

FAST TRACK TO CONFIRMATION

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Getting a Chapter 13 case confirmed timely **helps pay legal fees, limits potential objections to the plan, and gives clients a sense of confidence and assurance in their counsel and in the system.**

Every Chapter 13 bankruptcy case begins with a debtor filing a petition, along with required schedules of assets and liabilities, a schedule of current income, a schedule of executory contracts and unexpired leases and a statement of financial affairs. Fed. R. Bankr. P. 1007(b). Unless the court grants an extension, a debtor must file a repayment plan with the petition or no more than 14 days after the filing of the petition. Fed. R. Bankr. P. 3015.

Between 21 and 50 days after the debtor files the Chapter 13 petition, the Chapter 13 trustee will hold a meeting of creditors. Fed. R. Bankr. P. 2003(a). No fewer than 21 days or later than 45 days following the meeting of creditors hearing, the bankruptcy judge must hold a confirmation hearing and decide whether the plan is feasible and meets the standards set forth in the Bankruptcy Code. 11 USC §§ 1324 and 1325.

Getting a Chapter 13 case confirmed at the first confirmation hearing benefits the debtor, creditors and counsel as it allows the Chapter 13 Trustee to start disbursing funds to creditors “as soon as is practicable.” 11 USC § 1326(a)(2). In reality, that is normally within the next 30 days.

Getting the case confirmed early gives the debtor less time for the case to go “off the rails.” Confirmation is the largest hurdle to conquer in a Chapter 13 case and once confirmed the confirmation order necessarily means the plan complies with 11 USC § 1325(b). Its terms bind all parties, even if incorrect under non-bankruptcy law. 11 USC § 1327; *see In re Ulrey*, 511 B.R. 401 (Bankr. W.D. Va. 2014) *holding* that despite a foreclosure concluding forty-five minutes prior to a petition, confirmation bound the creditor to the terms of the Plan which provided reinstatement and cure of the underlying deed of trust and note. While issues can (and will) arise after confirmation, having achieved a confirmed plan helps prove to the Court the debtor is invested in reaching the goal of a discharge at the end of the case.

I. THE FIRST MAJOR EVENT IN A CASE IS USUALLY THE § 341 MEETING OF CREDITORS; BECOME FAMILIAR WITH THE TRUSTEE’S PRACTICES

A. Since 2021, both Chapter 13 trustees conduct § 341 meetings by Zoom.

Make sure the debtors not only are capable of connecting to a Zoom meeting but are also familiar with navigating commands like mute and unmute themselves and can turn on their video. Are they going to participate in the meeting from a location with unreliable cell service? Do they know how to grant the Zoom app permission to access their devices camera? If not, then consider having the debtor come to your office to connect to Zoom. If the debtor cannot connect to Zoom, the 341 meeting may be continued, delaying the ability to confirm the Plan at the confirmation hearing.

Each trustee asks standard questions required by the U.S. Trustee and also other questions unique to the case. Make sure to familiarize the debtors with the questions.

B. Each Chapter 13 trustee utilizes Zoom features differently so make sure the debtor knows what to expect.

Remind the client this is an actual hearing, and they have to dress and act accordingly, along with providing technical guidance on how to access and use Zoom. Please start by advising clients to add their name to the Zoom log in so the Trustee can identify them and not have to determine if “iPhone13” is a debtor, a creditor, or someone else. You can also have clients watch the US Trustee’s videos simulating the Meeting of Creditors which are available at: <https://www.justice.gov/ust/moc>

Give clients clear advice on how the hearing will proceed, with individual instruction for each trustee. Angela Scolforo has all parties present in the meeting room each 30 minutes so a debtor needs to be instructed that upon entry to the Zoom hearing other meetings may be in progress. Ensure the entering debtor does interrupt an ongoing meeting by making them aware of this process. Make sure to instruct the debtor to keep their sound muted while other hearings are being conducted and not to announce themselves.

Chris Micale utilizes the waiting room and only the parties present for a specific meeting will be present in the meeting room when conducting a meeting.

