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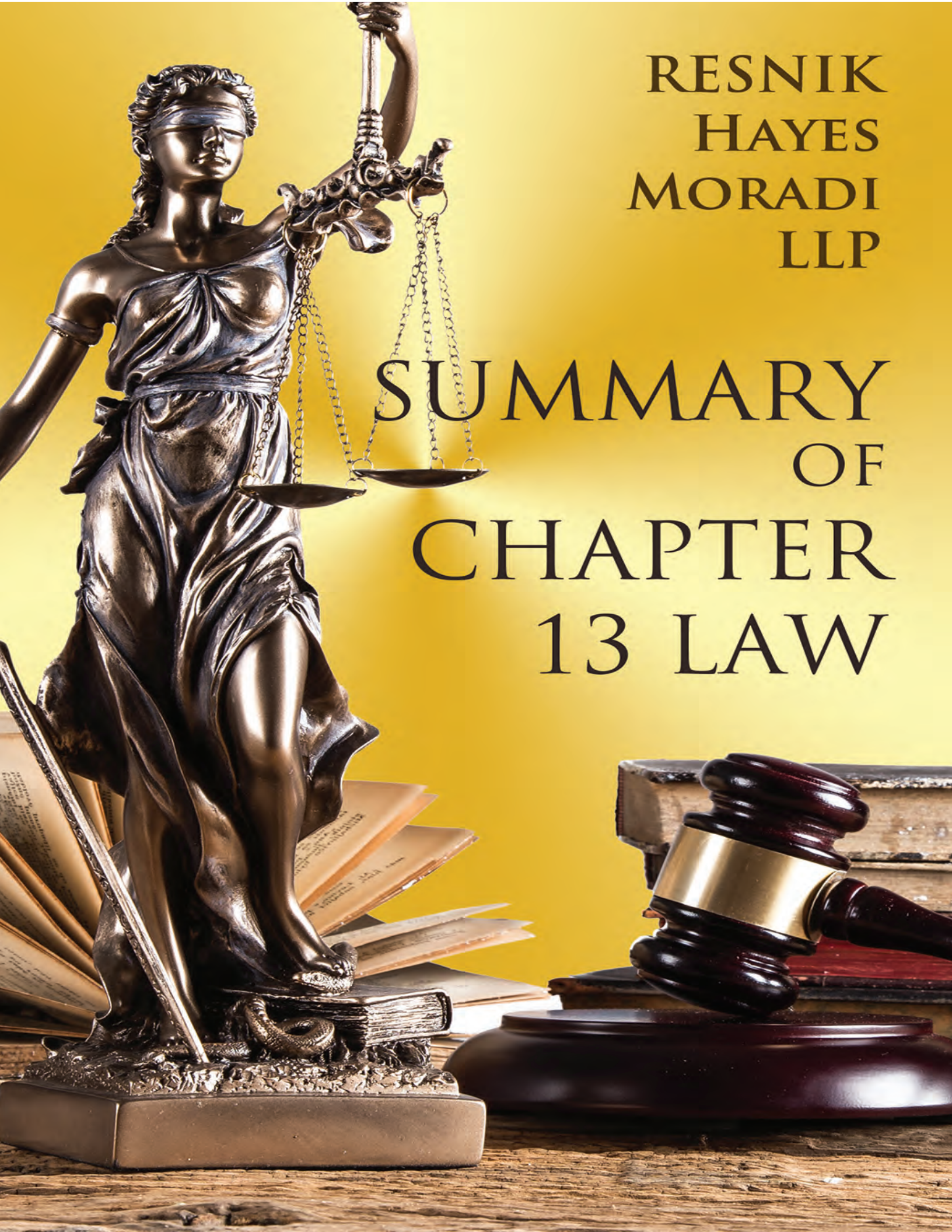
SUMMARY OF CHAPTER 13 LAW



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Introduction

Chapter 13 unfortunately for all of us can be a little complicated. The partners of Resnik Hayes Moradi LLP have more than 70 years of bankruptcy experience between them and still spend a significant amount of time studying the subject and keeping up with the changes being made by courts and trustees. We have attempted to explain the area in a quick and concise format. We have made every effort to make this as simple and understandable for you as possible. We all worked on it; we all reviewed it, and we all agree on it. It hopefully will give you a good overview of how chapter 13 works in the Central District of California.

By all means, do not make important decisions based on what you read here. We will explain your options and opportunities - and your risks. We understand that this is very important to you and you are probably a little overwhelmed by the process. We will get through it together. That is what we do.

RHM

Table of Contents

1. OVERVIEW OF CHAPTER 13

1. General

In a chapter 13 bankruptcy case, there is no liquidation of assets. The debtor proposes a plan to his creditors by which he will make monthly payments of as much as he can afford over a period of typically either three or five years. Generally speaking, if the total plan payments over the life of the plan exceed the amount creditors would receive in a chapter 7 liquidation, and if the debtor can afford to make the regular mortgage payments *and* the monthly chapter 13 plan payments, the plan will be confirmed. The monthly plan payments are made to a trustee who, in turn, distributes the funds pro-rata to the creditors.[1] The debtor retains all of his assets and receives a discharge of debts which remain unpaid at the end of the plan period.

Many chapter 13 cases are filed by homeowners whose mortgages are in default and who desire to save their homes from foreclosure. The debtor cures the default over a three to five year period, something which cannot be accomplished in a chapter 7. Chapter 13 cases are also filed by individuals trying to save their small business, save vehicles from repossession, by individuals who do not qualify for chapter 7 under the means test, and by those who have non-dischargeable debts such as taxes or child support.

In the Central District of California there are extensive local rules covering every aspect of chapter 13 procedure. See Local Rule 3015-1.

[1] Chapter 13 trustees distributed some $5.5 billion to creditors in fiscal year 2018. See https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics for annual statistics. Total Chapter 13 trustee overhead was $314 million if I'm reading the chart right.

2. THE PLAYERS

1. The Debtor

The debtor is the person who files the bankruptcy petition. Section 101(13).[2] When a husband and wife file together, they are known as joint debtors.[3] Section 302.

2. The Creditors

Creditors are the persons or entities to whom the debtor owes a debt. Section 101(10). Creditors are said to have a "claim" against the debtor and are often called "claimants."

2.1 Secured Creditors.

Secured creditors are those who have a security interest in specific property of the debtor known as "collateral." The security interest, also known as a "lien," is usually created by contract between the debtor and the secured creditor, i.e., the "voluntary lien," but it also may be created by law, i.e., the "involuntary lien." Examples of involuntary liens are the IRS lien, a mechanics lien and a judgment lien. The lien whether voluntary or involuntary *attaches* to the property specified in the contract or in the law that created the lien. The secured creditor is "secured" and therefore have priority only as to the asset to which the lien attaches.

2.2 Priority Creditors.

Priority creditors are *unsecured* creditors whose claims are paid before other *unsecured* creditors. Section 507. There are ten levels of priority creditors, the most common being spousal and child support, known

[2] The current law of bankruptcy is found in Title 11 of the United States Code. It was enacted on November 6, 1978 and governs all cases filed on or after October 1, 1979. It has been amended several times, most comprehensively in 1984, 1986, 1994 and 2005. All references herein to "Section" are to this act.

[3] The code provides that "spouses" may file joint cases. See *In re Balas*, 449 B.R. 567 (Bkrcy C.D. Cal, 2011 Donovan J.) (two men, married under state law, properly filed a joint chapter 13).

as "domestic support obligations." Other priorities are administrative expenses, certain wages and most taxes.

2.2 Unsecured creditors.

Unsecured creditors include everyone else to whom the debtor owes a debt, or *might* owe a debt. This is a very broad concept. It includes guarantees of another person's debt, torts such as car accidents, or malpractice claims.

3. The Chapter 13 Trustee

The chapter 13 trustee is an individual chosen by the U.S. Trustee to administer the chapter 13 estate. The chapter 13 trustee is a standing trustee meaning that the job is full time and permanent. The chapter 13 trustee's job is to investigate the financial affairs of the debtor and comment on the chapter 13 plan proposed by the debtor. Section 1302. When the plan is confirmed by the court, the plan payments are made monthly to the trustee who then distributes the funds to the creditors. The trustee receives a percentage of the plan payment as compensation for the efforts.

In the Central District of California there are five chapter 13 trustees. They will be assigned about 2,000 cases each in 2020. That is down from 6,000 cases each in 2012. Each trustee has at least one full time attorney on staff and 10-15 other employees. There is a Handbook for Chapter 13 Standing Trustees as well, effective October 1, 2012 which can be accessed on the US Trustee website.[4]

4. The Judge

Bankruptcy Judges are federal judges appointed by the Circuit Court of Appeals for a 14 year term.[5] Each bankruptcy case is assigned to a judge when the case is filed. In the Central District of California there are five branches ("divisions") of the Bankruptcy Court: Los Angeles with 9 judges; Santa Ana with five judges; Riverside with four judges (one sitting in Santa Ana), San Fernando

[4] At www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-13-handbooks-reference-materials

[5] 28 U.S.C. 152.

Valley with three judges and Santa Barbara with one judge. Judges sitting in some of the divisions also hear cases from other divisions.

5. The Court

The Bankruptcy Court is a Federal Court. This is so because bankruptcy law is a federal law enacted by Congress under the power given to it by the United States Constitution. All of the courts today have excellent web sites.[6]

[6] The Central District of California site can be found at www.cacb.uscourts.gov.

3. INTRODUCTION TO CHAPTER 13

1. Qualifying for Chapter 13

A chapter 13 petition may be filed only by an *individual* with regular income. Section 109(e). Section 109(h). The debtor must have less than $1,257,850 of secured debts and $419,275 in unsecured debts on the petition date. Eligibility for chapter 13 is generally determined by looking at the debtor's schedules.[7] The limits are adjusted every three years.[8] Section 104. The debtor may operate a business as long as the debt limitations are met. Section 1304(b).

1.1 Debt Limitations

The debt limitations apply to "non-contingent and liquidated" debts. Section 109(e). An example of a contingent debt is a guarantee of another's debt or a debt of a corporation owned by the debtor for which the debtor might be liable.

Liquidated is more complicated but generally means that the amount of the debt can be computed without too much difficulty.[9]

1.1.1 Liquidated Debts

If the debtor, for example, is being sued for his involvement in an auto accident, the amount of damages and therefore the amount of

[7] *In re Guastella*, 341 B.R. 908 (9th Cir. BAP 2006) (tentative decision of the state court "liquidated" the debt even though not final, Bankruptcy Court properly looked beyond the schedules to determine eligibility); *In re Scovis*, 249 F.3d 975 (9th Cir. 2001) (eligibility normally determined by the debtor's originally filed schedules).

[8] These amounts are effective as of April, 2019.

