

## **JUDICIAL PRACTICES AND PROCEDURES BANKRUPTCY JUDGE JEAN K. FITZSIMON**

Judge FitzSimon was appointed to the United States Bankruptcy Court for the Eastern District of Pennsylvania on June 28, 2006. Judge FitzSimon received her B.A. from St. John's College and J.D. from Notre Dame Law School.

### **PRELIMINARY GENERAL MATTERS**

#### *1. Correspondence with the Court*

Judge FitzSimon generally discourages unsolicited correspondence from counsel and will not consider correspondence that addresses any issue that should properly be raised by motion practice. Judge FitzSimon will, however, occasionally invite and/or direct counsel to report on the status of matters via letters. Counsel may not, by letter, raise or answer substantive issues or seek advice from the Court. Judge FitzSimon's Courtroom Deputy is responsible for scheduling all hearings and trials. Consequently, all correspondence that relates to Judge FitzSimon's calendar must be directed to her Deputy.

#### *2. Communications with Law Clerks*

Judge FitzSimon permits counsel to speak directly with her Law Clerk, subject to the limitations that law clerks are not permitted to give legal advice or discuss the merits of pending cases. The scheduling of trials, hearings and most conferences is the responsibility of Judge FitzSimon's Courtroom Deputy.

#### *3. Telephone Conferences and the Use of Facsimile Machines*

Judge FitzSimon welcomes telephone conferences. A request for a telephone conference generally will not be granted in the absence of a filed pleading, motion or other communication from, or agreed to by, all of the parties. The Judge's Judicial Assistant handles the scheduling of all telephone conferences. All requests for telephonic conferences and/or appearances must be made at least 24 hours in advance. Parties participating in telephone conferences must use a 'land line' telephone; use of cell phones is not permitted.

Judge FitzSimon does not accept facsimile transmissions.

#### *4. Pro Hac Vice Admissions*

Judge FitzSimon prefers that written requests for admission *pro hac vice* be submitted in accordance with Local Bankruptcy Rule 2090-1(c). Oral motion may be made in open court at the time of the hearing or trial. The fee required under Local Bankr. R. 2090-1(c) must be paid whether the request for admission *pro hac vice* is made by written application and motion or by oral motion in open court.

## *5. Chambers Copies of Filed Papers*

In adversary proceedings and Chapter 11 cases, Judge FitzSimon would appreciate receiving chambers copies of documents filed when the exhibits are voluminous. In all other situations, Judge FitzSimon will accept courtesy or chambers copies of filed papers, but stresses to the Bar that this is in no way required absent specific request on her part.

# **LITIGATION GENERALLY**

## *1. Continuances and Extensions*

### *a. General Policy Where Parties are in Agreement*

Judge FitzSimon generally is liberal with requests for continuances where all parties are in agreement. The request should be made through the Judge's Courtroom Deputy by letter, if time permits, or by telephone (except for a request for an extension of the dates in a pretrial order which shall be made by stipulation with the consent of all parties or upon motion to the Court).

### *b. Where the Request for a Continuance is Opposed*

If a request for a continuance is opposed or the matter has been specially listed, Judge FitzSimon expects counsel to raise the issue via a telephone conference call. Otherwise, the request for a continuance should be presented by written motion sufficiently in advance of the hearing to allow the same to be disposed of prior to the originally scheduled date. If necessary, a request for expedited consideration should be made.

### *c. Need for Court Appearance*

Judge FitzSimon may sometimes dispose of a contested continuance request on the papers alone. Counsel will be advised in advance if a court appearance will not be necessary.

## *2. Proposed Findings of Fact and Conclusions of Law*

Judge FitzSimon does not require proposed findings of fact and conclusions of law unless she specifically indicates so at the conclusion of the matter or proceeding in court. Judge FitzSimon will generally permit the filing of same, upon request. Similarly, the Judge welcomes memoranda of law from the parties, and will generally refrain from deciding matters from the bench if the parties desire an opportunity to brief certain issues.

## *3. Reading of Material into the Record*

Judge FitzSimon usually will not permit the reading of substantial material into the record.

#### 4. *Settlements*

##### *a. Settlement Conferences*

Judge FitzSimon encourages settlement discussions and will entertain chambers settlement conferences if all parties in interest agree. However, Judge FitzSimon will participate in such conferences only to the extent it will not jeopardize her role as a fact finder should a settlement not successfully be reached.

