Chapter 13 Trustee's Best Practices Manual[1]

by

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[1] DISCLAIMER: These materials are not an official statement of policies or procedures of the Chapter 13 Trustee's Office. These materials are for general assistance and guidance in representing debtors in Chapter 13 cases and they are subject to ongoing revisions. These materials do not constitute and are not intended as legal advice. These materials are not a substitute for your own research and analysis.
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I. OVERVIEW AND ELIGIBILITY

A. SOURCES OF LAW

Title 11 of the United States Code (11 U.S.C. §§ 101 – 1532) is the bankruptcy statute, referred to as the "Bankruptcy Code." The Bankruptcy Code is broken into chapters. Chapters 1, 3 and 5 relate to all types of bankruptcy cases except Chapter 9. Except as otherwise noted in the Bankruptcy Code, Chapters 7, 9, 11, 12, 13 and 15 relate only to cases filed under the applicable chapter of the Code.

Certain statutes in Titles 18 and 28 of the United States Code also apply to bankruptcy cases, including 28 U.S.C. §§ 151 – 159 (bankruptcy judges and appeals); 28 U.S.C. §§ 581 – 589b (United States Trustee); 28 U.S.C. §§ 1334, 1408 – 1412 (jurisdiction and venue); 18 U.S.C. §§ 151 – 158 (bankruptcy crimes).

The national rules relating to bankruptcy are the Federal Rules of Bankruptcy Procedure (FRBP). The rules are commonly called the "Bankruptcy Rules" and are numbered 1001 – 9037. The Federal Rules of Civil Procedure and Federal Rules of Evidence are also sometimes applicable to bankruptcy cases. The Bankruptcy Court for the Western District of Washington also has a comprehensive set of local bankruptcy rules (LBR). Any bankruptcy practitioner in this District should read through the local rules, which are located at the Court's website (www.wawb.uscourts.gov).

Creditors must file additional information with their claims that will be of assistance in reviewing the claims. In Chapter 13 cases, creditors secured by an interest in a debtor's principal residence that is provided for in the plan will also have to provide notice to the Trustee, debtor's counsel and debtor (1) of any change in the payment amount (including any change that results from an interest rate or escrow account adjustment), no later than 30 days before the new payment amount is due; and (2) of fees, expenses and charges incurred after the claim was filed and that the creditor asserts are recoverable against the debtor or the residence, and that notice must be served within 180 days of the fee, expense or charge being incurred. FRBP 3002.1.

State law may also be applicable in bankruptcy proceedings. For example, certain state law causes of action might be asserted in bankruptcy lawsuits, called "adversary proceedings." In Washington State, debtors may also choose to utilize either the state or federal exemption schemes (but not both). *See* 11 U.S.C. § 522.

Bankruptcy appellate decisions may be rendered by the Bankruptcy Appellate Panel of the Ninth Circuit (not all Circuits have a Bankruptcy Appellate Panel), District Courts, the Ninth Circuit or the United States Supreme Court.

B. CHAPTER 13 BASICS

Chapter 13, known as adjustment of debt of individuals with regular income, involves trustee administration of a debt repayment plan by individuals pursuant to a confirmed plan.

Corporations and partnerships are not eligible to be debtors under Chapter 13. Only the debtor may file a plan in a Chapter 13 case. Contents of the plan are determined by the Bankruptcy Code and local rules. *See generally* 11 U.S.C. § 1322 and Local Bankr. R. 3015-1. Local Bankruptcy Form 13-4 is the mandatory form plan. Local Bankr. R. 3015-1(a). The Court periodically revises the plan, most recently on December 1, 2017. Gen. Ord. No. 2017-5 (Bankr. W.D.Wa. Aug. 31, 2017). The plan must provide treatment to creditors that is at least the same as the creditors would receive in a Chapter 7 case.

Unlike Chapter 7, which requires the debtor to surrender his or her non-exempt assets to the trustee in return for an immediate discharge under 11 U.S.C. § 727, in Chapter 13 the debtor keeps his or her assets and proposes a repayment plan. The plan is generally three to five years in length. The discharge under 11 U.S.C. § 1328(a) is entered once the debtor has completed his or her obligations under the confirmed plan.

To be eligible for Chapter 13, an individual must:

1) Be an individual with "regular income," which means income that is sufficiently stable and regular to enable that the individual can make the proposed plan payments. 11 U.S.C. § 101(30).

2) Have noncontingent, liquidated, unsecured debt of less than $394,725 (this amount adjusts every three years); and

3) Have noncontingent, liquidated, secured debt of less than $1,184,200 (this amount adjusts every three years).

11 U.S.C. § 109.

A debtor must be eligible for Chapter 13 on the petition date itself. A debtor may not sell or surrender collateral post-petition in order to become eligible for Chapter 13. "[D]etermining Chapter 13 eligibility under § 109(e) . . . should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." *Scovis v. Henrichsen (In re Scovis),* 249 F.3d 975, 982 (9th Cir. 2001). And "ordinary events occurring subsequent to the filing (e.g., paying down debt) do not affect the eligibility determination." *Id.* at 984. Also keep in mind that "the unsecured portion of undersecured debt is counted as unsecured for § 109(e) eligibility purposes." *Id.* at 983. For example, if a house is worth $100,000.00 but the debt is $200,000.00, the $100,000.00 "undersecured" portion of the debt counts toward the unsecured debt limit.

However, debts for which the debtor's personal liability was discharged in a prior Chapter 7 case are not counted as unsecured debt for purposes of determining Chapter 13 eligibility under 11 U.S.C. § 109(e). *Free v. Malaier (In re Free),* 542 B.R. 492, 500-01 (B.A.P. 9th Cir. 2015).

Moreover, ineligibility under 11 U.S.C. § 109(e) is cause for dismissal under 11 U.S.C. § 1307(c) even though ineligibility is not one of the enumerated examples under Section 1307(c). *See In re Knight*, 55 F.3d 231, 237 (7th Cir. 1995); *In re McGovern*, 122 B.R. 712, 719 (N.D. Ind. 1989); *Mercantile Holdings, Inc. v. Dobkin (In re Dobkin)*, 12 B.R. 934, 936 (Bankr. N.D. Ill. 1981). Notably, "[s]ection 1307(c) enumerates eleven *non-exclusive* grounds which may constitute 'cause' for dismissal." *Ellsworth v. Lifescape Medical Associates, P.C. et al. (In re*

Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011) (emphasis added).

While ineligibility under 11 U.S.C. § 109(e) may not be jurisdictional, ineligibility still mandates dismissal of the case when a debtor is not eligible. "Under 28 U.S.C. § 1334(a) and the district court's order of reference," one court explained,

> this court has 'original and exclusive jurisdiction of all cases under title 11.' The court thus has jurisdiction over [the debtor's] case, even if she is not an eligible chapter 13 debtor under section 109(e). *See Rudd v. Laughlin,* 95 B.R. 705, 707-08 (D. Neb. 1998) (bankruptcy court has valid jurisdiction over case even where debtor ineligible). But the existence of jurisdiction does not mean this court can or should, as a matter of substantive bankruptcy law, ignore the plain terms of section 109(e) and allow [the debtor's] case to proceed when she is not eligible to use chapter 13.

In re Bailey-Pfeiffer, Case No. 17-13506-bhl (Bankr. W.D. Wis. March 23, 2018).

The court further explained that the debtor

> cannot fix the basis for the trustee's confirmation objection [that the debtor was ineligible to be a debtor under Chapter 13] because eligibility under section 109(e)'s debt limits is determined as of 'the date of the filing of the petition' and the amount of her unsecured debts at the petition date will never change. Because her ineligibility cannot be cured, [the debtor] will never be able to propose a plan that complies with all of Title 11 and can never satisfy section 1325(a)(1) [providing that a court shall confirm a plan if the plan complies with the provisions of Chapter 13 and other applicable provisions of Title 11 of the United States Code].

Id.

Only an individual with regular income may be a debtor under Chapter 13. 11 U.S.C. § 109(e). An individual with regular income means an individual whose income is sufficiently stable and regular to enable that individual to make payments under a chapter 13 plan. 11 U.S.C. § 101(30). Gifts or gratuitous payments from family or friends do not qualify as regular income. *See In re Cregut*, 69 B.R. 21, 22-23 (Bankr. D.Ariz. 1986); *In re Hanlin*, 211 B.R. 147, 148 (Bankr. W.D.N.Y. 1997). However, where the family member or friend commits to making the payments to allow the debtor to fund his or her plan *and there is direct evidence of that commitment*, those payments can constitute regular income. *See In re Campbell,* 38 B.R. 193, 196 (Bankr. E.D.N.Y. 1984); *In re Jordan*, 226 B.R. 117, 119 (Bankr. D.Mont. 1998). To establish that regular income, the debtor needs to file a sworn declaration from the family member or friend committing to make the payments to the debtor so that the debtor can qualify as a debtor under Chapter 13. Without that evidence, the debtor is not eligible to be a debtor under Chapter 13 if his or her ability to fund the plan depends on gratuitous payments from family or friends.

The most significant differences between a Chapter 13 and Chapter 7 discharge are:

1) Property/debt settlement in a divorce decree that is not related to a support issue can be discharged vis-à-vis the nonfiling ex-spouse in Chapter 13;

2) The willful *and* malicious tort exception to discharge in Chapter 7 is changed in Chapter 13 to willful *or* malicious; and

3) It appears traffic tickets and fines are dischargeable in Chapter 13, but not in Chapter 7.

Reasons to file Chapter 13 include:

1) Saving a house from foreclosure by paying back pre-petition mortgage arrears over the life of the plan;

2) Paying priority tax debt over the life of the plan;

3) Avoiding loss of assets that would be sold in a Chapter 7 case by paying an equivalent amount over the life of the plan;

4) "Stripping" off junior mortgages because there is no equity above the amount of the senior mortgage(s);

5) Protecting a codebtor from creditor collection;

6) Changing loan terms (for example, a "cramdown" of a vehicle purchased more than 910 days prior to the petition date); and

7) Obtaining a discharge when not eligible for a Chapter 7 discharge.

