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Nobody Understands Me: How the Hybrid Role of a Chapter 13 Trustee Affects Debtors and Creditors

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CONCURRENT SESSION

2018

The Role of Chapter 13 Trustee

Recent Cases Of Interest On Chapter 13 Trustees:

In re Robinson, 2017 WL 6497980 (Bankr. D.D.C. Dec. 15, 2017).

Dates v. HSBC U.S.A. N.A., 2017 WL 6402920 (S.D. Ohio Oct. 5, 2017), *rept. and reco. adopted by* 2017 WL 6403865 (S.D. Ohio Dec. 14, 2017).

Askri v. Gorman (in re Askri), 2017 WL 5181111 (E.D. Va. Nov. 8, 2017).

A Chapter 13 Trustee's Duties

-- "[A] chapter 13 trustee 'is no mere disbursing agent.' . . . § 1302 grants the chapter 13 trustee various powers to ensure that such collections and disbursements occur equitably, according to the dictates of Congress." *Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994).

-- Statutory Duties: The Chapter 13 Trustee shall:

-- be accountable for all property received. Sections 1302(b)(1), 704(a)(2).

-- ensure that the Debtor performs his intentions as specified in Section 521(a)(2)(B) -- retention or surrender of property. Sections 1302(b)(1), 704(a)(3)

-- investigate the financial affairs of the Debtor. Sections 1302(b)(1), 704(a)(4)

-- this includes review of attorney and bankruptcy petition preparer disclosures and practices. Sections 110(h)(2); 329(a); 330; Rules 2016(b); 2017; Chapter 13 Trustee Handbook, p. 3-6 to 3-7.

-- examine and object to proofs of claim, but only if a purpose would be served. Sections 1302(b)(1), 704(a)(5)

-- if advisable, oppose the discharge of the Debtor. Sections 1302(b)(1), 704(a)(6)

-- furnish information on the case in response to requests by parties in interest. Sections 1302(b)(1), 704(a)(7)

-- make and file a final report with the court and the U.S. Trustee. Sections 1302(b)(1), 704(a)(9)

-- appear and be heard on at any hearing concerning:

-- the value of property subject to a lien

-- confirmation of a plan

-- modification of a plan after confirmation. Section 1302(b)(2)

-- advise Debtors, but can't give legal advice, and assist the Debtors in the performance under the Plan. Section 1302(b)(4).

-- ensure that the Debtor commences making timely payments under section 1326. Section 1302(b)(5).

-- provide a specific notice to DSO claimants. Sections 1302(b)(6); 1302(d).

-- The Trustee has additional duties where a Debtor is engaged in business. Section 1302(c).

-- Police the requirements that Debtor have filed/provided tax returns. Sections 1308 and 1325(a)(9)

-- Review the schedules in each case to verify eligibility for Chapter 13.

-- debt limit eligibility. Section 109(e).

-- not ineligible based on prior voluntary dismissal after relief from stay was filed. Section 109(g).

-- certificate of credit counseling reflecting timely completion of the "briefing". Section 109(h).

-- that venue is proper. Rule 1014(a)(2); 28 U.S.C. Section 1408.

Potential Statutory Holes In The Chapter 13 Trustee's (and Debtor's) Arsenal

-- Section 1302(a)(b)(1): A Chapter 13 Trustee's Duties are based on the statute specifically including some, but not all, of the statutory duties of a Chapter 13 Trustee.

-- Listed Duties Do NOT Include:

-- Section 704(a)(1): Collecting property of the estate and reducing it to money as quickly as possible.

-- When is a Chapter 13 Debtor a "Trustee" under the Code?

-- Chapter 13 Trustee does not take control of estate property, the Debtor retains control of it.

-- Who can pursue avoidance actions?

-- Who controls litigation assets, like personal injury actions?

-- Who does the application to employ outside counsel?

-- Who sells property under Section 363?

-- Who has standing to sue for what?

-- The obvious solution: Debtor(s) and the Chapter 13 Trustee filing joint actions.

-- What does vesting mean? What property vests, and when?

-- Different jurisdictions have different "usual rules" - either vesting on confirmation or upon completion of the Plan.

Trustee's discretion -

-- disposable income test

-- The Code requires the Debtor to put in all disposable income if the Trustee (or the holder of an allowed claim) objects. Section 1325(b)(1)(B).

-- The rule that Chapter 13 Plans can't run more than Sixty Months. 11 U.S.C. Section ____

-- Remember, this rule was created as a consumer protection (prevents Chapter 13 becoming indentured servitude)

The Chapter 13 Office - Part Law Office, Part Accounting Firm.

-- Law Office on the front end

-- Accounting predominates after Confirmation

-- Imagine turning a Chapter 13 Plan and all the filed claims into a computer program....

Other issues - when the Chapter 13 Trustee wants a Court (comfort) Order

-- for disbursing funds other than when there is a filed claim.

-- Trustee's fear "misdisbursements"

-- If the funds can't be recovered from the party who received them, the Chapter 13 Trustee may have to pay from his/her own pocket.

-- If a Debtor objects to a Proof of Claim after a distribution has been made on that claim, the Chapter 13 Trustee may want it made clear that s/he is not going to have to seek return of the funds previously disbursed.

Chapter 13 Trustee's fiduciary duty

-- Rule No. 1: You can't lose the money.

-- Audits

-- Lockboxes

-- Controls

-- But "fiduciary" duties are owed to who?

-- "[T]he primary purpose of the Chapter 13 trustee is not just to serve the interests of the unsecured creditors, but rather, to serve the interests of all creditors." *In re Andrews*, 49 F.3d 1404, 1407 (9th Cir. 1995).

-- If a Chapter 13 Trustee is a "fiduciary" to parties with very different goals, are they really a true fiduciary to anyone?

-- If a legal position benefits a Debtor at the expense of unsecured creditors, or vice versa, the Trustee is going to be inclined to remain neutral and let the parties litigate the issue.

-- Personal liability - breaches of fiduciary duty vs. Quasi-Judicial immunity and the Barton Doctrine.

-- Chapter 13 Trustees have a surety bond

-- A bond is NOT insurance (you have an obligation to pay back any money paid out on your bond).

-- Trustees potentially have almost unlimited personal liability

-- Chapter 13 Trustees also have insurance for some thing

-- Cyber insurance, fire, theft, employee, etc.

Is a Chapter 13 Trustee supposed to be "neutral"?

-- In the context of investigating the financial affairs of the debtor, the Trustee was not required to remain neutral. *Askri v. Gorman (in re Askri)*, 2017 WL 5181111 (E.D. Va. Nov. 8, 2017).

Chapter 13 Trustee's Relationship To Each Other

-- Chapter 13 Trustees are a pretty tight knit group

-- The NACTT

-- The Due Process Committee

-- The NDC

-- The Academy

How Chapter 13 Trustees Are Paid - what are the economic motivations?

-- All "full comp" Chapter 13 Trustees are paid the same. 28 U.S.C. Section 586(e)(1)

-- Chapter 13 Trustees are paid the equivalent of the compensation "for a level V of the Executive Schedule".

-- that amount is adjusted to reflect the fact that Chapter 13 Trustees receive no benefits. 28 U.S.C. Section 586(e)(1)(A)(ii).

-- The motivation to stay "full comp"

-- the Trustee fee cannot exceed 10%

-- expenses can be cut only so far

-- If there is not enough money coming in, Chapter 13 Trustees don't receive the full compensation provided by statute

-- Mostly a problem for smaller trusteeships, or when there is a steep drop in filings/income.

-- All Chapter 13 Trustee are equal, but Pre-UST Chapter 13 Trustees Are A Little More Equal Than Others.

-- Marriage, owning and renting office buildings, etc.

How the Chapter 13 Trustee Percentage Fee Is Determined.

-- Projections and a proposed annual budget.

-- "Operational Efficiency" - it impacts the bottom line for many Debtors.

-- Weird economics of Chapter 13: Chapter 13 Trustee fees most directly impact low percentage and 100% Plans.

Chapter 13 Trustee's duty/relationship with the court

-- The Rule Against Ex Parte Contact With Judges [Rule 9003(a)], And The Administrative Exception - operational discussions not related to a particular case.

The Obligation to follow the Code.

-- Trustees have to follow the Code . . . or at least their Judge's view of the requirements of the Code.

-- But, on some issues, there is built in flexibility and Trustee discretion

U.S. Trustee's role

-- The Chapter 13 Handbook - a Manual for Chapter 13 Trustees

https://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/handbook2012/Handbook_Ch13_Standing_Trustees_2012.pdf

-- It has shaky underpinnings

-- but it is important in many ways, in part because Chapter 13 Trusteeship operations are audited on it

-- Audits

-- The Importance Of The Annual Audit

-- The four seasons of a Chapter 13 Trusteeship: 1) getting ready for the audit; 2) the 3 or 4 days when the audit is actually conducted (usually late October/November); 3) getting the audit findings and the post-audit meeting with the Office of the U.S. Trustee about the findings; and 4) your normal life.

-- Monthly Reports

-- Internal Financial Controls

-- Dual Controls, Signature Stamps, Electronic Transfers, Positive Pay.

-- Criminal Referrals

-- Overlap of responsibilities re: policing attorneys (the Trustee, the Office of the U.S. Trustee, and the Judge).

Direct Communication by the Chapter 13 Trustee with Debtors

-- Debtor is a "represented party" - is it appropriate?

-- What about when the Debtor calls the Chapter 13 Trustee's Office?

-- Section 521 information

The filing of proofs of claim; Rule 3004 says Trustees can file them if the creditor fails to file a timely POC.

-- Chapter 13 Trustee has the power to file one, but can they do it as a practical matter?

-- How would the Trustee know what was owed? (Can a Trustee sign a POC based on mere "hearsay"?)

-- How is the Trustee going to get the documentation required to be attached? (i.e. the document(s) required by, for example, Rule 3001(c)?)

The Non-Uniform Nature of Chapter 13 Practice

-- Culture and the way things have been done

-- Relying on the "way things have been done" is very risky because there may be a change in the law, the judge's mind, or the judge..

-- Conforming to how your Judge(s) want things done

-- The difficult of resolving issues (and creating uniformity) through appeal

-- Problems with finality (denial of Plan Confirmation is not appealable as of right)

-- Appeals are expensive, and Debtors can't afford the costs

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Avoidance Powers In Chapter 13©

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I. Some Perspective: Chapter 7, Chapter 11 and Chapter 12.

In Chapter 7 cases, the avoidance rights generally have been under the exclusive control of the Chapter 7 Trustee. Debtors had rights under §522(f), because those avoidance rights are specifically given to the debtors. For exemptible property, Chapter 7 debtors also have the limited rights granted by §522(h).

Historically, many courts have limited §506 avoidance actions to the "reorganization" sections, based on the holding in *Dewsnup v. Timm*, 502 U.S. 401, 112 S.Ct. 773 (1992). The Supreme Court affirmed *Dewsnup* in *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 192 L.Ed.2d 52 (2015), but noted that its holding relied, in part, on the fact that the *Caulkett* debtors had not asked the court to overrule *Dewsnup*. Thus, the scope of §506 avoidance actions in liquidation proceedings could change should the issue come before the Supreme Court again.

In contrast, in Chapter 11 cases, the Debtor-In-Possession ("DIP") is statutorily defined as having most of the rights and duties of a "trustee". *See*, §1107(a). Thus, the DIP is able to use all of the avoidance rights that a "trustee" could use - at least until an actual trustee is appointed by the court. *See*, §1101(1); §1107(a).

Similarly, in Chapter 12, Section 1203 confers avoidance powers on debtors by making a Chapter 12 debtor the equivalent (except for certain investigatory duties) to a debtor-in-possession in Chapter 11.

There is less statutory clarity in Chapter 13. "[N]either the trustee nor the debtor have explicit authority under Chapter 13 to bring avoidance actions." *In re Hansen*, 332 B.R. 8, 14 (10th Cir. BAP 2005). It has been held that a Chapter 13 Trustee "is no mere disbursing agent". *Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). But the exact relationship, and division of powers, between the Chapter 13 Trustee and the Debtor, is less clear than in Chapter 7 and Chapter 11 cases. *See*, *In re Keenan*, 364 B.R. 786, 807 (Bankr. D.N.M. 2007)(holding that *Hansen* only prohibits debtor use of the trustee's strong arm powers under §544 and that debtors can still bring avoidance actions under §522).

Behind all of the issues discussed below is a fundamental question: "What are all these statutory avoidance rights for, if there is no one to enforce them in Chapter 13?"

II. Looking At The Provisions Of Chapter 13.

A. Section 1302(b) - Chapter 13 Trustee Duties.

Section 1302(b) states:

> (b) The trustee shall--
>
> (1) perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(4), 704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title;

However, the listed subsections of §704 do not discuss the powers or duty of a trustee to prosecute avoidance actions. Arguably, that provision is found in §704(a)(1), which makes it a duty of a Chapter 7 trustee to "collect and reduce to money the property of the estate ...". But, Section 1302(b) does not make this one of the duties of a Chapter 13 Trustee - it is simply not on the §1302(b) list.

B. Arguments For And Against Debtors' Standing: Section 1303 - Debtor's Rights And Powers "Exclusive Of The Trustee".

Section 1303, which defines the rights and powers of a Chapter 13 debtor, lists very specific provisions where debtors have exclusive rights.

Section 1303 states:

> Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

Courts look at Section 1303 from two different perspectives:

1. Section 1303 lists the Debtor as having the exclusive right to "use, sell or lease…property of the estate" under Section 363(b). Courts have held that litigation, and litigation rights, are property of the estate. So, arguably, the right to "use" property of the estate should that include "litigation rights", including avoidance actions?

> "'[A] floor comment in the legislative history of Section 1303 suggests that this section "does not imply that the debtor does not also possess other powers concurrently with the trustee.' 124 Cong. Rec. H. 11106 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); S17423 (daily ed. Oct 6, 1978) (remarks of Sen. DeConcini)." *In re Binghi*, 299 B.R. 300, 302 (Bankr. S.D.N.Y. 2003).
>
> Furthermore, Section 1306(b) provides that the Chapter 13 Debtor remains in possession of all property of the estate during the case. In Chapter 13, property of the estate not only includes property as defined by §541, but also property acquired after the commencement of the case - like bankruptcy-specific avoidance rights. *See*, §1306(a). Litigation assets are property of the estate, and what does "possession" of these assets mean if it does not allow the Debtor to pursue these avoidance rights through litigation?
>
> This argument is also bolstered by the fact that a Chapter 13 Trustee's duties do not include a duty, under Section 704)(1), to "collect and reduce to money the

property of the estate." Further, courts have noted that policy concerns also support a Chapter 13 debtor's ability to utilize strong-arm avoidance powers. *See*, *In re Smith*, 2014 WL 1404722, 2014 Bankr. LEXIS 1538 (Bankr. W.D. Ky. April 10, 2014).

2. "Section 1303, which defines the rights and powers of a Chapter 13 debtor, lists very specific provisions where debtors have exclusive rights. Avoiding powers are not among them." *In re Hansen*, 332 B.R. 8, 12 (10th Cir. BAP 2005).

"In *Hartford Underwriters Ins. Co. v. Union Planters Bank*, the United States Supreme Court held that, in the context of the bankruptcy code, where a statute 'names the parties granted the right to invoke its provisions,…such parties only may act.' 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)." *In re Lee*, 432 B.R. 212, 215 (D.S.C. 2010); *see also*, *In re Wood*, 301 B.R. 558, 562 (Bankr. W.D. Mo. 2003)("Significantly, under the rule of *inclusio unius est exclusio alterius*, the plain language of § 547(b) states the "trustee may avoid" preferential transfers—no mention is made in the statute about the debtor having similar rights.").

The way that Congress gave debtors the power to exercise the avoidance rights of a trustee in Chapter 11 and Chapter 12 were much more direct than the "inference" argument that can be made for debtor standing using §1303.

Finally, because the rights of a Chapter 13 Debtor under §1303 are "exclusive of the trustee" - does a finding of Debtor standing to exercise avoidance powers mean that Chapter 13 trustees do NOT have avoidance powers?

III. Working Backward From The Rest Of The Code To Chapter 13 - Section 103(a) And Trustee Standing.

Section 103(a) states:

> (a) Except as provided in section 1161 of this title, ***chapters 1, 3, and 5 of this title apply in a case under chapter*** 7, 11, 12, or ***13 of this title***, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

The argument from §103(a) is: the avoidance sections state that they may be used by the "trustee". Nothing in Chapter 13 itself limits that power. And, §103(a) specifically makes the provision of Chapter 5 - such as §§544, 547 and 548 - applicable in Chapter 13 cases.

