

Conduit Mortgage Payment Procedure

Under the procedure as outlined in the attached proposed Operating Order, in certain cases, ongoing monthly post petition payments on claims secured by liens on real property or mobile homes would be made by the Debtor to the Chapter 13 Trustee for payment through the Chapter 13 plan.

Despite present procedures, more than 50% of debtors who propose to directly pay ongoing mortgage payments fail at some point (sometimes multiple times during the case), often resulting in relief from stay in the majority of those cases. Frequently, debtor's counsel is not aware of the delinquency until the amount is so significant that a reasonable cure is difficult or impossible.

According to the most recent UST program statistics (Fiscal Year 2014), 72% of the nation's Chapter 13 Trustees make full or partial conduit payments.

In addition, recent case law in the Fourth Circuit has indicated a majority view in reported cases that a debtor's failure to make all direct mortgage payments provided for by the Chapter 13 plan would prohibit a discharge at its completion and require dismissal of the case. See In re Evans, 543 B.R. 213 (Bankr. E.D.Va. 2016). On the other hand, conduit payments through the Trustee establishes a clear record of payments and timely addresses notices of payment changes or post petition charges and therefore ensures a debtor is current under the mortgage at the close of the bankruptcy case.

While the conduit procedure results in an additional trustee fee on the mortgage payment, the overall higher total receipts by the trustee over time allows for a reduced trustee percentage fee across the board. Experience in other conduit districts has not shown a significant decrease in the number of Chapter 13 cases filed or confirmed as a consequence of the procedure.

The Judge, working with Trustees Stephenson and Wyman, has initially limited the program to instances which indicate a higher likelihood of the failure of direct payment.

The attached proposed Operating Order is in draft form and will be refined and therefore the Judge invites comments, questions, or suggestions be sent to Andrew_Powell@scb.uscourts.gov on or before July 8, 2016.

DRAFT

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

CONDUIT MORTGAGE PAYMENTS IN
CASES ASSIGNED TO JUDGE WAITES

OPERATING ORDER 16-01

The following procedures are effective and binding upon all parties and all counsel appearing in Chapter 13 cases assigned to Judge John E. Waites on or after August 1, 2016:

- I. Requirement for the Debtor to make Mortgage Payments to Trustee.** Ongoing monthly payments on claims secured by liens on real property or mobile homes, if not otherwise the subject of a motion to value or surrender ("Mortgage Obligations"), shall be made by the Debtor to the Chapter 13 Trustee (the "Trustee") for payment through the Chapter 13 Plan ("Conduit Mortgage Payments") under the following conditions:
 - a.** If the Debtor is delinquent **six (6) months or more** as of the petition date in regular payments owed to a creditor holding a claim secured by a lien on real property or a mobile home;
 - b.** As part of a Section 362 Settlement Order regarding a mortgage obligation, which proposes a cure of a post-petition default in payments which are delinquent for **four (4) months or more** as of the date of the filing the motion for relief;
 - c.** If requested by the Debtor, or agreed to by the Debtor, Mortgage Creditor, and Trustee, or otherwise ordered by the Court.

- II. Exemption from Conduit Mortgage Payment Requirement.** The Debtor may be exempted from complying with the provisions of this Order only upon a showing of good cause. The burden of proof to establish such good cause shall be on the party requesting exemption. To seek an exemption, a party must file a motion and serve the Debtor, the affected Mortgage Creditor and the Trustee **on or before the date the Plan is due to be filed.**¹

¹ Any additional cost associated with the Trustee's statutory commission charged for disbursing the Conduit Mortgage Payments (see IV.a, below) shall not, by itself, constitute good cause justifying an exemption from the mandatory Conduit Mortgage Payment requirement.

III. Chapter 13 Plan Language. Conduit Mortgage Payments through the Trustee shall be proposed through the inclusion of approved non-standard language (set forth in **Exhibit A**) in the proposed Chapter 13 Plan. Such language is subject to objection by affected parties.