##### *b. Referral of Settlement Negotiations to Another Bankruptcy Judge*

When all parties in interest are in agreement and mediation is either inappropriate or has been unsuccessful, a request for a settlement conference with another Bankruptcy Judge will be entertained.

##### *c. Need for Court Appearances*

Settlements should be reported promptly to Judge FitzSimon's Courtroom Deputy and, if the matter is under advisement, also to her Law Clerk. The necessary motions to seek court approval must be filed pursuant to Federal Bankruptcy Rule 9019 and local rule, as applicable. An objection to a proposed settlement will require a court appearance.

#### 5. *Form Orders*

When a debtor files a motion either for expedited consideration of a matter or to avoid a lien pursuant to 11 U.S.C. § 522(f)(1)(A) or (B), the proposed order granting the relief should be in the form as set forth on the attached orders. The form orders are also found on the court's website.

## **UNCONTESTED MATTERS**

Judge FitzSimon will enter orders in response to a timely filed certificate of no objection. To avoid appearance at the scheduled hearing, counsel should contact the Courtroom Deputy at least 24 hours prior to the hearing.

Certain matters require an appearance notwithstanding the absence of a filed answer or other response. They include:

1. Motions to withdraw as debtor's counsel;
2. Motions to reconsider or vacate orders;
3. Objections to proofs of claim. Depending on the nature of the objection, the applicable burden of proof may require a record to be made notwithstanding the absence of a response by the claimant;
4. Motions to sell property pursuant to §363;
5. Motions requesting that a dismissal order include provisions which restrict the filing of a new bankruptcy case or which provide in rem relief;
6. Motions for default judgments in adversary proceedings.

Counsel may request permission to appear by phone on such uncontested matters, particularly if counsel is located away from the vicinity of the courthouse. Such requests should be directed to the

Judge's Courtroom Deputy well in advance of the scheduled hearing date, and will be considered on a case-by-case basis. Parties participating telephonically must use a 'land line' telephone; use of cell phones is not permitted. Counsel should obtain opposing counsel's consent to appear telephonically prior to contacting the Judge's Courtroom Deputy.

## **CONTESTED MATTER PRACTICE AND PROCEDURE**

### *1. Scheduling Contested Matters*

Upon the filing of a motion and answer or response to the motion in a contested matter, if presenting evidence or argument is anticipated to take thirty (30) minutes or longer, the parties are required to notify Judge FitzSimon's Courtroom Deputy of the need to schedule a specially listed hearing. The matter will then be taken off the regular docket and be specially listed by the Judge's Courtroom Deputy or by court order.

### *2. Scheduling of Expedited Hearings*

Local Bankruptcy Rule 5070-1 governs motions for expedited hearings. In matters in which relief is requested that directly affects one or more specific respondents, consistent with the Local Rule, Judge FitzSimon ordinarily will not grant or schedule an expedited hearing unless the movant's counsel confers with the respondent(s)' counsel regarding their consent to an expedited hearing and their availability for the requested expedited hearing. Counsel should submit an order in the form set forth on the attached sample expedited form order. Counsel are strongly encouraged to notify the Courtroom Deputy by telephone that a motion for expedited consideration will be filed.

### *3. Filing Memoranda of Law/Briefs*

#### *a. Before Hearing*

Judge FitzSimon will consider pre-hearing briefs but they are not required.

#### *b. After Hearing*

Memoranda are required only if a briefing schedule has been established at the conclusion of the proceedings in Court. Parties desiring to submit post-hearing memoranda ordinarily will be permitted to do so.

#### *c. Reply and Surreply Memoranda/Briefs*

Reply and surreply memoranda/briefs will be permitted if approved in advance, generally at the time a briefing schedule is established.

#### *d. Length of Memoranda/Briefs*

Unless otherwise permitted by the Court prior to filing, memoranda and briefs must be no more than 25 pages long.

### *4. Rule 52(c) Motions*

Such motions are permitted under Fed.R.Bankr.P. 7052 and 9014.

*5. Examination of Witnesses or Argument by More Than One Counsel*

Judge FitzSimon will permit more than one attorney for a party to examine a witness or argue different points of law if permission is asked in advance and under appropriate circumstances.

