

## Chapter 13 Trustee Eastern District of Kentucky

### Review and Production of Documents

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#### WHAT DOCUMENTS?

**The Chapter 13 Order to Debtor:** When a bankruptcy petition is filed under chapter 13 in the EDKY, an Order to Debtor is issued by the court within a day and is served on the debtor immediately. The Order requires the following documents to be sent to the trustee within 15 days after the petition is filed:

- a copy of all deeds or contracts under which the debtor holds title to or any interest in any real estate;
- a copy of all recorded mortgages, liens, or encumbrances on all real estate in which the debtor holds an interest;
- a copy of all Certificates of Title on which the debtor's name appears as owner individually or jointly of any motor vehicle, mobile homes, trailers, boats, motor homes, campers, motorcycles, or all-terrain vehicles,;
- a copy of the debtor's last state and federal income tax returns;
- a copy of paycheck stubs or equivalent document issued by the debtor's employer showing gross earnings and all deductions for the 60 days before the filing of the case.

The Order provides that **“Counsel for the debtor is responsible for seeing that the debtor complies with this order.”**

The Order further provides that **“Failure to timely comply with this order will result in the filing of a motion to dismiss the within case.”**

The court may also consider the imposition of sanctions against an attorney who fails to timely provide documents to the trustee.

**Standing Order:** In addition, the Court's Standing Order regarding the Filing of Payment Advices Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv) requires that copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition be provided to the trustee within 15 days after the petition is filed.

**Federal Rules:** Rule 4002(b) of the Federal Rules of Bankruptcy Procedure also imposes on debtors the duty to provide certain documents.

At least 7 days before the 341 meeting, the debtor must provide to the trustee a copy of the debtor's most recent federal income tax return, or provide a written statement that the documentation does not exist.

Rule 4002(b) also requires debtors to bring with them to the section 341 meeting:

- Photo ID;
- Evidence of social security number, or a written statement that such documentation does not exist;
- Evidence of current income, such as the most recent payment advice, or a written statement that such documentation does not exist or is not in the debtor's possession; and
- Unless the trustee instructs otherwise (and consider this the trustee's otherwise instruction in the EDKY), copies of bank statements for the time period that includes the petition date, or a written statement that the documentation does not exist or is not in the debtor's possession.

### **OBTAINING DOCUMENTS**

You should have the debtor bring the documents to you BEFORE you file the petition so you can review them and use them as you prepare the schedules and plan. Reviewing these documents before filing should be part of your due diligence in preparing the schedules and plan, if for no other reason than to comply with Rule 9011, which provides in pertinent part:

(b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

....

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr. P. 9011(b).

As the bankruptcy court in the EDKY has held:

The importance of filing accurate schedules at the outset of the case cannot be overemphasized. “The veracity of the statements filled out by the debtor is essential to the successful administration of the Bankruptcy Code.” . . . “[T]he petition, including schedules and statements, must be accurate and reliable, without the necessity of digging out and conducting independent examinations to get the facts.”

In re Gullett, Case #03-10995, Order entered November 2, 2004 (Bankr. E.D. Ky.) [citations omitted] [emphasis added]. In another case, the court stated:

[T]he Debtors should ensure that the schedules are complete and accurate so that the Trustee and Court are not forced to spend excessive resources deciphering the schedules. . . . “[G]reat care and complete honesty in the presentation of income and expense information are standards against which debtors and their lawyers will be measured.”

In re Lacny, Case #07-50184, Order entered October 25, 2007 (Bankr. E.D. Ky.) [citations omitted].

Make sure the debtor understands what documents need to be produced. The debtor may not understand the difference between a deed and a mortgage and they send only one or the other; or they may send the first mortgage, but not the second or third (they may not think of a home equity line of credit as a mortgage); or they send their copy which does not show the clerk’s recording stamp. They may send the car’s registration certificate rather than the certificate of title.

