DOES ANYBODY EVEN NOTICE? [1]

Chief U.S. Bankruptcy Judge Terry L. Myers

This note addresses a recurring problem in litigation: the use (and sometimes abuse) of judicial notice. An example shows how it might arise.[2]

Debtor's counsel:	**"Your Honor, we'd like the Court to take judicial notice of the file, particularly our last amended budget, and also our schedules . . . oh, and also that affidavit my client filed last month."**
Trustee:	**"No objection, Judge."**
Creditor's counsel:	**"No objection here either."**

Implicit in this debtor's request is the idea that, through such judicial notice, he will establish material facts in a manner other than or in lieu of testimony or affirmative documentary evidence admitted at the hearing. After all, this is litigation; each party is presumably trying to get a ruling in its favor based on the facts, however proven, and the law.

However, simply because *something* is *somewhere* in the Court's file does not make the factual assertions in that something properly admissible evidence. Judicial notice is not a magic cure-all. "In other words, the invocation of [judicial notice] does not relieve a party of the duty to gather, organize, and present evidence to the court." *Manix Energy, Ltd. v. James (In re James)*, 300 B.R. 890, 896 (Bankr. W.D. Tex. 2003).

Chief Bankruptcy Judge Barry Russell of the Central District of California is the author of a respected and often-cited work on bankruptcy evidence. He states:

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[1] "Does anybody even notice? Does anybody even care?" *Dawn's Lament*, BUFFY THE VAMPIRE SLAYER – ONCE MORE WITH FEELING (Soundtrack, Rounder Records 2002).

[2] While I've taken some literary license, this scenario actually was played out earlier this year.

> Bankruptcy judges are frequently asked to take judicial notice of a variety of facts, relevant to the determination of the proceeding, and which are not the subject of reasonable dispute. The usual method of establishing the facts in litigation is through the introduction of evidence, ordinarily through the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process may be dispensed with as unnecessary; a high degree of indisputability is the essential prerequisite. Judicial notice is therefore a substitute for formal proof.

Hon. B. Russell, *Bankruptcy Evidence Manual*, 2004 Ed., § 201.1 (hereafter "*Russell*").[3]

"Judicial notice" is a term of legal art. Use of the term, even casually, invokes Federal Rule of Evidence 201. That rule provides:

> **Rule 201. Judicial Notice of Adjudicative Facts**
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> **(a) Scope of rule.** This rule governs only judicial notice of adjudicative facts.
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> **(b) Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
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> **(c) When discretionary.** A court may take judicial notice, whether requested or not.
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> **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
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> **(e) Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
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> **(f) Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.
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> **(g) Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the

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[3] Judge Russell's work, running over 1600 pages with appendices and addressing matters under each of the Federal Rules of Evidence, is a trove of information and compiled authorities. I freely acknowledge that the majority of the case citations in this note were first found in *Bankruptcy Evidence Manual*.

> court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Fed. R. Evid. 201.

Since Rule 201(a) limits judicial notice to *adjudicative facts*, what qualifies? "Adjudicative facts are simply the facts of the particular case." Fed. R. Evid. 201, Advisory Committee Notes. These facts usually answer the questions of "who did what, where, when, how, and with what motive or intent" and are roughly the kind of facts "that normally go to the jury in a jury case." *Id.* (citation omitted).

The further restrictions of Rule 201(b) – that the adjudicative fact must not be subject to reasonable dispute because it is either generally known in the jurisdiction or, alternatively, is readily capable of determination by reference to unquestionably accurate sources – emphasize the types of *facts* that can properly be judicially noticed. Some examples illustrate what sorts of facts might meet the Rule's limitations:

- that foreclosure sales in Georgia took place, pursuant to statute, between 10 a.m. and 4 p.m. the first Tuesday each month.[4]
- that there were 36 weeks between March and December excluding July and August.[5]
- that spring includes the months of March, April and May.[6]
- that a certain city was located within a particular county.[7]

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[4] *Geibank Indus. Bank v. Martin (In re Martin)*, 97 B.R. 1013, 1020 (Bankr. N. D. Ga. 1989).

[5] *Holman v. Farmers Home Admin. (In re Holman)*, 26 B.R. 110, 112 (Bankr. M.D. Tenn. 1983).

[6] *In re Goetz*, 43 B.R. 849, 850 (Bankr. W.D. Wis. 1984).

[7] *Slone v. Integra Bank (In re Int'l Bldg. Components)*, 159 B.R. 173, 180 (Bankr. W.D. Pa. 1993), reconsideration denied 161 B.R. 764, 766 (Bankr. W.D. Pa. 1993) (citing *U.S. v. Wentz*, 456 F.2d 634, 635-36 (9th Cir. 1972)).

