



U.S. Department of Justice

Office of the United States Trustee
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MEMORANDUM

TO: Chapter 7 Trustees for the District of Colorado

FROM: Gregory Garvin
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Regional Supervisory Auditor

SUBJECT: Local Supplemental Guidance for Chapter 7 Trustees

DATE: January 29, 2020

Creditor Meetings

1. Electronic Pictures of Social Security Cards and Verification of Same

In an effort to comply with 11 U.S.C. § 522(h), some debtors' counsel may be presenting digital images of their clients' Social Security cards (via an iPad or some other handheld device) as proof of debtors' identification at the § 341(a) meeting. We do not believe this is sufficient proof. As set forth in the *Handbook for Chapter 7 Trustees* (Page 3-5):

Additionally, at the § 341(a) meeting each individual debtor must present original government-issued photo identification and confirmation of the social security number listed on the § 341(a) meeting notice received by the trustee. Any document used to confirm a debtor's identity and social security number must be an original (copies may not be accepted, except that in the discretion of the trustee, a copy of a W-2 Form, an IRS Form 1099, or a recent payroll stub may be accepted). This helps ensure an accurate court record and deters identity theft. (emphasis added).

Because debtors have been able to provide such documentary proof prior to the advent of the iPad, we do not believe it imposes an undue hardship for debtors to continue doing so. I will also ask the administrators of the various debtors' bar list serves to send this information out to their members.

2. Debtors § 341(a) Meetings of Creditors and Personally Identifiable Information (PII)

The U.S. Trustee Program defines PII to include "information which can be used to distinguish or trace an individual's identity . . . alone, or when combined with other personal or identifying information." A debtor's name and address, when combined, meets that definition. To minimize unnecessary additional public disclosure of this PII, the Program's policy has been modified regarding the

trustee's requirement that debtors state their addresses on the record. The required question stating, "state your name and current address for the record" was changed to: "State your name for the record. Is the address on the petition your current address?" See the *Handbook for Chapter 7 Trustees Supplementary Materials*.

Questions have been raised nationally with respect to PII and the trustees' conduct of § 341 meetings of creditors. Specifically, the question is whether there is a PII issue associated with (1) the trustee's calling of a case by the debtor's full name and case number, and the trustee's similar identification of the case for the record at the § 341 meeting; and (2) the posting of a calendar of scheduled section 341 meetings showing a debtor's full name and the full case number, either on the trustee's web site or outside the meeting room.

Trustee's calling of the case. As to the first issue identified above, it is important that trustees be able to, on the record, properly identify debtors at section 341 meetings. Accordingly, with respect to the calling of a § 341 meeting, it is appropriate and trustees should continue to identify on the record each case individually at the start of the meeting using the debtor's full name and full case number.

Posting dockets on trustee websites. With respect to the posting of a § 341 meeting calendar on a trustee's web site, placing a debtor's PII on the Internet significantly increases the risk of identity theft or improper use of a debtor's information. Therefore, the Program discourages trustees from posting § 341 meeting calendars on a trustee's web site where the calendar includes a debtor's full name and case number, unless access is limited through a password or other means only to debtors and/or their attorneys and, preferably, only to the information specific to that debtor. If such access limitations are not possible, trustees should instead limit the amount of information that is included on the calendar. For example, include only the last name of the debtor and a portion of the case number. In addition, trustees should evaluate their state privacy laws to determine if there are any limitations on what may be posted to a public web site.

Posting dockets outside meeting rooms. With regard to the posting of a § 341 meeting calendar showing a debtor's full name and case number, there is no prohibition against a trustee posting a paper copy of the § 341 meeting calendar outside of the meeting room; however, it must be removed at the conclusion of the meeting and properly disposed, preferably by shredding. Again, a suggested alternative to posting a debtor's full name and case number is to limit the amount of information that is included on the calendar.

Trustees Loss or Potential Loss of Personally Identifiable Information (PII)

3. Notification Procedures in the Event of Loss of PII

There have been a number of instances where bankruptcy documents, laptops, personal computers, personal digital assistants (PDAs), and removable drives belonging to private trustees have been lost or stolen from a trustee's office, automobile, or home. In a few of these instances, personally identifiable information (PII) was put at risk.

Attached for your information and review are revised pages of the Handbook which has been updated to include specific guidance to the trustees in the event of a loss or potential loss of PII, and (2) a requirement that trustees notify the United States Trustee if they become aware of an intrusion into their computer system. The critical points of the policy are summarized below.

Upon discovery, the trustee must report to the United States Trustee the loss or potential loss of PII, including the loss or potential loss arising from the theft of documents such as § 341 meeting notices and final reports, personal computers, laptops, PDAs, and removable drives such as USB flash drives and

CD-ROMs.

The trustee must discuss with the United States Trustee a possible course of action, the appropriate level of notification to affected individuals, the resources needed, and remedial actions to be taken. In turn, the United States Trustee should promptly notify the Assistant Director for the Office of Oversight of the loss or potential loss of PII data and the proposed action plan.