II. KNOW THE STATUTORY REQUIREMENTS FOR FILING AND CONFIRMATION, AND ANY LOCAL REQUIREMENTS.

A. Statutory Plan Requirements and Other Considerations:

Sections 1322 and 1325 of the Bankruptcy Code outline the various requirements for **confirmation** of a **Chapter 13** plan. Included among those are **requirements** that the plan be filed in good faith, that the debtor will be able to make all payments under the plan and to comply with the plan, and that the action of the debtor in filing the petition be in good faith. 11 USC §1325(a)(3),(6), and (7). *In re Colston*, 539 B.R. 738, 746, 2015 Bankr. LEXIS 3478, *17-18 (Bankr. W.D. Va. 2017)

Good Faith Test

In *Colston*, Judge Black held that the debtor has the burden of proof at confirmation and that “(e)valuating the good faith requirement for confirmation of a Chapter 13 plan pursuant to Section 1325(a)(3) is a fact-intensive, case-by-case determination made by the Court based on the totality of the circumstances.” *Colston*, citing *Neufeld v. Freeman*, 794 F.2d 149,152 (4th Cir. 1986); *Deans v. O’Donnell*, 692 F.2d 968, 972 (4th Cir. 1982).

The 4th Circuit’s foundational “lack of good faith” decision is *Deans v. O’Donnell*, 692 F.2d 968 (4th Cir. 1982). *Deans v. O’Donnell* specifically refused to accept a per se rule that “lack of good faith” required a substantial repayment to unsecured creditors. *Id.* at 972. Rather, “lack of good faith” required a review of all factors including “the percentage of proposed repayment,...the debtor’s financial situation, the period of time payment will be made, the debtor’s employment history and prospects, the nature and amount of unsecured claims, the debtor’s past bankruptcy filings, the debtor’s honesty in representing facts, and any unusual or exceptional problems facing the particular debtor.” *Id.*

Disposable Income Test

The Chapter 13 disposable income can be found at 11 USC §1325(b) and turns on whether a debtor is above-median or below-median. If a debtor is a below-median debtor, the Plan term is required to be only 36 months. 11 USC § 1322(d)(2). A below-median debtor’s expenses deducted from their income is not controlled by 11 USC § 707(b)(2). 11 USC § 1325(b)(3).

An above-median debtor must propose a plan of five years. 11 USC §1325(b)(4). However, the Plan may be a shorter period if unsecured creditors are paid in full. The expenses deducted from their income are controlled by 11

USC § 707(b)(2). 11 USC § 1325(b)(3). But any practitioner conducting a disposable income analysis should be familiar with *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010) which allows for deviations from 11 USC 1325(b)'s calculation in unusual cases.

The intersection between lack of good faith and disposable income may be confusing. Prior to enactment of 11 USC § 1325(b), the only two tests to measure how much had to be paid to unsecured creditors was 11 USC § 1325(a)(4)'s liquidation test and 11 USC § 1325(a)(3)'s lack of good faith test. This means unsecured creditors had to receive at least what they would receive in a Chapter 7 case and many courts interpreted the lack of good faith test to require a minimum distribution to unsecured creditors. *In re Iacovoni*, 2 B.R. 256, 267 (Bankr. D. Utah 1980). However, with the introduction of 11 USC § 1325(b), how much had to be contributed from income turned on a calculation from the debtor's budget rather than an inquiry into "best effort." *In re Barr*, 341 B.R. 181, 184 (Bankr. M.D.N.C. 2006).

What does this mean? Take for example, the debtor that is trying to keep a car with a monthly payment of \$1,500.00, but only wants to pay back creditors 2-3% of the unsecured credit card debt. **Is this a Plan proposed with a lack of good faith?** What if the car is a Mercedes? But what if that car payment is for a specially equipped handicapped van? Facts are important and counsel must be familiar with details of the case and convey that information to the trustee and the Court early in a way that deescalates the chance for objections.

Under the disposable income test, a court will consider whether a \$1,500.00 monthly car payment is reasonable and necessary for a below-median debtor. For an above-median debtor, Form 122C may allow the deduction, however, if the car is a luxury vehicle, that may trigger problems with the lack of good faith test. *In re Sandberg*, 433 B.R. 837 (Bankr. D. Kan. 2010). *See also, In re Hylton*, 374 B.R. 579, Case No. 07-70320 (Bankr. W.D. Va. Krumm, Aug. 22, 2007).

