

## LESSON 10

### INDIVIDUAL DEBTOR PLANS (Chapter 13 Bankruptcy Code)

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#### I. INTRODUCTION

The Chapter 13 provisions of the Bankruptcy Code are exclusively for individual debtors. Section 109(e). They permit individuals to reorganize their debts and formerly offered debtors a superdischarge as a reward. The Bankruptcy Abuse

Prevention and Consumer Protection Act of 2005 (the BAPCPA), which is effective for cases filed on or after October 17, 2005, changed many Chapter 13 provisions, including the superdischarge. All of the debtor's disposable income, which is not necessary to pay a debtor's living expenses, is used to fund the confirmed plan and pay allowed claims. Subject to certain debt limitations, Chapter 13 protection is available to individual debtors who may be traditional wage earners, proprietors of a business, farmers, service persons, professionals, retirees, recipients of welfare or disability payments, and others with regular income.

The Service frequently has trouble protecting its interest in Chapter 13 cases because of the speed at which the cases move to confirmation. In a typical Chapter 13 case, the first meeting of creditors is scheduled within 21 to 50 days after the petition is filed (the date the order for relief is entered). Bankruptcy Rule 2003(a). In many jurisdictions, plan confirmation is set for the same date and time as the first meeting of creditors. And, if there are no objections to the plan, the plan is confirmed at the first meeting of creditors. In other jurisdictions, a plan confirmation hearing occurs within a week or two after the first meeting of creditors. So, a debtor often has a Chapter 13 plan confirmed within 35-70 days after filing the petition. This time frame sometimes proves to be too short for Insolvency to uncover all of the information about a debtor necessary for the Service to make an informed judgment on whether the debtor's plan properly treats the Service's claims. Note that for cases filed on or after October 17, 2005, new section 1324(b) provides that a confirmation hearing may not be held earlier than 20 days and not later than 45 days after the date of the meeting of creditors under section 341(a), unless the court determines that an earlier hearing is in the best interests of both the creditors and the estate and there is no objection.

The automatic stay, which prohibits acts to collect prepetition debts, remains in effect for the life of the plan. This provides debtors with a very long "breathing spell." Section 1322(d) ties the allowable length of the plan to the household income. If household income is equal to or more than the applicable state median family income, the plan may not provide for payments that exceed 5 years. If household income is less than the applicable state median family income, the plan may not provide for payments that exceed three years, unless the bankruptcy court, for cause, approves a period of up to five years. Prior to BAPCPA, the length of time available to repay creditors, coupled with the superdischarge granted upon completion of the payments, made Chapter 13 a very attractive provision to qualifying debtors. As noted above, the BAPCPA eliminated the superdischarge in Chapter 13 cases. See discussion of section 1328, below.

There are several issues that must be addressed when representing the Service in Chapter 13 cases. These issues will be discussed first in this chapter, followed by a description of other provisions of Chapter 13. The five major issues in Chapter 13 cases are: jurisdiction or eligibility, plan review/proper treatment of the Service's claims, postpetition claims, plan modification, and discharge. As a general matter, Chapters 1, 3, and 5 of the Bankruptcy Code are applicable to Chapter 13. Section 103(a).

## **II. COMMENCEMENT OF THE CASE**

A Chapter 13 case is commenced only by the filing of a voluntary petition by an individual debtor or, in a joint case, by a husband and wife. Sections 301 and 302. Involuntary cases are not authorized (section 303), and a Chapter 7 liquidation case may not be converted to a Chapter 13 case unless the conversion is at the request or consent of the debtor (section 706(c)).

Procedures for filing a petition (Official Form 1) under Chapter 13 are essentially the same as in cases under Chapter 7. A Chapter 13 debtor is required to file a list containing the name and address of each creditor, a schedule of executory contracts and unexpired leases, schedules of assets and liabilities, a schedule of income and expenditures, and a statement of financial affairs. Bankruptcy Rule 1007; Official Forms 6 and 7.

The examination of a debtor concerning the debtor's statement of financial affairs and schedules, as well as the feasibility of the debtor's proposed plan of debt repayment, occurs at the first meeting of creditors. Sections 341(d), 1302(b).

## **III. RETURN FILING REQUIREMENTS - 11 U.S.C. § 1308**

For cases filed on or after October 17, 2005, the BAPCPA added a requirement that Chapter 13 debtors file certain tax returns. Pursuant to new section 1308(a), no later than the day before the date of the first meeting of creditors under section 341(a), the debtor must file all tax returns with the tax authority for all prepetition taxable periods ending during the four-year period prior to or on the date of the filing of the bankruptcy petition.

New section 1308(b) provides that if a return is not filed as required by section 1308(a), then the trustee can hold open the first meeting of creditors for a reasonable period of time to allow the debtor additional time to file the return. For returns due prepetition, the trustee may hold open the meeting no more than 120 days after the date the meeting was first scheduled. For returns due postpetition, such date shall not be more than the later of 120 days after the meeting was first scheduled or the date the return is due under the last automatic extension to which the debtor is entitled and for which the debtor made a timely

request. If the debtor establishes that the failure to file is attributable to circumstances beyond the debtor's control, the court can extend the filing period established by the trustee for an additional 30 days for returns due prepetition, and for a period not longer than the applicable extended due date for returns due postpetition.

If the returns specified by section 1308 have not been filed, then the Service should object to confirmation and seek dismissal of the case, if the trustee has not already done so. The Service will have additional time to file claims and object to confirmation after returns specified by section 1308 have been filed. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under section 1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. Bankruptcy Rule 3002(c)(1). See also 11 U.S.C. § 502(b)(9).

"Return" for purposes of section 1308 is defined to include substitutes for returns prepared by the Service without the taxpayer's cooperation under I.R.C. § 6020(a) or (b), or a written stipulation to a Tax Court judgment, even though such documents are not "returns" for purposes of dischargeability under section 523(a)(1).

