



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2019 Rocky Mountain Bankruptcy Conference

## *Consumer Workshop III*

### **The Perfect Storm: Working with Trustees and Navigating Complex Cases**

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24<sup>TH</sup> ANNUAL ROCKY MOUNTAIN BANKRUPTCY  
CONFERENCE CONSUMER PROGRAM

**THE PERFECT STORM:  
WORKING WITH TRUSTEES AND NAVIGATING  
COMPLEX CASES**

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<b>Chapter 7 Due Diligence Checklist</b>		
<b>Client:</b> _____		<b>Date:</b> _____
<b>Completed</b>	<b>Task</b>	<b>Notes</b>
<input type="checkbox"/>	Identify the primary reason the client is seeking information on bankruptcy	
<input type="checkbox"/>	Discuss workouts and other forms of bankruptcy	
<input type="checkbox"/>	Review the concept of discharge (727) and non-dischargeable debts(523), and reaffirmation/ride-through of secured debts	
<input type="checkbox"/>	Review property of the estate (541) and exemptions (522/state law), including planning	
<input type="checkbox"/>	Gather information on assets and debts and make a list of due diligence documents for the client to produce	
<input type="checkbox"/>	Identify lawsuits/judgments (SOFA Part 4 and 522(f)) and prefiling transfers (SOFA Parts 3,5, & 7)	
<input type="checkbox"/>	Review means test issues, including debt composition/income	
<input type="checkbox"/>	Review debtor's duties (521) and sanctions for failure to disclose assets and transfers	
<input type="checkbox"/>	Discuss facts that may determine filing date	
<input type="checkbox"/>	Review credit counseling requirement and provide tear sheet	
<input type="checkbox"/>	Discuss filing fee and attorney fee	

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DATE

John Smith  
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***Re: Chapter 13 Information To Assist in Filing Your Case***

Dear Mr. Smith,

I want to thank you for selecting me to represent you in bankruptcy. I understand that filing bankruptcy is not what you had planned, but I also know that it can be the means of getting out from under crushing debt and taking charge of your financial future. I hope to be sensitive to your situation and help you through this process.

I have already discussed with you matters related to the possible filing of a Chapter 13 bankruptcy in order to reorganize your debts as well as non-bankruptcy options and relief under other bankruptcy chapters. Because you have decided that Chapter 13 will most likely be the best option, I have prepared this letter to provide background information about Chapter 13, describing your rights and duties as a Debtor while in your Chapter 13 case. The information in this letter is intended to assist you to prepare for and work toward the successful confirmation and completion of your Chapter 13 case and is not intended to address all matters and issues that may arise in such a case. It is critical that you review this letter carefully and ask me questions that may occur to you in connection as your review it.

1. **Retention.** You have already entered into a separate engagement letter defining the scope my services, the basis for my fees, and other matters.
2. **General Background Concerning Bankruptcy.** For a general background concerning the court system and bankruptcy, I request that you review the “Chapter 13 - Bankruptcy Basics” materials produced by the Administrative Office of the U.S. Courts, found at <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics>. While much of this is very basic for you, it does provide helpful background.
3. **Advance Preparation.** As you understand, the filing of a Chapter 13 case is not a simple matter of paying a filing fee and submitting paperwork to the Bankruptcy

Court. The requirements and realities of a Chapter 13 case is that it usually renders immediate relief from collection efforts including repossession of vehicles and even foreclosure of real property. However, this is sometimes an uncertain and complex process that requires your dedication and diligence in following my legal advice and by providing me with documents and information. Indeed, you may have to show admissible evidence of your income, expenses, tax returns and other information several time during this case. When I ask for such information, the proper response should be in the affirmative, not “I already gave that to you.” Under the Bankruptcy Code, you have a statutory obligation to comply with these requests and there will be no satisfactory excuse for your failure to provide information. Indeed, the failure to provide complete and correct information on a timely basis may lead to sanctions, or the dismissal or involuntary conversion of your case to Chapter 7.

4. **Preservation of Information, Including Electronic Data.** Because Chapter 13 cases are court proceedings involving every aspect of your financial life, you should consider all of your financial documents and records to be relevant to the success of your case and should preserve those financial records to avoid any accusation of destruction or spoliation of evidence. Accordingly, you should take appropriate measures to preserve those records, both paper records and electronic records. I will need to understand those records and will need to meet with you in person perhaps several times during the pendency of this case.
5. **Social Media.** It will probably not be helpful to your case to list all of the restaurants you attend, all of your latest vacation destinations or nights out with the girls (or boys). Please be prudent in what you share. Others may be watching and recording your activities and may use the same against you in Bankruptcy Court. This applies as well to email and to text messaging.
6. **Initial Information Needed for Chapter 13 Filings.** When we first met, I provided you with an initial list of information and documents that need to be provided to me so I can help you prepare and file your voluntary petition and commence your Chapter 13 case. Please bring all of the highlighted documents to our scheduled two-hour meeting.
7. **Petition Filing, Debtor in Possession, and Bankruptcy Estate.** The date on which your voluntary Chapter 13 petition is filed is generally referred to as the “Petition Date.” The Petition Date is used to delineate, for a number of bankruptcy purposes, what is “prepetition” and what is “postpetition.” The filing of a voluntary petition commences a bankruptcy case under Chapter 13 of the Bankruptcy Code and creates a bankruptcy estate consisting of all your legal and

equitable rights and interests in property, real and personal, tangible and intangible, at the time the case is filed. The estate may even be expanded to include any and all rights in such property you acquire even after this case is filed. On the Petition Date, you become a “Debtor in Possession.” Generally, a Debtor in Possession is a fiduciary for the bankruptcy estate’s creditors and equity owners. The fiduciary duties of a Debtor in Possession are discussed in more detail in later sections of this letter. For purposes of this paragraph, please understand that you cannot borrow or incur debt or sell or dispose of any asset without working through me to obtain permission from the court. Such permission requires a motion and hearing to request such permission from your assigned Bankruptcy Court Judge, and typically takes 30 days from the time you meet with me.

8. **The Automatic Stay.** When a Chapter 13 petition is filed, an automatic stay arises. The automatic stay is a broad injunction which prevents, with certain exceptions, most creditors from collecting debts, foreclosing liens, continuing litigation, and otherwise taking certain actions against you or the property you are holding for the bankruptcy estate. The automatic stay does not apply to certain activities, including most divorce matters, criminal or traffic proceedings, issuance of notices of tax deficiencies, tax audits, assessments of taxes, and the terminating of certain leases. For example, The imposition of the automatic stay will halt most pending lawsuits for pre-petition debt and collection actions. However, the automatic stay does not stop actions against you for debts incurred after the filing of your case. While a Creditor may seek a judgment against you, they may not garnish you wages during this case. Please let me know if this happens to you.
  
9. **Relief from the Automatic Stay.** A creditor or other party in interest may seek relief from the automatic stay. This requires the filing of a motion with the Bankruptcy Court and a formal order from the Bankruptcy Court. To obtain relief from the automatic stay to enforce an interest in property, the creditor should show that you have no substantial equity in the property (i.e. that the amount of the creditor’s secured claim is greater than the value of the collateral securing the claim). To defend against a motion for relief from the automatic stay, you must show (and have the burden to show) that the property is needed for an effective reorganization and that you have made all required direct payments on such property and that the same is fully insured and that the value of the property is being preserved. Alternatively, the creditor may obtain relief from the automatic stay by showing that its interest in the subject property is not adequately protected (e.g., it is declining in value, deteriorating, not being maintained or repaired, not insured). A creditor is entitled to have its interest in the subject property protected to the extent of only the value of the collateral. Thus, depending on the valuation of the collateral, a so-called secured creditor may be found to be actually

undersecured. An undersecured creditor is, however, entitled to have the value of its collateral adequately protected, such as by making periodic cash payments to account for depreciation, performing maintenance and repairs, and providing proper security and insurance for the property. If a creditor tries to repossess property, terminate a contract, or collect a debt without having first obtained relief from the automatic stay, please contact me so that I may evaluate the creditor's action and take action, or request that the Court take action, if appropriate. Do not permit repossessions of property without court order.