The takeaway is that these two tests are independent but interrelated.

Feasibility

Under 11 USC § 1325(a)(6), the debtor has the burden to prove he will not only be able to make all payments under the plan but also to comply with the plan. The easiest example of feasibility is when the budget demonstrates the debtor can pay \$1,000.00 per month and the Plan payment is \$1,000.00 per month. But inconsistency can derail feasibility.

- A. What if the budget shows the debtor can pay only \$950.00 per month?
- B. What if the plan proposes the debtor, who has obsessive compulsive disorder and a hoarding disorder, whose house is packed full of belongings from the last 40 years, will sell a home sixty days after confirmation?
- C. What if the schedules demonstrate a single debtor with no dependents does not withhold anything for income taxes and has not filed a tax return for the five years prior to the petition?

While the feasibility test is self-explanatory, it is still nuanced and requires familiarity with the case's facts, consideration of the particular nuances of the case, and competent communication to the trustee and Court.

B. Finding your creditors

One of the challenges debtor's counsel will face is finding all creditors of the estate. Make sure you review credit reports. Make sure debtors know to bring the three-month old stack of unopened mail and bring the bills. Make sure your questions posed at the consultation or intake questionnaire are phrased to make the debtor think broadly about who may be a creditor. And remember, all creditors have to be listed, whether a family member or a debt the debtor wants to keep paying!

Example of hidden creditors:

- Does the debtor have a credit card versus what cards has he used to purchase items in the last few months. Maybe the debtor forgets the card that gets them into Sam's is not just his member ID but is also a Synchrony Bank credit card.
- Has the debtor moved 3-4 times in the prior years? She often will owe prior landlords, medical facilities in another city, or other debts that might not appear on a credit report, or that she is not getting bills for given a change of residence. This is where the internet can be a great help to locate prior creditors and provide notice, even if the liability is listed as unknown.
- Check online court records for prior general district judgments.
- Ask about family members they may owe.
- Ask about rent-to-own creditors (furniture, storage shed, etc.)

- List all executory contracts: fitness clubs, phone contracts, etc.

Inevitably a creditor will be missed.

- 1) When adding five or more creditors to the mailing matrix, only file a matrix with the added creditors, not the entire matrix. L.R. 1007-2(D).
- 2) Become familiar with L.R. 1009-1(B) when adding new creditors. There was a period where a matrix would be amended and the added creditors were not served with notice of the bankruptcy case or Plan. This rule was amended to ensure added creditors received notice. If the amended schedule or matrix adds new creditors, then you must provide the added creditor with the:
 - a. Amendment
 - b. Section 341 notice/Notice of Bankruptcy
 - c. Any order granting the discharge
 - d. Any other filed document effecting the creditor's rights, for example, the Chapter 13 Plan

Any amended schedule must include a certification whether the amended schedule adds creditors or not. See <https://www.vawb.uscourts.gov/sites/default/files/forms/CertAmdScheds010819a.pdf>.

Late filed claims: Because a creditor may be added to the matrix after the bar date, should the claim be disallowed or not. There is a difference between the Eastern and Western District approaches to late claims. It is common in the Eastern District for a creditor to file a motion to allow a late-filed claim. In the Western District, motions to file a late claim are construed under Fed. R. Bankr. P. 3002(c)(6) which requires the motion to be filed before the expiration of the bar date. Because it is usually after the bar date a creditor discovers the debtor filed a bankruptcy case, this rule will not provide a path for the creditor to file a claim late. If the creditor received late notice or was added after the bar date, the trustees take the position that any filed claim is an allowed claim unless disallowed by the Court. The creditor simply must file its claim. The trustees will therefore not object to a late claim if notice was not sufficient or was added after the bar date. The claim will be eligible for disbursement as otherwise provided by the Plan.

Judge Connelly may require an order which gives late added creditors 70 days to file a proof of claim, and such order must be served upon the creditors

along with Local Rule 1009-1 required documents.

C. Plan Payments

Within 30 days after filing the bankruptcy case, even if the plan has not yet been approved by the court, the debtor must start making plan payments to the trustee. 11 USC § 1326(a)(1). If any secured loan payments or lease payments come due before the debtor's plan is confirmed (typically home and automobile payments), the debtor or trustee must make adequate protection payments. If the debtor does not timely start his or her plan payments, the trustee cannot make adequate protection payments which will lead to an objection.

