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Outline of Court Procedures, Trustee's Policies and Procedures, and Required Forms For Creditors' Attorneys in Chapter 13 Cases Administered by Trustee Herbert L. Beskin in the Western District of Virginia

In an effort to assist creditors' attorneys and other interested parties, this section will set out the Court's procedures, the Trustee's policies and procedures, and the forms to be used by creditors in Chapter 13 cases administered by Trustee Herbert L. Beskin. The outline will follow the path of a Chapter 13 case chronologically from beginning to end: filing of the case; creditors' meeting; confirmation; post-confirmation; completion of plan payments, discharge, and closing of case; and miscellaneous matters. ***This outline is a truncated, creditor-focused, version of a much longer and more detailed outline and set of forms in the Debtor Attorney Information section of this website. For a much more thorough explanation of the confirmation and post-confirmation process, and the issues that arise from the debtor attorney's perspective, please see that longer outline.*** Also to be found in the Debtor Attorney Information section is the full CLE outline from the most recent annual seminar for Western District Chapter 13 attorneys put on by Trustees Beskin and Rebecca Connelly each fall

Each section of the outline will consist of two parts. The first part will explain *what* the procedures and policies are and provide forms for each one. The second part, "Practice Pointers," will provide the Trustee's suggestions and recommendations as to *how* best to comply with the procedures and policies.

At the end of the outline is a list of all the Trustee's forms referred to in the outline, organized chronologically from the beginning of the case until the end. These forms can be accessed by going to the end of the "Debtor Attorney Information" section of the website and there double-clicking on the desired form. [Note: That section of the website contains Word-compatible documents which can be copied and used by attorneys; this creditor section of the website is in a less-user-friendly PDF format.]

In order to help attorneys new to the Western District acclimate to the procedures required in Chapter 13 cases in this District, the Trustee is available to answer questions and encourages creditor attorneys and their staff to set up a time to visit his office and meet the Trustee's staff.

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OUTLINE

I. FILING OF THE CASE:

A. **Court website**: The Bankruptcy Court for the Western District of Virginia has a website which contains important information about procedures, Local Rules, personnel, forms, deadlines, etc. For further information see the home page of the U.S. Bankruptcy Court, Western District of Virginia. This entry point also contains a link to the Court's CM/ECF case look-up system, which requires a user name and password in order to access specific case information. A training session is available for attorneys who will be filing pleadings on CM/ECF. Attorneys who are new to the Western District should familiarize themselves with this site and the Court's requirements.

B. **Trustee's office structure and whom to contact:** Beginning March 1, 2010, the staff contact person for a case will depend upon the stage of the case and the nature of the issue. Kathryn will process all creditors' meeting ("341 meeting") documents. Jennifer and Danielle will prepare all cases for confirmation hearings, while Cassandra will handle all post confirmation Trustee motions to dismiss. Ryan will handle closing of cases. Cassandra will also provide "customer service" and action-item follow up for debtors, their attorneys, and creditors. All orders will be processed through the paralegal, R.C., and Brett and Jane will handle claims-related issues. All court hearings and 341 meetings will be handled either by the Trustee or the staff attorney, Angela.

For clarification, "*action items*" are any issues that are *not* related to an upcoming court hearing or 341 meeting. This includes, but is not limited to, the following examples: payoff requests; notice of changes in a debtor's situation or contact information; processing insurance proceeds on a totaled car; monitoring compliance of orders suspending payments and resolving Trustee's motions to dismiss; coordinating review of no-provision issues; and all matters related to the debtor education program.

1. Pre-341 meeting:

a. For matters relating to creditors' meeting documents ("341 docs"):
Liz ch13docs@cville13.net ext. 25

b. For action items concerning a case:
Cassandra Carey CCarey@cvillech13.net ext. 16

2. Between 341 meeting and confirmation of case:

a. For issues or questions relating to matters which have been set for a Court hearing (including Trustee's Report issues or documents), or matters which may have to be set for hearing, contact:

Case#	Case Admin.	E-mail address	Telephone
-00 to -49	Alexis Pennington	APennington@cvillech13.net	ext. 17
-50 to -99	Jennifer Wagoner	JWagoner@cville13.net	ext. 24

b. For action items concerning a case:
Cassandra Carey CCarey@cville13.net ext. 16

3. Post-confirmation:

a. For issues or questions relating to matters which have been set for a Court hearing or may be set for hearing, contact Jennifer or Danielle as set forth in 2.a., above, or Cassandra for post confirmation Trustee motions to dismiss.

b. For action items concerning a case:
Cassandra Carey CCarey@cvillech13.net ext. 16

c. For issues or questions relating to the closing of a case, including wage release orders for completed plans:
Ryan Bryant RBryant@cvillech13.net ext. 13

4. Orders:
All orders which require the Trustee's signature should be sent via e-mail to the paralegal:
R.C. Johnson beskinorders@cvillech13.net ext. 20

Please identify the order in the subject line of the e-mail by case number, debtors' names, type of hearing, and date of hearing. For example, please state "07-60579 T & E Johnson MTLS 1/20/08," where 1/20/08 is the date of the hearing that was held on the Motion to Lift Stay; or "07-60579 T & E Johnson TMTD 1/20/08," where 1/20/08 is the date of the hearing that was held on the Trustee's Motion to Dismiss.

C. **Chapter 13 Plan format and initial notices**:

1. **Standard Chapter 13 Plan format:** In the Western District, debtors are required to use a standard Chapter 13 Plan format which has been approved by the Judges. This form can be found on the Court's website (Local Forms, Form 3015-1B).

