to the preliminary stay hearing but insists that he or she has had the insurance coverage in question all along, I will ask the creditor's attorney if the creditor has searched its files before making the request. If the creditor answers "yes" and that the search did not disclose the proof of insurance, I reserve the right to modify the stay at that point.

11. **Trial exhibits:** You should be prepared to pick up your trial exhibits shortly after any decision has been rendered. In particular, keep in the mind that when we dispose of trial exhibits, we do not shred them. Thus, if the trial exhibits contain confidential information such as social security numbers, financial information, or other information of a confidential or private nature, you will want to make sure you get them back to assure yourself of adequate disposal.

12. **Corrected or amended e-mailed orders:** Occasionally someone sends in an order that turns out to be in need of correction. As soon as you discover that you have done that, e-mail us immediately with a statement to that effect in the subject line, preferably in capital letters. If you do it quickly enough, we may be able to save ourselves the trouble of reviewing an incorrect order, or even of entering it and then having to enter a corrected order.

13. **Form of agreement to serve as trustee's counsel:** Attached is a copy of a form of agreement which one attorney uses when representing a trustee on a contingency, quantum meruit, or regular hourly basis. It seemed to me when I reviewed this agreement that it was both concise and comprehensive. No one should feel compelled to use this form, of course, but it struck me that having it more widely available for inspection might be useful.

14. **Let someone know if you are unhappy with how we are doing our job:** Keep in mind that if you have any comments, suggestions, complaints, etc. about how I am doing my job, or about anything else, you are welcome to drop by chambers, or send an e-mail or a letter, or communicate with us in any other way. And that includes using the Clerk of Court or Professor Fred Hart at UNM Law School, if you want anonymity. See my chambers web page for details if you need them.

Stay orders and obtaining consent of the trustee: the ch 7 no asset docket text arising from the conclusion of the §341 meeting does not constitute an abandonment (look at §554), and therefore you need the consent or default of the trustee for stay relief in the absence of a specific abandonment.

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December 7, 2006

Philip J. Montoya, Esq.
320 Gold Ave. SW. Ste. 1200
Albuquerque, NM 87102

Re: Representation of Chapter Seven Trustee: In re: Reyna Guadalupe Pacheco, 7-06-11940 SA

Dear Mr. Montoya:

This letter will serve to confirm that you are requesting that we represent you in connection with the above-referenced matter, and to confirm the terms of such representation. You have asked us to investigate, and possibly pursue, various potential recovery claims for the estate, and to be available for other estate related legal work that may arise in your administration of the estate. Due to the fact that there are no funds in the estate at present, and the fact that there are not likely to be any such funds unless we are successful in recovering funds on potential avoidance or recovery actions, we have agreed to undertake recovery actions on a contingency fee basis. Specifically, we will be compensated by the estate in an amount equal to one-third of the amount actually recovered, plus applicable gross receipts tax thereon. These fees will apply to any amounts recovered, whether by demand, settlement, litigation or otherwise. The court filing fees will be paid out of the estate's share of any such recovery, as will any other costs or out of pocket expenses which we incur. We will not bill the estate for the cost of photocopies, faxes, long distance charges, and the other "office expenses" that are billed under our normal hourly retainer arrangement as the same are incurred in prosecuting recovery actions. If the matter is taken up on appeal of a bankruptcy court decision, our attorney fees will be forty percent of the ultimate recovery.

For purposes of this agreement, our attorney fees will be calculated on the value of the property recovered for the estate if what is recovered is not cash or cash equivalent. If we are successful in preventing allowance of an exemption, our fees will also be based on the value of the asset that would otherwise have been exempted from the estate. Our services will be complete upon entry of a final order avoiding the transfer, or denying the exemption. If we cannot ascertain the value of recovered property at the time it is recovered, the value of a recovery will be presumed to be equal to the gross sale price of the property when the property is sold by the estate, less any mortgages thereon. Thus, we are agreeing that the estate will bear the expenses of sale of property after we

recover it, and that only mortgages will be deducted from the sales price to determine what is recovered for the estate (since non-consensual liens will either be avoided or will be paid through administration of the estate).

In light of past experience, we recognize that the debtor may attempt to convert this proceeding to chapter thirteen, and that other circumstances may arise in which the Court will determine to measure our services and to allow payment therefore on an hourly rate basis. We agree that our fees will, in the event of conversion and ultimate discharge under chapter thirteen, or in the event that our fees are required to be measured on an hourly basis, be charged at the rate of \$215 for myself, \$175 for Ms. Berkson and Ms. Gandarilla, and \$60 for paralegal services. In addition, under such circumstances, our normal costs and expenses will be charged; you will be billed for any (1) out of pocket expenses, (2) copy charges, (3) long distance phone charges, (4) facsimile charges, (5) postage, (6) computer research fees, (7) mileage and per diem charges for travel, and (8) all applicable taxes on any of the foregoing. You will also pay all litigation costs, such as filing fees, service of process fees, witness fees and expenses, transcript or copy fees, abstract or search fees. We have attached a schedule of office expenses for which you will be billed; we have "unbundled" as many of such expenses as practical so that those clients that do not incur such expenses won't have to be charged for them, and won't subsidize our overhead for those that do incur them.

