

ONGOING MORTGAGE POLICY IN CHAPTER 13 CASES
ADMINISTERED BY CHRISTOPHER MICALE

I. Ongoing Mortgage Policy

- A. This policy will be effective for all cases filed on or after October 1, 2015. This date was selected to give attorneys time to prepare future clients and file cases for already retained clients who were not advised of this policy.
- B. Cases filed on or after October 1, 2015
 - 1. New cases without a confirmed plan:

If the deed of trust is 3 or more mortgage payments delinquent, all portions of the mortgage must be paid through case administration. “Mortgage payments” means three payments of principal and interest. If the amount of the arrearage is more than three payments but actually represents escrow shortage or something other than principal and interest, the ongoing mortgage does not have to be paid through case administration.
 - 2. Case filed on or after October 1, 2015, and the confirmed Plan provided direct payment of the ongoing mortgage

If the debtor defaults on a mortgage payment being paid directly all arrearage and ongoing payments must be paid through the Plan. This resolution will likely be the result after a motion for relief is filed.
- C. Cases filed prior to October 1, 2015
 - 1. Both cases without a confirmed Plan and cases where there is a motion for relief post-confirmation will be reviewed on a case by case basis and specific objection raised on a discretionary basis as to whether the ongoing mortgage payment needs to be paid through case administration.
 - 2. Under any event, all arrearages, regardless whether incurred pre- or post-confirmation must be paid through case administration.
- D. This policy has NOT been approved by Judge Black; upon receipt of this policy, please do not call his chambers to discuss this policy with him. Disputes over the Policy and its implementation will have to be brought before Judge Black and based on his decision the policy and implementation may be altered.

II. Frequently Asked Questions

A. Why should I have to pay a Trustee's fees on ongoing mortgages?

1. The U.S. Trustee will not allow ongoing mortgage payments to be charged a different fee than other creditors. Waiving fees on ongoing mortgage claims may also violate 28 U.S.C. § 586(e)(2).
2. The most significant resistance to paying ongoing mortgages through case administration is the cost of the Trustee's fee. However, as the amount of receipts increase for my office, the fee will correspondingly decrease. Consistent and sustained levels of receipts will cause me to reduce the fee used to project funding for a Plan.
3. Example
 - a. If my office requires \$100 to operate and receipts are \$1,000, my office will charge a 10% fee. However, if my office requires \$100 to operate and my receipts are \$1,500, my office will charge a 6.7% fee.
 - b. Ongoing mortgages paid through case administration have not demonstrated the need for me to increase office expenditures.
 - c. Thus, receipts at a consistent and sustained level of \$1,500 will not allow me to project funding at a level of 10% as my office is not allowed to carry forward a significant surplus from one fiscal year to the next.
4. A late fee is sometimes as much or more than the Trustee's fee.

B. Why will this be good for the debtors?

1. Ongoing mortgage programs in other districts have shown a significant decrease in the number of motions for relief filed. If a motion for relief is not filed, then the debtor is not charged fees by the mortgagee or their own counsel for its resolution.
2. Trustee's records are often superior to either the debtor or the mortgagee and thus resolutions to payment disputes happen more quickly and efficiently. Creditors also have online access to all disbursements I make and can easily track information about disbursements from my office.
3. Costs in litigating disputes over escrow calculation issues, notices of final cure and motions for relief may be borne by my office as my office is in control of all payments to the creditor. NOTE: In a case with an ongoing mortgage paid through case administration, it may appear as if the Debtor's and Trustee's interests are aligned. However, nothing in this policy should be construed to mean that the Trustee actually represents the Debtor. It is therefore important for Debtor's counsel to monitor all pleadings and respond when and if appropriate to any pleading. For example, assume the Trustee is paying the ongoing mortgage through case administration and a motion for relief is filed. The Debtor actually defaulted on Plan payments, thus causing the ongoing mortgage to fall into arrears. While the Trustee may respond to the motion for relief simply to keep relief from being granted on a default basis, it is still the Debtor's responsibility to answer as to the payment default and explain how the matter will be resolved.

