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THE “KINDER AND GENTLER” TRUSTEE **CHAPTER 13 BANKRUPTCY**

A Chapter 13 bankruptcy is for individual debtors to reorganize debts and receive a “discharge” so they will be able to have a “fresh start”.

Step 1 - The Schedules

Debtors list the following on their Schedules:

1. Assets (real property = dirt and any permanent improvement like a home; personal property = everything else). If the Debtor lists real property or land other than their home, have the Debtor obtain a source for the valuation;
2. Creditors - Secured (have a lien on property); priority (owe a governmental agency), or unsecured (no property attached to the debt - generally credit card or medical debt); and
3. Income and necessary and required Expenses (expenses as projected after the bankruptcy which means some debt payments like credit cards and surrendered property payments are deleted, and luxury payments are not generally allowed).

Step 2 - Notice of Commencement; Section 341 Meeting and The Bar Date

The Schedules are filed with the Clerk of the United States Bankruptcy Court and a Notice of the Commencement of the Case, the date of the Section 341 Meeting and the date for all creditors to file proofs of claim is mailed to each creditor. Make sure the Debtor knows that they must attend and have a valid governmental issued identification (like a Florida driver’s license with the correct address matching the Schedules) and proof of their social security number (like a social security card or an original wage statement). The Notice of Commencement, at least in the first case, is an imaginary line that stops virtually all creditors from pursuing the debts by imposing the “automatic stay” (stays pursuit of the Debtor and their property) and sets the date for the filing of the proofs of claim, as well as other deadlines in the case. The section 341 meeting is a structured meeting with the Debtors and their attorneys at which the Trustee and any creditors may appear and question the Debtors. The Claims Bar Date is the last date, absent a court order, that the creditors can file a paper setting forth under penalty of perjury the amount they believe is owed to them and the type of collateral or property that they believe secures or protects the money owed.

Step 3 - The Chapter 13 Trustee Receives ECF (Electronic Case Filing) Information; Establishes a Case to Administer

The Trustee receives a copy of the Notice of Commencement, the Petition and the Schedules via electronic mail. The Trustee opens an electronic file with all the information from the Petitions and Schedules, a claims’ file for each creditor listed on the Schedules under scheduled creditor. The information related to the scheduled claims is deemed to be accurate unless the creditor files a conflicting proof of claim, or the court enters an order determining the claim. The Trustee also sets up a financial file for the Debtors’ receipts and for payments/disbursements to the creditors

Step 4 - Pre-Confirmation Matters

During the time that the case is filed and the court sets the Debtor’s case for hearing, the Debtor must commence payments, file a Plan and the creditors may file proofs of claim. Secured and priority creditors may be paid through the Plan document without a proof of claim, but unsecured creditors must file a proof of claim to be paid by the Trustee. Prior to confirmation, the Trustee verifies that the Debtors are completing their requirements like the following:

- A. Debtor pays the Plan payments in the Plan (an employer deduction order is a great idea);
- B. Debtor has disclosed the correct income for the payment by comparing the pay stubs and tax returns;
- C. Make sure that the claims are set up for payment correctly by resolving any conflicts with the Debtor’s claims amounts and the proofs of claim (see if a notice of valuation of property is filed by the Debtor and the time to object has elapsed, or if during the time period a motion to determine value of collateral is filed and the court has entered an order; or the Debtor has filed a motion to strip the lien from certain property and change the status of the creditor from secured to unsecured). If the claim should be

receiving payment and there is a problem, the Trustee will often place the claim on reserve and file a Motion to determine the amount and type of disbursement to the creditor;

D. Make sure that the Debtor's expenses are reasonable for payment of necessary property (a Debtor generally would not be able to keep a boat, big screen television, or jet ski for examples);

E. Make sure that the Debtor is paying at least the amount to the general unsecured creditors that each creditor would receive in a chapter 7 straight liquidation case -- Total Property Value minus secured lien values minus any lawful exemption values equals the amount available for distribution -- and if the Debtor has completed the B22c form and is a "means test Debtor" is paying the amount at the end of the form times 60 to the unsecured creditors. This is called the liquidation test. In order for the liquidation test to be correct, the Trustee must ensure that the Debtors' exemptions claimed on Schedule "C" are correct;