2. **Special Notice:** The Court requires that if a secured creditor's lien is being avoided or modified (a "cram down," etc.) pursuant to paragraph 3.A or 7. of the plan, a "Special Notice" must be filed with the plan and served upon the creditor. This form can be found on the Court's website (Local Forms, Form 3015C). Lien avoidance under Code §506 will also require an adversary proceeding. Service on the lienholder's registered agent is required pursuant to Rule 7004.

3. **Adequate Protection Payments:** Section 1326 of the Code now requires that a Plan provide that adequate protection ("AP") payments be made to any creditor that is being paid through the plan and is secured by a purchase money security interest in personal property. These payments must commence within 30 days from the date the case is filed, and a case cannot be confirmed until the Court is satisfied that the plan has properly provided for such payments. A plan may propose that such payments be made directly by the debtors to the creditor, or they can be made to the Trustee as part of the debtors' plan payment and disbursed by the Trustee.

   If such payments are made to and disbursed by the Trustee, there will be no need for the debtors to provide proof of payment or proof of receipt by the creditor. If the payments are made directly by the debtors to the creditor, the Trustee will have to obtain proof of payment by the debtors and proof of receipt by the creditor prior to confirmation. Because of the difficulties inherent in proving that the debtors have made these payments, virtually all of the plans filed in this area have proposed that AP payments be made by the Trustee rather than directly by the debtors. The BAP & CPA Code changes do not specify the required minimum amount of the AP payments. AP payments on claims secured by personal property are set forth in paragraph 3.C. of the Court's required Chapter 13 plan form; further information about such payments can also be set forth in paragraph 11. The post-confirmation equal monthly payments ("EMA payments") on claims secured by personal property are set forth in paragraph 3.D. of the form plan, and additional information about such payments may likewise also be found in paragraph 11.

If the plan proposes not to pay a creditor anything for AP payments, the creditor still needs to be noticed of this in the same fashion. Sec. 1326. Over-secured creditors are still entitled to AP payments.

The Court's **Standing Order #9** [see the Court's website] requires that a Notice of Adequate Protection Payments must be sent by the debtors' attorney to affected creditors within five days of the date on which the initial plan is filed. If the creditor fails to object to the proposed AP payments within fifteen days, the creditor is deemed to have accepted the proposed payments, and no separate Court order will be necessary. The required **"Notice of Proposed Adequate Protection Payments and Opportunity for Hearing on Objection"** is Form 4008-1A in the Local Forms section of the Court's website.

4. **Automatic Stay—Extension of [Code §362(c)]**: A hearing to extend the automatic stay beyond the initial 30 days [362(c)(3)] or to establish a stay [362(c)(4)] must be held by the Court within 30 days of the date on which the case is filed, and the date and time of any hearing must be arranged beforehand with the Clerk's Office. Debtors' counsel must notice *all* creditors of any such hearing.

   a. Judge Krumm may require live testimony for such hearings, and has announced that he especially wants to hear evidence regarding the issue of good faith in the filing of the instant case.

   b. Judge Anderson has approved the use of a form notice and order which allows (i) the temporary continuance of the automatic stay until a second hearing can be held, with a "bridge order" entered in the interim; and (ii) the use of "negative notice" to creditors so that the second hearing will not need to be held if no creditors object to the continuation of the stay. **[FORM # 1]**.

5. **Noticing Requirements:** For noticing requirements for initial and amended plans, see the first page of the Form Plan and Local Rules 3015-1 and 3015-2. As stated above, for Special Notices see Bankruptcy Rule 7004.

D. **Payments, Pay Direct Orders, and Wage Deduction Orders:**

1. **Plan payments** are to be sent to a SunTrust Bank lockbox maintained by the Trustee in Memphis, Tennessee. **Payments are not to be sent to the Trustee's office in Charlottesville.** The address for payments is:

   Herbert L. Beskin, Trustee
   Chapter 13 Trustee's Office
   P.O. Box 1961
   Memphis TN 38101-1961

In every case, an order must be entered by the Court either ordering the debtors themselves to make the payments proposed in the Plan (a "*pay direct order*"), or ordering the debtors' employer to make the plan payments (a "*wage deduction order*"). The debtors' attorney is required to file the appropriate order with the Court. This order should be filed *as soon as the case is filed* so that the debtors will not fall behind right away. Studies show that automatic wage deduction cases are about five times more successful than direct payment cases.

Both Judges now require wage deduction orders in every case unless (a) there is a compelling reason why one should not be required, and (b) the Trustee endorses an order allowing a pay direct order. The Trustee is requiring any employed debtor to appear before the Judge to request an exception to this rule.

2. **Mortgage payments**: Sometimes extra precautions are advisable to keep debtors who have had trouble making their mortgage payments every month from defaulting on future payments. One possibility is for the plan to provide that the monthly mortgage payment will be made through the plan by the Trustee; in this scenario, the Trustee will take his usual commission on each such payment.

A second method is to have the Court enter a second, separate, wage deduction order with the employer that will have the employer send a separate check directly to the mortgagee each month to cover the mortgage payment. This method has the advantage of saving the debtors the Trustee's commission each month, and getting the payment to the mortgagee more quickly.

A third option is to set up an automatic monthly draft from the debtors' checking account directly to the mortgagee. This can be done by the debtors without any Court order or hearing, and many banks are offering this service at no or little charge.