For example: "Section 544(a) of the Bankruptcy Code empowers trustees with the capability to avoid liens that are unperfected as of the date of the bankruptcy petition. 11 U.S.C. § 544(a). Section 103(a) applies chapter 5 in chapter 13 cases, thereby imbuing chapter 13 truste

es with the § 544 powers. 11 U.S.C. § 103(a). Avoided transfers are preserved for the benefit of the estate. 11 U.S.C. § 551. Therefore, the Trustee has the capacity to challenge what she alleges is an unperfected lien." *In re Guiles*, 580 B.R. 466, 469 (Bankr. W.D. Tex. 2017).

This argument from Section 103(a) appears to be the dominant factor in the majority of case law that holds that Chapter 13 Trustees have standing to use avoidance powers.

IV. Case Law On Chapter 13 Trustees' Avoidance Powers.

A. Chapter 13 Trustees Have The Power To Avoid Transfers Using 544-549.

> "There is general agreement that the Chapter 13 trustee has standing to avoid transfers and recover property under §§ 544 (strong-arm power), 547 (preferences), 548 (fraudulent conveyance) and 549 (postpetition transfers)."

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Edition, §60.1, at ¶ 1, Sec. Rev. June 10, 2004, www.Ch13online.com.

Similarly, Corpus Juris states:

> "[T]he omission of 11 U.S.C.A. §704(a)(1) from the Chapter 13 trustee's duties, as enumerated in 11 U.S.C.A. §1302(b)(1), cannot be read so far as to preclude the use of the Chapter 5 avoidance powers by the trustee, and it is left to the Chapter 13 trustee's judgment to determine when it is feasible and efficient to exercise the avoidance powers. The exercise of avoidance powers is consistent with a Chapter 13 trustee's duty, pursuant to statute, to advise and assist the debtor in performance under a plan. Thus, a Chapter 13 trustee may avoid transfers of property or obligations of the debtor under 11 U.S.C.A. § 544, may avoid a preference under 11 U.S.C.A. §547(b), and may recover a fraudulent transfer under the provisions of 11 U.S.C.A. §548."

8A Corpus Juris Secundum, Bankruptcy, §103 (March, 2015).

Courts have generally held that a Chapter 13 Trustee can exercise avoidance powers:

> *In re McCarthy*, 501 B.R. 89, 91 (8th Cir. BAP 2013)("Generally, a Chapter 13 trustee has standing to bring certain avoidance actions, such as actions under Bankruptcy Code §545(2)"); *In re Geraci*, 507 B.R. 224, 230 n.6 (Bankr. S.D. Ohio 2014)(Section 544(a) is "unambiguous and grants the trustee, not debtors, the powers and rights of a bona fide purchaser" to avoid a transfer of an interest in property or to defeat a mortgage.); *In re Ramsey*, 356 B.R. 217, 227 (Bankr. D. Kan. 2006)("the Chapter 13 Trustee is empowered to exercise Chapter 5 avoiding powers"); *In re Colon*, 345 B.R. 723, 726 (Bankr. D. Kan. 2005)(Chapter 13 Trustee's powers are fixed as of the commencement of the case, and are not lost when the Chapter 13 Plan prevents the property in issue from revesting in the Debtor); *In re Ryker*, 315 B.R. 664, 670 (Bankr. D.N.J. 2004)("Equally clear is the ability of the Chapter 13 trustee to employ the avoidance powers."); *In re Huntzinger*, 268 B.R.

263, 265-266 (Bankr. D. Kan. 2000)("only the trustee could file the complaint under § 544."); *In re Griner*, 240 B.R. 432, 438 n.3 (Bankr. S.D. Ala. 1999)("only chapter 13 trustees may exercise the avoiding powers in 11 U.S.C. §§544, 545, 547, 548, and 549."); *In re Bonner*, 206 B.R. 387, 388 (Bankr. E.D. Va. 1997)("That the avoidance powers of §544 extend to trustees in Chapter 13, however, has become well settled."); *Lucero v. Green Tree Fin. Serv. Corp. (In re Lucero)*, 199 B.R. 742, 744–45 (Bankr.D.N.M.1996), *rev'd on other grounds*, 203 B.R. 322 (10th Cir. BAP 1996); *In re Bell*, 194 B.R. 192 (Bankr. S.D. Ill. 1996); *In re Driver*, 133 B.R. 476, 478 (Bankr. S.D. Ind. 1991)(standing Chapter 13 trustee, not the debtor, holds the lien avoiding powers); *In re Johnson*, 26 B.R. 381 (Bankr. Colo. 1982)(court disagreed with Chapter 13 trustee's argument that she did not have the power to avoid a transfer under §548).

B. When should Chapter 13 Trustees consider using their avoidance powers?

1. Where the avoidance action will benefit the estate.

2. When the avoidance action will assist the Debtor in performance under the Plan.

3. If avoidance is necessary if the Debtor is going to meet the requirements of the Best Interest Test.

4. In cases where a security interest is not properly perfected.

5. When the Debtor has no incentive to act, or is actively adverse to the avoidance action.

6. Others?

C. Problems In Creating A Benefit To The Estate Through Avoidance Actions In Chapter 13.

"The value of the avoided lien is automatically preserved for the benefit of the estate. However, Chapter 13 does not authorize the Trustee to liquidate property. Thus, the Chapter 13 Trustee may not recover the value of the lien by selling it. Instead, the Chapter 13 Trustee's avoidance of an unperfected lien, specifically under §544, benefits the estate by either one of two ways allowed under the Code. First, avoidance of the lien nullifies the security transaction. Accordingly, the portion of the debtor's income (or allocation in the plan) to pay the secured claim is no longer required to be paid to the defendant creditor. The resulting increase in disposable income available to pay creditors holding allowed claims under the Chapter 13 plan is a benefit to the estate. The second way the Chapter 13 Trustee may realize the benefit of an avoided lien for the estate is triggered by the debtor's desire to retain the property. Under the "best interests of creditors" test, the Code assures that unsecured creditors will receive at least as much as they would receive if the case were liquidated under Chapter 7. Thus, if a Chapter 13

> debtor elects to retain property subject to an avoided and preserved lien now held by the Trustee, the debtor must pay into the plan the value of the lien."

In re Ramsey, 356 B.R. 217, 227 (Bankr. D. Kan. 2006).

There is case law specifically holding that a Chapter 13 Trustee may use avoidance powers, even when doing so may disadvantage the Debtor:

> [T]he Trustee's ability to exercise her avoidance power does not hinge on the avoidance's effect on the Debtor. The Trustee's avoidance of a lien is not at odds with her § 1302(b)(4) duty to "advise ... and assist the debtor in performance under the plan." *See Ferrell v. Countryman*, 398 B.R. 857, 867 (E.D. Tex. 2009) (explaining that chapter 13 trustees are not disinterested bystanders post-confirmation, but instead should advise the debtor about matters including payment reductions or suspensions, credit problems, collection efforts, and executory contracts). This duty does not mandate that a trustee refrain from the exercise of other powers; a trustee's primary duty is to maximize the value of the estate, not to serve as additional debtor's counsel. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). The Code does not require that a trustee weigh every action against its potential impact on the debtor, to the possible detriment of the estate. Therefore, when avoiding a lien is in the best interest of the estate, a trustee may pursue the avoidance. The Court finds that the Trustee has standing to object to the claim and to attempt to avoid the lien.

In re Guiles, 580 B.R. 466, 469-470 (Bankr. W.D. Tex. 2017).

D. Problems Associated With Chapter 13 Trustees Obtaining Compensation For Work Done Litigating Avoidance Issues.

Chapter 13 Trustees face statutory barriers to receiving additional compensation for work undertaken in pursuing avoidance actions. Unlike Chapter 7 Trustees, where there are structural incentives (in addition to statutory duties) to bring avoidance actions, there are limits on compensation in Chapter 13 for work done as "attorney for the trustee".

Section 330, which deals with the expenses of a trustee, is "subject to sections 326 . . .". Section 326(b) appears to prohibit a bankruptcy court from allowing compensation or reimbursement of expenses of a standing Chapter 13 Trustee appointed by the U.S. Trustee under 28 U.S.C. §586(b). Accordingly, the usual power of the bankruptcy court to award trustee compensation and reimbursement of expenses under §330 is not available when the U.S. trustee has appointed a standing Chapter 13 Trustee. *See generally*, Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Edition, § 60.1, at ¶¶7 - 12, Sec. Rev. June 10, 2004, www.Ch13online.com.

It is unclear as to whether compensation of the Chapter 13 Trustee could be dealt with through a Plan provision. *Id*. at ¶13. If the debtor is asking the Chapter 13 Trustee to pursue an avoidance action, providing compensation for taking that action in the Plan might be used as an incentive for the Trustee to not object to a "let's you and him fight" provision.

V. The Statutory Basis For, And Against, A Chapter 13 Debtor Exercising Avoidance Powers.

A. Where There Is No Question Re: Debtor's Standing - Section 522(h) & (g).

Section 522(h) states:

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

> (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and
>
> (2) the trustee does not attempt to avoid such transfer.

In turn, Section 522(g) provides:

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

> (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
>
> (B) the debtor did not conceal such property; ....

If a Debtor can meet the requirements of Section 522(h), which references Section 522(g), then there is no question about the Debtor's ability to avoid qualifying transfers. *In re Dickson*, 655 F.3d 585, 592 (6th Cir. 2011); *Matter of Hamilton*, 125 F.3d 292, 297 (5th Cir. 1997)("In section 522(h), Congress granted debtors the authority to exercise section 544 avoidance powers under specific and limited circumstances."); *In re DeMarah*, 62 F.3d 1248, 1250 (9th Cir. 1995)("Section 522(h) allows the debtor to avoid certain transfers of exempt property."); *In re McCarthy*, 501 B.R. 89, 91 (8th Cir. 2013)("Bankruptcy Code §522(h) allows debtors to avoid certain transfers of exempt property. A debtor may have standing under §522(h), to bring certain avoidance actions, such as those under §545."); *In re Giachchetti*, 584 B.R. 441, 447 (Bankr. D. Mass. 2918)(avoiding the more difficult issue of derivative standing because §522(h) clearly applied); *In re Ryker*, 315 B.R. 664, 672 (Bankr. D.N.J. 2004)("Section 522(h) permits a debtor to avoid a transfer of property to the extent the debtor could have exempted the property under §522(g)(1).").

1. The Elements Of Section 522(h).

> "Some courts have described §522(h) as being composed of five (5) elements: (1) the transfer was not a voluntary transfer of property by the debtor; (2) the debtor did not conceal the property; (3) the trustee did not attempt to avoid the transfer; (4) the transferred property is of a kind that the debtor would have been able to exempt from the estate if the trustee had avoided the transfer under §522(g); and (5) the debtor seeks to exercise one of the trustee's avoidance powers enumerated in §522(h). *See, Matter of Hamilton*, 125 F.3d 292, 297 (5th Cir.1997); *In re DeMarah*, 62 F.3d 1248, 1250 (9th Cir.1995); *In re Steck*, 298 B.R. 244, 248–249 (Bankr.D.N.J.2003)." *In re Funches*, 381 B.R. 471, 492 n.32 (Bankr. E.D. Pa. 2008).

Stated with slightly different wording:

> "[A] Chapter 13 debtor has standing to avoid a transfer under § 522(h) if five conditions are met: (1) the transfer was not voluntary; (2) the transfer was not concealed; (3) the trustee did not attempt to avoid the transfer; (4) the debtor seeks the avoidance pursuant to §§544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code; and (5) the transferred property is of a kind that the debtor would have been able to exempt from the estate if the trustee had avoided the transfer under one of the provisions in §522(g). *Kildow v. EMC Mortg. Corp. (In re Kildow)*, 232 B.R. 686, 692–93 (Bankr.S.D.Ohio 1999)." *In re Dickson*, 655 F.3d 585, 592 (6th Cir. 2011).

> *See also*, *In re McCarthy*, 501 B.R. 89, 91-92 (8th Cir. BAP 2013)*; LaBarge v. Benda (In re Merrifield)*, 214 B.R. 362, 365 (8th Cir. BAP 1997); *Matter of Varquez*, 502 B.R. 186, 190 (Bankr. D.N.J. 2013)("Under sections 522(g) and (h) of the Bankruptcy Code, Chapter 13 debtors have the authority to avoid a transfer in place of the Chapter 13 trustee, in the event that the debtors could have exempted the property if the trustee had successfully prosecuted the avoidance action.").

2. Does the Debtor have a right to claim an exemption in the property?

Whether or not a debtor has the right to claim an exemption will generally turn on two factors: 1) is there an exemption applicable to the property in issue; and, 2) was the transfer of the property "voluntary"?

Section 522(g) is, under Section 103(a), applicable to all Chapters of the Bankruptcy Code. Thus, in evaluating any avoidance action, the distinction between an involuntary transfer (where a Debtor may have exemption rights) and a voluntary transfer (which deprives the Debtor of exemption rights under Section 522(g)(1)(A)). (This distinction is also important in evaluating what a Chapter 7 Trustee would do in a hypothetical liquidation - pursuing an involuntary transfer, like a garnishment, would not be undertaken if the Debtor could exempt any monies that were recovered. In contrast, a Chapter 7 Trustee would not be worried about a Debtor claiming an exemption in evaluating whether or not to take action to avoid the voluntary transfer of a car to mom for $1.)

> *See generally, In re McCarthy*, 501 B.R. 89 (8th Cir. BAP 2014). Chapter 13 Debtor had standing to pursue avoidance claim in aid of exemption rights.

B. Debtors Have Standing To Litigate Non-522(h) Avoidance Actions - The "Holistic Approach" Of *In Re Cohen*.

At present, the leading case for Debtor standing, beyond that provided by Section 522(h), is *In re Cohen*, 305 B.R. 886 (9th Cir. BAP 2004).

The *Cohen* decision cites to:

(1) The chapter 13 debtor remains in possession of all property of the estate during the case. §1306(b).

(2) The one chapter 7 trustee duty that is omitted from the duties of the chapter 13 trustee or debtor is the §704(1) duty to "collect and reduce to money the property of the estate." This is the duty that obliges chapter 7 trustees to pursue avoiding actions.

(3) Chapter 13 debtors have, exclusive of the trustee, the rights and powers of a trustee to deal with "property of the estate" (after notice and a hearing) not in the ordinary course of business. §1303.

(4) The chapter 13 "property of the estate" that, as noted, remains in the debtor's possession, includes all of the property designated by §541 that existed when the petition was filed and that is acquired postpetition before the case is closed, dismissed, or converted and includes postpetition personal service income. §1306(a). It follows that chapter 13 "property of the estate" includes interests in property that the trustee recovers under the trustee avoiding powers. §541(a)(3).

(5) Under the so-called "best interest" test for chapter 13 plan confirmation, the plan must provide for distributions under it on account of allowed unsecured claims that are of a value of at least what would be paid on unsecured claims in a hypothetical chapter 7 liquidation on the effective date of the plan. §1325(a)(4). It would be an odd system that would require a chapter 13 debtor to depend upon the recovery of an avoidable transfer in order to have a confirmable plan but not permit the debtor to avoid the transfer.

"If we regard §1303 as ambiguous and look at legislative history for guidance, a strong case for debtor standing to assert trustee avoiding powers becomes a compelling case." *Cohen*, 305 B.R. at 899.

There is legislative history that the designation in §1303 of rights and powers that chapter 13 debtors have exclusive of the trustee "does not imply that the debtor does not also possess other powers concurrently with the trustee" and that "[f]or example although [§323] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued." 124 CONG. REC. H11106; *id*. S. 17423.

C. The Majority Of Courts Reject The *Cohen* Analysis.

1. There is a limited provision for Debtor avoidance under Section 522(h). Why create that limited right if there is a larger general right to use avoidance powers was intended?

2. The plain language of the avoidance provisions apply to Trustees, not Debtors. And, unlike in Chapter 11 and 12, there is no similar clear provision (other than Section 522(h)) that gives Debtors the power to use those avoidance provisions.

3. *Hartford Underwriters Ins. Co. v. Union Planters Bank* held that, in the context of the bankruptcy code, where a statute "names the parties granted the right to invoke its provisions, ... such parties only may act." 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). One of the most powerful criticisms of *Cohen* is its failure to address the *Hartford Underwriters* holding in the context of Sections 544 to 549 only providing avoidance rights to "trustees".