Only married persons may file a joint bankruptcy case. 11 U.S.C. § 302(a); *Fitzgerald v. Hudson (Matter of Clem),* 29 B.R. 3, 4 (Bankr. D.Idaho 1982); *In re Estrada,* 224 B.R. 132, 135 (Bankr. S.D.Ca. 1998); *In re Aldape Telford Glazier, Inc.,* 410 B.R. 60, 63 (Bankr. D.Idaho 2009). Unmarried persons may not file a joint bankruptcy case. *Bone v. Allen (In re Allen),* 186 B.R. 769, 774 (Bankr. N.D.Ga. 1995) (noting that "in order to qualify to file a joint petition under § 302 the two parties must be legally married"); *In re Lucero,* 408 B.R. 348, 350 (Bankr. C.D.Ca. 2009) (observing that "only . . . those couples that are legally married" may file a joint bankruptcy case).

A Chapter 13 debtor must complete a plan within sixty months. "Under Chapter 13, a debtor must complete plan payments within 36 months or, with leave of court, not later than 60 months. 11 U.S.C. § 1322(c). This time period begins running from the date at which the Chapter 13 debtor is first obligated to begin making payments to the trustee under the confirmed plan . . . as opposed to the date at which the first payment becomes due under the confirmed plan." *Nicholes v. Johnny Appleseed of Washington (In re Nicholes),* 184 B.R. 82, 87 (B.A.P. 9th Cir. 1995) (citations omitted).

II. AUTOMATIC STAY AND CODEBTOR STAY

A. GENERALLY

The automatic stay is self-executing and effective upon the filing of the bankruptcy petition. *McCarthy, Johnson & Miller v. North Bay Plumbing (In re Pettit)*, 217 F.3d 1072, 1077 (9th Cir. 2000). The automatic stay applies only to property of the bankruptcy estate as defined

broadly in 11 U.S.C. § 541(a). *Id.* Acts in violation of the automatic stay are void rather than voidable. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992).

B. BURDEN OF PROOF

Generally, the burden of proof on a motion for relief from the automatic stay is a shifting burden. The moving party first has to establish a prima facie case that relief from stay is warranted. The burden then shifts to the debtor to show that relief is unwarranted. *Adelson v. Smith (In re Smith)*, 389 B.R. 902, 918 (Bankr. D.Nev. 2008). In addition, motions for relief are generally summary proceedings of limited effect. *Biggs v. Stovin et al. (In re Luz International, Ltd.*), 219 B.R. 837, 842 (B.A.P. 9th Cir. 1998). In other words, the court does not generally conduct an exhaustive evidentiary inquiry, but instead determines whether the movant has met its burden under the relevant statute.

C. MULTIPLE CASES AND CODEBTOR STAY

Many courts have written on what actually terminates if the stay is not extended when the debtor files a second case within one year. 11 U.S.C. § 362(c)(3)(A). The confusion arises with the phrase "with respect to the debtor" in the statute. Some courts have held that the phrase is critical and conclude that the stay terminates *only* with respect to the debtor and the debtor's property, but not as to property of the estate. The Bankruptcy Appellate Panel of the Ninth Circuit held that the stay terminates in its entirety on the thirtieth day after the second case is filed *unless* the debtor files a motion to continue the stay, the court holds a hearing within the thirty day period and the court then extends the stay. *Reswick v. Reswick et al. (In re Reswick),* 446 B.R. 362, 372-73 (B.A.P. 9th Cir. 2011).

Not all bankruptcy courts in the Ninth Circuit have agreed with the Panel. *See, e.g., Rinard v. Positive Investments, Inc. (In re Rinard),* 451 B.R. 12, 20 -21 (Bankr. C.D.Cal. 2011) (Under Section 362(c)(3)(A), the stay terminates only as to the debtor and not as to property of the estate.). Two courts in the Western District of Washington Seattle Division agree with the reasoning of *Rinard*. *In re Kral,* 15-11251-TWD (Bankr. W.D.Wa. May 8, 2015) (oral ruling); *In re Ansari*, 16-15552-TWD (Bankr. W.D.Wa. Dec. 13, 2016); *In re Choi*, 16-11875-MLB (Bankr. W.D.Wa. April 27, 2016) (oral ruling); *In re Duhon,* 16-10422-MLB (Bankr. W.D.Wa. April 27, 2016) (oral ruling); *In re Sygitowicz,* 17-10611-MLB (Bankr. W.D. Wa. May 9, 2017) ("[T]he Court follows *In re Rinard* [ ] and finds that the stay has only been automatically terminated as to the debtors individually, and not as to the estate."). The other court in the Seattle Division follows the Panel's *Reswick* decision. *In re Moegling*, No. 17-10795-CMA (Bankr. W.D. Wa. May 18, 2017) ("pursuant to 11 U.S.C. § 362(c)(3)(A) and *In re Reswick,* 446 B.R. 362 (B.A.P. 9th Cir. 2011), the automatic stay terminated in its entirety").

Notably, the only Circuit Court presently to have determined this issue held that "§ 362(c)(3)(A) terminates the terminates the entire stay thirty days after the filing of a second case." *Smith v. Maine Bureau of Rev. Servs. (In re Smith)*, No. 18-1573, 2018 WL 6520887 (1st Cir. Dec. 12, 2018). The First Circuit determined that, "[b]ased on the provision's test, the statutory context, and Congress's intent in enacting BAPCPA, we hold that § 362(c)(3)(A) terminates the entire automatic stay – as to actions against the debtor, the debtor's property, and

property of the bankruptcy estate – after thirty days for second-time filers." *Id.*

In order to extend the stay under 11 U.S.C. § 362(c)(3), the debtor must move for extension of the stay and the hearing must be completed before the expiration of the thirty day period. 11 U.S.C. § 362(c)(3)(B); *Ortola v. Ortola et al. (In re Ortola),* No. 11-1222, 2011 WL 7145793, at *5 (B.A.P. 9th Cir. Dec. 16, 2011) ("Any motion under § 362(c)(3)(B) must have been filed, heard, and ruled upon before expiration of the 30-day period.") (this case is cited for persuasive value only, as it does not have any precedential value).

Moreover, the debtor must overcome with clear and convincing evidence the presumption that the debtor did not file the current case in good faith. 11 U.S.C. § 362(c)(3)(C). Clear and convincing evidence is evidence that produces "in the ultimate factfinder an abiding conviction that the truth of [the] factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (quotations omitted). *See also* BLACK'S LAW DICTIONARY 256 (3d pocket ed. 2006) (Clear and convincing evidence "is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.").

Under Chapter 13, a codebtor stay comes into effect upon the filing of the petition under certain conditions. 11 U.S.C. § 1301. Generally, the codebtor stay prevents collection of a *consumer debt* against any individual who is liable on the debt with the debtor, "or that secured such debt." The language of Section 1301(a) "is broad enough to protect traditional cosigners, joint obligors, guarantors, sureties and others who have permitted their property to be used to secure a claim against the debtor." Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 84.1, at ¶ 7, Sec. Rev. May 5, 2004, www.Ch13online.com. A debt securing a debtor's principal residence qualifies as a consumer debt. *Zolg v. Kelly (In re Kelly),* 841 F.2d 908, 912-13 (9th Cir. 1988). Even if the automatic stay terminates or does not come into effect because of the debtor's prior cases filed within one year, the codebtor stay is not affected.

"Neither Section 1301 nor Section 362(c)(4)(A) contains any language that limits the applicability of the codebtor stay in cases where Section 362(c)(4) is applicable." *King v. Wells Fargo Bank,* 362 B.R. 226, 232 (Bankr. D.Md. 2007) (holding that a foreclosure sale violated the codebtor stay and was void even where the automatic stay did not go into effect under 11 U.S.C. § 362(c)(4)(A)(i)). "The co-debtor stay provided for by Section 1301 is not terminated by the statutory termination of the stay applicable to debtors pursuant to section 362(c)(3)(A)." *In re Lemma,* 393 B.R. 299, 306 (Bankr. E.D.N.Y. 2008) (holding that the creditor's scheduling of a foreclosure sale on a personal residence violated the codebtor stay even where the Court did not extend the automatic stay pursuant to 11 U.S.C. § 362(c)(3)).

When debtors have three cases pending in one year, the stay does not go into effect in the third case. Section 362(4)(A)(i) provides that

> if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed . . . the stay under subsection (a) shall not go

into effect upon the filing of the later case.

11 U.S.C. § 362(c)(4)(A)(i). However, "if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors." 11 U.S.C. § 362(c)(4)(B).

Based on the plain reading of Section 362(c)(4)(B), a debtor must file a motion to impose the stay within thirty days or the stay cannot go into effect. As noted by one court, under Section 362(c)(4)(B),

> there must be (1) a motion by a party in interest filed within 30 days of the bankruptcy filing, (2) notice and a hearing, and (3) a demonstration by the moving party that the new case was filed in good faith as to the creditors to be stayed.

In re Hart, No. 13-20039, 2013 WL 693013, at *1 (Bankr. D.Idaho Feb. 26, 2013). *See also In re Winston,* No. 07-24447, 2007 WL 2385095, at *2 (Bankr. E.D.Cal. Aug. 16, 2007) (the stay under Section 362(a) did not go into effect in the debtor's Chapter 11 case because more than thirty days had passed and no party in interest requested that the stay take effect); *In re Hoilien*, No. 14-01109, 2015 WL 509564, at *2 (Bankr. D.Haw. Feb. 3, 2015) (noting that a Chapter 11 "Debtor failed to make a timely motion within 30 days of filing the Third Bankruptcy Case under 11 U.S.C. § 362(c)(4)(B) for protection of the automatic stay notwithstanding her multiple bankruptcy filings").

D. *IN REM* RELIEF

Courts may grant *in rem* relief from the automatic stay as to real property under certain circumstances. On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -- . . .

> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either –
> (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
> (B) multiple bankruptcy filings affecting such real property.

11 U.S.C. § 362(d).

The Court does not need to hold an evidentiary hearing to determine if a debtor's Chapter 13 bankruptcy filing was part of a scheme to hinder, delay or default creditors, but can instead infer the debtor's intent to hinder, delay and defraud creditors from the fact of multiple bankruptcy filings. *In re Greer*, 18-13018-CMA (Bankr. W.D. Wa. Aug. 30, 2018) (oral ruling) (citing *In re Procel*, 467 B.R. 297, 308 (S.D. N.Y. 2012) and *In re Richmond*, 513 B.R. 34, 38 (E.D. N.Y. 2014)).

