

CHAPTER 13 PRACTICE TIPS

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Below are some chapter 13 practice tips offered here to enhance the day-to-day working relationship of the trusteeships, the court, and counsel. At first reading, it may appear that this list of tips serves only to make life easier for the trusteeships. In fact, these items impact trusteeships, the court, and counsel in equal measure. *If you follow this system (and insist that your clients do so), you will make your own work life much easier, happier, and less stressful.*

This list of practice tips have been previewed by each chapter 13 trustee in the district. They are presented in no particular order of importance.

1. What Your Client Needs to Bring to You Before You Can

Prepare the Petition and Schedules – This is not an exhaustive list but these are documents and things which you either will or may need to provide to your chapter 13 trustee, if he requires them or asks for them. *(There are minor differences in what each of the trustees requires; if you do not know, ask.)* The debtor is anxious to get your help and therefore is more willing and eager to give you whatever you need to provide that help early in the

case than at any other time. So, it is easiest and best to give the debtor one written list of everything you will need. If your office does not have such a list, prepare one and determine when it is best given to your client or prospective client. This will also help ensure that you make the “reasonable inquiry under the circumstances” which Rule 9011 requires before a petition, schedules, and Statement of Financial Affairs can be filed.

Here is a list of the things which the trustee may require you to provide to him prior to the § 341 meeting¹ or at the

meeting. (For some of these items, such as pay stubs, you may need more information from the debtor than the trustee requires to be able to properly prepare the case for filing.)

a. Picture Identification and Original Proof of Social

Security Number. Both must be originals; photocopies not accepted. Your client *must* bring both to their Meeting of Creditors. If they do not have them, their §341 meeting cannot be held. Acceptable photo ID’s include: driver’s license, government or employer ID, State picture ID, student

¹ Exhibit 5 describes the various documents John Logan’s chapter 13 office would like debtors’ attorneys to provide at least 5 business days prior to §341 meetings, in relation to requests for plan payment waivers, motions to modify plans, and requests for plan payoffs, and when and how to provide each. Attorneys who are doing this will attest that their § 341 meetings take very little time and the amount of work they and their staffs must do after these things are provided is minimized.

ID, U.S. Passport, military ID, resident alien card.

Acceptable SS # verification includes: Social Security card, medical insurance card, W-2 form, IRS 1099 or 1098 form, Social Security Administration Report, original letter from IRS or NCDOR if it contains both name and complete SS #.

- b. Pay Stubs.** Each debtor's pay stubs (a/k/a payment advices) received from the 60 days' prior to the petition date (the trustee may require that they be updated through the day of or day before the § 341 Meeting, so we suggest that you have your client bring any paystubs not previously given to you to their §341 meeting to be given to you at that time).
- c. Tax Returns.** For each debtor, copies of (i) any timely filed extensions of time to file income tax returns [e.g. NCDOR Form D-410, and IRS Form 4868), and (ii) the most recent State (Form D-40) and Federal (Form 1040) Income Tax Returns filed, *with* copies of *all* W-2's, Schedules, or Forms filed as part of the returns].
- d. Domestic Support Obligations ("DSO's").** For each DSO, a copy of the state court order or separation agreement (or both, when an order incorporates the terms of a separation agreement or modifies a prior agreement or order). [DSO is

defined in § 101(14A); generally alimony, child support or any obligation in the nature of either, established by a court order or separation agreement].

2. Petition Preparation – It is very helpful to include as much information as possible in the petition.

- a. Motor Vehicle Identification.** Include make, model, year, mileage, and VIN #. All are important to the trustee determining the NADA value of the vehicle.
- b. Real Property.** Include an address or a rural address and include acreage and any other information which is relevant to determining the value of the property (e.g., debtor’s residence, debtor’s business property, rented commercial property, unimproved lot in _____ subdivision, farmland, unimproved land with timber, etc.).
- c. Valuation** – Local Rule 1007-1(c) **requires** that, “[i]f a value is stated for property listed in [any of Schedules A through J] the method of valuation used **shall be identified,**” (e.g., tax value, debtor’s opinion, purchase price 2006, appraisal dated _____, etc.).

d. Plan Drafting.

(i) *Model Plan*: Please use the court's Chapter 13 Model Plan.

The Local Form for this plan (and all other Local Forms) may be found at the Clerk's Web site

(www.nceb.uscourts.gov), specifically at:

<http://www.nceb.uscourts.gov/newcode/local.php>.

(ii) ¶ 13. of *Model Plan*: Include any information important to the trustee's, court's, or creditors' understanding or the debtor's execution of the plan which is not otherwise specifically included in the plan you file in ¶ 13. (e.g., regular monthly mortgage payment, debtor approved for HAMP modification, etc.)

