

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**CLOIST JIMISON, SR. AND
BERTHA A. JIMISON,**

CASE NO. 11-50016-NPO

DEBTORS.

CHAPTER 13

IN RE:

**OBIE THREADFORD MCWILLIAMS, JR. AND
WOODRENA MCWILLIAMS,**

CASE NO. 12-51190-NPO

DEBTORS.

CHAPTER 13

**ORDER ON MOTIONS TO APPROVE SETTLEMENT AND
COMPENSATION AND REIMBURSEMENT OF EXPENSES OF
ATTORNEYS REGARDING DISBURSEMENT OF SETTLEMENT
FUNDS AND DEDUCTION OF CHAPTER 13 TRUSTEE'S STATUTORY FEE**

In two different chapter 13 cases, there came before the Court for hearing (the “Hearing”) on July 22, 2013, a common issue as to whether a chapter 13 trustee is entitled to deduct a statutory fee from proceeds paid in lump-sum settlement of a worker’s compensation claim. In the first case, *In re Jimison*, Case No. 11-50016-NPO (the “*Jimison Case*”), the Debtor, Bertha Jimison (“Jimison”), filed the Amended Motion to Approve Settlement (*Jimison Case*, Dkt. No. 64) and the Amended Application for Allowance of Compensation and Reimbursement of Necessary Expenses of Attorneys for Special Purposes (*Jimison Case*, Dkt. No. 66) (the “*Jimison Motions*”); the Chapter 13 Trustee, J.C. Bell (the “Trustee”), filed the Trustee’s Amended Response to Debtor’s Amended Motions to Approve Settlement and Fee Application (the “Trustee’s Amended Response”) (*Jimison Case*, Dkt. No. 72); and the Acting United States Trustee for Region 5, Henry G. Hobbs, Jr. (the “U.S. Trustee”), filed the United States Trustee’s Limited Response to Trustee’s Response to Debtor’s Amended Motions to Approve Settlement

and Fee Application (the “UST Response”) (*Jimison* Case, Dkt. No. 73). In the second case, *In re McWilliams*, Case No. 12-51190-NPO (the “*McWilliams* Case”), the Debtor, Woodrena McWilliams (“McWilliams”), filed the Motion for Approval of Compromise and Settlement (*McWilliams* Case, Dkt. No. 69) and Application for Allowance of Compensation and Reimbursement of Necessary Expenses of Attorneys for Special Purposes (*McWilliams* Case, Dkt. No. 70) (the “*McWilliams* Motions”); the Trustee filed the Trustee’s Response to Debtor’s Motions to Approve Settlement and Fee Application (*McWilliams* Case, Dkt. No. 79); and the U.S. Trustee filed the United States Trustee’s Limited Response to Trustee’s Response to Debtor’s Motions to Approve Settlement and Fee Application (*McWilliams* Case, Dkt. No. 89).

At the Hearing, Jimison was represented by Douglas M. Engell (“Engell”) and William Bruce Parker (“Parker”); McWilliams was represented by Tylvester O. Goss and Parker; the U.S. Trustee was represented by Christopher J. Steiskal; and the Trustee was represented by Samuel J. Duncan. The Court, having considered the arguments presented at the Hearing, ruled from the bench that the Trustee is the proper disbursing agent for the settlement proceeds and for payment of attorney’s fees and expenses and that the Trustee is not entitled to deduct a percentage fee under 28 U.S.C. § 586(e) from those proceeds. This Order memorializes and supplements the Court’s bench ruling.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. These are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (O). Notices of the *Jimison* Motions and the *McWilliams* Motions were proper under the circumstances.

