Fall 2012

Big 13 Conference

22nd Annual DFW Area Chapter 13 Consumer Bankruptcy Conference
Monday, October 22, 2012
Arlington Convention Center
Arlington, Texas

Registration form also available on Dallas and Fort Worth Chapter 13 Trustees' websites through www.13network. com.

Staff Attorney Speaks

by Deborah B. Morton, Staff Attorney for Tom Powers

Chapter 13 trustees and debtors face a tax refund conundrum with the change in Internal Revenue Service procedures. Prior to 2011, the Chapter 13 trustees in the Northern District received tax refunds directly from the I.R.S. **if the debtor owed taxes at the time of the bankruptcy filing.** As a general rule, the trustees only dealt with those refunds which were actually received by them. Once the I.R.S. stopped forwarding refunds to the trustees, the trustees' procedures changed in order to effectuate the intent of General Order 2010-10, paragraph 9.

In 2012, the Chapter 13 trustees implemented new procedures for handling tax refunds, which affected both debtors who owed and did not owe the I.R.S. at the time of filing. In early 2012, the trustees sent letters in all active cases requesting that the debtors provide 1) a copy of the 2011 tax return; 2) a copy of an extension; or 3) an affidavit that the debtor was not required to file a tax return for 2011. Note: An affidavit will need to be provided for **each** year in which the debtor is not required to file.

When the tax return is received by the trustee, it is reviewed to determine if the debtor is entitled to a refund. If the debtor is not entitled to a refund or the refund for the **household** is less than $2000, the tax refund matter will be closed for that particular year. The $2000 that the debtor is entitled to retain applies to the entire household regardless of the fact that separate tax returns may be filed by the debtor and the spouse. In the event that the tax refund exceeds $2000, it is the trustees' position that this amount constitutes an "Excess Refund" in accordance with Paragraph 9(c) of the General Order and should be paid to the trustee for the benefit of general unsecured creditors with allowed claims.

If the trustee receives the Excess Refund from the debtor, it will be paid to the general unsecured creditors with allowed claims, and the plan base will be raised. In Fort Worth, this will be accomplished through the filing of a Notice of Intent to Disburse the Excess Refund and Raise the Plan Base ("NOI"). In Dallas, this will be accomplished by a letter sent to the debtor and debtor's counsel advising that the Excess Refund will be paid to allowed general unsecured creditors and that the plan base will be raised. Debtor's counsel may request that the debtor be allowed to receive the Excess Refund by 1) filing an objection or response to the NOI in Fort Worth; or 2) providing an affidavit signed by the debtor together with supporting documentation as to why the debtor needs to retain the Excess Refund in Dallas.

In Dallas, if, after reviewing the affidavit and supporting documentation, the trustee agrees that the debtor should be allowed to retain the Excess Refund, a Notice of Intent to Allow Debtor to Retain Refund will be filed by the trustee and served upon all creditors. If the trustee does not agree, a letter will be sent to the debtors requesting that the Excess Refund be sent to the trustee. The trustee may agree that the debtor is entitled to keep part but not all of the Excess Refund.

If the trustee does not receive the Excess Refund and the debtor alleges that he should be allowed to retain the refund, a Motion to Retain Tax Refund should be filed by the debtor. The motion should specifically state why the debtor needs the refund, and an affidavit with supporting documentation should be attached to the motion. The motion and attached affidavit **should be served upon all creditors**.

NOTE: The trustees have discretion to reach agreements with debtors. The degree of discretion varies from court to court. In Dallas, the trustee currently has discretion to reach an agreement only if the amount of the refund is $5000 or less. This figure includes the initial $2000 amount that all debtor households are entitled to retain. In Dallas, if the refund exceeds $5000, the request must go to hearing

even if there is no opposition by the trustee.

If the debtor fails to provide a copy of the tax return or extension or an affidavit, the trustee will file a Motion to Compel to require debtor to provide the return **AND** pay the Excess Refund to the trustee. The motion will contain negative notice language and will be set for a pre-hearing conference. In Dallas, the trustee will have a separate pre-hearing conference for tax matters. If the matter is not resolved at the pre-hearing conference, it will be heard on the court's Chapter 13 docket. At the hearing, the trustee will seek an order compelling the debtor to provide the return and pay the refund to the trustee within a certain period of time.