In addition to recovery actions, you may, from time to time, request our services in administering the estate in other ways which do not involve the recovery of property for the estate, and which will not therefore result in a fund out of which to pay a contingency fee. Such "non-recovery" type services will be billed and paid on an hourly basis, pursuant to our normal hourly legal services agreement, which is set out in the preceding paragraph. For purposes of clarification, we will consider that a turnover action is not a recovery action. If any services you wish us to undertake are not clearly "recovery" actions, we will memorialize that they are not being undertaken on a contingent fee basis, or else we will file a supplemental motion to employ setting out the specific actions and the fact that we both consider them to be "recovery" actions, and therefore to warrant a contingent fee service. By noticing out such a supplemental fee application, we will be able to avoid any confusion between ourselves and will avoid objection after the fact from other parties in interest.

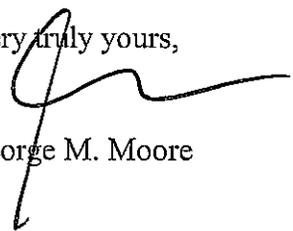
We have agreed to represent you in the above-referenced matter in a competent and ethical manner. We cannot guarantee the outcome of representation, but will always try to keep you advised of our estimate of the probabilities of success or failure, since you will be called on to make decisions based on such estimates, among other factors. You have agreed to cooperate with us in this legal matter, including, among other things, making yourself available for meetings, conferences and hearings, providing us with requested documents or other materials, and keeping us fully informed. We are under an ethical duty to honor and protect your confidence in us; we cannot properly represent you if we are not fully informed, and anything you tell us in confidence is privileged. In most cases we will try to discuss any steps that we are taking with you prior to taking action, but, under certain exigent circumstances we may act without specific authorization if we believe such action is necessary to protect your interests. We have previously provided you with a statement of this firm's privacy policy for your information, if you have any questions regarding our policy, please advise.

When this legal matter is completed, or when we otherwise terminate this attorney-client relationship, we agree to notify each other in writing so that there is no period during which responsibility for this or any other matter is unclear. We will generally retain our files for an appropriate time after a case is closed or a representation is terminated, but ultimately may destroy files not claimed within thirty days after the attorney-client relationship ends. You agree to make written request for return of any materials provided to us within thirty days after notice of termination of representation. If you do not request your file within thirty days after termination of representation, you may incur fees and expenses to retrieve the file from storage. We generally try to copy clients on all substantive pleadings and correspondence; you should maintain a separate file of your since some of the materials you will receive copies of may be needed by you years after representation has been terminated.

We recognize that this engagement is for a bankruptcy estate, and that our fees are subject to court approval. We may file applications from time to time for interim approval of our fees, and, upon completion of this engagement, we will file an application for final approval of our fees, if necessary. You agree to review the applications prior to filing, and to cooperate in seeking court approval of such fees. You will consent to forms of orders approving our fees that call for immediate payment of allowed fees.

We have not made any other agreement regarding the subject of this letter that is not set out herein, or else in some other writing signed by each of us. If this conforms to your understanding of the terms of my representation in this matter, please indicate your approval by signing the enclosed copy of this letter. When you return the signed copy to us and file a motion seeking authority to employ us, this letter and the order of employment will constitute our agreement. We will begin representing you as set out herein upon the filing of the motion to employ.

Very truly yours,



George M. Moore

Approved subject to Bankruptcy Court approval

Philip J. Montoya, Trustee

SCHEDULE OF EXPENSES

- Photocopies: \$.15 per page, if done in office. Large copy jobs are generally contracted out to a copy service, and billed at actual cost.
- Long distance phone: \$1.50 per call, in state
(in addition to time spent) \$2.50 per call, out of state, with calls billed separately from counsel's normal carrier monthly statement (such as conference calls arranged through a conference call center of operator), billed at actual cost.
- Facsimile charges: \$.50 per page, outgoing only
- Postage, and other delivery: Billed at actual cost
- Computer research: As charged to counsel by database access provider, or, if no direct charge to counsel, at a \$50/hr. surcharge over counsel's hourly rates.
- Travel: Actual cost of travel and any accommodations, or IRC mileage rate for travel in counsel's vehicle. Attorney time is billed at one-half of normal rate for travel time unless attorney can actually do legal work during travel time.

Taxes on services and expenses are billed at the NM Gross Receipts Tax rate for Albuquerque in effect at the time payment is made. The rate is currently 6.875%.