*6. Examination of Witnesses Beyond Redirect and Cross*

Judge FitzSimon rarely will permit further examination of a witness after cross and redirect have been completed.

*7. Presentation of Evidence*

*a. Use of Rule 43(e) Affidavits*

When an expert witness will be providing an appraisal, Judge FitzSimon generally requires counsel to submit the expert's written report in lieu of direct examination. *See In re Adair*, 965 F.2d 777 (9th Cir. 1992). The expert report must be served upon opposing counsel prior to the hearing/proceeding and the expert must be available at the hearing/proceeding for cross-examination and redirect examination.

For other witnesses, Judge FitzSimon will generally permit the use of Rule 43(e) affidavits in lieu of testimony: (i) upon agreement of counsel; or (ii) where out-of-town witnesses are involved and cross-examination can be held via telephone conference call.

*b. Marking of Exhibits and Number of Copies*

Exhibits must be premarked and exchanged with opposing counsel at least one full day prior to a hearing or trial. The courtroom will be open for the marking and recording of exhibits by the Judge's Electronic Sound Recorder ("ESR") one hour prior to a hearing or trial. Counsel needs the original for the witness and should have a copy of the exhibit for every other party present. When the exhibits are particularly numerous, a binder and index may facilitate the trial. A bench copy of exhibits is appreciated, but is not required absent advance notice thereof. If any party objects to the Court viewing an exhibit during the trial, the Court will refrain from doing so until the objection is resolved or the exhibit's admission is resolved.

*c. Offering Exhibits in Evidence*

Exhibits should be offered at the conclusion of the party's case-in-chief. Parties are encouraged to stipulate as to admission on exhibits prior to trial.

*d. Need for Presentation of Evidence if Uncontested*

If the moving party must demonstrate "cause" for relief, or if the moving party requests that findings be made, evidence may be required even though the motion is uncontested if the Court is unable to make such findings on the basis of the pleadings alone. In appropriate circumstances, the Judge will accept a proffer or affidavit.

## **ADVERSARY PROCEEDINGS**

### **1. *Discovery Matters***

#### **a. *Length of Discovery Period and Extension***

A pretrial order will be entered in all adversary proceedings and certain contested matters establishing a discovery deadline. A copy of Judge FitzSimon's standard pretrial order is attached. Extensions of the deadlines generally will be given upon submission of a stipulation by consent of all parties or cause shown.

#### **b. *Discovery Conferences and Dispute Resolution***

Judge FitzSimon will entertain conference calls for the purpose of resolving discovery disputes. Requests for sanctions may be made only by written motion when counsel have attempted but are unable to resolve them.

#### **c. *Confidentiality Agreements***

Judge FitzSimon will approve confidentiality agreements or orders subject to the limitations of statutory and common law.

#### **d. *Expert Witnesses***

Judge FitzSimon requires the advance identification of expert witnesses in the joint pretrial statement to be prepared in conformity with her standard pretrial order (copy attached). When an expert witness will be providing an appraisal, Judge FitzSimon requires counsel to submit the expert's written report in lieu of direct examination. See *In re Adair*, 965 F.2d 777 (9th Cir. 1992). The expert must be available at the hearing/proceeding for cross-examination and redirect examination.

#### **e. *eDiscovery***

The pretrial order entered by Judge FitzSimon requires that all electronic discovery issues be addressed by the parties as part of the Rule 26 discovery conferences.

### **2. *Pretrial Conferences***

Final pretrial/settlement conferences will typically be scheduled in the pretrial order. However, Judge FitzSimon may enter a form of pretrial order which schedules an initial pretrial conference or status hearing. The Judge will entertain requests for other pretrial conferences by phone or otherwise as the circumstances warrant.

### **3. *Joint Pretrial Statement***

Prior to the final pretrial/settlement conference, and by a date specified in the pretrial order, the parties are directed to submit a joint pretrial statement. Judge FitzSimon's pretrial order sets forth detailed and

specific instructions for completing the joint pretrial statement, which should be completed cooperatively and timely. Failure to submit a timely or adequate joint pretrial statement may result in delay in the adversary proceeding's trial calendar and/or in the Court ordering the parties to revise the joint pretrial statement.