Facts¹

A. *Jimison Case*

On May 20, 2013, Jimison filed the *Jimison* Motions asserting that she had reached a lump-sum settlement of her worker's compensation claim in "*Bertha Jimison vs. East Mississippi State Hospital and Mississippi State Agency Workers' Comp Trust*, MWCC Nos. 10067004-K-6562 and 1001550-K-7540 in the amount of \$86,525.00." Jimison asked the Court to approve the settlement amount and the payment of \$25,310.46 to Engell and Parker in attorneys' fees and expenses. The balance of settlement proceeds then would be paid to Jimison, all of it being exempt from any claims of creditors. MISS. CODE ANN. § 71-3-43.² The *Jimison* Motions did not provide for the payment of any fee to the Trustee.

The Trustee did not object to the amount of the settlement or the amount of attorneys' fees and expenses. The Trustee, however, had alleged previously that he was entitled to compensation from the portion of the disbursement representing the payment of Jimison's attorneys' fees and expenses and had asked the Court to authorize payment of his percentage fee before the disbursement of the balance of the funds to Jimison. (*See* Trustee's Response to Debtor's Amended Motions to Approve Settlement and Fee Application, *Jimison* Case, Dkt. No. 69). In the Trustee's Amended Response, filed on June 5, 2013, the Trustee waived his right to compensation from any portion of the disbursement and asserted that "since the Trustee is to receive no compensation in connection with the settlement proceeds and the disbursements for

¹ The facts are undisputed.

² The Mississippi Workers' Compensation Act provides, in pertinent part, that "[n]o assignment, release or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid; and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for collection of a debt, which exemption may be waived." MISS. CODE ANN. § 71-3-43.

administrative expenses relating thereto, he should not be required to receive the settlement proceeds, disburse, and account for the same.” (*Jimison* Case, Dkt. No. 72).

On June 7, 2013, the U.S. Trustee filed the UST Response asserting that he had no position on the propriety of the proposed settlement. The U.S. Trustee, however, maintained that if the Trustee disbursed the settlement proceeds, then he was not entitled to any compensation unless he first established that such compensation is allowed under 28 U.S.C. § 586(e). The U.S. Trustee asserted that the Trustee had not shown how an exempt settlement, not included in or contemplated as part of the plan payments, would constitute a “payment received...under [a] plan” within the language of 28 U.S.C. §586(e)(2). As an alternative to the disbursement of the settlement proceeds by the Trustee, the U.S. Trustee proposed the disbursement of the settlement proceeds by Jimison’s counsel, who the Court could then require to file an affidavit certifying that the payments had been made as authorized.

On June 24, 2013, the Court entered the Order Approving Compromise Settlement (*Jimison* Case, Dkt. No. 76) approving the settlement and payment of attorney’s fees and expenses but reserving for later decision the issue as to whether the Trustee or Jimison’s counsel was the proper disbursing agent for the settlement proceeds. The Court instructed counsel for Jimison not to deposit or negotiate the settlement check. On July 1, 2013, the Court entered an Amended Order Approving Compromise Settlement (*Jimison* Case, Dkt. No. 80) in which the settlement amount was increased and the disbursement issue was again reserved. At the Hearing, the Court ruled that the Trustee is required to disburse the settlement proceeds without deduction of a percentage fee.

B. *McWilliams Case*

The *McWilliams Case* is factually similar to the *Jimison Case* but was in a slightly different procedural posture when the Hearing took place. Unlike the *Jimison Case*, the Court had not yet approved the settlement amount and payment of attorney's fees and expenses.

On May 31, 2013, McWilliams filed the *McWilliams Motions* asserting that she had reached a lump-sum settlement of her worker's compensation claim in "*Woodrena McWilliams vs. Meridian Public School District and Continental Western Insurance Company*, MWCC No. 1200379-M-1362-D, in the amount of \$17,000.00." McWilliams asked the Court to approve the settlement amount and the payment of \$4,567.57 to Parker in attorney's fees and expenses. The balance of the remaining settlement proceeds then would be paid to McWilliams, all of it being exempt from the claims of creditors. The *McWilliams Motions* did not provide for the payment of any fee to the Trustee.