The Bankruptcy Panel of the Ninth Circuit held that only *a creditor whose claim is secured by an interest in such property* may obtain *in rem* relief from the automatic stay. *Ellis v. Yu,* 523 B.R. 673, 678-79 (B.A.P. 9th Cir. 2014). In the case before the Panel, a third party purchased the property from the bank that foreclosed on the debtor's real property. The debtor five chapter 13 and chapter 7 bankruptcy cases to avoid foreclosure and keep the property. The third party sought *in rem* relief to evict the debtor from the property. Because the third party was not a creditor secured on the real property, the third party could not use Section 362(d)(4) to obtain relief as to the property itself. As the BAP noted, "this is a dispute between two putative owners of the same real property, not a contest where the parties occupy a debtor-creditor relationship." *Id.* at 678.

According to Bankruptcy Panel of the Ninth Circuit, 11 U.S.C. § 105(a) does not provide authority for courts to grant *in rem* relief from the automatic stay. *Johnson v. TRE Holdings LLC (In re Johnson),* 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006).

E. ANNULMENT

Acts in violation of the automatic stay are void rather than voidable. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992). However, bankruptcy courts may grant retroactive relief from the automatic stay. *Id.* at 572; *see also Phoenix Bond & Indemnity Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 126 (9th Cir. 1989). A determination whether to annul the automatic stay retroactively for cause requires a balance of the equities. *Hobdy v. Lien et al. (In re Fjeldsted)*, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003). The Panel set forth numerous non-exclusive factors courts may use to make this determination, including whether the creditor was aware of the bankruptcy case, whether the debtor engaged in unreasonable or inequitable conduct and whether prejudice would result to the creditor. *Id.* at 25 (the Panel set forth an additional twelve factors courts may consider).

F. RELIEF TO PROCEED IN STATE COURT

In determining whether to grant relief to allow parties to continue litigation in a nonbankruptcy forum, most courts analyze twelve nonexclusive factors in determining whether to lift the stay: (1) whether the relief will result in a partial or complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy case; (3) whether the foreign proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases; (5) whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question; (7) whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties; (8) whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c); (9) whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f); (10) the interest of judicial economy and the expeditious and economical determination of litigation for the parties; (11) whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and (12) the impact of the stay on the parties and the "balance of hurt." *In*

re Curtis, 40 B.R. 795, 799-80 (Bankr. D. Utah 1984). *See also Truebro, Inc. v. Plumberex Specialty Products (In re Plumberex Specialty Products)*, 311 B.R. 551, 559 (Bankr. C.D. Cal. 2004) (the court applied the *Curtis* factors); *Adelson v. Smith (In re Smith)*, 389 B.R. 902, 918 (Bankr. D.Nev. 2008); *In re Whipple*, 18-10618-MLB (Bankr. W.D. Wa. April 25, 2018) (oral ruling) (the court applied the *Curtis* factors).

The Ninth Circuit applied twelve similar factors in determining when a bankruptcy court may abstain from hearing a particular matter in favor of a state court proceeding involving the same issues: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of nondebtor parties. *Christensen et al. v. Tucson Estates (In re Tucson Estates)*, 912 F.2d 1162, 1166-67 (9th Cir. 1990) (citation omitted).

III. DEBTOR RESPONSIBILITIES AND INFORMATION

Attorneys need information from their clients sufficient to prepare all schedules, statements, Means Test forms (Form B122C-1 and Form B122C-2), plan and other documents. Information required in order to properly prepare all required documents includes details of all of the clients' income, including gross income from all sources earned in the 3 years up to the filing of the petition; all monthly living expenses; all assets, including any interests in real and personal property; all debts and obligations the clients may owe; and all sales, transfers, or other dispositions of real and personal property made in the two years before filing, etc.

Too much information is better than not enough. Most attorneys ask their clients to complete a questionnaire from which the attorney can draft the debtors' schedules, Statement of Financial Affairs and other documents. You should ask your clients to supply the following information in order to assist you in preparing complete and accurate documents:

1) Proof of Income for the last seven months, including all paystubs, proof of Social Security and/or unemployment benefits and information about any other income received during this time period;
2) Bills and Collection Letters, including all bills, letters and documents from your clients' creditors, collection agencies and attorneys. Debtors need to supply their attorneys with names, addresses, account numbers and amounts owed for all creditors, collection agencies and/or attorneys, as any and all parties to whom debtors may owe obligations should be scheduled in their Chapter 13 paperwork;
3) Last sixty days' of bank statements from all bank accounts;
4) Last sixty days' of checkbook entries/check registers, including any outstanding

uncashed checks;
5) All coupon books, including those for home loans, home equity lines of credit, auto loans, student loans, etc.;
6) All agreements for purchase or lease of cars, trucks, motorcycles and other vehicles;
7) All other contracts and agreements with clients' creditors;
8) All tax notices;
9) Federal (and, if applicable, State) income tax returns for the last four (4) years;
10) Any and all court documents received by clients;
11) All foreclosures and repossession papers received by clients;
12) All papers, if any, concerning prior bankruptcy cases client and/or a spouse have filed;
13) Copies of clients' credit report;
14) Picture ID (driver's license or passport) and Social Security Number proof (Original Social Security card, W-2 form or 1099 form).

Client (and attorney) responsibilities are generally set forth in the *Rights and Responsibilities of Chapter 13 Debtors and Their Attorney (Consumer Case)* (Local Bankruptcy Form 13-5). Attorneys need to review this document with their clients, sign it and have their clients sign it, give a copy of the document to the clients prior to the filing of the schedules and the plan, and retain the signed original document in their file.

Debtors are also required to complete a credit counseling class *pre-petition*, and obtain a certificate from the counseling agency which the attorney must file at the time the Chapter 13 petition and other documents are filed. A list of approved credit counseling agencies are available on the Court's website at www.wawb.uscourts.gov or on the US Trustee's website at www.justice.gov/ust.

Under the provisions of BAPCPA (the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005), which went into effect in October 2005, the Bankruptcy Code was revised to characterize attorneys representing debtors in bankruptcy cases as "debt relief agencies" and to characterize debtors as "assisted persons" under the Bankruptcy Code. Attorneys are required to supply debtors with written notices as mandated in section 342(b) and sections 527(a) through (c) of the Bankruptcy Code before they file bankruptcy cases for their clients.

Debtors have the duty file a statement of any change of the debtor's address. Fed. R. Bankr. P. 4002(a)(5). Please also keep in mind that service on the address the debtor designates constitutes effective service on the debtor. Fed. R. Bankr. P. 7004(b)(9); Local Bankr. R. 9011-1(b); *Cossio v. Cate (In re Cossio),* 163 B.R. 150, 155 (B.A.P. 9th Cir. 1994) (noting that "Rule 7004(b)(9) allows service on the debtor at the listed address until he files a change of address"). Both Rule 4002(5) [Rule 4002(a)(5)] and Rule 7004(b)(9) "place the burden squarely upon the debtor to apprise the clerk of the bankruptcy court of any change of address." *Ruiz v. Loera (In re Ruiz),* 2006 WL 6811033 (B.A.P. 9th Cir. 2006) (this case has persuasive, but not precedential, value pursuant to Fed. R. App. P. 32.1 and 9th Cir. B.A.P. R. 8013-1).

IV. DRAFTING SCHEDULES, STATEMENTS AND MEANS TESTS

A. MEANS TEST GENERALLY

One of the most significant changes to the Bankruptcy Code with passage of BAPCPA was implementation of a formula for determining whether a debtor's case is presumed abusive in a Chapter 7 and determining how long a Chapter 13 debtor must remain in the case and pay to creditors. The Chapter 13 means test is divided into two forms: *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Form B122C-1) and *Chapter 13 Calculation of Your Disposable Income* (Form B122C-2). All Chapter 13 debtors must complete Form B122C-1, but only debtors whose income is above the state median for their household size during the relevant time period must complete Form B122C-2. *See* 11 U.S.C. § 521(a)(1)(B)(v); 11 U.S.C. § 1325(b).

The debtor must disclose his or her average monthly income received from all sources during the six calendar months prior to filing the bankruptcy petition ("six month look back period"). For example, if the debtor filed the case during the month of July, the six month period is January 1 – June 30. Generally, the "six month look back period" is the average monthly income from all sources that a debtor or debtors received, without regard to whether such income is taxable income (other than benefits received under the Social Security Act), during the six month period ending on the last day of the calendar month immediately preceding the date on the commencement of the case. 11 U.S.C. § 101(10A). Once certain deductions are taken, the debtor determines whether his or her income is above or below the applicable median family income.

Current monthly income is based on income derived during the six month look back period. 11 U.S.C. § 101(10A)(A). "[P]ostpetition changes in income do *not* change the debtor's 'current monthly income' as defined." *In re Tengan*, No. 13-00225, 2014 WL 5306620, at *2 (Bankr. D.Haw. October 15, 2014) (emphasis added).

The Bankruptcy Code requires that a Chapter 13 plan provide that all of a debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors. 11 U.S.C. § 1325(b)(1). Debtors whose income is below the state median for their household size have an applicable commitment period of 36 months. Debtors whose income is above the state median for their household size have an applicable commitment period of 60 months and that is so whether or not the debtors have positive or negative monthly disposable income on Line 45 of Form B122C-2 (formerly Line 59 on Form B22C). 11 U.S.C. § 1325(b)(4); *Danielson v. Flores (In re Flores),* 735 F.3d 855 (9th Cir. 2013).

Above median income debtors with positive monthly disposable income (MDI) reflected on Line 45 of Form B122C-2 must include their projected disposable income (PDI) in Section IV.E. of the plan (or, alternatively, indicate that the debtors will pay 100% to nonpriority unsecured claims). The debtors' PDI is determined by multiplying the MDI by the debtor's sixty month applicable commitment period. For example, if a debtor's positive MDI is $500.00, the debtor's PDI that must be included in Section IV.E. is $30,000.00 ($500.00 multiplied by sixty).

Moreover, the debtor's PDI is the minimum amount that must be paid to *nonpriority* unsecured claims. As explained by one court,

> [i]t is clear from the above provisions that Debtors' disposable income (which must be distributed to "unsecured creditors" pursuant to Section 1325)already carves out full payment to Debtors' priority unsecured creditors. To then allow priority unsecured creditors to receive a distribution from Debtors' disposable income under the Chapter13 plan would mean that priority unsecured creditors receive payment from two sources, *i.e.,*the carve-out and Debtors' Chapter 13 plan. The practical effect of this outcome would be thatnot all of Debtors' disposable income would be used to pay unsecured creditors because, after the priority unsecured creditors are paid from Debtors' disposable income, the carve out from the disposable income that was originally intended for those creditors would remain.