E. **Other matters**

1. **Attorney's Fees:** As of August 1, 2011, there is no Local Rule or Standing Order authorizing a standard ("no look") fee for debtors' counsel in Chapter 13 cases. However, both Judge Anderson and Judge Krumm are now allowing, and the Trustee is not objecting to, attorney's fees of up to $2,750 for all ordinary services required through confirmation. If any attorney is requesting fees in excess of that amount, both the Court and the Trustee will expect to see contemporaneous time records and an explanation as to why such fees are being requested. The Court has ruled that while attorneys fees may be paid *ahead* of unsecured claims, executory contracts, secured debt arrears, and priority claims other than support arrears, they come *behind* AP and fixed monthly payments to secured creditors and at best can only be paid *pro rata* with support arrears being paid by the Trustee. For attorney's fees for work performed *after confirmation* of the case, see the "Post-Confirmation" part of this Outline, section V. I.

a. Cases: (1) A recent Supreme Court case held that an unsecured creditor can recover post-petition attorney fees authorized in a valid pre-petition contract: *Ogle v. Fidelity & Deposit Co. of Maryland,* U.S. , 4/30/10 denial of cert.; (2) Attorney's requested fees significantly reduced by the Court; Court sets out in detail the standard for evaluating such fees: *In re Palmer and Debra Goodbar*, #09-52018, and *In re Jeffrey Goodbar,* #10-51542, Bankr. Dt., W.D. Va, 6/29/11 Krumm opinions; (3) Photocopying expenses must be necessary to a particular case and property documented to be reimbursed: *In re Jeffrey Goodbar,* #10-51542, 8/10/11 opinion; (4) Attorney ordered to disgorge $5,000 in fees*: In re Edward Dunn*, #11-60847, Bankr. Ct., W.D. Va., 8/18/11 opinion by Anderson; (5) Appropriateness of "no-look" fees in Chapter 13 cases is reaffirmed by the Court; in this case the attorney's request for hourly fees is denied, but even if hourly fees were allowed, the lodestar analysis would confirm that the no-look fee was appropriate: *In re Bruce and Jane Slater*, #10-62521, Bankr. Ct., W.D. Va., 9/6/11 Anderson opinion.

2. **Bankruptcy Link**: The Trustee's case management software provider, EPIQ Systems, maintains a website that allows debtors' attorneys and creditors to have 24/7 access to basic information about all the Trustee's pending cases: payments received, claims filed, disbursements to creditors, etc. Access to this website is free, and can be obtained by e-mailing to the Trustee a request for access to the system. The Attorney will be required to sign an access agreement. Please note that there is usually a delay of 5 – 10 days between the date a payment is sent by the debtor to the Memphis SunTrust lockbox and the date it appears on Bankruptcy Link.

3. **Orders needing the Trustee's endorsement:** Almost all orders in a Chapter 13 case in this district require the endorsement of the Chapter 13 Trustee. At any time in the case if an order requires the Trustee's endorsement, please send it via e-mail to: beskinorders@cville13.net. Using this email address will ensure that the order is sent directly to the Trustee's paralegal, R.C., and that it will be reviewed promptly. As stated previously, the Trustee asks that orders be sent by e-mail instead of by fax or the postal service, and that they include the full case number, the name of the debtor(s), the kind of order, and hearing date in the subject line of the email. (E.g. "07-62161 B Jones MTLS 1/21/08").

4. **DSO Letters:** At the beginning of the case, the Trustee is required by BAP & CPA to send notice to any DSO (Domestic Support Order) payee and the state agency in charge of collecting child support to alert them to the case and certain information about the debtor. **[FORM # 12].** In order to ensure proper noticing of such claims, the Trustee will not recommend confirmation unless all DSO payees are listed on Schedule E, and he recommends that the state child support agency be listed there as well.

F. **Practice Pointers:**

1. **CMI / Form B22C: Disposable income issues:**

b. Line 28 and 29: See the U.S. Supreme Court's decision in Ransom v. FIA Card Services, #09-907, ____ U.S. _____, decided 1/11/11. Above-median debtor now allowed to claim vehicle ownership allowance on Line 28 or 29 unless he has a loan or lease payment on the vehicle as of the date the case was filed.

a. Line 47:

(1) *In Re McPherson*, 350 B.R. 38 (2006), opinion by Judge Anderson: debtors cannot deduct amount of pre-petition contractual payments in cram down situations; they can only deduct the amount being paid by the Trustee in the plan on the secured portion of the debt.

(2) *In re Kermit and Terri Ball*, Case #06-70154, 5/17/06 opinion by Judge Krumm: debtors cannot deduct the amount of pre-petition contractual payments if in their plan they are surrendering the collateral.

(3) *Good faith requirement*: In *In Re Earl and Robin Hylton*, supra, Judge Krumm stated that the confirmation requirement of good faith [1325(a)(3) and (7)] still applies, and the Court will still examine such secured debt payments to determine "if the unsecured creditors are better off than they would be if the asset is excluded and the monthly payments on the secured debt are added into a monthly plan payment."

(b) Line 58: *Monthly Disposable income:*

(1) This is the net amount (after Trustee's commission) which must be paid to unsecured non-priority claims and attorney's fees in the plan. It does *not* include plan payments for priority claims, Trustee's commission, or secured debts.

(2) When this figure is significantly different from the disposable income figure on the bottom of Schedule J, the Trustee may look closely at the feasibility and good faith of the proposed plan payments. See Hylton, *supra*.

2. **Issues regarding the Chapter 13 Plan**:

a. Determining the Applicable Commitment Period ("ACP"):

(1) Above median: *In Re Earl and Robin Hylt*on, 374 B.R. 579 [Judge Krumm]: 60 months of payments are required, unless the plan pays 100% in a shorter period of time, and the ACP is a temporal requirement. Code sec. 1322(d)(1).

(2) Below median: 36 months of payments are required, unless 100% is being paid in a shorter period of time. Code sec. 1322(d)(2).

b. Disposable income:

(1) Above median:

(a) Disposable income is to be determined using B22C, but good faith analysis still applicable (e.g., payment of luxury secured debts; see previous section of outline). *In Re Earl and Robin Hylton,* 374 B.R. 579 [Judge Krumm]. The Trustee may also seek an increase in the plan payment if the difference between the disposable income figures in Form B22C and Schedule J is very large.