(iii) Be sure to provide for assumption or rejection of all unexpired leases or executory contracts. This includes cell phone contracts, residential leases for a term (whether as lessee or as landlord) (need not include month-to-month contracts, but you may need to schedule the other party as a creditor), debtors' existing contracts with other attorneys such as attorneys representing the debtor in relation to a pending personal injury or Social Security disability claim, or a divorce or custody action (*and* be sure that any such

claims or assets or pending actions are appropriately scheduled and included in the debtor's Statement of Financial Affairs, as appropriate).

(iv) Sufficient Monthly Plan Payment: Be sure that the monthly payment you propose in your client's plan is sufficient to pay: (1) equal monthly payments on secured debts which you propose be paid periodic payments through the plan [§1325(a)(5)(B)(iii)], (2) your attorney's fees, particularly if you want your fees paid within the first 12 months of the plan; NOTE: this may result in a "step plan" – a plan with a higher payment during the first 12 months and a stepped-down payment later in the plan, and (3) be sure to include interest on secured claims *and* the trustee's commission, calculated at 6% on all money disbursed.

e. Creditor Address. Include a *complete* mailing address, including ox number or street number (and Suite No., if applicable), and zip code for *every creditor*.

f. SOFA Details. Be sure to provide detailed answers to every question in the Statement of Financial Affairs ("SOFA"), and pay attention to the time periods for which answers are

requested. For example, ¶ 1 requests details about gross income from (i) the beginning of the calendar year to the petition date, and (ii) for each of the two prior years for each debtor. If the debtor had no income whatsoever during one of those years explain why rather than not providing any information. Be sure to list all transfers, payments, etc. with all the detail requested for each separate payment or transfer during the time period covered. Repayment of debt during the 90 days pre-petition and particularly during the year prior to the debtor's slide into bankruptcy to insiders [as defined in § 101(31)(A); mother, father, sibling or other relative or business partner] are relatively common, and should be disclosed in detail. Other transfers or a debtor's sale of assets during the slide into bankruptcy is not uncommon either, so be sure to include any appropriate transfers or sales in ¶ 10. Also, be sure to disclose all gifts covered by ¶ 7 (the threshold amounts are fairly low here; this also specifically includes total charitable contributions itemized by organization; if the debtor's B-22-C or Schedule J includes \$200 per month in charitable contributions to their church, it is unlikely that nothing would be listed for that church in ¶ 7).

g. Verification by Client. Make sure each client reads the entire petition and every line of all Schedules and the SOFA before signing the Verification (they are verifying *under penalty of perjury* that everything is true and correct to the best of their knowledge, information, and belief... we can all make mistakes in preparing documents but you need to make *very clear* to your client how important the verification is and that the consequences of a false verification can be very serious (such as prosecution by the U.S. Attorney, if any false statement or omission is determined to be serious enough to warrant such action; this will help ensure any mistakes are caught before filing). Being careful to cover this in detail and perhaps even getting a signed statement for your client for your file that they have reviewed every line and answer and that all are true and correct after making inquiry and reviewing records, may well protect you down the road.

h. Noticing Purposes Only. Many petitions are filed listing many claims as “for noticing purpose only”. These claims are sometimes entries pulled from the client’s credit report and may not be relevant to the case. Credit reports also often include numerous errors which no one has bothered to

correct. **“Over-noticing” is very costly** to your office, the trustees, and the court, and it may not be necessary to list some of these ‘creditors’. Ask your client, and make notes in your file from your discussion with the debtor(s): did the debtor actually incur the debt? How long ago was the debt incurred? Has the statute of limitations on collection run? Has the debt been paid off? Was that loan sold to another creditor who is also listed and will be scheduled? If a revolving account (like a credit card), when did the debtor last use it (if more than three years collection might be barred by the statute of limitations)?.

- i. **Mortgage Claims.** It is ***very important*** to indicate the contractual, monthly mortgage payment, the amount of the pre-petition arrearage (include foreclosure fees and costs, if appropriate... usually about \$1,700.000, and whether taxes and insurance are escrowed. (There’s more about mortgage claims below.) Mortgage holders seldom file claims prior to the §341 meeting (or even by the bar date), and the trustee cannot determine whether the plan proposed is feasible if the amount of the debtor’s monthly payment is not included. If

Comment [JFL1]: I think this is a judgment call for the attorney, and is something we should avoid giving legal advice about.

not shown elsewhere, list each monthly payment amount and all relevant details in ¶13. of the Model Plan.

- j. Homeowner's Association Dues.** Be sure to include any delinquent pre-petition homeowner's association dues which must be cured, and it is **very important** to make very clear to your client that all post-petition homeowner's association dues (which are post-petition obligations and therefore collection, i.e., foreclosure is not prevented by the automatic stay) must be paid in a timely manner every month or quarter they are due.