[9] *In re Ho*, 274 B.R. 867 (9th Cir. BAP 2002) (dispute as to liability does not necessarily render a debt unliquidated); *In re Nicholes*, 184 B.R. 82, 99-91 (9th Cir. BAP 1995) (debt which is subject to ready determination and precision in computation of the amount due is considered liquidated); *In re Slack*, 187 F.3d 1070 (9th Cir. 1999) (debt is liquidated if the amount is readily ascertainable); *In re Soderlund*, 236 B.R. 271 (9th Cir. BAP 1999) (unsecured portion of secured creditor's claim should be counted as unsecured debt for determining chapter 13 eligibility).

the debt generally will usually not be known until trial. The debt is unliquidated until then and will not be included to determine eligibility for chapter 13 even if the debt is obviously very high. On the other hand, if the debtor is liable under a promissory note, the debt is liquidated at the amount of the note, even if the debtor asserts a complete defense such as statute of limitations or usury. The debt is liquidated because the amount of the debt can be easily computed.[10]

1.1.2 "Unsecured Secured" Debts

Some debts are secured by property and yet the value of the property is less than the amount owed, i.e, a partially secured debt. It may be that there is no value "secured" by the lien because senior liens take all the available value, i.e., the unsecured secured debt.

Assume the debtor owns a home valued at $400,000 on which he has a first mortgage of $450,000 and a second of $100,000. The first is only partially secured by the home. For eligibility purposes it is treated as fully secured since it cannot be modified in chapter 13. The second of $100,000, while secured technically, is treated as unsecured *for eligibility purposes* since it is, in reality, unsecured.[11] If the property were something other than the debtor's home, all of the unsecured portion of the secured debt would be treated as unsecured for eligibility purposes.

1.2 Regular Income

The chapter 13 debtor must also have regular income. Although regular income is usually wages or income from self-employment, it may come from other sources so long as the income is sufficiently stable and regular to support the plan payments. Section 101(30). Examples of possible other sources of regular income are social security, child support, unemployment income, and contributions from a family member.

[10] *In re Slack*, 187 F.3d 1070 (9th Cir. 1999) (debt is liquidated if the amount is readily ascertainable).
[11] *In re Smith*, 435 B.R. 637 (9th Cir. BAP 2010)

1.3 No Means Test

Unlike chapter 7, there is no means test qualification to file a chapter 13 petition. There is however a modified means test form, B22C, which must be filed but it is used not to determine qualification for chapter 13 but to determine the plan length, i.e. a 36 or 60 month plan, and the amount of the plan payment in some cases.

2. Benefits of Chapter 13 Filing

Chapter 13 affords several benefits to the individual debtor over chapter 7:

a) the debtor loses no assets whatsoever;[12]

b) the debtor may cure arrearages owed to his secured creditors;

c) the debtor may modify the rights of secured creditors in certain limited situations;

d) more debts are discharged than in a chapter 7;

e) interest and penalties stop on all unsecured debt including taxes for which no lien has yet been filed;

f) there is slightly less stigma to the filing and certainly to the successful conclusion of the chapter 13 (or so the creditor's bar tells us);

g) liquidation sales, when necessary, remain in control of the debtor;

h) a chapter 13 often will give the debtor time to do a loan modification;

i) the debtor can get a discharge of debts more often than in chapter 7 cases;

[12] An estate is created under Section 1306, "including property specified in Section 541." Confirmation of the plan "vests all the property of the estate in the debtor," "[e]xcept as otherwise provided in the plan or the order confirming the plan." Section 1327(b). In the Central District, the standard plan form provides that the property remains in the estate until the discharge is entered or the case is dismissed. The debtor has exclusive rights to sell property of the estate. Section 1303.

j) the debtor may change his mind at any time and simply dismiss the case.

3. Drawbacks to filing Chapter 13

The chapter 13 debtor must however be aware of the following:

a) while the case may be dismissed by the debtor at any time, it also may be converted to chapter 7 by the court before it is dismissed. A dismissal would trump conversion if the order is entered first but until the case is dismissed, it may be converted;[13] Section 1307.

b) property of the estate includes all postpetition earnings of the debtor and any other assets acquired by the debtor; Section 1306.

c) the debtor must make plan payments for three to five years. If the debtor's income increases, generally the plan payments may increase (unless the original plan provided for 100% payment to all creditors);

d) the debtor must pay the chapter 13 trustee a fee usually based on a percentage of the plan payments for the life of the plan.[14] In the Central District this is typically 11% of the plan payments. This is significant when the debtor is proposing a 100% plan since the fee will be in addition to the payment required to pay all creditors. Also when the debtor has filed the case to cure a mortgage or secured debt arrearage, she will be paying the arrearage plus the additional fee to the trustee.

e) any default recorded by a secured creditor against the debtor's property remains until the end of the plan and discharge. If the case ends without a discharge, the secured creditor need not record a new Notice of Default.[15] Likewise, the foreclosure sale itself will be continued throughout

[13] *Beatty v. Traub (In re Beatty)*, 162 B.R. 853, 857-58 (9th Cir. BAP 1994) (debtor's dismissal before the order of conversion was docketed was effective because debtor had an absolute right to dismiss). *But see Rossen v. Fitzgerald (In re Rossen)*, 545 F. 3d 764 (9th Cir. 2008) (debtor does not have an absolute right to dismiss "if the debtor's conduct is atypical").

[14] See 28 U.S.C. 586(e).

[15] Cal. Civil Code Section 2924g(c)(1) (if postponements exceed one year, a new Notice of Sale is required which would be, of course, prohibited by the automatic stay).

the first year of the case and therefore may take place immediately if the case is dismissed for some reason.

f) the discharge is not entered until the end of the plan. If the case is dismissed for any reason, there is no discharge. In fact, if the case is dismissed, for most purposes, it is treated as though it never happened. Section 349(b).

4. Limited Automatic Stay When Case is Refiled

When an individual debtor refiles a new case within one year of dismissal or closing of a previous case, the automatic stay *terminates* "with respect to the debtor" 30 days after the second case is filed. Section 362(c)(3)(A). The debtor must, in those cases, *immediately* file a motion requesting that the court extend the stay beyond the first 30 days. The motion must establish that the new case was filed "in good faith of the creditors stayed." Section 362(c)(3)(B). The motion must be filed and heard before the 30 days elapses. There are preprinted forms in the Central District available for that purpose. The matter must be heard however within the 30 day period; the stay cannot be continued thereafter.

When there have been two or more cases filed by the individual debtor and dismissed within the past year, the stay does "not go into effect." Section 362(c)(4)(a). Again, the debtor can move the court for a stay on a showing of good faith. Section 362(c)(4)(b). The courts are not generally as casual about reimposing the automatic stay for what is the third case in one year.

4.1 Good Faith

Good faith is not defined but what is "presumptively *not* in good faith" is set forth in Section 362(c)(3)(C) and (c)(4)(D). For example when there have been more than one or two filings in the past year, and there has been no "change of financial circumstances" or when the previous case was dismissed for failure to file all the forms, the new case is presumptively not filed in good faith.

4.2 Rebutting the Presumption of "Not in Good Faith"

If the case is presumptively "not filed in good faith," the debtor may rebut the presumption but only with "clear and convincing evidence." Section 362(c)(3)(C) and (c)(4)(D).

4.3 Practice in the Central District

While this sounds ominous, most of the judges in the Central District give the debtor the benefit of the doubt and extend the stay unless there is some strong reason not to.

4.4 Termination of the Stay "With Respect to the Debtor"

The bankruptcy code is not clear about whether the stay terminates only "with respect to the debtor" which is what the code says or also against the property of the estate. The general practice in the Central District is that it terminates with respect to both the debtor and the property of the estate.[16] Some judges take the position that the code means what it says and the stay terminates only with respect to the debtor.[17]

5. Co-Debtor Automatic Stay

As with all bankruptcy petitions, the filing of a chapter 13 case results in an automatic stay requiring creditors to refrain from any further collection efforts. Section 362(a). In a chapter 13, there is also a "co-debtor stay" which stops creditors from attempting to collect a debt "from any individual that is liable on such debt with the debtor." Section 1301. The co-debtor stay applies only to consumer debts and may be lifted if the debt is not paid in full in the plan.

[16] *In re Reswick*, 446 B.R. 362 (9th Cir. BAP 2011) (chapter 13 case, stay terminates as to both the debtor and the estate).

[17] *In re Rinard*, 451 B.R. 12 (Bkrtcy. C.D. Cal. 2011) (Clarkson, J.) (chapter 7 case with purported $600,000 of equity in the property, court ruled automatic termination applies only to the debtor).

4. COMMENCING THE CHAPTER 13 BANKRUPTCY CASE

1. Introduction

A bankruptcy case under every chapter is commenced by filing a "petition." Section 301. This is a several page form which has the debtor's name, address, which chapter the debtor is filing under and other information. Along with the petition, there are a number of additional forms which must be filed, generally known as the "schedules." When the petition is filed, a judge is assigned to the case as well as a trustee.

2. Filing Fees

The filing fee for a chapter 13 is $310; and usually must be paid with the petition. Under some circumstances the fee can be waived.

3. Pre-Filing Credit Counseling

Individuals must complete a credit counseling program within 180 days prior to the bankruptcy filing before filing any bankruptcy case. The certificate provided by the counseling agency must be included with the petition.

4. Emergency Filings

The debtor may file an emergency petition, sometimes known as a "face sheet" petition, by filing the petition and the creditors' mailing matrix only and paying the filing fee. The remainder of the schedules and the chapter 13 plan must be filed 14 days thereafter.[18]

[18] FRBP 1007(c).

5. CHAPTER 13 PROCESS

1. The Petition, Schedules and Plan

As stated above, a chapter 13 bankruptcy case is commenced by filing a petition and schedules.[19] Section 301. The petition and schedules are substantially the same as a chapter 7. They include a list of all of the debtor's assets and all of the debtor's liabilities. They include a Statement of Income, a Statement of Monthly Expenses and a Statement of Financial Affairs. Section 521(a).

In addition to the petition and the schedules, the debtor must attach copies "of all payment advices or other evidence of payments received within 60 days before filing" from the debtor's employer. Section 521(a)(1)(B)(iv). If the debtor is self-employed or has not worked in the past 60 days, a statement must be filed attesting to that.

The chapter 13 plan must be filed within 14 days after the case is commenced.[20] The plan must be served on every creditor. In the Central District of California, the case is automatically dismissed if the plan and any remaining unfiled schedules are not filed on the 14th day.

2. The Chapter 13 Trustee Requirements

Each of the chapter 13 trustees have a lengthy list of documents and forms which must be submitted at the outset of the case.[21] Among the documents many trustees require include the debtor's last four income tax returns, income and expense statements and a business report, long form or short form, from the self-employed individual, insurance declarations for all real property and vehicles,[22] worker's comp, last six months of unredacted bank statements, evidence of the fair

[19] FRBP 1007. The filing fee is presently $310.00.
[20] FRBP 3015(b).
[21] One chapter 13 trustee in Los Angeles commented to me about this sentence: "this sounds more imperious than I view the trustee's role – at least I hope that is what I am doing – my intent is to require that the debtor meet the requirements of the Code and the Rules – if I think that is not happening I object to the confirmation."
[22] The trustee will seek dismissal of the case if the debtor does not have proper insurance.

market value of the debtor's property, and proof of any income received by the debtor as set forth in Schedule I. The trustee often will request copies of court orders regarding child or spousal support, automobile purchase contracts, rental agreements if the debtor is renting his property to someone, and proof of unusual or extraordinary expenses. The debtor usually must complete a form called a "real property questionnaire" for her home and each rental property.

Each of the trustees in the Central District has an excellent website. The website of Elizabeth Rojas, for example, can be found at www.ch13wla.com.