F. Creditors in this pre-confirmation status do not generally receive payments unless the Debtor files a Notice of Adequate Protection (payments to compensate the secured creditor for use of the property during this time) or the Creditor files a Motion to Lift the Automatic Stay and/or for Adequate Protection Payments, and the court enters an Order related to same. The Trustee files a Response to the Motions to Lift the Automatic Stay which provides a list of the Debtor's receipts and payments to creditors;

G. If the Debtor is an above-median income Debtor, the Trustee must ensure that the Debtor pays the minimum floor amount to be paid to the creditors;

H. The Section 341 Meeting - The Trustee prepares the initial objection to confirmation pleading setting forth any potential "issues" for the case (i.e., the income from the pay schedules or tax returns do not match, or the claims do not match the Plan, or the Debtor has not provided the tax returns or there is a domestic support obligation or other bankruptcy filings, or the Debtor does not have the credit counseling certificate). Since the Objection to Confirmation is similar to a checklist, each attorney can prepare the checklist and the documents to respond:

1. Does the Plan base have enough money to pay the Debtor's attorney fees and the secured, priority and administrative claims?

2. Does the amount that the Plan states will be paid to the unsecured creditors actually meet or exceed the amount to be paid to the unsecured creditors?

3. If Schedule J reflects the inclusion of an adult dependent, not on the Debtors' tax returns, does the Schedule I have the adult dependent's income included?

4. Have all the filed certifications on tax returns and domestic support been filed?

5. Is the Plan payment less than the amount listed on Schedule J as the net disposable income and the Plan is not a 100% repayment Plan?

6. Will any secured creditors being paid direct by the Debtor payout earlier than the Plan term?

7. If the Debtor is claiming health care expenses, have you obtained from the Debtor a statement from their insurance company stating the maximum out of pocket expense?

8. If the Debtor is claiming a deduction for charity on Schedule I or Schedule J, does the deduction amount match the prior years' tax returns?

9. If the Debtor is claiming a 401(k) loan repayment, when was the loan taken out and when does it payout?

Step 5- The Confirmation Process

The Debtor will provide a Plan setting forth the amount to be paid to the Trustee for the benefit of the creditors. The Debtor will also list each secured and priority creditor and will state specifically how they will be paid (inside or outside the Plan) and the amount to be paid. The Trustee can agree with the plan, and the provisions, through the filing of a recommendation or object through the Objection to Confirmation. The Judge will either confirm the Plan or deny confirmation through an Order. If the Plan is confirmed by an Order Confirming Plan, the Trustee will recheck all claims for payee names, addresses, claim amounts matching or resolved to the Chapter 13 Plan, the Plan base, projected closing date, and Debtors' receipts, and then send a memo to the Debtors' attorney for their review as to the payment of the payees and their claims. The Trustee will send a case status to each Debtor and their attorney on an annual basis for their review and to give each of them an opportunity to advise the trustee of any errors or problems.

Step 6 - Debtor Must Maintain Monthly Plan Payments; Current and Not Delinquent Status in the Case

In general, the Debtor must commence payments within 30 days of filing the Petition and pay each payment on a monthly basis thereafter. An employer deduction is a good idea. If the Debtor misses a payment, the Trustee will file a motion for strict compliance order. If the Debtor does not respond within the noticed time period, then the Court will enter a Strict Compliance Order which requires the Debtor pay each Plan payment timely or be subject to dismissal by the Trustee notifying the court through a Notice of Non-Compliance pleading. If the Debtor files a response to the Motion for Strict Compliance and is correct, the Motion for Strict Compliance will be withdrawn. If the Trustee disagrees with the Debtor's response, the Motion will be set for hearing and the Judge will enter an Order deciding the issue. If the Debtor is under a Strict Compliance order and misses a payment or makes partial payment, then the Trustee will often transmit a 10 day letter to the attorney advising that the Debtor is delinquent and subject to dismissal. The 10 day letter allows the Debtor to respond. The response may be a memo, letter, motion to abate the payments or modification of the Plan. If the response is opposed by the Trustee, the Trustee will often file a special motion to dismiss requesting the court to proceed with dismissal. The court will resolve the matter with an Order. Under the Standing Order, the Debtor can include language in the Plan for an "automatic abatement and automatic use of the tax refunds" if the Debtor meets the requirements set forth in the Plan.