This is critical and simple. Judges do not confirm cases where the plan payments are not current. If the debtor has difficulty making the first full payment, consider a nominal payment for the first month to meet this requirement. A nominal payment or gradual bump-up in certain circumstances can help some debtors turn their finances around.

While the Chapter 13 trustees accept payments via different methods, both accept wage orders using the Court's local form which can be found at <https://www.vawb.uscourts.gov/?q=forms/> then navigate to the "Wage Deduction Order/Instructions" section. Any wage order should be sent to the payment address below for each respective trustee. As a practical matter, take care to send the wage order to the correct address and consider adding the company's registered agent as an additional noticed party to assure good service.

Angela Scolforo:

EFT: TFS Payment Service (7 days before due date)
<https://tfsbillpay.com/debtors>

Via mail: Angela Scolforo, Chapter 13 Trustee
P.O. Box 1961
Memphis TN 38101-1961

Chris Micalé

EFT for debtors: ePay
Login:
<https://www.billerpayments.com/app/enrolledwebui/#/login?bsn=wdvatrt>
Instructions: <https://youtu.be/6XiecRmDeH4>

EFT for attorneys/employers: <https://www.ch13wdva.com/ach.html>

Via mail: Debtor payments:
Christopher Micale, Chapter 13 Trustee
P.O. Box 750
Memphis, TN 38101-0750

Creditor refunds or return of disbursement checks
Christopher Micale, Chapter 13 Trustee
P.O. Box 613709
Memphis, TN 38101-3709

D. Local Requirements

Prior to a debtor's confirmation hearing, all debtors shall sign the "Affidavit of Debtor(s) Requesting Confirmation of Plan," which can be found on the Court's website. Local Rule 3015-3. See https://www.vawb.uscourts.gov/sites/default/files/forms/ch13affidavit_040620.pdf. It is critical that the debtor understands this affidavit and the statements contained are true and correct to the best of the debtor's knowledge.

2. KNOW THE JUDGE ASSIGNED TO THE CASE AND THE POLICIES OF THE CHAPTER 13 TRUSTEE

A. Court/Judges

- 1) If you have not re-read the local rules since you were admitted, review them now.
- 2) Review the Court's website, and make sure you sign up for Court Notifications. <http://www.vawb.uscourts.gov/>
- 3) Notice: Both judges accept negative notice. 11 USC § 102(1) allows an act to be taken if sufficient time is allowed for a party to request a hearing and no request is made. This type of notice is necessary if you want the Court to enter an order on your pleading prior to and without a hearing. If the notice simply sets the matter for hearing with no objection deadline, then the hearing must be conducted.
- 4) Judge Connelly may enter a confirmation order early without such request in a continuance order, but Judge Black requires the continuance order to allow a confirmation order to be entered early.

B. Trustees

- 1) Know how to interpret information in BSS (this is the trustees' case management software), the Chapter 13 Network (free online access to **Chris Micale's** case data information) and NDC (third-party website also containing the case data information and is currently free for debtors' attorneys—both **Chris Micale** and **Angela Scolforo** use this service). This software gives you critical information about your cases.

Review the Chapter 13 Trustees' websites and the resources there:

Chris Micale, Trustee. <https://www.ch13wdva.com/>

Angela Scolforo, Trustee. <http://www.cvillech13.net/>

- 2) Communicating with the Trustees

Both trustee utilize BK Documents to transmit documents to their offices. The website is free of charge for any users and is critical to use in today's environment. The website is a FTP site allowing for secure transmission to the trustees. If you email tax returns containing highly sensitive information to the trustee, you've just exposed your client's data to the world. The same principle applies to any other types of document with sensitive information. Transmission over an FTP site, like BK Documents, assures secure transmission over the web.

Micale: Requires both documents and proposed orders to be transmitted via BK Documents.

Scolforo: All documents must be uploaded using BK Documents. Angela's staff may no longer open attachments to emails. Except, orders must still be tendered to the email address: TROrders@cvillech13.net.