In re Renteria, 420 B.R. 526, 529 (Bankr. S.D. Cal. 2009).

B. MEANS TEST SPECIFICALLY

Certain lines of Form B122C-1 and Form B122C-2 are worth explaining at greater length. Line 2 of Form B122C-1 includes all gross income from any source, including bonuses and commissions. Generally speaking, income from a non-filing spouse must be included in column B as if it were a joint case. VA disability income is also included, but benefits received under the Social Security Act are not. 11 U.S.C. § 101(10A).

Line 11 of Form B122C-1 is the total of the income and the starting point for calculation of the Section 1325(b)(4) commitment period and for determining the applicability of Section 1325(B)(3) for determining disposable income.

Line 13 of Form B122C-1 is for use only by married debtors not filing jointly with his or her spouse. In determining who are dependents, see IRS publication 501 for guidance. Considerations in determining household size include time together, pooling of income, sharing expenses and functioning as a single economic unit. Applicable median family income is derived from the United States Census Bureau and published by the United States Trustee.

Line 9 of Form B122C-2, taken in conjunction with Line 33 of Form B122C-2, allows a debtor the greater of the Local Standard or their actual mortgage expense. If the debtor's mortgage expense is greater than the Local Standard, the entry on Line 9c will be zero and the debtor will deduct the entire monthly mortgage amount on Line 33g. If the debtor's mortgage expense is less than the standard, the debtor deducts the full mortgage expense on Line 33g and the difference between the standard and the mortgage expense on Line 9c. If the debtor is a renter, there is no entry on Line 9b and the IRS Standard from Line 9a is entered on Line 9c. A debtor may not take deductions for property being surrendered or junior mortgages being "stripped." *American Express Bank v. Smith (In re Smith),* 418 B.R. 359 (B.A.P. 9th Cir. 2009); *Yarnall v. Martinez (In re Martinez),* 418 B.R. 347 (B.A.P. 9th Cir. 2009).

Line 13 of Form B122C-2: A debtor who owns a car free and clear may not claim an "Ownership Costs" deduction for that car because that deduction is for the costs associated with a car loan or lease. *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 71 (2011). Line 13 of Form B122C-2 specifically provides that "[y]ou may not claim the expense if you do not make any loan or lease payments on the vehicle."

Line 16 of Form B122C-2 is the debtor's actual income tax expense, not to be confused with the amount withheld. It is computed using the debtor's income tax liability from his or her federal and state tax returns and the amount withheld for Social Security and Medicare. It is common for a debtor to overstate this line item by entering the withholding amounts and not backing out his or her tax refund amount.

Line 23 of Form B122C-2, Optional Telephones and Telephone Services, is often misunderstood. Basic telephone (land line and cellular) expenses are included in Line 8 and are not to be duplicated here. Generally, this line item should be zero and any amount that is included must be justified and documented.

Line 30 of Form B122C-2, Additional food and clothing expense, should generally be zero. Any entry must be justified and documented.

Line 41 of Form B122C-2, Qualified retirement deductions. Above median debtors may not exclude voluntary post-petition retirement contributions in any amount. *Parks v. Drummond (In re Parks),* 475 B.R. 703, 709 (B.A.P. 9th Cir. 2012). Below median debtors may make post-petition retirement contributions (which are not to be counted as disposable income) if those contributions are reasonably necessary to be expended for the maintenance and support of the debtor or a dependent of the debtor. *In re Bruce*, 484 B.R. 387 (Bankr. W.D.Wa. December 11, 2012). The Trustee reviews these situations on a case-by-case basis, reviewing each case for reasonableness. The Trustee reviews the amount of the contribution to determine if it is reasonable and the history of contributions. The retirement contributions should be historically documented, meaning the debtor must show a consistent history of contributions and not merely initiation of the contributions on the eve of bankruptcy.

Line 43 of Form B122C-2, Deduction for special circumstances, is also misunderstood. This category is for "special circumstances that justify additional expenses for which there is no reasonable alternative" and must be explained, justified and documented. In other words, this line should almost always be zero.

"Special circumstances" are circumstances such as a serious medical condition or a call or order to active duty in the Armed Forces "to the extent such special circumstances [ ] justify additional expenses or adjustments of current monthly income *for which there is no reasonable alternative*." 11 U.S.C. § 707(b)(2)(B)(i) (emphasis added). In other words, merely incurring expenses does not make them necessary and reasonable so that they can be deducted as special circumstances on Form B122C-2. If that were the case, the Internal Revenue Service standards would be meaningless. Debtors could simply claim any deduction for any expense they incur. That would eviscerate Form B122C-2. In order to claim a deduction for special circumstances, debtors have to show that there is no reasonable alternative to the expense and that the expense is

necessary and reasonable. They also have to document and explain in detail the expense. As the Ninth Circuit observed,

> Congress did not provide an exhaustive list of 'special circumstances,' but it did indicate examples of situations it would consider sufficient to rebut the presumption of abuse. As one court has noted, both examples given by Congress share 'a commonality; they both constitute situations which not only put a strain on a debtor's household budget, but they arise from circumstances normally beyond the debtor's control.'

Egebjerg v. Anderson (In re Egebjerg), 574 F.3d. 1045, 1053 (9th Cir. 2009) (citation omitted).

As explained by one court in this District, debtors may not claim any expenses on Line 57 ("Deduction for special circumstances") unless:

1. The debtor provides supporting documentation
2. The debtor provides a detailed explanation why the additional expense is reasonable and necessary
3. The debtor attests under oath that the itemization and explanation are accurate and
4. The debtor must show that there is no reasonable alternative to the additional expense

In re Dittrich, No. 11-42382, 2011 WL 3471090 (Bankr. W.D.Wa. August 8, 2011).

A debtor may not claim a $200.00 "old car" deduction on Form B122C-2. *Drummond v. Luedtke (In re Luedtke),* 508 B.R. 408, 414 (B.A.P. 9th Cir. 2014). Because the older vehicle operating expense is not included in the IRS National or Local Standards or the commentary interpreting those standards, a debtor may not claim that expense. *Id*. Rather, the older vehicle operating expense is an additional expense that IRS collection employees may consider when evaluating an offer-in-compromise. *Id.* at 415.

Generally speaking, above median debtors may choose which secured debt to retain and claim as deductions on their means test. *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013). However, as a practical application, this may not have as much impact as one might think. If the debtors are going to claim the deductions on the means test, the debtors will have to pay for the secured debt through their plan (with limited exceptions). Local Bankr. R. 3015-1(j). That may be prohibitive for debtors who may not be able to actually afford to keep the secured debt they wish to claim as deductions on the means test.

C. WHEN CAN DEBTORS DEVIATE FROM THEIR MEANS TEST RESULTS

Chapter 13 debtors with median family income above the state median and positive monthly disposable income on Line 45 of Form B122C-2 are obligated to pay their projected disposable income (PDI) into their plan for payment to unsecured creditors. 11 U.S.C. § 1325(b). A debtor's PDI is calculated by multiplying the MDI by the debtor's sixty month applicable commitment period. This can sometimes lead to harsh results where the debtor's

circumstances have worsened significantly since the six calendar months prior to filing the petition.

When calculating a debtor's projected disposable income, bankruptcy courts "may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Hamilton v. Lanning (In re Lanning),* 560 U.S. 505, 524 (2010). Thus, if for some reason a debtor's means test is clearly not representative of the debtor's known or virtually certain financial situation at confirmation, a bankruptcy court may consider those factors under certain circumstances. This applies to both income and expenditures. For example, if a debtor lost a high paying job during the six-month look back period and has a lower paying job post-petition, the debtor should be able to establish and document that change.

Debtors who assert that they cannot pay their PDI must comply with Local Bankruptcy Rule 3015-1(e) (*Deviation from Means Test*). This rule is important, as it gives debtors and attorneys clear guidance on how to assert *Lanning* relief. Pursuant to the rule, Debtors must (1) provide the trustee with evidence of the change in circumstances; (2) include in Section IV.E. of the plan the minimum amount the debtor shall pay to allowed unsecured claims; and (3) include the following statement in Section X of the plan: *The debtor is unable to pay all or part of the debtor's* $_____ *projected disposable income (the monthly disposable income shown on Line 45 of Official Form B 122C-2 multiplied by the sixty month applicable commitment period), and instead proposes to pay to allowed nonpriority unsecured claims at least the amount listed in Section IV.E.*

A debtor will have more difficulty establishing that his or her expenses increased post-petition such that he or she should be able to deviate from the means test results. The primary reason for that is because Congress established what expenses are reasonably necessary to be expended for the maintenance and support of the debtor or a dependent. 11 U.S.C. § 1325(b), 707(b)(2). As the Supreme Court observed in a post-*Lanning* case,

> Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system. In particular, Congress adopted the means test—'[t]he heart of [BAPCPA's] consumer bankruptcy reforms,' H.R.Rep. No. 109–31, pt. 1, p. 2 (2005) (hereinafter H.R. Rep.), and the home of the statutory language at issue here—to help ensure that debtors who *can* pay creditors *do* pay them. See, *e.g., ibid.* (under BAPCPA, 'debtors [will] repay creditors the maximum they can afford').
>
> In Chapter 13 proceedings, the means test provides a formula to calculate a debtor's disposable income, which the debtor must devote to reimbursing creditors under a court-approved plan generally lasting from three to five years. §§ 1325(b)(1)(B) and (b)(4). . . . *For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations.*

Ransom v. FIA Card Services, N.A., 562 U.S. 61, 64-65 (2011) (case citations, quotations and footnote omitted) (emphasis added). The Supreme Court observed that its opinion did not combine "applicable" with "actual" costs:

> Although the expense amounts in the Standards apply only if the debtor incurs the relevant expense, the debtor's out-of-pocket cost may well not control the amount of the deduction. *If a debtor's actual expenses exceed the amounts listed in the tables, for example, the debtor may claim an allowance only for the specified sum, rather than for his real expenditures.*

Id. at 727 (emphasis added).