3. Plan Payments and Payroll Deduction -- Be sure to make very clear to your client that:

- a. Due Date.** The debtor's first plan payment to the trustee is due (this means must be received in-hand by the trustee) on the first calendar day of the month after the day your office files the petition, **and**
- b.** They must continue making their plan payment on the first calendar day of every month thereafter until all plan payments have been made.
- c. No Grace Period.** It is NOT okay to tell your client, "you'll be okay as long as you pay your plan payment by the end of the

month.” Within days after the §341 meeting in most cases the trustee will be preparing and filing a motion to dismiss if the debtor is not completely current with plan payments, if the debtor has not agreed to a feasible plan (and appears able to make those payments), and has not provided the trustee everything he needs (most recently filed State and Federal tax returns, pay stubs, DSO orders, etc.). You may reassure Social Security recipients (who receive their checks on the 3rd or 4th day of the month) that as long as they send their plan payment to the trustee as soon as their Social Security payment is deposited in their account every month, their payment will be considered made on time.

Another important point about monthly plan payments is that if the trustee does not have the month’s plan payment in-hand by his cutoff date (usually about the 5th), he will not be able to disburse funds to the creditor that month (this is particularly important with respect to mortgage payments). The debtor will not only get behind with the trustee but will begin accruing post-petition late charges on secured loans with respect to which the trustee cannot disburse a payment during the month the payment is due. The “administrative

arrears" is only designed to protect the debtor from the disbursement delay for the two month's delay in disbursements between the petition date and the disbursement date following confirmation.

- d. Counsel Your Client about the First Plan Payment.** It is also important to counsel your client about the need to be saving up money to be able to pay the first plan payment on time and to stay on track from the beginning. This is particularly important if: (a) you must file the petition on one of the last days of the month and the first plan payment will then come due in only a day or two, and (b) if you file the petition on the 1st or 2nd and the debtor, not being in the habit, is likely to forget that they must begin making plan payments a month later.
- e. Correct Plan Payment Address & Payment:** Be sure to: (i) give your client the correct address to which their plan payments should be mailed, (ii) tell them to make payments payable to "Chapter 13 Trustee," (iii) tell them to put their SSN or Case Number on the memo line of each payment, and (iv) tell them that if they bounce a personal check to the trustee they will lose the privilege (and convenience) of

making payments by personal check for the remainder of their case. The plan payment address may be different than the address on the trustee's Payroll Deduction Request Form (see, ¶ f., below, and Exhibit 1) or the trustee's office address. Mr. Stubbs' debtors, for example, must mail their plan payments to his bank's drop box in Memphis, TN.

- f. **Payroll Deduction.** Payroll deduction is **the single best thing your client can do** to ensure they complete their plan and get a discharge (except, no payroll deduction for attorney fee only cases). It is also the best way to ensure that you get paid for all the work you're doing for the client. Encourage all clients to pay the trustee by payroll deduction. If the client has a regular job (i.e., is not self-employed) and gets a regular, periodic paycheck, or is in the military or receives military retirement income, they can do payroll deduction. Attached as Exhibit 1 is a payroll deduction form for your use with the trustee in your client's case. Go ahead and get the information from them at their initial visit or when they review and sign the petition and schedules. It is **very important** that you make crystal clear to them that the **trustee cannot send a Payroll Deduction Order** to their

employer until he files a motion to confirm the debtor's plan. So, be sure to tell your clients they must continue making direct payments from the time the case is filed until they see a deduction from their paycheck for a full month's worth of paychecks. For joint debtors, determine *what percentage of each monthly payment* will come out of each debtor's paycheck (*percentage is important because the monthly plan payment amount may change by the time the plan is confirmed*). Send the payroll deduction request to the trustee after the case is filed or give it to him at the §341 meeting. Note that the address on the attached payroll deduction request form may be different than the plan payment address (e.g., Mr. Stubbs' plan payments must be mailed to a lock box in Memphis, TN).

4. Preparation for § 341 Meeting of Creditors -- After the petition is filed and *at least 5 work days prior to the § 341 meeting date:*

a. Documents. If the trustee needs to receive documents and information from the debtor prior to the meeting (see, e.g. trustee document requirements in Exhibit 5 for John Logan's office), when you receive the §341 meeting notice, tickle your

calendar for 5-7 working days prior to the meeting date to send all necessary documents. This helps the trustee's staff work up your client's case for the § 341 meeting accurately and will make the § 341 meetings go *much* faster. The case is also more likely to be ready to be confirmed as soon as the meeting has been held if all documents and information have been received prior to the meeting.

If the trustee does not want documents until the time of the meeting, be sure you have all the documents which need to be provided at that time.

b. Bar Dates & Filing Claims for Debtors. Tickle your calendar for the claims bar dates (regular and governmental) to check and see if you need to file a claim for a creditor who must be paid but has yet to file a claim [e.g., DSO pre-petition arrearage claim, priority tax claim, mortgage claim, co-debtor protect claim, or student loan claim (if unsecureds are going to receive a dividend)]. If a claim is not *timely* filed, the trustee cannot pay it.

c. Interpreters. Advise the trustee when the case is filed (or as soon as possible thereafter) if your client will need an interpreter to be provided for §341 meeting so he can make

appropriate arrangements in advance. The trustee covers the cost of any necessary interpreter as an operational expense. It is also acceptable for the debtor to bring a friend or relative who is bi-lingual and who can interpret for the debtor, the trustee, and creditors, but you must make that person aware that they will be required to take an oath that they will completely, accurately, and truthfully interpret the proceedings.