#### **IV ELIGIBILITY/JURISDICTION - 11 U.S.C. § 109**

##### **A. Eligibility**

Only individual debtors are eligible for relief under the provisions of Chapter 13. Individual debtors who are married may choose to file jointly, but need not do so. Section 302. It is permissible for only one spouse to file for Chapter 13 relief. Sections 109(e), 302. Despite the fact that only individuals may file for relief under Chapter 13, not all individuals are eligible for Chapter 13 relief. First, an individual must have a regular source of income. Second, a debtor's total outstanding liabilities at the time the bankruptcy petition is filed cannot exceed certain dollar limits. Effective April 1, 2013, these dollar limits are \$383,175 for unsecured debts and \$1,149,525 for secured debts. (To be readjusted effective April 1, 2016.) Section 109(e). Pursuant to section 104(b)(1) the debt limits are increased every three years based upon changes in the Consumer Price Index.

An individual with regular income is defined in section 101(30) as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title." The test, then, is not the type of income, but its regularity and stability. In re Murphy, 226 B.R. 601 (Bankr. M.D. Tenn. 1998). See generally In re Buren, 725 F.2d 1080 (6th Cir. 1984) (Social Security payments qualify as regular income); In re Hammonds, 729 F.2d 1391 (11th Cir. 1984) (welfare payments qualify as regular income); In

re Bottelberghe, 253 B.R. 256 (Bankr. D. Minn. 2000) (contributions by nondebtor spouse are regular income); In re McMonagle, 30 B.R. 899 (Bankr. D. S.D. 1983) (unemployment compensation is regular income); In re Taylor, 15 B.R. 596 (Bankr. D. Ariz. 1981) (child support is regular income); In re Mozer, 1 B.R. 350 (Bankr. D. Colo. 1979) (regular income need not exist at date of petition, but must be in evidence by confirmation date; burden of proof on debtor). Cf. Gulley v. DePaola, 301 B.R. 361 (M.D. Ala. 2003) (contributions from son do not constitute sufficiently stable and regular income for Chapter 13 eligibility purposes).

At the very least, debtors are required to file schedules that include a description of regular income to fulfill the regular income requirement. In re Nowak, 143 B.R. 154, 158-59 (Bankr. N.D. Ill. 1992). Although this requirement is not addressed very often by the Service in its review of Chapter 13 cases, it represents an eligibility hurdle that a debtor must meet and should not be overlooked. When federal tax liabilities alone do not exceed the debt limits of section 109(e), they should be added to the other debts scheduled by a debtor to insure qualification. A difficult part of this analysis comes in deciding whether liabilities, for which liens have been filed, should be treated as secured or unsecured debts. Even when a lien has been filed, the Service's claim is unsecured to the extent it exceeds a debtor's equity in property. The portion of the Service's claim that is unsecured due to a lack of equity is added to the other unsecured claims in determining whether the dollar limit for unsecured debt has been met. In re Ficken, 2 F.3d 299 (8th Cir. 1993); In re Balbus, 933 F.2d 246 (4th Cir. 1991); Matter of Day, 747 F.2d 405 (7th Cir. 1984).

Another issue in deciding whether a debtor's liabilities exceed the eligibility ceiling is whether the liabilities are noncontingent/contingent and liquidated/unliquidated. There is a split in authorities regarding the effect of a dispute by the debtor over a liability. See generally In re Mazzeo, 131 F.3d 295 (2d Cir. 1997) (state-imposed trust fund liability is noncontingent and liquidated despite debtor's dispute); United States v. Verdunn, 89 F.3d 799 (11th Cir. 1996) (tax deficiency asserted in statutory notice of deficiency is noncontingent and liquidated); Matter of Knight, 55 F.3d 231 (7th Cir. 1995) (disputed penalties included in jurisdictional limits determination); contra, Matter of Pearson, 773 F.2d 751 (6th Cir. 1985) (state of the debtors' affairs as they appear on the date of filing determines whether debtors have meet eligibility requirements); United States v. May, 211 B.R. 991 (M.D. Fla. 1997) (deficiency in tax subject to pending Tax Court litigation not sufficiently certain to qualify as unliquidated debt for eligibility purposes).

One court has held that an individual debtor with responsible person liabilities must include those liabilities for purposes of determining eligibility even when the corporation, from which the underlying employment tax obligations arose,

scheduled them for payment in its own Chapter 11 proceeding. Brockenbrough v. Comm'r, 61 B.R. 685 (W.D. Va. 1986).

Courts generally have taken the position that if a debtor is not eligible for Chapter 13 relief under section 109(e), but has otherwise properly invoked jurisdiction under the Bankruptcy Code to be a debtor, then the courts will afford the debtor the opportunity to convert the case to a proceeding under a chapter for which the debtor is eligible rather than dismiss the case. Rudd v. Laughlin, 866 F.2d 1040 (8th Cir. 1989).

## **B. Waiver**

If an objection to a debtor's eligibility is not timely raised, the objection may be considered waived. In re Jones, 134 B.R. 274 (N.D. Ill. 1991). The authorities are split as to whether an eligibility motion may be made after the plan has been confirmed. Compare In re Koehler, 62 B.R. 70 (Bankr. D. Neb. 1986) (failure to object prior to confirmation is not a waiver), and In re Jarvis, 78 B.R. 288 (Bankr. D. Or. 1987) (plan confirmation constitutes binding determination of eligibility).

## **C. Jurisdiction**

Section 109(g) imposes two jurisdictional limitations on Chapter 13 cases. No individual may be a debtor who has been a debtor in a case pending in the preceding 180 days that was dismissed for a willful failure of the debtor to abide by an order of the court or to appear to prosecute the bankruptcy case. Section 109(g)(1). Also, it prohibits an individual from filing a Chapter 13 petition within 180 days after dismissal of a previous bankruptcy case that was voluntarily dismissed by the debtor after the filing of a motion to lift the automatic stay. Section 109(g)(2).

# **V. PLAN REVIEW - 11 U.S.C. §§ 1322 and 1325**

Although time often prohibits adequate review of a Chapter 13 plan prior to confirmation, review of the plan is a very important task. The requirements for a satisfactory plan are set forth in sections 1322 and 1325. While these sections are phrased in terms of mandatory requirements, in many jurisdictions it is not possible to rely on the trustee or the court to police the plans to insure that the claims of the Service are treated properly. This is especially true when the confirmation hearing occurs before the claim of the Service has been filed.