There seems to be a trend for above median debtors with positive PDI to assert that their Schedules I and J (Current Income and Expenditures), rather than their means test, should determine how much they should pay to allowed unsecured claims. However, a debtor cannot simply "opt out" of the means test because it is not representative of his or her asserted out-of-pocket expenses. In holding that excessive expenses (high transportation expenses) do not necessarily give rise to a change in circumstances, one court observed that

> [a] fair reading of *Lanning* indicates that the Supreme Court did not there discard the BAPCPA amendments to § 1325 nor jettison the calculation of current monthly income or disposable income under the Code that finds expression in each chapter 13 case through Form 22C. To the contrary, it was clear that Form 22C is to be followed, except in those exceptional cases where a forward-looking approach is required to take into account 'known or virtually certain' information impacting the debtor's income or expenses. The term 'projected' allowed for such an approach. But the Supreme Court clearly did not sacrifice the means test in favor of schedules I and J in every case, or validate a reversion to pre-BAPCPA practice. The contention, here, that the Court should use Form 22C only if it is, in Debtor's terms, 'reasonably connected' to schedules I and J reaches too far. *Indeed, if in order to look beyond Form 22C all that was required was a showing that a debtor's actual expenses varied from the standard expenses allowed under the means test, deviation from Form 22C would be the rule, not the exception.*

In re Thiel, 446 B.R. 434, 438-39 (Bankr. D.Idaho 2011) (citation and footnote omitted) (emphasis added).

The court summed up as follows:

> Debtors attempt to carry their burden of proving the Plan confirmable by pointing to schedules I and J and arguing that they are proposing to pay their 'truly' projected disposable income as shown thereon. That approach does not meet the requirements of the Code. The attempt to replace BAPCPA's changes with a call for a return to the 'good old days' before 2005 is not persuasive. Debtors' sole authority is *Lanning,* and it does not support such a rejection of the current statute in favor of the superceded version, especially in light of Ransom's recognition that Congress 'eliminat[ed] the pre-BAPCPA

case-by-case adjudication of above-median income debtors' expenses' in favor of the standardized statutory formula.

Id. at 440.

A debtor cannot simply ignore the means test results and assert that his or her monthly net income on Schedules I and J should determine the plan payment. If that were the case, the means test would be essentially meaningless for an above median debtor with positive PDI. Congress instituted a formulaic approach to determining what above median debtors should pay to unsecured creditors. A debtor's monthly disposable income shown on the means test is presumed to be correct.

Also keep in mind that a known or virtually certain change in circumstances can cut both ways. For example, one court held that an adult daughter's post-petition contributions to debtors' household expenses could be considered in calculating debtors' projected disposable income for plan confirmation purposes. *In re Coverstone*, 461 B.R. 629 (Bankr. D.Idaho 2011). In addition, once a debtor repays a retirement loan, the income previously used to repay that loan must be used to pay unsecured creditors. Once a debtor repays a retirement loan, the income previously used to repay that loan must be used to pay unsecured creditors. *Egebjerg v. Anderson (In re Egebjerg),* 574 F.3d 1045, 1050 – 51 (9th Cir. 2009) ("'because, as here, 401(k) loans might be paid off within the commitment period of a Chapter 13 case, the ability to increase the monthly plan payment would direct newly available funds to creditors'") (quoting *In re Lenton*, 358 B.R. 651, 660 (Bankr. E.D.Penn. 2006)); *Nowlin v. Peake (In re Nowlin),* 576 F.3d 258, 267 (5th Cir. 2009); *McCarty v. Lasowski (In re Lasowski),* 575 F.3d 815, 820 (8th Cir. 2009); *Seafort v. Burden (In re Seafort),* 669 F.3d 662, 674 (6th Cir. 2012); *In re McCullers*, 451 B.R. 498, 500 (Bankr. N.D.Ca. 2011); *In re Afko*, 501 B.R. 202, 207 (Bankr. S.D.N.Y. 2013) ("Repayment of the 401(k) loan is a known or virtually certain change in circumstances under *Lanning.*").

If a debtor cannot pay the PDI, the debtor must demonstrate through evidence that he or she has a known or virtually certain change in circumstances that justifies deviation from the means test. The Trustee reviews these issues closely to determine if the assertions are correct. Merely having expenses greater than the standards does not mean the expenses are reasonable or allowable. A debtor asserting expenses higher than the standards on the means test must establish both that they are reasonable and that there is no alternative to paying the increased expenses.

D. SCHEDULES AND STATEMENTS OF FINANCIAL AFFAIRS

The debtor must timely file schedules and the statement of financial affairs (SoFA). The debtor signs these documents under penalty of perjury. The debtor's schedules and SoFA must be complete and accurate.

The importance of accuracy cannot be overstated. "Debtors have an absolute duty to file complete and accurate schedules. . . . Full and comprehensive disclosure is critical to the integrity of the bankruptcy process." *In re Rolland*, 317 B.R. 402, 413 (Bankr. C.D.Cal. 2004) (citing *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001)) (other citations omitted). Moreover, "Debtors are presumed to have read the schedules and statements before signing the documents,

and are responsible for their contents. . . . [and] debtors bear an independent responsibility for the accuracy of the information contained in their schedules and statements." *Id.* at 414. *See also AT&T Universal Card Services Corp. v. Duplante (In re Duplante)*, 215 B.R. 444, 447 n.8 (B.A.P. 9th Cir. 1997) ("Adopting a cavalier attitude toward the accuracy of the schedules and expecting the court and creditors to ferret out the truth is not acceptable conduct by debtor").

Debtors who do not present accurate schedules open themselves up to problems in the bankruptcy case itself (e.g., possible dismissal of their case) and even after conclusion of the bankruptcy case. *See, e.g., Harris v. Fortin,* 333 P.3d 556 (Wash. App. 2014) (debtors were judicially estopped from collecting on a promissory note post-discharge because the debtors misrepresented in their bankruptcy schedules that their interest in the promissory had no value and was uncollectable).

Schedule A/B lists and values the debtor's real and personal property. The debtor claims exemptions in Schedule C. Schedule D is one of the most important schedules in Chapter 13. Schedule D lists the debtor's secured debt and that determines what non-exempt equity is available to pay unsecured creditors.

The value of the property, secured debts and exemptions are important for many reasons, including that they determine what must be paid to unsecured creditors under the liquidation analysis test of 11 U.S.C. § 1325(a)(4). That test provides that unsecured creditors must receive as much in the Chapter 13 case as they would have received in the Chapter 7 case. The difference is that, rather than surrendering the asset(s) to the trustee in the Chapter 7 case for liquidation, the Chapter 13 debtor may pay the value of the non-exempt assets over the life of the Chapter 13 plan.

The values in these schedules (and plan) are also important because the value of the real property will determine whether a Chapter 13 debtor may "strip off" a junior deed of trust lien. In the Ninth Circuit (and multiple other Circuits), a debtor may remove ("strip") a junior deed of trust lien if there is no equity to which the lien attaches.

Schedule E/F lists a debtor's nonpriority and priority debt. Priority debts are listed in 11 U.S.C. § 507 and include, among other debts, certain domestic support obligations, administrative expenses and taxes. Unless the priority creditor agrees to different treatment, a debtor's plan must fully pay all priority claims under Section 507. 11 U.S.C. § 1322(a)(2). It is important to check if the unsecured claims, including priority claims and undersecured claims, exceed the unsecured debt limit of Chapter 13. If so, the debtor is not eligible for Chapter 13 and must instead file under another chapter (e.g., Chapter 11).

Schedules I and J list the debtor's income and expenses, respectively.

E. EXEMPTIONS

A debtor's bankruptcy exemptions are fixed at the date of the filing of the bankruptcy case. *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193, 1199 (9th Cir. 2012). "Under the so-called 'snapshot rule," the Ninth Circuit explained,

> bankruptcy exemptions are fixed at the time of the bankruptcy petition. *See White v. Stump,* 266 U.S. 310, 313, 45 S.Ct. 103, 69 L.Ed. 301 (1924). Those exemptions must be determined in accordance with the state law "applicable on the date of filing." 11 U.S.C. § 522(b)(3)(A). And 'it is the *entire* state law applicable on the filing date that is determinative' of whether an exemption applies. *In re Zibman,* 268 F.3d 298, 304 (5th Cir.2001) (emphasis in original). In this case, the entire state law includes a reinvestment requirement for the debtor's share of the homestead sale proceeds. Cal.Civ.Proc.Code § 704.720(b).

Id.

Not only that, but the "snapshot" rule also fixes the value that a debtor is entitled to claim in her exemptions. *Wilson v. Rigby (In re Wilson)*, 909 F.3d 306, 308 (9th Cir. 2018) (post-petition appreciation in real property enures to the benefit of the bankruptcy estate and a debtor cannot amend her schedules later to exempt the increase in value) (citing *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1211 (9th Cir. 2010)).

In Washington State, the debtor may claim exemptions under *either* the state *or* federal statutory exemption schemes, but not both. See 11 U.S.C. § 522(b).

Washington State's homestead exemption statute does not apply to property located in other states. *In re Wieber*, 347 P.3d 41 (Wash. 2015). "While . . . the homestead exemption law is entitled to a liberal construction, the structure of the homestead exemption law indicates a legislative intent to limit application to homestead protection in Washington." *Id.* at 45.

A debtor may not claim a homestead exemption in real property owned by an entity such as a corporation or a limited liability company. *Northwest Cascade, Inc. v. Unique Construction, Inc. et al.,* 351 P.3d 172, 181-82 (Wash. Ct. App. 2015) ("[L]iving on a property, standing alone, does not create a legal or equitable interest in the property sufficient to claim a homestead."); *In re Brandt*, 14-19017-KAO (Bankr. W.D.Wa. June 10, 2015) (oral ruling); *In re Kinnaman,* No. 15-11640-KAO (Bankr. W.D.Wa. June 24, 2015) (oral ruling).

V. DRAFTING THE PLAN

All chapter 13 plans (original and amended) must be filed using ***the current version*** of Local Bankruptcy Form 13-4 (Form Plan). *See* Local Bankr. Rule 3015-1(a). The Form Plan is located on the Bankruptcy Court's website. Debtors may *not* create their own plan form. In addition, all appropriate blanks on the Form Plan must be completed and any case-specific provisions must be included in Section X. Any revision to the Form Plan not set forth in Section X are void and both the debtors and counsel certify that the form used does not alter the Form Plan except as provided in Section X. Local Bankr. Form 13-4, Section X.

