

## ***In re Evans: Chapter 13 Trustee Fees in Cases Dismissed Pre-Confirmation***

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### **A. INTRODUCTION**

In a recent Ninth Circuit Court of Appeals decision, the court held that a standing trustee in a chapter 13 case will not be paid their percentage fee when the case is dismissed before plan confirmation.<sup>1</sup> That case, *In re Evans*, addressed a single issue as a matter of first impression: statutory interpretation harmonizing 28 U.S.C. § 586(e)(2) (“§ 586(e)(2)”) and 11 U.S.C. § 1326(a)(2)<sup>2</sup> to determine whether a chapter 13 trustee may keep fees arising from a case that is dismissed pre-confirmation.<sup>3</sup> This article discusses the reasoning behind *Evans*, opinions from other circuits that have ruled on the issue, and what *Evans* means for chapter 13 practice in the Western District of Washington.

### **B. FACTS**

In *Evans*, joint debtors Roger Evans and Lori Steedman (“Debtors”) filed a chapter 13 bankruptcy plan.<sup>4</sup> The Debtors’ proposed plan provided that the fees of the chapter 13 trustee (“Trustee”) would be “governed and paid as provided by 28 U.S.C. § 586.”<sup>5</sup> The Debtors began making payments to the Trustee according to the proposed plan in accordance with § 1326(a)(1).<sup>6</sup> The Trustee collected a percentage fee from each payment as compensation under § 586(e)(2), as reflected in the Debtors’ plan.<sup>7</sup> Before plan confirmation, however, the Debtors voluntarily dismissed their case.<sup>8</sup>

After the dismissal, the Debtors filed a “motion to disgorge fees” collected by the Trustee from the § 1326(a)(1) payments.<sup>9</sup> The Debtors argued that the Trustee was obligated to return to them any fees she had collected because § 1326(a)(2) requires that the trustee return fees to the Debtor if a plan is not confirmed.<sup>10</sup> The bankruptcy court agreed with the Debtors and ordered the Trustee to return the fees. The district court reversed the bankruptcy court, and the Debtors timely appealed to the Ninth Circuit.<sup>11</sup>

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<sup>1</sup> *In re Evans*, 69 F.4th 1101 (9th Cir. 2023).

<sup>2</sup> Unless otherwise indicated, all chapter, section, and rule references are to the Federal Bankruptcy Code, 11 U.S.C. § 101–1532, and to the Federal Rules of Bankruptcy Procedure, 1001–9037.

<sup>3</sup> *Id.* at 1105.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; See *In re Evans*, 615 B.R. 290, 303 (Bankr. D. Idaho 2020) (“If a chapter 13 case is dismissed pre-confirmation . . . the trustee shall return any such payments not previously paid and not yet due and owing to creditors to the debtor, including the trustee's percentage fee.”); *McCallister v. Evans*, 637

## C. DISCUSSION

### 1. *The Trustee's Interpretation.*

In their arguments presented to the Ninth Circuit, the Trustee and the Debtors relied on the same word, “collect,” in § 586(e)(2) as dispositive on the issue but came to opposite conclusions. In relevant part, § 586(e)(2) states that the trustee “shall *collect* such percentage fee from all payments received by such individual under plans . . . for which such individual serves as standing trustee.”<sup>12</sup> The Trustee argued that the statute directed a standing trustee to collect **and retain** fees made by debtors under a confirmed plan or from pre-confirmation § 1326(a)(1) payments.<sup>13</sup> The Trustee relied on dictionary definitions of “collect” and other federal statutes where Congress used the same verbiage to infer that Congress intended for trustees to irrevocably collect fees when receiving each payment, including pre-confirmation payments.<sup>14</sup>

### 2. *The Debtors' Interpretation.*

The Debtors argued that the Trustee's interpretation conflicted with the directive to return payments under § 1326(a)(2) if a plan is not confirmed.<sup>15</sup> The Debtors argued for a more harmonious reading: § 586(e)(2) directs the trustee to collect **and hold** fees from pre-confirmation payments pending confirmation, while § 1326(a)(2) directs trustees how to disburse payments once a decision on confirmation is made.<sup>16</sup> Under the Debtors' interpretation, upon plan confirmation, the trustee distributes the payments, including the fees, under the plan.<sup>17</sup> Conversely, if a plan is not confirmed, the payments, including the fees, are returned to the debtors.

