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 <u>ongoing</u> 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.

LANGUAGE WHEN TRUSTEE PAYS ONGOING MORTGAGE

Paragraph 11 language:

The Trustee will pay all post-petition mortgage payments through the plan. The first post-petition mortgage payment through the plan will begin with the _____(month), _____(year) payment, which is the third mortgage payment due after the filing of the petition. The number of regular post-petition payments paid by the Trustee shall be equivalent to the number of months from the first post-petition payment due under the plan to the month after the last monthly payment under the plan is made, which is approximately _____ months, unless the plan pays off early. This does not include the first two mortgage payments due after filing of the petition which shall be paid by the Trustee as post-petition arrears, including late fees, in the approximate amount of $_____. Disbursement of ongoing post-petition mortgage payments from the Chapter 13 Trustee may not begin until a proof of claim from the mortgage holder is filed. At the completion of the term of the plan, it is predicted that the Debtor shall resume monthly mortgage payments directly pursuant to the terms of the mortgage contract beginning with the payment due on _____ (month/year).

The two monthly post-petition mortgage payments that come due prior to the commencement of the regular ongoing mortgage payment, plus two late fees, shall be paid at the same time and method as the prepetition arrearages. Pre-petition mortgage arrearages will be paid pro-rata with other similarly classed creditors over the life of the plan. The amount of the arrearage as specified in the creditor's proof of claim shall govern unless an objection to the claim is filed.

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

IN RE: **John Doe**
and **Chapter 13**

Jane Doe **Case No. _____**

ORDER ON CHAPTER 13 PLAN PROVISION INSTRUCTING TRUSTEE TO DISBURSE REGULAR MONTHLY MORTGAGE PAYMENTS

Upon the terms of the Chapter 13 Plan filed herein by the Debtor(s), the Debtor(s) request this ORDER directing that the Chapter 13 Trustee may immediately begin disbursing regular monthly mortgage payments to _____, (hereafter the "Mortgage Company") and it appearing to the Court to be proper, it is hereby

ORDERED THAT:

1. The Chapter 13 Trustee is authorized to commence disbursing regular monthly payments to the Mortgage Company of $_____, or subsequently in such amount as the Mortgage Company provides in writing in its proof of claim or other written notice filed with the Court, beginning with the mortgage payment due for the month of _____, 20 ___, for redacted account number _____. These payments shall be mailed to the Mortgage Company at the following address [as provided by Debtor(s) counsel] _____, or subsequently at such address as the Mortgage Company provides in writing either in its proof of claim or with a notice filed with the Court.

2. These payments may be made (i) whether or not a proof of claim has yet been filed by the Mortgage Company, and (ii) only if the Debtor(s) provide sufficient and timely funds to the Trustee for this purpose.

Dated: _____ _____
U.S. Bankruptcy Judge

I ASK FOR THIS:

_/S/ (attorney name)
Counsel for Debtor(s)

SEEN:

_/S/ (Trustee name)
Chapter 13 Trustee

(Version #4, 01/20/15)

THE TEN MOST IMPORTANT THINGS
TO REMEMBER WHEN YOU'RE SETTING UP AN ONGOING MORTGAGE CASE

1. Submit the "first day order" (authorizing the Trustee to begin making mortgage payments before confirmation) the same day you file the plan.

2. The start date for the Trustee to begin making regular mortgage payments must be *after* (i) the Trustee has actually received sufficient funds from the Debtors and (ii) *after* the money has been held in his account for the requisite 14 days; do not create a default or propose an impossible order

3. You must provide the correct payment address for mortgage payments for a debtor in bankruptcy, which is probably not the same address as that for prepetition mortgage payments.

4. The monthly mortgage payment amount must be correct and exact – not estimated, not a guess.

5. Make sure the monthly mortgage payment amount in plan = amount of the mortgage payment on the claim = the amount of the mortgage payment on the first day order.

6. Separate out the pre-petition and post-petition arrears clearly in paragraph 5A.

7. Always use the suggested form language in paragraph 11.

8. The proposed plan payment in paragraph 1 should always be monthly when the Trustee is paying the ongoing mortgage; otherwise it causes confusion.

9. The Trustee must always hold funds for 14 days before disbursing them, and he disburses once monthly; make sure your plan matches this cycle and does not create a default.

10. File motion for Trustee to pay post-petition fees to help your client

To: Counsel

From: Chris Micale

Date: 5/1/16

Re: Payment of 3002.1 Fees

Fed. R. Bankr. P. 3002.1(c) permits a deed of trust/mortgagee to file a notice that it assessed post-petition fees, expenses or charges to a debtor's deed of trust. The fees must be 1) post-petition and 2) recoverable under the promissory note or deed of trust. The rule doesn't provide any instruction as to how they are to be paid and the fees likely are in addition to any proof of claim.

In 2012 Judge Huennekens issued *In re Sheppard*, No. 10-33959-KRH, 2012 WL 1344112, which effectively held that a Chapter 13 trustee was not required to pay post-petition mortgage fees claimed pursuant to Fed. R. Bankr. P. 3002.1. Judge Huennekens' decision was followed by Judge Connelly in *In re Quesenberry*, Case No. 12-62001.