(b) The recent Supreme Court decision of *Hamilton v. Lanning*, #08-998, 560 U.S. ____ (6/7/10), held that for above-median debtors, the Court may consider changes in income and expenses that have occurred since the case was filed in determining disposable income.

(2) Below median: The Trustee uses the disposable income figure as determined at the bottom of Schedule J, unless he believes that the numbers on Schedule I or J are incorrect or claimed expenses are greater than reasonably necessary.

c. Computing percentage payout to unsecured creditors: When computing plan payments, please assume a Trustee's commission of 10%, as that is the maximum rate that can be charged and is the figure the Trustee's staff will use in evaluating any proposed plan.

d. Chapter 7 test calculations: The Trustee follows the ruling of Judge Stone in *In re Christopher and Angel Todd*, Case #7-02-04451, 3/17/03 opinion in calculating the amount necessary to meet the "Chapter 7 test" of Code section 1325(a)(4). That decision held that in evaluating whether a plan meets this test, both reasonable costs of sale and the Chapter 7 Trustee's statutory commission must be deducted from the

fair market value of the property in question. The Trustee uses a 6% commission for improved real estate and a 10% commission for unimproved real estate and personal property; the Chapter 7 Trustee's sliding commission rate can be found at Code section 326(a).

e. 910 Claims: To be paid in full, a "910 claim" must satisfy *all* of the requirements of Code section 1325: it is purchase money, it is secured by personal property, it was purchased within 910 (or 365) days, and it was purchased for the debtor's personal use. If the balance owed includes any "negative equity" from a trade-in that was part of the purchase, such negative equity is part of the creditor's purchase money secured claim. *In re Price,* 562 F.3d 618 (4th Circ. 2009

f. Cram downs:

(1) Interest rate: Rate should be in accordance with the Supreme Court's Till decision. The Trustee uses the Wall Street Journal prime rate as of the first day of the month in which the plan was filed. The monthly amount and the number of months should be specified in paragraphs 3.C. and 3.D.; the plan should not say "pro rata."

(2) Attorney must file a Special Notice (supra, section I. C.) for every creditor whose claim is being "crammed down" pursuant to this provision.

(3) The Fourth Circuit has recently ruled that "910 creditors" cannot be forced to accept surrendered collateral "in full satisfaction" of the underlying debt; such creditors retain their right to file an unsecured deficiency claim. Tidewater Finance Co. v. Kenney, No. 07-1664(L) (4th Cir. 6/27/08).

g. Paragraph 5 of the form plan:

(1) Payment of arrearages:

(a) If provision is paying interest on arrears, Trustee will usually object unless the plan is 100% or has been extended beyond required ACP for that purpose.

h. Paragraph 7 of the form plan: lien avoidance: Debtor cannot use Code section 522 to avoid a judgment lien against one spouse when the lien is lodged against property owned as tenants by the entireties and both spouses are alive: the lien never attaches to the property, and therefore cannot be avoided. *In re James and Virginia Smith*, #10-50687, 12/22/10 opinion by Judge Krumm (Bankr. W.D. Va.).

(1) The Fourth Circuit has affirmed that debtors can avoid junior liens on their residence if the lien is wholly unsecured. *In re Derrick and Tracie Millard*, #09-2266 (4th Cir. 12/15/10, unpublished opinion).

i. Paragraph 10 of the form plan: The Court requires that any sale or refinancing of real estate be noticed to all parties and approved by the Court (see section V. J., below)

j. Paragraph 11 of the form plan:

(1) Intent of paragraph: Generally, anything not in the standard format of paragraphs 1-10 should go here. Paragraphs 1-10 are not supposed to be altered.

(2) Providing substantive or future-problem-resolving provisions: Both Judge Anderson and Judge Krumm have restricted the use of this paragraph to affect substantive rights of creditors. The Judges struck down 18 proposed sub-paragraphs of paragraph 11 inserted by debtor's counsel. Many of these proposed provisions would have affected substantive creditor rights (e.g.: negating contractual arbitration provisions; how payments were to be applied; releasing of title). Read this decision before trying to use this paragraph in any new or creative ways. *In re Susan Maupin*, 384 B.R. 421 [Judge Anderson]; *In re Louis and Nikki Jones*, Case #07-50446, 12/14/07 opinion by Judge Krumm reaching the same conclusion regarding the same provisions.

(3) Effective 7/11/11, both Judge Anderson and Judge Krumm are now allowing standard language to be added to the form plan that limits the time within which a creditor may file an unsecured proof of claim for a deficiency on property being surrendered pursuant to paragraph 3.B. of the plan. This language will provide certainty and closure in situations where debtors must pay 100% of claims or want to pay off their plan early.

The following language (or something comparable) can be inserted into paragraph 11 of the plan. ***If you add this language, you need to state clearly in paragraph 3.B. that the creditor also needs to look at paragraph 11.***

"Any unsecured proof of claim for a deficiency which results from the surrender and liquidation of the collateral noted in paragraph 3.B of this plan must be filed by the earlier of the following dates or such claim will be forever barred: (1) within 180 days of the date of the first confirmation order confirming a

plan which provides for the surrender of said collateral, or (2) within the time period set for the filing of an unsecured deficiency claim as established by any order granting relief from the automatic say with respect to said collateral.

Said unsecured proof of claim for a deficiency must include appropriate documentation establishing that the collateral surrendered has been liquidated, and the proceeds applied, in accordance with applicable state law. "

II. CREDITOR'S (SECTION 341) MEETING

A. **Conduct of the creditors' meeting**: The debtors' testimony is under oath and is digitally recorded. The Trustee or his staff attorney will have questions for the debtors, and creditors attending the hearings will be allowed to ask questions. Debtors are encouraged to ask questions of the Trustee. There will also be a fifteen minute talk by the Trustee or staff attorney about the debtors' obligations in Chapter 13.