10. **Duty to Identify All Creditors.** When you file your bankruptcy, you must list all of your creditors and provide an accurate address for each. The debt you owe to any unlisted creditor will not be discharged and such creditor may continue collect efforts after this bankruptcy has completed. Therefore, please make an accurate list of any and all of your creditors. If you later learn that you have omitted any creditors, please make an appointment with me and I will assist you in preparing the necessary amendments to add them to your case. Once your case is filed, some amendments will necessitate the payment of a filing fee. To avoid this, please make sure all statements and schedules are correct and complete.
11. **Notice to Creditors.** The noticing center for the Bankruptcy Court will send written notice of your Chapter 13 case filing to all creditors and parties appearing on the Creditor Mailing Matrix that will be filed with the court. You may also want to personally contact certain creditors and other parties in interest to notify them of your Chapter 13 filing. If your home is scheduled for foreclosure or your wages or bank funds are going to be garnished, or you anticipate a lender may want to repossess your vehicle, please let me know and I will contact those creditors.
12. **What if Creditors Continue to Call?** If any creditors call you after the filing of this case, please tell them the following:
  - You filed a Chapter 13 bankruptcy;
  - The date you filed;
  - Your case number; and
  - Refer them to my office (801-264-0699).

Most collection companies and creditors obey the law and will stop contacting you once they know you filed a bankruptcy case. If these collection calls do not stop after you informed them of your filed bankruptcy, keep a record of the name, date, time and other contact information (especially the phone number and email address) of the person who called. Please immediately notify me if you are threatened with physical harm, jail, or anything else.

13. **United States Trustee.** The United States Trustee is an officer of the United States Department of Justice. The United States Trustee monitors all bankruptcy cases to ensure compliance with the bankruptcy laws and has certain supervisory and investigatory duties. The United States Trustee also prosecutes, or assists in the prosecution of, bankruptcy crimes, such as any type of fraud in connection with a bankruptcy case. Otherwise, involvement of the United States Trustee is minimal.
14. **Chapter 13 Trustee - Lon Jenkins.** Under Chapter 13, most of our interaction will be with the Chapter 13 Trustee. You will start paying the Trustee your monthly plan payments 30 days after the filing of your case. You will also have to provide the Trustee (through me) copies of various documents as he may request. You should not communicate with the Chapter 13 Trustee without me being present. Bankruptcy Judges regularly accord great deference to the opinions of the Chapter 13 Trustee as well as the United States Trustee's office. Among other things, the Chapter 13 Trustee often seeks to dismiss or convert to liquidation a Chapter 13 case that is not making sufficient progress toward reorganization. The Trustee and the Court expects that you will take sufficient action to have your case confirmed. If you fail to cooperate in this endeavor, your case will be dismissed or converted.
15. **Meeting of Creditors.** Approximately thirty days after the Petition Date, the Court will schedule, and the Chapter 13 Trustee will conduct a meeting of creditors in your case. You must be present at the meeting to answer questions under oath. Creditors may ask questions of you as well. I will assist in preparing you for the meeting of creditors and will also attend the meeting. While I may help clarify certain questions, I cannot testify on your behalf. On rare occasions, I may object to Questions posed by a Creditor. Otherwise the purpose of this meeting is to obtain your testimony. Above all else, your testimony should be truthful.
16. **Debtor's Duties.** The primary duties of a debtor in a chapter 13 case are to file the appropriate schedules and statements, file and obtain confirmation of a chapter 13 plan, and make the payments and perform the acts required under the duties of debtor under chapter 13 confirmed plan. The debtor must also comply with the pre-filing credit counseling requirement, cooperate with the chapter 13 trustee, comply with the orders and rules of the bankruptcy court, and complete an instructional course on personal financial management. You have a duty to file tax returns on time every year of this plan and provide a copy to the Trustee. In most cases, the Court will Order that you turn over a portion of those tax refunds.



17. **Honesty.** At all times and above all else, you should be honest and forthright with me, my office, the Trustee, and the Court. At no time should you conceal information or property from the Court or attempt to avoid or evade law, rules of procedure, or orders of the Court. Improper (and in some cases criminal) conduct in connection with a bankruptcy case includes concealing property of the estate from the Court or Court officers; making false oaths, declarations, certificates, verifications, or statements whether or not under oath; concealing destroying, mutilating, falsifying, or making a false entry in a document relating to your case, withholding information from the Court or a Court officer.
  
18. **Tax Returns and Refunds.** In a Chapter 13 bankruptcy, you will be required to turnover tax refunds for the next three to five years. In addition to the monthly Plan Payments required by your plan. You must also pay into the plan the total amount of yearly state and federal tax refunds that in the aggregate exceed \$1,000. If such tax refund includes amounts from the Earned Income Credit (E.C.) and/or the Additional Child Tax Credit (ACT), You may retain up to a maximum of \$2,000 of the tax refund based on the following formula: the first \$1,000 as provided above, plus the combined amount of the E.C. and ACT up to an additional \$1,000 (maximum retained tax refund cannot exceed \$2,000). However, you are not obligated to pay into the Plan tax refunds that have been properly offset by a taxing authority and must provide evidence of such offset (tax transcript, letter from taxing entity indicating the offset amount. Bank statements or screen shots of the taxing authority website is not sufficient). This issue is non-negotiable.
  
19. **Debtor's Rights.** You have the right to propose a plan under chapter 13 for the repayment or adjustment of your debts under the supervision and protection of the Bankruptcy Court. Upon the successful completion of a confirmed chapter 13 plan, you have the right to a full chapter 13 discharge under 11 U.S.C. § 1328(a). You have many of the rights, powers, and duties of a trustee with regard to the possession of property and the running of a business during the case. With only limited exceptions, you have the right to dismiss your chapter 13 case or convert it to chapter 7 at any time. You have the right to modify a chapter 13 plan at any time prior to confirmation, and under certain conditions, after confirmation.
  
20. **Utilities.** Under the Bankruptcy Code, a utility may cut off postpetition service unless within 20 days after the petition date it receives adequate assurance of payment for postpetition services that is satisfactory to the utility, such as a cash deposit and/or advance payments. In addition, utilities may, without receiving prior relief from the Court, recover or set off against an existing security deposit. Such "Utilities" include services such as electric power, natural gas, water service,

telephone if you have included such debts in your bankruptcy.

21. **Executory Contracts and Unexpired Leases.** Contracts for which material performance is still due on each side, the failure of which would excuse performance the other contract party, are called “executory contracts.” Executory contracts and unexpired leases may either be assumed or rejected by the Debtor. Rejection permits the Debtor to discontinue performance of the executory contract or lease and gives the other party to the contract only a damages claim in the bankruptcy case, which claim is treated as if it arose prepetition. Assumption means that the Debtor in Possession agrees to continue performance of the executory contract or lease and cure all defaults. Contract provisions which prohibit or condition assignment or impose automatic default upon the filing of a Bankruptcy (referred to as ipso facto clauses) are generally not enforceable in Bankruptcy.
22. **Ongoing Rent, Mortgage Payments and Home Owners Association (HOA) Dues.** Unless you are rejecting your rental lease or are surrendering your home, you must continue to pay your mortgage or ongoing rent payments. Generally you must continue to pay your HOA dues until your home is foreclosed or surrendered. Such HOA dues may not be discharged. If you have HOA dues, please bring this to my attention.
23. **Avoiding Judicial Liens.** If 1) were in a lawsuit prior to the filing of this case, 2) a judgment was entered against you, and 3) and you own real estate, you may have a judicial lien that encumbers your property. That lien will survive this bankruptcy unless it is avoided. A bankruptcy does not remove judicial liens from your property even though the debt is extinguished as to you personally. Only judicial liens that "impair the homestead exemption" may be removed by order of the court. If this applies to you I advise you to obtain a preliminary title report, an appraisal or a fair market analysis so I can determine determine if the judicial lien(s) can be voided.
24. **Interest.** During the pendency of the Chapter 13 case, interest does not accrue on your unsecured debt. Secured creditors typically receive interest on their claims.
25. **Claims Bar Date and Claims Objections.** The Bankruptcy Court will establish a date (referred to as a “Bar Date”) by which all Creditor’s claims must filed in your case. With few exceptions, to have their claims allowed and paid, creditors must file their claims with the Bankruptcy Court on or before the Bar Date. Under the Bankruptcy Code, a claim for which a proof of claim is filed is deemed allowed,

unless object to the claim. Allowance means that the creditor's claim is treated as a valid obligation of the Debtor and is entitled to the distribution that particular type of claim eventually receives, if any. You may object to the creditor's claim on various grounds. For example, you may assert that the creditor's claim was not timely filed or that the creditor failed to include adequate supporting documentation with its claim or that the claim is invalid on substantive grounds, as a matter of law and/or fact. You may also may challenge the secured nature of the claim or take issue with the amount or basis of the claim. The Bankruptcy Court may hold a hearing at which evidence about the nature and amount of the claim is presented and the issue of the validity of the claim is litigated.

