



U.S. Department of Justice

Office of the United States Trustee

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TO: Chapter 7 and 13 Trustees for the Eastern District of Wisconsin

FROM: David W. Asbach
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Eastern District of Wisconsin

DATE: January 30, 2020

RE: Local Supplemental Guidance for Trustees

Please find below a summary of previous guidance provided to you. We may update this information from time-to-time, so please review it regularly. Thank you!

1. **Creditor Meetings**

a. JEFS

The United States Trustee Program (USTP) has implemented a file-sharing system (JEFS) for the timely and secure transfer of files between trustees and the USTP. The primary use of this system will be for the transfer of § 341 meeting recordings. No Personally Identifiable Information (PII) is allowed on the JEFS/Box site. Kirstin A. Kruegel is the contact person.

b. Continued Meetings

When a § 341 meeting is continued for production of documents or amended schedules, there are two options for concluding the meeting once the documents or amendments are received:

- i. The best practice is to call the case on the date continued, indicate that the documents/amendments have been provided, and then conclude the meeting on the record and with a subsequent docket entry.
- ii. An acceptable alternate practice is to clearly state the parameters for continuing/concluding the meeting at the initial § 341 meeting and then conclude the record with a docket entry once the documents/amendments have been provided.

c. Security

The United States Trustee Executive Office has established a database of § 341 meeting security issues. If you have a security-related event occur at one of your meetings, please let the USTP office know as soon as possible after the event occurs, even if it is already resolved. A security event can mean anything from weapons to an altercation between participants to a serious or extended verbal outburst or other activity that makes people in the room afraid.

If you have reason to foresee that there might be a problem at an upcoming meeting, please let the USTP office know as soon as you become aware of this risk, so that we can work on safety planning with you.

The USTP has also been working with the United States Marshals Service (USMS) to increase security response access. One result of this process is that we now can provide you with a phone number that will allow you to phone the USMS Threat Management Center (TMC) directly in an emergency situation. The TMC is an additional option for evaluating the credibility of threats rather than a replacement for other first lines of defense, such as the distress button in our § 341 rooms or calls to local police. When possible, contact with the TMC should be done with the involvement of our USTP office. We encourage you to key the TMC telephone number, along with your office number, into your cell phone. Finally, if you ever feel you are in immediate danger, call 911.

Weapons of any kind are not allowed in the Milwaukee Federal Courthouse nor in other federal space, including § 341 meeting space wherever located.

d. Translation Services at §341 Meetings

The trustee must advise limited English proficiency individuals of free telephone and interpreter services. It is not necessary to schedule a language interpreter in advance, but please contact our office if an interpreter for the hearing impaired is required. When making a Polycom call, the name and city given to Certified Languages International (CLI) should be the trustee's name and the location of the § 341, together with the customer code. Fill out the Limited English Proficiency (LEP) Form for each call--multiple calls can be listed on the same sheet--and return to the USTP office with your call sheet. **Please note:** The customer code and client ID should not be shared with debtors' attorneys or any other third party. Also, please be aware that interpreters from our Translation Services are no longer required to provide their names, only their Interpreter ID number.

e. Wet signatures

Occasionally, debtors' counsel will file documents where the timing of the filing or some other factor strongly suggests that they did not obtain their clients' signature before the document was filed. It is important that all of us who share bankruptcy oversight duties respond appropriately and consistently to this abuse of the system. Please remind counsel of their responsibility to their clients and to the integrity of the system. If this communication is by email, please cc the USTP office on the email. If you become aware of a particularly egregious or habitual abuser, please let the USTP office know so that we can follow up on your response.

f. Suspected Fraud

When you suspect possible fraud in one of your chapter 7 cases, please:

- Notify the USTP office immediately by email (it doesn't have to be a formal referral at this point);
- Calendar the applicable § 727 deadline;
- File motion(s) to extend the § 727 deadline as necessary; and
- Include the USTP office in any § 727 deadline extension.

As soon as we know about possible fraud, we can consult with you to decide whether it's more appropriate for our office or for you to take the lead in investigating, filing the complaint, etc.

g. Substitute counsel

At the meeting of creditors, trustees may ask a variety of questions to determine whether the substitute counsel's fees are excessive. You may ask whether a Form B2030 Disclosure of Compensation of Attorney was filed. Form B2030 includes whether the substitute counsel was paid, how much, and the source. If the Form B2030 was not filed, then you may consider asking the attorney following questions:

- i. Will you file a Form B2030?
- ii. Were you paid?
- iii. How much?
- iv. What was the source of payment?
- v. Have you had the opportunity to review the schedules with the debtor?
- vi. Is everything on the schedules accurate?