The trustee does not provide an interpreter for the Financial Management Class provided free of charge to debtor's prior to their §341 meeting. And, while attendance at such class is generally a prerequisite to holding the § 341 meeting, if an interpreter is necessary, the trustee will waive such requirement and conduct the §341 meeting. The debtor may also bring a friend or relative to interpret the meeting if desired, but if a debtor with an English language impediment does not attend the class provided by the trustee, it is important that you make clear to the debtor that he or she cannot receive a discharge after completion of the plan without first attending "an approved instructional course concerning personal financial management described

in §111, as per §1329(g)(1). There are approved financial management instruction providers who provide such services online.

d. Pre-meeting Client Contact. Contact your client sometime during the 5-7 days prior to their §341 meeting and remind them (this is as much as anything to ensure you are not inconvenienced by the debtor failing to do what is required of them):

(i) of the date for the Financial Management Class and §341 meeting,

(ii) the location of the meeting,

(iii) they must be sitting in class not later than 9:00 a.m. (or they will not be permitted to enter the class late, and their §341 meeting will not be held; tell them to plan ahead for travel time, parking issues, etc., and suggest they arrive by 8:30 a.m.),

(iv) they must bring an original picture I.D. and original proof of their SSN, both issued by a third party with reason to have the info.,

- (v) if not already provided, they must bring the financial account statements, tax returns, DSO order/separation agreement, and any other necessary information,
- (vi) if the debtor has a post-petition DSO obligation, ask if he or she is current with that obligation since filing and reiterate the importance of remaining current (if a support payment is due the 1st of each month, and if that payment is not made for that month by the time of the meeting, the debtor is not current with the obligation – no grace period),
- (vi) the debtor must bring any pay stubs not previously provided to you,
- (vii) the debtor should bring payroll deduction information, if not previously provided, and
- (vii) they must bring any plan payment which is due but has not yet been paid (otherwise they and you can expect a motion to dismiss the case within a few days after the meeting).

e. Need to Continue Meeting? If you know the scheduled §341 meeting needs to be continued, be sure your client has paid any plan payment due prior to the meeting which has

not yet been paid, and file a motion to continue the meeting as soon as possible so the trustee does not do unnecessary work for a meeting which will not be held until a later date.

5. After the §341 Meeting of Creditors – Within one or two days provide any information the trustee which was not provided at or before the meeting (or expect to receive a motion to dismiss the case within a few days after the meeting).

6. The Importance of Timely Confirmation, Getting Tax Returns Filed, Getting Mortgage Claims Filed, and the Effect of Your Client's Delay on Next Year's Tax Return -- The trustee cannot start making disbursements to creditors until (1) the creditor has filed a claim, and (2) after the debtor's plan is confirmed. Mortgage creditors are notoriously slow about filing their claims and sometimes about attaching appropriate supporting documentation. You may have to file a properly documented claim for them under LOCAL RULE 3004-1. Another potentially serious problem for your client is that if they delay confirmation because they have not yet filed a tax return which was due (even if not past due) when the case was filed, this could substantially increase their post-petition tax liability for the next tax year. Because the trustee cannot disburse mortgage

payments until after the claim holder's claim is filed and the case is confirmed, the mortgage lender might not receive many months' mortgage payments during the year they are due. If the lender does not receive any monthly mortgage payment due during a given year, they are also not receiving the portion of each month's payment which is applied to the interest obligation on the loan. Consequently, for debtors who itemize deductions on their tax returns, once December 31 comes and goes, the plan has not been confirmed for a case filed early the prior year, and the debtor's tax year is closed, the debtor may have a very big tax problem when the IRS form 1098 which they are accustomed to receiving from the lender before they file the return due the following April 15 may reflect substantially less interest, and hence much less of a deduction to itemize, than they have been accustomed to. If the debtor has not planned for this, they may face a much higher post-petition tax bill than they are able to pay. It is not uncommon for a subsequent § 1305(a)(1) claim filed by the IRS or NCDOR to torpedo the debtor's plan.

7. Proposed Orders Allowing Motions – When you submit a proposed order granting the relief requested in a document, as

required by LOCAL RULE 9072-1, it is important that the order submitted track the language in the document, and that the ordering language matches the prayer for relief in the document, neither adding to or excluding the relief requested.