- 3) All Chapter 13 Plans usually require additional language in Part 8.1 to administer the Plan. Make sure you are familiar with standard language each trustee will accept.

For **Micale's** language, refer to https://www.ch13wdva.com/files/Standard_Part_8_Language.docx

For **Scolforo's** language, refer to: CONDUIT MORTGAGE

LANGUAGE FOR PART 8.1

Part 8.1 - Include the following special language

Pursuant to Part 3.1, the Trustee shall pay the designated post-petition mortgage payments through the plan. These mortgage payments shall be classified and paid as follows:

- (1) Pre-petition Arrears: The prepetition arrears are \$ _____.
- (2) Initial GAP Payments: The initial “gap” post-petition mortgage payments shall be disbursed pro-rata by the Trustee as post-petition arrears, including late fees, in the approximate amount of:
\$ _____ per month for the _____ months of
_____ through _____.
_____.
- (3) Ongoing Conduit Payments: The Trustee shall recommence disbursing regular post-petition mortgage payments in the amount of:
\$ _____ per month beginning with the payment due for the month of _____, and continuing for approximately _____ months.
- (4) At the completion of the term of the plan, it is estimated that the Debtor(s) shall resume monthly mortgage payments directly pursuant to the terms of the mortgage contract beginning with the payment due for the month of _____.

(Note: Both judges expect this language to be part of the Plan if collateral will be surrendered in Part 3.5 of the Plan.)

SURRENDER LANGUAGE FOR PART 8.1:

Note: The latest language developed sets a deadline for deficiency claims to be filed after collateral is surrendered. Both trustees accept the following language and Judge Black recently raised concerns if a plan that surrenders collateral does not include this language.

Any unsecured proof of claim for a claim of deficiency that results from the surrender and liquidation of collateral noted in Part 3.5 of this Plan must be filed by the earlier of the following or such claim shall be forever barred: (1) within 180 days of the date of

the first confirmation order confirming a plan providing for the surrender of said collateral, (2) within the time period for the filing of an unsecured deficiency claim as established by any Order granting relief from the automatic stay 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.

- C. Pay attention in Court and 341s and learn from other cases. If the trustee is asking all debtors for a breakdown of their IRA distribution 2 years ago, start asking your client for that information up front as part of your documentation request. If your client owns real estate with equity as tenants by the entities and you are claiming that exemption, provide the deed to the trustee with the tax returns and paystubs. Given the current real estate market, tax assessed values will not be considered appropriate values by any trustee. If the property is valued based on tax assessed value you will likely draw an objection from the trustee and will be required to obtain a market analysis. As you draft the schedules, consult online sources like Zillow and realtor.com. While these sites are not dispositive of the value, they will provide a touchpoint. If the online source's value, reduced by liens and exemptions, results in non-exempt equity, you should obtain a market analysis before you file the case. Make sure the market analysis is accurate. If the market analysis relies on comparables sold five years ago, the analysis may not be accurate. If the market analysis uses comparables that are not like the subject property, the analysis may not be accurate. Also make sure the analysis accounts for the current condition of the property and provide documentation to support that condition, such as the realtor's description of the issues.

Consider the content of your schedules. Information may be conveyed through your schedules that will avoid further questions from the trustees and Court. The explanations are valuable to the trustees because if included on the schedules, they are signed under the pains and penalty of perjury and may avoid the debtor testifying about the details that could have otherwise been included in the schedules. Examples:

1924 Ford Model T:

Option 1: Schedule A/B simply lists 1924 Model T valued at \$5,000.

Option 2: Schedule A/B lists a 1925 Model T valued at \$5,000 and further describes the vehicle has no engine or tires and is severely rusted. The value is effectively that of the frame which a

collector may want for parts.

\$5,000 borrowed by debtor's mother:

Option 1: \$5,000.00 owed to debtor

Option 2: \$5,000.00 owed to the debtor by debtor's 94 year old mother. The funds were borrowed to pay for medical care. The mother's only source of income is social security income and otherwise has minimal assets.

2024 Ford F-150 Raptor:

Option 1: Schedule A/B lists Ford F-150 Raptor valued at \$95,000.00

Option 2: Schedule A/B lists Ford F-150 Raptor valued at \$95,000.00 which the debtor acquired because he suffers from PTSD and the truck has significant rehabilitative value in his recovery.

