

HOT TOPICS IN CHAPTER 13



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Lou Jones Breakfast Club

Trustee Mary B. Grossman

Trustee Rebecca R. Garcia

TRUSTEE FEES CALCULATED AT TIME OF RECEIPT OF PLAN PAYMENTS RATHER THAN AT DISBURSEMENT

1. Both Chapter 13 Trustees in the Eastern District of Wisconsin are changing to calculation of trustee fees at time of receipt of plan payments effective October 1, 2015.
 - a. No change to amount of trustee fees; only the time at which fees are calculated and transferred to trustee's expense account will change.
 - b. Trustee fee still applies only to "plan payments"
 - If a receipt is later determined to be something other than a plan payment, the trustee will reverse the fee taken and return the gross amount to the debtor.
 - Example: Trustee receives \$7,000 of insurance proceeds for totaled car and reports \$350 of trustee fees when she receives the insurance proceeds. If debtor amends his plan to obtain a refund of insurance proceeds to use for purchase of a replacement vehicle, trustee will reverse the \$350 fee and return the entire \$7,000 to the debtor.
 - Example: Debtor's last plan payment of \$600 overpays the case by \$200.
Current system-fee on disbursement. The trustee's website will show \$600 available for creditors. To close the case, the trustee would disburse \$380 to creditors, take a \$20 trustee fee, and return \$200 to the debtor.

Fee on receipt system. The trustee will report \$30 of trustee fees upon receipt of \$600. Website will initially show \$570 available for creditors. At closing, the trustee will disburse \$380 to creditors and reverse \$10 of the trustee fee taken upon receipt of the last payment, leaving \$200 available to return to the debtor.
2. Reason for change
 - a. All but one or two other UST districts in the country changed to this system at the direction of UST Program on October 1, 2014.
 - b. UST Program has since made change optional, but all software vendors converted their systems to calculating fees at the time of receipt.
 - c. Trustees in Eastern District of Wisconsin have not been able to update software and software vendors will no longer support old system of fees taken at time of disbursement.

3. Debtors' attorneys will be able to quickly see the amount of funds on hand and available to pay to creditors. All of the money shown as on hand at a given time will go to creditors; the trustee fee will have already been subtracted from funds received.
 - a. Attorneys practicing in other districts, including Western District of Wisconsin, are already accustomed to fee on receipts and report no problems with it.

4. Model Plan language does not preclude trustees from taking fees upon receipt of plan payments.
 - a. Model plan states that the trustee "shall receive a fee for each disbursement" but does not state when the trustee shall receive the fee.

 - b. Other districts with the same or similar model plan language changed to reporting trustee fees upon receipt of funds.

FUNDS HELD BY CHAPTER 13 TRUSTEE AT TIME OF CONVERSION TO CHAPTER 7

1. Supreme Court decision in Harris v. Viegelahn, 135 S.Ct. 1829 (2015). Debtor converted his Chapter 13 case after confirmation to Chapter 7 case. After debtor converted his case, the Chapter 13 Trustee distributed wages she was holding as of the date of conversion to creditors. Debtor sought recovery of these funds from trustee. Fifth Circuit Court of Appeals held that wages the trustee was holding at the time of conversion were properly distributed to creditors. Third Circuit Court of Appeals had previously decided in another case that funds held by the Chapter 13 Trustee at conversion to Chapter 7 must be returned to the Debtor.

2. Prior practice in Eastern District of Wisconsin:

Trustee Grossman: Preconfirmation and post confirmation – funds on hand at conversion returned to the debtor except that fees paid to attorney to the extent amounts owed pursuant to Court order on a fee application.

Trustee King/Garcia: Post confirmation - funds on hand distributed according to plan. Preconfirmation - funds on hand at conversion returned to the debtor except that fees paid to attorney to the extent amounts owed pursuant to Court order on a fee application.

3. Supreme Court holds that conversion of a Chapter 13 case immediately terminates the services of the Chapter 13 Trustee, and accordingly Sec. 1326 ceases to apply. Previously, in preconfirmation cases converted to Chapter 7, Sec. 1326(a)(2) gave Trustees authority to pay attorney fees as Sec. 503(b) claims from funds that were otherwise to be returned to a Debtor if the attorney filed a fee application and the Court approved the fees. After Harris v. Viegelahn, Sec. 1326 no longer applies so Trustees cannot rely on Sec. 1326(a)(2) to pay attorney fees from funds on hand at preconfirmation conversion. Also, no authority to pay attorney from funds on hand when Debtor converts case post confirmation.

4. Trustees now have no mechanism to pay attorneys from funds on hand at conversion.

- Watch for cases pending in other courts where attorneys are alleging a lien on amounts held by the trustee and demanding payment of their secured debt at conversion.
- Talk with debtors' attorneys in other districts for creative ways to pay attorney fees from funds on hand at conversion.