The provisions of sections 1322 and 1325 contain requirements with respect to each type of claim the Service might file: secured, priority unsecured, and general unsecured. Unlike Chapter 11 plans where creditors vote prior to

confirmation, Chapter 13 creditors do not vote but must file timely objections to the plan if the plan does not properly treat their claims. If no objections are filed, the court must confirm the plan if it meets the statutory requirements found in sections 1322 and 1325.

#### **A. Plan Requirements**

The debtor has the burden of proof on all confirmation requirements. See, e.g., In re Hill, 268 B.R. 548 (BAP 9th Cir. 2001).

The following requirements are applicable to all Chapter 13 plans:

1. **Time for Filing** - Bankruptcy Rule 3015 requires a plan to be filed within 14 days after the petition is filed if not filed at the time the petition is filed.
2. **Commencement of Payments** – Unless the court orders otherwise, a debtor must start payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier. Section 1326(a)(1).
3. **Length of Plan** – Prior to its amendment under the BAPCPA, section 1322(d) provided that a plan may not provide for payments over a period longer than three years, unless the bankruptcy court, for cause, approved a longer period, but the court could not approve a period longer than five years. Under the BAPCPA, section 1322(d) was amended to tie the allowable length of the plan period to the debtor's household income. If the current combined income of the debtor and his spouse is not less than the applicable state's median family income, the plan may not provide for payments over a period exceeding five years. If the combined household income is less than the applicable state's median family income, the plan may not provide for payments over a period exceeding three years, unless the bankruptcy court, for cause, approves a period of up to five years.

The impact of the amendment to section 1322(d), in conjunction with the amendment to section 1325(b), discussed below, is to require certain debtors at or above the applicable state's median income to commit their disposable income to paying unsecured debt for a five-year period. The plan must provide for payments over five years if (1) the trustee or the holder of an allowed unsecured claim objects to confirmation and (2) the plan does not provide for payment in full of all allowed unsecured claims over a shorter period. **Thus, debtors who fail the section 707(b) means test because they can pay the specified amount of debt over a five-year period must pay such amount of unsecured debt in a five-year plan.**

4. **Funding** – The debtor must submit all or a portion of future earnings or other future income to the trustee as is necessary for the execution of the plan. Section 1322(a)(1). In Hamilton v. Lanning, 130 S.Ct. 2464 (2010), the Supreme Court held that “when a bankruptcy court calculates a debtor’s projected disposable income, the court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.”
5. **Good Faith** - A Chapter 13 plan must be proposed in good faith. Section 1325(a)(3). To determine whether a plan has been filed in good faith, courts generally look at the totality of the circumstances. In re Gier, 986 F.2d 1326 (10th Cir. 1993); Matter of Smith, 848 F.2d 813 (7th Cir. 1988); Educ. Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987). Some of the factors that go into a determination of good faith include whether debts were accurately stated in the debtor's filing, whether the debtor accurately disclosed his income and expenses, whether any inaccuracy of a debtor's filings was intended to mislead his creditors and the court, how much the debtor intends to pay compared to any surplus which may be reserved in his budget, the debtor's employment history and his ability to earn income, the duration of the plan, whether classes of creditors should be treated alike or differently, the circumstances in which the debtor's liabilities arose, whether debts to be discharged in a Chapter 13 would be excepted from discharge in a Chapter 7, and the frequency of filings by the debtor and their resolution. In re Estus, 695 F.2d 311, 316 (8th Cir. 1982). For a different perspective on the issue of good faith, see In re Keach, 243 B.R. 851 (BAP 1st Cir 2000). Note that the denial of a Chapter 13 plan confirmation for lack of good faith under section 1325(a)(3) does not necessarily lead to dismissal of a Chapter 13 petition for lack of good faith under section 1307(c). Matter of Love, 957 F.2d 1350 (7th Cir. 1992). The BAPCPA added new section 1325(a)(7), which requires the court to find, as a condition of confirmation, that the debtor filed the Chapter 13 case in good faith.
6. **Best Interests of Creditors Test** - The value of the property to be distributed to the holders of allowed unsecured claims is not less than the amount they would receive in a liquidating Chapter 7. Section 1325(a)(4).
7. **Best Efforts Test** – If the trustee or the holder of an allowed unsecured claim objects to the plan, the debtor must devote all of his projected disposable income to the plan for its term. Section 1325(b). The definition of “disposable income” for purposes of the “best efforts” test was amended by the BAPCPA. Under the amendment, disposable income is determined consistently with the means test for the presumption of abuse under



section 707(b). It is defined as current monthly income less specified deductions, including amounts reasonably necessary to be expended for the maintenance or support of the debtor and his dependents, in reliance on IRS standards. For debtors whose monthly income is more than the applicable state median, “best efforts” requires either full payment of general unsecured debt or commitment of disposable income to a five-year payment plan. Thus, debtors who are excluded from Chapter 7 because they are able to pay unsecured debt over a five-year period will be required to do so if the case is converted to Chapter 13 or if they file a Chapter 13 case after the Chapter 7 case is dismissed.

8. **Feasibility** - Confirmation is prohibited unless the court determines that a debtor will be able to make all payments under the plan and otherwise comply with its terms. Thus, the debtor carries the burden of establishing that his income is sufficiently regular and stable to allow him to meet all payments under the plan. Section 1325(a)(6).
9. **Tax Returns** - New section 1325(a)(9) conditions plan confirmation on whether the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

## **B. Secured Claims**

Secured claims of the Service and other creditors must be treated in accordance with section 1325(a)(5). This section requires that the debtor satisfy one part of a three-part test. The debtor must:

- (1) show that the holder of a secured claim has accepted the plan; **OR**
- (2) have a plan that provides that the holder of a secured claim retains the lien securing the claim and that the creditor receives payments under the plan equal to the value of the secured claim on the effective date of the plan; **OR**
- (3) surrender the property securing the claim to the holder of the secured claim.

A Chapter 13 plan that meets all of the confirmation standards and requirements will be confirmed so long as it satisfies any one of the three alternative tests with respect to the treatment of allowed secured claims. If the Service does not agree with the treatment of its secured claim in a Chapter 13 plan, an objection should be filed.

The Bankruptcy Code does not provide a mechanism for a creditor to accept a Chapter 13 plan. Therefore, several courts hold that a failure by a secured creditor to object to the treatment of its secured claim in a Chapter 13 plan is deemed acceptance of the plan and its treatment of the claim. In re Andrews, 49 F.3d 1404 (9th Cir. 1995); In re Szostek, 886 F.2d 1405 (3d Cir. 1989). Local rules may provide that a failure to object to a Chapter 13 plan is considered a deemed acceptance of the plan.