You may consider asking the debtor the following questions:

- i. Who is your attorney?
- ii. Who do you think your attorney is?
- iii. Are you okay with Attorney [substitute counsel] appearing with you today?

h. *Pro Se* Debtors

If you come across *pro se* debtors who need help with amendments to schedules or other matters, please to send them to the Bankruptcy Court's *Pro Se* Help Desk. Do not send them to the Clerk of Court's Office. The Help Desk operates in Milwaukee on Thursdays from 9 a.m. to 10:30 a.m., U.S. Courthouse, Room 153.

i. Request for an audio copy of the § 341 hearing

If a request for a copy of the § 341 hearing is made, you may refer the person to the USTP, Legal Assistant Kirstin Kruegel, who will provide a § 341 Request form. Recordings will be emailed, if possible; however, if the recording is too large, a CD and return, postage-paid envelope must be provided. If trustees request a recording, a simple email to Kirstin is all that is needed.

2. Reporting Reminders

a. TFR & TDR Reporting Requirements

There is no informal or non-traditional TFR or TDR. In any asset case involving a distribution to creditors or payment to professionals, a TFR and TDR must be submitted to the USTP Office. Entry of a Court order authorizing and directing a trustee to make a distribution does not excuse compliance with these reporting requirements at the appropriate time. The USTP will likely oppose motions that seek to bypass these requirements. Submit TFRs at ustp.region11.tfr@usdoj.gov and TDRs at ustp.region11.tdr@usdoj.gov.

b. Auctioneers/Liquidators

All auctioneers/liquidators must be approved by USTP and bonded. The bond must be in name of the Eastern District of Wisconsin. The Form 2 account codes are same for both auctioneers and liquidators' fees and expenses, including any buyer's premiums. On-line auctioneers have different codes. All auctioneer/liquidator fees and expenses must be Court-approved, including buyer's premiums.

c. Interim Fee Applications

When seeking a Court order approving an interim fee application (whether trustee compensation or professional fees), please email a copy of the application to your supervising Trial Attorney at the time of filing. The USTP will review the application prior to the hearing date and will contact you to discuss if necessary.

d. Interim Distributions

In accordance with Bankruptcy Rule 3009, interim distributions to creditors on account of allowed claims should be made as soon as practicable. Interim distributions must be reviewed by the USTP in advance. When you seek approval of an interim distribution from the Consolidation Team, please submit an interim bank statement, Form 2, and a Claims Proposed Distribution Sheet that is signed and certified by the trustee to ustp.region11.tfr@usdoj.gov. The email should have the following subject line Example: 5211612345 Jones ITR Smith. The USTP will review the application and will contact you with an approval or questions.

e. Minimum Funds Cases

In cases where a trustee elects not to administer an estate after receiving funds, the Minimum Funds NDR process must be followed. *See* Section 4-35 of the Chapter 7 Trustee Handbook. This procedure is similar to the one we use for review of interim distributions.

Trustees should send an email to the TFR mailbox (USTP.Region11.TFR@usdoj.gov) with a cc to the supervising attorney using the following standardized naming convention in the subject line – case number, space, case name, space, NDR MF, space, trustee last name. (*e.g.* 5811513832 Ott NDR MF Block). The email should include:

- an explanation as to why the funds are being returned versus being distributed to creditors;
- a statement that the bank statements reflect a zero balance;
- Forms I and II; and
- any bank statements and any voided checks that are not available on a portal.

The consolidation team will do the initial review and then forward the package to the supervising attorney. The supervising attorney will then communicate back to the trustee whether the NDR MF is approved. The NDR should not be filed until there is a zero bank balance and approval from the supervising attorney has been obtained.

f. Converted Cases

If the case was originally filed as a Chapter 13 or 11, please update Paragraph 1, Page 1 of the TFR. The Trustee should review the previous Chapter's Final Report and Account if one was filed. If an administrative claim was filed by the USTP in a case converted from Chapter 11 to 7, our claim should be categorized under Applications for Chapter 7 Fees and Administrative Expenses on the NFR & TFR. If the trustee is serving in a case converted from another chapter, Form 2 should begin with the balance turned over by the previous trustee or debtor-in-possession.

g. Bank Records

Please maintain your bank records for all open cases, even if those cases last longer than seven years.

h. Notifying the USTP of a Change in Banks

If you intend on moving your estate accounts to a new bank, please contact Bankruptcy Auditor Vince Morelli in advance to confirm that the prospective bank is an authorized depository and is properly collateralized.

i. Billing Attorney Time for Trustee Duties

Please be mindful that trustee duties should not be delegated to attorneys.

3. Liquidating Secured Property

a. Third-Party Offers

When reviewing offers from third parties to assist with liquidation of secured property, here are some of the factors to consider in reviewing these offers:

- Would this provide a certain and meaningful return for unsecured creditors, above the trustee's commission and administrative claims?
- Is the proposed action practicable?
- Are there tax ramifications for the estate?
- Are there exemption issues?
- Would you be exposed to possible liability? (e.g., slip-and-fall liability while a property is being sold)
- Is the proposed action unfair or potentially harmful to the debtors or other parties-in-interest? (e.g., in the case of a mortgage on the homestead, has the debtor defaulted?)
- Could you, as trustee, locate and administer the asset in question without the aid of the third party?

b. Section 506(c) Carve-outs

Section 506(c) carve-outs are estate property and are intended to benefit unsecured creditors. Section 506 is not a compensation statute and should not be cited as authority to allow either trustee compensation under § 326 or professional fees under §§ 328 or 330. When a trustee files a motion for approval of a § 506(c) carve-out, the trustee should not seek approval of trustee compensation or professional fees at that time. Instead, approval should be limited to approving a carve-out for the benefit of the estate, subject to distribution in accordance with the Bankruptcy Code's priority scheme. Trustee compensation and professional fees would be fixed by subsequent Court order on the appropriate applications. Further, carve-outs *solely* for the benefit of professional fees are objectionable.