2.1 Meeting of Creditors

About four weeks after the case is filed, the chapter 13 trustee conducts a meeting of creditors.[23] Section 341(a). The debtor is required to attend. Section 343. At this formal meeting, the debtor is questioned first by the chapter 13 trustee or one of her staff attorneys. The debtor may also be questioned by creditors, although few creditors appear as a rule. The questions focus primarily on the assets and liabilities of the debtor, his income and expenses, and the compliance with the rules and guidelines of the trustee. The testimony is recorded and is under oath.

2.2 Plan Payments and Mortgage Payments

The debtor is required to make the first payment under the plan, known as the "plan payment," to the trustee 30 days after the petition is filed (even though the plan has not yet been confirmed). Section 1326(a). In the Central District, the payment must be by certified check or money order. [24] Some trustees require the debtor to bring the initial plan payment to the 341(a) meeting, others want it mailed.

The debtor is also required to make his regular monthly payment to his secured creditors on time, that is, the due date pursuant to the terms of the promissory note. If the debtor files his chapter 13 petition on the 19th of the month and the mortgage payments are due on the 20th, he must make his regular mortgage payment to the lender the next day. The payment must be

[23] FRBP 2003.
[24] LBR 3015-1(m).

made by certified check or money order and mailed to the creditor by certified mail.

2.3 Payments to Personal Property Lessors

When the debtor has a personal property lease, usually a vehicle, the debtor must also make the payments due to lessors of personal property directly to the lessor for "that portion of the obligation that becomes due" after the petition is filed. Section 1326(a)(1)(B). If the plan provides that the payment to the lessor will be part of the monthly plan payment to the trustee, the debtor may reduce "the payment to the trustee" by that amount. Section 1326(a)(1)(C). This is pretty uncommon. Typically auto lease payments are made directly to the lessor or "outside of the plan." But the regular lease payment must be made directly to the lessor beginning immediately.

2.4 Payments to Personal Property Secured Creditors

Again, this comes up most commonly with the debtor's vehicle. The debtor must make an "adequate protection" payment directly to any creditor whose claim is secured by personal property. This means, for practical purposes, the regular monthly payment. Again, if the plan provides, or is going to provide, for payment of the secured debt to the trustee (which is rare) who will then pay the secured creditor for the life of the plan, the debtor may deduct the payment made directly, from the payment made to the trustee until the plan is confirmed. Section 1326(a)(1)(C).

2.5 Proof of Insurance

The debtor must provide the lessor or secured creditor proof of insurance, of any personal property subject to a lease or a secured debt, within 60 days and "continue to do so for as long as the debtor retains possession of such property." Section 1326(a)(4). The case will likely be dismissed if the debtor does not have insurance.

3. The Chapter 13 Plan

The chapter 13 Plan is filed either with the petition and schedules or within 14 days after the case is filed.[25] It is a standard "fill in the blank" type of form. Only the debtor may propose a plan. Section 1321.

3.1 The Confirmation Hearing

Creditors do not vote on the plan as is the case in chapter 11. A confirmation hearing is typically held about two months after the case is filed.[26] Section 1324(b). A few judges in the Central District have been setting confirmation hearings several months after the meeting of creditors. The idea is that everyone will know by the time of the confirmation hearing whether or not the debtor can and will make the plan and monthly mortgage payments.

The chapter 13 trustee or any creditor may object to confirmation of the plan on the basis that the plan does not meet the requirements of the Bankruptcy Code. Section 1324(a). If the plan complies with the code, it is confirmed. Section 1325(a)(1). If not confirmed, the case is dismissed at the confirmation hearing, converted to chapter 7, or the judge gives the debtor time to amend the plan and otherwise respond to the objections.[27]

3.2 Filing Tax Returns

The plan cannot be confirmed unless the debtor has filed all tax returns "required by Section 1308." Section 1325(a)(9). Section 1308 requires the debtor to file all tax returns for the past four years "before the (first meeting of creditors)."

4. Dismissal or Conversion of Chapter 13 Case

The court may, upon request of a party in interest, dismiss or convert a chapter 13 case for cause, Section 1307(c), before or after confirmation of the plan, for a number of different reasons including;

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[25] FRBP 3015(b).
[26] In Riverside, the confirmation hearing is the same day as the meeting of creditors.
[27] *In re Nelson*, 343 B.R. 671 (9th Cir. BAP 2006) (the debtor should be offered the opportunity to amend plan before dismissal).

1) bad faith[28] or,

2) if the debtor fails to pay any "domestic support obligation" which comes due after the case is filed, Section 1307(c)(11) or,

3) if the debtor fails to file any tax return which was due within the previous four years and was unfiled, or comes due after the bankruptcy case is filed. Section 1307(e).

5. Additional Obligations for the Chapter 13 Trustees

The chapter 13 trustee is required to give notice to the "holder of a claim for domestic support obligation" which will give that person information regarding rights to use the services of the state child support enforcement agency. When the debtor is granted a discharge, the trustee must notify the holder of the domestic support obligation claim and the state agency and provide certain information such as the last known address of the debtor. Section 1302(d).

6. Attorney's Fees in Chapter 13 Cases

In general, the amount of fees charged by attorneys in chapter 13 cases are subject to the scrutiny of the court. Section 329. Fees are typically a fixed amount depending on the local rules in the district.[29] If the attorney believes that his fees should be higher than this "no-look" amount, he must ask the court for approval of the additional fees in the form of a fee application. This occurs most often when post-confirmation efforts are required such as modifications to the plan, objections to claims, motions for relief from the automatic stay and trustees motions to dismiss, usually because the debtor is behind on the payments.

In the Central District of California, courts allow fees of $5,000 to attorneys in non-business cases and $6,000 in business cases without the requirement of a fee application. A non-business case is a person with W-2 income. Virtually all other cases are business cases.

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[28] *In re Eisen*, 14 F.3d 469 (9th Cir. 1994) (bad faith filing); *In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999) (concealment of assets and inflation of expenses could amount to bad faith warranting dismissal of petition with prejudice).

[29] *Law Office of David A. Boone v. U.S. Trustee (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006) (use of no-look fees appropriate); *see also* FRBP 2017(b).

To get the no-look fee, the debtor and the attorney must execute a six-page agreement called a "RARA" – a "Rights and Responsibilities Agreement" which sets forth the amount of the fees.

Most attorneys will accept less than the full allowable fee as a retainer from the client, that is, basically a down payment and the filing fee. The remainder of the fee is included in the chapter 13 plan and paid by the trustee as an administrative expense ahead of the other unsecured creditors.

6. THE CHAPTER 13 PLAN: COMPUTING THE AMOUNT OF THE PLAN PAYMENT AND THE LENGTH OF THE PLAN

1. Overview

Only the debtor may file a chapter 13 plan. Section 1321. This section will discuss the amount of the plan payment, the liquidation test, the length of the plan, and feasibility. Treatment of specific types of creditors is discussed in the next section.

To be confirmed the chapter 13 plan *must*:

1) pay *priority creditors in full*, most often past due taxes and past due family support payments, over the term of the plan, Section 1322(a)(2), and,

2) pay secured creditors the full value of their allowed secured claim, Section 1325(a)(5), [see next section] and,

3) pay the debtor's "*projected disposable income*" for at least three years, Section 1325(b)(1)(B), and,

4) pay unsecured creditors at least as much as they would receive in a chapter 7 liquidation (the "liquidation test"), Section 1325(a)(4), and,

5) be proposed in good faith,[30] Section 1325(a)(7), and,

6) provide for compensation to the chapter 13 trustee, typically 11% of the monthly payment in the Central District of California.

2. Computation of the *Amount* of the Monthly Plan Payment

To be confirmed, the chapter 13 plan must provide for payment of "all" of the debtor's "*projected disposable income*"[31] to be received during "the applicable

[30] *Drummond v. Welsh (In re Welsh),* 465 B.R. 843 (9th Cir. B.A.P. 2012), affirmed by the Ninth Circuit in *Drummond v. Welsh (In re Welsh)* 711 F.3d 1120 (9th Cir. 2013)

commitment period." The applicable commitment period is either three years or five years. Section 1325(b)(1)(B). See below.

The plan payment is usually constant, i.e., a flat amount each month, but may be a 'step plan' payment; i.e., higher monthly plan payments in months 24-60 than in months 1-24, for example. Sometimes the plan payment *must* be stepped up, for example when a car loan is paid off during the plan. The additional net disposable income at that point must be paid into the plan thereafter.

2.1 Above-Median Debtor vs. Below-Median Debtor

The specific computation *method* of the plan payment depends on whether the debtor is a "below-median" or "above-median" debtor. An *above*-median debtor is a person whose annual income for the past year is greater than the median income in the debtor's state for the debtor's household size. A *below*-median income debtor is a person whose annual income for the past year is below the median income in the debtor's state for the debtor's household[32] size.

The median income in California, effective May 1, 2019, for a one-person household is $57,962; $77,167 for two; $84,003 for three; $96,813 for four; and $9,000 for each person after that. [33]

2.2 Current Monthly Income "CMI"

Irrespective of whether the debtor is below or above the median, the computation of the plan payment *begins* with the debtor's income or more specifically the "current monthly income," a defined term in the Bankruptcy Code. Current monthly income ("CMI") is the average of the debtor's gross income for the six calendar months *prior* to the bankruptcy filing. Section

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[31] We often tell prospective debtors that "net disposable income" means "as much as you can afford." While that makes sense and is generally the way it works in the Central District at least, it is not technically true. Following the code literally, the net disposable income is sometimes *not* the amount the debtor can actually afford each month.

[32] There is no definition of household in the Bankruptcy Code and the cases are not consistent about the definition. The US Trustee takes the position that the household number is limited to the debtor and dependants taken on the debtor's tax return.

[33] This data can be found at https://www.justice.gov/ust/eo/bapcpa/20190501/bci_data/median_income_table.htm.

101(10A). CMI includes receipts which are not taxable income as well as receipts from other persons "on a regular basis for household expenses."

2.2.1 Establishing Current Monthly Income

Typically, of course, the current monthly income comes from wages or self-employment. The chapter 13 trustee will require copies of tax returns and recent pay check stubs to verify this income. When the debtor's income is from self-employment, this can be more difficult. For current monthly income, it is the actual receipts for the past six calendar months, not the net income. The trustees usually carefully review the debtor's bank statements for the past six months to insure that all income has been included in CMI. .

3. Computation of the *Amount* of the Monthly Plan Payment for the Below-Median Debtor

3.1 Overview of "Projected Disposable Income" for Below-Median Debtors

Disposable income for a *below-median debtor* is defined in the Bankruptcy Code as "current monthly income" received " reduced by amounts reasonably necessary to be expended" for the support of the debtor and his dependants, and reduced by payment of alimony and child support, charitable contributions, and, if the debtor owns a business, reasonable business expenses. Section 1325(b)(2).

If the debtor's remaining funds after payment of these items is $600 per month for example, the plan payments to the trustee must be $600 per month. The plan payment cannot be less unless creditors are being paid in full. Proposing to pay this amount does not necessarily get the plan confirmed. The treatment of specific creditors is set forth in the next section.