The Trustee and the U.S. Trustee asserted the same position in the *McWilliams Case* that they had set forth in the *Jimison Case*. At the Hearing, the Court approved the settlement and the payment of attorney's fees and expenses and, as in the *Jimison Case*, ruled that the Trustee is required to disburse the settlement proceeds without deduction of a percentage fee.

The Court on July 31, 2013, entered the Order Approving Settlement (*McWilliams Case*, Dkt. No. 101) approving the settlement and the payment of attorney's fees and expenses and instructing the Trustee to disburse the settlement proceeds to McWilliams and her attorney. In the Order Approving Settlement, the Court also noted that a separate order would be entered denying the Trustee's request for compensation and expenses in the *McWilliams Case*.

Discussion

The annual compensation of a chapter 13 trustee is “fixed” by the Attorney General of the United States pursuant to 28 U.S.C. § 586(e)(1)(A). The Attorney General also “fixes” a percentage fee “not to exceed ten percent . . . based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.” 23 U.S.C. § 586(e)(1)(B)(i). The percentage fee is collected by the standing chapter 13 trustee “from all payments received by such individual under plans in [chapter 13 cases] for which such individual serves as standing trustee.” 28 U.S.C. § 586(e)(2). Thus, the percentage fee pays both the salary and the expenses of the standing chapter 13 trustee. Notably, the percentage fee may be collected by the trustee only on monies received pursuant to the plan. *In re Wright*, 82 B.R. 422, 423 (Bankr. W.D. Va. 1988).

This statutory formula for determining payment of compensation and expenses renders the fee-setting provisions under 11 U.S.C. § 326 inapplicable to a chapter 13 trustee. Section 326(b) states:

In a case under chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses . . . of a standing trustee appointed under section 586(b) of title 28.

11 U.S.C. § 326(b). This statutory limitation was addressed by the Court in *In re Bazor*, No. 08-50412-NPO, Dkt. No. 223 (Bankr. S.D. Miss. June 19, 2009). The issue in *Bazor* was whether a standing chapter 12 trustee could seek administrative expenses apart from the percentage fee. This Court found that under 11 U.S.C. § 326(b) “the court may not award compensation or expenses to the standing trustee, and the only compensation a standing trustee may receive is the percentage fee provided under 28 U.S.C. § 586(e).” *Bazor*, Dkt. No. 223 at 6 (citing *In re Ward*, 132 B.R. 417, 418 (D. Neb. 1991) (involving chapter 13 trustee)). The Court similarly noted that

the “statutory language is clear that Congress intended the standing trustee only to collect a percentage fee pursuant to 28 U.S.C. § 586(e), and not compensation or reimbursement of expenses through other agreements.” *Bazor*, Dkt. No. 223 at 3 n.10.

Although *Bazor* involved a chapter 12 trustee seeking administrative expenses, the Court’s opinion was based on reasoning equally applicable to a chapter 13 trustee. “This Court’s lack of authority to award compensation or expense applies to chapter 12 and 13 standing trustees alike.” *Bazor*, Dkt. No. 223 at 6. In short, the Court in *Bazor* concluded that trustee compensation is fixed by statute and that 11 U.S.C. § 326(b) strictly prohibited reimbursement of additional expenses. *Bazor*, Dkt. No. 223 at 7.

In the two cases presently before the Court, proceeds from the workers’ compensation settlements are not included in the confirmed plans. (*Jimison* Case, Dkt. No. 35; *McWilliams* Case, Dkt. No. 27). The U.S. Trustee maintained at the Hearing that the Trustee had not demonstrated how the lump-sum settlement proceeds would constitute payments received under the plans. The Trustee disagreed with this view but made no attempt to support his position after he agreed to waive his entitlement to a percentage fee.

The Court found at the Hearing that the Trustee was not entitled to recover a percentage fee for the disbursement of the settlement proceeds and attorney’s fees and expenses. The Court then turned to the Trustee’s next contention that he should not be required to disburse the settlement proceeds because he would not receive any compensation for doing so.