### 3. *The Ninth Circuit's Reasoning.*

The Ninth Circuit rejected both interpretations, noting that both “suffer[ed] from the same basic flaw: they both require us to add words to the statute that are not there.”<sup>18</sup> Instead, the court adopted the interpretation proposed by amicus National Consumer Bankruptcy Rights Center and National Association of Consumer Bankruptcy Attorneys, which asserted that the phrase “payments . . . under plans” in § 586(e)(2), when read contextually, refers only to payments under confirmed plans, rendering § 586(e)(2) irrelevant to the pre-confirmation period.<sup>19</sup> For pre-confirmation payments, the appropriate provisions are § 1326(a) and (b) because they

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B.R. 144, 148 (D. Idaho 2022) (Holding that “chapter 13 standing trustees may keep the percentage fee pursuant to the plain language of § 586(e)(2) even if the plan is not confirmed.”)

<sup>12</sup> 28 U.S.C. § 586(e)(2) (emphasis added)

<sup>13</sup> *Evans*, 69 F.4th at 1106.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1106-07.

refer to payments “proposed by the plan.”<sup>20</sup> Furthermore, § 1326(a)(1) “instructs the debtor to commence making ‘payments . . . in the amount[ ] . . . proposed by the plan’ no later than 30 days after the date of filing of the plan or the order for relief, whichever is earlier.”<sup>21</sup> In other words, before confirmation, the trustee does not collect fees because § 586(e)(2) is not triggered but rather retains the proposed plan payments under § 1326(a)(2) pending a determination of plan confirmation.

The result in *Evans* was that since the Debtors voluntarily dismissed their case pre-confirmation, § 586(e)(2) was not triggered, and § 1326(a)(2) mandated that the Trustee return all retained payments to the Debtors, including any fees that the Trustee would have collected under § 586(e)(2) had the Debtors confirmed a plan.

#### 4. Policy Arguments.

The *Evans* court noted that its holding reached the same conclusion as the Tenth Circuit in *In Re Doll*,<sup>22</sup> the first circuit to decide the issue, albeit upon slightly different reasoning.<sup>23</sup> Both courts, however, addressed and rejected policy arguments in favor of trustees retaining fees if a case is dismissed pre-confirmation. In *Evans*, the Trustee argued that permitting debtors who voluntarily dismiss their case before confirmation to avoid paying trustee fees “diminishes the total funds available to chapter 13 trustees to help all debtors.”<sup>24</sup> Further, fee avoidance unfairly shifts fees onto other successful chapter 13 debtors, and it may even incentivize trustees to violate their duty to object to plans preconfirmation, recognizing that confirmation is a prerequisite to payment.<sup>25</sup>

The *Evans* court, in response to the Trustee’s policy arguments, stated that “[i]t is hardly this [c]ourt’s place to pick and choose among competing policy arguments . . . selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in . . . judicial policymaking.”<sup>26</sup> The court noted that policy arguments cannot overcome the relevant statutory provisions’ plain language and context.<sup>27</sup> The trustee in *Doll* raised similar arguments.<sup>28</sup> In rebuffing those arguments, the *Doll* court stated, “Congress has unambiguously already made that policy decision for Chapter 13 debtors.”<sup>29</sup> In other words, both the *Evans* and *Doll* courts declined entertaining policy arguments against, from their perspective, an unambiguous statute.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 57 F.4th at 1129 (10th Cir. 2023).

<sup>23</sup> *Id.* at 1141 (“We read [§ 1326(a)(2)] to mean that the standing trustee must return all of the pre-confirmation payments he receives, without first deducting his fee.”)

<sup>24</sup> *Evans*, 69 F.4th at 1109.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1110 (quoting *United States v. Nishiie*, 996 F.3d 1013, 1028 (9th Cir. 2021)).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Doll*, 57 F.4th at 1143.

## D. IMPLICATIONS OF *EVANS* IN CHAPTER 13

### 1. *A Circuit Split May Arise, or the Supreme Court Could Grant Certiorari.*

The two circuits to have decided the issue thus far agree that § 1326(a)(2) prevents a standing trustee from collecting fees from a debtor if the case is dismissed pre-confirmation. The Tenth Circuit’s reasoning in *Doll* differs somewhat from *Evans*. In *Doll*, the Court buttressed its opinion by comparing § 1326(a)(2) to its “sister” statutes under chapter 12 and subchapter V, §§ 1226(a) and 1194(a), respectively.<sup>30</sup> In both, Congress provided explicitly that the standing trustee should first deduct their fee before returning pre-confirmation payments to the debtor.<sup>31</sup> The *Doll* court declined to read into § 1326(a)(2) language that Congress omitted.<sup>32</sup>