Common mistakes to avoid in completing and filing the Form Plan include:

1) Failure to properly complete Section I relating to disclosure of nonstandard provisions and modification of secured debt;

2) Failure to indicate whether the debtor is an above or below median debtor in Section II;
3) Failure to list the plan payment frequency in Section III;
4) Failure to list domestic support obligations in Sections IV.B. and/or Section V;
5) Failure to complete Section IV.E. of the plan, which states the distribution to nonpriority unsecured creditors. For above median income debtors with positive monthly disposable income, the figure in Section IV.E. should be Line 45 of Form B122C-2 multiplied by the debtor's sixty month applicable commitment period;
6) Failure to list the liquidation value of the bankruptcy estate in Section IX. The liquidation value and the PDI that results from the debtor's means test are different analyses;
7) Failure to include the federal judgment interest rate when the liquidation value of the estate exceeds unsecured claims (i.e., the estate is solvent);
8) Failure to make sure that the plan is feasible (i.e., that the plan payments are sufficient to fund the proposed plan and that the plan does not project to run more than sixty *total* months);
9) Inclusion of unnecessary or extraneous information in Section X.;
10) Failure to sign the plan;
11) Failure to serve the plan on creditors if the plan is not filed with the petition. Local Bankr. R. 3015-1(c)(2);
12) Failure to use the Court's mandated form plan;
13) Failure to include appropriate interest for IRS secured claims and for pre-petition HOA/COA and real estate property taxes;
14) Inclusion of interest for pre-petition mortgage arrearages;
15) Failure to provide that the Trustee makes payments on vehicles (other than leases) and delinquent mortgages (*both* the pre-petition arrearages and the post-petition payments). Local Bankr. R. 3015-1(j).

Failure to complete these and other sections of the plan delays confirmation of the plan. Prior to filing, debtors' counsel should carefully review the plan to make sure all appropriate sections are completed and the above issues addressed. All parties usually have a strong incentive to obtain confirmation of the plan as soon as possible.

Overall plan payments must be enough to pay the scheduled installments each month, plus allow the Chapter 13 Trustee to take his administrative fee (mandated by the Bankruptcy Code) on all disbursements made through the plan. The Trustee's fee is subject to change, but averages around 6.0% on funds received / disbursed. Also remember to propose round plan payment numbers (e.g., $600.00 rather than $599.00).

A feasible plan simply cannot be composed without reviewing the debtor's documented income. In other words, you cannot construct a feasible and confirmable plan without first reviewing your client's pay stubs, or other documented sources of income, for the most recent 60 days. Preparing a plan based on what the debtor tells you he or she is earning, without first verifying that against documented proof of income, is a recipe for amended plans and a great deal of frustration for everyone involved (leaving aside the reasonable inquiry required under Federal Rule of Bankruptcy Procedure 9011(b)).

If debtors are behind on their mortgage payments and are proposing a "homesaver" plan, where they will cure mortgage arrears over a period not to exceed 60 months, they must make their ongoing mortgage payments through the plan, and also provide for payments sufficient to cure the arrears within five years. If the debtors are behind in real property taxes and/or condominium dues, they can likewise provide for cures of these arrears in their plan, but they not only must set up a real estate tax holding account (to be funded at 1/12 of the debtors' yearly taxes, with the Trustee to hold those funds until the post-petition taxes come due and then use the funds to pay the ongoing taxes due) to pay ongoing condo dues through the plan, but they must also provide for a cure of the property tax and/or condo dues arrears, with 12% statutory interest to be paid on the delinquency over the life of a plan.

Even if the debtors' means test shows that they are not required to pay any funds to their unsecured creditors, their plan must still provide that unsecured creditors will be paid at least as much as said creditors would receive if their case was liquidated under Chapter 7 of the Bankruptcy Code. This "liquidation value" of the debtors' estate must be paid to allowed unsecured claims over the life of the Chapter 13 plan.

Make sure you advise your clients that their first plan payment is due within 30 days of the filing of the Chapter 13 petition. If your client is employed, a wage deduction is generally issued by the Trustee to your client's employer requesting that the employer deduct the plan payments from each paycheck and forward them to the Trustee at his lockbox address in Memphis, Tennessee. If the wage deductions do not begin within the first 30 days, your clients will be responsible for making direct payments to the Trustee until the wage deduction takes effect. If your clients are self-employed or receive Social Security/disability or unemployment benefits, they will have to remit their plan payments directly to the Trustee's lockbox address each month, and must make the payments by way of cashier's checks or money orders; personal checks and cash cannot be accepted. In addition, the debtors may efficiently make their payments through the following website: www.TFSbillpay.com Please review the Trustee's website for further information: www.seattlech13.com

Section IV.C. provides that only the secured claims provided to be paid in the plan will be paid. If a creditor files a secured claim that is not provided for in the plan to be paid will not be paid.

Provision in Section X. of the plan must be necessary and clearly related to the specific facts of the case. If it is not readily apparent from the plan and schedules why those special provisions are necessary, the Trustee will likely object. The reasons for this are many, including that unnecessary or extraneous provisions in Section X. of the plan merely create confusion.

The Court, with the input of trustee, the debtor bar and the creditor bar, has spent a great deal of time over the years carefully crafting a form plan that works well. There is no reason to create your own plan or to add unnecessary or extraneous provisions to Section X. With many cases being filed each month, a form plan is essential to achieving our common goal of quickly confirming plans and disbursing funds to creditors. As succinctly noted by Judge Williams in the Eastern District of Washington,

> one of the principal reasons for the adoption of a form plan is that a standard form in use throughout the District assists all interested parties. … A standard form allows relevant information to be located quickly and efficiently and allows an interested party to focus on the portion of the plan of most interest to that party. The use of a standard form results in predictability and uniformity. … Allowing debtor's counsel to develop their (sic) own plan language is contrary to the purpose of the prescribed plan form. It creates inefficiency and uncertainty. It requires any creditor to carefully review the additional page and a half of language added to determine if anything in that language effects (sic) that creditor's rights.
>
> The prescribed form plan does have an optional section where a debtor may add special provisions. *The purpose of that option is not to circumvent the prescribed form, but a recognition that there can be unique circumstances in a specific case which require some treatment different than the prescribed form. 'Special provisions' are just that—special. They may arise in a specific case based on unusual facts. They should not appear as standard deviations from the prescribed standard form plan*

In re Grantham, No. 03-00165-W13 (Bankr. E.D. Wa. May 21, 2003) (emphasis added).

Similarly, be sure to read the recent United States Supreme Court decision *United States Aid Funds, Inc. v. Espinosa,* 559 U.S. 260 (2010). That case dealt with a Chapter 13 Plan that provided for the discharge of any unpaid interest on an otherwise nondischargeable student loan, and which was confirmed without objection from the student loan creditor. Although the Court upheld the order confirming the plan, it nevertheless held that " … §1325(a) instructs a bankruptcy court to confirm a plan only if the court finds, *inter alia*, that the plan complies with the 'applicable provisions' of the Code." The Court goes on to rule that "the Code makes plain that bankruptcy courts have the authority – indeed, the obligation –to direct a debtor to conform his plan to the requirements of §§1328(a)(2) and 523(a)(8)." In other words, Justice Thomas, who authored the unanimous decision, observed that Bankruptcy Judges have an independent obligation to refuse confirmation of plans that do not comply with Code requirements.

The Court concludes the opinion by stating that "debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See Fed. Rule Bkrtcy. Proc.9011. The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required."

Always review the plan with your client signs the plan and before you file it. This is imperative to assist in catching mistakes and to make sure debtors understand their obligations under the plan.

Remember that a plan projecting a term in excess of 60 months cannot be confirmed. *See* 11 USC §1322(d)(1), and (d)(2). Therefore, you must pay close attention to the delinquency cure payments proposed by the plan. If the original plan is not immediately confirmed and several months pass, then any amended plan must account for that passed time and cannot propose a 60 month cure. For example, an amended plan filed 10 months after the first plan

payment is due under 11 USC §1326(a)(1), must propose a delinquency cure term of 50, not 60 months. And, the amount to be cured then becomes the total of the pre-petition delinquency claim plus the total of the post-petition payments which have not been made.

VI. FILING DOCUMENTS / PAYING COURT FILING FEE

Documents must be filed electronically, using the Court's ECF system. For attorneys new to ECF, you should contact the Clerk's office through the Court's website. Registration forms and other tools and information are available there.

The court filing fee can be paid at the time of filing (usually as a charge on the attorney's credit card when the case is filed) or the debtor can pay the $310.00 court filing fee in installments through the Chapter 13 plan. The debtor must generally pay the full filing fee within 120 days of the date of the filing of the petition. *See* Local Bankr. R. 1006-1 for more information about the filing fee. Make sure to file an application and order to pay the filing fee in installments if that is what your client intends. If the filing fee is to be paid through the plan, the Trustee will pay it to the Court prior to plan confirmation from plan payments received.

If at all possible, you should file your clients' Chapter 13 plan and other schedules, statements and forms at the same time you file the Chapter 13 petition, credit counseling certificates and creditor matrix. However, if you only initially file the petition and other minimum filing requirements, you must file the balance of schedules, statements, forms and Chapter 13 plan within 14 days of the date the petition was filed. If the documents are not timely filed, the debtors' case may be dismissed on an *ex parte* basis. *See* Local Bankr. R. 1017-1.

If the debtor does not file the plan with the petition, the debtor must serve copies of the plan on creditors at least fourteen days prior to the originally scheduled meeting of creditors. Local Bankr. R. 3015-1(c)(2). This is a very common mistake. Failure to comply with this requirement will result in delay of confirmation.

VII. ATTORNEY FEES

All applications for compensation must conform to Local Bankruptcy Form 13-9 and all orders must conform to Local Bankruptcy Form 13-10. Local Bankr. R. 2016-1(e)(3). Please review the rule carefully to avoid delaying approval and / or payment of your fees.

The Bankruptcy Court must approve all attorney fees whether or not the fees are to be paid through the Chapter 13 plan.

The presumptive ("no look") fee is $4,000.00. Local Bankr. R. 2016-1(e)(1). "The no-look fee option is an administrative creation of the bankruptcy court designed to quickly identify a level of debtor's counsel compensation that is presumptively reasonable and easy to administer." *McBride v. Riley (In re Riley)*, 923 F.3d 433 (5th Cir. 2019). If you subsequently request compensation above the presumptive fee, you must comply with Local Bankruptcy Rule 2016-1(e)(3) and file an itemized record for all services provided for representation of the debtor *in any capacity whatsoever in connection with the case*. In other words, if you take the

$4,000.00 presumptive fee and later ask for fees in addition to $4,000.00, you must go back in time and produce itemized records justifying the first $4,000.00.