In a Chapter 13 plan that provides for payment of the secured claim of the Service as a part of the plan, the debtor must provide for retention by the Service of its lien and for the payment of the "present value" of the Service's secured claim. Retention of its lien protects the Service if the debtor fails to complete the plan. Absent such a provision, confirmation of a Chapter 13 plan may eliminate the Service's lien when property of the estate is vested in the debtor free and clear of any claim or interest of a creditor. Section 1327(c). For cases commenced on or after October 17, 2005, a secured creditor that retains its lien will retain it until the earlier of the payment of the debt (under nonbankruptcy law) or discharge. Section 1325(a)(5)(B)(i)(I). The lien also will be retained (under nonbankruptcy law) if the case is dismissed or converted without completion of the plan. Section 1325(a)(5)(B)(i)(II). Additionally, if property is distributed to secured creditors in the form of periodic payments, then such payments must be in equal monthly amounts; and, if the claim is secured by personal property, the payments must be sufficient to provide adequate protection during the plan. Section 1325(a)(5)(B)(iii)

Payment of "present value" of a secured claim is construed to mean that the Service is paid interest on the value of its secured claim. New section 511(a) provides that if payment of interest on a tax claim or on an administrative expense tax is required by the Bankruptcy Code, or the payment of interest is required so that a creditor receives the present value of its allowed tax claim, the rate of interest on a tax claim or on an administrative expense tax shall be the rate determined under applicable nonbankruptcy law. Applicable nonbankruptcy law for the determination of interest on federal tax liabilities is I.R.C. § 6621. New section 511(b) provides, however, that in the case of taxes paid under a confirmed plan, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.

Occasionally, debtors provide in their plans for treatment of a secured claim outside of the Chapter 13 plan. It is possible for a debtor to deal with some secured claims outside of a plan. Matter of Foster, 670 F.2d 478 (5th Cir. 1982). If a debtor seeks to treat a secured claim outside of the plan, the court should be willing to lift the automatic stay should the debtor not pay the secured liability.

Secured debts held by the Service are somewhat different than most other secured debts, since there is no fixed repayment schedule. Debtors should be reminded that if they intend to deal with the secured claims of the Service outside of their plans then the Service generally expects prompt payment of the entire secured liability.

Spendthrift trusts and pensions with anti-alienation provisions are excluded from a bankruptcy estate by section 541(c)(2). Patterson v. Shumate, 504 U.S. 753 (1992). In United States Internal Revenue Service v. Snyder, 343 F.3d 1171, 1173 (9th Cir. 2003), acq. 2004-41 I.R.B.593, the Ninth Circuit held that the Service did not hold a secured claim with respect to the debtor's interest in an ERISA-qualified pension plan because such interest was excluded from the bankruptcy estate under section 541(c)(2). The Ninth Circuit rejected the reasoning of the bankruptcy court in In re Lyons, 148 B.R. 88, 94 (Bankr. D. D.C. 1992), that because the anti-alienation provisions in a pension plan were ineffective against federal tax liens, such plans were not excluded from the bankruptcy estate with respect to the Service and could be included in the value of the Service's secured claim.

In light of the Ninth Circuit's decision in Snyder, the Service will no longer rely upon the reasoning in Lyons. If a pension plan is excluded from the bankruptcy estate under section 541(c)(2), the value of the debtor's interest in the plan cannot be included in the amount of the Service's secured claim under section 506(a). Although the Service's secured claim in bankruptcy will not include the value of the debtor's interest in a pension plan that is excluded from property of the estate, the Service's lien against the debtor's interest in the plan is not extinguished and will continue to exist outside of the bankruptcy proceeding. See Snyder, *supra*, 343 F.3d at 1179.

### **C. Priority Claims**

The plan must provide for full payment in deferred cash payments of the priority claim of the Service, as well as all other claims entitled to priority under section 507 unless the holder of a claim agrees to different treatment. Section 1322(a)(2). They may not be treated outside of the plan. Matter of Foster, 670 F.2d 478 (5th<sup>th</sup> Cir. 1982); In re Eby, 38 B.R. 318 (Bankr. D. Or. 1984).

Most Chapter 13 plans will parrot the language of the statute regarding payment of priority claims.

Unlike section 1129(a)(9)(C), which requires payment of the present value of priority claims whose payments are deferred over time in a Chapter 11 case, the language of Chapter 13 does not contain a clear statement concerning whether interest is required to be paid on deferred priority claims. Payment of interest is

not required under the terms of section 1322(a)(2). Interest, though, may be due under the "best interests of creditors" test found in section 1325(a)(4). The best interests of creditors test provides that the holder of an allowed unsecured claim is entitled to receive property whose present value is not less than the amount that would be paid to the claimant in a Chapter 7 case. If a Chapter 7 liquidation would result in full payment of an allowed unsecured claim (priority or general), then the debtor in a Chapter 13 plan must provide for interest on the deferred payments to the claimant. In re Hardy, 755 F.2d 75 (6th Cir. 1985). If the Service would receive a partial distribution or no distribution on its unsecured claim in a Chapter 7 case, then it is not entitled to interest in a Chapter 13 case. In re Young, 61 B.R. 150 (Bankr. S.D. Ind. 1986).

#### **D. General Unsecured Claims**

The general unsecured claims of the Service should be treated the same as other general unsecured claims. Section 1322(a)(3) requires that the debtor provide the same treatment for each claim within a particular class. How much the Service receives on its general unsecured claims is determined by the "best interests of creditors" test of section 1325(a)(4) and the "best efforts" test of section 1325(b). The best interests of creditors test found in section 1325(a)(4) provides that the Service is entitled to receive on its general claims in a Chapter 13 case an amount equal to what it would receive in a liquidating Chapter 7 case. The best efforts test of section 1325(b) requires, where the trustee or an unsecured creditor objects to confirmation of a plan, that the debtor devote all of his projected disposable income to the plan for its term. The BAPCPA amended section 1325(b) to revise the definition of "disposable income" for purposes of the best efforts test. See discussion of "Best Efforts Test," supra.