3.2 "Amounts Reasonably Necessary to be Expended" for the Below-Median Debtor

"Amounts reasonably necessary to be expended" for the below-median debtor is generally determined by the debtor's budget, set forth on the debtor's Schedule J filed with his initial schedules. Schedule J sets forth the debtor's actual monthly expenses including payments to secured and priority creditors, rent, food, gas, insurance, education, alimony, etc. Remember this does not include payment of debts, other than the regular monthly payments on secured debts, usually the mortgage and car payments. It does include current taxes and current court-ordered support payments if any.

As to the below-median debtor, "Amounts reasonably necessary to be expended" means simply "reasonable expenses." There is no "bright-line" test as to what is or is not a reasonable expense. The chapter 13 trustees object routinely to amounts they think are unreasonable. They will request proof of the amount of the expense. Expenses such as cable TV, recreation expenses, are carefully reviewed. The extent of the review depends, in part, on the percentage being proposed to unsecured creditors in the plan. If the plan proposes to pay 70% or 80% of unsecured debts for example, the trustee and the court are usually less picky about the debtor's budgeted monthly expenses.

3.2.1 Pension Accounts

In general, voluntary contributions to pension accounts, i.e., IRAs, and the like are *not* allowed by most trustees unless the contribution is required by the debtor's employer. Repayment of 401(k) loans are allowed. Section 1322(f).

3.2.2 Private School Tuition

The chapter 13 trustee almost always objects to payments for private school tuition unless the cost is nominal or the payment percentage to unsecured creditors is high. An exception is usually

made when the amount is perceived as reasonable and the school functions as child care, i.e., allowing the debtor to work.

3.2.3 Charitable Contributions

When the debtor has established a pattern of making regular charitable contributions, those contributions up to "15% of gross income" may be deducted in the net disposable income computations.[34] Section 1325(b)(2(A)(ii).

3.2.4 Life Insurance Premiums

The debtor may deduct reasonable life insurance premiums.[35] A trustee may object to the expense it she believes there is no reasonable need for life insurance, if the debtor is young for example.

3.2.5 Other "Luxuries"

The trustee will object (and some courts will object *sua sponte*) to perceived luxuries of the debtor such as a new vehicle, or a luxury vehicle, payment of which is reducing the return to unsecured creditors significantly. Payments to a gym or summer vacation or for big screen televisions are problematic for the debtor. Trustees object to payments for timeshares or storage bins. These payments reduce the plan payment and are not reasonably necessary to "be expended" by the debtor and her family. .

4. Computation of the *Amount* of the Monthly Plan Payment for the Above-Median Debtor

4.1 Overview of "Projected Disposable Income" for Above-Median Debtors

Again, projected disposable income for the *above-median debtor* is "current monthly income" received " reduced by amounts reasonably

[34] *In re Cavanaugh*, 250 B.R. 107 (9th Cir. BAP 2000) (discussing the Religious Liberty and Charitable Donation Protection Act of 1998).
[35] *In re Smith*, 207 B.R. 888 (9th Cir. BAP 1996) (life insurance premiums may be necessary expense under chapter 13).

necessary to be expended" for the support of the debtor and his dependants, alimony and child support, charitable contributions, and, reasonable business expenses. Section 1325(b)(2). The computation of "amounts reasonably necessary to be expended" for the above-median debtor however is different than the below-median debtor as will be seen below.

The code mandates again that the computation begin with current monthly income but for the above median-debtor, subtract from CMI the deductions *set forth in the means test*, i.e., Section 707(b)(2)(A) and (B). Section 1325(b)(3).

4.2 Determination of "Amounts Reasonably Necessary to be Expended" for the Above-Median Debtor

For the above-median debtor, Congress attempted to provide a simple calculation by which the court can determine reasonable expenses each month - the means test. That attempt has failed in the eyes of most practitioners since the computations in the means test typically do not lead to the amount the debtor can actually pay each month. To begin with, the means test begins with IRS charts to determine the debtor's monthly expenses which may be higher or lower than the debtor's actual monthly expenses. The means test has many other deductions including some of the deductions above. The means test is virtually impossible to compute without a computer program designed for that purpose.

Further, the means test does not allow deduction of the full actual car payment, for example, but only $1/60^{th}$ of the total amount to be paid during the coming 60 months. So if the monthly car payment is $200 but will be paid off in 10 months, the means test allows a deduction of $33 per month ($2,000 divided by 60). This artificially increases the debtor's projected disposable income for the first ten months by $167 per month.

Some trustees are firm on insisting that the plan payment for the above-median debtor must be the amount from the means test computations, others are more practical and will bend, especially when it is close and the debtor is paying a significant percentage of his unsecured debts through the plan.

4.3 "Projected Disposable Income" Must be Paid to Unsecured Creditors

The code requires that the projected disposable income be "applied to make payments to unsecured creditors under the plan." Section 1325(b)(1)(B)

5. Length of the Plan or the "Commitment Period"

The length of the chapter 13 Plan depends on the "commitment period." Section 1325(b)(1)(B). If the debtor is an above-median debtor, the commitment period is five years. Section 1325(b)(4)(A). This means that the plan must be five years. If the debtor is a below-median debtor, the commitment period is three years. Section 1325(b)(4)(B). The plan may be shorter than prescribed by the commitment period *only* if it pays all creditors in full. The plan may not exceed five years in any event. Section 1322(d)(2).[36]

5.1 Plan Length for the Self-Employed Debtor

The self-employed debtor's "current monthly income" is her gross receipts for the past six months, not her *net* self employment income.[37] Section 101(10A). If the gross receipts in the past six months exceed the median income for the debtor's household size in her state, the commitment period is five years.

5.2 Extending the Plan Period

The court may confirm a five year plan for a below-median debtor only if it finds "cause."[38] No Plan may exceed five years. Section

[36] The Ninth Circuit attempted to limit the five year plan term requirement to debtors with a positive "net disposable income" as computed by the means test. See *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) (the "applicable commitment period" requirement is inapplicable to a plan submitted voluntarily by a debtor with no "projected disposable income"). *Kagenveama* was reversed by the *en banc* ruling in *Danielson v. Flores (In re Flores),* 735 F.3d 855 (9th Cir. 2013)(above-median chapter 13 debtor required to propose a five year plan even though her net disposable income is zero).

[37] *In re Weigand*, 386 B.R. 238 (9th Cir. BAP 2008).

[38] A number of persons who reviewed this summary commented to us that "cause" was no longer required in order to extend a plan beyond 36 months. The code however provides in Section

1322(d)(2). If the below-median debtor requires five years to cure the default on his home, for example, the court will almost always find cause and permit the plan to run five years. Reasonable cause is also common where the debtor requires additional time to pay priority creditors, for example, taxes or past due child support.

4. Liquidation Analysis

In every case, the total payments made by the debtor must be at least as much as the creditors would receive in a chapter 7 liquidation. Section 1325(a)(4). The plan cannot be confirmed unless this test is met. The total payments made over the life of the plan must exceed the value of the debtor's non-exempt assets on the date of the bankruptcy filing.

4.1 Example

Assume the plan payment is $600 per month. Total payments over 36 months would therefore be $21,600. That amount must be at least as much as the creditors would receive in a hypothetical chapter 7. If the debtor owns property that has equity that is not exempt and would therefore be sold by a chapter 7 trustee, the total plan payments must at least as much as that equity.

5. Feasibility

The chapter 13 plan cannot be confirmed unless it is feasible. The bankruptcy court must make a finding that the debtor has sufficient income to make all of the payments required under the plan. Section 1325(a)(6). If the debtor's income appears to be insufficient to make the required payments, this requirement may be met by having a family member or other person contribute funds each month. The family member will be required to submit a declaration promising to make the contribution as well as proof of ability to make the contributions.

1322(d)(2) that a below-median debtor's plan may not be longer than "3 years, unless the court, for cause, approves a longer period."

5.1 Review by the Trustee

The trustees take this requirement seriously although the debtor is usually given the benefit of the doubt. If the debtor does not have sufficient income to make the regular house payments, car payments, support, taxes, and the plan payments, the trustee will oppose confirmation of the plan and the case will typically be dismissed.

5.2 Feasibility When Claims are in Dispute

Sometimes, the feasibility of the plan cannot be determined until claims issues have been resolved. For example, the Internal Revenue Service often files a proof of claim *estimating* the amount owed when the debtor is not current on filing. Taxes, as a priority claim, must be paid in full pursuant to the proof of claim unless and until the court determines a lesser amount is owed. The court therefore may be unable to determine whether or not the plan is feasible until the amount of the IRS claim is resolved. In this case the court will typically continue the hearing on plan confirmation to allow claims issues to be resolved.

6. Good Faith

The court is required to find that "the action of the debtor in filing the petition was in good faith."[39] Section 1325(a)(7). The most common examples of bad faith filings are multiple filings by the debtor, filing when the motive is something other than to take advantage of the Bankruptcy Code such as to disrupt ongoing litigation, or to adversely change the rights of only one particular creditor such as the ex-spouse.

On the other hand, plans which pay nothing to unsecured creditors are common when the debtor cannot afford to pay more. These "zero percent" plans are not bad faith by themselves.

The issue also comes up when the debtor has expenses which are specifically allowed by the means test in Section 707(b) and yet appear to be

[39] *In re Warren*, 89 B.R. 87 (9th Cir. BAP 1988) (setting forth 11 factors to consider); *In re Villaneuva*, 274 B.R. 836 (9th Cir. BAP 2002).

excessive. In *In re Welsh*,[40] the debtor had six vehicles and a very nice home and, largely because of the payments to secured creditors (which are deductible on the means test), was left with little income at the end of each month. A divided Ninth Circuit BAP held that the payments by themselves could not lead to a bad faith conclusion since Congress specifically mandated that the payments to secured creditors were presumed not to be an abuse for means test purposes..

7. Payment of Domestic Support Obligations

The plan cannot be confirmed unless the debtor has paid "all amounts that are required to be paid under a domestic support obligation, and that first became payable (after the petition date)." Section 1325(a)(8).

8. Tax Refunds During the Plan

The trustees in the Central District of California all require the debtor to pay in, as an additional payment during the plan term, any refund they get from the IRS or California Franchise Tax Board during the life of the plan, unless they are proposing a 100% plan. The debtor should obviously make sure he is using the right amount of exemptions so that he pays into the IRS and FTB the amount actually owed for the year, no more and no less.

[40] *Drummond v. Welsh (In re Welsh),* 465 B.R. 843 (9th Cir. B.A.P. 2012), affirmed by the Ninth Circuit in *Drummond v. Welsh (In re Welsh)* 711 F.3d 1120 (9th Cir. 2013)(Where Congress has provided specific computations for determining disposable income, making those calculations cannot be part of the good faith determination).

7. THE CHAPTER 13 PLAN: TREATMENT OF CREDITORS

1. Overview

The plan payment, computed as set forth above, is only the first part of the analysis and is not sufficient, by itself, to result in confirmation of a plan. The plan must also provide for a given treatment to certain classes of creditors.

2. Treatment of Secured Debt in the Plan

The plan must pay secured creditors in full with a few important exceptions. Section 1325(a)(5). If the debtor does not have sufficient income to pay secured creditors in full, the chapter 13 plan cannot be confirmed. The debt is fully secured unless the value of the collateral is less than the amount owed. In that case, the claim may be bifurcated, i.e., secured to the value of the collateral and unsecured after that. Section 506(a). Some secured claims cannot be bifurcated as set forth below.

