THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: December 21, 2012

Honorable Pamela Pepper
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

IN RE: GLORIA E. LOCKETT, 12-20115-pp

Debtor. Chapter 13

ORDER DENYING MOTION OF DEBTOR'S COUNSEL FOR PAYMENT OF UNCLAIMED FUNDS

The debtor filed her Chapter 13 case on January 6, 2012. Attorney Luke Witte represented her. She agreed to pay Attorney Witte $4,000 in fees (the presumptively reasonable fee in this district for cases involving participation in the court's Mortgage Modification Mediation Program), and paid him $519 prior to the date he filed the petition. Long story short, the case was dismissed pre-confirmation on July 2, 2012.

On November 23, 2012, the Chapter 13 trustee sent to the clerk of court a letter, with an enclosed check for $180. The trustee's letter indicated that the trustee had attempted to contact the debtor to return to her this amount, left in his account after the case was dismissed. The trustee had been

unsuccessful, and accordingly, he was tendering the check as unclaimed funds.

On November 27, 2012, almost four months after the court had dismissed the case, Attorney Witte filed a fee application, asking the Court to order the clerk to release the $180 in unclaimed funds to him. He indicated that he'd performed almost eight hours of work on the case, and had never received a dime over the $519 he'd received pre-petition. The debtor had agreed to pay him $4,000, so clearly he'd not been paid the agreed-upon fee.

Section 1326(1)(2) of the Code states that in a case in which the court doesn't confirm a plan, "the trustee shall return [plan payments made by the debtor] not previously paid and not due and owing to creditors . . . to the debtor, after deducting any unpaid [administrative claims]." Section 347(a) indicates that within a certain time period after concluding distributions, trustees must stop payment on uncashed checks, and must pay those funds "into the court" pursuant to the procedures outlined in 28 U.S.C. § 2041. Neither of these code sections mentions dismissal; both sections refer to funds that are left over after the trustee finishes making distributions.

Title 28, section 2041 states,

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.
>
> This section shall not prevent the delivery of any such money to

> the rightful owners upon security, according to agreement of parties, under the direction of the court.

Section 2042 of Title 28 states that "[n]o money deposited under section 2041 of this title shall be withdrawn except by order of court." It further states,

> In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

In contrast, § 349(b)(3) of the Code states that, "[u]nless the court, for cause, orders otherwise, a dismissal of a case . . . re-vests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." Section 349(b)(3) specifically addresses what happens to funds left over after *dismissal*, as opposed to funds left over after the trustee finishes making *distributions*.

At least one court has found this distinction critical. In In re Lewis, 346 B.R. 89 (Bankr. E.D. Pa. 2006), Judge Frank conducted a comprehensive analysis of the interrelationship among §§ 347, 349 and 1326. He first concluded that, in the Chapter 13 context, § 349(b)(3) governed disposition of estate property after dismissal. Id. at 111. Under that section, the unclaimed funds would re-vest in the debtor. Judge Frank also found, however, that the

language in § 349 that stated that the court, "for cause," could order otherwise, gave the court the flexibility to order the unclaimed funds payable to the debtor's attorney *if* the debtor's attorney had requested allowance of administrative expenses *before* the court had dismissed the case. Id. at 111-112. In contrast, Judge Frank found that if the attorney had not requested allowance of the administrative claims until *after* the court had dismissed the case, the court lacked jurisdiction to direct payment of the unclaimed funds to the creditor. Id. at 114.

Even with regard to the case in which the attorney had requested allowance of administrative expenses before the case was dismissed, Judge Frank concluded that the "equitable" procedure would be to "require that all interested parties be given notice of the potential fund which exists for administrative expenses once the court intervenes to alter the presumptive re-vesting of estate property." He also held that the law firm asking for the money ought to be the party tasked with providing that notice. Id. at 112.

Applying the reasoning of Lewis to the facts of the current case leads to the conclusion that this Court does not have jurisdiction to direct that the unclaimed funds be paid to Attorney Witte. Attorney Witte did not request allowance of his administrative claim until almost four months after the case had been dismissed. Pursuant to § 349, by the time he made his request, the funds had re-vested in the debtor, which was why the trustee had attempted to return them to her. When that attempt failed, the trustee followed the dictates

of §§ 1326 and 347, the trustee remitted the uncashed check to the clerk's office.

Even if the Court had the jurisdiction to order the money paid to Attorney Witte, the stringent requirements of §§ 2041 and 2042 make clear that he would have further hurdles to clear in order to justify such a distribution. In In re Applications for Unclaimed Funds Submitted in Cases Listed on Exhibit "A", 341 B.R. 65 (Bankr. N.D. Ga. 2005), Judge Bonapfel analyzed the requirements of those two sections. He noted that they allowed a court to disburse unclaimed funds only to "the rightful owners," and only with "full proof of the right thereto." Id. at 69. Noting that many requests for unclaimed funds are filed *ex parte*, Judge Bonapfel stated that "the Court must insist on exact compliance with legal requirements relating to the authority of an individual or entity to act on behalf of the owner." Id. at 69. (The court specifically was considering requests made by corporate entities.)