C. What if a debtor cannot afford the Trustee's fee even if Trustee uses a reduced rate for projections?

1. While I appreciate attorneys may counsel their debtors against retaining a home, many debtors will not appreciate the advice unless they see all of their debt payments in one monthly payment. By breaking apart the Plan payment from the car payment and from the mortgage payment, debtors continue the habit of robbing Peter to pay Paul. They short the car payment to make the Plan payment but then short the mortgage payment to pay the car payment. If the debtor saw all debt payment in one monthly amount compared to their budgets, they may then appreciate that they simply cannot retain all of the secured debt. Hopefully, something will give before the case is filed and the first Plan confirmed will be realistic for them to complete. Or, they may elect to not file Chapter 13 and simply surrender collateral and file a Chapter 7. In either event, doesn't either choice result in a successful bankruptcy case?

D. Will any exceptions be made to the policy?

1. Generally speaking, yes, exceptions will be made. However, while discussing an ongoing mortgage policy, one comment criticized a rule where only a minority of cases had the ongoing mortgage paid through case administration. The criticism pointed out that these cases were not receiving the benefit of a reduced Trustee's fee and this was a legitimate criticism. The only way to implement a successful ongoing mortgage policy is to have enough cases paying the ongoing mortgage through case administration such that it causes a reduction in the Trustee's fee. Thus, exceptions will likely occur in rare cases and only where the facts are so extreme to justify an exception.
2. Examples of what may NOT qualify as an exception
 - i. My debtor cannot afford the Trustee's fee. Without more, this may not justify an exception. The inability to afford the Trustee's fee may demonstrate a debtor's inability to afford a home. If a debtor cannot afford the corresponding monthly Trustee's fee, can the debtor afford to repair the home when the hot water heater breaks or any of the other numerous issues that arise with home ownership?
 - ii. It was the mortgagee's fault that the debtor fell into arrears because of a botched loan modification. Again, without more, this may not qualify as an exception because the mortgagee already demonstrated it may not be the best qualified to administer the payments. If the loan modification was botched, is it not more likely true that the application of payments under the Plan will also be botched? Who is in the better position to defend against misapplication of payments, the debtor or the Trustee? While the modification was pending can the debtor demonstrate he or she made all payments called for under the modification or if the modification required a suspension of the mortgage payment that the debtor escrowed the payments and is prepared to bring them immediately current?

E. What should my Plan contain if the ongoing mortgage is paid through case administration?

1. At the filing of the petition or the Plan, make sure to also file the order authorizing the Trustee to commence the ongoing mortgage payment pre-confirmation. This will ensure timely payments and hopefully ward off early motions for relief.
2. Both Herb Beskin and I recently drafted standard language for paragraph 11. Both judges have seen the language and are aware of its provisions. The language is as follows:

The Trustee will pay all post-petition mortgage payments through the plan. These mortgage payments will be classified and paid as follows:

(1) Class 1: The first two mortgage payments due after filing of the petition will be paid pro-rata by the Trustee as post-petition arrears, including late fees, in the approximate amount of \$_____ ; and

(2) Class 2: The regular post-petition mortgage payments will be paid by the Trustee beginning with the third mortgage payment due after the filing of the petition [(month), (year)]; the total number of Class 2 payments to be made by the Trustee will equal the number of monthly plan payments being made by the Debtor(s) to the Trustee [approximately _____ months], unless the plan pays off early.

The total number of monthly mortgage payments to be paid by the Trustee (Class 1 plus Class 2) is _____ months, unless the plan pays off early.

Disbursement of ongoing post-petition mortgage payments from the Chapter 13 Trustee may not begin until an allowed claim on behalf of the mortgagee has been filed.

At the completion of the term of the plan, it is predicted that the Debtor(s) shall resume monthly mortgage payments directly pursuant to the terms of the mortgage contract beginning with the payment due in (month), (year).

3. Remember, it is imperative that you include the first two ongoing mortgage payments as an arrearage claim. This will allow the first Plan payment to be disbursed not only to the then current ongoing mortgage payment but also other claims like car payments and attorney's fees. If you do not include this post-petition arrearage claim, the ongoing mortgage portion will already be months in arrears and the first distributions under the Plan will be used to catch up the ongoing mortgage payment and payments to car claims and attorney's fees will be delayed. Using the language above will resolve this issue.
4. It is also important that the Plan be specific how the mortgage claim will be addressed. Lack of specificity will cause objections. Also remember that mortgage companies and servicers deal in terms of months. Thus, if the arrearage provides some nebulous number without specificity as to which months it includes, confusion and objections are bound to follow.