The appropriate level of notification to affected individuals is determined by the risk the data loss poses to those individuals. The trustee is required to notify affected individuals if the loss involves full Social Security numbers, or full banking, credit card, or other financial PII.

The trustee must review state law to determine whether there are statutory requirements addressing the situation. For example, Massachusetts General Laws Chapter 93H, Section 3, sets forth the notification procedures a person who either stores or owns data that contains PII must follow in the event of a data loss. For persons that own data, which may include trustees, the Massachusetts law requires that notice be given to the state's attorney general and director of consumer affairs and business regulation, in addition to the resident whose PII was compromised.

Notices to affected individuals must be written in clear, concise, easy-to-understand language and should contain the following information: (1) a brief description of what happened; (2) a description of the type of PII involved in the breach (for example, full name, Social Security numbers, date of birth, account numbers); (3) a brief description of actions being taken, and by whom, to investigate the breach, to mitigate losses, and to protect against further breaches; (4) contact procedures for people who want to ask questions or learn additional information, including a web site address and/or postal address, or a local or toll-free telephone number; and (5) the steps individuals should take to protect themselves from the risk of identity theft.

See the *Handbook for Chapter 7 Trustees*, (Pages 5-22, 5-23).

Court Clerk's Fees Required and Non-Payment of Fees

4. GPO Regarding Dismissals for Non-Payment of Fees

The following is information on the new GPO regarding dismissal of cases that was distributed to all constituencies from the Bankruptcy Court for the District of Colorado.

“Dismissals for non-payment of installment fees: PLEASE be aware that we are not going to send out Notice of Impending Dismissals for non-payment of fees as was told to you in October of 2014 (this time we mean it for cases where the proper installment fee order entered containing the notice). As you are aware, we do not have the staff to operate as a tickle system for our customers when a payment is past due. Cases will be dismissed for non-payment and we are including notice of the same in the installment fee order. Also, the Judges are testing a General Procedure Order (GPO) that may stay the dismissal for up to 180 days if the trustee filed a Notice of Possible Dividends. That GPO, GPO 2015-1, will be posted to our website today. The language in the Installment Fee Order is:

IT IS FURTHER ORDERED AND NOTICE IS HEREBY GIVEN TO THE DEBTOR AND TRUSTEE that the failure to make any designated payment timely may result in the forthwith dismissal of the case, unless a timely objection to dismissal for non-payment is filed with the court within three (3) business days of the specific installment payment deadline missed or a Notice of Possible Dividends has been filed by the Trustee, then GPO 2015-1 applies. See, 11 U.S.C. §707(a)(2), Fed.R.Bankr.P.1017(b) and L.B.R. 9014-1.

Additional information for trustees:

The stay will only work if a Notice of Possible Dividends (NOPD) is on file and it only lasts for 180 days; the stay ends if the Trustee withdraws the NOPD or requests dismissal for non-payment or upon motion of another party that is granted by the Court; at the end of the 180 days, if neither the Trustee nor the debtor has paid the fee, absent further motion and order, the case will be dismissed; there should be a new flag that is raised when your NOPD is filed in any case that has outstanding fee installment payments, it is "InstallNOPD." If we do not mark the case with that flag or accidentally remove it, it will get dismissed in our regular process. If a mistake is made, please call the Court and, if applicable, we can issue the dismissed in error entry."

5. Additional Guidance on Clerk's Notice of Fees Required

The GPO noted the changes in the Court Clerk's procedures to halt the automatic dismissals of installment payment cases when the debtor stopped paying and the trustee had identified assets. A key aspect of this was that the trustee ultimately was responsible for the filing fee.

To determine whether any fees were due, on occasion, some trustees were relying on docket text used by the court to stop the dismissal of cases. The docket text read "Zero Clerk's Fees Due." This has resulted in those trustees incorrectly believing that the filing fees had been paid when they were not, and unfortunately, needing to recover funds to pay the unpaid portion of the filing fees.

While our office has recently implemented procedures to try to catch this at the TFR stage, the Clerk's office has also changed their internal procedures to help reduce misunderstandings. Below is the description of the changes whereby the Clerk's office:

"has revised the Notice of Fees Required form ("Notice") to include cases where the Trustee has filed a Notice of Possible Dividends (NOPD) and the court has previously entered an order waiving the Chapter 7 filing fee (IFPAsset) or allowing the Chapter 7 filing fee to be paid in installments. You will start seeing the Notice shortly after the expiration of the Proof of Claim deadline;

will stop entering the "Zero Clerk's Fees Due" entry in cases that are flagged as IFPAsset or InstallNOPD;

will be implementing a new internal procedure for alerting the Chapter 7 Trustees about outstanding fees in cases that are flagged as IFPAsset or InstallNOPD.

First, we have revised the Notice of Fees Required form (Notice) to include cases where the Trustee has filed a Notice of Possible Dividends (NOPD) and the court has previously entered an order waiving the Chapter 7 filing fee (IFPAsset) or allowing the Chapter 7 filing fee to be paid in installments.