One court summarized the statutory argument as follows: "[I]n §522(h), Congress specifically authorized a chapter 13 debtor to exercise the trustee's avoidance powers in limited circumstances. Given this narrow exception, contrasted with the general grant of authority to chapter 11 and 12 debtors, it is clear that Congress knew how to grant a chapter 13 debtor the general duties and powers of a trustee but chose not to." *In re Salaymeh*, 361 B.R. 822, 826 (Bankr. S.D. Tex. 2007)(citing *In re Hamilton*, 125 F.3d 292, 297 n.5 (5th Cir. 1997)).

VI. Case Law On The Avoidance Powers of the Chapter 13 Debtors

A. The Majority Rule: Debtors do not have standing to use avoidance powers under Sections 544 - 549:

"The better reasoned decisions hold that, in contrast to the provisions authorizing a chapter 13 debtor to pursue causes of action that are property of the estate, none of the provisions of chapter 13 authorize a chapter 13 debtor to sue on a trustee's avoidance powers (under, for example, 11 U.S.C. §§544 (unperfected liens), 547 (preferences), or 548 (fraudulent conveyances)) other than pursuant to 11 U.S.C. §522(h)." *Dawson v. Thomas (In re Dawson)*, 411 B.R. 1, 24 (Bankr. D.D.C. 2008); *see also*, *Knapper v. Bankers Trust Co. (In re Knapper)*, 407 F.3d 573, 583 (3d Cir. 2005)(right to proceed under §544 not conferred on Chapter 13 Debtors); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220 (4th Cir. 1994)(§548 "cannot be enforced by a debtor"); *Stangel v. United States (In re Stangel)*, 219 F.3d 498, 501 (5th Cir. 2000), *cert. denied*, *Stangel v. United States*, 532 U.S. 910, 121 S.Ct. 1240, 149 L.Ed.2d 147 (2001)(case law strongly suggests that Debtor "does not have standing under a plain reading of §545); *Hansen v. Green Tree Servicing, LLC (In re Hansen)*, 332 B.R. 8 (10th Cir. BAP 2005); *In re Lee*, 432 B.R. 212 (D.S.C. 2010)(Chapter 13 Debtor did not have standing to exercise trustee's strong-arm avoidance powers under §544), *aff'd on other grounds*, 461 Fed. Appx. 227 (4th Cir. Jan. 6, 2012); *In re Kalesnik*, 571 B.R. 491, 496 (Bankr. D. Mass. 2017); *In re Cole*, 563 B.R. 526, 529 (Bankr. W.D.N.C. 2017); *In re Atkins*, 525

B.R. 594, 603 (Bankr. E.D. Pa. 2015); *In re Thompson*, 499 B.R. 908, 912 (Bankr. S.D. Ga. 2013); *In re Turner*, 490 B.R. 1 (Bankr. D.D.C. 2013)(Chapter 13 debtor could not exercise trustee's strong-arm powers under §544 to avoid unperfected deed of trust); *In re Ryker*, 315 B.R. 664, 668 (Bankr.D.N.J.2004); *In re Binghi*, 299 B.R. 300, 302-303 (Bankr. S.D.N.Y. 2003); *Montoya v. Boyd (In re Montoya)*, 285 B.R. 490, 493 (Bankr. D.N.M. 2002)(Chapter 13 debtors lacked standing to bring §548 avoidance proceeding.); *In re Bell*, 279 B.R. 890, 898 (Bankr. N.D. Ga. 2002); *Miller v. Brotherhood Credit Union (In re Miller)*, 251 B.R. 770, 772 (Bankr. D. Mass. 2000)("I find persuasive those cases which do not permit a Chapter 13 debtor to bring an independent avoidance action. I agree that, absent a specific grant of authority in the Bankruptcy Code, a Chapter 13 debtor cannot bring an avoidance action independent of section 522(h)."); *Hacker v. Hodges (In re Hacker)*, 252 B.R. 221, 223 (Bankr. M.D. Fla. 2000); *In re Hill*, 152 B.R. 204, 206 (Bankr. S.D. Ohio 1993)("Congress did not intend for debtors to have authority to avoid preferences under § 547"); *Matravers v. United States (In re Matravers)*, 149 B.R. 204, 207 (Bankr.D.Utah 1993)(Chapter 13 debtor had standing to avoid unauthorized postpetition transfer of property under §549.); *In re Redditt*, 146 B.R. 693, 696 (Bankr. S.D. Miss. 1992)(there is no specific statutory grant of power giving a chapter 13 debtor avoidance powers); *In re Driver*, 133 B.R. 476, 478 (Bankr. S.D. Ind. 1991); *In re Tillery*, 124 B.R. 127, 128 (Bankr.M.D.Fla.1991) (§1303 does not include the power of avoidance granted by §544); *In re Bruce*, 96 B.R. 717 (Bankr. W.D. Tex. 1989); *In re Mast*, 79 B.R. 981 (Bankr. W.D. Mich. 1987).

B. The Minority Rule: Debtors Do Have Standing To Use Avoidance Powers Under Sections 544 - 549:

In re Cohen, 305 B.R. 886 (9th Cir. BAP 2004); *In re Barbee*, 461 B.R. 711, 714-716 (6th Cir. BAP 2011); *Countrywide Home Loans v. Dickson (In re Dickson)*, 427 B.R. 399, 403-406 (6th Cir. BAP 2010)(derivative standing properly allowed), *aff'd on other grounds*, 655 F.3d 585 (6th Cir. 2011); *In re Zubenko*, 528 B.R. 784, 787 n.3 (Bankr. E.D. Cal. 2015)(following *Cohen*); *Thacker v. United Companies Lending Corp.*, 256 B.R. 724, 728–29 (W.D. Ky. 2000); *In re Bonner*, 206 B.R. 387, 387-389 (Bankr. E.D. Va. 1997)(Chapter 13 debtor or trustee may exercise the avoidance powers); *In re Tillery*, 124 B.R. 127 (Bankr. M.D. Fla. 1991); *Freeman v. Eli Lilly Fed. Credit Union*, 72 B.R. 850, 853–55 (Bankr. E.D. Va. 1987); *In re Weaver*, 69 B.R. 554 (Bankr. W.D. Ky. 1987); *In re Ottaviano*, 68 B.R. 238 (Bankr. D. Conn. 1986); *In re Einoder*, 55 B.R. 319 (Bankr. N.D. Ill. 1985); *In re Boyette*, 33 B.R. 10 (Bankr. N.D. Tex. 1983); *In re Colandrea*, 17 B.R. 568 (Bankr. D. Md. 1982).

C. The Supreme Court's Decision In *Hartford Underwriters* - Has The Old Majority/Minority "Split" Changed To A Modern Trend For The Majority View?

"In *Hartford Underwriters Ins. Co. v. Union Planters Bank*, the United States Supreme Court held that, in the context of the bankruptcy code, where a statute 'names the parties granted the right to invoke its provisions, ... such parties only may act.' 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). Decisions since *Hartford* have trended toward a

different result, finding that a debtor lacks a trustee's avoidance powers under Chapter 5." *In re Lee*, 432 B.R. 212, 215 (D.S.C. 2010); *see also*, *In re Hansen*, 332 B.R. 8, 11 n.13 (10th Cir. BAP 2005)(citing *Ryker*); *Ryker v. Current (In re Ryker)*, 315 B.R. 664, 667 (Bankr. D.N.J. 2004)(characterizing as "growing majority" the view that Chapter 13 debtors lack authority to utilize the trustee avoidance powers.); *but see*, *In re Simmons*, 560 B.R. 308, 311 (Bankr. S.D. Ohio 2016)("It is not controversial that chapter 13 debtors may be granted derivative standing to pursue avoidance actions, using a trustee's powers under Code Section 544. This concept is so well settled that it has been enshrined within the Court's [Mandatory Form Plan].").

D. If The Chapter 13 Trustee "Unjustifiably Refuses" – Does That Give The Debtor The Right To Request "Derivative Standing" And Proceed Under "Derivative Rights"?

Yes:

"[T]he bankruptcy court properly granted the Debtor derivative standing to pursue lien avoidance under 11 U.S.C. §§ 544 and 547." *Countrywide Home Loans v. Dickson (In re Dickson)*, 427 B.R. 399 (B.A.P. 6th Cir.2010)*, aff'd on other grounds*, 655 F.3d 585, 593(6th Cir.2011); *see also*, *In re Barbee*, 461 B.R. 711, 714-715 (6th Cir. BAP 2011); *In re Rothenbush*, 2017 WL 933019, 2017 Bankr. LEXIS 622 at *3 (Bankr. M.D. Fla. Feb. 28, 2017)("*Hartford Underwriters* does not rule out derivative standing"); *In re Simmons*, 560 B.R. 308 (Bankr. S.D. Ohio 2016); *In re Smith*, 2014 WL 1404722 at **2-3, 2014 Bankr. LEXIS 1538 at **4-9 (Bankr. W.D. Ky. April 10, 2014)(no standing if derivative standing is not requested).

No:

In re Stewart, 473 B.R. 612 (Bankr. W.D. Pa. 2012)(rejecting argument for derivative standing).

In re Hannah, 316 B.R. 57, 61 (Bankr. D.N.J. 2004)(holding that Chapter 13 Debtor did not have standing to bring an avoidance action under §544(a) in the context of a discussion of derivative standing).

Maybe, if there is a benefit to the estate, but "no" if there is not:

Geiger v. Federal Home Loan Mortgage Corp. (In re Weyandt), 544 Fed. Appx. 107 (3d Cir. 2013). Even assuming that there are situations in which it may be appropriate to grant Chapter 13 debtor derivative standing to pursue trustee's avoidance powers, it was inappropriate to grant debtor derivative standing to avoid prepetition foreclosure sale in order to bring into bankruptcy estate real property in which she lacked any equity that could be administered for benefit of creditors.

Maybe, if a timely request is made to the court:

In re Smith, 2014 WL 1404722, at *3, 2014 Bankr. LEXIS 1538, at *8 (Bankr. W.D. Ky. April 10, 2014)("In this case, the Plaintiffs did not request derivative standing prior to filing this suit. As such, they do not have standing to pursue this action. Consequently, the Court must dismiss this adversary proceeding without prejudice.")

Any discussion of possible 'work arounds'?

"To avoid the need for derivative standing, clever chapter 13 trustees and debtors' counsel have adopted workarounds. For example, debtors may offer a retainer to chapter 13 trustees to pursue the avoidance claims. Or trustees may hire a debtor's counsel to serve as special counsel for purposes of pursuing the claims." *In re Rothenbush*, 2017 WL 933019, 2017 Bankr. LEXIS 622 (Bankr. M.D. Fla. Feb. 28, 2017)(footnotes citing cases omitted). See additional discussion below.

Leading non-Chapter 13 cases - *Cybergenics* and company:

Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 559 (3d Cir. 2003)(Chapter 11 case permitting "derivative standing"). *Cybergenics* points out that, in footnote number 5, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) explicitly stated that the decision did not address the issue of derivative standing. In addressing derivative standing in the context of a creditor seeking to exercise avoidance rights in a Chapter 11 case, the Sixth Circuit Court of Appeals stated: "perhaps the most important prerequisite to derivative standing is that [the party with authority to act under the Bankruptcy Code] has abused its discretion in failing to avoid a preferential or fraudulent transfer." *In re Gibson Grp., Inc*., 66 F.3d 1436, 1442 (6th Cir. 1995).

There is also the issue of creditor derivative standing in Chapter 13 cases....

See e.g., *In re Demeza*, 582 B.R. 868 (Bankr. M.D. Pa. 2018).

E. Can The Debtor Create Standing Through A Plan Provision And The Binding Effect Of Confirmation?

Some courts thinks so: "In this case, the Plaintiffs' modified plan expressly addressed the Plaintiffs' standing to bring this adversary proceeding. Fifth Third was noticed with the motion and had the opportunity to object to the language contained in Section 8 of the Plaintiffs' modified plan. By electing not to object to this language within the time provided, Fifth Third may not now object to the provisions of the modified plan." *In re Hazelwood*, 513 B.R. 323, 329 (Bankr. W.D. Ky. 2014); *see also*, *In re Simmons*, 560 B.R. 308, 311-312 (Bankr. S.D. Ohio 2016)(binding effect of standard provision in Mandatory Form Plan conferred standing on Debtors).

F. Why Not Both? What About The Chapter 13 Trustee And The Debtor Bringing Avoidance Actions Jointly.?

1. Can The Chapter 13 Trustee And the Chapter 13 Debtor Proceed Jointly? And Does That Help?

Voluntary Joinder

Lucero v. Green Tree Fin. Servicing Corp. (In re Lucero), 199 B.R. 742, 745 (Bankr.D.N.M.1996) (Chapter 13 debtors had no standing to bring avoidance action but were allowed to substitute Chapter 13 trustee as party plaintiff.), *rev'd on other grounds*, 203 B.R. 322 (10th Cir. BAP 1996).

In re Geraci, 507 B.R. 224 (Bankr. S.D. Ohio 2014)(Chapter 13 debtor and Chapter 13 Trustee were joint plaintiffs seeking to avoid a mortgage with a defective legal description under §544(a)(3). "Knowledge" was not attributed to the Trustee.)

Involuntary Joinder

In re Funches, 381 B.R. 471, 488-489 (Bankr. E.D. Pa. 2008). Trustee who had never been asked by Chapter 13 debtor to avoid prepetition mortgage as improperly notarized, or to avoid verdict entered in state court mortgage foreclosure action as alleged preference, and who had never consented to debtor's prosecution of such strong-arm and preference claims in his name, could not be joined as involuntary plaintiff, for purpose of alleviating any concerns about debtor's standing; even aside from fact that trustee had never been asked to join in proceeding and was not beyond jurisdiction of the bankruptcy court, trustee was under no duty to permit debtor to exercise his avoidance powers, as required for him to be joined as involuntary plaintiff.

In re Cole, 563 B.R. 526, 530 (Bankr. W.D.N.C. 2017). Federal Rule of Bankruptcy Procedure 7019, making Federal Rule of Civil Procedure 19 applicable, does not allow the Debtor to make the Chapter 13 Trustee an "involuntary plaintiff". Moreover, it would not cure the standing problem, because: "allowing the Plaintiffs to use Rule 19 as a post hoc mechanism to gain standing when they have none would be repugnant to foundational principles of federal jurisdiction, especially since the standing inquiry is made at the commencement of an action...". *Id*. "Indeed, courts have declined to allow an existing plaintiff to join an involuntary plaintiff when the existing plaintiff did not have standing to commence the action." *Id*. (Citing cases).

Is The Trustee <u>Really</u> A Party?

The Third Circuit Court of Appeals was not impressed by the Debtor's apparent tactic of putting the Chapter 13 Trustee in the caption, where the Chapter 13 Trustee did not actually participate in the litgation. *See*, *In re Knapper*, 407 F.3d 573, 577 n.3 & 583 (3rd Cir. 2005)("although the caption of Knapper's complaint lists the standing Chapter 13 trustee as a plaintiff, he did not participate in her adversary proceeding in any way."). The *Knapper* court held that the Chapter 13

Debtor did not have standing to pursue the avoidance claim. *See also*, *In re Funches*, 381 B.R. 471, 487-489 (Bankr. E.D. Pa. 2008).

Timing – If The Debtor Wants The Chapter 13 Trustee To Join In Litigation: Ask Early:

See, *In re Merritt*, 529 B.R. 845 (Bankr. E.D. Pa. 2015)(Chapter 13 Trustee objected to joining with the Debtor, in part, because the Debtor approached the Trustee so close to the two year bar date that the Trustee could not get comfortable with filing an action that would comply with Rule 9011).

Can The Chapter 13 Trustee Intervene Or Be "Substituted In"?

Wood v. Mize (In re Wood), 301 B.R. 558, 562 (Bankr. W.D. Mo. 2003)("the trustee is an indispensable party within the context of this proceeding because he is the only person with standing to bring the action and full relief cannot be accorded the creditors of the estate without his joinder." The decision then states: "Therefore, the Court will order that Wood's Complaint be amended to reflect the entry of Richard V. Fink, the Chapter 13 trustee, as a party plaintiff to prosecute this action in tandem with Wood, and as the party plaintiff who filed the Motion for Judgment on the Pleadings.").

In re Huntzinger, 268 B.R. 263, 265-266 (Bankr. D. Kan. 2000)("the court ruled that the Huntzingers had no standing to prosecute the action; only the trustee could file the complaint under § 544. Since that ruling, the trustee has moved for and has been granted permission to intervene as the party plaintiff.").

In re Ryker, 315 B.R. 664, 674 (Bankr. D.N.J. 2004)("At present, nothing in the record indicates whether the Chapter 13 Trustee intends to ratify, join or be substituted in the adversary proceeding. Ryker and his counsel are directed to immediately confer with the Chapter 13 Trustee, who shall thereafter advise the parties and the Court whether she will ratify, join, or be substituted in this adversary proceeding.").