At the end of the creditors' meeting, the Trustee and the debtors' attorney will determine, as best they can, if the case can be ready at the originally scheduled confirmation hearing. If it appears that there are appropriate reasons why it cannot be ready, the Trustee and the attorney may agree that the case should be set for a later confirmation date, and the Trustee's Report will so state.

B. **Trustee's Report and Objections Following Meeting of Creditors (the "Trustee's Report")**: The day after the creditors' meeting, the Trustee will file with the Court, the debtors, and the debtors' attorney his Trustee's Report. **[FORM # 13]**. This is a detailed three page report which sets forth the Trustee's objections to confirmation, if any; any documents or information that still need to be submitted; any motions that need to be filed by debtors' counsel; and any other items that need to be resolved in order for the case to be confirmed.

Please note that: (a) this means that there is pending in every case a motion to dismiss until such time as the case is confirmed, and (b) the Trustee retains the right to ask at any subsequent confirmation hearing for dismissal of a case if either the debtors are not current in their proposed plan payments or the attorney fails to present appropriate reasons why matters in the Trustee's Report remain unresolved.

III. PERIOD BETWEEN CREDITORS MEETING AND CONFIRMATION

A. **Debtors' Pre-Confirmation Affidavit**: This affidavit is to be submitted to the Court, with a copy to the Trustee, prior to confirmation. This form is available on the Court's

website under "Trustee Forms." It provides the Trustee and the Court with information and certifications which under BAP & CPA must be obtained before a case can be confirmed. Specifically, the debtors must affirm to the Court that they are current on all post-petition tax payments, support payments, and secured debt payments; that they have filed all tax returns required in the past four years; and that all objections to confirmation have been resolved.

While this affidavit is not mandatory, the Trustee believes that it will save debtors and attorneys significant time and effort in the confirmation process. The affidavit has been used in virtually every case filed since BAP & CPA was enacted. If the affidavit is not used, the debtors will either have to appear at the confirmation hearing and testify to the necessary facts, or provide other appropriate documents to achieve the same result. The *attorney must sign off on the affidavit* to show that he/she has reviewed it with the debtors.

The affidavit states that the information being certified by the debtors is true as of that date, *and will also be true as of the date of the confirmation hearing*, so the **debtors have an affirmative obligation to notify the Trustee if, for example, they fall behind in support payments or secured debt payments after the affidavit is executed but prior to the confirmation hearing. The debtors' attorney needs to make sure the debtors understand this aspect of the affidavit**. If a motion to lift stay is filed shortly after confirmation and it becomes clear that the debtors' affidavit was not correct as of the date of confirmation, the Trustee reserves the right to bring this problem to the Court's attention and ask for sanctions. For example, the Trustee may object to any modified plan that seeks to cure a post-petition mortgage default by reducing the payout to unsecured creditors.

B. **Attorney's responsibility to complete all items on Trustee's Report, contact Trustee's office once case is ready, or confirm status of case prior to the confirmation hearing**:

"Six months/three strikes and you're out" rule: If the case will not be ready to be confirmed at the initial confirmation hearing, it is the attorney's responsibility to so advise the Trustee's office as soon as that becomes evident. As long as the debtors are making their plan payments as proposed and the attorney is working to resolve the remaining issues, the Trustee will not object to a continuance beyond the initial confirmation hearing.

If a case is still not ready for confirmation at the second scheduled confirmation hearing, the Trustee will recommend to the Court a second continuance if (a) the debtors are current in their proposed plan payments, (b) the attorney is making progress towards resolving the remaining issues, and (c) there is a justifiable reason why the case is not yet ready.

If the case is still not ready at the third scheduled confirmation hearing, *unless there are extraordinary circumstances* presented to the Trustee justifying the continuation of the case, the Trustee will report the case to the Court as not ready and ask for dismissal of the case, and the debtors and their attorney should be present to the Court their reasons why the case should not be dismissed. It is the Trustee's expectation that, **absent extraordinary circumstances, all cases should be confirmed within six months of filing,** so the third scheduled confirmation should take place within that six month time frame.

C. **Continuation of the confirmation hearing**: In the Western District, the Court has issued a standard Continuance Order form; see the Local Forms portion of the Court's website, and look under Form B263. However, at present the continuance process differs somewhat between the Lynchburg and Harrisonburg Divisions of the Western District.

1. Lynchburg Division: In Judge Anderson's Court, a confirmation hearing can be continued in one of two ways. If the case is continued "*with conditions*," the attorney must submit to the Court the official Continuance Order and the attached Exhibit A (a total of three pages) for entry by the Court; such orders must be endorsed by the Trustee. The Exhibit A will contain a list of items that need to be completed or resolved for the case to be confirmed, and the Trustee will usually fill out this Exhibit A **[FORM # 14]** and hand it to the attorney in Court. If the attorney attaches the Trustee's version of Exhibit A to the Order, the attorney may endorse the Order on the Trustee's behalf and submit it to the Court.

   A continuance "with conditions" means that, absent extraordinary circumstances, the case will be dismissed if it is not ready for confirmation at the next hearing, and the attorney will not be allowed to offer explanations as to why the case is not ready. If prior conditions have not been met but there are legitimate reasons why, debtors' counsel can submit to the Court prior to the scheduled hearing an Order, endorsed by the Trustee, extending these conditions until a future Court date. **[FORM # 15].** This will keep the case from being dismissed.

   If a case is continued in Judge Anderson's Court "*with expectations*," the Trustee will informally hand the attorney the same Exhibit A, but the attorney will not be required to submit an Order of Continuance. The case can still be dismissed at the next hearing, since the Trustee's Motion to Dismiss is still pending, but if the case is not ready as anticipated the attorney *will* be allowed to offer explanations at the next hearing as to why the case is not ready and why it should not be dismissed.