• that the Presidio in San Francisco is under federal jurisdiction.[8]

See generally Russell at § 201.2; § 201.8. Frankly, many of the "facts" parties regularly ask courts to judicially notice could never satisfy the requirements of subdivisions (a) and (b) of the Rule.

Note that Rule 201(c) allows the Court to take judicial notice (at any time, even after hearing) if it so chooses. But the thrust of my comments concern instead a party's request for judicial notice during litigation. That request falls under Rule 201(d).

Importantly, this provision requires the Court to take notice "if requested by a party *and supplied with the necessary information.*" Fed. R. Evid. 201(d). Unfortunately rare is the hearing where a request for judicial notice is accompanied by a document, other material, or even an express and concise oral statement of the *fact* to be proven by such notice. Merely complying with the requirement to "suppl[y] . . . the necessary information" and going through the pre-hearing process of identifying what is going to be handed up to the bench, will serve to alert the lawyer to the important question of whether the *something* she wishes to be judicially noticed is an essentially indisputable, adjudicative fact properly falling within the Rule.

Any trial lawyer knows that pitfalls await the unprepared. Once encountered, judicial notice is rarely a remedy. For example, in the following case, a chapter 13 debtor objected to a mortgagee's claim and, in particular, to the creditor's use of the contract rate of interest. She did not succeed in introducing into the record evidence of a different, allegedly appropriate local market rate. The court commented:

> The record is therefore devoid of any evidence regarding market rates of interest offered by home lenders at the time the Debtor filed her bankruptcy. Nor are we at liberty to "pursu[e] copies of the Philadelphia Inquirer" in an attempt to

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[8] *Volk v. United States*, 57 F.Supp.2d 888, 893 n.2 (N.D. Cal. 1999).

> determine market rates of interest at the time the Debtor's bankruptcy petition was filed despite Debtor's invitation that we do just that.
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> Finally, although we have not been asked to do so, we cannot take judicial notice of any market rate figures because such are neither "facts" "generally known" within this jurisdiction, nor "facts" "capable of accurate and ready determination by resort to sources where accuracy cannot reasonably be questioned." Federal Rule of Evidence 201(b). We doubt that even the Philadelphia Inquirer itself would lay claim to status as a source whose reliability, particularly in its advertisements, could not be questioned.

In re Harned, 166 B.R. 255, 259 n.3 (Bankr. E.D. Pa. 1994) (citations omitted).[9]

Often the matters counsel wants to have judicially noticed are found or mentioned somewhere in the Court's files. That's certainly the case in the scenario I first used above. This raises some additional problems and concerns.

The request that the Court "take judicial notice of its files" is commonly, and often erroneously, made. *Russell* comments:

> It is generally accepted that a bankruptcy judge may take judicial notice of the bankruptcy court's records. . . .
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> What then, is meant by taking judicial notice of a court's own records? There exists a mistaken notion that it means taking judicial notice of the truth of facts asserted in every document in a court file, including pleadings and affidavits. However, a court may not take judicial notice of hearsay allegations as being true merely because they are part of a court record or file. It is difficult to understand why the filing of a document with a court should magically result in the contents of the document attaining a sufficient degree of reliability to overcome evidentiary objections such as hearsay to its admissibility in a trial before a bankruptcy judge.

Russell at § 201.5.

Is there some "adjudicative fact" – highly indisputable and generally known in the jurisdiction or capable of ready reference to an unquestionably accurate source – lurking

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[9] *But see Stein v. JP Morgan Chase Bank*, 279 F.Supp.2d 286, 290 (S.D.N.Y. 2003) (judicial notice taken of published prime rate).

somewhere in the Court's files? Maybe so (and what a helpful thing it is that the lawyer is ready to supply it as Rule 201(d) requires).[10]

Perhaps the time of filing of the petition is at issue, critical to the question of perfection of a lien filed some other time that same day. This "adjudicative fact" could possibly be established by judicial notice of the petition in the Court's file with the clerk's filing stamp on it.[11] Sometimes, a material fact is whether a debtor or a creditor did or did not file a pleading or claim, or the date of such an act.[12]

But rarely is the question this simple. More commonly, the proponent of notice wants to establish more than just "what has or has not been filed and the outcome of previous proceedings before the court" which are the sorts of things that "are properly noticed because they are beyond dispute." *Russell* at § 201.6. Thus, in my not-so-hypothetical example earlier, it is doubtful that the debtor just wanted the Court to judicially notice the fact that he filed an amended budget. It is more likely that something in the budget must be proven because it is critical to the debtor's