Or, Perhaps, "Strongly Encouraged To Substitute In"?

In re Keenan, 364 B.R. 786, 807 (Bankr. D.N.M. 2007)("For the purposes of this Memorandum, the Court has also assumed that the judicial lien is a preferential transfer. In general, Chapter 13 debtors lack standing to pursue preferential transfer actions. See *Wood v. Mize (In re Wood)*, 301 B.R. 558, 561, 562 (Bankr.W.D.Mo.2003). Therefore, the Trustee should consider whether she has a duty to pursue a preferential transfer in this case to allow maximum relief to unsecured creditors. See id. at 562." Footnote 33 continues: "The effect on the Debtors and the unsecured creditors would be considerable. If Mallon's lien is avoided only in part pursuant to §522(f), Mallon will continue to have a lien on the property for $60,639, but the unsecured creditors (other than Mallon) would

receive less. On the other hand, if the Trustee entirely voids the lien pursuant to § 547(b), the Debtors will own their home free and clear of Mallon's lien, and the unsecured creditors other than Mallon will receive a larger dividend.").

G. A Trap For The Unwary Chapter 13 Trustee/Debtor – Failing To Object To Confirmation.

Hope v. Acorn Financial Inc., 731 F.3d 1189 (11th Cir. 2014). Trustee's post-confirmation adversary action to avoid perfection of creditor's security interest was barred by Trustee's failure to object to the Chapter 13 Plan. Confirmation of Plan in which Creditor was given a secured position can bind a Trustee who was aware of defect, failed to object, and affirmatively recommended confirmation.

But see, *In re Hazelwood*, 513 B.R. 323 (Bankr. W.D. Ky. 2014). Confirmation of the original confirmed Plan, listing a mortgage as "secured", was superseded by the unobjected to Amended Plan, which gave Debtors standing to pursue avoidance of Creditor's mortgage under §544.

H. In Jurisdictions Where The Debtor Lacks Standing, The Action May Be Terminated Under Rule 12(b)(6).

"A motion to dismiss for lack of standing is "properly brought under Rule 12(b)(1), because standing is a jurisdictional matter." *Hunters United for Sunday Hunting v. Pennsylvania Game Commission*, 28 F.Supp.3d 340, 343 (M.D. Pa. June 18, 2014) *(*citing *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)); s*ee also, Smith v. One West Bank, FSB (In re Smith)*, 459 B.R. 571, 572 (Bankr. M.D. Pa. 2011)(noting that the standing of a Chapter 13 debtor to utilize the strong arm powers of the trustee implicates subject matter jurisdiction because, if the debtor lacks standing, then the bankruptcy court lacks subject matter jurisdiction to address the merits of the case). "When a defendant moves to dismiss under both Rules 12(b)(1) and 12(b)(6), the court must first consider the defendant's motion under Rule 12(b)(1) because '[w]hether the complaint states a cause of action on which relief could be granted is a question of law ... [that] must be decided after and not before the court has assumed jurisdiction over the controversy.' *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L.Ed. 939 (1946). *See also Mielo v. Aurora Huts, LLC*, 2015 WL 106631, at * 2 (W.D. Pa. January 7, 2015) (*citing Int'l Ass'n of Machinists & Aerospace Workers v. Northwest Airlines,* 673 F.2d 700, 711 (3d Cir.1982))("Absent standing, and by extension subject matter jurisdiction, the court does not possess the power to decide the case, and any disposition it renders is a nullity.")." *Merritt v. MidAtlantic Farm Credit, ACA (In re Merritt)*, 529 B.R. 845, 858 (Bankr. E.D. Pa. March 25, 2015).

I. The Use Of Avoidance Powers Is Different Than A Chapter 13 Debtor Simply Pursuing Litigation On Behalf Of The Bankruptcy Estate.

> "Debtor argues that she has the ability to pursue litigation on behalf of the bankruptcy estate. That proposition is not particularly controversial. Though the Fourth Circuit has not yet considered the issue, each circuit to have considered it has found that Chapter 13 debtors have standing to bring claims in their own name on behalf of the bankruptcy estate. *See*, *e.g.*, *Smith v. Rockett*, 522 F.3d 1080, 1081 (10th Cir.2008); *Crosby v. Monroe County*, 394 F.3d 1328, 1331 n. 2 (11th Cir.2004); *Cable v. Ivy Tech State College*, 200 F.3d 467, 474 (7th Cir.1999)(ADA claim); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir.1998)(class action fee application). If the pursuit of litigation in the name of the estate was all that Debtor sought, there would be little issue with her chosen course. However, by the face of her complaint and argument at the May 5, 2010 hearing, she seeks to exercise the strong-arm powers of the Chapter 13 trustee pursuant to §544(a), which is an altogether different animal."

In re Lee, 432 B.R. 212, 214 (D.S.C. 2010).

See also, *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515 (2d Cir.1998)("Although this Court has not previously ruled on the issue, we conclude that a Chapter 13 debtor, unlike a Chapter 7 debtor, has standing to litigate causes of action that are not part of a case under title 11."); *In re Griner*, 240 B.R. 432, 436 (Bankr. S.D. Ala. 1999)("The Court concludes that the trustee and debtor concurrently hold the power to sue as to nonbankruptcy federal and state law claims such as Mr. Griner's suit."); *but see*, *Rugiero v. Nationstar Mortg., LLC*, 580 Fed.Appx. 376 (6th Cir. 2014)(Chapter 13 case where court cites Chapter 7 cases stating that trustee is the only one who can act as representative of the estate).

J. Lack Of Standing's Potential Bleed Over Into The Claims Objection Process.

> "Even if the bank's lien is avoidable under §544, §502(d) does not alter the outcome, for the debtor lacks standing to invoke §502(d).
>
> Although a debtor is entitled to object to a claim under 11 U.S.C. §502(a) (permitting a party in interest to object to a claim), §502(d) does not use the term "party in interest" and depends upon a showing that the lien is avoidable pursuant to a power vested only in a trustee. A debtor cannot circumvent the restriction against her exercising a trustee's avoidance powers by objecting to the claim under §502(d) and invoking defensively a power reserved to a trustee. *Holloway v. IRS (In re Odom Antennas, Inc.)*, 340 F.3d 705, 709 (8th Cir. 2003); *Energy Income Fund, L.P. v. Compression Solutions Co. (In re Magnolia Gas Co.)*, 255 B.R. 900, 914–15 (Bankr.W.D.Okla.2000); *United Jersey Bank v. Morgan Guar. Trust Co. (In re Prime Motor Inns, Inc.)*, 135 B.R. 917, 920–21 (Bankr. S.D. Fla. 1992)." *In re Turner*, 490 B.R. 1, 4 (Bankr. D.D.C. 2013).

VII. Does The Trustee Having Avoidance Powers Create A Corresponding Duty To Use Them?

A. Some Courts Say: "Generally, No".

In re Engle, 496 B.R. 456, 464 (Bankr. S.D. Ohio 2013)("By conditioning the distribution of the net proceeds of the Preference Action on the Trustee's election to commence litigation that he has no obligation to bring—and almost certainly will not prosecute—the Debtors have not provided for the actual avoidance of the Transfer. Quite simply, the Debtor cannot satisfy §1325(a)(4) by conditioning the required distribution of property on an event that almost certainly will not happen.").

In re Hansen, 332 B.R. 8, 14 (10th Cir. BAP 2005)("Section 1302, which governs the trustee's duties, does not list avoidance powers among them. In fact, §1302, which incorporates Chapter 7 trustee duties under §704 by reference, does not refer to §704(1)—the Chapter 7 trustee duty to "collect and reduce to money the property of the estate.").

In re Cohen, 305 B.R. 886, 896 (9th Cir. BAP 2004)("The one chapter 7 trustee duty that is omitted from the duties of the chapter 13 trustee or debtor is the §704(1) duty to 'collect and reduce to money the property of the estate.' This is the duty that obliges chapter 7 trustees to pursue avoiding actions.").

In re Straight, 200 B.R. 923, 928 (Bankr. D. Wyo. 1996)("The power to avoid a lien or transfer under §§544, 545, or 547 is granted to the "trustee." In chapter 13, the trustee's specific duties do not include using the lien avoiding powers of chapter 5.").

Gilliam v. Bank of Am. Mortgage, L.L.C. (In re Gilliam), 2004 WL 3622646 at *7, 2004 Bankr. LEXIS 1653 at *25 (Bankr. D. Kan. Oct. 28, 2004)("The Court believes the difference in Chapter 7 and Chapter 13 trustee duties simply gives Chapter 13 trustees more discretion not to use the avoiding powers; it does not eliminate their standing to use them.")

B. Some Courts Say "Yes" There Is A Duty.

In re Johnson, 279 B.R. 218, 225 (Bankr. M.D. Tenn. 2002)("Chapter 13 trustees have a fiduciary obligation to object to claims, to examine the validity of security interests and to prosecute avoidance actions during the Chapter 13 case. See 11 U.S.C. § 1302(b).").

In re Driver, 133 B.R. 476, 480 (Bankr. S.D. Ind. 1991)("it would then be in the Chapter 13 trustee's interest (and is arguably among the trustee's duties, *see* 11 U.S.C. section 1302(b)(4)) to use the transfer avoidance powers to enable the debtor to propose and perform a feasible plan.").

In re Redditt, 146 B.R. 693, 696-697 (Bankr. S.D. Miss. 1992)("Where use of the avoiding powers will achieve a more equitable distribution among creditors or where it will aid in a more appropriate classification of claims, the trustee should proceed with such action pursuant to the trustee's duty to advise and assist the debtor in performance under the plan.").

C. Maybe It Isn't A "Yes" Or "No" Question....

"Equally clear is the ability of the Chapter 13 trustee to employ the avoidance powers. Under § 103(a) the provisions of Chapters 1, 3 and 5 apply to cases commenced under Chapters 7, 11, 12 or 13. 11 U.S.C. §103(a). Accordingly, a Chapter 13 trustee, is empowered to use all of the avoidance powers found in Chapter 5. This authority is not diminished because a Chapter 13 trustee is not required to perform the duty of a Chapter 7 trustee under §701(1) to collect and reduce to money the property of the estate. That duty does not provide the authority for the exercise of the avoidance powers. Rather, the authority resides in §§544, 545, 547 and 548. The avoidance powers are a means by which a Chapter 7 trustee may meet his duty under §701(1). Similarly, the exercise of avoidance powers by a Chapter 13 trustee can be a means to fulfill the duty to '... assist the debtor in performance under the plan,' set forth in §1302(b)(4).

Nor is it necessarily contrary to the purpose or functioning of Chapter 13 for the Chapter 13 trustee to be the sole party to exercise the avoidance powers. It would certainly be less cumbersome if the Chapter 13 debtor enjoyed the independent authority to proceed with an avoidance action. However, there is no reason to expect that a Chapter 13 trustee will refuse to act on an avoidance claim that has merit. Further, the Chapter 13 trustee need not personally prosecute each avoidance action. For example, the trustee can retain debtor's counsel as special counsel pursuant to §327(e) in order to prosecute the matter. Limiting Chapter 13 debtors to the trustee powers identified in §1303 is consistent with both the statutory language and the structure of the Code." *In re Ryker*, 315 B.R. 664, 670 (Bankr. D.N.J. 2004).

D. At Least One Court Says The Chapter 13 Trustee Has No Duty To Let A Debtor Exercise Trustee's Avoidance Rights.

In re Funches, 381 B.R. 471, 489 (Bankr. E.D. Pa. 2008)("Because the Trustee has no duty to permit the Debtor to exercise his avoidance powers in his name, the Debtor may not maintain this action in the name of the Trustee by invoking Rule 19.").

E. "Let's You And Him Fight!" Plans (Nope. Nope. Nope.)

In *In re Engle*, 496 B.R. 456 (Bankr. S.D. Ohio 2013), the Chapter 13 debtors' proposed plan, simply by requiring debtors to pay to general unsecured creditors the actual net recovery from any preference proceedings, in event that Chapter 13 trustee elected to pursue such proceedings and was successful, did not satisfy "best interests of creditors" or "liquidation" test, given that Chapter 13 trustee did not have same incentive as Chapter 7 trustee to pursue avoidance claims, and that debtors' payment was conditioned on event that was unlikely to occur.

The argument in *Engle* did not come out of nowhere - it was suggested by the holding in *Loeffler*:

> The Court cannot apply the best interests test under §1325(a)(4) in such a way as to require the Debtor to personally fund the distribution of assets that she does not possess and cannot personally recover. Avoidance actions are typically causes of action concerning money paid to a creditor that constitutes a preference; an avoidable lien granted to a creditor within 90 days of the petition date; or real or personal property transferred prior to the petition date in a transaction that is either constructively or actually fraudulent. In this case the allegation concerns a right to payment of money that the Debtor relinquished prior to the petition date. As is typical of many avoidance actions, it involves property the Debtor does not possess. The Court cannot require the Debtor to personally fund payment of the hypothetical value of an asset that the Debtor does not possess and that the Code gives her no authority to recover. By its very nature, an avoidance action to recover money from a third party is unlike property that vests in the debtor upon plan confirmation, the value of which the debtor pays to creditors under his plan. Except for actions to avoid the transfer of exempt property under §522(h), avoidance actions are not under the control of the debtor. It is the trustee who chooses to pursue an avoidance action.
>
> That does not mean that a creditor in a chapter 13 proceeding should not expect to receive a distribution on account of assets that may be subject to recovery under §§544, 547 or 548. But, because a chapter 13 debtor has no control over such recovery actions, the creditor must look to the chapter 13 trustee to recover and distribute those assets exactly as it must look to the trustee to pursue those recovery actions in a chapter 7 case. So long as the Debtor's plan provides for that eventuality and provides that any such recovery must be distributed to creditors under a the Plan, it passes muster under §1325(a)(4).

In re Leoffler, 2011 WL 6736066 at *3, 2011 Bankr. LEXIS 5038 at *9-11 (Bankr. D. Colo. Dec. 21, 2011)(footnotes omitted).

E. But What About Trustee Liability?

One reason that a Chapter 13 Trustee might be motivated to pursue an avoidance action is because if, after the statute of limitations passes, the Chapter 13 case converts to a Chapter 7 - the Chapter 13 Trustee could be sued by the Chapter 7 Trustee for failing to avoid the transfer before the statute of limitations expired.

Not a happy thought for the Chapter 13 Trustee.

While one method of protecting creditors without having to institute avoidance litigation is an objection to confirmation of the Plan based on the Best Interest of Creditors Test - that does not protect creditors if the case is converted to a Chapter 7.

Is there another method that preserves the ability to pursue litigation, if necessary, without the Chapter 13 Trustee actually having to actually file an avoidance action?

1. Obtaining a waiver - the alternative to litigation.

If the main concern is protecting creditors from the possibility of conversion after the bar date for bringing an avoidance action, one of the most common ways to address that concern is by obtaining a waiver.

A waiver saves the Chapter 13 trusteeship the time and expense of litigation, while still preserving the cause of action if it should need to be brought at a later date.

The most important consideration in obtaining a waiver is making sure that it is effective in waiving the statute of limitations defense. That means: NOT getting a waiver from the Debtor - getting it, instead, from the potential preference/fraudulent transfer DEFENDANT. The Debtor is generally not going to be able to provide an effective waiver on behalf of a future defendant in an adversary proceeding.

A copy of a waiver form that has been used by other Chapter 13 Trustees is attached as Appendix A.

F. Other Potential Negative Consequences To Chapter 13 Trustees Not Pursuing Avoidance Claims:

1. Use Of Avoidance Powers As A Factor In Conversion To Chapter 7:

In re Killian, 529 B.R. 257, 264 (C.D. Ill. 2013)("The bankruptcy court stated that unlike a Chapter 13 trustee, a Chapter 7 trustee could avoid and recover preferential transfers, thus making conversion the better option in this case.").

VIII. Section 522(f) - Avoidance Powers That Primarily Belong To The Debtor.

Section 522(f) specifically gives ***debtors*** the power avoid the fixing of certain liens.

A. Judicial liens that impair an exemption [§522(f)(1)(a)]. The lien avoidance power provided by Section 522(f)(1) "enables the debtor to extinguish or partially avoid the judicial lien of a creditor in property that would otherwise be exempt but for the creditor's lien." *In re Steck*, 298 B.R. 244, 248-249 (Bankr. D.N.J. 2003).