2 Harrisonburg Division: In Judge Krumm's Court, only the first two pages of the Order of Continuance are used by the Court, and the Judge will announce from the bench which clauses in the Order are to be filled in by the attorney before it is submitted for entry. Each such Order must be forwarded to the Trustee for his endorsement before being submitted to the Court. (As with all other orders needing the Trustee's endorsement, it should be e-mailed to: beskinorders@cville13.net)

D. **Dismissal of case pre-confirmation**: If a case is dismissed prior to confirmation, all funds on hand with the Trustee except accrued Adequate Protection payments and any other payments authorized by Court order (e.g., debtors' attorney's fee) will, as required by the Code, be returned to the debtors upon dismissal.

E. **Lien avoidance**:

1. When avoiding a lien, Judge Anderson requires language in the order avoiding lien that makes it clear that the avoidance of the lien will occur *only* at such time as the plan has been successfully completed. *In re Ricky Wharton,* Bankr. Ct. W.D. Va., #09-61741, 3/26/10 opinion. While the Court will enter the order as soon as the matter has been resolved, the order makes clear that the debtors' attorney may file the order with the state Circuit Court Clerk's Office only if and when the plan has been successfully completed. In the interim the claim shall be treated for all plan purposes (including payment) as if it is unsecured. **[Form#18: PDF / RTF]** Judge Krumm requires that any such order state that it is subject to Code §349(a).

2. Note: On 6/13/11, the Fourth Circuit upheld the decision of the Western District of Virginia (Judge Kaiser) and held that a Chapter 13 debtor need not file a Homestead Deed prior to avoiding a judgment lien on real estate using Code section 522. *In re Annie L. Botkin*. [This case would appear to overrule Judge Anderson's decision in *In re Tarpley*, 123 B.R. 741 (1991), that while a Homestead Deed need not be filed in Chapter 13 to obtain the benefit of Va. Code 34-4 for the purpose of claiming the exemption on Schedule C and passing the "Chapter 7 test" it must be timely filed (within 5 days of the originally scheduled 341 meeting) to avoid a lien under Code sec. 522(f).] At a hearing on such a lien avoidance motion, the attorney needs to be prepared to present evidence as to the property value, the balance owed on the debts against the property, and the claiming of the exemption.

3. Make sure service of process on a lien avoidance motion/complaint complies with Rule 7004, and file the motion immediately after the plan is filed so as not to delay confirmation any longer than need be. NACBA (the National Association of Consumer Bankruptcy Attorneys) is compiling a list of FDIC institutions and their officers to make service of process a bit easier to accomplish.

4. The Fourth Circuit on 12/15/10 reaffirmed the right of debtors to avoid junior liens on their primary residence if the lien is *wholly* unsecured. *In re Derrick & Tracie Millard*, #09-2266 [unpublished opinion].

5. Debtors cannot use section 522(f) to avoid a potential judgment lien against one debtor on tenants by the entireties property, because the lien does not attach if both debtors are alive and still married: *In re James & Virginia Smith*, #10-50687, Bankr. Ct., W.D. Va., 12/22/10 Krumm opinion. In light of this decision, the Trustee does not oppose listing such debts as unsecured claims on Schedule F instead of listing them as secured claims on Schedule D.

6. Other cases: Debtor can still avoid a mortgage lien after he's surrendered the property in a confirmed plan; here the deed of trust was lost and never recorded: *In re Charles and Christine Rector*, #09-62669, Bankr. Ct., W.D. VA., 3/11/11 Anderson opinion; Liens can be avoided in a Chap. 13 cased filed close on the heels of a Chap. 7 case even though the debtors are not eligible for discharge, but in this case confirmation is denied because the case was filed in bad faith to avoid *Dewsnup*: *In re Karen Helton, #11-60126, Bankr. Ct., W.D. Va., 8/12/11 Anderson opinion in A.P. #11-06028;*

IV. CONFIRMATION

A. **Confirmation Order**: There is a standard form for the Confirmation order in the Western District. **[FORM # 19]**. It is only one page long, and incorporates by reference the terms of the confirmed plan.

The last section, entitled "Other Provisions," is a versatile section which can be used at the confirmation hearing for a variety of purposes, including: correcting math mistakes or typos in the plan; clarifying that the plan must pay 100%; requiring the attorney to make sure a wage deduction order is working; or increasing plan payments to an amount greater than that set forth in the plan. Such uses of the "Other Provisions" allow confirmation of the plan without additional notice or hearing where the additional provisions do not prejudice creditors. Attached is a list of some of the standard "Other Provisions" used by the Trustee to expedite the confirmation of cases. **[FORM #20].**

B. **Continuation of the Trustee's motion to dismiss case**: In certain situations the Trustee may agree to recommend confirmation only if he is allowed to continue an objection (usually a Chapter 7 test or disposable income test objection under Code §1325) to a future date. In this event, the continuation of his motion to dismiss, the retention of his objection, and the next hearing date will be noted in the "Other Provisions" section of the Confirmation Order.

C. **United Student Aid Funds v. Espinosa**, ____ U.S. _____ (3/23/10 Opinion). U.S. Supreme Court rules that the debtor's failure to file an adversary proceeding to determine the dischargeability of a student loan debt violated procedure, but did not amount to a violation of the creditor's due process, since the creditor was notified of the proposed plan and did not object. The confirmation order was therefore still enforceable and binding. Bankruptcy Courts have a duty to address and cure such plan defects even if no party is objecting.