Another difficult problem that occurs with general unsecured claims arises out of the classification of some fraudulent returns and unfiled returns as general unsecured claims. Because the discharge granted in a Chapter 13 formerly discharged all general unsecured claims provided for in a plan, these liabilities could have been discharged even though little or nothing is paid on the claims. Some courts held that a Chapter 13 plan lacks good faith under section 1325(a)(3) where a debtor seeks to discharge a liability stemming from fraud or unfiled returns with a minimal payment to the Service. As more fully discussed infra, section 1328 was amended by the BAPCPA and taxes relating to unfiled or fraudulent returns, or for which there is willful evasion, are now excepted from discharge in Chapter 13 cases.

#### **E. Postpetition Obligations**

Section 1305(a)(1) provides that a proof of claim may be filed for taxes that become payable while a Chapter 13 bankruptcy case is pending. A tax generally

becomes payable on the due date of the return for the tax. A claim for such taxes is allowed or disallowed as though it were a prepetition claim. Section 1305(b). As such, postpetition accruals of interest and penalties are not claimed, unless specifically provided for by the debtor. Furthermore, a debtor cannot file a postpetition claim on behalf of a creditor. Taxes payable postpetition in a Chapter 13 case do not constitute administrative expenses of the Chapter 13 estate because the underlying tax liability is against the debtor, rather than the estate. See In re Gyulafia, 65 B.R. 913 (Bankr. D. Kan. 1986).

In addition to the option of filing a section 1305(a) claim, the Service may choose not to file a claim at all and either pursue collection immediately after confirmation or wait until the plan is completed. Pursuing collection immediately from a debtor's postpetition property including wages has been approved subject to limitations. How far a creditor can go to collect a postpetition debt has caused courts to harmonize the stay on collection from property of the estate (section 362(a)(3) and (4)), the definition of property of a Chapter 13 bankruptcy estate (section 1306), and the provisions on vesting after confirmation (section 1327). For instance, when a confirmed Chapter 13 plan required debtors to submit to Chapter 13 trustees a specific amount of postconfirmation earnings necessary to fund a plan, the court ruled that the property of the Chapter 13 estate consisted only of those funds actually paid to the trustee, and the automatic stay did not bar the Service from collecting postpetition debts from the debtors' earnings. In re Thompson, 142 B.R. 961 (Bankr. D. Colo. 1992). However, other courts conclude that the Chapter 13 estate following confirmation consists of those assets necessary for the success of the Chapter 13 plan and that the automatic stay insulates postconfirmation earnings to the extent of the Chapter 13 plan payment. In re Leavell, 190 B.R. 536 (Bankr. E.D. Va. 1995). Where this rule is applied, collection should be approached with some caution since most debtors frequently have little to collect from other than wages that are necessary to fund the plan.

Collection of postpetition taxes from a debtor's wages may cause the court to grant the debtor injunctive relief to the extent that the collection interferes with the debtor's plan or to impose sanctions for violation of the automatic stay. In a third approach to this issue, some courts have held that all postconfirmation earnings are part of the Chapter 13 estate and are protected by the automatic stay from collection by a postpetition creditor. In re Reynard, 250 B.R. 241 (Bankr. E.D. Va. 2000). Finally, employing the view that all property of the estate vests in the debtor upon confirmation pursuant to section 1327(b) unless the plan or confirmation order clearly identifies what property is to remain property of the estate, some courts have held that once the property vests in the debtor, the automatic stay provisions of sections 362(a)(3) and (4) no longer apply, and the Service is free to collect the postpetition debts. In re Petruccelli, 113 B.R. 5 (Bankr. S.D. Cal. 1990). See Barbosa v. Soloman, 235 F.3d 31, 35 (1st Cir.

2000), for a thorough discussion of the issue. When in doubt about pursuing immediate collection postconfirmation, seek relief from the automatic stay.

## **VI. PLAN MODIFICATION**

### **A. Modification before Confirmation - 11 U.S.C. § 1323**

At any time before confirmation, a debtor may modify a Chapter 13 plan without first obtaining court approval provided the plan, as modified, complies with the requirements of section 1322. The holder of a secured claim who has accepted or rejected a plan before confirmation is deemed to have accepted or rejected the plan, as modified, unless the modification provides for a change in the rights of the holder of the secured claim from those proposed under the previous plan. If that happens, the holder of the claim may change the prior acceptance or rejection.

### **B. Modification after Confirmation - 11 U.S.C. § 1329**

Section 1329 provides that at any time after confirmation and prior to the completion of payments under a confirmed plan, a Chapter 13 plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to:

1. increase or reduce the amount of payments on claims of a particular class provided for by the plan;
2. extend or reduce the time for those payments;
3. alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of that claim other than under the plan; or
4. under the BAPCPA, reduce amounts that must be paid under a plan by actual and reasonable amounts spent for health insurance.

The modified plan must contain the three types of provisions that are required in section 1322(a) for all Chapter 13 plans. The optional provisions of section 1322(b) are available as options in the modified plan just as in the original plan.

The acceptance or rejection by a secured creditor of the original plan applies to the modified plan, unless it changes the rights of the secured creditor, thereby giving the secured creditor the right to change the acceptance or rejection. Sections 1329(b)(1) and 1323(c).

A modified plan may not provide for payments over a period that is longer than the applicable commitment period under section 1325(b)(1)(B), unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time. Section 1329(c).

The plan as modified becomes the plan for all purposes unless, after notice and a hearing, the modification is disapproved by the court. Section 1329(b)(2). If no person objects to the proposed modification after notice is sent to interested parties, the court may approve it without the need for a hearing. If a hearing is held, the trustee is required to appear and be heard on the appropriateness of the modification.

The Service may have to seek modification of a Chapter 13 plan in those districts in which confirmation of a Chapter 13 plan is considered to fix who will receive a distribution under the plan and the amount of the claim on which the distribution will be made. Often, the Service will file its claim, although timely, after the plan has been confirmed. Chapter 13 plans ordinarily identify the Service as a creditor but fail to list the correct liability due to the Service. Where this occurs and a timely claim is filed, the debtor should be requested to amend the plan. If the debtor refuses to amend the plan, a motion to modify the plan should be filed by the Service. In some jurisdictions, the courts will order the debtor to modify the plan or dismiss the case. In other jurisdictions, the court will not order modification or dismissal. Thus, even though the Service has timely filed a claim, it will not get paid the full amount of its priority claim due to the fact that the confirmed plan makes "provision" for payment of priority claims, but is underfunded.