Section 522(f) lien avoidance applies in Chapter 13 cases. *In re Hall*, 752 F.2d 582, 589-90 (11th Cir.1985); *In re Steck*, 298 B.R. 244, 249-250 (Bankr. D.N.J. 2003) Other circuits addressing lien avoidance in Chapter 13 have simply assumed that a chapter 13 debtor may avoid liens under § 522(f). *See*, *In re McKay*, 732 F.2d 44, 48 (3rd Cir.1984); *Mead v. Mead*, 974 F.2d 990, 991-92 (8th Cir.1992); *In re Billings*, 838 F.2d 405, 406 (10th Cir.1988).

When a debtor seeks to avoid a lien to the extent that it impairs his permitted exemptions, he does not utilize any avoidance powers derived from the trustee. *In re Tash*, 80 B.R. 304, 306 (Bankr.D .N.J.1987).

B. Nonpossessory, nonpurchase money security interests in household goods, "tools of the trade" and professionally prescribed health aids [§522(f)(1)(B)].

See, *In re Bland*, 793 F.2d 1172 (11th Cir. 1986)(en banc); *Matter of Ambrose*, 179 B.R. 982 (Bankr. S.D. Ga. 1995).

C. Does a Chapter 13 Trustee also have standing to avoid liens under §522(f)?

Yes. *Matter of Maddox*, 15 F.3d 1347, 1355-56 (5th Cir. 1994); *In re Kennedy*, 139 B.R. 389, 390-392 (Bkrtcy.N.D. Miss.1992). However, a Chapter 13 Trustee does not generally take actions that will only benefit the Debtor - and, in most cases, Section 522(f) avoidance does not benefit the unsecured creditors in a Chapter 13 case.

IIX. Avoidance You Can't Avoid - The Hypothetical Liquidation For The Best Interest Test.

The "Best Interest of Creditors Test" is set forth in Section 1325(a)(4), which states:

> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of this title on such date.

A. Under The "Best Interest" Test, The Chapter 13 Trustee Has To Look At A "Hypothetical Liquidation"

"To determine compliance with the test, a hypothetical liquidation of the debtor's estate under Chapter 7 on the "effective date of the plan" must be compared to the value on "the effective date of the plan" of what the debtor proposes to distribute to the holders of allowed unsecured claims. Two mathematical calculations are required: (1) an estimate must be made of what would be available for distribution to unsecured claim holders in a Chapter 7 case; and (2) the distributions to unsecured claim holders under the proposed plan must be "present valued" (discounted) as of the effective date of the plan."

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Edition, §160.1, at ¶2, Sec. Rev. June 7, 2004, www.Ch13online.com.

> "The determination regarding what property creditors would receive in a liquidation should also take into account the administrative expenses that would be incurred in a chapter 7 case. These expenses may include, in addition to costs of sale, costs such as capital gains taxes incurred by the trustee who disposes of property. This determination may present issues of valuation when the debtor proposes to retain nonexempt property. When the property is sold pursuant to the plan, the amount of the

> actual net proceeds, less applicable exemptions, normally determines the amount that must be distributed to creditors."

8-1325 *Collier on Bankruptcy*, ¶1325.05 (16th ed.).

B. Avoidance Actions Are "Litigation Assets" For Purposes Of The Best Interest Of Creditors Test.

Avoidance actions are assets that are part of the liquidation analysis. While there is a question regarding the extent to which a Chapter 13 Trustee would be required to pursue avoidance actions, there is question about the obligation of a Chapter 7 Trustee to do so under §704(1). However, that obligation to pursue avoidance actions is contingent on whether or not the litigation would result in significant monies being available to pay unsecured creditors.

The Best Interest of Creditors Test depends on a number of variables that could affect the "hypothetical liquidation". As one court has stated:

> "In deciding whether to pursue litigation such as a preference action, Chapter 7 trustees must undertake a cost/benefit analysis considering not only the potential recovery but also the potential loss if the litigation is unsuccessful. See *In re Wildman*, 72 B.R. 700, 707 (Bankr. N.D. Ill. 1987). Neither Chapter 7 trustees nor their attorneys have a duty to collect assets when the costs of collection exceed the value to the estate of the collection. *See In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir.1995). To the contrary, Chapter 7 trustees and their lawyers have a duty to abandon burdensome assets and burdensome litigation. *Id.*; *see also* 11 U.S.C. §554. Chapter 7 trustees should not pursue preference claims where the amount in controversy does not justify the costs. *See In re Minich*, 386 B.R. 723, 728–29 (Bankr. C.D. Ill. 2008). The hypothetical liquidation analysis undertaken in Chapter 13 cases must follow these same principles. If a Chapter 7 trustee would abandon an asset, then there is no amount required to be paid to unsecured creditors through a Chapter 13 plan for that asset. *See In re Sharp*, 394 B.R. 207, 212–13 (Bankr. C.D. Ill. 2008)."

In re Cowger, 2014 WL 318241, at *2, 2014 Bankr. LEXIS 379, at **5-6 (Bankr. C.D. Ill. Jan. 29, 2014); *see also*, *In re Hopkins*, 494 B.R. 306, 319 (Bankr. E.D. Tenn. 2013)("In this case, the court is requiring her to include an additional amount in her plan in order to meet the best interest of creditors test. That amount is an estimate of the value of the adversary proceeding to the estate less the expenses of the litigation and costs of sale.").

Similarly, the court in *LaLonde* stated:

> There is little doubt that this court must consider what the chapter 7 trustee could have achieved by his avoidance and sale powers. On its face, the language of §1325(a)(4) seems to demand that a court conduct just this hypothetical inquiry, and the few courts confronting the issue have agreed with this reading. *See*, *In re Carter*, 4 B.R. 692 (Bankr.D.Colo.1980); *In re Future Energy Corp.*, 83 B.R. 470 (Bankr.S.D.Ohio 1988); *In re Larson*, 245 B.R. 609 (Bankr.D.Minn.2000). In *Future Energy*, for example, the court

> examined whether a chapter 11 plan met the best interests test of §1129(a)(7). To make that judgment, the court considered the distribution that would have resulted had the chapter 7 trustee avoided an allegedly preferential transfer. 83 B.R. at 489–90.
>
> Courts have generally held that a plan proponent must show that a trustee was not reasonably likely to have succeeded in an avoidance or sale action. *See*, *In re Larson*, 245 B.R. at 615 (best interests test required the court to determine whether a chapter 7 trustee "could be reasonably expected to succeed in setting aside the transfer").

In re LaLonde, 431 B.R. 199, 205 (Bankr. W.D. Wis. 1010).

In short, the practical problem appears to be: How do litigants provide proof to the bankruptcy court regarding the likelihood that a Chapter 7 Trustee would pursue litigation, how much it would cost, the chances of legal success, and then the probability of any judgment being collectable?

C. The Best Interest Of Creditors Test - Deductions.

The court in *Trombetta* stated the "formula" for the Best Interest Test as follows:

> "To arrive at a liquidation value to be paid the general unsecured creditors, the Court is to calculate the value of all nonexempt property of the estate, reduced by the administrative expenses that would be incurred in a chapter 7 case, by the amount of all lien claims that would be enforceable against the property under chapter 7, and by the amount attributable to priority unsecured claims allowed under chapter 7."

In re Trombetta, 383 B.R. 918, 924 (Bankr. S.D. Ill. 2008).

Courts generally allow certain expenses that would be incurred in a Chapter 7 liquidation to reduce the amount of the Chapter 13 payments required to meet Section 1325(a)(4)'s Best Interest of Creditors Test. *See*, *In re Steele*, 403 B.R. 882, 888 (Bankr. D. Kan. 2009)("In performing a hypothetical liquidation analysis, the starting point is obviously the value of the property the Chapter 7 Trustee would be entitled to liquidate. . . . That is only the starting point, however. From that amount, one must deduct the costs the Chapter 7 trustee will likely incur in completing the liquidation, as well as the trustee fees and any other expenses that would be incurred in an actual Chapter 7 liquidation of the property.").

1. The "cost of sale" is one expense that is often allowed.

> *See*, *In re Locklear*, 386 B.R. 911 (Bankr. S.D. Ga. 2007)(deducting the costs of realtor commission); *In re Trombetta*, 383 B.R. 918, 924 n.15 (Bankr. S.D. Ill. 2008)("These expenses would include costs of sale by the chapter 7 trustee"); *In re Delbrugge*, 347 B.R. 536 (Bankr. N.D. W.Va. 2006)(test must take into account costs of sale); *In re Dixon*, 140 B.R. 945 (Bankr. W.D.N.Y. 1992) (permitting 10% deduction from estimated sale price to account for costs of sale in chapter 7 based on court's experience).

2. The Chapter 7 Trustee fee may also be included in the calculation.

In re Trombetta, 383 B.R. 918, 924 n. 15 (Bankr. S.D. Ill.("These expenses would include . . . trustee's fees"); *In re Delbrugge*, 347 B.R. 536, 539 (Bankr. N.D. W.Va. 2006)("Appropriate deductions used in making the calculation required by §1325(a)(4) include: Chapter 7 trustee's fees"); *In re Gatton*, 197 B.R. 331, 332 (Bankr. D. Colo. 1996); *In re Barth*, 83 B.R. 204, 206 (Bankr. D. Conn. 1988)(allowing Chapter 7 trustee compensation as a deduction without presenting evidence).

3. Taxes, such as capital gains taxes, that would have to be paid in the Chapter 7, are also deducted.

In re Delbrugge, 347 B.R. 536, 539 (Bankr. N.D. W.Va. 2006)("Appropriate deductions used in making the calculation required by §1325(a)(4) include: . . . capital gain taxes"); *In re Gatton*, 197 B.R. 331, 332 (Bankr. D. Colo. 1996)("In addition, we must now take into consideration a hypothetical capital gains tax that would be payable by a chapter 7 trustee."); *Matter of Young*, 153 B.R. 886, 887 (Bankr. D. Neb. 1993)("Before the court is the limited issue whether capital gains taxes should be deducted in completing a hypothetical Chapter 7 liquidation analysis for purposes of confirming a Chapter 13 plan. I conclude that capital gains taxes should be deducted"); *In re Card*, 114 B.R. 226, 228 (Bankr. N.D. Cal. 1990)("Since one of those expenses would be the capital gains tax, the debtor here is justified in including the hypothetical tax in his calculation.").

4. As With Many Things In The Law - Sometimes The Problem Is Evidence.

In re Dick, 2008 WL 294583 at *3, 2008 Bankr. LEXIS 264 at *8 (Bankr. D. Kan. Jan. 30, 2008)("For chapter 13 liquidation test purposes, the Court values the parts inventory at $4,500 and accepts Palmer's appraisal of the Connex container at $1,000. The trustee would be entitled to § 326 compensation on $5,500, or $1,300. **The Court has no evidence of what the auctioneer's commission would be and makes no deduction therefor.** This would leave $4,200 for distribution to the creditors.").

In re Barth, 83 B.R. 204, 206 (Bankr. D. Conn. 1988)("It is the debtor's burden to establish all the conditions necessary for plan confirmation under §1325(a). . . . If a debtor claims liquidation expense in addition to trustee compensation, the burden will be on the debtor to establish such amount. The court will not accept blanket assertions that six percent, or any other percentage of estate assets, automatically should be allowed to establish liquidation cost.").

D. Going The Other Way - Additions: Discount Rates/Interest If Liquidation Would Provide A Dividend In Chapter 7.

In contrast to the expense associated with liquidating assets in Chapter 7 that reduce the amount to paid to meet the Best Interest Test, some courts require an increase in the amount to

be paid in a Chapter 13 Plan based upon the fact that payments will not be paid in a lump sum - but rather, will be paid over a three to five year period.

Without going into some of the complexities of timing associated with a determination of whether a Plan complies with Section 1325(a)(4), it is easy to see that payments to be received 60 months from now are not worth as much as the immediate payment of the same amount of money. For a stream of payments over time to have the same "present value" as an immediate payment, the payments over time have to be enhanced through something akin to an interest component. This type of calculation will only come into play when the amount that would be received in a Chapter 7 liquidation exceeds the present value of the amount that is to be distributed through the Chapter 13 Plan.

When the assets that need to be liquidated are litigation assets, courts may look at the reality of how long the litigation would take in a Chapter 7 (down the road several years), versus when payments would begin in Chapter 13 (after confirmation). *See*, *In re Lapin*, 302 B.R. 184, 192 (Bankr. S.D. Tex. 2003).

Of course, on of the major factors in determining "present value" is the underlying interest rates. When interest rates are high, the enhancement can be significant. *See*, *In re Hieb*, 88 B.R. 1019 (Bankr. D.S.D. 1988)(discount rate of 12% per annum). Today, because interest rates are hovering near historic lows, less "value" is being lost in payments over time, and it appears that this aspect of the Best Interest Test has been litigated less frequently as a result. Should we again see the days of savings accounts paying 5% interest, this issue may raised more frequently.

E. Arriving At A Precise Number For Purposes Of Section 1325(a)(4) Is Hard - So, Many Courts Use A Standard Discount.

Some courts simply adopt a "flat rate" to simplify the process of arriving at a "net" figure. *See*, *In re Craver*, 2012 WL 290366 at *3, 2012 Bankr. LEXIS 446 at *8-9 (Bankr. N.D. Ohio Jan. 31, 2012)("In this case, both parties have adjusted for any exemptions in the property and allowed a flat ten percent for the cost of sale/administrative cost. The court recognizes the utility of a flat rate and accepts this rate. The ten percent flat rate will generally favor unsecured creditors. When chapter 7 assets total $50,000 or less, the trustee's statutory compensation alone is at least ten percent, not including any expenses related to liquidation."); *In re Boyd*, 410 B.R. 95, 100 (Bankr. N.D. Cal. 2009)("The Court estimates that the sale proceeds would be further reduced by costs of sale which are normally calculated as eight percent of the sale"); *In re Trombetta*, 383 B.R. 918, 924 n. 15 (Bankr. S.D. Ill. 2008)("The chapter 13 trustees in this District subtract 12 percent of an asset's value to account for the hypothetical chapter 7 trustee's costs in selling the item and for the chapter 7 trustee's statutory fees. The debtor has not contested using this methodology.").

Educational Materials

Friday October 10, 2014 11:30 AM - 12:30 PM

Who is Driving This Train?
The Proper Roles of the Judge and the Trustee in Chapter 13 Cases

Who Is Driving the Train
The Proper Roles of the Judge and the Trustee in Chapter 13 Cases

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BEST PRACTICES FOR DOCUMENT PRODUCTION REQUESTS BY TRUSTEES IN CONSUMER BANKRUPTCY CASES

Shortly after the effective date of BAPCPA, the United States Trustee Program ("USTP") reviewed its document production requirements and decided that USTP staff would not routinely request from debtors any documentation that is not otherwise required by the Bankruptcy Code ("Code") or Federal Rules of Bankruptcy Procedure ("Rules"). The USTP similarly notified chapter 7 and chapter 13 trustees that we did not require them to collect additional documents without a specific need for additional information. In an effort to control the cost of consumer bankruptcy without interfering with a trustee's obligation to investigate the financial affairs of the debtor, the USTP consulted with the National Association of Bankruptcy Trustees ("NABT"), National Association of Chapter 13 Trustees ("NACTT"), and the National Association of Consumer Bankruptcy Attorneys ("NACBA") to consider prevailing document request practices in consumer bankruptcy cases. After reviewing its own practices and considering the input of those entities, the USTP developed the best practices set forth below.

By identifying common examples of potentially unreasonable or burdensome document requests and some of the most common situations that may reasonably lead a trustee to make further inquiry, this USTP guidance is intended to ensure that all parties in interest are focused on documentation that is likely to advance the proper and efficient administration of a particular bankruptcy case.

These best practices are not intended to override the requirements of the Code, Rules or local bankruptcy rules. Nor are they intended to interfere with the reasonable judgments made by trustees in light of the facts and circumstances in specific cases.

I. Common Examples of Potentially Unreasonable or Overly Burdensome Document Requests

A. A trustee asks every debtor to supply copies of automobile titles, copies of a county treasurer's tax statement for real property, six months of bank statements, three years of tax returns, an itemized inventory of household goods, copies of divorce decrees or property settlements entered in the last three years, and copies of the complaint and answer in any legal proceeding to which the debtor is a party. This request is excessive. There may be good reasons to make any or all of these requests in an individual case, but a blanket request for all of these documents should not be made in all cases.

B. Trustees in a particular jurisdiction have met and agreed upon a uniform letter request or questionnaire that requires all debtors to submit documents and

information that supplement and expand upon the detail required by the Bankruptcy Code and Rules. This request is excessive. In a specific case, there may be valid reasons to make such a request, but that request should not be made routinely in all cases.

C. A trustee routinely rejects liquidation analyses and plan calculations that contain *de minimis* mathematical errors that will not affect the ultimate distribution to creditors. Generally, before rejecting a plan with minor errors, the trustee should weigh the cost to the debtor of preparing a new plan against the benefit to creditors.