2.1 Example of Bifurcation

For example, suppose the creditor is a credit union which has a $10,000 claim secured by equipment used by the debtor in his business which is valued at $8,000. This credit union has an $8,000 *secured* claim which must be *paid in full* with interest through the plan, and a $2,000 unsecured claim that would be treated the same as other unsecured claims.

2.2 Payment of Secured Debt Under the Plan

The debtor's plan must propose to pay secured claims in full or return the collateral to the creditor.[41] Section 1325(a)(5). When the debtor bifurcates the debt, the secured portion of the debt must be paid through the plan. The trustee then will be paid an additional 11% of the plan payment as

[41] *In re Andrews*, 49 F.3d 1404 (9th Cir.1995) (creditor who does not object to plan is deemed to have accepted it)

well. When secured loans are modified in this way, the loan must be paid *in full* over the life of the plan, i.e., three to five years.[42]

The debtor will make the regular monthly payment on the secured loan directly to the creditor each month, i.e., "outside the plan" and cure any arrearage through the plan payments made to the trustee.[43] If the due date of the loan is beyond the term of the plan, the debtor will continue making the loan payments after the plan ends.

When the collateral is the debtor's residence or relatively new vehicles, i.e., "910 vehicles" (see below), the debtor cannot bifurcate the loan, or change the interest rate or any of the other terms of the loan.

2.2.1 Example

Suppose the debtor owes the bank $100,000 secured by rental property valued at $150,000. The loan carries interest at 12% and is due in full in six months. The debtor may propose to pay the bank $100,000 over 60 months at 6%[44] interest. Those payments will be made to the trustee and therefore include an additional 11% of the payment. That plan will be approved by the court if the interest rate is "reasonable" and the debtor has sufficient income to make the payments, i.e., the plan is feasible. The payments however may not be stretched out more than 60 months.

2.3 When the Collateral is the Debtor's Residence

When the collateral is the debtor's residence, the chapter 13 plan *may not* modify the terms of the secured debt other than to cure any existing

[42] See *In re Enewally*, 368 F.3d 1165 (9th Cir. 2004) (secured portion after lien is stripped must be paid in full over the plan period).
[43] In some districts in California, even regular monthly payments to secured creditors are paid to the chapter 13 trustee.
[44] *Till v. SCS Credit Corp.*, 541 U.S. 1 (2004) (formula rate approved); *In re Pluma*, 303 B.R. 444 (9th Cir. BAP 2003), *aff'd*, 427 F.3d 1163 (9th Cir. 2005) (approving formula method of computing interest rate).

defaults.[45] Section 1322(b)(2). This means that the loan cannot be rewritten to change the interest rate or due date of the loan. The arrearage (or default amount) may be cured over the plan period but the promissory note must be paid in full according to its terms. Obviously the lender and the debtor may agree to modify the terms but short of agreement, the plan may not change the original terms over the objection of the creditor.

2.3.1 What is the Debtor's Residence?

Generally speaking, the debtor's home is where she lives on the petition date. If the debtor operates a business from her home, the loan nevertheless may not be modified in the debtor's plan. [46]

2.3.2 *Lam* Motions and Judgment Liens

In the Ninth Circuit, the debtor may "strip off," that is, avoid or remove, a *completely unsecured lien* on the debtor's residence or on any other asset.[47] This is known colloquially as a "*Lam* Motion." Assume the residence is worth $400,000; the first lien is $450,000 and the second lien is $100,000. The second lien is, in reality, although not technically, completely unsecured and the lien may be avoided as part of the plan.[48] Once avoided, the debt is treated as unsecured. The first lien must be paid in full according to its terms although it may be cured over the plan period.

The debtor must file the *Lam* Motion early in the case asking the court to set the value of the property and find therefore that the lien is completely unsecured. The motion also asks the court to

[45] *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993); *In re Lee*, 215 B.R. 22 (9th Cir. BAP 1997) (first deed of trust on real estate and appliances cannot be stripped under Section 1322(b)(2)).

[46] *Wages v. JP Morgan Chase Bank (In re Wages)*, 508 B.R. 161 (9th Cir. BAP 2014)(loan may not be modified in chapter 11 even though debtor operates business from the home)

[47] *In re Lam*, 211 B.R. 36 (9th Cir. BAP 1997) (bankruptcy debtors entitled to treat wholly unsecured deed of trust as unsecured debt and avoid the lien); *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002) (approving *Lam*)

[48] Some courts require the avoidance action to be brought as an adversary proceeding under Rule 7001 but most allow avoidance by motion.

confirm that he does not have to make the regular monthly payment on the unsecured lien even prior to confirmation of the plan.

The debtor may also strip-off a judgment lien, i.e., an abstract of judgment, to the extent that it impairs the homestead exemption. Section 522(f). The stripped-off portion of the debt is then treated as unsecured debt.

2.4 When the Collateral is the Debtor's Automobile

2.4.1 "910 Vehicles"

As to auto loans, if the debtor purchased a vehicle "for the personal use of the debtor" within the past two and a half years, i.e., 910 days before the bankruptcy filing, and financed the purchase with a purchase money loan, "Section 506 does not apply."[49] Section 1325(a). This apparently means that the lien may not be "stripped down," i.e., bifurcated into a secured portion and unsecured portion. The debt must be treated as fully secured and paid in full over the life of the plan.[50] The debtor may however modify the terms of the secured debt, i.e., the interest rate may be reduced and defaults cured in the plan. Section 1322(b)(2) and (3). The debtor proposes to pay the lender the amount owed over the life of the plan with reasonable interest and recomputes the monthly payment based on those parameters. This payment must be made "through the plan," that is, to the trustee each month as part of the plan payment meaning that the trustee's percentage will be added to the amount paid each month. In the alternative, the debtor may simply "assume" the loan and make the regular monthly payment directly to the auto lender.

[49] This is the so-called "hanging paragraph" because it does not have a paragraph number.
[50] *In re Trejos*, 374 B.R. 210, 215 (9th Cir. BAP 2007) (confirming that creditor must be paid in full although interest rate and length of payment could be modified since creditor did not appeal that issue). The ultimate result of this amendment is that huge amounts of debtor plan payments are going to auto lenders that would otherwise to going to unsecured creditors.

If the debtor chooses to return the 910 vehicle, the creditor is entitled to a deficiency unsecured claim.[51]

2.4.2 Partial Purchase Money Liens

Often a person will purchase a new car and finance not only the purchase but also the deficiency amount still owed on the previous loan. In the Ninth Circuit, this loan is treated as partially purchase money and partially non-purchase money.[52] For example, suppose a person buys a new car for $25,000 but owes $5,000 more on the car they are trading in than it is worth. This results in a new loan of $30,000. In other words, the lender is lending $30,000 to buy a $25,000 vehicle. The debt is treated as partially purchase money and partially non-purchase money. The purchase money portion cannot be bifurcated into secured and unsecured. The non-purchase money portion is treated as unsecured assuming the value of the vehicle is less than the amount owed.

2.4.3 Other Vehicle Loans

If the vehicle is not a "910 vehicle," the debt may be bifurcated into secured and unsecured portions[53] and re-written in the plan, that is, the debtor is required only to pay the secured portion of the debt in full with reasonable interest over the life of the plan. Section 1325(a)(5)(B)(ii). Any remaining balance is paid with the unsecured class.

2.4.4 Example

Suppose the debtor owes the finance company $20,000 secured by a purchase money lien on a vehicle that is not a "910 vehicle"

[51] *In re Rodriguez*, 375 B.R. 535 (9th Cir. BAP 2007) (creditor entitled to unsecured claim); *Wright v. Santander Consumer USA, Inc. (In re Wright)*, 492 F.3d 829 (7th Cir. 2007) (creditor entitled to unsecured claim).
[52] *In re Penrod*, 611 F.3d 1158 (9th Cir. 2010).
[53] *In Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the Supreme Court ruled that property valued under Section 506(a) must be valued at "replacement value," noting "Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property."

valued at $12,000. The plan must pay the finance company $12,000 with reasonable interest over the life of the plan or return the vehicle.[54] The interest rate on the secured portion depends on current interest rates, not the contract rate between the debtor and the finance company. If the vehicle was purchased in the past two and a half years and the loan was used to buy it, the loan must be paid full over the life of the plan.

2.4.5 Effect of Subsequent Dismissal

Remember, if the chapter 13 case is later dismissed for any reason, the plan is no longer in effect and the debtor must pay the auto lender according to the original terms of the loan. Thus, on dismissal, the debtor may be in significant arrears on the payments and will have to work something out with the lender or return the vehicle.

2.5 When the Collateral is Other Personal Property

If, within one year before the bankruptcy filing, the debtor incurred a purchase money debt secured by "any other thing of value," Section 506 does not apply. Section 1325(a). This again apparently means that the debt must be paid in full or the asset returned.

If the collateral was purchased more than a year before the bankruptcy, the debt may be re-written in the plan, that is, the debtor is required only to pay the secured portion of the debt in full with reasonable interest for a reasonable amount of time. Section 1325(a)(5)(B)(ii).

2.6 Surrender

If the debtor intends to surrender the property, that is, permit the secured creditor to exercise its rights to foreclose, the plan will provide for that and the secured creditor does not have to be paid.

[54] The payment is part of the chapter 13 plan payment made to the trustee.

3. Curing Defaults on Secured Debts

The chapter 13 plan may cure defaults on secured loans over a three or five year period. Section 1322(b)(3). Obviously this is one of the primary uses of chapter 13 cases.

3.1 Example

Suppose the debtor is four payments behind on his home mortgage. A Notice of Default has been recorded and the "cure amount" including late charges, foreclosure fees and all the other charges lenders dream up is $7,200. The filing of the chapter 13 essentially makes the debtor instantaneously current. He will make the next regular mortgage payment when it is due and all subsequent monthly payments directly to the creditor. He will propose a plan to pay the cure amount to the chapter 13 trustee over 36 or 60 months. The cure payment does not have to include interest. The plan payment must still be the debtor's net disposable income and the plan length must still be three or five years unless all creditors are paid in full in a shorter period. The trustee will pay the secured creditor the amount set forth in the plan and the default will be cured by the end of the plan.

4. Priority Creditors

The chapter 13 plan must pay priority creditors in full over the life of the plan. Section 1322(a)(2). Priority creditors include delinquent spousal and child support, most taxes, and administrative expenses including the debtor's attorney. Section 507(a) If the debtor cannot establish that he has sufficient income to make these payments, the plan cannot be confirmed.

Most trustees will permit the debtor's attorney to be paid in full early in the plan. The plan may provide for example that whatever monthly amount is going to be paid to unsecured creditors be paid 100% to the attorney until the attorney is paid in full. Then the entire payment will go to unsecured creditors thereafter.

5. Unsecured Creditors in the Plan

The unsecured creditors, get - obviously - what is left of the plan payment after the secured creditors and priority creditors are paid their respective portion of the monthly payments by the trustee.

5.1 Percentage Paid to Unsecured Creditors

The plan form estimates the percentage to be paid to unsecured creditors. For example, a plan will be called a "20% plan" or a "70% plan" because that is the amount the debtor estimates will be paid to each unsecured creditor through the plan. But how much are the unsecured creditors? Creditors in chapter 13 must file a proof of claim, a one page form. So the total unsecured debt is the total amount set forth in the proofs of claim as a group. If the total for example is $57,000 and the plan is paying $500 per month to unsecured creditors for 36 months, the plan is paying each unsecured creditor 32% of the total claim. The rest will be discharged at the end of the plan.