If the judge fussed at an attorney for an error that you have made, fix it or at least apologize immediately and propose a remedy. While the trustees and judges seek to be fair and impartial, they also usually have particular triggers that can influence how a case goes. Most of the attorneys in the area will remember that former Chief Judge Ross Krumm really questioned the good faith of debtors who owned boats (especially nice boats), and before him, Judge Pearson had a low tolerance for debtors who had not filed required tax returns. By paying attention in court, you can often learn about issues that may cause concern in your case and about which issues the judges are sensitive.

3. **AVOID CREATING AN EMERGENCY FILINGS AND HAVE ALL DOCUMENTS COLLECTED AND REVIEWED PRIOR TO FILING**

There are mandatory documents counsel has to collect to a) accurately complete schedules and b) to satisfy due diligence, and c) to provide to the trustee under the Code. Then there are documents you should know the trustee will request based on knowledge of prior cases and because you pay attention when you attend 341s. These can include, but are not limited to:

- **ALWAYS:** Most recent tax return, 60 days of pay advices from all sources, Trustee's Questionnaire, DSO information and payment, **Scolforo:** Deed and county tax value for real estate
- **Scolforo--**Bank statement for month of filing showing the balance on the

day of filing

- Breakdown of spending of any lump sum income in prior 3 years (inheritance, retirement distribution, lawsuit, etc.)
- Deed for home if tenants by entirety or deeds for contiguous parcels
- Unusually high childcare—make sure to provide the history of an unusually high expense as that will show the debtor did not decide to incur the expense in preparation for the filing
- Record or proof of tithing
- **Scolforo:** If no tax returns required to be filed, supply a Tax Affidavit to Scolforo. **Micale** will not require the affidavit to be provided but encourages you have one in your file to address an estimated claim from a taxing authority
- Proof of expenses required to be provided by Form 122C as they are in excess of allowance and proof is required
- Proof of other unusual circumstances

Emergency filings leave more room for mistakes and can often lead to surprises for counsel and the debtors. While sometimes necessary, both counsel and client can have a better expectation of the case if all documents are obtained and reviewed prior to filing.

4. MAINTAIN CONSISTENT POLICIES AND PROCEDURES FOR PLAN REVIEW AND POST-FILING

Consistency in how you file cases, formulate plans, review plans and the service thereof can help avoid mistakes and amended plans.

Tasks to be done quickly and early consistently:

- A. Before filing, review the plan to verify you have provided for proper treatment and service to secured creditors. If possible, review a version of the pleading that will actually be filed. Oftentimes the PDF version filed is radically different than what may be in your case management software.
- B. Be sure you have scheduled creditors in the proper section based on the nature of debt and date of debt. If filing the plan after the case is filed (but

within the 14 days), check claims before filing to see if any adjustments are required.

- C. File the wage deduction order timely. Make sure you are serving the right address and if possible, email or fax deduction order to employer.

Tip: Have clear communication with the client about when a wage deduction will start and how they must make a payment themselves if the wage deduction is delayed. Protect yourself by having this in writing.

- D. Help client set up E-pay/TFS if necessary on the day the petition is signed and filed.
- E. Transmit all required documents to the Chapter 13 Trustee timely.
- F. Submit any conduit mortgage orders needed.
- G. Make sure the pre-confirmation affidavit is being timely signed and filed.
- H. Help the client decipher the multitude of mail and notices they will get from the trustee and the Court.
- I. Educate the clients about National Data Center and the resources they have there. Debtors can access the NDC for free and will provide them information. This may help reduce calls to both attorneys and trustees.

5. CLIENT COMMUNICATION: THEY MUST KNOW WHAT TO EXPECT

One of the biggest reasons cases do not go well at the 341 or in the time leading to confirmation is because the debtors do not understand what is happening or needs to happen.

Counsel must explain who the parties are and the process to the debtor and explain what the debtor's duties are (trustee payments, appearing at 341 hearing, supplying any additional documents), and what he or she should expect. If your plan has an unusual treatment that will raise additional questions at the 341 from the trustee, advise your client so he knows what to expect.