V. POST-CONFIRMATION

(Note: The Court requires the Trustee's endorsement of any and all of the orders described below. Send any such proposed order to: beskinorders@cville13.net)

A. **Trustee's objections to claims:** The Trustee will generally object to any filed proofs of claim that: (1) are filed late; (2) purport to be secured or priority, but do not have appropriate supporting documentation; or (3) are unsecured, have no appropriate documentation, and are not listed on the debtors' schedules. The Trustee will not generally object to unsecured claims where (i) the claim has been listed on Schedule F, (ii) a proof of claim has been filed in approximately the same amount as that set forth in Schedule F, and (iii) the proof of claim does not have the usually-required documentation. Before filing his objection, the Trustee will send to the debtor, debtor's counsel, and the creditor a letter explaining the documentary deficiency and giving the creditor or attorney thirty days to provide the requested documents.

If a secured claim is filed late but the payment of the claim is important to the debtors' rehabilitation and plan success, the Trustee will generally not object to the *secured portion* of the late claim, but will object to any payments being made on the *unsecured portion* of the claim. A copy of the standard order on such an objection by the Trustee is attached. **[FORM # 22].**

Judge Anderson has issued an important decision concerning objections to proofs of claim. *In re David and Amanda Falwell*, #08-60495, 11/5/09 Opinion. The opinion covers burdens of production and proof; acceptable bases for objection; and other related issues. Attorneys are cautioned not to object solely on the basis of no documents being attached to the creditor's proof of claim. [Regarding attorneys' fees recoverable for such objections, see paragraph V.I., Attorney's fees for post-confirmation work.]

Other cases: *In re Randall and Tina Woods*, #10,62058, W.D. Va. Bankr. Ct., 1/27/11 Anderson opinion [in an objection to claim based on the statute of limitations the debtor must provide evidence, since he has both the burden of production and of persuasion]; *In re Reginald Ponton* , #10-61515, W.D. Va. Bankr. Ct. , 1/27/11 Anderson opinion [a second claim filed by a secured creditor as a supplemental claim for repossession is a separate claim]; *In re George Tomaras,* #10-60785, W.D. Va. Bankr. Ct., 2/9/11 Anderson opinion [an objection that the debtor has made other arrangements outside of bankruptcy to pay the claim is not a valid grounds]; *In re Frank and Sandra Zacchino*, #10-62312, Bankr. Ct., W.D. Va., 4/8/11 Anderson opinion [fact that a claim is contingent or unliquidated is not a basis for disallowing the claim]; *In re Chrystalene McCutcheon*, #09-64035, Bankr. Ct., W.D. Va., 10/6/10 order [Court lacks jurisdiction to hear objection to claim asserting that it is not a joint claim]

B **Motions to lift stay: language required in consent orders**: In order to expedite the processing of creditors' motions to lift stay, the Trustee has developed certain language which must be included in any order resolving such a motion. The required language **[FORM # 25]** clarifies when the Trustee is to cease making payments on the creditor's secured claim for pre-petition arrearages; sets a time limit by which any unsecured claim for deficiency must be filed; and, if the stay is to be lifted at some future date without any further Court order, sets out a process for notifying the Court and Trustee if the creditor is enforcing its rights to liquidate the collateral. The Trustee will not endorse any order lifting stay unless it contains this language.

C. **Motions to lift stay: fees for creditors' attorneys:** In March and April, 2008, Judge Anderson ruled that $500 plus court costs will be the standard fee for creditors' attorneys in motions to lift stay where the motion is not contested and there are no unusual circumstances. *In re Godsoe*, 04-03189*; In re Viar*, 06-61526; *In re Kidd*, 07-61488. *In re Horsley*, 07-61657.

Judge Anderson has ruled that in cases where the parties have agreed to a proposed settlement order resolving the matters in controversy without the need for a hearing, the

fees which the Court will approve for the moving party will be $500.00 in attorney's fees plus reimbursement of the filing fee of $150.00, for a total of $650.00. *In re Beverly Horsley*, 07-61657, 4/49/08 Order. Judge Stone ruled in *In re Sara Travis,* #08-71735, W.D. Va. Bankr. Ct., 1/19/11 opinion, that a debtor attorney's request for fees incurred in defending a motion to lift stay would be denied because it was two weeks after a modified plan was filed and counsel's "reactive approach" to the problem and failure to contact the creditor's attorney were not sufficient.

D. **Sale or refinancing of debtors' property; early payoff of case**:

1. **Court permission required:** Debtors are required to seek Court permission, after notice to all parties, before selling or refinancing real estate. (Note: A loan modification is considered by the Court to be a refinancing.) In these situations Local Rule 6004-3 requires that the notice must state: (i) the amount of sale / refinancing; (ii) the amount to be paid to the Trustee; (iii) whether the transaction will pay off the balance owed on the plan; and (iv) if the plan is not being paid off, the amount to be received by the debtors.

   The Trustee requires that certain additional language be inserted into the order authorizing the sale or refinancing before he will endorse any such order. **[FORM # 29].**

   The Court also requires prior authorization in the form of a Court order before selling, transferring, or refinancing other property. If the value of the property being transferred is small, the process may not require notice to all parties. Counsel should check with the Clerk's Office in such situations.

2. **Notice to closing attorney:** It will be responsibility of debtors' counsel to ensure that the closing attorney has received a copy of the order authorizing sale or refinancing prior to closing, and that the Trustee receives a copy of the HUD-1 and the correct amount of funds from closing.