The due date for filing a proof of claim is 90 days after the meeting of creditors. The due date may therefore be after the plan is confirmed. This can cause trouble later when proofs of claim are filed *after* the plan is confirmed resulting in more unsecured debt than the debtor anticipated. The plan *must pay the percentage* set forth in the plan by the end of the term or the discharge cannot be entered at the end of the plan and the case will be dismissed.[55] Debtor's counsel must be vigilant to prepare and file a modification of the plan after the deadline to file proofs of claim has run to modify the estimated percentage and make sure the debtor is paying that amount over the life of the plan.

Using the example above, if a creditor files a $10,000 proof of claim after the plan is confirmed, the total claims would then be $67,000 instead of

[55] *In re Schlegel v. Billingslea (In re Schlegel),* 526 B.R.333 (9th Cir. BAP 2015)(chapter 13 debtor required to actually pay the percentage indicated in the plan to unsecured creditors). In *Schlegel*, the debtor made the plan payments for 58 months not realizing that this would not pay the specified percentage set forth in the plan and the case was dismissed. In the Central District, the plan states that the percentage is estimated but the Order Confirming the Plan states that the debtor is ordered to pay the specified percentage.

$57,000. The total payments to unsecured creditors at $500 per month would only pay creditors 27% instead of 32%. At the end of the plan, the trustee will move to dismiss the case because creditors were not paid 32% as provided by the confirmation order. Debtor's counsel must be vigilant when this happens and file a Motion to Modify the Plan which would provide that the unsecured class will receive only 27% instead of 32%.

5.2 Student Loans

Student loans cause difficult problems for the debtor. A student loan is typically non-dischargeable and therefore will survive the plan. But the student loan is also a non-priority unsecured debt which is paid pro-rata with other unsecured creditors. When the plan is completed, there will still be a balance due to the lender along with accruing interest and late charges because the debt is non-dischargeable.[56] Section 1325(b)(2)(A)(ii). Because of this, the debtor might owe more on the student loan that when the case began.

Most of the trustees in the Central District will allow the student loan to be paid outside of the plan, i.e., directly to the lender, if the payment does not result in unfair treatment to other unsecured creditors. For example, if the plan is paying unsecured creditors 20% of the total claims, the student loan may be paid directly as long as the loan is not being paid more than 20% of the principal owed to the lender. If the payment to the student loan results in more being paid to that lender than other unsecured creditors, the plan will not be confirmed unless the student loan is treated the same as other unsecured creditors.

5.3 Classes of Unsecured Creditors

It is possible, although very rare, for the debtor to create two different classes of unsecured creditors and treat the two classes differently. This can be accomplished only when the discrimination does not treat the creditors unfairly.

[56] *In re Labib-Kiyarash*, 271 B.R. 189 (9th Cir. BAP 2001) (separate classification of student loans possible if the classification meets the fairness test under Section 1322(b)(1)).

There is one situation when the discrimination works and that is when the debtor is a co-debtor of a consumer with someone else. The plan may pay that particular debt in full leaving the other unsecured creditors to get what's left.[57] Section 1322(b)(1).

6. Other Provisions Allowed in the Plan

In addition to the above, the chapter 13 plan may provide for the assumption or rejection of executory contracts, for example office leases, return of collateral, and "any other appropriate provision not inconsistent with this title." Section 1322(b).

[57] *Meyer v. Renteria (In re Renteria)*, 470 B.R. 838 (9th Cir. B.A.P. 2012)(chapter 13 plan that pays a "codebtor consumer debt" in full and other unsecured creditors 9% may be confirmed without considering whether the discrimination is reasonable at least here where the trustee conceded that the plan was filed in good faith). The debtor's plan in *Renteria* proposed to pay her family law attorney in full and other unsecured creditors 9%. The family law debt had been guaranteed by the debtor's mother, thus the co-debtor.

8. THE CHAPTER 13 PLAN: CONFIRMATION PROCEDURE

1. Overview

A hearing to consider confirmation of the chapter 13 plan takes place typically about two months after the case is commenced. Section 1324(a). Most judges hold these confirmation hearings on one particular morning or afternoon court session each month.[58] No live testimony is received by the court at the hearing and typically the debtor need not appear at the hearing.

2. Objections by Interested Parties

Objections to confirmation of the plan must be in writing and filed with the court in sufficient time to allow the debtor and the trustee to respond.[59] The objections must be supported by admissible evidence and must set forth specific reasons why the chapter 13 plan does not comply with the code or the rules and should therefore not be confirmed. Section 1325(a)(1). The debtor should file a written response to the objection in time to allow the court to consider the response.

3. Objections by the Chapter 13 Trustee

Typically the chapter 13 trustee advises the debtor and her counsel at the meeting of creditors, or thereafter, of any objections or "issues" she has to the plan and what must be accomplished to satisfy the trustee. This is often "comments" about the debtor's income and expenses, valuations of property if there appears to be equity, and missing or incomplete compliance, i.e., tax returns, business reports etc. If the oral objections are not timely satisfied, the trustee will file a written objection with the court, usually a "check-the-box" sort of objection. This is common. The debtor's attorney should contact the trustee's staff attorney assigned

[58] One of the chapter 13 trustees commented once to me that at some hearing, the court confirmed only 22 out of 95 plans which were heard that morning. Many were continued to allow the debtor more time to come into compliance. Many cases were dismissed because the debtor had not made the required monthly payments either to the trustee or to the secured creditors.

[59] FRBP 3015(f).

to the case well before the confirmation hearing and attempt to clear the objections. The debtor usually does not file a formal response however to the trustee's objections.

4. The Confirmation Hearing

At the confirmation hearing, the judge calls the matter and asks the trustee whether her objections, if any, have been resolved and whether she recommends the plan for confirmation. The trustee will advise the court at that time whether all of the plan payments, and required regular monthly payments to secured creditors, have been made to date. The trustee will also advise the court whether the debtor has filed her required tax returns, paid all required domestic support obligations and generally complied with the code and the local rules. The trustee will summarize the issues that are still remaining and make a recommendation about what to do at the hearing.

4.1 Chapter 13 Trustee's Recommendation

The trustee's recommendation on confirming the plan carries a lot of weight with the court.

4.2 Objections of Other Interested Parties

Once the trustee has her say, the court will consider other objections. Often the objections restate the objections of the trustee and have therefore already been dealt with by the court. If the objections cannot be resolved at the hearing, for example, if there are factual issues for which testimony is required, the court will set an evidentiary hearing.

4.3 Consent Calendar

Some courts permit a "consent calendar" meaning if there are no written objections, all payments required to be made to date have been made, and the chapter 13 trustee recommends confirmation in advance, the plan will be deemed confirmed without an appearance by the parties.

4.4. Payment of Domestic Support Obligations

The plan cannot be confirmed unless the debtor has paid "all amounts that are required to be paid under a domestic support obligation, and that first became payable (after the petition date)." Section 1325(a)(8).

5. Continuances of the Confirmation Hearing

The courts are typically pretty casual about continuances to permit the debtor to "come into compliance" with the code and the rules or to otherwise resolve issues or submit further evidence needed to resolve some particular issue.[60] Several continuances in a case are not unusual although obviously each successive continuance requires a greater showing that the delays have not been caused by the debtor. On the other hand, continuances are rarely granted if the debtor is behind on the postpetition mortgage payments or the plan payments.

6. Confirmation or Dismissal

Eventually the court will either confirm the plan, dismiss the case or convert it to chapter 7, at the confirmation hearing. If confirmed, the chapter 13 trustee will prepare the Order Confirming the Plan.

6.1 Conversion Against Debtor's Wishes

Remember, conversion to chapter 7 against the debtor's wishes is not common but certainly happens. Section 1307(c). If the court orders the case converted, it is too late to request dismissal.

6.2 Dismissal

If dismissed, the dismissal is usually "without prejudice" to filing another case.

7. *Res Judicata* Effect of the Confirmation Order

Entry of the Plan Confirmation Order has *res judicata* or *collateral estoppel* effect with respect to all issues that were necessarily resolved as part of the plan

[60] *In re Nelson*, 343 B.R. 671 (9th Cir. BAP 2006) (the debtor should be offered the opportunity to amend plan before dismissal).

confirmation process.[61] This means that the facts and the conclusions of law that the court ruled on when approving confirmation of the plan, cannot be attacked or relitigated later, other than by appeal. For example, when the court rules that the debtor's home has a certain value and therefore a secured creditor is really unsecured, that cannot be relitigated later. Or that property has been surrendered, or a lease has been rejected.

A good example of this is in *In re Espinosa*, where the debtor's plan provided that a portion of his student debt was discharged. The lender, who had proper notice, did not object. The Supreme Court confirmed that the Confirmation Order was final as to that issue and could not be relitigated later.

8. Conversion to Another Chapter

The debtor has an absolute right to convert the case at any time to a chapter 7.[62] Section 1307(a). The debtor also has an absolute right to dismiss the chapter 13 case unless it has been previously converted, for example, from a chapter 7 to a chapter 13.[63] Section 1327(a). In that case the chapter 13 may not be dismissed but must be converted back to chapter 7.

[61] *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) (plan which provided that student loan was discharged binding on lender who did not object to the plan); *In re Summerville*, 361 B.R. 133 (9th Cir. BAP 2007) (validity of promissory note not affected by plan and post-confirmation litigation of the issue is okay); *In re Brawders*, 325 B.R. 405 (9th Cir. BAP 2005) (adequate notice to creditor is required if confirmation order is to have *res judicata* effect); see also *Knupfer v. Wolfberg (In re Wolfberg*), 255 B.R. 879 (9th Cir. BAP 2000) (confirmed chapter 11 plan *res judicata* against debtors).

[62] *In re Croston*, 313 B.R. 447 (9th Cir. BAP 2004) (debtors had an absolute right to convert from chapter 13 to chapter 7).

[63] *In re Rossen*, 545 F.3d 76 (atypical conduct can justify denial of debtor's otherwise absolute right to dismiss chapter 13 case).

9. POST-CONFIRMATION ISSUES IN CHAPTER 13

1. Overview

When the court enters its Order Confirming the chapter 13 Plan, the debtor makes his regular monthly payments to the secured creditors and the plan payments to the trustee each month and generally gets on with his life. The debtor however continues to be "in bankruptcy" for the term of the plan. The case remains open for the three to five year period.

2. Modifications to the Confirmed Plan

The chapter 13 plan may be modified at any time after confirmation of the plan and "before the completion of the payments under such plan."[64] Section 1329(a) A motion and a hearing is required and usually a showing of "changed circumstances."[65] Section 1329.

2.1 Increases in Income

When the debtor's income *increases* during the life of the Plan, the debtor is at least technically required to increase the monthly payment. Section 1329. The plan payments do not however increase unless and until someone files a motion to modify the plan. Local rules require that the debtor provide copies of his tax returns each year so the trustee may determine whether to request an increase in the payment.[66] The trustee can file a motion asking the court to increase the plan payments although that is not common.[67] A creditor can file the same motion although that is rare.