II. Common Examples That May Lead to Further Inquiry and Document Requests

A. The debtor's schedules show an expensive home but value household goods and furniture at a disproportionately nominal amount (e.g., $500). The inconsistency between the value of the debtor's home and the value of the household goods and furnishings may cause the trustee to make further inquiry and request additional documents.

B. On Schedule I, the debtor lists monthly pay but does not itemize deductions or identify his employer. On the Statement of Financial Affairs ("SOFA"), Question 1, the debtor lists income for the previous year only. Since Schedule I and question 1 of the SOFA appear to be incomplete, the trustee might request additional information regarding the source of the debtor's income for the current and prior years as well as the monthly deductions from the debtor's pay.

C. On Schedule D, the debtor lists a secured automobile loan that is owed to a relative. The fact that the debt is owed to an insider may cause the trustee to request proof that the security interest has been properly perfected or other documents relating to this transaction.

D. The debtor lists a value for his residence that, in the trustee's experience, is significantly lower than homes in that neighborhood or town. The apparent asset undervaluation may cause the trustee to request some proof of value, particularly if there appears to be equity in the property. However, trustees should not request proof of value if the asset is fully exempt under state law or there is clearly no equity.

E. A debtor's attorney files a large number of cases in which the same questions on Schedule B are left blank, or lists the identical value on Schedule B for all of his

debtors. To the extent that the trustee believes Schedule B to be inaccurate or incomplete in a particular case, the trustee may request documents in that case to supplement the incomplete information provided.

F. The debtor lists significant unsecured debts on his Schedule F, including recent and high credit card debt, but minimal or no assets on Schedule B. The trustee might request additional documentation, including credit card and bank statements, to determine whether the debtor has dissipated or failed to disclose assets.

G. A debtor's attorney files cases in which the means test forms are frequently completed improperly or contain significant mathematical errors. To the extent that the trustee believes the improperly completed or miscalculated means test form will have a material impact on a debtor's case, the form deficiencies may cause the trustee to request documents to supplement the incomplete or miscalculated information provided.

H. The debtor lists a vehicle that appears to be a "classic" or vintage car and values it at a nominal amount (e.g., $250). The apparent undervaluation may cause the trustee to request that the debtor provide proof of the car's value, which proof may include an appraisal or documentation regarding the purchase price.

I. The debtor lists her past-due federal tax debt and child support as "secured" debts on Schedule D. The categorization of these debts, which usually are unsecured liabilities, may cause the trustee to request that the debtor provide proof that the debts are secured.

J. The debtor works for an hourly wage with differing hours each pay period, sometimes resulting in overtime. The debtor supplies a recent payment advice that lists cumulative year-to-date information and provides only a rough estimate of the debtor's earnings in the six months prior to filing. The variance in hours and pay may cause the trustee to request additional information to confirm the debtor's income in order to conduct a proper means-test analysis.

K. A trustee requests additional documents such as six months of bank statements and credit card statements based on a "feeling" or "hunch" following the debtor's testimony at the meeting of creditors. The debtor's testimony may cause the trustee to make such requests in order to fully investigate the debtor's compliance with the Code and Rules. However, the trustee should be able to provide debtor's

counsel or an unrepresented debtor with a reasonable explanation for the "feeling" or "hunch".

III. Submission of Documents to the Trustee

Currently, there is no uniformity in the manner in which debtors furnish documents, information, verification of identity, and other materials to the trustee. Even in the same geographic locality, trustees may have different preferences on the production and receipt of information and documents; and debtors and debtors' attorneys can have different preferences on the assembly and production of this material. To avoid confusion and promote judicial efficiency, it is in the interest of all parties to the bankruptcy system to agree on a uniform manner or process through which documents, information, verification of identity, and other materials are timely furnished by debtors and debtors' counsel to trustees. Ideally, a uniform process, such as email, should impose the least burden and cost on both trustees and debtors. Examples of uniform procedures that trustees could adopt are set forth below.

A. Trustees in a jurisdiction have adopted a uniform method of receiving information by email. Trustees allow pro se debtors and counsel without access to email to submit their additional information in hard copy.

B. Trustees in a jurisdiction have set up a system that allows debtors and debtors' attorneys to send copies of encrypted information and documents to a central file-transfer-protocol site or third-party repository. Trustees allow debtors and debtors' counsel to submit documents by another method on a case-by-case basis to accommodate specific needs or requests.

BEST PRACTICES FOR TRUSTEES and MORTGAGE SERVICERS IN CHAPTER 13
AS ENDORSED BY NACTT, NACBA, CMIS AND AFN

If servicers/mortgagees include a flat fee cost in the proof of claim for review of the Chapter 13 plan prior to confirmation and for the preparation of the proof of claim, it should be reasonable and fairly reflect the attorney's fee incurred.

If Servicers/mortgagees include attorney fees for pursuing relief from stay, such fees should be clearly identified as well as how such fees are to be paid in any agreed order resolving a Motion for Relief from Stay or any other matter before the court.

Servicers/mortgagees should analyze the loan for escrow changes upon the filing of a bankruptcy case and each year thereafter. A copy of the escrow analysis should be provided to the debtor and filed with the Bankruptcy Court by the servicers/mortgagee or their representative each year.

Servicers/mortgagees should not include any pre petition cost or fees or pre petition negative escrow in any post petition escrow analysis. These amounts should be included in the prepetition claim amount unless the payment of such fee or cost was actually made by the servicer.

Servicers/mortgagees should attach a statement to a formal notice of payment change outlining all post petition contractual costs and fees not previously approved by the court and due and owing since the prior escrow analysis or date of filing whichever is later. This statement need not contain fees, costs, charges and expenses that are awarded or approved by the Bankruptcy Court order. In absence of any objection or challenge to such fees, the trustee should take appropriate steps to cause such fees to be paid as part of Debtor's Chapter 13 plan.

Servicers/mortgagees should supply and maintain a contact for debtor's counsel and trustee's for the purpose of restructuring, modifying a mortgage, or other loss mitigation assistance including a short sale or deed in lieu of foreclosure. The contact should be an individual or group with the ability to implement or assess with objective criteria a loss mitigation modification after filing of a chapter 13 petition with the goal of keeping the Debtor in the house and the success of the bankruptcy.

Mortgage servicers should provide a dedicated phone line and contact for Chapter 13 Trustee inquiry use only.

Mortgage servicers should monitor post petition payments. If the mortgage is paid post petition current then the servicers/mortgagees should not seek to recover late fees. No late fees should be recovered or demanded for systemic delay but should be limited to actual debtor default.

Pre petition payments should be tracked as applied to pre petition arrears, post petition payments should be tracked as applied to post petition ongoing mortgage payments

Servicers/mortgagees should file a notice and reason of any payment change with the court and provide same to the Debtor.

Servicers are required to file a notice of any protective advances made in reference to a mortgage claim, such as non escrow insurance premiums or taxes. Such notice should be provided to the debtors and filed with the court.

Servicers/mortgagees should clearly identify if the loan is an escrowed or escrowed loan and break out the monthly payment consisting of Principal, Interest, Escrow and PMI components.

Servicers/mortgagees should identify nontraditional mortgage loans in their proof of claims. Loans with options should identify on the proof of claim the type of loan as well as the various contractual payment options available during the bankruptcy to the borrower/Debtor.

Trustees should initiate a communication with mortgage servicers when questions arise in a review of a post petition escrow analysis.

United States Trustees and Trustee Education Network should modify the requirements of the financial management class regarding adjustable rate mortgages, the calculation of mortgage escrows and, in particular, the potential of increased mortgage payments resulting from increased taxes, interest rate hikes and/or mortgage premiums.

Trustee voucher checks, check stubs or vouchers provided with any other form of payment contain the following information, except to the extent prevented from doing so by local rule:

1. The Name of the debtor and case number
2. The trustee's claim number
3. The mortgagee's account number (to the extent provided on the proof of claim)
4. If the mortgagee account number is not available, e.g. not contained on the proof of claim, at least one other piece of identifying information e.g., property address
5. The amount of the payment
6. Whether the payment is for the ongoing mortgage payment or the mortgage arrearage
7. If for the mortgage arrears, the balance owing on the arrears claim after application of the payment
8. If the trustee has set up a separate claim for post-petition charges of the mortgagee, that the voucher clearly identify that fact
9. If any portion of the payment on arrears is intended to pay interest on the mortgage arrears, the amount of that interest portion of the payment
10. if the mortgage is to be paid off during the bankruptcy under the confirmed plan through payments by the trustee, e.g., a total debt claim, the portions of each payment which represent principal and interest, and the balance owing on the claim after application of the payment

There is a movement among servicers to redact all but the last four numbers of the mortgagors' loan numbers on proofs of claim, because those claims are public records. While mortgage servicers in general want as much information as possible on the vouchers, the mortgage servicers on the Working Group felt that if the voucher had the bankruptcy case number, the name of the debtor and the redacted loan number from their filed claim, they would be able to post the payment. Using the account number to the extent provided in a filed proof of claim also insures that trustees are not disclosing information on their website that is not already disclosed in the public record.

Voucher Narrative re Payments: The Working Group places particular emphasis on No. 6 above. The voucher should identify if a payment is for the regular mortgage payment or for the mortgage arrearage in consistent language. While Chapter 13 trustee disbursement applications focus on the claims to be paid, mortgage servicer computer systems focus on their mortgagor account number. Posting of receipts, whether or not the account is in bankruptcy, is typically handled by a Cash Processing group or department of the mortgage servicer. Those departments focus on the account number on the voucher and the narrative on the voucher for that account number to determine if the payment is for the regular mortgage payment or the mortgage arrearage.

Mortgage Arrearage Claims: When filing their initial proofs of claim, mortgage servicers should state their mortgage arrearage up to the date of the filing date of the bankruptcy petition, unless the plan or trustee indicates otherwise, or local rule provides otherwise. The Chapter 13 Trustee will use the mortgage arrearage claim to set up the arrearage balance on the claim, which in turn will show up as the "balance" on the voucher check, absent objection to the claim.

How to Please Your Trustee: Practice Pointers to Help You Navigate Bankruptcyland

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Practice Pointers to Help Navigate Bankruptcyland

ABI Chicago Consumer Bankruptcy Conference
October 14, 2013

Presented by:
Marsha Combs-Skinner, Chapter 13 Standing Trustee
Deborah Gutfeld, Perkins Coie LLP
George Vogl, Ledford & Wu
Mark Wheeler, Wheeler & Patel LLP

I. Prior to the 341 Meeting

A. If you and/or your client are unable to appear at the scheduled meeting time, advise your Trustee in advance of the meeting date.

B. Advise your client to bring photo ID and a Social Security Card.

C. Provide tax returns and income information timely and in the manner requested by the Trustee.

D. Provide information in Schedules that will make the Trustee's verification easy.

1. Caption and contact information for attorney (name, address, phone number, email address) for all pending lawsuits.

2. Details on occasional, seasonal or other income.

3. Details on anticipated changes in income.

4. Contact information (name, address and phone numbers) for potential insider or fraudulent transfers.

5. Provide affidavits for anything out of the ordinary.

E. Look for inconsistencies in the Schedules.

1. No automobile is listed on Schedule B/G, but Schedule J identifies auto installment and/or insurance payments.

2. No life insurance policies are identified on Schedule B, but insurance premiums are identified on Schedule J.

3. Debtor does not identify any jewelry on Schedule B, but arrives at meeting wearing a watch, necklace and wedding band.

4. DSO not marked on Schedule E, but alimony/child support expenses identified on Schedules I/J.

F. Provide a detailed basis for assertion of value with respect to high value items (*i.e.*, CMA/appraisal, Carmax appraisal, etc…) and provide supporting documentation.

G. Keep in mind that, regardless of current monthly income, a reasonableness and good faith standard still applies.

H. Review the Schedules as required by Federal Rule of Bankruptcy Procedure 9011.

1. Affirmative duty to conduct a reasonable inquiry to verify schedules before signing. See generally In re Wulfekuhl, 267 B.R. 856, 860 (Bankr. W.D. Mo. 2001) (Federman, J.) (citing Computer Dynamics Inc. v. Merrill (In re Computer Dynamics Inc.), 252 B.R. 50, 56 (Bankr. E.D. Va. 1997); see also Int'l Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388, 390 (2nd Cir. 1985).

2. Attorney must "exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in his client's bankruptcy schedules." In re Triepke, 2012 WL 1229524 *5 (Bankr. W.D. Mo. April 12, 2012); 11 U.S.C. § 707(b)(4).

I. If you aware of equity in an asset(s) that may require administration by the Trustee, advise your client of potential action prior to the meeting.

J. Advise your clients of the questions that will be asked by the Trustee.

K. Review Bankruptcy Information Sheet with your Client.

II. At the 341 Meeting

A. BE ON TIME! Your Trustee works hard to stay on schedule and respect YOUR time, please make sure that you are present at the scheduled time of your meeting and respect HIS/HER time.

B. Advise your client to have photo ID and Social Security Card in hand when entering the meeting room.

C. Advise your Trustee if your client would like an interpreter for the meeting -- one will be provided by the Trustee.

1. Do not bring a relative/friend -- they will not be allowed to participate.

D. DO NOT ATTEMPT TO ANSWER QUESTIONS FOR YOUR CLIENT.

III. Following the 341 Meeting

A. If Trustee requests additional information, provide on a timely basis.

B. File all required credit counseling certifications to receive timely discharge.

C. Make all required payments (Ch 13 plan, repurchase obligations) timely and to the correct address.

NACTT Mortgage Committee is comprised of Chapter 13 trustees, mortgage servicers and their attorneys.

The goal of the committee is to foster communication between the parties, improve the bankruptcy system and provide the trustee and mortgage community with proposed best practices of conduct. Although these are agreed best practices, the committee recognizes that there may be other acceptable procedures.

TRUSTEE PAYMENT VOUCHERS FOR MORTGAGE CLAIMS – BEST PRACTICES

The NACTT Mortgage Working Group has been reviewing the forms of voucher checks sent to mortgage servicers in connection with the monthly disbursements to such creditors. "Voucher checks" are checks with a detachable form indicating the reason for payment. The party who endorses and deposits the check, retains the stub as a record of payment. Mortgage servicers typically use the voucher or stub as a means of posting the payment to the account of the mortgagee. Some trustees have the payment posting information on the check itself, rather than on a detachable stub.

In addition, mortgage servicers who subscribe to the basic services offered by the Chapter 13 National Data Center (NDC) may view details of the voucher online. Additional NDC services enable subscribers to download an electronic file containing substantial additional data, which is suitable for import to be read by servicer employees or integrated into a mortgage servicer's case management or cashiering application.

Trustees who disburse funds to mortgage servicers electronically may email their vouchers to the servicers at the time of disbursement, or may make the vouchers available for viewing on the trustee's website or on the NDC website.

This effort was spurred in part by the enactment of 11 U.S.C. § 524(i) in the 2005 Amendments to the Bankruptcy Code. That section provides that "The willful failure of a creditor to credit payments received under a plan confirmed under this title, …in the manner required by the plan (including crediting the amounts required under the plan) shall constitute a violation of an injunction under [11 U.S.C. § 524(a)(2)] if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor." The hope of the Working Group is that mortgage servicers whose obligations are provided for in a chapter 13 plan receive adequate information on the vouchers to assist the mortgagees in complying with the new law.

The Working Group makes the following recommendations of "best practices"regarding vouchers and disbursements by Chapter 13 Trustees to mortgage servicers:

1. Recommended Information on Vouchers. Committee recommends that the voucher checks, check stubs or vouchers provided with any other form of payment contain the following information, except to the extent prevented from doing so by local rule:

1. The Name of the debtor and case number
2. The trustee's claim number

3. The mortgagee's account number (to the extent provided on the proof of claim)
4. If the mortgagee account number is not available, e.g. not contained on the proof of claim, at least one other piece of identifying information e.g., property address
5. The amount of the payment
6. Whether the payment is for the ongoing mortgage payment or the mortgage arrearage
7. If for the mortgage arrears, the balance owing on the arrears claim after application of the payment
8. If the trustee has set up a separate claim for post-petition charges of the mortgagee, that the voucher clearly identify that fact
9. If any portion of the payment on arrears is intended to pay interest on the mortgage arrears, the amount of that interest portion of the payment

There is a movement among servicers to redact all but the last four numbers of the mortgagors' loan numbers on proofs of claim, because those claims are public records. While mortgage servicers in general want as much information as possible on the vouchers, the mortgage servicers on the Working Group felt that if the voucher had the bankruptcy case number, the name of the debtor and the redacted loan number from their filed claim, they would be able to post the payment. Using the account number to the extent provided in a filed proof of claim also insures that trustees are not disclosing information on their website that is not already disclosed in the public record.