Step 7 - Debtor Must Provide Annual Statements and Tax Returns; Tax Refunds (Prior to and During the Case)

The Debtor must provide the tax returns to the Trustee prior to the confirmation hearing for review of the income, or undisclosed assets like a business, and during the case filing for review of additional income. Any tax refunds dedicated in the Chapter 13 Plan must be paid to the Trustee or the Trustee will file a motion to dismiss for failure to turn over the tax refunds. The Debtor may respond with a motion to use the tax refunds which will usually include unanticipated financial circumstances and a method to repay the funds to the estate.

Step 8 - Trustee Must Manage Changes to Case or Claims

During the life of the Plan, the Debtor may change the Chapter 13 Plan due to changes in circumstances by the filing of a motion to modify the Plan. The Trustee will review all the original and new issues of the Debtor.

During the life of the case, the Trustee must disburse to the proper creditor, the proper address and with enough information for the creditor to identify and post the claim. If the creditor transfers the claims, the Trustee must make the changes on the Trusteeship payees. If the payment is returned to the Trustee, the Trustee must determine if the claimant, the Clerk of the United States Bankruptcy Court through a Notice of Payment to the Court Registry, or another creditor should receive the payment.

Step 9 - Case Ends With Discharge, Hardship Discharge, Dismissal or Conversion

If the Debtor completes all the obligations in a chapter 13 case, the Trustee will transmit a Notice of Intention to Close Case with a listing of how each creditor was paid under the Plan and a notice that the Trustee will pursue closing the case if an objection is not filed with the court. The Trustee will issue the final checks and file a Preliminary Final Report. Once the checks are cleared, the Trustee files a final report and the discharge is entered. If the Debtor does not complete the chapter 13 process, an Order dismissing the case or an Order converting the case may be entered. If the Debtor does not complete all Plan payments, but the circumstances are beyond their control, no modification is possible, and the Debtors have met the liquidation amount, the Court may enter a Hardship Discharge.

Step 10- Trustee Must Meet Standards Set Forth by The Office of the United States Trustee While Administering Case

During the life of the Chapter 13 case, the Trustee must file monthly reports and an Annual Report with the Office of the United States Trustee. The reports cover all financial and operating aspects of the case to the Office of the United States Trustee. The Annual Report will be audited and approved by the UST. The Trustee must also submit an annual budget to the UST for approval. The Chapter 13 Trustee must also provide recordings of the Section 341 meetings to the UST, and notice of any Form B22C issue which may impact the UST like the Debtor's failure to meet the creditor counseling certificate requirement.

MORTGAGE MEDIATION

We are currently presenting options to the Judge for the Northern District of Florida related to pursuing a mortgage mediation program. The Mortgage Mediation program which has been implemented in the Middle District of Florida has been very successful and appears to be an excellent model. The procedure commences with a Motion for Referral to Mortgage Modification Mediation. The Court will then enter the Mortgage Modification Mediation Order. The Order sets forth each party's responsibilities.

RULE 3001 AND RULE 3002 AND SOME OF THE RELATED ISSUES

RULE 3001 was amended to provide as follows:

(c) If a security interest is claimed in property that is the Debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(d) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

HISTORY OF RULE AS RELATES TO RULE 3002

The following is an excerpt from the Report of the Judicial Conference for the Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States:

Rule 3002.1

New Rule 3002.1 implements Section 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 Debtor to cure a default and maintain payments of a home mortgage over the course of the Debtor's Plan. The rule is intended to provide the mortgagor-Debtor information necessary to determine the exact amount needed to cure any pre-petition arrearage and the amount of the post-petition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the Debtor and Trustee. Numerous consumer bankruptcy lawyers, Trustees, and judges have reported that Debtors often do not learn until after completing a Chapter 13 Plan that the mortgage payments have changed. In particular, Debtors do not learn that fees, expenses, or other charges have been imposed during the life of the Plan. As a result, Debtors may face renewed foreclosure proceedings immediately after emerging from bankruptcy. Timely notice of such changes will permit the Debtor and Trustee to adjust post-petition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

Rule 3002.1(b)

- In chapter 13 for claims secured by an interest in the Debtor's Principal Residence.
- Holder of the claim is required to file as a supplement of the POC.
- Any payment change due to interest rate or escrow change due no later than 21 days before a payment is due.
- Use Form B 10 attaching any RESPA escrow analysis if applicable.