8. Motions to Modify Plan –

a. What must be included? Because Form B-22-C does not apply to plan modifications and because of the U.S. Supreme Court's decision in *Hamilton v. Lanning* (see below also), you must provide to the trustee (but you need not file with the court) at the time you file the motion to modify: (i) a current, revised Schedule I & J verified by your client as true and correct, (ii) a copy of each debtor's most recently filed Federal income tax return (with all W-2's, Schedules, Forms, or other attachments) for the last tax year which ended on or before the date the motion is filed, and (iii) copies of each debtor's two most recent pay stubs. If not provided, expect the trustee to object to the motion.

b. Calculating Necessary Plan Modifications. Frequently, debtor's counsel will call the trustee to ask the trustee to figure a plan modification if the debtor should decide to give up some property or for some other reason. This is too much

to ask. We just can't stop work to refigure a plan modification that may not get filed. [**For Logan's office only:** *after* (and only after) you have finished working up the modified plan, but before the motion to modify is filed, please e-mail (ctodd@ralch13.com) or call Cindy Todd (ext. 105), and run your proposed plan by her; we prefer your confirming that it works after you've done the work but before you file the motion so that if it needs to be tweaked for some reason you may not know, we can let you know that and avoid additional, later work for both you and us. Cindy's going to have to check it for feasibility after you file the motion anyway, so it's better that we all do as much in advance as possible to ensure you get it right the first time. Be sure to send the documents required by Exhibit 5 too.]

- c. If You Didn't File a Motion to Modify but Should Have.** If the trustee properly disburses under a confirmed plan, he will not take action to recover money properly disbursed (i.e., don't attempt a retroactive modification if you failed to earlier modify a plan but should have done so as a way of trying to require the trustee to recover funds he's already properly disbursed); and

d. Lift of Stay or Client Changes Mind after MFC Filed but before Confirmation? If the stay is lifted on secured

collateral after the trustee has filed a motion for confirmation or after plan confirmation, look at whether a motion to modify the plan is needed [see, ¶ (c)(5) of new LOCAL RULE 3070-2, Exhibit 4]. If your client changes her mind and decides she wants to surrender her house rather than keep it *after* the trustee has filed a motion for confirmation but before an order confirming plan has been entered, file a Motion to Modify Plan Before Confirmation under § 1323. *The trustee will not withdraw his motion for confirmation, change it, and re-file it because of some change he had nothing to do with and could not anticipate.* If the stay is lifted or a debtor's financial situation substantially changes after confirmation making it necessary to modify the plan to surrender secured collateral, do it under § 1329.

9. Preparations for the Motions Calendar -- Please try and deal with your share of the motion calendar as early as possible, preferably 3-5 days prior to hearing. File motions to continue with proposed order allowing the motion at least 2-3 working days in advance of hearing. If you don't, you'll cause yourself a

lot of unnecessary stress, and you'll cause the trustee, the court, and their staff to do a lot of otherwise unnecessary work in the preparation of detailed hearing worksheets which the trustees are required to prepare and deliver to the court a day or two prior to hearing in relation to every matter set for hearing in any of their cases. If you know a matter is not going to be heard when scheduled, or if you intend to withdraw a motion, objection, or response to a motion, or if you know a consent order will be submitted please let everyone know in advance so our staff does not spend unnecessary time preparing, and the court does not spend unnecessary time reviewing, such worksheets.

a. Consent Orders. Proposed consent orders resolving motions to dismiss should be submitted to the trustee prior to the hearing by fax with a signed order placed in the mail. **[For Logan's office only:** Send proposed consent order in MSWord format by e-mail only (do not fax) to Nancy Burton at nburton@ralch13.com with your signature conformed (/s/); if acceptable, Nancy will conform the trustee's signature, convert to .pdf, and

upload for entry; if not acceptable, she will return with suggested revisions.]

b. Never Assume Consent. Never assume that the trustee will consent to a continuance. Give his office a call or e-mail prior to the hearing.

10. Hamilton v. Lanning Decision – The U.S. Supreme Court’s June 2010 decision on the *Hamilton v. Lanning* case allows the court some discretion to look at changes in the debtor’s future income to determine projected disposable income. If you have a case where the proposed plan does not meet the PDI requirements of the Form B-22-C, be prepared to show to the trustee some proof of the debtor’s reduced income. If you believe an adjustment to CMI or PDI is appropriate based on the case, be prepared to provide a detailed explanation and evidence to support your position.

11. Proofs of Claim. For those of you who file claims on behalf of creditors who fail to do so – be careful to:

- a.** fill out the claim completely,
- b.** make sure the claim is signed, AND includes a printed or typed name of a contact person and a phone number, and

- c. make sure you've attached necessary supporting documentation to the claim (most importantly, proof of perfection of the creditor's security interest.