26. **Plan Presentation and Confirmation Process.** The end goal of the Chapter 13 process is the confirmation of a plan of reorganization which binds creditors to a result, such as restructuring your debt, and treatment of allowed claims. Within 10 days after the Petition Date, you should, with my assistance, develop and file a Chapter 13 plan of reorganization. The plan will describe in detail the proposed restructuring of your debts and the treatment and payment of your creditors' claims.
27. **Keep All Contact Information Current.** It is imperative that you keep my office informed of any changes to your phone numbers, email addresses and physical addresses so we can contact you efficiently. Periodically you will receive letters and emails from my office. Please make sure to read these carefully as they contain important information critical to the success of your case. You will also receive documents from the US Bankruptcy Court and Trustee's Office. My office will do all we can to ensure you are kept informed of the status of your case. If my office staff, the Trustee, or taxing authority requires additional documents or information, please provide this to my office promptly.

Undoubtedly, the foregoing information will raise many questions and issues. I look forward to discussing them with you at our next scheduled meeting as we prepare to file your case.

Sincerely,

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David M. Cook  
Attorney at Law

**EXAMPLE PANEL TRUSTEE  
CASE MANAGEMENT PROCEDURES**

**May 16, 2017**

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## **GENERAL OFFICE PROCEDURES FOR CHAPTER 7 CASES**

These procedures are for employees of the Bankruptcy Section to follow when providing services to a Trustee in Chapter 7 cases. They are supplemented by the Handbook for Chapter 7 Trustees effective October 1, 2012 (“Handbook”), which is incorporated by reference into these procedures. In case of conflict, the Handbook is the controlling document. All employees of the Bankruptcy Section will have a copy of, read and understand these procedures. The procedures set forth below apply to all Chapter 7 cases and incorporate specific real property, personal property, accounting, litigation, and emergency procedures.

### **CASE OPENING PROCEDURES**

Upon Duane’s appointment to a Chapter 7 case, the staff will review the statements and schedules and other pleadings received from the U.S. Trustee to determine if there is cash, tangible personal property or other property which could be subject to deterioration or immediate conversion if some action is not taken. If there is no cash, tangible personal property, or other convertible property in the estate, no immediate action needs be taken by members of the staff and the opening procedures set forth below should be followed. In the event cash is found in any estate, either in the hands of the debtor(s), other individuals, or banking institutions, a staff member will immediately call whoever is holding the funds and notify them of the bankruptcy and within twenty-four (24) hours, send a standard form demand letter for turnover of the funds with a copy of the Notice appointing the Trustee.

If substantial personal property, i.e., inventory or equipment is found, either the Estate Manager or another staff member, will immediately contact Rob Olson (or other Standing Auctioneer) at (801) 355-6655, to plan arrangements to take possession of the property on behalf of the Trustee. A decision will be made regarding whether auction procedures are to be initiated on the property or if a sale or abandonment is more appropriate. The Trustee or other staff member will contact secured creditors to ascertain their preference to auction, sell or abandon the property and obtain their agreement to be charged for any costs incurred under 506(c) of the Bankruptcy Code. *See* Chapter 8, Section K of the Handbook.

If accounts receivables are discovered the Trustee or staff member should gather all records regarding the receivables and promptly send demand letters for collection of same in accordance with the Litigation Procedures set forth below.

If accounts receivables are discovered, the Trustee or staff member should gather all records regarding the receivables and promptly send demand letters for collection of same in accordance with the Litigation Procedures set forth below.

If the estate includes real property that is generating rents or subject to deterioration, a viable real estate agent will be instructed to contact the property's possessor and take the appropriate actions as listed below under Real Property Procedures. *See* Chapter 8, Section L of the Handbook for periodic payment posting and handling.

## **COMPUTER PASSWORDS**

The Bankruptcy Management Systems ("BMS") software ("Caselink"), or any other password-enabled software used to administer Chapter 7 cases will automatically prompt the user to change their password at the appropriate intervals. If a staff member's employment is terminated for any reason, the Trustee will immediately remove this person from the system. Caselink restricts user access based on assignments as described in the Assignment Legend under Accounting Procedures for Chapter 7 Trustee Cases set forth below. These lockout provisions are described in detail in the Caselink user manual. The Trustee will change his password at least once a year. *See* copy of email from U.S. Trustee's Office dated January 31, 2014 at the front of this binder regarding the hacking incidents that have occurred to a few trustees. Also included is the response email from Melanie Patton with BMS responding to the password security.

## **BACKUP PROCEDURE**

Files are backed up nightly by and a web backup sent to BMS nightly.

## **DISASTER RECOVERY**

In case of disaster, the Trustee, law firm administrator, firm IT manager, and shareholders will meet at the firm's office, if possible, or at a nearby site to discuss continued business operations and data recovery. The type and severity of the disaster will dictate what steps are taken to recover data and continue operations. The data recovery process may necessitate retrieval of backup tapes, United States Bankruptcy Court records, United States Trustee records, bank records, and other undamaged records. If necessary, business operations may be conducted at other leased office space or the Trustee's home.



## **CALENDAR PROCEDURES**

The appropriate staff member will enter calendar events into the Bankruptcy Docket calendar in Microsoft Outlook as needed and invite all attendees when appropriate. Calendars for a four week period will be printed every Thursday and distributed to appropriate staff members. The responsible secretary will keep a hard copy of all office calendars generated for future reference.

## **FILING PROCEDURES**

Bankruptcy Section employees should follow current filing procedures.

## **PROCEDURES FOR REGULARLY ASSIGNED CHAPTER 7'S**

All the files for cases assigned to a 341 calendar will be kept together and not placed in general filing until after the following procedures are completed. The assigned Trustee's staff member will prepare the files for the 341 meeting and the Trustee's Checklist. When appropriate, a Trustee's Directive should be used to direct delivery of documents. All files for a 341 calendar will be given to the Trustee or Trustee's counsel when appearing on behalf of the Trustee at the 341 meeting, no later than two (2) working days prior to the day set for the 341 meeting.

## **MEETING OF CREDITORS (341 Meeting) PROCEDURES**

Chapter 7, Section A of the Handbook should be consulted by the Trustee, his counsel or staff member prior to conducting any 341 meeting. This applies particularly if counsel or staff members are substituting for the Trustee at a 341 meeting and have not conducted a meeting within the last three months. The Handbook should be reviewed thoroughly, including the sample questions and recommended oath. Throughout the day of and during the meeting, the Trustee and/or his counsel and staff members will make every effort to document any information that creditors may be able to provide regarding the matters related to the estate. Any phone call contact, verbal contact at the 341 meeting or in any other form, shall be the subject of a request for written information and documentation. Such request for written documentation will be made under terms whereby the specific written information is provided within a specific length of time, i.e., within two (2) weeks of the 341 meeting. The Trustee or his counsel or staff

member will decide what cases should be held in an asset status until said information is received.

The Trustee or his counsel will review all files immediately following the 341 meeting to determine which cases will be Asset cases and which will be No Asset cases. The procedures for No Asset cases, set forth below, will be initiated on the day following the 341 meeting. Asset cases will be handled in accordance with the procedures set forth below relating to real and personal property, funds and/or litigation, and the Form 1 property report will be prepared. A 341 memo will also be prepared by the Trustee or conductor of the 341 meeting to address assets to be pursued, objections to exemptions, and other actions to be taken by the Trustee or his professionals.

**“ENSURING” DEBTOR PERFORMS INTENTIONS UNDER 521(2) (B)  
AND THE BANKRUPTCY INFORMATION SHEET REQUIRED BY 11  
U.S.C. § 341**

In connection with the first meeting of creditors, the Trustee should utilize any local rule or order to ensure the Debtor(s) file(s) at or prior to the meeting of creditors, a Statement of Intention under 521(2)(B) of the Bankruptcy Code. The Statement of Intention should be reviewed by the Trustee at the meeting and the following steps taken in relation to it.

If it is the Debtor’s intention to surrender certain personal property to the secured creditor, the Trustee should attempt, at the meeting of creditors, to obtain the Debtor’s consent to relief from the automatic stay on the record. He should also direct the Debtor(s) to contact the secured creditor that day and make arrangements to have the collateral surrendered to the creditor immediately. In the event the Debtor(s) refuse(s) to surrender the property, the Debtor(s) should be directed to deliver the property to a viable bonded Auctioneer, to be held pending a stay lift hearing.

In the event the Debtor(s) express(es) an intention to reaffirm with a secured creditor and keep possession of the collateral, the Trustee should direct the Debtor(s) to immediately contact the secured creditor in question. If the secured creditor in question has a representative at the meeting of creditors, the Debtor(s) should be directed to meet with him and immediately prepare and execute a reaffirmation agreement.

At the 341 meeting the Trustee will confirm on the record that each debtor has received, read and understands the Bankruptcy Information Sheet.