If the debtor provides the return or an affidavit that no tax return is due and, if applicable, pays the Excess Refund prior to the pre-hearing conference, the motion to compel will be withdrawn. If the debtor provides the return but is unable to pay the Excess Refund prior to the pre-hearing conference, the debtor may enter into a short term interlocutory order to pay the Excess Refund ("Tax I.O.") to the trustee. The tax I.O. payments will be handled through an ACH due on the 15th of each month. Modifications to pay the Excess Refund over the remaining plan term will be objected to by Tom Powers and Alice Whitten. If the debtor provides a copy of an extension, the motion to compel will be passed to a pre-hearing conference after the date on which the return is due.

Debtor's counsel may file a response to the motion stating why the debtor should be allowed to retain the Excess Refund. This response should include an affidavit signed by the debtors as to why they need the Excess Refund with supporting documentation attached. If a response is filed, and the trustee and the debtor reach an agreement, an order will be entered. Otherwise, the matter will be set for hearing.

If the court enters an order compelling the debtor to provide the tax return and/or pay the Excess Refund to the trustee and that is not done, the trustee will file a motion to dismiss for failing to abide by a court order. Obviously, the trustees' preference is that these matters are resolved before it is necessary to file such motions. The trustees are aware that many debtors need the Excess Refund. If possible, debtor attorneys should encourage their clients to provide their returns in a timely manner to the trustees and to contact their attorney's office before they spend their tax refund.

Save the Date
Monday,
October 22, 2012

DFW Area
Chapter 13 Consumer
Bankruptcy Conference

Arlington Convention
Center
Arlington, TX

Chapter 13 Trustees:
Dallas - Tom Powers
Fort Worth - Tim Truman
Fort Worth - Alice Whitten

Case Decisions

by Tim Truman

Good Faith

Viegelahn v. Essex, 452 B.R. 195 (W.D. Tex. 2011)

Under the plan, debtors retained a $600,000 home with virtually no equity while paying only 1% to unsecured creditors. The mortgage payment was 51% of debtors' monthly income and over four times the Internal Revenue standard for housing and utilities. The trustee filed a good faith objection. The bankruptcy court overruled the objection and confirmed the plan saying, "We already know we have a statute that is designed to help people keep their homes, and we already know that Congress also, *de facto*, put an upper limit on what kind of home you can keep because they put an upper limit of how much secured debt you can take into Chapter 13."

On appeal, the district court first had to determine whether the bankruptcy court's decision was based on facts, in which case the clearly erroneous review standard would apply, or if it was based on a legal interpretation, in which case the *de novo* review standard would apply. In as much as no witnesses were ever sworn in to give testimony and no evidence was presented or admitted to support debtors' burden to show good faith and the bankruptcy court ultimately confirmed the plan based on its interpretation of § 109(e) eligibility limits and the underlying purpose of Chapter 13 to allow debtors to keep their homes, the bankruptcy court's decision to overrule the trustee's good faith objection had to be based on a legal conclusion rather than on facts. As such the order was subject to *de novo* review.

The court said that just because a plan may comply with § 1325(b)(3), it does not necessarily satisfy the good faith test of § 1325(a)(3) which must be based on the totality of the circumstances.

The court adopted the approach taken in *Owsley*, 384 B.R. 739 (Bankr. N.D. Tex 2008) that expenses deemed "reasonably necessary" under § 1325(b)(3) are presumed to be in good faith under § 1325(a)(3) but that presumption can be rebutted by aggravating circumstances, an example being a luxury vehicle purchased on the eve of bankruptcy. Here, debtors had not paid income taxes for three years prior to purchasing their home. They proposed to retain a home valued at $600,000 while paying only 1% of the $136,681.46 unsecured debt owed to IRS. They presented no evidence of why retention of the home might be necessary, and they seemed unwilling to engage in meaningful belt tightening. These factors constituted sufficient aggravating circumstances to rebut the presumption of good faith. The order confirming the plan was reversed.