Second, the Clerk's Office will stop entering the "Zero Clerk's Fees Due" entry in cases that are flagged as IFPAsset or InstallNOPD.

Going forward, the Panel Trustees will start seeing the applicable Notice shortly after the expiration of the Proof of Claim Deadline, which is set when the NOPD is filed."

Reporting Reminders

6. No Distribution Report (NDR) with Funds Cases

In cases where a trustee elects not to administer an estate after receiving funds, the NDR with funds process must be followed. The NDRs with funds consist of the following:

Trustee's Report of No Distribution - dismissed or converted, some funds collected.

Applicable when the court enters an order either dismissing or converting the case, and some funds were

collected. The trustee is not required to file the NDR if he/she resigns from a case due to a conflict prior to the § 341 meeting.

Trustee's Report of No Distribution - minimal funds collected.

Applicable when the trustee has received assets of nominal value which he/she determines are insufficient to administer and all funds have been returned to the debtor(s). It is used when the trustee has opened a bank account. It is also used when funds are received by the trustee from the debtor or a third party after the § 341 meeting, and the trustee determines, prior to opening a bank account, that the funds constitute an insufficient amount to administer. It is not used when funds are presented to the trustee and returned to the debtor during the § 341 meeting. In such situation, the trustee should state on the record that funds were received and returned and file the No Funds NDR.

Trustee's Report of No Distribution - with funds (Adhoc).

Applicable when none of the other NDR options is appropriate. A pdf file will be attached to this docket entry. This docket entry is for a case where funds were handled by the trustee. For example, this special NDR should be used when a trustee took possession of significant funds which were determined to be exempt or fully secured.

Whenever funds have been received by the trustee, a Min Funds NDR, Dismissed/Converted NDR With Funds, or Adhoc NDR With Funds must be submitted to the TFR mailbox (USTP.Region19.DV.TFR@usdoj.gov) for review before the virtual entry is docketed. Once the bank statement reflects a zero balance, the package is submitted electronically and should include one pdf file with the report. Concurrently, the trustee must send any bank statements and cancelled checks not available electronically, any voided checks, Form 1, and a Form 2 for each bank account opened. The reviewer will notify the trustee by email when the virtual entry can be docketed with the court.

Miscellaneous

7. Payment of Exemption Claims and Non-Estate Funds

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

8. Notifying the OUST of a Change in Software Vendors and/or Banks

If you change case management software providers and/or intend on moving your estate accounts to a new bank, please contact Krista Hale, Regional Supervisory Auditor, in advance to notify of the change(s) and confirm that the prospective bank is an authorized depository and is properly collateralized.

9. Defalcation and Internal Controls

Lessons learned from a recent Chapter 7 Trustee reconstruction:

- Trustees must not abdicate duties to their assistants.
- Trustees should carefully review before signing checks; do not sign blindly.
- Make sure back-up materials are reviewed, e.g., POC, Claims Register, and Form 2.
- Trustees must review bank statements and canceled checks and do a meaningful reconciliation; simply initialing and dating bank statements is not acceptable.
- Be aware of missing pages or illegible or blanked out descriptions.

- Look for missing items.
- Look at checks, including the endorsement.
- Do a reconciliation at the end of the case (after TFR before TDR); this is the trustee's job, not the assistant's job.
- Trustees must be conscientious in compiling and reviewing required financial and case administration reports, responding to audit findings, and correcting identified issues.
- Trustee's and trustee's firm's interests may diverge if there is a loss from an estate (i.e., the firm blames the trustee), so the trustee may want to consider separate representation.

Employee Fraud Indicators:

It is very common to learn that an employee who has embezzled funds is having personal problems such as:

- spouse lost job;
- substance abuse;
- divorce and/or custody battle;
- a failing outside business;
- a serious health problem for the employee or family member; or
- a gambling addiction.

Standing trustees have observed significant changes in personality, lifestyle or appearance of employees who are later found to have embezzled trust funds.

Employees may fabricate justifications for the embezzlement by, for example, attempting to claim they were reimbursement for expenses or payment of expenses to third parties or that they were simply errors. Be alert to those excuses.

The following management approaches contribute to environments that cause embezzlements to occur and escape detection:

- lack of trustee involvement;
- lack of supervision;
- excessive delegation;
- allowing a single employee to be responsible for a transaction from beginning to end;
- insufficient investigation of potential employee's background; and
- lack of attention to complaints received in office.

Bank Account Reconciliations (*Handbook for Chapter 7 Trustees Supplementary Materials*):

- Trustee receives bank statements unopened;
- Trustee or assistant must reconcile before the end of the following month (preparer initials and dates);
- Identifies and compares bank statement balance and Form 2 balance;
- Identifies why a difference (i.e. outstanding check(s), deposits in transit, etc.);
- Case management software generated summary reports can be utilized:
 - Cut-off date must match;
 - Bank statement and form 2 balances must appear;
 - Each bank statement balance physically compared and documented with check marks;
 - If balances do not match, the reconciliation must be prepared or printed (detailed reconciliation in software) noting the differences and why; and
 - Both the preparer and the trustee must initial and date the report.