## **VII. EFFECT OF CONFIRMATION - 11 U.S.C. § 1327**

A confirmed Chapter 13 plan is binding on the debtor and each creditor, whether or not the claim of the creditor is provided for by the plan, and whether or not the creditor has objected to, accepted, or rejected the plan. Section 1327(a). Once a Chapter 13 plan has been confirmed, the rights of prepetition creditors generally are determined by the terms of the plan. For instance, a confirmed plan has been held to be binding on a secured creditor who did not timely object to the plan, even though the plan did not provide for the payment of interest as required by section 1325(a)(5)(B). In re Szostek, 886 F.2d 1405 (3d Cir. 1989). In United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010), the Supreme Court held that the holder of the nondischargeable student loan debt could not collect the unpaid portion of the debt after the discharge was granted, because the confirmation of the plan was a final order and the creditor received an actual notice of the plan's terms and failed to file an objection.

Except as otherwise provided in the plan or the order of confirmation, all property of the estate is vested in the debtor on confirmation free and clear of any claim or interest of any creditor provided for by the plan. Sections 1327(b) and (c). To the extent that it is the holder of a lien, the Service must be careful to object to a plan that does not provide for retention by the Service of its tax lien. Otherwise, the Service may lose its lien following confirmation.

## **VIII. REVOKING CONFIRMATION - 11 U.S.C. § 1330**

If any order of confirmation has been procured by fraud, the court may revoke the order on request of any party in interest if the request is made within 180 days after the confirmation order was entered. There are no exceptions to this rule. Where fraud is discovered after the 180 days following confirmation of a plan, a referral to a criminal law enforcement authority should be considered.

Should the confirmation order be revoked, the court may dispose of the case by dismissing it or converting it to a Chapter 7 liquidation, whichever is in the best interests of the creditors and the estate. Sections 1330(b), 1307(c). Alternatively, under section 1330(b), the debtor may propose modification of the confirmed plan.

## **IX. DISCHARGE - 11 U.S.C. § 1328**

Chapter 13 formerly offered the debtor an opportunity to obtain a very favorable discharge. Section 1328(a) provided a superdischarge of prepetition debts if the debtor successfully completed the plan. For cases filed on or after October 17, 2005, the BAPCPA amended section 1328(a) to except from discharge certain tax liabilities and some other debts. If the debtor does not complete the plan, a discharge may be granted under section 1328(b). This type of discharge is called a hardship discharge because it is issued when an unexpected hardship prevents the debtor from completing the plan payments. A hardship discharge provides substantially the same relief as a discharge in a Chapter 7 liquidation. Section 1328(c).

### **A. Superdischarge – for Cases Filed before October 17, 2005**

After completion by the debtor of all payments under the plan, the debtor is discharged of all debts provided for by the plan or disallowed under section 502, regardless of whether paid or not, **except**: (1) any long-term debt such as a mortgage provided for under the plan, the last payment on which is not due until after the completion of the plan, (2) for restitution, or a criminal fine, included as a part of a debtor's sentence for conviction of a crime, (3) all debts for alimony, maintenance or support rendered nondischargeable by section 523(a)(5), (4) educational loans guaranteed by a governmental unit, and (5) debts for death or



personal injury caused by the debtor's operation of a motor vehicle while legally intoxicated by using alcohol, drugs, or any other substance. Section 1328(a). Debts that are incurred by the debtor after the commencement of the case and that are not provided for by the plan are not subject to discharge.

**B. Discharge under BAPCPA - for Cases Filed on or after October 17, 2005**

In addition to the debts already excepted from the Chapter 13 "superdischarge," the BAPCPA amended section 1328(a) to except the following taxes from discharge: taxes of the kind specified in section 507(a)(8)(C) (trust fund taxes), section 523(a)(1)(B) (taxes with respect to which returns were either not filed or were filed late, and after two years before the date of the bankruptcy petition), and section 523(a)(1)(C) (taxes with respect to which the debtor made a fraudulent return or that the debtor willfully attempted in any manner to evade or defeat). In addition, debts specified in section 523(a)(2), (3), and (4) are excepted from discharge in Chapter 13 cases. Section 1328(a) was also amended to except from discharge amounts awarded in a civil action against the debtor as a result of willful or malicious injury causing personal injury to or death of an individual.

As a result of the amendments to section 1328(a), a debtor will not be able to obtain a discharge of trust fund taxes for which the Service files an untimely claim or does not file any claim. Even if a trust fund liability is discovered after the bar date, it will be in the Service's interest to file an untimely claim because the debtor may be willing to modify the plan to pay the liability since it is nondischargeable.

A debtor also will not be able to obtain a discharge of taxes relating to unfiled or fraudulent returns, or for which there is willful evasion. The Service can evaluate whether any taxes are nondischargeable due to fraud or unfiled returns in Chapter 13 cases to the same extent it currently makes such determinations in individual Chapter 7 and 11 cases.

**C. Debts "Provided for" by the Plan**

The discharge granted under section 1328(a) can cause problems for the Service. Since it discharges all debts "provided for" by the plan with certain exceptions, it is important to determine what debts are provided for in a given plan. The Service had taken the position that for a claim to be "provided for" it must be paid and if it is not paid, it is not discharged. However, the probable death knell for the Service's position occurred on appeal in In re Tomlan, 88 B.R.302 (Bankr. E.D. Wash. 1988), rev'd, 102 B.R. 790 (E.D. Wash. 1989), aff'd, 907 F.2d 114 (9th Cir. 1990). The Tax Division of the Department of Justice will

not appeal adverse opinions in this area. The courts have ruled by and large that a claim is "provided for" if: (1) the claim is listed in the schedules of liabilities in a manner that provides sufficient notice "to excite attention and put the party on his guard and call for inquiry" and (2) the plan must "make a provision for it", i.e., "deal with it or refer to it." Matter of Gregory, 705 F.2d 1118, 1122-23 (9th Cir. 1983). Mere reference to a priority claim may suffice for the claim to be "provided for." A claim cannot be considered to have been provided for by a Chapter 13 plan if the creditor does not receive proper notice of the proceedings. In re Hairopoulos, 118 F.3d 1240 (8th Cir. 1997).