Res Judicata

Countrywide v. Stewart, 2011 WL 1899820 (E.D. La 2011)

Debtor's chapter 13 plan provided for a pre-petition home mortgage arrearage claim of $5,622.41 (9 payments). The mortgage company did not object to confirmation. The plan was confirmed February 12, 2004. The mortgage company never filed a proof of claim. Forty-six months into the case, the mortgage company's successor filed a motion to allow a late-filed claim for $16,404.23 in pre-petition home mortgage arrearages (20 payments). The bankruptcy court *sua sponte* ordered the chapter 13 trustee to object to the claim, and, after a hearing, disallowed the claim. Citing *Espinosa* (130 S.Ct. 1367, 176 L.Ed.2d 158 (2010)), the bankruptcy court concluded that the confirmed plan was *res judicata* and binding on the mortgage company as to the maximum amount of the claim regardless of the amount set forth in its proof of claim. The district court reversed and vacated the judgment of the bankruptcy court holding that *Espinosa* did not apply.

The court distinguished *Espinosa*, saying:

> In *Espinosa*, the debtor had not only achieved plan confirmation without objection but had completed plan payments and received a discharge under § 1328(a). The question presented was whether, several years after the debtor's case was closed, a creditor holding the debtor's

> student loans could have the confirmation order set aside as "void" under Federal Rule 60(b)(4) on grounds that the student loans can only be discharged through an adversary proceeding, and not through a provision in a chapter 13 plan, as the debtor had allegedly done. The debtor in *Espinosa* did provide for payment of his student loans through the chapter 13 plan, but proposed to pay only the principal and specifically provided in the plan that the accrued interest would be discharged on completion of the plan. The dispute arose when the creditor later attempted to collect the unpaid interest on the loan.
>
> Where the deadline for filing claims falls after the deadline for objecting to a chapter 13 plan, the failure of a creditor to object to a plan on the grounds that the plan has misstated the amount of the claim cannot, consistent with due process, bind the creditor with respect to the amount which the creditor is required to identify no earlier than the deadline for filing proofs of claim. Thus, the debtor's proposed plan treatment of Countrywide's secured claim – payment of less than the full pre-petition arrearage – would not, standing alone, preclude the bankruptcy court from reaching a post-confirmation conclusion that the amount of Countrywide's claim for pre-petition arrearage is greater than that set forth in the debtor's chapter 13 plan.

The court acknowledged the continuing validity of *Simmons*, 765 F.2d 547 (5th Cir. 1985), wherein the Fifth Circuit held that a chapter 13 plan may not substitute for an objection to a secured creditor's proof of claim, and *Howard*, 972 F.2d 639 (5th Cir., 1992), wherein the Fifth Circuit held that a chapter 13 plan which purports to reduce or eliminate a creditor's secured claim is *res judicata*, as to that creditor only if the debtor has filed an objection to the creditor's claim. If no objection is filed to a secured claim, the creditor is entitled to rely upon its lien and not participate in the bankruptcy proceeding.

Disposable Income

*In re Stretcher***,** 466 B.R. 891 (Bankr. W.D. Tex, 2011)

Debtor settled a pre-petition cause of action post-confirmation for $12,633.00 net and filed a modification to pay from it a lump sum of only $2,367.00 to unsecured creditors. Debtor contended this met the best interest of creditors test since unsecured creditors were already receiving $10,266.00 under the plan. The trustee objected saying all the net settlement proceeds should go to unsecured creditors under the disposable income test. Debtors argued that the disposable income test of § 1325(b) is not applicable to plan modification because § 1325(b) is not specifically listed as being applicable in § 1329. The court, citing *Braune*, 385 B.R. 167 (Bankr. N.D. Tex, 2008), held that the requirement of § 1325(a)(1) that a modification "conform to the provisions of this chapter and with other applicable provisions of this title" necessitates that a modification proposed by a debtor comply with the disposable income test. The court acknowledged that this is currently a minority view. Citing *Launza*, 337 B.R. 286 (Bankr. N.D.Tex, 2005), the court held that monies received in the settlement of a lawsuit constitute income.