2. **Voucher Narrative re Payments:** The Working Group places particular emphasis on No. 6 above. The voucher should identify if a payment is for the regular mortgage payment or for the mortgage arrearage in consistent language. While Chapter 13 trustee disbursement applications focus on the claims to be paid, mortgage servicer computer systems focus on their mortgagor account number. Posting of receipts, whether or not the account is in bankruptcy, is typically handled by a Cash Processing group or department of the mortgage servicer. Those departments focus on the account number on the voucher and the narrative on the voucher for that account number to determine if the payment is for the regular mortgage payment or the mortgage arrearage.

3. Mortgage Arrearage Claims: When filing their initial proofs of claim, mortgage servicers should state their mortgage arrearage up to the date of the filing date of the bankruptcy petition, unless the plan or trustee indicates otherwise, or local rule provides otherwise. The Chapter 13 Trustee will use the mortgage arrearage claim to set up the arrearage balance on the claim, which in turn will show up as the "balance" on the voucher check, absent objection to the claim.

4. ELIGIBILITY FOR CHAPTER 13

The standing trustee must review the schedules in each case to verify that the debtor is eligible to file for chapter 13, has filed the credit counseling certificate or a certification of exigent circumstances in support of a waiver, and that each debtor has filed the petition in the proper judicial district. 11 U.S.C. § 109, Fed. R. Bankr. P. 1014.

If the debtor is not eligible to be a debtor for the reasons stated in section 109 of the Bankruptcy Code, the standing trustee may move to dismiss or take other appropriate action. If venue is improper, the standing trustee may move to dismiss or take other appropriate action, which may include referral to the United States Trustee. The standing trustee may also file a motion to have debtor's counsel disgorge the compensation received if counsel was responsible for filing the case in an improper venue.

Related Provisions:

11 U.S.C. § 109	Eligibility for Chapter 13
28 U.S.C. § 1408	Venue of Bankruptcy Case
28 U.S.C. § 1412	Transfer of Venue
Fed. R. Bankr. P. 1014(a)(2)	Improper Venue
Fed. R. Bankr. P. 1016	Death or Incompetency of Debtor

Practice Tips:

Factors that may guide the standing trustee's judgment include cases filed in an improper venue for an improper purpose, including to conceal assets, to inconvenience creditors or other parties in interest, or to obtain a perceived advantage by a trustee or judge that might be assigned to the case. These circumstances should be brought to the attention of the United States Trustee.

5. MULTIPLE FILINGS

The standing trustee should move to dismiss or take other appropriate action when a debtor files chapter 13 in violation of the Bankruptcy Code bar on filing for 180 days, if applicable, or in violation of a court

order. The standing trustee also should take appropriate action whenever multiple filings demonstrate an abuse of the bankruptcy system.

Related Provisions:

11 U.S.C. § 109(g)	Prohibition on Refiling

Practice Tips:

The standing trustee should access the standing trustee's own database and the clerk of court's database to check for a debtor's previous filings. Trustees should also access the national PACER database which lists all bankruptcy filings indexed by debtor's name and last four digits of the social security number. To access PACER, go to www.pacer.uscourts.gov and select the U.S. Party case Index.

6. REVIEW OF ATTORNEY AND BANKRUPTCY PETITION PREPARER DISCLOSURES AND PRACTICES

The standing trustee has an independent duty to review documents pertaining to compensation paid or agreed to be paid to the debtor's attorney or bankruptcy petition preparer (BPP) pursuant to the Bankruptcy Code, Rules and local rules. 11 U.S.C. § 1302(b)(1) incorporating 11 U.S.C. § 704(a)(4). This review is a necessary part of investigating the debtor's financial affairs and claims against the estate. The standing trustee should exercise discretion and take appropriate action against attorneys when proper disclosure is not made or when fees are unreasonable or otherwise objectionable. Appropriate action may include referral to the United States Trustee.

In business cases, debtor's attorneys routinely provide services to debtors that are in addition to the services provided to the average consumer debtor. The level of complexity of a business case should be a factor in the standing trustee's evaluation of the reasonableness of an attorney's fee request.

The standing trustee also must be aware of the requirements imposed by law on petition preparers and should take appropriate action when a BPP does not comply with those requirements. 11 U.S.C. § 110(h).

In many districts the appropriate action will be referral of the matter to the United States Trustee.

Related Provisions:	
11 U.S.C. § 110(h)(2)	BPP Duty to Disclose
11 U.S.C. § 329(a)	Attorney Duty to Disclose
11 U.S.C. § 330	Compensation of Debtor's Attorney
Fed. R. Bankr. P. 2016(b)	Duty to Disclose
Fed. R. Bankr. P. 2017	Examining Debtor-Attorney Transactions

Practice Tips:
Many districts have set a "no look" fee for chapter 13 cases by local rule. Attorneys need not file an itemized application for fees below the "no look" maximum. The standing trustee should not informally establish a minimum or maximum fee for chapter 13 cases but should review fees based on the individual character of the case.

7. REVIEW OF CERTIFICATE OF CREDIT COUNSELING

The standing trustee must review the certificate of credit counseling. 11 U.S.C. § 109(h). If the certificate is missing, not timely obtained, or is not issued by an approved credit counseling agency, the standing trustee should consider the individual facts of the case when determining whether to take any further action. The trustee can refer matters concerning credit counseling certificates to the United States Trustee.

B. MEETING OF CREDITORS

Summary of Standing Trustee Duties
1. Preside at meetings of creditors or designate a trained substitute, with prior written approval of the United States Trustee. 2. Schedule meetings within the statutory time limits, conclude meetings promptly, and give notice of rescheduling and continuances in accordance with local rules.

CHAPTER 5 – ADDITIONAL STANDING TRUSTEE RESPONSIBILITIES

A. DUTY TO REPORT AND REFER SUSPECTED CRIMINAL ACTIVITY

1. DUTY

The standing trustee is often in the best position to initially identify fraud or criminal activity in chapter 13 cases. The United States Code requires a standing trustee to refer suspected violations of Federal criminal law to the appropriate United States Attorney. A similar duty is imposed on the United States Trustee by 28 U.S.C. § 586(a)(3)(F).

Related Provisions:	
18 U.S.C. § 3057	Referral of Suspected Crimes
28 U.S.C. § 586(a)(3)(F)	Duty of United States Trustee to Refer Suspected Crimes

2. REFERRAL PROCEDURE

When criminal activity is suspected, it is important that the standing trustee and the United States Trustee coordinate efforts in the criminal referral process. The mechanics of criminal referrals should be discussed with the United States Trustee. Depending upon local practice, a standing trustee may be asked to submit any referral to the United States Attorney through the United States Trustee or furnish a copy to the United States Trustee. Each United States Trustee has developed specific procedures with the local offices of the United States Attorney and the Federal Bureau of Investigation. 18 U.S.C. § 3057.

The standing trustee should provide as much specific factual and documentary information as possible in a criminal referral. To the extent the information is available, the referral should ordinarily include:

a. the bankruptcy case name, file number and chapter;

b. a chronological summary including dates and specific facts related to the who, what, where, when and how of the suspected crime;

c. a brief narrative of what occurred in relation to each allegation referring to copies of relevant documents;

d. an estimate of the amount of loss involved;

e. names, addresses, phone numbers, titles, and descriptions of all persons involved; and

f. copy of all documents relevant to the allegations.

3. BANKRUPTCY CRIMES

The most common bankruptcy crimes are set forth in 18 U.S.C. §§ 152 - 157.

a. Concealment of Assets; False Oaths and Claims; Bribery

Section 152 of title 18 makes it a crime for any individual to "knowingly and fraudulently" (1) conceal property; (2) make a false oath or account in relation to a bankruptcy case; (3) make a false declaration, certification, verification or statement in relation to a bankruptcy case; (4) make a false proof of claim; (5) receive a material amount of property from the debtor with intent to defeat the Bankruptcy Code; (6) give, offer, receive or attempt to obtain money, property, reward or advantage for acting or forbearing to act in a bankruptcy case; (7) transfer or conceal property with the intent to defeat the Bankruptcy Code; (8) conceal, destroy, mutilate or falsify documents relating to the debtor's property or affairs; or (9) withhold documents related to the debtor's property or financial affairs from the standing trustee or other officer of the court.

Excerpted from *The Consumer Bankruptcy Fee Study: Final Report* (2012)

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American Bankruptcy Institute Resident Scholar, Fall 2014

With respect to fees in Chapter 13 cases, there are significant distinctions in all fee-related practices, customs and policies at the state, district, court, and even individual levels. Over 50% of attorneys surveyed charge a flat fee to their Chapter 13 clients.[1] Fifteen percent of the lawyers reported charging by the hour, and ~15% used a combined hourly rate and flat fee. Others reported charging a "sliding scale," depending upon what debtors can pay. The median hourly rate reported by those responding attorneys who charge an hourly rate is $271. Note however, that this is the rate charged, not necessarily the rate ultimately received. In many instances, there is a significant divergence between the two. Moreover, many lawyers reported that their effective hourly rate, when they charged the presumptively reasonable fee was considerably lower than their "usual" hourly rate.

In many jurisdictions, the "flat fee" is a *de jure* or *de facto* "presumptively reasonable fee" arrangement ("PRF"). A PRF allows the lawyer to charge a flat, pre-approved fee for an array of services and avoid the necessity of filing a fee application with the court. In some jurisdictions, the lawyer determines up front whether he or she will charge client the PRF. In at least one district, the attorney is afforded more flexibility in terms of the timing of the decision: "Attorneys make the decision within 30 days of the 341 completion to opt out of the base fee and this is due to complicated issues in the case." In yet other jurisdictions, the amount of the PRF turns on the size of the plan payments: "In [my district] there is an 'official' no-look fee of $3,000, but if the plan will pay less than a total of $5,000 (including attorney's fees and trustee's commission) the attorney fee is only $2,000."

As one Chapter 13 Trustee observed, "Per local rule, fee [applications] are an option if counsel does not want to be bound by the no-look fee. Some few always chose that option; most accept the no-look fee."

In those jurisdictions where the PRF is a "cradle to grave" fee,there is no opportunity, even if the unforeseeable happens, for the lawyer to receive additional compensation. Most often however, the debtor is charged the PRF in a standard case, but if a complication arises, such as the filing of an adversary proceeding, the attorney may be entitled to either a fixed amount of additional compensation, or payment of an hourly

[1] See Lois R. Lupica, *The Consumer Bankruptcy Fee Study: The Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012) for citations to information and quotes contained in this excerpt.

rate for time spent.

The circumstances under which a lawyer would file either an abbreviated fee application and receive a fee amount in accordance with a local rule-based schedule, or file a more extensive fee application and receive an hourly rate, varies by district and by court and by Trustee.

As one Chapter 13 Trustee noted,

> the most frequent participants in the system are "scared" to file the fee applications because they don't know what to expect and many comment that filing the application takes far longer than the fees incurred in many cases (and they can't seek payment for much of the time preparing the application) so they don't bother.

At least one district builds an "administrative reserve" into every Chapter 13 plan as a way of ensuring the debtor will be able to pay additional legal fees if approved. If the reserve fund is not used for attorney fees, it is distributed to unsecured creditors. According to the data, the administrative reserve is not widely used.

We further found in some Chapter 13 cases, fees charged by attorneys do not rise to the level of the PRF. A variety of reasons were cited for this, including: (i) filing a Chapter 13 to pay attorney fees, with the intention of converting to a Chapter 7 as soon as the fees were paid, (ii) agreeing to a lesser fee for those in the military or other "sympathetic" clients, (iii) determining that a debtor "can't afford" the no-look fee (iv) the case is a "disguised" Chapter 7, (v) market pressures, and (vi) the operational complexity of a case.

A majority of lawyers reported, and the quantitative data confirmed, only the exceptional cases merited charging less than the PRF. One attorney observed that the client's ability to pay the PRF was used as a prognosticator of the success of the Chapter 13 plan: "if a debtor cannot afford the full legal fee, they are likely not able to complete a plan."

As observed, "The [C]hapter 13 is a [C]hapter 7 in disguise. The most appropriate circumstance for this to occur is when the debtor does pass the means test in [Chapter] 7, but has a 0% payout to unsecured in a [Chapter] 13. This can occur when the debtor has child support income which is included in [Current Monthly Income] in [Chapter] 7 but excluded in [Chapter] 13, or has retirement account payroll deductions which are not an allowable expense in [Chapter] 7 but are in [Chapter] 13. The case is simpler than the normal [Chapter] 13 and the attorney charges less."

Not only is there variation in how much an attorney is paid, and the method by which the amount of the fee is determined, there are also material differences in Chapter 13 cases as to how the attorney fee is structured. The extent to which an attorney receives his or her fees up front, in whole or in part, or over time as part of the plan payments, and over what period of time, turns on one of more of the following variables: (i) the lawyer's or the lawyer's firm's policies, predilections or business model, (ii) the presiding judge, (ii)

the interpretation of the Bankruptcy Code in the jurisdiction, (iii) the Chapter 13 Trustee, (iv) the lawyer's predictions about the feasibility of the debtor's case, (v) the market for legal services, and (vi) local custom and practice.

How fees are structured impacts not only how much is paid by a client, but also how much is received by the lawyer. The structure also affects chapter choice as well as the issue of how cases perform and their eventual disposition. An example of how this plays out was described by an attorney as follows:

> In [District A] attorneys get paid $200 a month, meaning that if nothing is taken in advance, the attorney [is] paid [over] . . . 15 months. There is no judicial opinion on where these funds [should be] taken from, so frequently Debtors have "step" plans that provide $200 more a month for the first 15 months, then drop down.
>
> In [District B], however, the Court [determined] that while [section] 1325 requires secured creditors to receive "equal monthly payments" it does not require that [those] . . . payments start at confirmation. Accordingly, these plans pay only "adequate protection payments" to secured creditors (usually cars) basically swiping some of their money to pay attorneys fees. Additionally, since the Code only requires pre-confirmation adequate protection payments for personal property collateral, the 2-4 months of pre- confirmation mortgage payments get diverted to pay attorneys fees, with that amount being added to the mortgage arrearage. With these . . . maneuvers, debtors' attorney fees usually get paid within 6-12 months of filing a case.
>
> Lastly, in [District C] the attorney fees are spread over the length of the Chapter 13 plan. This means that if nothing is taken in advance, the full amount is paid in 60 installments. Because of this, fees paid through the plan are incredibly devalued, both [because of the time value of money] and because of the [higher] risk of case dismissal. Accordingly, most attorneys [in District C] require $1500 or more "up-front."
>
> These three different schemes for paying attorney fees have real effects on chapter selection. [District C] has far fewer Chapter 13 cases . . . . [In many instances] potential clients either don't file or the attorney works with him or her to get them into a Chapter 7.
>
> Similarly, [District B] might have higher dismissal rates, since an attorney only needs a debtor to last 6-10 months to cover his or her costs, making it less risky [for the attorney] to take a more tenuous case.
>
> In [District A] with step-down plans, the first year, which is already often the hardest for a debtor, is even harder due to the heightened payment.

On their face, these appear to be mere procedural decisions about the timing of fee distributions, but in practice, these decisions have a critical substantive effect on the debtor, the attorney as well as on the bankruptcy system as a whole.

The above discussion concerns fees charged in cases in which the debtor receives a discharge. The story with respect to attorney fees received in cases that end in a *dismissal* is very different. As the objective data reveals, attorney fees received in dismissed cases were 42% lower than those fees received in cases that end in discharge. This, in part, accounts for the difference between the fee an attorney charges, and the fee the attorney receives. When Chapter 13 Trustees were asked how much attorneys charged and how they are paid in dismissed cases, the answers varied greatly. With respect to cases dismissed prior to confirmation, the range of answers included:

- "$800 paid pre-petition plus 25% of unpaid balance up to a max amount of

- "In addition to the amount of the fee paid pre-petition, sometimes attorneys receive a portion of payments made prior to dismissal or conversion."

- "To the extent that pre-confirmation plan payments were made, the debtor's attorney will receive some pro rata portion distribution after, i) all required adequate protection payments are paid in full, and ii) the Trustee's 'new case set up fee.' Usually they receive nothing."

- "Generally, the dismissal orders provide for attorney fees to be paid up to $400."

- "Funds are refunded to the debtor in care of the attorney. The attorney may resolve with the debtor what if any are paid from the refund."

- "Pursuant to court order they get up to one-half of the no look fee if the case is dismissed."