#### **D. Hardship Discharge**

Although the debtor does not complete the payments required by the plan, he or she may still be eligible for a discharge under section 1328(b), frequently referred to as a "hardship" discharge. There are several requirements that must be met before the court may grant a hardship discharge. The debtor's failure to complete the payments must be due to circumstances for which the debtor should not be held accountable. Also, the value, as of the effective date of the plan, of all property and payments actually distributed under the plan regarding each unsecured claim may not be less than the amount that would have been paid on such claim if the estate had been liquidated under Chapter 7 as of the effective date of the plan. Finally, modification of the plan must be impracticable. Section 1328(b). The effect of a hardship discharge is to give the debtor the same relief from debt as that granted to a Chapter 7 debtor. Section 1328(c).

### **X. MISCELLANEOUS PROVISIONS OF CHAPTER 13**

#### **A. Consumer Debt**

Section 1301 provides for a stay of action by a creditor against a co-debtor. The purpose of this section is to prevent creditors from indirectly putting pressure on Chapter 13 debtors by demanding payment from someone who is jointly liable with the debtor. Typically, the co-debtor is someone with a close relationship to the debtor, such as a spouse, a relative, or a good friend. The stay of action against co-debtors applies to consumer debts only. Consumer debt is defined in section 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose."

Tax liabilities are not included within the definition of consumer debt. In re Westberry, 215 F.3d 589 (6th Cir. 2000). In addition, on joint tax returns, each taxpayer is jointly and severally liable in his/her own right. Therefore, section 1301 does not act to stay collection of joint tax obligations.

#### **B. Trustee**

A trustee is in charge of every Chapter 13 case. The Chapter 13 trustee is almost always a standing trustee who is a member of the local bankruptcy bar appointed by the United States Trustee to be the standing Chapter 13 trustee for a geographical area. Section 1302. Developing and maintaining good rapport with the Chapter 13 trustee is important. In many cases, the Chapter 13 trustee can assist in stopping confirmation of a “bad” plan or revising a “bad” plan.

The Chapter 13 trustee conducts the first meeting of creditors. This meeting is recorded, and a transcript can be obtained from the trustee by making a timely request. The tapes are usually kept for a period of two years. At the first meeting of creditors, the trustee will ask the debtor, under oath, a series of questions, and the trustee will give any creditors present the opportunity to ask questions of the debtor. Where attendance at these meetings is practical, it can provide an excellent opportunity for obtaining information from the debtor without the need to use a summons or a motion for examination of the debtor pursuant to Bankruptcy Rule 2004.

After conducting the first meeting of creditors, the trustee reviews the debtor's plan and schedules to reach a conclusion regarding whether the plan should be confirmed. In many jurisdictions, no confirmation hearing occurs. The plan is confirmed based on the trustee's report recommending confirmation. In those jurisdictions where a confirmation hearing is conducted, the court will ask the trustee for a recommendation and will usually rely heavily on it. For this reason, it is important to educate the trustee on the requirements of Chapter 13 plans vis-à-vis the claims of the Service. A knowledgeable trustee often spots and rectifies problems before they even come to the attention of the Service.

The trustee must make sure at confirmation that the amount of payment to be received during the life of the plan, the plan base, will be sufficient to pay the creditors included in the plan. After confirmation, the trustee begins to pay the claimants according to the terms of the plan. As compensation for administering the plan, the trustee retains a percentage (usually 6-10 percent) of the amounts paid by the debtor.

Under section 1302(b), the Chapter 13 trustee for a debtor who is not engaged in business must perform all the duties of a Chapter 7 trustee except the collection and liquidation of property of the estate. If the debtor continues to operate a business during the case, under section 1302(c) the trustee must also investigate the financial affairs and condition of the debtor's business and report the findings to the court along with a recommendation as to whether the business should be continued.

### **C. Rights of a Debtor**

In a Chapter 13 case, an exclusive right is given to the debtor to seek court approval for the use, sale or lease of property outside the ordinary course of business. This is consistent with the debtor maintaining control over property of the estate. These rights are essentially the same rights given to a trustee of a Chapter 7 case. Section 1303.

Unless the court orders otherwise, a debtor engaged in business is authorized to operate his/her business. Section 1304. In this capacity, the debtor is subject to the same rights, powers, and limitations that pertain to a debtor in possession (or trustee) in a Chapter 11 reorganization case with respect to the use, sale, or lease of property and the obtaining of credit.

Under section 1304(c), a debtor engaged in business must also perform the duties imposed on a liquidating trustee by section 704(a)(8). Thus, the debtor is required to file, with the court and with the Chapter 13 trustee, periodic reports and summaries of the business operation, including statements of receipts and disbursements.

#### **D. Importance of Filing Claims**

To receive payment in a Chapter 13, it is necessary for a creditor to file a claim. Unlike Chapter 11 where a properly scheduled creditor will receive payment whether or not a claim is filed, a Chapter 13 trustee cannot make payment to a creditor who has not filed a claim. In re Hardy, 56 B.R. 95 (Bankr. N.D. Ala. 1985).

The time for creditors to file a claim in a Chapter 13 case is within **90 days after the first date set for the first meeting of creditors**. Bankruptcy Rule 3002(c). However, Section 502(b)(9) provides that **a governmental unit shall have 180 days after the date the order for relief is entered** (the petition date in a Chapter 13) or such later time as the Federal Rules of Bankruptcy Procedure provide. This time frame may be extended by the court by a motion for an extension brought by the Service before the expiration of the initial time frame. Bankruptcy Rule 3002(c)(1).

If a creditor fails to file a timely claim for prepetition debt, the debtor, a co-debtor, or the trustee may file a claim on behalf of the creditor. Section 501(c); Bankruptcy Rules 3004 and 3005. However, only the Service may elect to treat a postpetition claim as a prepetition debt by filing a claim pursuant to section 1305(a). In re Hester, 63 B.R. 607 (Bankr. E.D. Tenn. 1986); In re Dickey, 64 B.R. 3 (Bankr. E.D. Va. 1985). Furthermore, the Service is not required to file a section 1305(a) claim. In re Klein, 20 B.R. 493 (Bankr. N.D. Ill. 1982).