## **OBJECTION TO DISCHARGE**

The Trustee, pursuant to his duty under § 704 will object to the debtor's discharge if advisable and appropriate. The Trustee will include the basic facts for denial of discharge in his § 341 memo. The Trustee and/or his counsel should examine the acts and conduct of the debtor(s) to determine whether grounds exist for denial of discharge under § 727 of the Bankruptcy Code. The complaint objecting to the discharge must be filed within 60 days of the date first set for the § 341 meeting of creditors, or a motion to extend the time for filing the complaint must be filed on or before 60 days from the § 341 meeting. The Trustee and his counsel may conduct Rule 2004 Examinations and review other documentation to prepare a complaint for the denial of discharge. If the Trustee has information that supports an objection to discharge, but deems such an action inadvisable, the Trustee will inform the United States Trustee of the facts and his reasons for not pursuing them, via a letter to the United States Trustee.

## **BANKRUPTCY CRIMES**

The Trustee, his counsel and his staff members should consult Chapter 8, Section W of the Handbook for recommendations on detecting criminal activity, types of criminal conduct, and compliance with the Trustee's duty to report criminal conduct. Attention should be paid to gathering information regarding criminal activity or acts. When preparing a referral the following guidelines should be followed:

A. Start the Referral with a Brief Summary of the Crime:

1. Begin the letter or report with a short summary of the main crimes alleged. Label the alleged crimes in terms of how they would be charged criminally. For example, indicate that the referral concerns a concealment of assets and a false statement. Complaining that someone has filed multiple bankruptcies is not helpful in a summary of the crime since that is not a crime in and of itself. Multiple filings may be relevant in showing intent to defraud or knowledge, so those facts should be included at a later point in the referral. Civilly, a debtor may have substantially abused the bankruptcy system, but criminally only a false statement or a concealed asset may be actionable. Leave all civil complaints aside and think specifically about what crime(s) might have been committed.

B. The following information should be included whenever possible:

1. The names(s) of the subject(s) believed to have been involved in the commission of the crimes(s). If there is a corporate entity or partnership, provide the names of all known individuals.

2. A thorough summary of the evidence concerning each of the potential bankruptcy crimes. Keeping the elements of each crime in mind should help in structuring such a discussion.

3. The total loss amount or the amount of harm caused by the alleged crime. For example, what is the value of the concealed asset or the effect of the false statement in the bankruptcy? If no monetary value can be put on the harm, explain what the significance of the crime was. Did the crime seriously obstruct the proper functioning of the bankruptcy System? Is it an activity that occurs regularly in the bankruptcy context and civil remedies are not adequate? Did a bankruptcy judge ask you to refer it?

4. The date of birth, social security number and address of the alleged perpetrators of the crime to help law enforcement ascertain any criminal history or prior complaints.

5. A list of potential witnesses to the crime and what information you believe they can provide. If prior statements of certain witnesses are available, indicate whether they are depositions, declarations, phone interviews, etc. Provide address and phone number(s) of witnesses if available. If such a list would be lengthy, indicate that it will be provided should the government decide to proceed with the investigation.

6. Indicate the nature and scope of available documentary evidence and its location. Attach key documents to your referral, but do not compile an extensive exhibit book or the like until you have consulted with someone in a law enforcement agency who has indicated such extensive work will be reviewed. Attach relevant civil pleadings especially if they summarize key issues or evidence in a particular motion or decision.

7. Indicate potential defenses to any charges you are aware of and provide any response to your allegations. If there is a legal issue that is unsettled or tricky and could affect the outcome of the case, flag it in your referral. You do not need to resolve the issue or any discrepancy in versions of any event, but you should ensure law enforcement is aware of it.

## **PROCEDURES IN NO ASSET CASES**

In the event the Trustee determines a case should be treated as a No Asset case, the case file should be set aside and not filed in general filing and a No Asset report generated from Caselink within one (1) week of the meeting of creditors.

After a No Asset Report is generated, signed by the Trustee and filed with the U.S. Trustee's Office, and the Bankruptcy Court, the file is sent to storage with the applicable number on it and kept for a period of at least two years.

## **PROCEDURES IN ASSET CASES**

In connection with Asset cases, the relevant procedures set forth under the Accounting, Real Property, Personal Property, Funds and Litigation sections of this handbook should be followed. In addition, an Asset case will be noted as such in Caselink. The Trustee or his counsel should fill out a New Client Matter sheet with all appropriate information.

## **REPORT PROCEDURES**

All cases in which the Trustee serves, he or she will be reported to the U.S. Trustee for the period ending December 31. The report is due at the end of the month following the reporting period. The report will include every Asset case opened or assigned during the reporting period, and those cases closed during the reporting period. The report will consist of the following: Individual Estate Property Record [Form 1]; Estate Cash and Receipt and Disbursements Record [Form 2]; and Summary Asset Report [Form 3]. Consult Chapter 9, Section B of the Handbook regarding the appropriate method of maintaining Forms 1, 2, & 3, as well as the general instructions for interim reports attached as a separate provision.

Reports to the U.S. Trustee are generated from Caselink and it is the Estate Manager's responsibility to make sure all reports are timely filed.

## **ACCOUNTING PROCEDURES FOR CHAPTER 7 TRUSTEE CASES**

### **BANK ACCOUNTS**

There is at least one separate account for each Chapter 7 case in a depository insured by the Federal Deposit Insurance Corporation (FDIC) and approved by the United States Trustee. Currently, all estate funds for which the trustee is Trustee are deposited to Rabobank. The funds

for an estate are always deposited into the appropriate estate account and never commingled with other estate accounts, business accounts, law firm trust accounts, or any other accounts.

### **BOND/SECURITIES PLEDGE**

The current Blanket Bond covers all cash in any Chapter 7, 12 or 13 estate in which Duane H. Gillman is the Trustee, up to an aggregate total of \$47,027,358. If the Trustee's cash on hand exceeds an aggregate of \$47,027,358 for all Chapter 7, 12 or 13 cases he will immediately post a separate bond for the largest Chapter 7, 12 or 13 estates. (Largest defined as the estate with the greatest amount of cash on hand.) Copies of the Blanket Bond and all other bonds are kept in the Trustee's binder.

The bank at which any case deposit total exceeds \$250,000.00 should provide the United States Trustee with evidence of a securities pledge for those funds exceeding \$250,000.00. The securities pledge report is filed quarterly by the bank. In addition, the Trustee periodically and/or as necessary, communicates with the U.S. Trustee's office to insure there is adequate collateral pledged by the financial institution holding estate funds. Copies of the Security Quarterly Report are sent by the bank directly to the United States Trustee.

### **RECEIPT OF FUNDS**

Depositors are requested to make checks payable to the "Chapter 7 Trustee for the Estate of \_\_\_\_\_". Cash deposits must be converted to cashier's checks by the payer and made payable to the estate as set forth above before being accepted by the Trustee's office. Deposits of all funds received are made daily.

The Deposit Clerk is responsible for opening the mail and maintaining the receipts log in Caselink with every check received by the Trustee, the date the check was received, the amount of the check, the debtor's name/case number, the payer, and the purpose. When a check received cannot immediately be deposited into the estate's bank account, the Deposit Clerk will still record receipt of the funds in the receipts log and place the check in the firm safe pending deposit. A subsequent note as to the final disposition of the funds will be recorded as soon as it is known. After funds have been recorded the Deposit Clerk stamps all checks with a restrictive endorsement, and makes a copy of each check. The checks, the copies, and any supporting documentation received are given to the 7 Account Manager for deposit.

The 7 Account Manager is responsible for preparing a deposit slip for each estate using the supplied blank deposit slips, kept in the locked filing cabinet, sending deposits to the bank, and posting deposits to the appropriate trust account. The 7 Account Manager is also responsible for obtaining a tax identification number in all cases in which the debtor is an individual. The tax identification number is assigned, usually within a week, by the bank and will be printed with the transmission report. Upon notification from the bank of the assigned tax ID number the Trustee electronically signs the W-9 in Caselink which automatically sends it to the bank. The 7 Account Manager prints a copy which is filed in the estate's "Funds" file. If the case is a corporation, a partnership or a Limited Liability Company, the debtor's original tax identification number is used.

### **EARNEST MONEY DEPOSITS**

If the Trustee receives earnest money deposits relating to the sale or auction of real or personal property of a case, all procedures set forth herein shall be followed. In addition, a separate estate account titled "Earnest Money Deposits" shall be opened and the 7 Account Manager will deposit all earnest money deposits to this account.

### **NSF DEPOSITS**

A copy of checks returned by the bank is given to the Trustee and immediate steps taken by the Trustee, Estate Manager or Trustee's counsel (depending on the source of the funds) to get the check replaced with certified funds.

### **TRANSFER OF FUNDS**

Transfers of Funds are only allowed between accounts within an estate and are done electronically through Caselink, by authorized personnel only. Funds transferred from one estate to another must be done by check.