If you have clear and consistent communication with the debtor client, he or she will be easier to reach to resolve any unanticipated issues that arise.

Client should be advised:

- Who are the parties in the case? What is the trustee's role vs. the judge's role.
- When and how to make payments.
- How to appear at the Zoom hearing
- They are rarely required to appear in person or via Zoom at the confirmation hearing.
- What questions is the trustee likely to ask?
- Are there creditors that you expect may object or appear at the § 341 meeting?
- Many debtors live in fear of this initial hearing, thinking their creditors are going to appear and challenge their case. It is your job to educate them about that very slim likelihood.

Because emotions are riding high, expect that clients only hear about 50% of what you tell them. Follow up in writing and remember that what is a regular event to you can be overwhelming to them

6. REVIEW PROOFS OF CLAIM.

An unexpected proof of claim is often the cause for a plan not being ready for confirmation at the initial hearing. Claims should be reviewed weekly after the case is filed, with a particular emphasis on the week prior to the 341 hearing and the 2 weeks prior to confirmation.

If the plan classifies unsecured claims, confirm with the Trustee which claims filed are the claims to be disbursed, or not, per the plan classification. **Micale:** Accomplish this by simply defining the separate class. Following the bar date Micale's office will file a motion for distribution to determine which creditors belong in the separate class. **Scolforo:** The plan should be very clear which classified claims should be paid and in what amounts. After the bar date, the parties will review claims and determine which of the filed claims shall be treated as classified and the confirmation order should reflect this agreement.

In reviewing proofs of claims you should be checking for:

Claims containing personally identifiable information (PII). Ask the creditor to hide the claim and file a new one.

Claims barred by the statute of limitations. *Tip: Most creditors will withdraw these if you simply ask. If they do not, you should be filing an objection.*

Claims filed as secured which the plan treats as unsecured. *Tip: Review the documentation attached and determine if an objection under Rule 3001 is*

warranted.

Claims which show an arrearage on a debt greater than you anticipated.

Claims which don't actually belong to your client (Yes, that happens)

Claims significantly exceeding the debt scheduled

7. WORK DOCKETS EARLY AND CONSISTENTLY:

The first major review of a case should be in the week prior to the 341 and continue on a regular basis up until confirmation.

- A. Check service on the plan and that the plan has been served according to Rule 7004.

Tip: If service not correct, then immediately prepare a special notice giving the impacted creditor clear notice of the terms of the plan and how it treats the creditor's claim. Notice the date and time of confirmation and provide the creditor must object or appear in court or the plan will be binding. File and serve the special notice per Rule 7004.

If you are reviewing prior to the confirmation hearing, you can provide 21 days notice to the creditor, however, notices should still be consistent with L.R. 3015-4(A) in that the notice period may need to be longer to provide the creditor until 7 days prior to the confirmation hearing to object.

- B. Verify if the wage deduction is working and if not, contact the employer to determine why not.

Tip: Sometimes it is necessary to serve the registered agent of the employer to make sure they are paying attention to the order. You must follow up to make sure it is effective and the debtor is making direct payments until the deduction starts.

- C. Verify the pre-confirmation affidavit has been filed.

- D. If the plan contemplates stripping a second mortgage, get the complaint filed.

Tip: Some trustees will not recommend confirmation until they see this action undertaken by the required adversarial proceeding.

- E. Checks claims filed to date and see if the plan projected to pay close to the noticed dividend?

Tip: If the distribution is off by an amount you suspect may disturb the judge, file and mail a notice to all creditors of the anticipated reduction and set a deadline for objection.

- F. Has a creditor filed a claim which is not addressed in the plan?

Tip: Determine how material the claim and collateral is to the plan and debtor. If small secured claim and lender appears unlikely to pursue collateral, the Trustee may agree to confirm with language in the confirmation order that the order is without prejudice to the creditor's rights in the collateral.

Tip: Is the claim for secured taxes paid by escrow? Notice the taxing authority that the escrow account will pay per prior course of business and include language in the confirmation order to that effect.

Tip: Is an amended plan really required, or can you obtain agreement of creditor to terms and simply include the language in the confirmation order. If counsel for the creditor will sign off, then you can do so with no notice normally if the change does not impact other creditors.