FED. RULE BANKR. PRO. 3001(d) requires that evidence of perfection of the creditor's security interest must be attached to the claim. 11 U.S.C. § 1325 only allows payments under a confirmed plan (whether by the trustee or a debtor, if the debtor's making direct payments) to creditors who hold "allowed claims." Under §502(a), an "allowed claim" is a claim that is properly and timely filed. For secured claims, to be properly filed, evidence of perfection of the creditor's security interest *must* be attached. If your client has a copy of the invoice, bill, contract, or promissory note that should also be attached [FED. RULE BANKR. PRO. 3001(c)].

- (i) *For Motor Vehicles:* You can get a certified copy of copy of the title history on a debtor's vehicle by completing and mailing to the NCDMV a Form MVR-605A (a filled-in sample and a blank for are attached as Exhibit 2) (you may fill in the form online and print the completed form by going to:

http://www.ncdot.org/download/dmv/VR_MVR605A.pdf,

and mailing a \$10.00 check, payable to NCDMV, to the address at the bottom of the form. [NOTE: ALL DMV Official Forms may be found at:

<http://www.ncdot.org/dmv/forms/>.

(ii) *For Real Property*: You may find online, at the appropriate county Register of Deeds' Web site, a copy of the deed and deed of trust for your client's property to be attached to the claim. Be sure that the copy of the Deed of Trust attached shows the Registrar's recordation date stamp, and Book and Page where recorded. Also, be sure the deed of trust has not been canceled or released (an attorney or certified paralegal should check this).

Here are some helpful County Register of Deeds URLs (found by entering into a Google or other search window, e.g. "Wake Register of Deeds") :

Wake: <http://services.wakegov.com/booksweb/genextsearch.aspx>

Vance: <http://vancencrod.org/welcome.asp>

Granville: <http://www.granvillecountydeeds.org/resolution/>

Lenoir:

<http://cottweb.co.lenoir.nc.us/external/LandRecords/protected/SrchQuickName.aspx>

New Hanover: <http://srvrodweb.nhcgov.com/localization/menu.asp>

Cumberland: <http://www.ccrodiinternet.org/welcome.asp>

- d. On mortgage proofs of claim *do not include*, as part of the arrearage, the two months admin. claim. The trustee's staff will take care to add this, as appropriate.

MORE ON MORTGAGE CLAIMS & NEW LOCAL RULE 3070-2

1. Paying Residential Mortgages Through Plans.

- a. **Generally Required and New LOCAL RULE 3070-2:** As a general rule, all mortgage claims secured by real property which is a chapter 13 debtor's principal residence and which the debtor intends to keep and pay for (as opposed to surrender) must be paid through a confirmed chapter 13 plan via trustee disbursements. Initially, this was required by an Administrative Order entered by the court on November 5, 2009, which established this rule in all chapter 13 cases filed on or after January 1, 2010. The Local Rules Committee has long been working on drafting a Local Rule to recommend to the court for entry

concerning these payments, known as “Conduit Payments”. That proposed LOCAL RULE, RULE 3070-2, has been delivered to the Court by the Committee with the recommendation that it be adopted. The court is expected to discuss the proposal at a Bench Meeting prior to this Seminar, and we expect to have more up-to-date information about the status of the proposal at the time this Seminar is held. A copy of proposed LOCAL RULE 3070-2 (referred to hereinafter as the “RULE” or “RULE 3070-2”) is attached as Exhibit 5. **Read this Rule very carefully several times.** No single local bankruptcy rule enacted in this district has undergone so much study, scrutiny, and drafting revisions by so many experienced debtors’ and creditors’ attorneys, trustees, and judges as this one, and we believe it is very tightly conceived and well-drafted. It does, however require your attention to detail.

LOCAL RULE 3070-2 does not change the basic structure of our practice over the last two years under the November 5, 2009, Administrative Order, but it does include some details which were not addressed in the Administrative

Order and it is also written to dovetail nicely with other Rules, including specifically FEDERAL RULE OF BANKRUPTCY PROCEDURE 3002.1, effective December 1, 2011 (more about this new RULE below).

Here are some provisions of LOCAL RULE 3070-2 which stand out:

- i.** ¶ (b) requires that all residential conduit mortgage payments be disbursed by the trustee, but sub-¶ (2) allows being excused from this requirement via trustee discretion (more about that below) or court order;
- ii.** ¶ (c) addresses changes in residential conduit mortgage payments, required notices related to changes, when the change takes effect, and that post-confirmation plan modification may be accomplished by consent order between the debtor and trustee if no other creditor or party in interest is adversely affected;
- iii.** No disbursement until a claim is properly filed [¶(c)(3)];

- iv.** ¶ (c)(4) addresses how the trustee handles short plan payment receipts;
- v.** ¶ (c)(5) addresses the consequences of stay relief;
- vi.** ¶ (d) addresses the Real Property Creditor’s many responsibilities;
- vii.** ¶ (e)(1) addresses the effect of plan completion on conduit mortgage claims and that the trustee must file and serve the RULE 3002.1(f) notice;
- viii.** ¶ (e)(2) addresses mortgage payments made directly by the debtor;
- ix.** ¶ (e)(3) addresses a Real Property Creditor’s deemed admission resulting from failure to file and serve a RULE 3002.1(f) response in a timely manner;
- x.** ¶ (e)(4) addresses motions to deem current or for determination of a final cure;
- xi.** ¶ (f) addresses service requirements, including that all service to the trustee by a Real Property Creditor under ¶ (d) must specifically be addressed “Attn: Mortgage Claim Administrator.”