Rule 3002.1(c)

- In chapter 13 for claims secured by an interest in the Debtor's Principal Residence.
- Holder of the claim is required to file as a supplement of the POC.
- Notice itemizing all fees, expenses, or charges
 - (1) that were incurred in connection with the claim after the bankruptcy case was filed, and
 - (2) that the holder asserts are recoverable against the Debtor or against the Debtor's principal residence.

Notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred. The Notice can be filed by the Creditor or the Creditor's agent.

Rule 3002.1(f) Notice of Final Cure Payment

- Within 30 days after the Debtor completes all payments under the Plan,
- Trustee shall file and serve on the holder of the claim, the Debtor, and Debtor's counsel,
- Notice stating that the Debtor has paid in full the amount required to cure any default on the claim.
- Notice shall also inform the holder of its obligation to file and serve a response under subdivision (g).
- Notice may also be filed by Debtor.

Rule 3002.1(g) Response to Notice of Final Cure Payment

- Within 21 days after service of the Notice under subdivision (f) of this rule,
- The Holder shall file a statement indicating
 - o (1) whether it agrees that the Debtor has paid in full the amount required to cure the default on the claim, and
 - o (2) whether the Debtor is otherwise current on all payments consistent with Section 1322(b)(5) of the Code.

Rule 3002.1(g) Response to Notice of Final Cure Payment

- The statement shall itemize the required cure or post-petition amounts, if any, that the holder contends remain unpaid as of the date of the statement.
- The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

Rule 3002.1(h) Determination of Final Cure and Payment

- On motion of the Debtor or Trustee filed within 21 days after service of the statement under subsection (g) of this rule, the court shall, after notice and hearing, determine whether the Debtor has cured the default and paid all required post-petition amounts.

Rule 3002.1 (i) Failure to Notify

If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

- (1) Preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
- (2) Award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

SOME ISSUES TO PONDER:

What happens if the mortgage creditor does not file POC for arrears and is only in Plan?

What happens if the new mortgage payment amount is not included on the new POC?

Can the Mortgage Holder charge a fee for responding to the Trustee's Notice of Cure? See *In re: Carr* 486 B.R. 806 (Bankr. E.D. Va. 2012) where the court held that the mortgage creditor could not charge a fee to respond to the Trustee's Notice of Cure. Court appeared to reason that the filing of a document on the claims' registry could have been handled by the creditor without counsel.

SOME SCENARIOS WHICH HAVE OCCURRED REGARDING RULE 3002.1:

1) Notice of Payment Changes – 3002.1(b) states the holder of a claim shall file and serve a notice of any change in the payment amount, no later than 21 days before a payment in the new amount is due.

We have seen on many occasions that the Notice is filed in August, but the payment change date may be stated as June. Should we just consider them in violation of the Rule and deem the Notice moot? We have filed Objections to these Notices.

2) Notice of Fees, Expenses, and Charges – 3002.1(c) provides that the holder of a claim shall file and serve a notice itemizing all fees, expenses, or charges incurred in connection with the claim after the case is filed and that the holder asserts are recoverable against the principal residence and that the notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred. The following are problems with this section:

Notices have been filed for charges such as late fees, attorney fees, etc. Are these charges considered claims that now have to be addressed and which cause more time and money than the fee itself? Notices for fees associated with filing the Notices are being filed. A Notice for \$50.00 for preparing the Notice of Mortgage Payment Change and \$50.00 for filing the Notice of Post-Petition Fees has even been filed. See decision by one court referenced above.

Another issue is a creditor filed a supplement for fees that were noted as incurred well in excess of the 180 days given by Rule 3002.1.(c). It would be ideal if the Debtor's attorney just objected on that basis.

A supplement filed for property inspection and appraisal fees on property surrendered pursuant to the confirmed Plan has also been filed. The creditor had filed an unsecured deficiency claim prior to confirmation also, so is this really allowed on an unsecured claim that was also filed by the creditor? Is the Notice then considered an amendment to the claim?

3) Notice of Final Cure Payment - 3002.1.(f) provides that within 30 days after the Debtor completes all payments under the Plan, the Trustee shall file and serve on the holder of a claim that the Debtor has paid in full the amount required to cure any default on the claim. This section covers if a response is filed to the Notice and determination of a final cure and payment after notice and hearing; however, it does not state that the default is deemed cured if no response is filed.