Exemptions

In re Chilton, 674 F.3d 486 (5th Cir, 2012) Held: "funds in inherited IRA constituted "retirement funds" within the meaning of statue providing for the exemption of retirement funds from bankruptcy estates."

Modification of Home Mortgage

In re Redden, 2011 WL 2292312 (Bankr. S.D. Tex 2011)

Debtors' plan proposed to pay home mortgage in full by 35 monthly payments of $1,507.25 followed by a balloon payment of $140,040.25 in the 36th month. The court cited G*rubbs*, 730 F2d 236 (Fifth Cir. 1984), which held:

> Section 1322(b) of the Code, construed in the light of its legislative history and of its context within Chapter 13 as a

> whole, evinces no legislative intent that a home-mortgagor debtor is barred either (a) from curing a pre-petition acceleration into maturity of the unpaid installments due upon his home mortgage, or (b) from proposing (in his Chapter 13 plan for consideration by the bankruptcy court) that all past due or matured amounts secured by his home mortgage be paid during the term of his plan, if approved by the court – so that, thereby, proceedings upon foreclosure of his home mortgage may properly be stayed, while permitting the debtor to pay off his arrearages in accordance with the terms of a plan confirmed by the court.

The court then pointed out that after *Grubbs*, § 1325(a)(5)(B)(iii)(I) was added to require "equal monthly" payments on secured claims and held that balloon payments violate such section. Cause existed therefore to lift the stay.

Service on a Domestic Corporation

In re Brewster, 2011 WL 448792 (Bankr. W.D. Tex 2011)

Bankruptcy Rule 7004(b)(3) provides that service "upon a domestic corporation is made by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law. . ." The bankruptcy court held that by mailing the objection to claim to the attorney who was the mortgage company's authorized agent per notice of appearance as well as to the address listed by the creditor on its proofs of claim as the address to which notice should be sent, the debtor satisfied the requirements of the Rule.

Insurance Proceeds from Storm Damage to Home

In re Hill, 2011 WL 6936357 (Bankr. S.D.Tex 2011)

The court held that the debtor's claim for damage to their home from Hurricane Ike was exempt and should not go to the trustee nor to the debtor but rather to debtor's mortgage company to apply first to repairs and second, against the mortgage arrearage.

The Thirteen Connection
is a publication of the Dallas and Fort Worth Chapter 13 Trustees.

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Topics and Speakers

U.S. Trustee Report - Bill Neary and Lisa Lambert

Bankruptcy Rules 3001 and 3002.1; relating to home mortgage claims – June Mann and Mark French

Processing a Business Case in Chapter 13 – Gary Armstrong, Alice Whitten, and David Rainey

Mortgage Loan Modifications; requirements for eligibility, lender expectations, issues facing the courts and trustees – Edward J. Boll, III

Local Rules and Compliance with Local Rules – Hon. D. Michael Lynn, Hon. Russell F. Nelms, and Hon. Stacey G.C. Jernigan

Case Law Review – Gerrit Pronske

Specific tax issues; dischargeability for income taxes, using account transcripts, identifying tax liabilities which will be unsecured but nondischargeable, tax return preparation tips – David Coffin and Jay Schlichting

Chapter 13 Trustee Panel – Tim Truman, Tom Powers, and Alice Whitten

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Registration 8:00 a.m.
Program 8:30 a.m. - 4:45 p.m.
Lunch and parking
fees included.

Registration Form
22nd Annual DFW Area Chapter 13 Consumer Bankruptcy Conference

Pre-registration:	**$125.00, non-attorneys**
	$175.00, attorneys
At the seminar:	**$150.00, non-attorneys**
	$200.00, attorneys.

Registration fee pays for parking, continental breakfast, and lunch.
Fees not refundable. Register by October 15, 2012, to be included for lunch.
One attendee per form, please. 6.75 hours MCLE applied for.

Name _____ **Amount** _____

Address _____

City and Zip _____
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Mail registration form and check for payment to:

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