- "We have a local rule that allows them up to $500 of the funds on hand toward their unpaid fee claim in a case that is dismissed or converted pre-confirmation. They also get to keep whatever they were paid pre-petition."

- "Debtors' attorneys will now receive up to $1,000, depending on balance on hand, in converted or dismissed cases."

- "My rule . . . is not to object to all but $100 or so of the requested fee (usually $2,500) if the dismissal/conversion is not the attorney's fault and the case was otherwise ready for confirmation. Often there is not enough money in our account to pay all that."

- "The attorney generally gets paid his retainer and some amount as an administrative fee based upon the Court's granting of a fee application."

- "If their client has made plan payments and there are funds in the case, the attorney will file a fee application for the 'no look' fee balance remaining less trustee's fees from the available funds."

- "It depends on the amount on hand after payment of the filing fee. Usually $300 to $900."

- "Cases crater in the first 9 months. The plan dictates how such fees are paid and in many cases, the fees have not been satisfied at the time of dismissal."

- "Attorneys who want to be paid need to file a motion for an administrative expense. These motions are typically allowed for the full amount of the no-look fee, though there is rarely enough money on hand to pay it."

- "We are a jurisdiction that pays pre-confirmation, so often times counsel is paid in full."

- "Depends on the amount of the plan payment—but 60-70% are likely getting the entire fee because such a small portion is going to adequate protection payments in most cases."

- "$300 per court order."

- "Presumptive fee of $900 if funds are on hand."

- "If attorney timely completed all tasks and dismissal was debtors fault, they can get the full presumptive fee (however, I usually only have one or two payments to disburse on attorney fees). Other times, the court only allows the retainer, and in extreme cases, the [court] will require disgorgement."

These answers show that the debtor's ability to complete a multi- year plan dictate whether an attorney will received their full fee, or nothing. One attorney observed that a consequence of these varied policies is that lawyers take Chapter 13 cases essentially on a contingency basis. This, in turn, has a profound effect upon the quality of legal services delivered.

With respect to cases that were dismissed following confirmation, attorneys fared somewhat better. A majority of Chapter 13 Trustees reported that attorneys received what they had already been paid. In many jurisdictions, by that point, attorneys were paid all or most of their fee.

EFFECTIVE COMMUNICATION AMONG JUDGES, UNITED STATES TRUSTEES, AND STANDING TRUSTEES

NCJB-UST Liaison Committee Task Force

Final Draft - For Review by NCBJ Board of Governors on October 8, 2014

Federal Rule of Bankruptcy Procedure 9003 prohibits attorneys from having *ex parte* contact with judges concerning matters affecting a particular case or proceeding, but "does not preclude communications with the court to discuss general problems of administration and improvement of the bankruptcy administration, including the operation of the United States Trustee system" by the United States Trustees ("U.S. Trustees"), assistants to, employees, and agents of the U.S. Trustees. Fed. R. Bankr. P. 9003(b). In June 2014, the National Conference of Bankruptcy Judges ("NCBJ")'s NCBJ-UST Liaison Committee created a task force (the "Task Force") to explore ways to maximize effective communications between Chapter 12 and 13 trustees, U.S. Trustees and bankruptcy judges within the parameters of Federal Rule of Bankruptcy Procedure 9003 and ethical canons.

The Task Force[1] worked collaboratively to develop an Effective Communications Guide (the "Guide") that articulates best practices, with the intent it would be shared among the various bankruptcy constituencies to improve Chapter 12 and Chapter 13 case administration. The ultimate goal of the Guide is to enhance case administration through direct communication and productive professional relationships among the judge, U.S. Trustee, and trustee communities, within the ethical parameters of the Rules of Professional Conduct, the Code of Conduct for United States Judges, and Bankruptcy Rule 9003.

THE ETHICAL RULES AND STATUTORY AUTHORITY

The Task Force recognizes that when a judge is asked to meet with a party who appears in his or her court, the judge must comply with the judicial conduct rules, and also that bankruptcy judges will want to ensure that their assessment of when, how, and with whom to communicate about case administration issues fits within the scope of conduct authorized by the controlling ethical guidelines. In this regard, the Model Rules of Professional Conduct and the Code of Conduct for United States Judges are especially crucial. Rule 3.5 of the Model Rules of Professional Conduct provides, in pertinent part:

> *Rule 3.5 - Impartiality and Decorum of the Tribunal*
>
> *A lawyer shall not:*
> *(a) seek to influence a judge, . . by means prohibited by law;*
> *(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;*
> ...

In the Code of Conduct for United States Judges, Canon 1 requires judges

> *to uphold the integrity and independence of the judiciary*

and Canon 2A provides that

> *[a] judge should ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.*

[1] The members of the Task Force are: Judge Colleen A. Brown, Chair, and Judge Laura S. Taylor, representing the bankruptcy judges, on behalf of the NCBJ; U.S. Trustee and Acting Deputy Director William Neary and U.S. Trustee Nancy Gargula, on behalf of the United States Trustee Program; Jan Sensenich, Chapter 12 and 13 Trustee, on behalf of the Chapter 12 Trustees; Joyce Babin and Marge Burks, Chapter 13 Trustees, on behalf of the Chapter 13 Trustees / National Association of Chapter Thirteen Trustees ("NACTT").

Additionally, Bankruptcy Rule 9003(a) is essential to the analysis. It prohibits *ex parte* communication, and specifically recognizes the unique role of the U.S. Trustee professionals and their agents in the administration of bankruptcy cases, the corollary need for direct communication with bankruptcy judges. It provides as follows:

Rule 9003 Prohibition of Ex Parte Contacts

(a) General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

(b) United States Trustee. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communication with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

COMMUNICATION BETWEEN JUDGES AND TRUSTEES - WHY?

The notion that communication about bankruptcy administration is essential is inherent in the final sentence of Rule 9003(b). It makes absolutely clear that the general prohibition against judges talking with parties who appear in bankruptcy matters about cases does not apply when the discussion is about general administrative matters: "*This rule does not preclude communication with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system*."

Many judges and trustees have found that direct and regular communication about procedural and policy matters improves case administration. This increases efficiency, and benefits the courts, trustees, debtors, and creditors, as well as their representatives.

The U.S. Trustee has a unique role in the bankruptcy system as an administrator, regulator, and enforcer. Rule 9003 speaks to the U.S. Trustee's role as administrator. The Bankruptcy Reform Act of 1978 removed the bankruptcy judge from the responsibilities for day-to-day administration of cases. Debtors, creditors, and third parties with adverse interests to the trustee were concerned that the Court, which previously appointed and supervised the trustee, might not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated with the result that many of the administrative functions formerly performed by the court were placed within the Department of Justice through the creation of the Program. The Program became permanent and was expanded nationwide by the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986. Pub. L. No. 99-554, 100 Stat. 3088 (1986). Section 586 of title 28 sets forth the statutory duties of each U.S. Trustee. Included in the administrative functions assigned to the U.S. Trustee were the appointment and supervision of Chapter 12 and Chapter 13 trustees. 28 U.S.C. § 586(b), (c), (d), (e). Communications with the Court were undoubtedly anticipated as essential

when the U.S. Trustee assumed responsibility for these administrative functions as evidenced by the clear language of Rule 9003.

There are a number of administrative matters for which the U.S. Trustee provides guidance and oversight relating to the administration of Chapter 12 and Chapter 13 cases by the Chapter 12 and Chapter 13 standing trustees.[2] These include but are not limited to: designating the standing trustee as the presiding officer at the meeting of creditors (11 U.S.C., § 341, 28 U.S.C. § 586(b)); requiring standing trustees to work with the U.S. Trustee and Clerk of Court to ensure prompt scheduling and noticing of the meetings of creditors within the time frame of Rule 2003; approving standing trustees as providers of personal financial management education courses for debtors pursuant to 11 U.S.C. § 111, in addition to overseeing the performance of their statutory duties as set forth in the Code. Coordinating the calendars for § 341 meetings, debtor personal financial education courses and confirmation hearings among the U.S. Trustee, standing trustees and the Court is but one example of where communication among these parties will improve case administration. It has also proved very effective to include trustees and the U.S. Trustee in discussions of Local Rules or Standing Orders that impact the practices within a District to bring about uniformity, about what services should be included in any "presumed reasonable fee" or "no look fee" a District may adopt for debtors' counsel, as well as the planning and presentation of attorney training about, for example, new forms, model plans, and case administration.

In addition to the administrative functions of appointing and supervising Chapter 12 and Chapter 13 trustees, the U.S. Trustee also takes actions in bankruptcy cases to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public. The Program monitors the conduct of bankruptcy parties and acts to ensure compliance with applicable laws and procedures. Communications relating to matters in which the U.S. Trustee is taking such supervisory or regulatory actions in bankruptcy cases should not occur with the judges, as these guidelines make clear.

Judges and trustees also have unique and complementary roles in Chapter 12 and 13 case administration. There is no question that disputes in individual cases must be addressed by court hearings and decisions. However, there are many procedural and/or policy decisions that affect large numbers of cases, e.g., procedures for confirmation hearings, routine orders, calendar procedures, and hearing schedules, which are effectively and appropriately addressed through judge – trustee – U.S. Trustee conversations. If Chapter 12/13 case administration is viewed as an integrated system involving judges, trustees, attorneys, debtors, and creditors, it must also be recognized that each of these players has a unique perspective. It is also true that there are many different configurations of meetings that are available for the conversations about Chapter 12/13 procedures, depending on the nature of the topic under consideration. Small meetings, bench – bar meetings, as well as CLE seminars, are all tools through which productive communication may occur. Often, when one participant hears the perspective of another, he or she may become persuaded to do something different, in order to increase efficiency, save money, redirect scarce economic resources, and/or improve service to debtors, creditors, their representatives, and the court. Post-BAPCPA, the roles of bankruptcy judge, U.S. Trustee and trustees are connected and complementary in many facets of case administration. If they are in regular communication, each can learn more about the other participants' priorities, operating constraints, and long-term vision – and they can do this within the

[2] See *Handbook for Chapter 12 Trustees*, July 1, 2013, and *Handbook for Chapter 13 Standing Trustees*, October 1, 2012 located on the United States Trustee Program's website at: http//www.justice.gov/ust.

parameters of Bankruptcy Rule 9003(b), as long as all participants comply with the controlling ethical canons.

SUGGESTIONS FOR COMMUNICATION AMONG BANKRUPTCY JUDGES, STANDING TRUSTEES, AND U.S. TRUSTEES

Meetings to discuss administrative matters between judges, the U.S. Trustee, and trustees are encouraged. The first parameter to put in place is that substantive issues pending before the Court must never be discussed at an administrative meeting. All parties must take care to conduct the meeting in a way that does not create even the appearance of impropriety. Transparency is an excellent tool for accomplishing this. Transparency can be created by publicizing the fact that a trustee, group of trustees and/or U.S. Trustee representatives holds regular meetings with the Judge(s).

It is also helpful to be intentional about who attends the administrative meetings, depending upon the topic to be discussed. Some topics might be most appropriately discussed at a meeting of a standing trustee and the judge before whom s/he appears. For other topics, it might be appropriate to include all of the standing trustees and judges of a district. And for yet other topics, it would be most effective and appropriate to invite representatives of the United States Trustee Program. The Judge(s) will need to decide that. In some instances, individual meetings may serve a specific purpose which would be difficult to facilitate in a larger meeting or by written communication. For example, there may be practices that are not "visible" to the debtor/creditor bar that may help or hinder effective administration, e.g., the needs of case trustees to administer cases on a wide scale using specialized software with some limitations, the administrative parameters for court chambers and clerks for CM/ECF, and the needs of the United States Trustee Program to consider policies affecting consistent administration of all chapters or cases, which will be most expeditiously addressed by the court and trustee alone.

It may also be helpful for a judge to provide direct feedback to a trustee about his or her operational approach to certain types of matters in order to improve case administration, and that can be delivered more effectively in a small one-on-one meeting. A judge or trustee may also want to meet alone in order to share the early concept of an idea for an administrative change before the change is distributed for public comment and/or implementation, to explore if both think it worthy of further consideration. If they agree it may have merit, then they can decide how and when to share it with others in the bankruptcy community, so all constituents who will be affected by it have an opportunity for input before it takes a final shape.

Under Rule 9003, and the ethical canons, it is permissible for a judge, the U.S. Trustee and trustee(s) within a district to meet as long as only administrative issues are discussed. In order to be sure that all parties are comfortable with the topics to be discussed – and can have time to prepare in advance – the Task Force recommends that meetings be scheduled, and the person initiating the meeting circulates a proposed agenda, in advance. If a court opts not to meet with just a trustee, utilizing an advisory council or other group to discuss case administrative matters may be an effective vehicle for obtaining input from all constituents, e.g., debtor bar, creditor bar, standing trustees, U.S. Trustees, and the court, and therefore that is also encouraged.

COMMUNICATION CONSIDERATIONS AND PITFALLS TO AVOID IN COMMUNICATIONS AMONG JUDGES, TRUSTEES, AND U.S. TRUSTEES

The overarching objective in the administrative meeting is two-fold: to improve case administration and avoid the appearance of impropriety. To do this requires that all participants focus on both the opportunities for improving effective case administration and the confines of the Rules of Professional Conduct, the Canons of the Code of Conduct for United States Judges, and Bankruptcy Rule 9003, at all times. The following list is provided to help trustee and U.S. Trustee participants to achieve that dual objective:

- Be careful not to engage in communications or make comments that lead to the perception that the trustee or U.S. Trustee enjoys special access or influence because of the communication or his/her role as a standing trustee/U.S. Trustee.

- Be careful not to reference pending cases or issues that are before the court during direct communications with a bankruptcy judge.

- Avoid making statements that imply, or leave the perception, that the issue before the court in a particular case was previously discussed privately with the judge.

- Remember that perceptions are often based on what is observed, what is said, or what is not said. Be mindful of where your interactions occur, when your interactions occur, with whom your interactions occur, and the words you use to avoid even an appearance of impropriety or an inference the judge may lack impartiality.

- Limit discussion during administrative meetings to only matters that involve case administration, improvement of bankruptcy administration, or trustee operational matters, such as, staffing matters that directly impact the administration of Chapter 12 and Chapter 13 bankruptcy cases, United States Trustee Program Chapter 12 and Chapter 13 Handbook and policy changes that impact case administration, and administrative challenges of, and potential assistance to*, pro se* Chapter 12 and Chapter 13 debtors.

- Avoid the appearance of engaging in any communication that is or could be perceived as an *ex parte* communication, i.e., about a specific case or open matter.

- Be transparent that meetings with the bankruptcy judge(s) are held to discuss matters related to case administration, and share the outcome of the meetings with the bar, to the extent it will have an impact on the bar or bankruptcy practice generally in that court.

- Schedule meetings in advance, prepare an agenda if it will facilitate the purpose of the meeting, share the agenda with all who will attend the meeting, and stick to the agenda (so no one is caught by surprise or faced with a topic that might raise some ethical concern).

- Consider utilizing an advisory council or other group as a sounding board to discuss case administration matters which includes all bankruptcy constituents, e.g. debtor bar, creditor bar, standing trustees, U.S. Trustee, and the Court, either in lieu of the smaller meetings or as a next step after such meetings.

- Participate in activities of the bar association, bankruptcy section, or other organized groups of attorneys who practice bankruptcy law, but scrupulously avoid discussing pending cases or issues during conversations there when any bankruptcy judge is present.

- In a multi-judge district, take into account whether, given the agenda, it would be appropriate to include all judges.

- Bear in mind that administrative meetings are not intended to short-cut processes already in place for addressing changes to local rules or procedures; for example, if a change that is agreed upon at an administrative meeting would typically require a 30-day notice and comment period, that should still happen.

- Be cognizant of, and do not run afoul of, the mandates the ethical rules, the applicable Codes of Conduct, and Rule 9003 impose on all parties.

SUGGESTIONS FOR LEVELS OF INCLUSIVENESS	
PARTICIPANTS	***NATURE OF ADMINISTRATIVE TOPICS***
Judge and Standing Trustee	Discrete issues re specific Judge/Trustee processes
All Judges and Standing Trustees in a District	Preliminary discussions of issues in common to procedures within a District, with subsequent notice to the U.S. Trustee
Judges, Trustees and U.S. Trustee	Preliminary discussion of issues in common to local procedures in a district which directly impact Trustee/U.S. Trustee policy or responsibilities
Judges, Trustees, U.S. Trustee and Bar Representatives	Issues which could possibly have a broad impact on practice within a District
Open Bench-Bar Meeting	Issues which are likely to have a broad impact on practice within a District
CLE Seminar	Changes which will impact on practice within a District