Make sure your fee itemizations provide a detailed description of the service rendered and the time spent performing the service. Local Bankr. R. 2016-1(e). Do not "block bill" your time entries, as that may result in an objection to your application and possibly a reduction of your fees. "'Block Billing' is the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Welch v. Metropolitan Life Ins. Co.,* 480 F.3d 942, 945 n.2 (9th Cir. 2007) (citation and quotations omitted). A court may reduce hours that are billed in a block format. *Id.* at 948. *See also Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004) (noting that "many time records lump together multiple tasks, making it impossible to evaluate their reasonableness").

Most debtors' attorneys get the bulk of their attorney fees paid through the Chapter 13 plans, but attorneys can accept fees from debtors prior to filing. In general, no attorney fees will be paid through the Chapter 13 plans until the debtor's case has been confirmed. "When a chapter 13 plan is confirmed," one court explained,

> there is an obvious and demonstrated benefit to the debtor and, presumably, counsel's services contributed to completion of the case. In most cases, additional proof will not be needed. But when cases are dismissed prior to confirmation, Counsel must provide an explanation in the fee application and evidence that counsel provided substantial, valuable professional services including investigation, evaluation, and counseling that was intended and designed to achieve an objective appropriate for chapter 13 cases.

In re Phillips, 291 B.R. 72, 82 (Bankr. S.D. Tex. 2003). "A proper purpose for filing a chapter 13 bankruptcy petition," after all, "is to confirm a plan (and thereby to obtain a discharge)." *Phillips*, 291 B.R. at 83.

VIII. MEETING OF CREDITORS

Debtors are required to appear at a meeting of creditors. 11 U.S.C. §§ 341(a), 343(a). "[T]he meeting is an important tool for identifying possible factual matters and attendant legal issues that may indeed be of major significance to the debtor." *In re Johnson*, 291, B.R. 462, 469 (Bankr. D. Minn. 2003). Attorneys who routinely hire "appearance counsel" to attend meetings of creditors should carefully consider whether that is appropriate. Sending appearance counsel to avoid attending the meetings raises numerous issues, including adequate disclosure as well as fee sharing and ethical issues. "[W]hen accepting an engagement to represent a debtor in relation to a bankruptcy proceeding," one court observed, "an attorney must be prepared to assist that debtor through the normal, ordinary and fundamental aspects of the process. *These include . . . attendance at the § 341 meeting*." *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001) (emphasis added). "Appearance attorneys can hinder the swift dispatch of a case," one court observed, "and the lack of a formal association raises questions about the ability and authority of

appearance attorneys to speak for debtors." *In re Bradley*, 495 B.R. 747, 786 (Bankr. S.D. Tex. 2013) (citation omitted).

Generally within 20 to 40 days after the filing of the petition, a 11 U.S.C. § 341(a) meeting of creditors will occur. The Chapter 13 Trustee or his representative will conduct the meeting. At the meeting, the Trustee will question the debtor about the schedules, review income and expenses and, if necessary, ask for amendments and additional information. Following the meeting, the Trustee will send debtors and their attorney the list of information and/or amendments that are needed before the Trustee can recommend confirmation of the debtors' plan. Debtors are required to cooperate with the Trustee as necessary to enable him to perform his duties under the Bankruptcy Code. 11 U.S.C. § 521(a)(3). Not surprisingly, the sooner debtors provide the requested information and make the necessary amendments (if any), the sooner the debtors' plan can be confirmed.

Creditors are permitted to attend and ask questions at the meeting. Given the number of meetings of creditors held on any particular calendar, the time permitted to a creditor to ask questions is generally limited. If a creditor wants to question a debtor further or obtain documents, the creditor may request the Court to set an examination of the debtor pursuant to Federal Rule of Bankruptcy Procedure 2004.

At the meeting of creditors, a debtor must produce proof of his or her identification (ID) and social security number. Acceptable forms of ID include:

1) Driver's license;
2) Government ID;
3) State picture ID;
4) Student ID;
5) U.S. passport;
6) Military ID;
7) Resident alien card; and
8) Consulate card.

Acceptable forms of proof of social security number include:

1) Social security card;
2) Medical insurance card;
3) Pay stub;
4) W-2 form;
5) IRS form 1099; and
6) Social Security Administration report.

Local Bankr. R. 2003-1(a).

A debtor is required to provide copies of sixty days payment advices or other evidence of payment, a copy of the debtor's most recently filed federal income tax return, and a completed Chapter 13 Trustee Information Sheet (Local Bankruptcy Form 13-2, amended) AT LEAST SEVEN DAYS PRIOR TO THE MEETING OF CREDITORS. 11 U.S.C. § 521; Interim Fed. R. Bankr. P. 4002(b); Local R. Bankr. P. 4002-1; Local R. Bankr. P. 3015-1(e). All of these documents must be submitted to the Trustee at least seven days prior to the meeting of creditors so that the Trustee and his staff have time to review the information and

prepare for the meeting. **To submit these documents, follow these steps:**

1) Log in to the Trustee's website at www.13documents.com
2) Proceed to Document Filing
3) Select "Jason Wilson-Aguilar" as the trustee
4) Type the case number in the field (do not include the hyphen)
5) Select the type of document from the drop down menu and attach the document
6) Click "Upload File"

Please use this system to submit 341 documents rather than sending the documents to an email address at the Trustee's office, as using this system is much more efficient and is more likely to result in prompt processing of the documents. This system also protects the debtor's personally identifying information.

The Trustee will not conduct the meeting of creditors until this information is provided. Failure to provide this information at least seven days prior to the meeting will result in continuation of the meeting to a future date and often a motion to dismiss. Moreover, if the debtor fails to provide the most recent income tax return seven days prior to the original meeting of creditors, "the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." 11 U.S.C. § 521(e)(2). The most common reason that meetings of creditors are continued is due to failure to timely provide this information to the Trustee, resulting in loss of time and additional work for the debtors, debtors' counsel, and the Trustee and his staff. If the debtor needs to reschedule the meeting of creditors or appear by alternative means, the debtor must consult Local Bankruptcy Rule 2003-1. Please keep in mind, however, that requests to reschedule the meeting or appear other than in person are disfavored. Local Bankr. R. 2003-1(b).

➔ **Please send all requests to reschedule meetings of creditors to courtmail@seattlech13.com**

IX. PLAN CONFIRMATION ISSUES

A. OVERVIEW AND TRUSTEE OFFICE CONTACTS

As mentioned above, debtors and their counsel should carefully review the plan before it is filed. Too often attorneys indicate that the problem with a plan is due to a software provider mistake, but that is not really an adequate explanation. Reviewing a plan prior to filing it is critical, as mistakes will slow down confirmation and negatively impact the debtor.

Moreover, a debtor's plan must comply with all relevant subsections of Chapter 13. As an example,

> when a Chapter 13 Debtor's treatment of a creditor under one subsection of § 1322(b) falls within the contours of another subsection of that statute, all standards of both subsections must be satisfied. This is clear from the face of § 1322(b) and a common sense reading of the statute. To allow a debtor to comply with

> the requirements of only one of the eleven subsections of § 1322(b) when the facts of his case fall within another subsection of the statute would be nonsensical. Congress chose to set forth all eleven subsections. A debtor cannot ignore those he does not like.

Jordahl v. Burrell (In re Jordahl), No. 15-6009 (B.A.P. 8th Cir. Nov. 2, 2015).

The Trustee's website (www.seattlech13.com) includes many resources which can be of assistance, including links to the websites for the Court, the United States Trustee, County Treasurers Offices, the NACTT, the Chapter 13 Network, and other helpful sites.

The Trustee's staff includes paralegals that assist the Trustee and his Staff Attorneys in reviewing plans and cases for confirmation. These paralegals are good contacts and great sources of information (other than legal advice, which the Trustee and his staff cannot provide). Current paralegal assignments are:

Cases	**Paralegal**	**Email**	**Telephone Extension**
Judge Alston Port Orchard	A-K Janine Reger L-Z Karen Mather	jreger@seattlech13.com kmather@seattlech13.com	146 142
Judge Alston Seattle	Linda Horan	lhoran@seattlech13.com	144
Judge Barreca Everett	Karen Mather	kmather@seattlech13.com	142
Judge Dore Seattle	Janine Reger	jreger@seattlech13.com	146

These assignments change periodically, but current assignments can be found on the Trustee's website.

- ➔ **Please send all requests to reschedule meetings of creditors to courtmail@seattlech13.com.**

- ➔ **Please send applications to employ professionals to courtmail@seattlech13.com.**

B. MOTOR VEHICLES

Collateral issues are central in Chapter 13 cases. A debtor cannot "cram down" the value of a motor vehicle if the debtor purchased the motor vehicle within 910 days of the petition date and the creditor has a purchase money security interest in the motor vehicle or if the debtor incurred credit and used it to purchase other personal property within one year of the petition date. 11 U.S.C. § 1325(a). A debtor may, however, cram down the interest rate on a 910 vehicle. *In re Craig,* No. 14-01076, 2014 WL 5325873, at *2 (Bankr. D.Haw. October 20, 2014) ("Based on the plain text of section 506 and the hanging paragraph [of 11 U.S.C. § 1325(a)],

there is no basis to conclude that Congress intended to eliminate a debtor's option to lower the interest rate on 910-day car loan[s]."). For non-910 motor vehicles, a debtor may cram down both the value of the vehicle and the interest rate. The Form Plan includes specific Sections for 910 collateral and non-910 collateral.

While in a small and distinct minority (at least eight other circuits have disagreed with the Ninth Circuit), the Ninth Circuit held that a creditor does not have a purchase money security interest in the "negative equity" (the total negative net-trade in amount of a vehicle) of a vehicle traded in during a new vehicle purchase. *Americredit Financial Services, Inc. v. Penrod (In re Penrod II),* 611 F.3d 1158, 1164 (9th Cir. 2010), *cert. denied*, 565 U.S. 822 (2011). So what happens if the debtor also makes a down payment when she is trading in a vehicle with negative equity for a new vehicle? Does the down payment reduce the negative equity trade-in amount or is the down payment applied to the purchase price? At least one Court in the Western District of Washington held that a down payment was applied toward the negative equity. *In re Siemers,* No. 11-44935, 2011 WL 5598349, at *3 (Bankr. W.D.Wa. Nov. 17, 2011) (citing *In re Gray,* 382 B.R 438, 442 (Bankr. E.D.Tenn. 2008) and *In re Burt*, 378 B.R. 352, 355 n.6 (Bandr. D.Utah 2007)). The key fact, however, in the Court's decision was that the contract controlled application of the down payment and the contract "manifested [the debtors'] intent to apply the down payment against the negative equity." *Id.*

11 U.S.C. § 506(a)(2) sets the cramdown value of a vehicle as its replacement value without deduction for costs of sale or marketing. And "[w]ith respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time the value is determined." Section 506(a)(2) does not explain the meaning of "costs of sale" or "marketing*." The value stated in the creditor's proof of claim controls unless the debtor limits the amount of a secured claim in Section I.B. However, if the debtor intends to value collateral through the plan process, the debtor must fully comply with Local Bankruptcy Rule 3015-1(f).* ***Please review Local Bankruptcy Rule 3015-1(f) carefully, as failure to comply with the Local Rule will delay confirmation.*** The better approach is likely to object to the claim itself than risk a delay in confirmation.