### **DISBURSEMENTS**

The 7 Account Manager is responsible for posting and printing all checks. Upon instruction from the Trustee, the 7 Account Manager will print checks from the appropriate checking account using the supplied blank checks, kept in a locked filing cabinet. Caselink automatically prints the appropriate check number, case name, case number, payee, magnetic account codes, description of payment, and void after 90 days on checks based on data supplied

by the 7 Account Manager. The check(s) and supporting documentation are given to the Trustee for approval and signature. The Trustee is the only signor on chapter 7 estate accounts. Check vouchers are attached to source documents and placed in the estates "Funds" file.

## **AUTOMATED CLEARING HOUSE TRANSACTIONS**

The Trustee should not approve conversion of estate checks to Automated Clearing House (ACH) transactions or electronic funds transfers and should instruct the bank to refuse any attempt to make such debits to estate accounts. The Trustee's Caselink account manager has assured the Trustee that their banks are always in full compliance with the U.S. Trustee Handbook.

## **PAYROLL TAXES**

If the Trustee has to make any payroll tax payments, he or his accountant must make such payment via the Electronic Federal Tax Payment System (EFTPS). The website is [www.eftps.gov/eftps](http://www.eftps.gov/eftps) and the phone number is 1-800-555-3453.

## **VOIDED CHECKS**

All voided checks should be accounted for as follows:

- A. The person voiding the check must date, initial, and note the reason for the voidance.
- B. A canceling entry is made in Caselink indicating the check number and reason for voidance.
- C. The voided check is given to the Statement Clerk to be placed in the "Funds" file.

## **STOP PAYMENTS**

When checks issued from an estate account become stale dated (outstanding for more than 90 days) or lost, a stop payment is issued on the check. The stop payment procedure is automated in Caselink and will be done by the 7 Account Manager. The Trustee may request the check be reissued if he is contacted by the payee/creditor or if a current address can be located. Otherwise, the check will be sent to the Court's registry as set forth in the Final Disbursement Procedures below. The Trustee will initial and date the Caselink transmission log showing the voided entry.



## **RECONCILING OF ACCOUNTS**

The Trustee receives, unopened, the bank statements and canceled checks by the 10th day of each month to inspect signatures, endorsements, and transactions for unusual endorsements, alterations, transfers and forged signatures.

On or before the 20th day of each month, the Estate Manager runs the Caselink bank reconciliation report and verifies that each account is balanced and denotes variances when applicable. The Estate Manager promptly follows up on variances and coordinates with Rabobank to reverse any improper service charges if applicable. It is the responsibility of the Estate Manager to keep all Chapter 7 Accounts in balance. When the Estate Manager has finished reconciling all accounts, the reconciliation reports are given to the Trustee for review.

The Statement Clerk files the statements and canceled checks alphabetically by case name in the appropriate statement binder located in a designated area. Bank reconciliation reports are filed a binder located in a designated area.

## **TAX RETURNS**

On a semi-annual basis the Trustee reviews all open asset cases to ensure that all required tax returns have been filed. If they have not been filed, the Trustee will designate and instruct, in writing, an accountant to prepare the appropriate returns.

## **FINAL REPORTS**

When all claim objections are complete, the 7 Account Manager will prepare the Trustee's Final Report ["TFR"] and send it to the U. S. Trustee's office for approval. After the order approving the TFR has been entered and the trustee is ready to disburse funds to creditors, the 7 Account Manager will transfer all money from the estate's interest bearing account to the estate's checking account and close the interest bearing account<sup>1</sup>. Upon the closing of the interest bearing account, Caselink will calculate any interest accrued up to the date of closing and enter the final interest amount to the checking account register. Any difference due to interest accruals between the distribution as calculated in the TFR and what is reported in the Trustee's Distribution Report ["TDR"] will be footnoted in the TDR. No amended TFR will be filed because creditors are receiving more money, not less.

<sup>1</sup> Currently the Rabobank is not offering interest bearing accounts. All accounts have been converted to checking accounts. When interest bearing accounts are again offered by the bank, the above procedures will be followed.

## **CLOSING AN ESTATE**

When the supplemental final report has been filed with the U.S. Trustee's office the 7 Account Manager enters the date the report was filed into the TDR field of the case screen in Caselink, and verifies all bank accounts are closed. Caselink automatically updates the closing date in the specified field within the case screen.

## **ASSIGNMENT LEGEND**

Estate Manager: Jane Doe 1  
Backup: Trustee  
7 Account Manager: Jane Doe 2  
Backup: Jane Doe 1  
Deposit Clerk: Jane Doe 3  
Backup: Jane Doe 1  
Statement Clerk: Jane Doe 2  
Backup: Jane Doe 1

## **EMERGENCY PROCEDURES FOR MAJOR ASSET CASES**

When the Trustee or his counsel determines a case should be treated as an emergency case, the following procedures apply. All members of the Bankruptcy Section must be familiar with these procedures. These procedures typically apply when the Trustee is appointed in a case still operating its business.

## **INITIAL CONTACT PROCEDURES**

Upon contract from the U.S. Trustee's office regarding a potential trusteeship, the Trustee or his counsel, and the billing department, should immediately perform a conflicts in accordance with the Bankruptcy Section's conflicts check process. After determining there are no conflicts, a general review of the nature of the case should be made. Particular attention should be paid to questions of cash collateral, asset location and going concern values.

## **ACTIONS TO BE TAKEN IMMEDIATELY UPON APPOINTMENT**

Immediately upon appointment, the Trustee or his counsel should go to the debtor's business and interview its employees and may take a standing auctioneer with him to evaluate the estate assets. If the Trustee needs the support of the U.S. Marshall's Office to provide protection, a writ of assistance should be filed with the Court immediately. Counsel should

schedule an ex parte hearing regarding the writ of assistance and coordinate with the U.S. Marshall's Office (524-5693) regarding availability of manpower.

The Trustee or Trustee's counsel should coordinate with the U.S. Attorney's Office and/or FBI regarding any ongoing investigations if there are indications from creditors or other parties-in-interest of any serious improprieties. If the Trustee is meeting with the principals of the debtor and taking possession of an operating business, it may be necessary for the Trustee's counsel to meet with the FBI on the same day to obtain critical information.

The Trustee will obtain any professional assistance needed to determine whether the operating business should continue. Utilization of Name1 (xxx-xxxx) or Name2 (xxx-xxxx), is encouraged to make these initial operating decisions.

Contact should be made with the secured creditor(s) involved in the case or an appropriate financial institution regarding any potential interim financing needed.

### **CASH COLLATERAL MATTERS**

The Trustee should ascertain whether there are any cash collateral problems with the case immediately upon appointment. If possible, an agreement should be negotiated with either counsel or creditors having interest in the cash collateral. If no such agreement can be reached a motion for use of cash collateral should be filed and set for expedited hearing.

### **ESTATE FUNDS**

All funds in banking institutions or in the hands of the debtor should be gathered by the Trustee or Estate Manager and deposited to an account managed solely by the Trustee as soon as possible. The Estate Manager or a secretary will see that demand letters and/or a complaint for turnover are served. Letters will be served upon the banking institutions within forty-eight (48) hours of the Trustee's appointment after having given telephonic notification immediately upon learning of the account.

### **PROPERTY AND RECORDS**

Key records will be removed from the debtor's premises and moved to an undisclosed location by the Trustee or the Trustee's employees whenever the Trustee deems it appropriate. The location of the records will be denoted in Caselink. The locks of the premises will be

changed within twenty-four (24) hours of the Trustee being appointed in all emergency cases. Keys will be maintained by only those the Trustee deems appropriate.

### **RELATIONSHIP WITH CREDITORS**

Within forty-eight (48) hours of the appointment of the Trustee, the Trustee or Trustee's counsel will attempt to contact all secured creditors, landlords, lessors of real or personal property and members of the creditors' committee or their counsel. Meetings will be scheduled within one (1) week of the appointment of the Trustee with all parties-in-interest to obtain creditor input when possible. Communication will be established as soon as possible regarding any action to be taken. In addition to contacting creditors, any regulatory agency, i.e., FAA, FDA, etc., should be contacted and coordinated with regarding any requirements to be met.

### **TAX AND OTHER REPORTS**

The Trustee will establish procedures for handling tax reports, withholding or otherwise, and any other reports associated with the debtor's business, e.g., reports on oil production as in Overland Dome. A procedure will be established by the Estate Manager to see that the reports are done either by the Trustee's professional or at the debtor's place of business. Chapter 8, Section E of the Handbook should be consulted by the Trustee and/or his employees for additional information on tax returns, employment taxes, W-2 forms and other tax forms required. The Handbook is a general overview of tax considerations and the Trustee's tax professional should be consulted when dealing in out of the ordinary or complicated tax issues. Generally the Trustee's tax professional will prepare all tax reports.