[64] In re Profit, 283 B.R. 567 (9th Cir, BAP 2002)(the order modifying the plan must be entered before the 60th month of the plan).
[65] *In re Than*, 215 B.R. 430 (9th Cir. BAP 1997) (section 1329 does not require changed financial circumstances, but merely changed circumstances). See also Rule 3015(g).
[66] In the Central District, see Local Rule 3015-1.
[67] *In re Powers*, 202 B.R. 618 (9th Cir. BAP 1996) (trustee need not show changed circumstances in order to move for modification).

2.2 Decreases in Income

The debtor may petition the court for a modification of the plan *decreasing* the plan payment if he experiences a decrease in his income or an increase in expenses. Section 1329. The new plan payment must still be sufficient to pay the priority debt in full as well as cure the arrearages on secured debt. It also must pay creditors more that they would get in a liquidation over the life of the plan.

2.3 Request to Suspend Payments

The debtor may petition the court to suspend the monthly plan payment due to an unplanned event. If the suspension is granted, the full amount required to be paid under the plan must still be paid, i.e., the shortfall must be paid by extending the plan period (but not for more than five years) or increasing future plan payments.

2.4 Refinancing to Pay Down the Debt

When a chapter 13 plan which provides for payment of a sum certain to creditors over a fixed period is confirmed, there is some authority which provides that the debtor may simply borrow that much and pay off the creditors in one fell swoop although the courts are not uniform in allowing this.[68]

3. Changes in Monthly Payments to Secured Creditors

As discussed above, the debtor may not modify his home mortgage in the plan, without the lender's consent. The debtor may cure over the plan term but otherwise must pay the loan according to the terms in effect when the case is filed. When the loan terms provide for changes in the monthly payments, perhaps because the loan is "adjustable," or because of the escrow

[68] *In re Sunahara*, 326 B.R. 768 (9th Cir. BAP 2005) (permitting a refinance of a residence and payment to unsecured creditors of the remaining amount owed under the plan and entry of the discharge); *In re Profit*, 283 B.R. 567 (9th Cir. BAP 2002) (a modified plan must meet some of the same requirements as an original plan, including the 60-month duration limit).

account; or when the loan gives the lender the right to charge the debtor for certain things, the debtor must comply with the changes and charges during the plan.

The rules provide that the lender must give notice to the debtor, the trustee and creditors of changes in the regular monthly payments at least 21 days before the new payment is due.[69] The rules also provide that the lender must give notice to the debtor, the trustee and creditors of any charges it intends to require the debtor to pay "within 180 of when the charges are incurred."[70]

The debtor may thereafter object to the changes or charges and ask the court to resolve the issue.

4. Bar Date for Filing Proofs of Claim

The bar date for filing proofs of claim is 90 days after the first date set for the first meeting of creditors.[71] A governmental unit has until 180 days after the petition is filed to file its proof of claim.[72] Creditors who do not timely file a proof of claim by this date will not receive any distributions from the trustee.[73]

4.1 Failure to File a Proof of Claim

It is common that a creditor will fail to file a proof of claim. As to secured creditors, the failure does not affect the right to foreclose if the plan fails. The trustee will reserve sufficient funds to pay the secured debt during the plan but will not pay the secured creditor until a proof of claim is filed. As to unsecured creditors, they are out of luck if they fail to file a proof of claim. The trustee will not pay the creditor anything and the claim will be discharged at the end of the plan. On occasion the debtor will file a proof of

[69] FRBP 3002.1(b).
[70] FRBP 3002.1(c).
[71] FRBP 3002(c). This deadline applies to secured creditors as well who are bound by the terms of the plan unless they object. This probably does not apply to residential loans or a "910 vehicle." See Section 1322(b)(1). *Spokane Law Enforcement FCU v. Barker (In re Barker)*, 839 F.3d 1189 (9th Cir. September, 2016)(debtor's admission of a debt in the schedules is not sufficient - a proof of claim is required).
[72] FRBP 3002(c)(1)
[73] FRBP 3002(a)

claim for the creditor. This happens when the debtor wants to be sure the trustee either pays the debt or pays at least part of it. For example, if the IRS *fails* to file a proof of claim for priority taxes (which is rare), the debtor should file a proof of claim for the IRS so that the taxes are paid by the trustee. The debtor may also file a proof of claim for the secured creditor so that that creditor will begin receiving payments from the trustee.

4.2 Objections to Claims

Although the debtor, any creditor and/or the chapter 13 trustee may object to claims of creditors, it is typically the debtor who objects and most often when the plan has proposed to pay all creditors in full. The objection is accomplished by motion[74] which must include evidence that the claim would not be allowed under the agreement or under non-bankruptcy law.[75] Section 502(b)(1). At the hearing, the burden will be on the creditor to establish that a debt is owed. If there are factual issues over whether the claim should be allowed, the court will set an evidentiary proceeding which proceeds similar to a trial. This is very rare except when the plan is paying creditors in full.

5. Motion to Dismiss ("TMD")

If the debtor gets behind on the monthly payment to the chapter 13 trustee, the trustee will file a motion to dismiss the case. If the motion is granted, no discharge is entered and the debtor owes the unpaid portion of her debts including all applicable interest and penalties which may have accrued during the case. Section 349. It is also likely that any foreclosure pending since the petition date will occur quickly after the dismissal, as the foreclosure process is not required to start over. The trustees and the courts often will give the debtor the benefit of the doubt and permit the debtor to catch up the past due payments.

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[74] FRBP 3007(a).

[75] *In re Campbell*, 336 B.R. 430 (9th Cir. BAP 2005) (objecting party must provide *some* evidence that the claim is not allowable, other than the lack of support by the creditor on the proof of claim form); *In re Garvida*, 347 B.R. 697 (9th Cir. BAP 2006) (claimant bears the burden of proof in the claims objection process, claims objection process should not be made part of the chapter 13 plan confirmation process).

6. Motion for Early Discharge

The debtor can file a motion asking the court to permit a plan to end early and enter a discharge even though the debtor has not completed all plan payments. The debtor must establish that he cannot complete the payments due to "circumstances for which the debtor should not be held accountable," and the unsecured creditors have recovered more than they would have received in a chapter 7. Section 1328(b). In this case however the discharge does not include any of the non-dischargeable debts under section 523(a). Section 1328(c).

7. Motions for Relief from the Automatic Stay

If the debtor misses a regular monthly payment to a secured creditor, the creditor may file a motion for relief from stay seeking permission to proceed with its non-bankruptcy remedies to foreclose or repossess its collateral. A hearing will take place about a month after the motion is filed. These motions are routinely granted unless some arrangement is made with the creditor.

7.1 Adequate Protection

Often when the debtor gets behind on the payments and is confronted with a motion for relief, he will catch up the past due payments before or at the hearing on the motion. The court typically then will give the moving creditor an "adequate protection order" ("APO") which will provide that if another payment is missed, the creditor may simply submit an order with a declaration attesting to the failure to abide by the APO and the order granting relief will be entered. Often thereafter, the debtor will dismiss the case and refile immediately prior to the next foreclosure sale. When this happens, the creditor will have a good argument that the refiling is not "in good faith" unless there is some good reason that the payments were not being made during the first case, such as loss of job or sickness.

8. Post-Confirmation Borrowing

If the debtor wishes to borrow money, refinance debt or enter into any loan transaction outside of the regular course of business or for medical emergencies, the debtor must obtain court authorization to complete the transaction. A party who enters into a transaction with the debtor during the case has the risk of having

the debt disallowed if the debt was not incurred in the ordinary course of business. Section 1305(c).

9. Post-Confirmation Business Operations

The debtor is free to operate his business and the trustee will not interfere with business operations. The trustee may require the debtor to submit semi-annual business reports to review the ongoing income and expenses of the business.

10. Attorneys Fee Applications

To the extent debtor's counsel is required to perform services after the plan is confirmed, the attorney will file a fee application for the additional fees. These are called supplemental fees. Once granted, the chapter 13 trustee will pay the fees to debtor's attorney.

11. Voluntary Dismissal by the Debtor

The debtor may dismiss the case at any time by filing a form requesting dismissal provided the case has not previously been converted from another chapter. Section 1307. In that case, notice and hearing is required.

10. CLOSING THE CASE AT THE END OF THE PLAN

1. Overview

The bankruptcy case stays open until an order is entered closing it. When the case is closed because the debtor has completed the payments under the plan, an order discharging the debtor's unpaid debts will be entered at the same time.

2. Notice from the Debtor that the Plan is Complete

When the debtor has completed making the payments under the plan, the debtor will file a "Debtor's Certificate of Compliance Under 11 U.S.C. § 1328(a) and Application for Entry of Discharge."[76] The debtor certifies that he has made all the plan payments, is current on the domestic support obligations and is entitled to a discharge.

2.1 Notice When the Debtor will not Receive a Discharge

Sometimes the debtor does not receive a discharge at the end of the plan term. This happens most commonly when the debtor has received a discharge recently in a different case. If the debtor is not going to receive a discharge, the notice must be modified to indicate that the plan payments are complete but that no discharge will be entered.

3. Trustee's Notice of Intent to File a Final Report and Close the Case

When it appears that the case is ready to be closed, the chapter 13 Trustee will file a form entitled Notice of Intent to File Trustee's Final Report. That report, a copy of which is attached to the notice, tells the debtor and all creditors the total amount that has been paid to the trustee by the debtor during the plan and the amounts paid to each creditor. The notice invites creditors to file an objection to the report and request a hearing within 30 days after the notice. If there are no objections, the trustee will file her final report and account. Shortly after that, the

[76] Form F3015-1.8 DISCHARGE APPLICATION

court clerk will enter an Order of Discharge and not long after that the case will be closed.

4. Trustee's Notice of Final Cure Mortgage Payment

The trustee is also required to give notice that "the debtor has paid in full the amount required to cure any default on the claim" within "30 days after the debtor completes all payments under the plan."[77] Creditors may object by filing a statement which must "itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement."[78] When that happens, a hearing is set and the court will resolve any discrepancy.

[77] FRBP 3002.1(f)
[78] FRBP 3002.1(g)

11. THE CHAPTER 13 DISCHARGE

1. Overview

The chapter 13 discharge is basically the same as the chapter 7 discharge except that it is a little more broad than the chapter 7 discharge. The discharge wipes out the debtor's liability for "all debts provided for by the plan or disallowed under Section 502" with a few exceptions. Section 1328(a). The discharge however is not "entered" or awarded to the debtor until all of the plan payments have been made to the trustee and the case is over. If the chapter 13 case is dismissed for any reason at any time, the discharge is not entered.

2. Exceptions to the Discharge

The chapter 13 discharge does *not* discharge the following:

1) Secured debts which extend beyond the plan period, typically long term mortgages (Section 1328(a)(1)),

2) Debts identified in Section 523(a)(1), i.e., most taxes; (a)(2) fraud; (a)(3) creditors who do not receive notice of the bankruptcy filing; (a)(4) defalcation by a fiduciary; (a)(5) domestic support obligations; (a)(8) student loans; and (a)(9) drunk driving. Section 1328(a)(2).

3) a fine or restitution included as part of a criminal sentence.[79] Section 1328(a)(3).

4) restitution or damages awarded in a civil action for willful and malicious injury *to a person*. Section 1328(a)(4).