E. How will the Trustee handle Notices of Payment Change issued pursuant to R. 3002.1(b)?

1. The purpose of R. 3002.1 was to permit the debtor or trustee “to adjust postpetition mortgage payments to cover any undisputed claimed adjustment.” Thus, when a notice of payment change is issued, I will adjust the ongoing mortgage claim accordingly and simply pay the adjusted mortgage payment in order to ensure the debtor is current by the end of the Plan. The change will not automatically result in a motion to modify or dismiss for funding. A motion to modify or dismiss for funding will be filed only if the priority and other secured creditors will not be paid in full or the variation in the dividend to unsecured creditors is so great that either funding will need to increase or the debtor will need to modify the Plan providing notice of the significantly lower dividend.

Promoting a Complete Fresh Start: Support for Conduit Payments

Direct payment of an ongoing mortgage by a chapter 13 debtor has been the historical practice in the Western District of Virginia. However, given the reality that many debtors default in post-petition mortgage payments, support for allowing a trustee to act as a mortgage conduit is growing nationally and should be implemented as routine practice in the Western District.

Courts considering the issue typically start at § 1326(c) as justification for conduit payments, which provides that unless it is otherwise stated in the plan or a confirmation order, a trustee is directed to act as a disbursing agent to creditors. Congress said that this section “makes it clear that the chapter 13 trustee is normally to make distribution to creditors of the payments made under the plan by a debtor.”¹ Based on this, courts have found that a presumption exists in favor of a trustee acting as a disbursing agent for all payments to creditors, but leaving open the possibility of direct pay.²

Nevertheless, recognizing the problem inherent in leaving already delinquent debtors to their own devices, many courts have gone a step further by adopting local rules or standing orders mandating conduit pay, particularly where a debtor is already in arrears.³ Within the Fourth Circuit, the Western District of North Carolina requires all conduit payments, regardless of arrears, to be made through a trustee.⁴ The Eastern District of North Carolina likewise requires all payments to be made through a trustee unless the trustee or the court allows direct pay.⁵

Standing practice is based on historical experience: courts routinely find that debtors already in arrears will likely default during the course of the chapter 13.⁶ The causes may be several: (a) a debtor cannot afford a home but is relying on a rob from Peter to pay Paul scenario to stay afloat; or (b) the debtor is not living within the budget initially prepared during credit counseling. Regardless the cause, continuous defaults exacerbate the ability of a chapter 13 debtor to successfully complete a case with both a mortgage in good standing and a discharge of unsecured debt. In this district, repeat filings are commonplace with a mortgage arrears higher than it was in a preceding case. Confirmation in each of these cases implicates feasibility and good faith at confirmation, something a trustee could challenge on a case-by-case basis. However, case-by-case litigation is an inefficient means for addressing a systemic concern. Therefore, if all parties involved work together in adhering to a uniform policy, the ultimate purpose of chapter 13 is more likely to be achieved: a fresh start with ongoing secured debt in good standing.

¹ Sen. Rep. No. 95-989 (1978 Acts).

² See e.g.; *In re Foster*, 670 F.2d 478, 486 (5th Cir. 1982); *In re Mendoza*, 111 F.3d 1264, 1269 (5th Cir. 1997); *In re Reid*, 179 B.R. 504, 507 (E.D. Tex. 1995); *In re Gregory*, 143 B.R. 424, 427 (Bankr. E.D. Tex. 1992).

³ Outside the Fourth Circuit at least the following courts have addressed conduit payments by local rule or standing order: (a) District of Arizona; (b) Middle District of Georgia; (c) Southern District of Indiana; (d) District of Kansas; (e) Eastern District of Michigan; (f) District of Nevada; (g) Northern District of Ohio; (h) Southern District of Ohio; (i) Western District of Texas; and (j) Western District of Washington.

⁴ Bankr. W.D.N.C. Loc. R. Bankr. P. 3003-1(b).

⁵ Bankr. E.D.N.C. Loc. R. Bankr. P. 3070-2(b).

⁶ For discussion of justification for conduit payments, see e.g.; *In re Giesbrecht*, 429 B.R. 682, 690-91 (9th Cir. B.A.P. 2010); *In re Perez*, 339 B.R. 385, 409 (Bankr. S.D. Tex. 2006); *In re Carey*, 402 B.R. 327 (Bankr. W.D. Mo. 2009).