### **TRUSTEE'S REPORT**

Whenever appropriate, the Trustee will, within sixty (60) days of his appointment, submit a report to the U.S. Trustee and creditors regarding the business activities of the debtor. The report will contain recommendations regarding plan confirmation prospects or conversion to Chapter 7. *See Trustee's Report in Sunsets, 83-0897.*

## **REAL PROPERTY PROCEDURES FOR CHAPTER 7 CASES**

In those Chapter 7 cases where the Trustee and/or his counsel determines an interest in real property exists, including mortgages, trust deeds or contracts, the following procedures, in addition to those procedures set forth in Chapter 8, Section K of the Handbook, will be followed:

### **INSURANCE**

If real property exists with insurable buildings, structures, or other fixed property, the Trustee will take the following action:

A. The Trustee or Estate Manager will contact the secured creditor, if one exists, and notify them in writing that they are responsible for maintaining insurance on the property. This may include fire, theft, vandalism, liability and other possible hazardous insurance. In addition, the Trustee or Estate Manager will request the secured creditor provide the Trustee with a copy of the insurance binder for the estate file.

B. If no secured creditor exists and there is equity in the property, the Trustee will post insurance on the property if it is insurable and necessary.

C. If the property cannot be insured and there is equity in the property, the Trustee will expedite the sale of the property as rapidly as possible.

D. If there is no equity in the property, the Trustee will notice an abandonment of the property as soon as possible.

### **TAX CONSEQUENCES**

The Trustee, his counsel and staff should be aware that selling and/or abandoning real property assets carry tax consequences. A general overview of tax consequences from the sale or abandonment of real property assets is contained in Chapter 8, Section E of the Handbook and should be reviewed by the Trustee and his professionals prior to liquidating real property assets. An equity analysis including tax consequences should be performed. To complete the equity analysis the Trustee may need to consult a tax professional.

### **LISTING AGREEMENTS**

Listing agreements will be executed as soon as possible after the first meeting of creditors. The property will be listed with a real estate agent determined by the Trustee as best qualified to handle a piece of property. In connection with listing the property, an application

will be filed with the Court for authority to employ the realtor. The Trustee's secretary will coordinate all matters related to the application including affidavit and order. The Trustee's secretary will also note in Caselink the employment of the agent. Listing agreements should be reviewed periodically to determine if the marketing should continue with the same realtor.

### **REAL PROPERTY REPORT PROCEDURES**

All real property, either scheduled or discovered, will be entered into Caselink as soon as a case is declared an Asset case. The status of assets will be updated regularly as the case progresses, i.e., auctions, sales, abandonment, etc.

### **RENTAL/OCCUPANCY ARRANGEMENTS**

The Trustee, acting either directly or through his realtor, will coordinate with the possessor of real property to see that rental payments are made to the estate, credited against a homestead or secured claim. A written lease agreement in some form will be executed within two weeks of the meeting of creditors regarding all real property. In the event the Trustee wishes to leave the debtors in possession of the property and allow the homestead to be used as the rental payments such will be reflected in a written agreement.

Payments for rent are to be carefully monitored and the Trustee's secretary is to send a notice to quit if rent payments are not made timely.

Rental arrangements are to be coordinated with the real estate agent to insure marketing is not interfered with according to the terms of the lease agreement. Most direct contact will be channeled to the real estate agent because of the need to coordinate the marketing effort with the rental arrangements.

### **NOTICE OF BANKRUPTCY**

The Trustee will send a Notice of Bankruptcy to the appropriate county recorders office if the debtor owns real property.

### **STAY LIFT PROCEDURES**

The Trustee's staff will immediately notify the Trustee or his counsel upon notification that a Motion for Relief from the Stay has been filed by a secured creditor so that they can adequately prepare for any hearing. Negotiations and/or litigation will follow under normal procedures.

## ABANDONMENT PROCEDURES

After the Trustee has designated certain real property be marketed and some effort has been made with no resulting sale, a decision may be made to abandon the property. If such is the case, written notice will always be given of the proposed abandonment. The written abandonment may in some cases request assistance from creditors in relation to potential purchases. If the property is ultimately abandoned, such abandonment will be noted in Caselink. *See* additional discussions of abandonment under Chapter 8, Section D of the Trustee's Handbook.

## **PERSONAL PROPERTY PROCEDURES FOR CHAPTER 7 CASES**

In the event personal property is determined by the Trustee to be of sufficient value and should be sold, the following procedures will be taken:

### INSURANCE

A. The Trustee or the Estate Manager will contact the secured creditor, if one exists, and notify them in writing that they are responsible for maintaining insurance on the property. This may include fire, theft, vandalism, liability and other possible hazardous insurance. In addition, the Trustee or Estate Manager will request the secured creditor provide the Trustee with a copy of the insurance binder for the estate file.

B. If no secured creditor exists and there is equity in the property, the Trustee will post insurance on the property if it is insurable and necessary.

C. If the property cannot be insured and there is equity in the property, the Trustee will expedite the sale of the property.

D. If there is no equity in the property, the Trustee will notice an abandonment of the property as soon as possible.

### TAX CONSEQUENCES

The Trustee, his counsel and staff should be aware that selling and/or abandoning personal property assets carry tax consequences. A general overview of tax consequences from the sale or abandonment of personal property assets is contained in Chapter 8, Section E of the Handbook and should be reviewed by the Trustee and his professionals prior to liquidating any

personal property asset. An equity analysis including tax consequences should be performed prior to selling any personal property. To complete the equity analysis, the Trustee may need to consult a tax professional.

### **PROCEDURES FOR MARKETING PERSONAL PROPERTY**

Every effort should be made to coordinate with the Trustee's auctioneer on a piece of property and market it utilizing not only local papers, but throughout the debtor's industry. Trade journals should be located and utilized as a source of advertising. Any associations of the debtor's industry should be contacted in connection with the auction. Every effort should be made to maximize the sale price through as many contacts as possible.

### **NOTICE PROCEDURES**

In all sales or auctions of personal property, written notice to creditors will be utilized. A hearing will be scheduled and a Notice mailed to all parties appearing on the mailing matrix, the U.S. Trustee and other interested parties. The Trustee's secretary and staff should consult the "Forms" file to obtain the appropriate notice for a particular sale or auction.

### **REPORTING PROCEDURES**

All personal property will be entered into Caselink for all Asset cases as soon as the case is declared an Asset case. The status of assets will be updated regularly as the case progresses, i.e., auctions, sales, abandonment, etc.

### **AUCTION PROCEDURES**

Under normal circumstances, neither the Trustee, members of his staff, or Trustee's counsel should appear at the auction. The Trustee or his counsel should be available at the time of the auction, by phone, in case any problems develop at the auction.

UNDER NO CIRCUMSTANCES IS ANY EMPLOYEE OF THIS LAW FIRM, THE TRUSTEE OR ANYONE ASSOCIATED WITH THE TRUSTEE OR ANY OF THEIR RELATIVES, FRIENDS OR ACQUAINTANCES, TO PARTICIPATE IN ANY PURCHASE ASSOCIATED WITH ANY SALE OR AUCTION OF PROPERTY. THIS RESTRICTION APPLIES TO THE SALE OR AUCTION OF BOTH PERSONAL AND REAL PROPERTY BUT IN PARTICULAR INSTANCE AS TO PERSONAL PROPERTY.



## **AUCTIONEER REPORT PROCEDURES**

In connection with any sale or auction of property by an auctioneer, the Trustee or the Trustee's counsel will instruct the auctioneer that a report must be provided to Trustee along with all funds received within thirty (30) days of the auction. Under no circumstances will the delivery of the funds and report within the thirty (30) days be waived by anyone other than the Trustee.

In the event the report is not received within thirty (30) days of the auction, the first member of the staff learning of this should immediately bring it to the attention of the Trustee or his counsel and steps taken to insure the procedure is followed.

## **TRUSTEE'S REPORT**

The Trustee's sale or auction report will be filed with the Court within ten (10) days of receipt of auction proceeds and auctioneer's report and the auctioneer's report incorporated therein. In the event secured creditors are involved in the property sold, a copy of the report will be forwarded to that secured creditor or their counsel.

## **COLLECTION AGENCIES**

The Trustee may use a collection agency to collect on a receivable or judgment, but generally only after all other collection efforts have been exhausted by the Trustee or his counsel. The applications to employ the collection agency will spell out the terms and conditions of the employment and how the collection agency is to be compensated. At no time will the collection agency ever handle estate funds. All payments will be made directly to the Trustee and will be handled in accordance with the Trustee's accounting procedures set forth above. As part of its employment, the collection agency will be required to report to the Trustee, or his counsel, on a monthly basis regarding its collection efforts. The Trustee and his counsel will then update the Case Action report accordingly.