While I've followed these decisions, I believed these decisions to be incongruous with a policy that requires ongoing mortgages to be paid through case administration; for, what does it benefit a debtor if mortgage payments have been brought current but there are unpaid post-petition fees which may render the account not current? In fact, I've already reviewed several cases where counsel emailed notices of mortgage fees right after Plan completion that appear to be related to fees assessed in accordance with 3002.1 but unpaid during the bankruptcy case. There is of course the problem of what to do with these charges, and worse yet, how to explain to the debtor that the mortgage may or may not be current. On November 23, 2015, I brought the matter before Judge Black and asked that he adopt a position that would allow me to disburse these fees to the creditor in order ensure the accounts were current as of Plan completion.

Judge Black ruled that while 3002.1 fees could be paid through case administration, it should only be done by an increase in the Plan payment so as to not deplete the funds earmarked for unsecured creditors. *In re Roberston,* 13-71986. I appreciate that not every debtor may want this result. So in order to implement *Robertson* and take into account all interests, I propose that counsel work with debtor to make a conscious choice whether I should pay the fee or not and communicate that choice through language in the Plan. With the choice clearly stated in the Plan everyone can proceed through the case's life with certainty on how to treat the fees and know what consequences may result from that choice.

Implementation will begin as follows:

With any Plan filed before **June 1, 2016,** I will follow *Sheppard* and *Quesenberry*, and NOT pay any fee assessed pursuant to R. 3002.1 absent a motion and order initiated by the debtor authorizing payment of the 3002.1 fee in accordance with the *Robertson* case.

Plans filed on or after **June 1, 2016**:

1) If they are silent as to treatment of fees and charges assessed pursuant to R. 3002.1: I will NOT seek to pay the fees or charges through case administration and assume the debtors will pay these directly.
2) If the debtors consciously choose to pay the post-petition 3002.1 fees directly, please include the following language in paragraph 11.

> **Any fees, expenses, or charges accruing on claims set forth in paragraph 5A or 5B of this Plan which are noticed to the debtor pursuant to Bankruptcy Rule 3002.1(c) shall not require modification of the debtor's plan to pay them. Instead, any such fees, expenses or charges shall, if allowed, be payable to the debtor outside the Plan unless the debtors choses to modify the plan to provide for them.**

3) If the debtors consciously choose to pay the post-petition 3002.1 fees through case administration, please include the following language in paragraph 11.

> **The Trustee may pay fees, expenses or charges accruing on the claims set forth in paragraph 5A or 5B of this Plan and noticed pursuant to Bankruptcy Rule 3002.1(c) only after obtaining the debtor's consent and only after the Court approves payment via an agreed motion and order modifying the Plan to increases the Plan payment in an amount sufficient to pay the fee, expense or charge together with appropriate trustee's commission.**

If the debtors elect this third option, then I will contact debtors' counsel after receipt of the 3002.1 fee and provide a form agreed motion and order that will increase the Plan payment to pay the fees. Upon approval I will submit the motion and order to the Court and pay the fee once the fee is approved. Once approved, the fees will be paid together with other secured arrearage claims. A separate claim record will be set up for each fee notice and the purpose for this is to be able to account to all parties precise detail for payment of the claim.

For those debtors electing this option, I will also review all fees, expenses, or charges and if they do not appear appropriate or reasonable, I will object. For those debtors either electing to pay the fees directly or that fail to make any election, I will not review or object to any fee, expense or charge.

2016 SESSION

VIRGINIA ACTS OF ASSEMBLY -- CHAPTER

An Act to amend and reenact § 8.01-220.2 of the Code of Virginia, relating to spouse's liability for medical care; exemption for principal residence.

[H 1128]
Approved

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-220.2 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-220.2. Spousal liability for medical care.

Each spouse shall be jointly and severally liable for all emergency medical care furnished to the other spouse by a physician licensed to practice medicine in the Commonwealth or by a hospital located in the Commonwealth, including all follow-up inpatient care provided during the initial emergency admission to any such hospital, which is furnished while the spouses are living together. For the purposes of this section, emergency medical care shall mean any care the physician or other health care professional deems necessary to preserve the patient's life or health and which, if not rendered timely, can be reasonably anticipated to adversely affect the patient's recovery or imperil his life or health.

Any lien arising out of a judgment under this section against the judgment debtor's principal residence held as tenants by the entireties shall not be enforced unless the residence is refinanced or is transferred to a new owner.

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§ 55-37. Spouse not responsible for other spouse's contracts, etc.; mutual liability for necessaries; responsibility of personal representative.

Except as otherwise provided in this section, a spouse shall not be responsible for the other spouse's contract or tort liability to a third party, whether such liability arose before or after the marriage. The doctrine of necessaries as it existed at common law shall apply equally to both spouses, except where they are permanently living separate and apart, but shall in no event create any liability between such spouses as to each other. No lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entireties.

(Code 1919, § 5134; 1932, p. 22; 1984, c. 504; 1985, c. 202.)