LATE CLAIMS – Recent 7th Circuit Decision *In re Pajian*, 15WL 2182951

1. Background
 - a. A claim is paid in a chapter 13 case if a proof of claim is filed and allowed. 11 U.S.C. §§ 501, 502(a) and 502(b)(9).
 - b. Rule 3002(c) governs the time for filing a proof of claim and very limited exceptions.
 - c. Traditionally Trustees have objected to all late filed priority and general unsecured claims
 - d. The 7th Circuit took the case to resolve a split among bankruptcy courts. Compare *In re Dumain*, 492 B.R. 140, 148-49 (Bankr. S.D.N.Y. 2013) (Rule 3002(c) deadline applies to all creditors) with *In re Strong*, 203 B.R 105, 112-13 (Rule 3002(c) deadline does not apply to secured creditors).
2. *Pajian* – clearly states that late filed secured claims are disallowed
 - a. The *Pajian* court found that Rule 3002(c) applies to any proof of claim, not just secured claims.
 - b. Trustees are objecting as it is required by our handbook which provides, in part, that the standing trustee may not make a payment under a plan to an unsecured creditor that did not file a timely proof of claim. The handbook goes on to state, “the standing trustee must follow controlling legal authority in the jurisdiction as to payment of secured creditors . . .”
 - c. Unfortunately, any motion by a creditor to extend the time allowed to file a claim under Rule 3002(c) will not be successful, as Rule 9006(b)(3) limits the ability to enlarge the time under certain rules, including Rule 3002(c).
3. What can debtors counsel do?
 - a. File a claim for the secured or any other creditor the debtor has reason to make sure gets paid. Rule 3004 gives either the Debtor or the Trustee 30 days after the expiration of the time for filing claims prescribed by the rules.
 - b. Create a procedure in your office to review every case after both the general and government bar dates, and then file claims for those you wish to be paid.

- c. Rule 3001 requires certain attachments to be made to proofs of claim. (recorded mortgage, proof of perfection among other items) To the extent possible, attach the required information to the proof of claim if you are filing the claim as a debtor.
- d. Rule 9006 does not have a similar limitation on a motion to enlarge the time to file a proof of claim under Rule 3004. It may be possible to file a motion to get a late claim filed by the Debtor if excusable neglect can be shown.
- e. Watch out for adversary proceedings and the claims resulting from them. Rule 3002(c)(3) allows creditors 30 days after a judgment to file a proof of claim if there is a judgment entered against them, an exception to the usual bar date. However claims arising from stripping junior mortgages in an adversary proceeding/plan do not fit within this exception see *Neitzel v. J.P. Morgan Chase Bank, N.A. (In re Neitzel)*, Case No. 15-2057 (July 22, 2015) GMH

TRUSTEE PLAN MODIFICATIONS

1. You may begin to see more post confirmation plan modifications filed by Trustees as allowed by § 1329. Like Debtors the Trustees are limited by statute, to increase or reduce the amounts of payments on claims of a particular class provided for by the plan, to extend or reduce the time for such payment, to alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.
2. Modification would happens most frequently if a 60 month plan is proposed without “shortening language” and general unsecured claims come in low, trustee will modify to pay the general unsecured creditors additional funds. Debtor may wish to modify to decrease the term of the plan if under median.

OTHER ITEMS OF INTEREST

1. E-Pay and electronic payment from employers to the Trustee
 - a. Trustee Garcia accepts electronic payments from Debtors. There is a \$2.00 per transaction service fee (usually less than the cost of a money order or cashiers check). Website: <http://www.ch13oshkosh.com/epay/>

- b. In the near future Trustee Garcia will accept electronic payments from employers as well, which may be especially appreciated by large employers or payroll services (ADP, Paychex). If an employer has interest in submitting plan payments to the trustee electronically please have them contact us directly.
 - c. Trustee Grossman hopes to initiate E-Pay and electronic payment from employers by the end of the year.
 - d. Please note, that due to the ability of the debtor to stop payment on E-Pay payments, those funds are held 30 days for the Trustee to guaranty the validity of funds. This may cause a delay in disbursements to attorney fees, creditors and debtor refunds.
2. www.NDC.org (National Data Center) Website for debtors, attorneys and creditors. Information provided on the website comes from trustees through their software providers, but information is uniform regardless of the software used by the Trustee. Creditors pay for this service so they can check cases of multiple debtors easily, there is no charge for debtors or attorneys. (separate handout)
3. Nuts and Bolts for debtor attorneys and especially their staff – training on schedule and plan preparation. Last given in February 2010, we are considering offering it again soon, no charge, no CLE credit, expect about one-half day training.
4. New forms, Dec 1, 2015 – Petition, schedules A-J, SOFA, proof of claim –Annual update will have more (Thursday Nov 19 in Madison, Friday Nov 20 in Milwaukee)