Judge Bonapfel concluded that §§ 2041 and 2042 contained seven requirements that a requesting person or entity must satisfy to show entitlement to unclaimed funds. First, "[t]he application must clearly and unequivocally identify the entity seeking the unclaimed funds." Id. at 73. Second, "[t]he application must be signed by a person with authority to act on behalf of the claiming entity and to seek the unclaimed funds on its behalf and include such person's address and telephone number." He also stated that the signature block should show the capacity in which the signor acts. Id. Third,

"[t]he application must be accompanied by appropriate proof of the source of authority of the person filing the application." He stated that the court would presume that an attorney admitted to practice before the court had such authority. Id.

Fourth, "[t]he application must show the name of the person or entity to whom the unclaimed funds were payable." Id. at 74. Fifth, "[t]he application must state, clearly and unequivocally on its face, the amount of unclaimed funds that it seeks and must show that the applicant presently is entitled to them." Specifically, the judge stated that the claimant must submit "an affidavit or declaration under penalty of perjury . . . that the applicant still holds the debt, that it has not been paid or otherwise satisfied, and that the applicant is presently entitled to the unclaimed funds." Id. Sixth, "[t]he application must state, clearly and unequivocally on its face, the facts showing that the applicant is entitled to the unclaimed funds," and it is the applicant's responsibility to make this showing. Id. Finally, the judge found that a single applicant requesting funds in multiple cases could submit a single application. Id. at 74-75.

In applying these requirements to the facts of the current case, one must also keep in mind the fact that this district has a presumptively reasonable fee for Chapter 13 cases. If a Chapter 13 debtor's attorney's fee is equal to or less than $3,500 (in a case which does not involved participation in the Court's Mortgage Modification Mediation Program) or $4,000 (in a case which does

involve participation in MMMP), the Court does not require that attorney to submit a request for allowance of administrative fees (accompanied by an itemized billing statement) unless the trustee or other party objects. As Judge Frank noted in Lewis,

> [i]f a plan is not confirmed . . . it is unlikely that the use of the so-called 'no look' fee allowance process . . . would be appropriate. Rather, if a request for compensation is made in a case that will not be confirmed and is subject to dismissal, the court would have to employ the traditional analysis of determining the reasonable amount of compensation, taking into account the results achieved by counsel's efforts in a case dismissed without a confirmed plan, all of the factors set forth in 11 U.S.C. 330(a)(3), 330(a)(4)(B) and any other relevant considerations.

Lewis, *supra*, at 109.

In the current case, Attorney Witte did submit an affidavit with his application. The affidavit attested that he and the debtor had agreed on a flat fee of $4,000 for up to 20 hours of work. Had counsel performed twenty hours of work, this agreement would amount to an hourly rate of $200 an hour. If counsel had managed to conduct all the work contracted for in the case in, say, ten hours, the hourly rate would have come to $400 an hour, and likely the Chapter 13 trustee would have objected to the fees. The affidavit attested that Attorney Witte had performed 7.8 hours of work before the case was dismissed–at an hourly rate of $200, that would have amounted to $1,560 in fees. Attorney Witte attested that he had received only $519 of that–and he received that pre-petition.

Had counsel presented his application for allowance of fees prior to

dismissal, it is likely he would have been able to meet the § 330 requirements. The case survived from January through November. Attorney Witte filed the petition, schedules and plan, and participated in the meeting of creditors. He filed the MMMP motion, and the creditor consented to participate. The parties apparently attempted mediation. There was a motion for relief from stay, and three adjournments of the meeting of creditors. The Court cannot tell from the docket why the debtor stopped making plan payments–the problem that led the trustee to request dismissal of the case–but clearly Attorney Witte put in work on the case, and deserved to be paid more than $519 (or $699–the pre-petition $519 plus the $180 Attorney Witte requests in unclaimed funds).

Even though the Court finds that it lost jurisdiction to order the claims distributed to Attorney Witte, the Court discusses the details of the above cases and statutory provisions because it can anticipate that not only Attorney Witte, but other Chapter 13 debtors' counsel, might have an interest in knowing whether there is some sort of procedure that they can employ to gain access to unclaimed funds. It appears that one possible answer to that question is that, upon receiving an indication that the debtor's case is likely to be dismissed pre-confirmation, counsel should, *before* dismissal, file an application for allowance of administrative expenses, and should lay out in that application the work that counsel has done and the terms of counsel's agreement with the client. As Judge Frank pointed out in Lewis, "[t]he debtor's counsel, by virtue of the information available to him due to his role in the case, is likely to be in

a far better position to recognize when a case is likely to be dismissed than the debtor's creditors and therefore, is also in a far better position to initiate a request that the court exercise its discretion under § 349(b)(2)." Lewis, 346 B.R. at 112. In this case, the trustee filed the motion to dismiss on May 23, 2012, and gave interested parties twenty-one (21) days to object. No one objected, and on June 29, 2012, the trustee submitted an affidavit that there had been no objection, along with a proposed order of dismissal. Had counsel filed an application for allowance of fees during that time, and attached the appropriate information showing what fees he'd earned, he would have preserved his claim.

Other districts have procedures in which the debtor's counsel has a retainer agreement which indicates that if the case is dismissed pre-confirmation, the debtor agrees that any funds remaining up to the agreed fee will be distributed to the attorney. Others do the same thing, but via affidavit of the debtor or some type of contract in addition to the fee agreement. The Court does not opine as to the validity of such procedures.

Because the Court finds that dismissal of the case divested the Court of jurisdiction to order unclaimed funds to be paid to counsel, the Court **DENIES** the November 27, 2012 motion of attorney Luke T. Witte to pay unclaimed funds as attorney fees.

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