IV. Conduit Mortgage Payment Definitions and Calculations.

- a. Trustee Percentage Fees.** The payments by the Debtor to the Trustee shall provide sufficient funding to cover the Trustee percentage fees, fixed annually under 28 U.S.C. § 586(e) at no greater than 10% of receipts for all claims, including the amounts needed for payment of the ongoing mortgage. The applicable percentage fee shall be periodically published by the Trustee.
- b. Classification in the Plan.** The Plan may include up to five classes of mortgage claims, as follows:
 1. **Arrearage payments (pre-petition arrears only).** This class shall include only the payments due at the time of filing the petition.
 2. **Conduit Mortgage Payments (ongoing mortgage payments).** If conduit mortgage payments are provided for in a proposed Plan, this class shall begin to accrue in the third calendar month following the filing of the petition, so that funds may be collected from the Debtor by the Trustee in time to be disbursed.
 - A. For so long as the Debtor complies with the conduit requirements of the Plan/Payment Change, the affected Mortgage Creditor may not declare a default based on any delinquency in payment provided for by the Plan/Payment Change, and the creditor shall not impose any post-petition fee on account of any arrearage paid by the Trustee. If the ongoing mortgage payments are current pursuant to the provisions of the Plan/Payment Change, then the Mortgage Creditor shall not seek to recover late fees.
 - B. Payments from the Debtor that are posted timely but later returned for insufficient funds will be deemed “not received.”
 - C. Each Mortgage Creditor shall designate a member of the S.C. Bar who shall represent it on issues related to the conduit program in any hearing or proceeding before the Court and for purposes of responding to requests from the Trustee.
 3. **Gap payments.** In the event that the confirmed Plan provides for conduit mortgage payments, this class shall include the payments due to the Mortgage Creditor after the petition is filed, but before the resumption date of post-petition, ongoing payments by the Trustee.
 4. **Post-petition charges.** See **VI(d)** below.
 5. **Post-petition arrears.** To be included only if the Debtor has a post-petition delinquency, or is granted a moratorium of payments.

- c. **“Mortgage Creditor”** within this Order and the Plan shall be the holder of a note secured by real property or a mobile home, and any entity which acts on its behalf, including, but not limited to, any subsequent holder, servicer, transferee, or Trustee.
- d. **Conduit Mortgage Payment Changes.** In the event a mortgage payment changes as the result of escrow adjustment or mortgage modification, the Trustee is authorized to increase or decrease Plan payments by the amount of the change plus the applicable trustee percentage fee. The Trustee is also authorized to increase the Plan payment in this fashion in order to pay allowable post-petition mortgage fees and charges or if the Court grants a moratorium in Plan payments. The Trustee may make these changes by filing a Trustee’s Notice of Plan Payment Change and provide notice to the Debtor and Debtor’s attorney.

V. Disbursements to Mortgage Creditors by Trustee.

- a. The terms and timing of disbursements of post-petition arrearages and regular payments by the Trustee as a result of a Section 362 Settlement Order referenced in Section **I(b)** above shall be set in the Order with the consent of the Trustee.

b. Commencement.

1. Unless otherwise ordered by the Court, Conduit Mortgage Payments will be retained by the Trustee, until confirmation, and distributed as soon after confirmation as is practicable.²
2. The amount held by the Trustee for disbursement in the Conduit Mortgage Payment class shall be the amount estimated by the Debtor in the Plan, ¶IV(B)(3)(b), until such time as a Proof of Claim is filed in compliance with the Official Forms and F.R.B.P. Rule 3002 or 3004, and thereafter, the amount set forth in an allowed Notice of Mortgage Payment Change filed in compliance with the deadlines and service requirements set forth in F.R.B.P. 3002.1(b) and using the applicable Official Forms. Mortgage claims shall include any escrow, mortgage insurance, or other monthly obligation as required by the terms of the note and mortgage.
3. If a Proof of Claim is filed either by the Mortgage Creditor or the Debtor without all required Official Forms properly completed and attached, and the Plan is confirmed, the Trustee may disburse funds for the Conduit Mortgage Payment in the amount provided in the Plan. No subsequent Notice of Payment Change filed pursuant to F.R.B.P. 3002.1 shall be effective to change this amount, until a Proof of Claim is filed in compliance with Official Forms and F.R.B.P. 3002 or 3004. If such Proof of Claim is filed after disbursements have been made by the Trustee in reliance upon the Plan, any Conduit Mortgage Payments made prior to the filing of such Proof of Claim will be deemed to have been disbursed in the proper amount and shall be accepted by the Mortgage Creditor without assertion of default, late charges or other fees assessed.

² If case is dismissed prior to confirmation, disbursements will be made pursuant to the terms of SC LBR 3070-1.