A finding that a debt is non-dischargeable does not change the plan or the confirmability of the plan. The unpaid portion of the debt that is not discharged simply survives the case and continues to be a debt when the case is finished.

[79] This section was added by the 1994 amendments to undo the Supreme Court ruling in *Pennsylvania Public Welfare Debt. v. Davenport*, 495 U.S. 552 (1990).

2.1 The Super Discharge[80]

The chapter 13 discharge is sometimes referred to as the super discharge because a few debts which would not be discharged under chapter 7 are discharged under chapter 13. These are willful and malicious injury *to property*, 523(a)(6); fines payable to a governmental agency, (a)(7); and subsections(a)(10) through (a)(19). Marital obligations, i.e., (a)(15), which are not domestic support obligations, are discharged in a completed chapter 13.

2.2 Complaint Required by Creditor

As in chapter 7, debts arising from fraud, defalcation by a fiduciary, or willful and malicious injury to some person, *are discharged* unless the creditor timely files a complaint seeking a ruling that the debt is non-dischargeable.[81]

3. Effect of Less Than Full Payment Under the Plan on Non-Dischargeable Debts

A chapter 13 plan may be confirmed even though it does not provide for full payment of non-dischargeable debts, for example, student loans. In that case, the debtor remains liable for the unpaid portion of those debts along with any accrued and unpaid interest at the end of the plan. The creditor is stopped from collecting the debt by the automatic stay during the life of the case but the stays ends when the discharge is ultimately entered.[82] Some non-dischargeable debts are also priority, for example taxes and alimony, and must be paid in full during the plan period.

[80] Post-2005 Amendments, this is sometimes known as the "not-so-super-discharge," as the 2005 Amendments significantly reduced the debts discharged in a chapter 13 but not in a chapter 7.
[81] FRBP 4007(d).
[82] *In re Foster*, 319 F.3d 495 (9th Cir. 2003) (interest on nondischargeable child support continues to accrue after a chapter 13 petition is filed and survives the discharge).

4. Payment of Postpetition Domestic Support Obligations

The chapter 13 discharge may not be entered at all until the debtor "certifies" that he has made all payments "required to be paid under a judicial, or administrative order, or by statute," that became payable or "are due" up to the time of the certification including prepetition payments to the extent provided for under the plan. Section 1328(a).

5. No Discharge Permitted to Prior Filers

No discharge is granted to a person who received a discharge in a previous chapter 7 or 11 if the previous case was filed within four years before the current chapter 13 was filed or if the person received a discharge in previous chapter 13 paying less than 70% to unsecured creditors within two years before this case was filed. Section 1328(f).

6. Course on Personal Financial Management

The chapter 13 discharge will not be entered unless, "after filing the petition, he completes "an instructional course concerning personal financial management described in Section 111. . ." Section 1328(g).

7. No Discharge to Certain "Bad People"

Section 1328(h) denies a discharge to a person "to whom Section 522(q) applies" or whom there is a pending proceeding of the "kind described in Section 522(q)."[83]

Section 522(q) identifies

1) debtors convicted of a felony which "demonstrates that the filing of the case was an abuse of the provisions of this title," or,

2) debtors owing a debt, arising from, or violating various federal securities laws,[84] or

[83] We have never seen nor heard of any case to which this section was asserted.
[84] This is especially curious since debts arising from violation of securities laws, section 523(a)(19) is discharged in chapter 13.

3) a debt for “any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five years.”

12. CONVERSION OF THE CHAPTER 13 CASE TO AND FROM CHAPTER 7

1. Right to Convert Chapter 7 Case to Chapter 13

The Bankruptcy Code seems to say that the debtor has the absolute right to convert his case from chapter 7 to another chapter "at any time" during the case provided the case has not already been converted from some chapter to chapter 7. Section 706(a). The code also provides that the debtor may convert from chapter 13 to 7. Section 1307(a)

1.1 The Right to Convert is not Automatic

The Supreme Court has ruled that while to right to convert a case appears to be automatic under the code, it is not.[85] The bankruptcy court may refuse to enter an order converting the case if it finds "cause."

2. Reasons to Convert From Chapter 7 to Chapter 13

Conversion from chapter 7 to chapter 13 is fairly rare. It usually happens when the chapter 7 trustee is trying to sell something the debtor does not want to lose. Conversion from chapter 7 to chapter 11 or 13 may also be requested when the debtor finds a job or a new source of income which makes a chapter 11 or 13 plan feasible.

Conversion from chapter 13 to chapter 7 is more common. Typically the debtor determines at some point that he is unable to confirm a chapter 13 plan, or cannot continue to make the plan payments, or no longer wishes to save some particular property, and decides to at least get the chapter 7 discharge of his debts.

[85] *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007)(request to convert from chapter 7 to chapter 13 denied after the chapter 7 trustee discovered property that the debtor was hiding)

3. Procedure to Convert the Case

To convert a chapter 7 case to chapter 13, the debtor must file a motion and have it heard by the court.[86] To convert a chapter 13 to chapter 7, the debtor merely files a "notice of conversion" which functions as the order converting the case.[87]

4. Effect of Conversion

Conversion of the case either direction changes the date of the "order for relief" but does not generally change the "date of the filing of the petition," or the "commencement of the case." Section 348(a).

Conversion of the case from chapter 13 to chapter 7 "terminates the service of any trustee." Section 348(e). There are other consequences to conversion. For example, a new meeting of creditors is set which itself triggers new deadlines to object to exemptions and the discharge. Debts arising after the petition date but before conversion are treated "as if such claim had arisen before the commencement of the case." Section 348(d). If the court allows the conversion from chapter 7 to chapter 13, the chapter 7 trustee's fees will have to be paid as an administrative expense. Section 348(d).

5. Property of the Chapter 7 Estate When the Chapter 13 is Converted to Chapter 7

The property of the chapter 7 estate, when the chapter 13 is converted to chapter 7, consists of the property the debtor had on hand when he filed the chapter 13 "that remains in the possession of the debtor" on the conversion date. In other words, when the debtor has acquired property during the chapter 13 case, that property is not part of the chapter 7 estate. Section 348(f). Congress placed this limitation on what the chapter 7 trustee can seize and sell to encourage debtors to file chapter 13. There was concern that a person would prefer chapter 7 in the first place if he thought he was going to acquire property in the future.

[86] FRBP 1017(f).
[87] Id.

6. Property in the Possession of the Chapter 13 Trustee When the Case is Converted

Since a chapter 13 case may be suddenly converted at any time without even an order of the court, what does the chapter 13 trustee do with the payments received during the case which have not been forwarded on to creditors according to the confirmed plan? The Supreme Court answered that question recently ruling that the trustee must return any funds she is holding to the debtor.[88]

[88] *Harris v. Viegelahn*, --- U.S. ----, 135 S.Ct. 1829 (May 18, 2015)(chapter 13 trustee must turn over any funds she is holding at conversion to the debtor)

13. CHAPTER 13 PLAN COMPREHENSIVE EXAMPLES

1. Example One

Assume the debtor's only income is social security. Her home is worth $250,000 and she owns it free and clear. She has no debts except a recent hospital bill of $45,000. Chapter 7 will do her no good because the chapter 7 trustee will simply take the home, sell it and pay the hospital bill. Likewise she cannot get a chapter 13 plan confirmed since she does not have sufficient income. The plan would have provide for 100% of the hospital bill since that is the amount the hospital would receive in a chapter 7, or $1,250 ($45,000 divided by 36) plus $125 in trustee fees each month and her budget will not allow this size payment. In theory at least, a chapter 13 plan could provide for a refinance or sale of the residence and payment of the proceeds to creditors but there would be a feasibility issue.

2. Example Two

Assume the debtor is five months or $3,600 behind on his house payments. He owes $7,200 in back income taxes and has $50,000 of other unsecured debts. His only assets are his home with $25,000 equity and two vehicles, one worth $15,000 on which he owes nothing and the other a recently purchased BMW on which he owes more than it is worth. His gross income is $4,000 per month and he is therefore a below-median debtor. He would compute his plan payment by taking his current monthly income of $4,000 less his necessary monthly expenses. Let's assume the net is $400 per month. The debtor would propose a 36 month plan of $400 per month. He will pay his regular mortgage payment each month directly to the bank. The plan would provide for $100 per month to cure the $3,600 arrearage on the home and $200 per month to pay the taxes, a priority claim, (no interest is required unless the IRS has an unavoidable lien). This leaves the debtor with $100 per month for his unsecured creditors or $3,600 for the 36 months. $3,600 divided by $50,000 is 7.2%. This is sufficient if it is at least as

much as the unsecured creditors would receive in a chapter 7. Our debtor here has equity in his home which is exempt and the unsecured creditors would get none of it in a chapter 7. A chapter 7 trustee would however sell the one vehicle and receive $15,000 ($3,050 would go to the debtor for the exemption). This $11,950 would go first to the taxes, $7,200, leaving $4,750 for the unsecured creditors. This is more than the debtor is proposing and therefore the plan will not be confirmed. The debtor will have to figure out how to increase the monthly payments. Note, as to the BMW, i.e., the second vehicle, the debtor will have to reaffirm the debt or return the vehicle. The trustee may object that the plan is not proposed in good faith since returning the vehicle, an over-encumbered vehicle, will result by itself in increased funds available to pay creditors.

3. Example Three

John Jones operates a small plumbing business. He has two employees. Recently one employee negligently caused a fire resulting in $200,000 in damages which his insurance does not cover. He has about $100,000 in other unsecured debt. He does not own a home. He has about $75,000 of accounts receivable and non-exempt equipment. John files chapter 13 to stave off the litigation resulting from the fire. Whether his plan will be 36 months or 60 months will depend on whether he is a below-median debtor (36 months required) or an above-median debtor (60 months required). If the total of the monthly plan payments exceeds $50,000, i.e., $75,000 less the wildcard of roughly $25,000, he meets the liquidation test since that is more than the creditors would receive in a chapter 7. If the total plan payments are $60,000 over a 60 month period, for example, the unsecured creditors would receive roughly 20% of the amounts owed to them.

If the insurance claim is higher than $200,000, Jones may not qualify for chapter 13 since his unsecured debt would exceed the debt limit of $394,725. If the claim amount is however disputed and cannot be easily quantified, it is unliquidated and would not count when determining whether or not Jones qualifies for chapter 13. If it is unliquidated and is later determined to be $1 million, the debtor still qualifies for chapter 13 because it was unliquidated on the petition date. In that case, the insurance claim would receive a greater share of the plan payments but, in any event, the remaining amount owed would be discharged once the plan was completed.

4. Example Four

Cindy Smith is a teller at a bank. She is four months behind on the first trust deed on her home and six months behind on the second. Her home is worth less than the amount owed to the first. She must make the regular mortgage payments to the first and a sufficient amount to the trustee to cure the arrearage on the first over five years. The second lien can be removed by a Lam Motion. The second will thereafter be treated as an unsecured debt. If Cindy is a below-median debtor, the plan payment will be determined by taking her current monthly income ("CMI") and subtracting necessary expenses. The plan period will be three years unless she requests five in order to cure the arrearage. If she is an above-median debtor, her plan payment must be determined by the means test, Form B22C, and must be five years. Since it is likely that the "net disposable income" as determined by the means test will not realistically establish her ability to pay, the courts will typically look to her CMI and deduct necessary expenses.