4. Miscellaneous

a. Payment of Exemption Claims

Please pay exemption claims as soon as the funds are on hand. Exempt funds do not constitute property of the estate and should not be retained until the end of a case.

b. Administering Mass Tort Cases

While there may always be specific cases where other actions should be taken, general best practices for these cases are as follows:

- Q: Should trustees file motions to employ the mass tort firms in the bankruptcy?
- A: Yes – whether the firm is acting as attorney – 327(e) – or in more of an administrative/financial capacity – 327(a) – they still need to be employed if they want to receive compensation.
- Q: If the mass tort firms are employed, does an application to employ need to be filed, or can employment merely be included as one of the proposed settlement terms?
- A: An employment application should be filed, pursuant to Bankruptcy Rule 2014. Filing an application also lets the trustee address any issues raised by hiring an attorney who was already retained by the debtor (such as - Which one is the client? What happens if the debtor wants the settlement money paid as comp for injury (exempt), but the trustee wants it classified as punitive or other non-exempt category?).
- Q: May trustees claim trustee compensation on the amount of money distributed to the mass tort firm even though that money doesn't pass through the hands of the trustee?
- A: Absent some other objectionable factor, the United States Trustee will not object to this.

The USTP office does not make determinations as to whether the claims constitute property of the estate, or whether they should be administered. Our office will in most cases move to reopen the case, leaving those matters to the trustee's business judgment.

c. Review of Debtor Attorney Fees

The debtor's attorney in a bankruptcy case, whether or not the attorney intends to apply for compensation post-petition, must file a statement in compliance with § 329(a) and Bankruptcy Rule 2016(b) setting forth the amount of compensation paid or agreed to be paid for services in connection with the case. This statement must be filed within 15 days after the order for relief, or as otherwise ordered. The trustee should review this disclosure of compensation and make an independent determination whether the fee paid or agreed to be paid is excessive. If the fee is excessive, the trustee must discuss with the United States Trustee the possibility of bringing the matter before the court for a review of fees pursuant to § 329(b) and Bankruptcy Rule 2017(a).

d. Filing Proofs of Claims

For a variety of reasons, trustees may wish to file proofs of claim on behalf of creditors. While USTP policy does not preclude the practice, extreme caution is urged. *See Handbook for Chapter 7 Trustees*, at Section 4.F.3. (pg. 4-27). A trustee's signature on a proof of claim is subject to the burdens and consequences of Bankruptcy Rule 9011. Accordingly, some measure of due diligence is required prior to signing and filing a proof of claim. Reliance on a debtor's schedules alone is not sufficient because unlike in chapter 11 cases, schedules filed in chapter 7 cases do not constitute *prima facie* evidence of the validity and amount of the claims. Rather, trustees may wish to obtain a credit report from the debtor or verify the scheduled claim information directly with creditors. Alternatively, trustees may consider obtaining copies of documentation from debtor's counsel that were used to prepare the schedules, assuming the debtor was represented.

Case law regarding trustee-filed claims is not abundant, although common themes in such cases include whether trustees should be filing claims in the first place and the scrutiny trustees open themselves up to in such circumstances. In *In re Davis*, 538 B.R. 368 (Bankr. S.D. Ohio 2015), the court addressed the issue of trustee-filed claims in a lengthy, yet instructive, footnote. The importance of validating creditor information prior to the filing of a claim has practical implications, as well as legal. Verifying creditor information will help reduce or eliminate returned checks (which remain live assets of the estate) and the time and effort required to log and reissue those checks. Additionally, verifying creditor information (including addresses) can reduce or eliminate the misappropriation of estate funds. Even in circumstances where a trustee has conducted due diligence and has validated creditor information, the decision to file proofs of claim nevertheless must be informed by the requirement that the effort results in a meaningful distribution to creditors. Like many decisions trustees are required to make, this one is dependent upon the sound exercise of a trustee's business judgment.

e. Third-Party Solicitations

Some of you have been contacted by third parties proposing various schemes they claim will net a return for your bankruptcy estates. Here are some of the factors you may wish to consider in reviewing these offers:

- Would this provide a certain and meaningful return for unsecured creditors, above the trustee's commission and administrative claims?
- Is the proposed action practicable?
- Are there tax ramifications for the estate?
- Are there exemption issues?
- Would you be exposed to possible liability? (e.g., slip-and-fall liability while a property is being sold)
- Is the proposed action unfair or potentially harmful to the debtors or other parties-in-interest? (e.g., in the case of a mortgage on the homestead, has the debtor defaulted?)
- Could you, as trustee, locate and administer the asset in question without the aid of the third party?

We are also glad to discuss a specific proposal with you anytime.