- c. **Change by Mortgage Creditor of name, address, servicer or Trustee.** If the name and/or address of the Mortgage Creditor changes, the claim is transferred, and/or the servicer changes, no change will be recognized for payment by the Trustee until a reasonable time after the filing of a notice which complies with F.R.B.P. 3001(e) and other applicable Rules.

VI. Late Charges and fees on Conduit Mortgage Payments.

- a. The Trustee shall commence disbursements after confirmation and as soon as is practicable after receipt and posting of such funds, but no payments will be disbursed until at least ten (10) days after posting to ensure funds are available. Disbursements by the Trustee will be made in accordance with Trustee's established office policy and procedures and may not coincide with the payment due date set forth in the note/mortgage.
- b. If payment to the Trustee is received from the Debtor and posted by the Trustee before such payment becomes due under the note/mortgage, no late charges, fees, or related penalties may be assessed by the Mortgage Creditor, any servicer, trustee for the loan, or successor-in-interest for such payment.
- c. Checks or other payments from the Debtor to the Trustee which are returned for insufficient funds or for other reasons by the Trustee's financial institution will be deemed "not received."
- d. **The Debtor will be responsible for reviewing and objecting to a Notice of Post-petition Mortgage Fees, Expenses, and Charges under F.R.B.P. 3002.1(c) filed with the Court, within 60 days of the date of filing such notice.** The failure to object will be deemed as a waiver of any claim *against the Trustee only* for any overpayment or underpayment of such amounts, and any request for refund of overpayment or obligation for any underpayment will be the sole duty of the Debtor. Once the Trustee has filed a Notice of Final Cure, the Debtor shall be directly responsible for any further post-petition fees and charges.
- e. If the Debtor pays less than the amounts needed to fund the Plan, the Trustee is authorized to first apply any funds to Trustee fees, then to ongoing Conduit Mortgage Payments, and then on a pro rata basis to all other secured claims and Debtor's attorney's fees included in the Chapter 13 Plan.

VII. Moratoriums. A motion seeking a moratorium to defer payments due under a Plan which includes Conduit Mortgage Payments must include the amount that will be deferred. In order to make up for payments that are missed through the granting of a moratorium, the Trustee will file a Trustee's Notice of Plan Payment Change to increase the Plan payment by an amount sufficient to cover the missed payments by the end of the Plan

AND IT IS SO ORDERED.

EXHIBIT TO OPERATING ORDER –
approved non-standard language regarding conduit mortgages

Non-standard language approved for conduit mortgage payments, to form plan, Exhibit A to SC LBR 3015-1:

Substitute as ¶ III(A):

A. Payments from the Debtor to the chapter 13 trustee (the “trustee”): The Debtor submits to the supervision and control of the trustee all or such portion of future earnings or other future income as is necessary for the execution of the plan. In addition, the Debtor will pay to the trustee any portion of a recovery under a pre-petition claim or cause of action that constitutes disposable income or is not exempt.

All payments shall be sent by the Debtor in time to be received by the trustee beginning not later than thirty (30) days following the date of the filing of the bankruptcy petition or order for relief, and on each calendar month following.

The Debtor shall pay to the trustee the sum of \$ _____ per month for a period of _____ months, unless all allowed claims (other than long-term claims) are fully paid pursuant to the plan.

Trustee shall first apply any funds received to trustee fees, then to ongoing mortgage payments, then to creditors holding secured claims, then to the remaining creditors in accordance with the plan or other Order of the Court. Nothing in this plan should be interpreted to impair the right of any party in interest to take any lawful action as a result of the Debtor’s failure to make payments to the trustee.

In the event a mortgage payment changes as the result of escrow adjustment or mortgage modification, the Trustee is authorized to increase or decrease Plan payments by the amount of the change plus the applicable trustee percentage fee. The Trustee is also authorized to increase the Plan payment in this fashion in order to pay allowable post-petition mortgage fees and charges or if the Court grants a moratorium in Plan payments. The Trustee may make these changes by filing a Trustee’s Notice of Plan Payment Change and provide notice to the Debtor and Debtor’s attorney.