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[10] There really is no good reason not to have the material available to provide the Court in accord with Rule 201(d). First, it focuses the proponent's attention on the "fact" he wants to prove. Second, the integrity and clarity of the record is preserved for review. Third, as *Russell* notes, "It is a rare judge who will stop the proceeding in order to send his clerk in search of such a court record." *Id.* at § 201.4. *See also In re Tyrone F. Connor Corp.*, 140 B.R. 771, 782 (Bankr. E.D. Cal. 1992) ("[T]he Court will not rummage through the Court files [to] take notice. . . . It is not [the] Court's function to lay a record for the lawyers involved in this case."), *followed by In re Hillard Dev. Corp.*, 238 B.R. 857, 864 (Bankr. S.D. Fla. 1999).

[11] *In re Brown*, 37 B.R. 516 (Bankr. E.D. Mo. 1984).

[12] *Johnson v. Internal Revenue Service (In re Johnson)*, 210 B.R. 134 (Bankr. W.D. Tenn. 1997) (taking notice of deadline for filing proofs of claim); *Alofs Mfg. Co. v. Toyota Mfg., Ky., Inc. (Matter of Alofs Mfg. Co.)*, 209 B.R. 83, 96 (Bankr. W.D. Mich. 1997) (notice taken that two chapter 11 debtors filed separate cases and the same had not been substantively consolidated); *In re Walters*, 188 B.R. 582, 583 n.1 (Bankr. E.D. Ark. 1995) (notice taken that debtor had not sought to amend chapter 13 plan); *Pruitt v. Gramatan Investors Corp. (In re Pruitt)*, 72 B.R. 436 (Bankr. E.D.N.Y. 1987) (notice taken of absence of an adversary proceeding filed by the trustee).

case. But this stretches Rule 201 too far:

> While a bankruptcy judge may take judicial notice of a bankruptcy court's records, *see* Fed. R. Evid. 201(c), . . . we may not infer the truth of the facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court.

Staten Island Sav. Bank v. Scarpinito (In re Scarpinito), 196 B.R. 257, 267 (Bankr. E.D.N.Y. 1996) (citing *Russell* § 201.5) (citations omitted). Similarly:

> [T]he Court notes that judicial notice of the hearsay assertion contained in the Debtor's bankruptcy schedules . . . is not permitted under . . . Fed. R. Evid. 201(b)(2). As this Court has previously noted, the actual truth of the assertions contained in a Debtor's bankruptcy schedules cannot readily be ascertained and such assertions are not the proper subject of judicial notice.

In re Leslie, 181 B.R. 317, 322 (Bankr. N.D. Ohio 1995). *See also Tyrone F. Connor Corp.*, 140 B.R. at 781-82.

Generally speaking, if the proponent of judicial notice is trying to establish as a fact some assertion found in a pleading, the use of Rule 201 is flawed and should be rejected.[13]

Nevertheless, it is still clear that evidence may properly be found in the Court's record. A prime example are the assertions debtors make in the schedules and the statement of financial affairs they sign and file in a case. This result arrives *not* by way of the vehicle of judicial notice but, instead, is based on the proposition that statements made under penalty of perjury in bankruptcy schedules and statements may be treated as non-hearsay statements or admissions under Fed. R. Evid. 801.[14]

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[13] Of course, it would be proper to establish factual matters through, for example, an admission in an answer, or a response to a request for admission. Even so, the other comments herein regarding the *effective* use of judicial notice remain relevant.

[14] *Russell* categorizes some cases as reflecting "harmless error" (*i.e.*, the courts incorrectly or improperly took judicial notice of facts asserted in debtors' schedules, but the information would have been properly considered as admissions in any event). *Id.* at § 201.9. In others, improper judicial notice was not merely a question of "no harm, no foul". *Id.* at § 210.10.

Rule 801 provides definitions relative to the hearsay rule and its exceptions. Under Rule 801(a), a "statement" includes both oral and written assertions. The debtor is the "declarant" insofar as written assertions in the schedules and statement of financial affairs are concerned. Fed. R. Evid. 801(b).

According to Rule 801(d)(1), a prior "statement" of a witnesses is not hearsay. This subdivision applies where "[t]he declarant testifies at the trial or hearing and is subject to cross-examination[.]" The next subdivision, entitled "admission by party-opponent," includes additional statements which are not hearsay. *See* Fed. R. Evid. 801(d)(2). Unlike Rule 801(d)(1), nothing in Rule 801(d)(2) expressly or implicitly limits its application to oral statements.

