

## **Guidelines for Payment of Post-Petition Arrearage and Payment of Fees, Charges and Expenses under Fed. R. Bankr. P. 3002.1**

The following guidance is provided to assist parties and counsel in chapter 13 cases assigned to Judge John E. Waites.

### **POST-PETITION ARREARS**

Post-Petition Arrears in non-conduit cases most frequently arise on three occasions:<sup>1</sup>

- (1) A debtor's failure to make direct payments in a non-conduit cure and maintain (or keep current) plan pursuant to 11 U.S.C. § 1322(b)(5),
- (2) A debtor's failure to pay mortgage payments during an effort to obtain a modification of the mortgage pursuant to a LM/MM plan or motion, or
- (3) As a result of a forbearance agreement in which missed mortgage payments are not deferred to the end of the original loan period.

In these instances, a debtor may propose to pay post-petition arrears through a modified plan. If the debtor intends to cure both pre-petition and post-petition missed payments by payments to the Chapter 13 Trustee under the modified plan, the amount to be cured must be established through either:

- (1) the filing of an amended claim by the mortgage creditor;
- (2) an order in settlement of a previously filed § 362 motion which sets the post-petition arrearage amount and indicates that the Trustee's consent to the settlement order;<sup>2</sup> or
- (3) the filing of a Motion for Order Setting Post-Petition Arrearage or Consent Order.<sup>3</sup>
  - o The Motion for Order Setting Post-Petition Arrearage should be filed at the same time as the modified plan and must be served on the affected mortgage creditor and the Chapter 13 Trustee.<sup>4</sup>

The modified plan must list the pre-petition and post-petition arrears as two separate claims for the same mortgage creditor (with the "arrears through" months separately identified) under Part 3.1(b) of the District's form chapter 13 plan as well as include a resumption date for ongoing maintenance payments. In addition, the debtor must file an amended budget and pay advices to show the affordability of the payments under the modified plan as well as provide an explanation of the ability to make the increased payments in the motion to modify plan.

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<sup>1</sup> The following guidance regarding post-petition arrearage is for cases with a confirmed non-conduit plan. For treatment of post-petition arrearage in a case with a conduit plan, please see Operating Order 20-08.

<sup>2</sup> The Court will not enforce any provisions in a § 362 settlement order that provides for *ex parte* relief upon a debtor's failure to make payments to the Chapter 13 Trustee as part of the curing of the post-petition arrearage.

<sup>3</sup> The modified plan and Motion for Order Setting Post-Petition Arrearage is subject to the objection of the Chapter 13 Trustee and the mortgage creditor.

<sup>4</sup> The Motion for Order Setting Post-Petition Arrearage is considered a self-scheduled, passive notice motion under SC LBR 9013-4 with a 14-day objection period.

**POST-PETITION FEES & EXPENSES UNDER FED. R. BANKR. P. 3002.1(c)**

Under Fed. R. Bankr. P. 3002.1(c), a mortgage creditor must notice all fees, charges and expenses incurred post-petition if it is secured by the debtor’s principal residence and is paid contractual installment payments under the chapter 13 plan.

Outstanding post-petition payments, including fees, charges and expenses, may have implications on a debtor’s receipt of a discharge at the conclusion of the term of the chapter 13 plan. *In re Dowey*, 580 B.R. 168 (Bankr. D.S.C. 2017); *see also Cure and Maintain Payments under § 1322(b)(5) and Discharge: For Cases Assigned to Judge Waites Only*, available at [http://www.scb.uscourts.gov/pdf/chambers\\_guidelines/jw/discharge\\_memo\\_for\\_cases\\_assigned\\_to\\_judge\\_waites.pdf](http://www.scb.uscourts.gov/pdf/chambers_guidelines/jw/discharge_memo_for_cases_assigned_to_judge_waites.pdf).

In a non-conduit case where the debtor is making ongoing maintenance payments directly to the mortgage creditor in a cure and maintain or keep current plan, the debtor is responsible for directly paying the post-petition fees, charges and expenses under the terms of the loan agreement and the chapter 13 plan. *See In Re Wyatt, C/A No. 13-06272-jw*, slip op. at n. 5 (Bankr. D.S.C. Nov. 6, 2018) (“The language of § 1322(b)(5) appears to further support that ‘maintenance of payments’ may include the payments of fees and expenses provided for by the underlying agreement that come due post-petition . . .”).<sup>5</sup> In non-conduit direct pay cases, the Court will not grant motions or consent orders providing for the payment of post-petition fees, charges and expenses through disbursements by the Trustee.

If the debtor cannot afford to directly pay the total charges as required by the mortgage creditor, and after a definite hearing called before the Judge, the debtor may seek to modify the plan to treat the amounts as a post-petition arrearage by providing for treatment in Part 3.1(b) as a separate claim to the same mortgage creditor with reference to the specific Notice of Post-Petition Fees, Charges and Expenses.<sup>6</sup> The “arrears through” date should reference the Notice date, in the following manner:

**3.1(b)** The debtor is in default and will maintain the current contractual installment payments on the secured claims listed below, with any changes required by the applicable contract and noticed in conformity with any applicable rules. The arrearage payments will be disbursed by the trustee, with interest, if any, at the rate stated. The trustee shall pay the arrearage as stated in the creditor’s allowed claim or as otherwise ordered by the Court.

Name of Creditor	Collateral	Estimated amount of arrearage	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage
		\$_____ Includes amounts accrued through the <b>Notice of Post-Petition Fees filed [date]</b>	_____%	\$____ (or more)

<sup>5</sup> Per Operating Order 20-08, under a conduit plan, the Trustee may pay the amounts claimed in the Fed. R. Bankr. P. 3002.1(c) notice if the debtor advises the Trustee of the debtor’s agreement to the payment or if the debtor fails to file a timely objection to the notice.

<sup>6</sup> Plans providing for a general provision for payment of such fees without a specific reference to the particular notice of post-petition fee, charge or expense to be paid will not be confirmed.