A claim will be deemed allowed as filed unless a party in interest objects. Section 502(a).

## **E. Notice of Filing**

A number of courts have held that, where the fault for a late-filed claim can be “laid at the door” of the debtor, the late claim will be treated as a timely filed claim. When notice of a debtor’s Chapter 13 filing fails to inform creditors of the debtor’s business dealings (i.e., debtor conducted business and owed taxes under an undisclosed trade name), creditors may be allowed to file proofs of claim beyond the deadline established by Bankruptcy Rule 3002(c). A debtor may not hide necessary information from its creditors until it is too late and then assert the strict requirements for timely filed claims. See In re Anderson, 159 B.R. 830 (Bankr. N.D. Ill. 1993). In these types of cases it would be inequitable to allow the debtor the benefit of his “mistake.” See also In re Trembath, 205 B.R. 909 (Bankr. N.D. Ill. 1997) (trust fund taxes were not “provided for” by the Chapter 13 plan and discharged where the plan provided that tax claims entitled to priority status would be paid in full, since the debtor failed to answer questions on his statement of financial affairs concerning prior business operations, thus preventing the Service from tying the debtor’s contingent liabilities for trust fund taxes to the corporate entity primarily responsible).

The BAPCPA made substantial changes to the notice provisions of section 342. Section 342(c) generally requires the debtor to send any notice required by the Bankruptcy Code to an address supplied, in writing, by the creditor at least twice within the 90-day period preceding the bankruptcy. Section 342(c)(2)(A). The communications sent to the debtor in the preceding 90 days must include the debtor’s account number and the address at which the creditor requests to receive correspondence. New section 342(e) allows a creditor in a Chapter 7 or 13 case involving an individual debtor to file with the court and serve on the debtor a notice of address specifying the address to which any notices should be sent in that case, and makes the address effective seven days after receipt. New section 342(f) allows any entity to file with the court a notice stating its address for notice purposes in Chapter 7 and Chapter 13 cases, and makes that address effective in any Chapter 7 or 13 case 30 days after filing, unless specific notice is given under section 342(e) with respect to a particular case. A notice filed under section 342(f) also may be withdrawn by the creditor.

New section 342(g) provides that where notice is not provided in accordance with section 342, it is not effective until the notice is brought to the attention of the creditor. Where the creditor has established reasonable procedures to ensure that bankruptcy notices received by the creditor are delivered to a specified department or person, notice not provided in accordance with section 342 is not effective until it is brought to the attention of the person or department designated

by the creditor to receive such notice. In addition, new section 342(g) provides that a creditor who has not yet received appropriate notice of the commencement of the bankruptcy is not subject to sanctions for certain specified actions, including violation of the automatic stay.

#### **F. Property of the Estate - 11 U.S.C. § 1306**

All of the property included in the estate pursuant to section 541 is property of the estate in a Chapter 13 case. In addition, property that the debtor acquires after the commencement of the case, but before the case is closed, dismissed or converted, is property of the estate, as are earnings from services performed by the debtor between the petition date and the date of the closing, dismissal, or conversion of the case. Section 1306(a).

Although the property of the debtor becomes property of the estate, the debtor may retain possession of and may continue to use the property. Section 1306(b).

#### **G. Conversion or Dismissal - 11 U.S.C. § 1307**

On request of a debtor at any time, the court must dismiss a Chapter 13 case, unless the case has been converted from another chapter. An interested party may request that a Chapter 13 case be either dismissed or converted to a Chapter 7 liquidation case. The court may not grant such request, however, unless after notice and a hearing the evidence establishes cause for the dismissal or conversion, e.g., unreasonable delay by the debtor that is prejudicial to creditors; material default by the debtor with respect to a term of a confirmed plan; or failure to commence making timely payments under section 1326. Section 1307(c). A court may consider matters other than those listed in section 1307(c) as grounds for dismissal of a Chapter 13 case. Lack of good faith in filing a petition is sufficient cause for dismissal of a Chapter 13 case. In re Lilley, 91 F.3d 491 (3d Cir. 1996).

Section 1307(e) was added by the BAPCPA to enforce the tax return filing requirements of section 1308. This provision requires the court, on request of a party in interest or the United States trustee, after notice and hearing, to dismiss the case or convert it to Chapter 7, whichever is in the best interest of the creditors and the estate, if the debtor fails to file a prepetition tax return as required under section 1308. Thus, the court's discretion to permit a Chapter 13 case to proceed without the debtor filing tax returns is now limited. If the returns specified by section 1308 are not filed, the Service should object to confirmation and seek dismissal of the case, if the trustee has not already done so.

If a case is dismissed prior to confirmation of a Chapter 13 plan, the trustee is to return any payments to the debtor. After dismissal, the Service may levy on the Chapter 13 trustee for any federal tax liabilities owed by the debtor. In re Beam, 192 F.3d 941 (9th Cir. 1999).

A debtor may convert a Chapter 7 case to a Chapter 13 case at any time, if the case has not previously been converted from another chapter. Section 706(a). The court may convert a Chapter 11 case to a Chapter 13 case, if the debtor has not been discharged under section 1141(d) and the debtor requests the conversion. Section 1112(d). To convert a case to a Chapter 13 proceeding, the debtor must be eligible for relief under Chapter 13. Section 109(e). The court may not convert a Chapter 7 or 11 case to a Chapter 13 case unless the debtor requests or consents to such conversion. The date of commencement of a case converted to Chapter 13 is the date of the initial filing of the case under the preceding Chapter 7 or 11.

The debtor may convert a Chapter 13 case to a liquidation case under Chapter 7 at any time, even if the debtor is not eligible for a Chapter 7 discharge. Section 1307(a). Frequently, a debtor may not be eligible for Chapter 7 relief because the debtor has had a Chapter 7 discharge granted within six years before the petition filing date. Section 727(a)(8). Under the BAPCPA, the time between discharges was amended from six years to eight years. As a “party in interest,” the debtor may request that the case be converted to a case under Chapter 11. The case may then be converted by the court, after notice and a hearing, if the Chapter 13 plan has not been confirmed under section 1325. Section 1307(d).