Rule 801(d)(2) makes a "a statement . . . offered against a party" non-hearsay if it is (A) the party's own statement, in either an individual or representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth. Fed. R. Evid. 801(d)(2)(A), (d)(2)(B).

So, a non-debtor may seek to admit, as evidence (and, usually, as impeachment evidence), a prior written statement of the debtor found in his bankruptcy schedules. Such a statement is a Rule 801(d)(2) admission, because it is the debtor's own statement and, by swearing to its accuracy (under penalty of perjury) and filing it with the Court in support of the request for bankruptcy relief, the debtor has "manifested an adoption or belief in its truth."

One example of the interplay between Rules 201 and 801 is found in *Weatherbee v. Willow Lane, Inc. (In re Bestway Products, Inc.)*, 151 B.R. 530 (Bankr. E.D. Cal. 1993). Bankruptcy (and BAP) Judge Christopher Klein there discussed at length the concept of a court taking judicial notice of its records, noting that part of the process goes to the question of

establishing the genuineness and authenticity of documents. *Id.* at 540. However:

> The fact that the documents are genuine does not mean that the court can automatically accept as true the facts contained in such documents. Unless they relate to a preliminary question of admissibility as to which the rules of evidence (other than privilege) do not ordinarily apply, or are not adjudicative facts, statements therein must be admissible under the Federal Rules of Evidence.
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> In this instance, the statement is offered against Weatherbee and is his own statement. Accordingly, it is not hearsay. Fed. R. Evid. 801(d)(2). Because it pertains directly to the issue [before the court], it is relevant and admissible.

Id. at 541 (citations omitted). Another court commented, in a similar vein:

> The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the *existence* thereof, and the taking of judicial notice of the truth or falsity [of the] *contents* of any such document for the purpose of making a finding of fact.
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> However, the verified Schedules and Statements filed by a debtor are not just pleadings, motions or exhibits thereto. They are evidentiary admissions. *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985). *See*, Fed. R. Evid. 801(d)(2) (Admission by a party opponent not hearsay).

In re Earl, 140 B.R. 728, 730 n.2 (Bankr. N.D. Ind. 1992). This Court has validated the use, as evidence under Rule 801, of debtors' assertions in schedules. *In re Webb*, 03.1 I.B.C.R. 25, 26 (Bankr. D. Idaho 2003); *In re Kaskel*, 269 B.R. 709, 715, 01.4 I.B.C.R. 139, 141-42 (Bankr. D. Idaho 2001).

Returning to the opening hypothetical, the debtor cannot "prove up" plan feasibility or other factual aspects of his amended budget by simply asking for judicial notice of this document, even though it is in the Court's file. Nor are his assertions in the schedules established as "adjudicative facts" by their mere presence in the file. But while it might seem unfair to this debtor, the trustee or creditor might well ask the Court to consider the debtor's prior written assertions as "admissions" under Rule 801(d)(2). Of course, this only occurs when those assertions are inconsistent with the position later advanced by the debtor at the hearing or

are otherwise damaging to the debtor's case.

And some additional comment can be made regarding the affidavit the hypothetical debtor wanted the Court to consider. First, recall that outside of summary judgment proceedings, disputed factual issues may not be adjudicated based on affidavit.[15] Second, the preceding discussion should make one leery of the idea that, simply because an affidavit was once filed, any assertions of "adjudicative fact" therein can be established through judicial notice.[16]

In sum, there is more to the question of judicial notice than first meets the eye. The rather casual approach to judicial notice taken by some attorneys should be avoided. Certainly attempts to streamline litigation make good economic sense, and the Court encourages them. But, if the attempt to use judicial notice is flawed, and if there is no other affirmative evidence on the point presented at hearing, the result is wasted effort, an incomplete record and likely a losing cause. Some planning and forethought about what might properly be subject to judicial notice, how and when to request such notice, and how to best provide the material to the trier of fact, will pay off handsomely. Sure, it's more work. Then again, no one said it would be easy.[17]

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[15] *See* Fed. R. Bankr. P. 9014(d) (addressing contested matters and providing that "Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.").

[16] And, though it may not be a problem with the affidavit of this hypothetical debtor, testimonial assertions in affidavits are always subject to a showing that there is a proper foundation for that witness to make them. *Esposito v. Noyes (In re Lake Country Invs.)*, 255 B.R. 588, 594-95, 00.4 I.B.C.R. 175, 176-77 (Bankr. D. Idaho 2000) (refusing to consider attorney's affidavit based on lack of personal knowledge).

[17] "No one said it would be easy. But no one said it'd be this hard." SHERYL CROW, *No One Said It Would Be Easy*, TUESDAY NIGHT MUSIC CLUB (A&M Records 1993).