F. Is there an objection to confirmation timely filed?

Tip: Don't wait until the confirmation hearing to discuss resolving.

Immediately pick up phone or email to see if you can find common ground.

The vast majority of the time, the resolution can be incorporated into the confirmation order if it does not impact other creditors.

8. COMMUNICATE TIMELY WITH THE TRUSTEE REGARDING ISSUES AND SOLUTIONS

Establish a good working relationship with the Chapter 13 trustee's office, the staff attorneys and the case administrators. If a case is unusual, communicate with the attorney or case administrator early and provide documentation of the debtor's unique circumstance.

The Chapter 13 trustee routinely advises counsel of issues he or his staff attorney sees at the 341 hearing. It is critical that counsel take quick action to respond to any concerns and see if they can resolve the concerns or reach a compromise. The confirmation hearing is not the date to start the discussion! When issues are raised at the 341 hearing, schedule a meeting with the debtor to discuss and review what possible changes may be needed to resolve the objection. Then reach out to the trustee or staff attorney to propose solutions, or even seek advice.

Know when your major court dates are approaching. Review the Trustee's case notes. **Micale** and **Scolforo** publish all court notes on BK Documents. **Scolforo** also sends the final notes the evening prior to the hearing. If the notes don't reflect action you have taken advise the case administrator so everyone is updated. Try to have 90% of your cases resolved by 5-7 days prior to the confirmation hearing, so you can focus on the remaining troublesome cases. (And yes, there will always be a few of those no matter how hard you work.)

9. AND ONE POST-CONFIRMATION ISSUE: Trustee's Motion to Dismiss Process

It is the rare case that will never see a motion to dismiss filed after confirmation. Become familiar with the trustee's process. While there are numerous reasons a party may seek dismissal of a case, the most common is the failure to make Plan payments. Become familiar not only with how the trustee will administer the process but also how you may collect fees for defending against the motion.

Micale and Scolforo:

The motion to dismiss process is utilized as a trigger that something has gone wrong and if there is no response from the debtor, then the goal is to dismiss the case. If the debtor responds, the goal shifts from dismissal to resolution. While the circumstances causing the motion to be triggered may be relevant, it is more important to focus on how the case will move forward. Motions to dismiss will generally fall into three categories:

- I) A non-mortgage case where the delinquency exceeds the value of two or more current Plan payments.
Resolution generally falls into one of the following categories:
 - A) If it is the first instance of default and the debtor cures before the hearing, the motion will be withdrawn.
 - B) If the debtor cannot cure, the default is rolled into the remaining life of the Plan and the Plan payments increased over the remaining life of the case. Debtors are also required to either submit a wage deduction order or enter into a conditional order. (Scolforo also allows automatic and recurring TFS payments for future payments.)
- II) If the Plan pays the ongoing mortgage through case administration, a motion to dismiss for non-payment will be triggered when the delinquency is greater than the value of one Plan payment. Mortgagees will usually refer a case for a motion for relief if the mortgage payments are two or more payments in default. However, if the mortgagee sees a motion to dismiss already on file, they may delay seeking relief pending resolution of the motion to dismiss.

III) Cases operating under a conditional order:

A) If the conditional order allows for a response to be filed, the notice of default will be filed when the delinquency is greater than the value of one current Plan payment. The debtor must file a response within 21 days of the notice and set the matter for hearing. At the hearing, resolution usually follows the same process as a motion to dismiss.

B) If the conditional order does not allow for a response, the case will be dismissed upon the Trustee certifying a default under the conditional order with no further opportunity for hearing. This result is usually reserved for rare, extreme circumstances.

Fees: The response to a motion to dismiss or certification usually includes a request for a presumptive fee allowed by the Standing Order.

<https://www.vawb.uscourts.gov/sites/default/files/Standing%20Order%202022-001%20Final.pdf>

The response to the motion to dismiss and the fee request should be drafted as a single document and separately filed both as a response to the trustee's pleading and a request for fees. The response should be noticed to the estate with a hearing date the same as the motion to dismiss. The order the Trustee prepares resolving the motion to dismiss will also grant or deny the fee request. (Scolforo does not require a written response to her motions to dismiss and Debtors' attorneys generally prepare and circulate the Order Resolving the Default.)