Add as substitute for ¶ IV(B)(3) – add subsequent lettered ¶s :

3. Mortgage payments,

*property located at:
full address, TMS #*

*Ongoing mortgage obligations to Mortgage Creditors (list creditor names) will be maintained, on a conduit basis, by the trustee. For so long as the Debtor complies with this plan, a creditor may not declare a default based on any payment delinquency to be cured by this paragraph and the creditor shall not impose any post-petition fee on account of any arrearage paid by the trustee. **If a payment is posted by the trustee on or before such payment becomes due, no late charges, fees, or additional interest may be assessed by Mortgage Creditor for such payment. Payments posted timely but later returned for insufficient funds will not be deemed received. If insufficient funds are received to meet the obligations for the ongoing obligations, funds will be held in reserve by the trustee until a full payment may be disbursed. The creditor shall apply trustee disbursements, as designated by the trustee, per the classes below.***

a. Pre-Petition Arrearage payments.

To **(creditor name)**: The trustee shall pay the **pre-petition arrearage (including month of filing)** as stated in the creditor’s allowed claim or as otherwise ordered by the Court at the rate of **\$payment amount** or more per month, **along with (percent)% interest.**

Note to users: add separate paragraphs for each creditor entitled to be paid arrears

b. Conduit Mortgage Payments (ongoing mortgage obligations). Beginning (month, year), the third mortgage payment due after filing of the petition, the trustee shall pay the ongoing payments due to Mortgage Creditors as indicated in the chart below. Unless otherwise ordered, however, these payments will be retained by the trustee until after confirmation of the plan and, except as provided by §501(c), Mortgage Creditor must file a proof of claim in compliance with the Official Forms for trustee to disburse such payments. Mortgage Creditors shall apply the payments designated by the trustee as conduit mortgage payments solely to post-petition obligations that accrue during or after the month specified herein. If such payments are placed into a suspense, forbearance or similar account, they will be deemed to have been applied pursuant to this subsection. Mortgage Creditor shall file and serve a Notice of Mortgage Payment Change in accordance with the applicable Official Form, within the deadline and in compliance with the service requirements set forth in F.R.B.P. 3002.1(b), to reflect any changes in the monthly mortgage payments or escrow amounts that occur during the term of the Plan.

<i>Mortgage Creditor name, including servicer/ trustee as applicable, at time of last notice</i>	<i>Ongoing Mortgage Payment*</i>	<i>Does monthly payment include escrow? Yes/no</i>

****Amount(s) listed above will be deemed to be the amount of the ongoing payment due. Debtor asserts that the above amount is correct as of the last written notice (including escrow, if applicable). Upon the filing of a Proof of Claim, or sixty (60) days after the filing of a Notice of Mortgage Payment Change, the Plan shall be deemed modified to change the Monthly Ongoing Payment amount, and to permit the trustee to disburse the amended payment amount.***

c. Gap payments. *The post-petition arrearage through the month before the Conduit Mortgage Payments (ongoing mortgage obligations) begin, shall be cured over the full term of the plan at the rate of \$ _____ or more per month, along with (percent)% interest, for the two (2) months after filing the petition not cured by (a) and (b) above.*

d. Post-Petition charges. *If a Notice of Post-Petition Fees, Expenses and Charges is filed, pursuant to F.R.B.P. 3002.1(c), Debtor shall be responsible for reviewing and objecting to the Notice within 60 days of the date of filing such notice, or the failure to object will be deemed as a waiver of any claim against the trustee for any overpayment of such amounts, and request for refund of overpayment will be the sole duty of the Debtor, and trustee will pay these charges on a pro-rata basis as funds are available. Once the trustee has filed a Notice of Final Cure, the Debtor shall be responsible for any post-petition fees and charges.*

e. Post-Petition Arrearage payments (to be included for moratoriums or post confirmation delinquencies).

To **(creditor name)**: The trustee shall pay the **post-petition** arrearage for the following calendar month(s): _____. Disbursements will be made at the rate of **\$payment amount** or more per month, along with (percent)% interest.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

CASE NO:
CHAPTER:

TRUSTEE'S NOTICE OF PLAN PAYMENT
CHANGE

DEBTOR(S)

TAKE NOTICE THAT, ss the result of escrow adjustment, mortgage modification, post-petition mortgage fees and charges, or the granting of a moratorium, the trustee deems it necessary for the Chapter 13 plan payment to change.

If no timely written objection is filed, the new Chapter 13 plan payment will change to \$_____, effective on the eleventh (11th) day following the date of this Notice.

Date: _____

Chapter 13 Trustee