If you need to file a petition in an emergency without first obtaining and reviewing the documents, consider providing the client with a written disclosure of the risks of filing before the documents have been reviewed.

If the petition is filed before all documents are produced, for whatever reason, send a strongly worded reminder letter (including a warning that the case could be dismissed) to the debtors. Then follow up often with letters and phone calls, and keep track of the dates and times of the contacts attempted. If nothing else, putting the request for documents in writing and recording the follow-up efforts made to contact the client is a good “CYA” practice in the event the case is dismissed for failure to produce the documents. The attorney is somewhat protected against the debtor’s allegation that “nobody told me I had to do this.”

### **REVIEWING DOCUMENTS:**

In the EDKY trustee’s office, the case manager assigned to a particular division reviews the documents and scrutinizes the petition, schedules, and chapter 13 plan. This extensive review of documents is made in each and every case, and (unfortunately) is well worth the effort in terms of identifying undisclosed assets, under-reported income, and avoidable liens. The debtor’s attorney should not be caught off guard.

The following are suggestions and examples of what to look for in your pre-filing document review:

- If there are two deeds, there should be two properties described on Schedule A. Even if they are contiguous tracts and the debtor's home sits on both tracts, Schedule A should adequately describe both properties. Conversely, if there are multiple properties listed on Schedule A, there should be a deed for each property.
- Is the deed in the name of only one debtor in a joint case? This might affect the debtors' exemptions, so make sure Schedule A accurately identifies the debtors' ownership interests. If a debtor owns property jointly with a nonfiling spouse or some other third party, Schedule A should indicate whether the value listed is the value of the property as a whole or the value of only the debtor's interest therein.
- If the debtor says s/he has two (or more) mortgages on the property (or a mortgage and a home equity loan), make sure you have a complete, recorded copy of all mortgages. Likewise, if you have copies of two different mortgages, both should be listed on Schedule D and dealt with in the plan (even if the mortgages are owed to the same lender).
- Make sure the mortgage produced is the current mortgage and has not been released due to a subsequent refinance. Also watch for recorded assignments of mortgages.
- Make sure the clerk's recording stamp is on the mortgage and is legible (not the "Received" date; the "Recorded" date, as well as the county in which the mortgage was recorded). If the mortgage was recorded within 90 days prior to the (anticipated) petition date, further investigation is required to see if the mortgage is avoidable under § 547 by the trustee.
- Make sure the property description is contained in the mortgage; the property description in the mortgage matches the description on the deed; the mortgage was timely recorded; the mortgage was recorded in the correct county; and there is a maturity date in the mortgage (not required on a home equity line of credit loan).
- Get updated titles for mobile homes by having the debtor go to the county clerk's office to apply for a lost/duplicate title. Often the debtor has the original Certificate of Title but has since refinanced the land and mobile home, so an updated title is necessary to determine whether the lien on the mobile home is perfected.
- If the debtor believes the mobile home is part of the land, get a copy of the Affidavit of Conversion (or Affidavit of Affixation) from the county clerk so you can determine whether to include the mobile home as real property, or whether it is unencumbered personal property.