## **LITIGATION PROCEDURES FOR CHAPTER 7 CASES**

The following general outline of litigation procedures for recovery of receivables, trustee avoiding actions and other recoveries, applies in all cases where this law firm represents Duane H. Gillman, Trustee. No attempt has been made in these procedures to analyze particular causes of action.

## **PRE-COMPLAINT PROCEDURES**

To the extent possible, counsel and the Trustee will obtain all evidence which can be found prior to the filing of a complaint. The Debtor will be examined regarding any elements of a preference, fraudulent conveyance or other matters at the meeting of creditors with the hope of obtaining admissions on as many elements as possible. In the event important admissions are made by the debtor at the first meeting, transcripts will be immediately ordered through the Clerk's Office, and the appropriate court reporter. Every effort should be made to flush out the facts prior to filing a complaint. Rule 2004 should be utilized whenever possible.

## **COMPLAINT DRAFTSMANSHIP**

Complaint should be drafted with the intent of filing an early motion for summary judgment on any element possible. In any case possible at the time of drafting the complaint, counsel should draft a motion for summary judgment which may be filed within twenty (20) days of service of the complaint. Narrow down the case through use of summary judgment.

Orders Governing Scheduling and Preliminary Matter dates will be input into the Bankruptcy Docket calendar in Microsoft Outlook by the appropriate staff member. Once this information is input, the Order Governing Scheduling and Preliminary Matters will be filed in the related adversary proceeding file.

## **DISCOVERY PROCEDURES**

Assuming enough pre-complaint discovery has been undertaken, post-petition discovery should be relatively limited. Depositions, requests for admissions and request for production of documents will be the primary sources. Interrogatories should be discouraged unless absolutely necessary.

## **MOTION PRACTICES**

As soon as possible, motions for partial summary judgment should be utilized when pursuing matters on behalf of the Trustee. Factual matters need to be narrowed for trial and motions for partial summary judgment should be utilized.

## **PRETRIAL ORDER PROCEDURES**

Counsel connected with a case should attempt to have a draft of the pretrial order ready for all attorney conferences. If opposing counsel does not appear at the attorney's conference, the draft of the pretrial order should be filed.

## **TRIAL PREPARATION PROCEDURES**

A subpoena should be issued at the time of filing the pretrial order to insure that witnesses will be there. Documents should be identified and marked at the time of filing the pretrial order. Exhibit files should be made up in all cases as early as possible for quick utilization and easy copying.

## **CASE CLOSING PROCEDURES**

The initial step in closing a Chapter 7 Asset case is the filing, with the bankruptcy court, of a Request for Notice to Creditors to File Claims. Once it is determined that the case will likely be treated as an Asset case, this Request should be filed. The Bankruptcy Court sets a date (the "Claims Bar Date") and mails notice to creditors.

## **CLAIMS APPROVAL/OBJECTION PROCESS**

The Trustee's paralegal will pull the claims register and the Trustee will review to decide which claims he has to review individually based upon the facts of a case. The Trustee or his counsel will then review all claims identified by the Trustee. To the extent possible, the Trustee or his counsel will utilize a notice and opportunity for hearing procedure related to claim objections. Minimizing court time is an important factor in getting cases closed.

## **FINAL REPORT PROCEDURES**

Once claims have been reviewed, objections filed and resolved, the final report will be prepared and emailed to the U. S. Trustee, along with the latest bank statement, and fee applications. The Trustee's original signature will be kept in the Final Report file. The U.S. Trustee will file the final report with the court upon their approval. The Trustee's paralegal will monitor the docket for the filing of the final report by the U.S. Trustee. Once the final report is filed the Trustee will file the notice of final report. The court's BNC noticing automatically mails copies of the notice to all parties on the mailing matrix. To comply with the Court's desire

to specify notice periods by a date certain, the Trustee will use one of the two following alternative notice provisions in the notice of final report:

Used when no hearing setting required (fee request of less than \$1,000):

Any person wishing to object to any fee application that has not already been approved or to the Final Report, must file a written objection no later than \_\_\_\_\_ [insert date certain not less than \_\_\_\_ days from the mailing of the notice], together with a request for a hearing and serve a copy of both upon the trustee, any party whose application is being challenged and the United States Trustee. If no objections are filed, the Court will act on the fee applications and the trustee may pay dividends pursuant to FRBP 3009 without further order of the Court.

The Trustee will allow 14 days for the objection period plus three days from service by mail plus a four day BNC noticing delay for a total of 21 days.

Used when hearing required (fee request is more than \$1,000):

Any person wishing to object to any fee application that has not already been approved or to the Final Report, must file a written objection no later than \_\_\_\_\_ [insert date certain not less than \_\_\_\_ days from the mailing of the notice but not later than \_\_\_\_ days before the hearing specified below], serve a copy of the objections upon the trustee, any party whose application is being challenged and the United States Trustee. A hearing on the fee applications and any objection to the Final Report will be held at \_\_\_\_\_ on \_\_\_\_\_ in Courtroom \_\_\_\_\_, \_\_\_\_\_ Courthouse, \_\_\_\_\_. Pursuant to L.R. 2002-1(b), in the absence of a timely filed objection the hearing may be stricken the relief requested may be granted without hearing. Upon entry of an order on the fee applications, the trustee may pay dividends pursuant to FRBP 3009 without further order of the Court.

The Trustee will schedule a hearing date at least 25 days from the filing date of the NFR to allow for a four day BNC noticing delay.

## **PROCEDURES REGARDING FINAL HEARING**

The Trustee or his counsel should always appear at the final hearings. The staff should be aware of any phone call problems related to the final closing and bring them to the attention of the Trustee or his counsel prior to the final hearing.

## **FINAL DISBURSEMENT PROCEDURES**

Once the final report and accounting has been approved by the U.S. Trustee and the Court, the following procedures should be followed:

Immediately following the final hearing, the Trustee or the Trustee's counsel should inform the 7 Account Manager that within the next fifteen (15) days he/she will be cutting

checks on a case. Once funds are disbursed, the Accounting procedures should be followed to verify when all checks have been cleared. If after ninety (90) days checks still have not cleared, attempts should be made to contact the creditors and if such attempts are unsuccessful, a check should be cut to the registry.

A supplemental final report should be filed as soon as all checks have cleared, as evidenced by a zero balance bank statement. Once the final decree is received, the file should be sent to storage and kept for a minimum of two years. (See accounting procedures for instruction on closing an estate.)

These Case Management Procedures will be updated as changes are made to Caselink and/or as modifications are made to the Handbook.

DATED this \_\_\_\_\_ day of September, 2018.

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Chapter 7 Panel Trustee

CASE SUMMARIES

By: Adelaide Maudsley  
Rocky Mountain ABI 2019

*In re Taylor*, 899 F.3d 1126 (10th Cir. 2018) – **Judicial Lien Avoidance on Joint Property Must Only Use Debtor’s Half Interest**

Chapter 7 debtor filed motion to avoid liens that impaired homestead exemption under Section 522(f). Debtor owned one-half of property as joint tenant with his ex-spouse. Tenth Circuit held that bankruptcy court had to interpret the term “all other liens on property” as used in the statutory lien-impairment formula, as referring to all other liens on the debtor’s one-half interest in the property; abrogating *In re Cozad*, 208 B.R. 495 and *In re Biesterveld*, 2008 WL 515770. As a result, in calculating liens against property, debtor could only count 50% in mortgage lien against the joint property.

*In re Mundo Latino Market Inc.*, ---B.R.---, 2018 WL 3965216 (Bankr. S.D.N.Y. Aug. 18, 2018) – **Trustee Sues Debtor’s Director for Mismanagement**

The U.S. Bankruptcy Court, Southern District of New York denied in part and granted in part the defendant’s motion to dismiss the Chapter 7 trustee’s complaint. The court denied the defendant’s motion to dismiss the complaint to the extent it asserted that the defendant breached her fiduciary duty in her capacity as a director. The gravamen of the trustee’s complaint was that the defendant breached her fiduciary duty by failing to supervise the individual operating the debtor’s business, and more generally, the operations of the business. Not necessarily complex, but good warning that chapter 7 bankruptcy may turn ugly against managing members.

*In re: Health Trio, Inc.*, 584 B.R. 342 (Bankr. D. Colo. 2018) – **Priority Claim for CFO During GAP Period**

Corporate Chapter 7 debtor's former chief financial officer (CFO) filed claim to be compensated on priority basis under Section 502(f) and 503(b)(3)(D) for services provided during gap period of more than 3.5 years between filing of involuntary petition and entry of order for relief, as well as for services provided postpetition.