#### *4. Filing of Trial Memoranda and Briefs*

##### *a. Pretrial*

Each party may file a pretrial memorandum with the Clerk of Court provided it is served on opposing counsel and a courtesy copy is delivered to chambers at least five business days prior to the trial date.

##### *b. Post-trial*

Post-trial memoranda are necessary only when specifically requested by the Court; however, Judge FitzSimon liberally will approve requests from the parties to submit the same. The schedule for briefing will generally be established at the conclusion of the trial. In cases in which a transcript is being ordered by a party or parties, Judge FitzSimon will generally permit the briefing schedule to commence after receipt of the transcript in the regular course of business.

##### *c. Reply and Surreply Memoranda and Briefs*

The complete briefing schedule ordinarily will be established at the conclusion of trial proceedings. Briefs not otherwise identified at that time should not be submitted.

#### *5. Mediation*

The pretrial order will ask counsel to consider participation in the mediation program. If all parties agree, a mediator will be assigned. If the parties do not identify a proposed mediator in their communication to the Court indicating their willingness to mediate, the Court will appoint a mediator from the approved list of mediators. Judge FitzSimon will not insist that the parties attempt mediation against their will, nor does she require parties to explain a decision not to participate in mediation. Mediation will not suspend any of the deadlines established in the pretrial order except upon written request of the parties.

#### *6. Briefing Schedules for Motions*

Dispositive motions in an adversary proceeding (dismissal, summary judgment, etc.), other than motions for expedited consideration, which are discussed above, shall not be scheduled in accordance with the system for self-scheduling motions in contested matters. When filing a dispositive motion in an adversary proceeding, counsel should not assign a hearing date to the motion. After a response to the motion is filed, a hearing date will be assigned by the Judge, and counsel will be notified.

## **ARBITRATION**

#### *1. General Approach to Arbitration*

Proceedings will be assigned to compulsory arbitration in accordance with Local Bankruptcy Rule 9019-2.

## *2. Scheduling of Trial De Novo from Arbitration*

Once a trial *de novo* is demanded, Judge FitzSimon generally will issue a pretrial order directing the filing of a joint pretrial statement and setting a date for trial.

# **TRIAL PROCEDURE**

## *1. Scheduling of Cases*

Motions are assigned a hearing date in accordance with Local Bankruptcy Rule 5070-1. Adversary proceedings are assigned a trial date after the pretrial/settlement conference in accordance with the pretrial order.

## *2. Matters Involving Out-of-Town Parties or Witnesses*

Judge FitzSimon endeavors to be as flexible as possible in matters involving out-of-town parties or witnesses when scheduling trials. Counsel should make the Court aware of such circumstances in the joint pretrial statement as required by the pretrial order.

## *3. Side Bars*

Side-bar conferences are discouraged but will be entertained when necessary.

## *4. In Limine Motions*

Judge FitzSimon's pretrial order contains a deadline for filing of such motions.

## *5. Opening Statements and Summations*

Judge FitzSimon will permit opening and closing statements, but will sometimes suggest that the same be waived where pretrial memoranda have been submitted and/or post-trial memoranda are contemplated.

## *6. Examination of Witnesses Out of Sequence*

Judge FitzSimon will permit counsel to examine witnesses out of turn if all parties consent or for the legitimate convenience of the witness.



## *7. Videotaped Testimony*

Judge FitzSimon will permit the use of videotaped testimony to the extent agreed to by all parties or as allowed by the Federal Rules of Bankruptcy Procedure. Arrangements to have equipment set up in the courtroom and/or cleared through security should be done in advance by contacting the Courtroom Deputy.

# **INJUNCTIONS**

## *1. Hearings on Motions for Temporary Restraining Orders or Preliminary Injunctions*

Hearings on motions for temporary restraining orders or preliminary injunctions are viewed and scheduled in the same manner as requests for expedited consideration in contested matters. Requests for expedited discovery are treated in the same fashion.

Requests for expedited discovery should be filed and served upon opposing parties. Courtesy copies of all filed documents seeking expedited relief should be sent to chambers. The requests will be determined summarily after opposing parties have had a reasonable opportunity to respond.

## *2. Proposed Facts and Conclusions of Law*

Judge FitzSimon generally requires such submissions unless the parties are informed otherwise.