

## PRACTICAL CONSIDERATIONS FOR OUTSIDE COUNSEL

As stated in my letter to attorneys representing debtor(s) in an on-going lawsuit or claim (see appropriate tab herein), it is the Trustee's position that outside counsel that is handling such a lawsuit or claim for the debtor should **always** file the appropriate application to seek Bankruptcy Court approval of his employment and then seek Bankruptcy Court approval of any settlement of such a lawsuit or claim. With that said, the Trustee acknowledges that there are times when the outside counsel may decide not to go through these steps:

**--Settlement is Fully Exempt:** Suppose the settlement or recovery comes in at an amount lower than the exempt portion of the claim or lawsuit and the exemptions are final (meaning, more than 30 days have passed since the conclusion of the 341 creditors' meeting or, if amended exemptions are filed after the conclusion of the 341 creditors' meeting, more than 30 days have passed since the filing of the amended exemptions, the time deadline for anyone to object to the exemptions has passed), an argument can be made that the exempt portion (in this example, all of the settlement or recovery) is no longer property of the bankruptcy estate and obtaining permission from the Bankruptcy Court to represent the estate and to settle the matter is moot.

--If the outside counsel decides not to make such an application, the Trustee would request that he send the Trustee a letter advising the Trustee that he represents the debtor(s) in an on-going lawsuit or claim; that the lawsuit or claim has now been settled (or a recovery has been made) in an amount less than the exempted amount; that the exemptions are now final; that, in the opinion of the attorney, that settlement or recovery is a fair and reasonable settlement or recovery; and that the attorney requests a letter from the Trustee confirming that the Trustee will assert no interest in the settlement or recovery. The attorney should send the Trustee a copy of the settlement statement.

--Upon receipt of such a letter, the Trustee will review the file and the exemptions and, if the exemptions are in fact final and the settlement is in fact lower than the amount of the exemptions, the Trustee will issue a letter confirming that the Trustee will assert no interest in the settlement or recovery with a disclaimer that the Trustee is expressing no opinion on the attorney's failure to file with the Court an application for employment.

**--Settlement is Sufficient to Pay All Claims in Full:** Suppose the settlement or recovery comes in at an amount where the non-exempt portion is sufficient to pay all claims, including the administrative, secured, priority, and unsecured claims, in full plus interest to the unsecured claims. While technically, the attorney should go through the steps of filing an application for employment along with a motion to approve the settlement, an argument could be made that there is no harm to any parties if such steps are not done. The Trustee will work with the outside counsel in determining the appropriate amount to forward to the Trustee that will accomplish the payment of all claims including interest.

**--Settlement is Nominal:** Suppose the settlement or recovery comes in an amount where the non-exempt portion is fairly nominal. In such a case, the attorney may decide to forego the process of obtaining permission from the Court to represent the estate and obtaining approval from the Court of such a settlement and simply forward the non-exempt portion to the Trustee. The attorney should send his letter advising the Trustee of the settlement or recovery; that, in the opinion of the attorney, that settlement or recovery is a fair and reasonable settlement or recovery; and that he is forwarding the recovery to the Trustee to be administered in accordance with the terms of the debtor(s)' confirmed

plan. The attorney should include with his letter a copy of the settlement statement. Again, the Trustee would urge the attorney to go through the steps of formal application for employment and motion to approve the settlement. However, upon receipt of such a letter, the Trustee will administer the payment in accordance to the terms of the debtor(s)' confirmed plan.

As a practical consideration, the attorney is ultimately attempting to determine the amount, if any, the debtor(s) are entitled to keep; the amount, if any, that needs to be turned over to the Trustee for the benefit of the creditors; the amount that the attorney is able to keep to reimburse the attorney for reasonable and necessary expenses; and the amount that the attorney is able to keep as reasonable and necessary attorney's fees. The Trustee asserts that the Bankruptcy Court is in the best position to make such a determination and the preparation and filing of the forms as attached hereto should accomplish this.

However, the Trustee cannot give legal advice to the attorneys handling on-going lawsuits or claims. The Trustee can provide this information in order to assist in the administration of these cases. **However, the ultimate decision on how to proceed with the handling of the on-going lawsuits or claims rests with the attorney handling the on-going lawsuits or claims.**