2. The Trustees' View of Why Conduit Payments Work Well.

The reasons and needs for chapter 13 trustees to monitor, make disbursements on, and police residential mortgage claims are many, and this trend has been growing steadily across the country over the last five years. The primary reasons are rampant abuses in the residential mortgage and residential mortgage servicing industry including sale and resale of such loans in securitized investment trusts at such a rapid pace that proper documentation and perfection of security interests have often failed to keep pace with the speed at which the sales or transfers happen. This resulted in an exponential increase in creditors' and loan servicers' errors in not properly accounting for and posting payments to loans, and the pressure to ensure that such flipped investments produce projected investment returns has resulted in the posting of improper and unauthorized additional charges to debtors' loan balances by some loan servicers. It became all too common, in the day when debtors' plans routinely provided that debtors' make post-petition mortgage loan payments directly, for debtors to have timely made all the post-petition payments due, all plan

payments to the chapter 13 trustee when due (so that the payments received could be disbursed the same month they were paid), and the trustee having cured all pre-petition mortgage arrearages, only for the debtor to receive a letter from the lender or loan servicer within less than a month post-discharge, threatening foreclosure if the debtor did not immediately pay all of the many thousands of dollars the lender/servicer alleged were in default. It just couldn't be, or at the very least, shouldn't be when both the debtor and trustee had done everything properly! Consequently, it was also becoming more common for debtors' attorneys to re-open cases and file actions, such as declaratory judgment adversary proceedings, to trace both payments made and charges posted to the debtor's account to determine whether (and how) the debtor could be so delinquent. As you can imagine from your experience of dealing with either debtors' or creditors' records related to mortgage loans, and from our now collective knowledge of rampant abuses and mismanagement in the mortgage loan and servicing industries, the ensuing process was a tangled mess! A good example of such a case is found at *In re: Adams*, 2010 WL 2721205 (Bankr. E.D.N.C. (2010))

Humrickhouse, J., aff'd., Case No. 5:10-CV-340-BR (Jan. 24, 2011) Britt, J. If the debtor's fresh start, achieved after so many years of laboring under a confirmed chapter 13 plan, was to have any real meaning for the debtor, then something had to be done to fix the problem.

Dealing with the continuous monitoring and management of post-petition mortgage loans is time consuming and labor-intensive. Accordingly, because the chapter 13 trustee is accustomed to dealing with large numbers of claims and cases has many more well-trained, specialized staff members than most law offices, has a nationwide network of chapter 13 trustees who likewise deal with the same issues and have contacts across the mortgage industry, and keeps detailed records of all receipts and disbursements in every case which are independently audited each year, the trustees have an economy of scale driven efficiency in their operations and a level of accuracy in their financial case records which make them the logical party to manage mortgage claims in the most efficient, cost-effective manner.

It is also worth noting that although RULE 3070-2 (and the court's administrative order, which we expect to be superseded

by the new RULE) mandates payment through the plan for mortgage loans secured by the debtor's principal residence, other mortgage loans may voluntarily be paid through the plan. This will depend on the facts of your case and what you and the debtor determine is best for the debtor.

If the debtor's Mortgage Loan is paid as a Conduit Payment, and if the debtor makes all payments due under his or her confirmed plan and the plan is completed, the trustee will prepare, file, and serve the notice required by RULE 3002.1(f), and will include the total amount due as of a specific date identified in the notice, as per LOCAL RULE 3070-2(e)(1). This, in essence, will be what has previously been the procedure covered by the trustee's motion to declare mortgage current. If the debtor has been excused from the requirements of LOCAL RULE 3070-2 and has been paying the payments directly, LOCAL RULE 3070-2(e)(2), requires the debtor to file and serve any notice permitted under RULE 3002.1(f), and such notice must be verified by the debtor. It is important to note that debtors' counsels' duties under Rule 9011 apply to these notices. Will your client have kept good enough records to enable you to file and serve such a verified notice? This potential issue and the fact that the

trustee's filing of the RULE 3002.1(f) notice for conduit mortgages does not require additional work in your office and will not cost your client any additional fees.

If you have ever had to contact a mortgage lender or servicer about any sort of loan or payment accounting problem, you have most likely had to spend countless hours speaking to one person after another and explaining the problem over and over, sometimes making no progress in the process. Trustees are able to avoid such delays not only through experience and contacts, but we also have (and those who create the problems know that we have) at our fingertips everything needed to prove exactly how and why the problem should be corrected as quickly as possible – or else! Unfortunately, your clients cannot usually provide you with all the necessary information and records you need in as well-organized a bundle as a chapter 13 trustee at the click of a mouse, and the claim holders and loan servicers know that.