Other circuits may rule differently than *Doll* and *Evans*, leading to a circuit split. In *In re Soussis*, the bankruptcy court held that § 586(e)(2) permits a standing trustee to collect and keep fees if the case is dismissed pre-confirmation, and the district court affirmed. The appeal is pending before the Second Circuit, which recently heard oral argument on the issue in February 2023 but has yet to rule. Another case on the same issue, *In re Johnson*,<sup>33</sup> is pending before the Seventh Circuit. The bankruptcy court in *Johnson* ruled the same as *Evans* and *Doll* but took additional precautionary measures.<sup>34</sup> The court certified a direct appeal to the Seventh Circuit *sua sponte* and stayed its ruling pending appeal, stating that it was “a matter of public importance” and “there is no controlling decision of the court of appeals in this Circuit or of the Supreme Court.”<sup>35</sup> A circuit split may arise depending on how the Second and Seventh Circuits rule.

The Supreme Court could answer the question before a circuit split arises. *Doll* is currently pending before the Supreme Court on the trustee’s Petition for a Writ of Certiorari.<sup>36</sup> Additionally, a coalition of seven retired bankruptcy judges has filed an amicus brief in support.<sup>37</sup> If the Court grants certiorari, the Court may resolve the issue before other circuits rule. Alternatively, the Court may decline until more circuits weigh in.<sup>38</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see also U.S.C. §§ 1226(a); 1194(a).

<sup>32</sup> *Id.* at 1142.

<sup>33</sup> 650 B.R. 904 (Bankr. N.D. Ill. 2023).

<sup>34</sup> *Id.* at 913 (“the Trustee is not authorized to deduct from held plan payments her statutory fee if a chapter 13 case is dismissed without confirmation of a plan.”)

<sup>35</sup> *Id.*

<sup>36</sup> Adam M. Goodman, Chapter 13 Trustee, Petitioner, v. Daniel Richard Doll, Respondent., 2023 WL 5913514 (U.S.) (Petition for Writ of Certiorari).

<sup>37</sup> Adam M. Goodman, Chapter 13 Trustee v. Daniel Richard Doll, 23-218 (Brief of *Amici Curiae* in Support of Petitioner).

<sup>38</sup> See generally Sup. Ct. R. 10 (Identifying the case characteristics the Court considers in determining whether to grant certiorari as a matter of judicial discretion.)

## 2. *How Evans Affects Chapter 13 Cases in the Western District of Washington.*

For practitioners in the Western District of Washington, *Evans* is binding. Therefore, if a chapter 13 case is dismissed pre-confirmation, the standing trustee must return all payments made by the debtor under § 1326(a)(1), including any fees that the standing trustee would have otherwise collected under § 586(e)(2). Time will tell how much *Evans* affects chapter 13 case administration moving forward.<sup>39</sup> *Evans* provides a means for debtors to avail themselves of § 362 stay protection while amassing post-petition property held by the trustee, which is returned to the debtor at no cost if the case is dismissed pre-confirmation. Also, if pre-confirmation dismissals increase, trustees may begin to feel the effects of *Evans* more acutely.<sup>40</sup> On the other hand, perhaps the impact of *Evans*, espoused in the policy arguments, is overblown, and pre-confirmation dismissals will remain an incidental cost of chapter 13 case administration.

Although *Evans* is binding now, that may change in the future. The issue is still an open question in most circuits, and a split may emerge, eventually leading to a definitive ruling by the Supreme Court. Alternatively, the Supreme Court may grant certiorari in *Doll*. Also, interested parties may have enough financial incentive to compel Congress to adopt a new policy choice. *Evans* and *Doll* illuminate that standing trustees, debtors in confirmed plans, and creditors receiving payments under confirmed plans may choose to lobby Congress to amend § 1326(a)(2) to align with the comparable provisions contained in chapter 12 and subchapter V.<sup>41</sup> Of course, such a decision is for Congress to make. For now, *Evans* controls in the Western District of Washington.

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<sup>39</sup> See generally Ed Flynn, Chapter 13 Case Outcomes by State, ABI JOURNAL, August 2014, at 40 (Analyzing chapter 13 data acquired from the Executive Office for U.S. Trustees (EOUST), collected between 2007-2013)

<sup>40</sup> See Flynn, *supra* note 40 (Reporting that between 2007-2013 Nationwide, approximately 25.1% of chapter 13 cases were dismissed pre-confirmation and 4.2% were converted pre-confirmation.)

<sup>41</sup> See Rochelle's Daily Wire: *Stop Punishing the Innocent: Congress Should Fix the Doll/Evans Problem*, September 07, 2023 ("Add at the end of 11 U.S.C. § 1326(a)(2) the phrase, ". . . and if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee.")