A chapter 13 trustee performs the duties specified in 11 U.S.C. § 704(a)(2). *See* 11 U.S.C. § 1302(b)(1). Section 704(a)(2) provides that a trustee shall “be accountable for all property received.” 11 U.S.C. § 704(a)(2). Therefore, a chapter 13 trustee is responsible for handling all property of the bankruptcy estate.

All property of the debtor becomes property of the bankruptcy estate upon the filing of a petition for relief, including property of the debtor that is exempt under state law. 8 COLLIER ON BANKRUPTCY ¶ 1322.12 n.3 (16th ed. 2013). Indeed, an exemption affects property only after it has become property of the estate. *In re Schnabel*, 149 B.R. 353 (Bankr. S.D.N.Y. 1993). Accordingly, the exempt status of workers' compensation benefits does not preclude them from being treated as property of the estate. *In re Crawley*, 117 B.R. 457, 459 (Bankr. D. Minn. 1990).

Here, the Court found that the Trustee was required to fulfill his statutory duty and disburse the exempt settlement proceeds, which constitute property of the bankruptcy estates in the *Jimison* Case and the *McWilliams* Case. Moreover, as a matter of general policy, holding the Trustee responsible for disbursing lump-sum settlement payments provides some assurance to the Court that the monies will reach debtors, attorneys awarded compensation and reimbursement of expenses, and secured creditors. Unlike counsel for the debtor, a chapter 13 trustee must file a bond with the court. 11 U.S.C. § 322. The trustee's bond provides the debtor with a remedy in the event the trustee fails to perform his official duties "including most significantly the safeguarding and responsible disposition of estate assets and their distribution to creditors." *In re Abraham*, 163 B.R. 772, 779 (Bankr. W.D. Tex. 1994). Also, the trustee is required to examine proofs of claims as part of his statutory duties and, therefore, would be better suited to disburse the settlement proceeds in those cases where liens had attached to the funds. *See* 11 U.S.C. § 704(a)(5).

This decision is not in any way a reflection on the attorneys now before the Court but is made necessary by the conduct of a few attorneys in unrelated cases. *See, e.g., In re Douglas*, Adv. Proc. Nos. 10-01187-DWH, 11-01018-DWH, 2011 WL 832501 (Bankr. N.D. Miss. March

3, 2011) (denying summary judgment in matter involving alleged embezzlement of settlement proceeds by an attorney). Also, in reaching this decision, the Court recognizes that a disbursing agent is more than “a glorified check-writer.” *In re Perez*, 339 B.R. 385, 416 (Bankr. S.D. Tex. 2006). The statutory method for calculating compensation of a chapter 13 trustee, however, is not based upon the services rendered in a particular case, and the Court has no discretion to award a trustee compensation beyond what he is entitled to receive under 28 U.S.C. § 586(e).

Conclusion

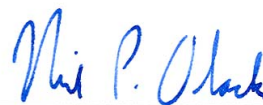
The Court concludes that the Trustee should be required to disburse the settlement proceeds. The Trustee’s duty is to handle and be held accountable for all property of the estate, including exempt property. Additionally, because exempt settlement proceeds are not payments received under the plans within the meaning of 28 U.S.C. § 586(e)(2), the Trustee is not entitled to a percentage fee from their disbursement.

IT IS, THEREFORE, ORDERED that the portion of the *Jimison* Motions not previously ruled upon is hereby granted as set forth herein.

IT IS FURTHER ORDERED that the portion of the *McWilliams* Motions not previously ruled upon is hereby granted as set forth herein.

IT IS FURTHER ORDERED that the Trustee is hereby ordered to disburse the settlement funds and attorneys’ fees and expenses without deduction of any statutory fee.

SO ORDERED.



Neil P. Olack
United States Bankruptcy Judge
Dated: August 2, 2013