*In re Vorhes*, No. 16-1577, 2018 WL 1577980 (Bankr. N.D. Iowa Mar. 29, 2018) – **Bad Debtor Loses Exemption After Fraudulent Transfer**

A Chapter 7 debtor’s transfer of a parcel of real estate to an insider trust for no consideration (in an attempt to avoid a \$462,000 judgment against the debtor in state court) was an avoidable fraudulent transfer, even though he could have exempted the property if he had kept it, an Iowa bankruptcy judge has ruled. Title to the property was vested in the estate.

*In re Werth*, No. 13-30926, 2017 WL 1832210 (B.A.P. 10th Cir. May 8, 2017) – **Proceeds from Unlisted Beach Front Property in Mexico Property of the Estate**

Debtor ordered to turnover interest in beachfront property in Guaymas, Sonora, Mexico. Because Mexican law prohibited foreign nationals from owning beachfront properties as individuals, property was purchased through a Mexican trust. Debtor did not list the property in her bankruptcy schedules and less than a year after the case was filed, the property was sold, without court approval, and did not amend her schedules after receiving proceeds from the sale. Bankruptcy court order requiring turnover of sale proceeds to the estate affirmed.

*In re Hartson*, No. 17-10905, 2018 WL 1887326 (Bankr. N.D. Ohio Apr. 18, 2018) – **Miss 2004 Exam, Denial of Discharge**

An Ohio couple's failure to comply with a bankruptcy court order to appear at a Rule 2004 exam and bring with them certain financial documents warrants a denial of their Chapter 7 discharge after trustee brought adversary complaint. Court rejected the debtors' assertion that they believed the meeting had been rescheduled, saying they had nonetheless refused to obey a court order by not delivering the requested information.

*In re Bird*, 577 B.R. 365 (B.A.P. 10th Cir. 2017) – **Self-Interested Trustee**

Chapter 7 Trustee racked up over \$100,000 in administrative fees on two separate cases in attempt to sale homestead property. Trustee argued that sale proper because IRS will to carve out \$10,000 from their priority liens that guaranteed some minimal benefit for creditors and also allowed trustee's firm to earn fees for tasks related to the sale. BAP affirmed bankruptcy court and agreed that trustee's conduct made "no sense whatsoever." According to the BAP, it is appropriate for a Chapter 7 trustee to negotiate a carve-out agreement with a creditor whose claim is secured by the fully encumbered property that the trustee wants to sell only when the carve-out agreement will result in "meaningful" distributions to creditors.

*In re Glieberman*, No. 15-55996, 2017 WL 4681805 (E.D. Mich. Oct. 11, 2017) – **Trustee's Business Judgment Subject to Discovery**

The U.S. District Court, Eastern District of Michigan, hearing a creditor's appeal and request for a stay of the bankruptcy court's order approving a Rule 9019 Compromise entered into by the chapter 7 trustee and the debtor's children, remanded the matter to the bankruptcy court to provide discovery to the appellant and then reargument regarding the compromise. Creditor had \$81 million dollar default judgment against debtor.

*In re Afy, Inc.*, 902 F.3d 884 (8th Cir. 2018) – **Debtor's Shareholders Lacked Derivative Standing to Sue Former Shareholders.**

The 8th Circuit agreed with the BAP that the shareholder standing rule barred the plaintiffs' claims (family members of closed corporation). The rule was an equitable restriction that generally prohibited shareholders from initiating actions to enforce the rights of a corporation unless the corporation's management refused to pursue the same action for reasons other than good-faith

business judgment. The requirement served to ensure that plaintiffs asserted only their own legal rights. The plaintiffs only alleged injuries that were derivative of the debtor company.

*In re Shove*, 585 B.R. 250 (Bankr. D. Mass. 2018) – **Debtors Allowed to Avoid Judicial Lien Despite Using Home For AirB&B**

Chapter 7 debtors able to avoid creditor's \$965,000 judicial lien against duplex because it impaired homestead exemption. Homestead exemption was valid on equity in their duplex even though they used portions of the property for commercial purposes such as Airbnb rentals. Court determined that Massachusetts law on homestead exemption protected mixed-use of property that is used by debtor as residence as well as for commercial purposes.

*In re VPH Pharmacy, Inc.*, 578 B.R. 776 (Bankr. E.D. Mich. 2017) – **Reclamation Claim Available When Goods Delivered to Debtor's Agents**

The U.S. Bankruptcy Court, Eastern District of Michigan granted the supplier's motion for payment of an administrative expense pursuant to Section 503(b)(9). The court rejected the Chapter 7 trustee's contention that the supplier could not establish "receipt" of the goods by the debtor because the goods were received by individuals employed by a company that leased the individuals to the debtor. Assuming that the trustee would concede that a seller's agent can act as a conduit, there was no evidence in the language of Section 503(b)(9) that the same was not true for the debtor-buyer.

*In re: First Connecticut Consulting Group, Inc.*, 579 B.R. 673 (Bankr. D. Conn. 2018) – **Unusual Chapter 7 Case with Bad Debtor**

Individual Chapter 7 debtor moved to reconvert his individual case and administratively consolidated case of his 50%-owned corporation back to cases under Chapter 11 more than a decade after they were converted and a Chapter 7 trustee was appointed. Debtor attempted to sale assets of the estate during the chapter 7 without trustee approval. Judges who previously addressed aspects of the cases commented on the entangled webs and elaborate deceptions. With the end of the bankruptcy cases finally in sight, the court declined the invitation to "turn back into the abyss" despite Debtor's having recruited seasoned restructuring officer.

*Matter of JFK Capital Holdings, L.L.C.*, 880 F.3d 747 (5th Cir. 2018) – **Trustee uses Debtor's Interest to Put Solvent Company in Chapter 7**

Case focused on appropriate method for determining reasonable compensation for Chapter 7 trustees in light of BAPCPA's amendments to the Code. But factually interesting is that the case stems from individual bankruptcy filing of John Kelly, who allegedly operated more than 80 entities in a single business enterprise to defraud his investors. Unlike most of Kelly's entities, JFK Capital Holdings LLC was solvent. JFK Capital was awaiting a \$876,000 settlement check related to a separate matter. Because the law firms that negotiated the settlement on behalf of JFK Capital had not yet received their \$320,000 in fees, the firms filed a state-court lawsuit to secure their claim against the settlement proceeds. In response to that lawsuit, the trustee in the Kelly chapter 7 case filed a chapter 7 petition on behalf of JFK Capital. A different trustee was appointed



as trustee in the JFK Chapter 7 case, and issues over fees ensued. What was interesting here was that the Kelly trustee used individual debtor's business interests to force company into bankruptcy.

*In re United Western Bancorp, Inc.*, 893 F.3d 716 (10th Cir. 2018) **Chapter 7 Debtor Holding Company Did not have Interest in \$4 million Tax Refund**

Chapter 7 trustee for bankruptcy estate of parent bank holding company brought adversary proceeding against Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver for affiliate bank, requesting declaratory judgment that \$4,081,335 tax refund arising as result of consolidated tax returns filed by holding company was property of bankruptcy estate, requesting turnover of tax refund, and objecting to FDIC's proof of claim. The Bankruptcy Court, [Thomas B. McNamara, J.](#), 558 B.R. 409, entered summary judgment in trustee's favor. FDIC appealed. The United States District Court for the District of Colorado, No. 1:16-CV-02475-WJM, [William J. Martinez, J.](#), 574 B.R. 876, reversed and remanded. Trustee appealed. Tax allocation agreement was ambiguous as to whether holding company was agent on behalf of bank or whether standard commercial relationship existed. Tenth Circuit found that refund was not part of holding company's bankruptcy estate.

*In re Smith*, 585 B.R. 168 (Bankr. W.D. Okla. 2018) – **Serious Gambling Factor in Determination of Abusive Chapter 7 Filing**

Fact that Chapter 7 debtor-husband continued to gamble at Indian casino during debtors' slide into bankruptcy, losing an average of \$6,868.15 per month over the six months preceding petition date, at same time the debtors were not paying their mortgage, was relevant factor that court could consider in ruling on motion to dismiss Chapter 7 case as abusive based on totality of circumstances of debtors' financial situation, but it was not determinative and instead was merely one factor in the overall "totality of circumstances" inquiry.

*In re Eurogas, Inc.*, 576 B.R. 648 (B.A.P. 10th Cir. 2017) – **Foreign Parties in Bankruptcy**

Slovak Republic, entity that was involved in pending arbitration with another party, who was interested in acquiring whatever interest the bankruptcy estate had in certain causes of action to enhance its arbitration position did not have standing to appeal bankruptcy court order approving settlement and sale of the estate's putative interest in these causes of action, even though the Slovak Republic purchased unsecured claims in the case.