- Get current titles for all motor vehicles listed on Schedule B. Conversely, review all titles to make sure all motor vehicles are listed on Schedule B (or if appropriate, that the disposition has been described in the SOFA).
- If the debtor says a car belongs to his/her teenager or adult child, get a copy of the title. Chances are, the debtor's name is on the title either for insurance purposes or because the debtor is obligated on the loan with the child.
- Review the date on which any lien was noted on each Certificate of Title. If the lien was recorded within 90 days prior to the (anticipated) petition date, further investigation is required to see if the lien is avoidable under § 547 by the trustee.
- Make sure all pages of both the Federal and the state tax returns – including all schedules – are included.
- Is there a large tax refund? If so, the refund should be prorated and added back into Schedule I as monthly income (or the tax refund should be paid into the plan annually), or be prepared to explain why the refund should not be included in the disposable income analysis.
- Is the income on Schedule I consistent with the income reported on the debtor's last tax return? If not, is there a reason for the change (e.g., different job), or should Schedule I be corrected?
- Is the income on Schedule I consistent with the current period income on the paystub? Is it consistent with the average year-to-date gross earnings? Is it consistent with the debtor's CMI on Form B22C? If not, be prepared to explain why, or amend Schedule I accordingly.
- Make sure the basic math on Schedule I is accurate based on the debtors' paystubs (and make sure attorneys and support staff know how to do the math).
  - Weekly pay times four does not equal monthly income! Weekly pay times 52 weeks in the year divided by 12 months in the year = monthly income.
  - Bi-weekly (every 2 weeks) pay times two does not equal monthly income! Bi-weekly income times 26 pay periods in a year divided by 12 months in the year = monthly income.
  - Semi-monthly (twice a month) pay times two is monthly income.
- Do expenses on Schedule J seem reasonable? If any expenses seem high, ask for proof. Particular trouble spots that can be easily supported by documentation are utilities, insurance, and charitable contributions.

- Are all expenses necessary? Be prepared to offer explanations, justifications, and perhaps even proof of expenses such as care for elderly parents, care for grandchildren, private school tuition, and other unusual expenses.
- Are there other relevant documents that you need? For example, as long as the debtor needs to go to the county clerk's office to get copies of deeds and mortgages, ask them to get copies of any tax liens or judgment liens of record as well so you can address them in your initial plan. If the debtor has gone through a divorce, get a copy of the property settlement agreement or decree (you may need it to disclose pre-petition transfers made pursuant to the decree on the SOFA). Probate records might be useful if the debtor anticipates an inheritance. A copy of the PVA's assessment of the value of real property might be appropriate.

These are just examples of what the debtor's attorney should be doing to prepare for filing the chapter 13 case.

## **TRANSMITTING DOCUMENTS TO TRUSTEE**

Many attorneys have a checklist that they or their staff use; the checklist can double as a cover letter to the trustee. That way they have a record of what was sent to the trustee in compliance with the Order to Debtor and what remains to be produced. This is especially helpful where there are multiple motor vehicles or multiple tracts of real estate.

Since the documents to be produced in chapter 13 cases in this District differ from the documents required in chapter 7 cases, it may be helpful to have separate checklists.

Most attorneys now retain a copy of the documents in their files. The documents can be scanned and retained as PDF files, or paper copies can be retained in the client's file. If the case converts from one chapter to another, a new Order to Debtor is entered, and it is once again the responsibility of the debtor and counsel to provide the documents to the trustee after conversion.

After you file the petition and get a case number, review the copies once again for completeness and accuracy (and make sure the copies are legible), write the case number on the documents or on a cover sheet, and then send to the trustee. You may mail copies to PO Box 2204, Lexington, KY 40588, or you may email them to [documents@ch13edky.com](mailto:documents@ch13edky.com). (please put the case number in the Subject line of the email). A cover sheet/checklist identifying the documents being transmitted is helpful.

On occasion the debtor and counsel are unable to produce all the documents because, for example, they are waiting for a duplicate title to replace a lost one, or the debtor has changed jobs and has not yet received a pay stub, or the debtor has not yet filed last year's tax return. The remaining documents should be produced in the meantime with a note indicating what is missing.

The absolute latest the trustee's office can receive the documents and complete the review prior to the 341 is one full calendar week prior to the 341. However, production at that late date should be in rare circumstances.

If documents have not been timely produced to the trustee, the 341 meeting will not be conducted. The meeting will either be continued, or a motion to dismiss may be filed.

Please do not send bank statements, pleadings in foreclosure actions, proof of insurance, contracts for the purchase of personal property, multiple years of tax returns, and documents other than those required to be produced by the Order to Debtor. The trustee will request additional documents on an as-needed basis.