3. New FEDERAL RULE OF BANKRUPTCY PROCEDURE 3002.1, effective December 1, 2011.

On December 1, 2011, an important new rule, FEDERAL RULE OF BANKRUPTCY PROCEDURE 3002.1, will become effective in all cases, including those filed before that date. A copy of the new rule is attached as Exhibit 4. The new rule deals with new notices which must be given in relation to claims secured by a security interest in the debtor's principal residence. The rule applies only to claims secured by the debtor's principal residence. To summarize, the new rule requires:

- a.** A mortgage claim holder must file with the court and serve on the debtor, debtor's counsel, and the trustee notice of any mortgage payment change at least 21 days prior to the change;
- b.** Within 180 days after they are incurred, a mortgage claim holder must file with the court and serve on the debtor, debtor's counsel, and the trustee an *itemized* notice of any fees, expenses, or charges that were *incurred after the case was filed* which the holder asserts it can recover against the debtor or the residence; (such charges incurred pre-petition

should be included in the creditor's claim, and you can require that they be itemized);

- c.** The debtor or trustee have one year after service of a notice to contest the charges asserted by filing a motion asking the court to determine whether they must be paid;
- d.** After the debtor makes the last plan payment the trustee must file and serve on the claim holder, the debtor, and debtor's attorney a notice that the debtor has paid the last amount necessary to cure any default on the claim holder's claim paid through the plan (the debtor may file and serve this notice if he believes the last payment has been made and the trustee doesn't do it in 30 days – such as if there's a dispute between the debtor and trustee about whether the last payment necessary has, in fact, been paid);
- e.** The claim holder can respond to the notice but must itemize what the holder contends remains due to fully cure, and any response must be filed as an amendment to the holder's claim;
- f.** The debtor or trustee can file a motion in reply to the claim holder's response, asking the court to decide whether and to

what extent the debtor has cured or whether additional amounts are due;

- g.** If the claim holder does not do something the Rule requires, the court may prevent the claim holder from presenting any evidence about their assertions or may “award other appropriate relief, including reasonable attorney’s fees and expenses.”

This new rule, in addition to the trustee’s policing of the claim holder’s claim, creates strict requirements for claim holders and will do a lot to help ensure that claimants cannot attempt to later claim that amounts due which were added to a debtor’s loan without the debtor’s or the trustee’s knowledge cannot be collected after a debtor makes all plan payments, even if the debtor is not eligible for a discharge at the end of the case (such as if the debtor fails to comply with all post-petition requirements of a domestic support obligation).

4. When Can a Debtor Propose to Pay a Residential Mortgage Directly?

There are circumstances in which the trustee is now permitted under the Administrative Order and will be permitted under proposed LOCAL RULE 3070-2(b)(2) to allow a debtor to

continue making post-petition residential mortgage loan payments directly. One reason for not providing that such a loan be paid through a plan might be that the debtor's non-filing spouse, who's also obligated on the loan has always made all the loan payments on time, and he or she does not want the post-petition disbursement delay between the petition date and the trustee's first post-confirmation disbursement to adversely effect the non-filing spouses credit report in relation to late payments. There are also reasons why a debtor (and a non-filing spouse) might want to pay post-petition residential payments (or other mortgage payments) through a plan, even if all pre-petition payments were paid on time. The trustees are in agreement as to the standards to apply to allow post-petition direct payments to continue. If your client meets all the requirements to allow continued direct payment, you or the attorney should discuss with your client (and perhaps a non-filing spouse) what's best. Here's what's necessary and what you must provide to the trustee if your client wants to be excused from the requirement that post-petition residential mortgage payments be paid through the debtor's plan:

- a.** If the trustee is shown proof that the debtor was not obligated on the loan secured by the debtor's principal residence, the claim will not be paid through the plan because there is no "claim" to be paid as "claim" is defined in § 101(5);
- b.** The amounts due on the loan on which the debtor is an obligor must have been paid in full by the due date for the three (3) payments due pre-petition;
- c.** The specific amounts and specific dates of those three (3) payments must be included in ¶ 3.a. of the Statement of Financial Affairs;
- d.** The proposed plan must specifically provide that the payments will be made directly or that the plan does not provide for the mortgage loan in the plan;
- e.** The trustee may require that the debtor provide documentation of relevant facts including documentation or proof of how and when the three (3) payments due pre-petition were made (such as by providing a bank statement or the front and back of a cancelled check for each payment); and

f. If the mortgage loan holder files a claim showing that any of the three (3) pre-petition payments were not timely paid, the trustee can require that the post-petition payments be included in the plan and disbursed by the trustee.