3. **Impact of 4th Circuit Murphy decision on debtor motions to sell real estate: Trustee's motion to modify plan pursuant to Code §1329:** In *In re Murphy*, 474 F.3d 143 (4th Cir. 2007), the 4th Circuit held that a Chapter 13 Trustee may, using Code §1329, seek an increase in plan payments when the debtor experiences a substantial and unanticipated increase in his property and is selling it. The Trustee interprets this decision to mean that in situations where the debtors are seeking Court permission to sell real estate, the Trustee is obligated to determine (i) the amount the asset has appreciated since the case was filed, and (ii) whether or not the debtors' plan should be modified to increase the total of plan payments and the payout to unsecured creditors.

   a. Please provide the Trustee with documentation of the current value of the real estate when the motion to sell is filed.

4. **Loan modifications:**

Judge Krumm requires 15 days notice to all creditors and the Trustee, and will allow negative noticing if the attorney certifies in the motion that there is no prejudice to creditors. Judge Anderson only requires that the Trustee be noticed. Both require that the Trustee endorse any order approving the modification. The Trustee asks that the loan modification agreement be attached to the motion, and that the motion state the following: the change in monthly payment, interest rate, and principal balance; the total of any fees and charges being assessed against the debtors; the amount of arrears being included in the new loan; and the amount of any cash being received by the debtors. Attorneys should review Local Rule 6004-3 regarding sale or refinance of property post-confirmation. If under the confirmed plan the Trustee was paying pre- or post-petition arrears to the mortgagee, the order must contain the following language:

"The Trustee shall make no further payments to this creditor on the arrearage portion of it secured claim after the date on which this Order is entered. This provision supersedes any language to the contrary in the confirmed plan and/or the Confirmation Order. The amounts paid to this creditor by the Trustee through the date of this Order on the arrearage portion of the creditor's secured claim are hereby approved. If the Debtor defaults under the terms of the loan modification being approved herein or wants the Trustee for any other reason to resume making arrearage payments to this creditor, the Trustee will not be able to resume making payments to this creditor on the arrearage portion of its secured claim until either (i) a modified plan reinstating such payments has been confirmed by the Court, or (ii) the Trustee has been instructed to resume such payments by other order of this Court. "

VI. COMPLETION OF PLAN PAYMENTS, DISCHARGE, AND CLOSING OF CASE

A. **Discharge procedure for cases filed under BAP & CPA (cases filed after 10/17/05):** Pursuant to Local Rule 4008-1, once the Trustee has certified to the Court in a BAP & CPA case that the debtors have completed their plan payments, the Court will issue to the debtors a "Notice to File Certification of Compliance." The debtors will then have 60 days to execute and file with the Court and the Trustee the "Debtors' Certification of Compliance with USC §1328" form that accompanies this Local Rule and which can be found on the Local Forms section of the Court's website. [Form 4008-1A.] If the debtors fail to file this form within the 60 day period, the case may be closed by the Court Clerk's Office without the issuance of a discharge.

(Note: In this Form the debtors are certifying, among other things, that they have taken the personal financial management course required by Code section 1328(g). If the debtors have not taken this course by the time they have completed their plan payments, the Court's discharge procedure appears to give the debtors 60 additional days from the date on which the Notice is sent to them to complete the course.)

Once the debtors have filed the Certification form with the Court, the Clerk's Office will set the case for a discharge hearing no less than ten days after the form is filed. Notice of the hearing is only sent to the debtors, their attorney, and the Trustee. The case will be called on the Court's docket for that day, and as long as there are no objections by any party there will be no actual hearing and no need for the debtors to appear. The Clerk's Office will proceed to issue the Discharge Order within ten days after the hearing. Of course, if objections to the discharge have been filed prior to the hearing, debtors' counsel will need to be prepared to present appropriate evidence at that time.

B. **DSO Letters:** At the time of discharge, the Trustee is required by BAP & CPA to send notice to any DSO (Domestic Support Order) payee and the state agency in charge of collecting child support to alert them to the issuance of the discharge and certain information about the debtor and any of his/her non-dischargeable debts. **[FORM # 36].**

C. **Disposition of unclaimed creditor funds:** When a check has been sent by the Trustee's office to a creditor with an allowed claim, and the check is returned "undeliverable" or with a statement from the creditor that the identity of the debtor cannot be determined, the Trustee's claim clerk will first attempt to determine the creditor's correct address or provide the creditor with additional identifying information. If these steps are unsuccessful, the creditor's claim will be placed on hold and the check voided until such time as the necessary information has been provided. Once the necessary information has been provided, the Trustee will reissue the check to the creditor.

If such information is not provided within 90 days and the case is still open, the Trustee will file an objection to the creditor's claim. If this objection is sustained, the funds will be distributed to other allowed claims. If the case has been completed, the Trustee's financial officer will forward the funds to the Bankruptcy Court's Registry, where the funds will be held indefinitely. If you have questions about funds which may be in the Registry, please contact the Court's Clerk's Office.

D. **Revocation of discharge**: *In re Cathy Knupp*, #06-50342, Bankr. Ct., W.D. Va., 7/26/11 Krumm opinion [a case of first impression in the W.D. of Va; Court sets out the standards and elements that must be proven and finds that in this instance the discharge should be revoked].

VII. MISCELLANEOUS

A. **Complaints about Trustee staff or communications**: The Trustee's office is committed to providing prompt, courteous, and accurate service and information to debtors, attorneys, and creditors involved in Chapter 13 cases. Any complaints concerning Trustee staff will be handled directly by the Trustee, Herbert L. Beskin, and can be transmitted to him using the

phone, fax, or e-mail contact information found on the home page of this web site.

B. **Internet Resources for Bankruptcy Lawyers**. Nova Southeastern University published in the summer of 2011 Legal Studies Paper No. 11-003 entitled "The Bankruptcy Lawyer's Guide to the Internet," by Pearl Goldman. It contains a variety of sites that practitioners might find helpful. The paper can be downloaded without charge from The Social Science Research Network Electronic Paper Collection: http://www.ssrn.com/abstract=1815219.

(Version #7, 10 /05/ 2011)

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