The appropriate interest rate is a "formula approach" providing for a base rate with "risk factors." As explained by the Supreme Court,

> the approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of the of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors

may present evidence about the appropriate risk adjustment.

Till v. SCS Credit Corp., 541 U.S. 465, 479-80 (2004).

It is very rare for debtors and creditors to litigate over motor vehicle valuations and interest rates. Litigating these issues does not generally make economic sense, resulting in settlement of these amounts by the parties. Once the parties agree on the appropriate valuation and interest rate, the debtor will need to amend the plan to encompass the terms of the agreement.

A debtor may also sometimes change the monthly payment amount to the creditor. In the Western District of Washington, motor vehicles must be paid through a debtor's Chapter 13 plan by the Trustee. The one exception is motor vehicle leases, which cannot be paid through the Chapter 13 plan due to the uncertainties that arise at the end of the lease term.

Non-910 motor vehicles must be paid in full during the life of the plan, while 910 motor vehicle claims can survive beyond the plan. Keep in mind, however, that it is advisable to pay 910 motor vehicle claims in full during the plan if any changes are made to the contract terms (e.g., interest rate and monthly payment amount).

All secured creditor payments are to be disbursed by the Chapter 13 Trustee with certain exceptions: mortgages that are current on the petition date, leases of personal and real property, and domestic support obligations made by an assignment from a debtor's wages. Local Bankr. R. 3015-1(j). The Trustee makes payments to motor vehicle creditors (except for leases), even if the debtor is current on the payments as of the petition date. A debtor's plan "shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1). The Trustee's duties include monitoring a debtor's performance under the plan. 11 U.S.C. §§ 1302(b)(1), 1307(c). Payment of claims by the Trustee is necessary for many reasons, including administrative efficiency, monitoring of payments, fairness and treatment of creditors, reduction of plan failure and provision of an independent accounting in the event of a dispute between the debtor and a creditor. *See In re Genereux*, 137 B.R. 411 (Bankr. W.D. Wa. 1992) (enumerating various factors).

The so-called "hanging paragraph" of 11 U.S.C. § 1325(a) provides that debtors may not "cram down" motor vehicle collateral if the creditor has a purchase money security interest in the vehicle and the debt was incurred within 910 days of the petition date. However, a creditor does not have a purchase money security interest in the "negative equity" of a vehicle traded in during the new vehicle purchase transaction. *Americredit Financial Services, Inc. v. Penrod (In re Penrod II),* 611 F.3d 1158, 1164 (9th Cir. 2010), *cert. denied*, 565 U.S. 822 (2011).

Effective December 1, 2017, secured creditors must file a proof of claim or interest for the claim or interest to be allowed, except as provided. Fed. R. Bankr. P. 3002(a). This is an important addition to the rules. At the same time, however, a lien that secures a claim against the debtor is not void due only to the failure of an entity to file a claim. Fed. R. Bankr. P. 3002(a).

C. MORTGAGES

1. NON-CONSENSUAL MORTGAGE MODIFICATION

The rights of a holder of a secured claim secured only by a security interest in real property that is the debtor's principal residence cannot be modified. 11 U.S.C. § 1322(b)(2). Thus, the debtor cannot change the monthly payment and cannot lower the interest rate on the debtor's home mortgage. In addition, the debtor must make all the post-petition mortgage payments because a default cannot be created. "[A] plan that proposes withholding of monthly installments due on the obligation for any period of time modifies the rights of the expected creditors in violation of 11 U.S.C. § 1322(b)(2)." *In re Gavia*, 24 B.R. 573 (B.A.P. 9th Cir. 1982); *In re Proudfoot,* 144 B.R. 876, 878 (B.A.P. 9th Cir. 1992). However, Courts in this District generally approve plans that 1) grant the mortgage creditor relief from the stay immediately; 2) specify a date, not significantly beyond the date the creditor could otherwise conduct a foreclosure sale, by which the debtor must sell the property, or there is an equity cushion or other adequate protection sufficient to protect the creditor beyond that date; 3) provide that the debtor will enter into a stipulated order for relief from stay at the creditor's request; and 4) include a provision that in any conflict between the plan and a stipulated order for relief from stay, the stipulation controls. *In re Dunn,* 399 B.R. 909, 910 (Bankr. W.D.Wa. 2009).

There is also the question of what point in time it is determined when the debtor is using real property as her personal residence so that a mortgage creditor is protected (or not protected) by the residential mortgage anti-modification protection of Section 1322(b)(2). Some courts have determined that the loan transaction date is the point of determination. *In re Hildebra*n, 54 B.R. 585, 586 (Bankr. D.Or. 1985) (noting that the legislative intent behind Section 1322(b)(2) was to provide stability in the long term residential housing market and holding that a debtor's principal residence for purposes of Section 1322(b)(2) is determined at the time the security interest was created); *Parker v. Fed. Home Loan Mortg. Corp*., 179 B.R. 492, 494 (Bankr. E.D.La. 1995); *In re Smart*, 214 B.R. 63, 67 (Bankr. D.Conn. 1997); *In re Baker,* 398 B.R. 198, 203 (Bankr. N.D.Ohio 2008). However, the Bankruptcy Appellate Panel of the Ninth Circuit held that the petition date is the point in time in determining the anti-modification provision of Section 1322(b)(2). *Benafel v. One West Bank (In re Benafel),* 461 B.R. 581, 591 (B.A.P. 9th Cir. 2011).

In a decision interpreting 11 U.S.C. § 1123(b)(5), which is identical to 11 U.S.C. § 1322(b)(5), the Bankruptcy Appellate Panel listed three distinct requirements for applicability of the anti-modification provision:

1) The security interest must be in real property;
2) The real property must be the only security for the debt; and
3) The real property must be the debtor's principal residence.

Wages v. J.P. Morgan Chase Bank, 508 B.R. 161, 165 (B.A.P. 9th Cir. 2014). The Panel specifically addressed the third requirement, holding that the anti-modification exception applies to any property that is used as the debtor's principal residence, even if that property is not used *exclusively* as the debtor's principal residence. *Id.* The debtors used part of their residence for a home office to run their business and they also parked trucks and trailers that they used in the business on the property. The debtors contended that there was an exception to the anti-

modification provision when the property is used not only as the debtors' residence, but also for a commercial use. As noted, the Court rejected the debtors' argument.

In addition, the undersecured mortgage holder secured cannot be crammed down to the property value. *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). However, if a mortgage is completely unsecured, that mortgage creditor's lien can be "stripped." *Zimmer v. PSB Lending Corp. (In re Zimmer),* 313 F.3d 1220 (9th Cir. 2002). This issue turns on the valuation of the property and usually involves dueling appraisers opining on property value at an evidentiary hearing before the Bankruptcy Court. If there is even one dollar of equity in the property to which the junior mortgage can attach, the lien cannot be stripped. For example, if a house is worth $100,000.00 and the senior deed of trust amount is $100,001.00, there is no equity for a junior deed of trust lien to attach to (i.e, the junior lien is "wholly unsecured"). This is different than removing a judgment lien that interferes with the debtor's claimed homestead exemption. With a junior deed of trust lien "strip," the homestead exemption does not come into play.

When the debtor intends to retain the property and avoid the junior mortgage lien as wholly unsecured, the proper valuation is the fair market value and the debtor may not deduct hypothetical selling costs when determining that value. *Taffi v. United States,* 96 F.3d 1190, 1192 (9th Cir. 1996); *United States Farmers Home Administration v. Case (In re Case),* 115 B.R. 666, 669 (B.A.P. 9th Cir. 1990); *In re Serda*, 395 B.R. 450, 453, 456 (Bankr. E.D.Cal. 2008); *Lee v. Wells Fargo Bank*, Adv. Proc. No. 14-01396-KAO, No. 14-15632 (Bankr. W.D.Wa. Dec. 10, 2014) (oral ruling).

The petition date rather than the plan confirmation date is the point of valuation of the property itself and the senior mortgage liens. *Benafel v. One West Bank (In re Benafel*), 461 B.R. 581, 589 (B.A.P. 9th Cir. 2011); *In re Montiel*, 572 B.R. 758, 762-63 (Bankr. W.D. Wa. 2017) (noting that "the petition date is the critical and logical date for determining the status of claims and generally establishing the respective rights of debtors and creditors, to the extent possible" and that "the valuation of a debtor's residence as of the petition date properly balances the competing goals of providing a fresh start to the debtor [ ] versus the creditor's bargained-for rights as the holder of a secured claim"); *In re Gutierrez*, 503 B.R. 458, 466 (Bankr. C.D.Cal. 2013) (tentatively ruling that courts should use the petition date as the date for valuation and determining the dollar amount of senior liens when debtors seek to avoid junior mortgage liens as wholly unsecured); *In re Dean*, 319 B.R. 474, 477 – 78 (Bankr. E.D.Va. 2004) (concluding that "the petition date is the appropriate date to value debtors' principal residence because debtors have used the property as their principal residence throughout the bankruptcy case from the date of their petition to the present"); *Giebel v. Styron (In re Giebel)*, No. 13-18835, 2014 WL 4346611, at *7 (Bankr. W.D.Wa. Aug. 29, 2014) (holding that "[t]he petition is the appropriate date for both valuing the mortgage property and for determining the amount of the senior mortgage debt"). *But see In re Crain*, 243 B.R. 75, 85 (Bankr. C.D.Cal. 1999) (holding that "the appropriate date of valuation for the [property] is the 'effective date of the plan' or ten [now fourteen] days after entry of the order confirming the plan, provided no timely appeal has been made").

"Chapter 20" (a chapter 7 case followed by a chapter 13 case) debtors may avoid wholly

unsecured mortgage liens even when they are not entitled to receive a discharge, but they must complete their plan. *HSBC Bank USA v. Blendheim (In re Blendheim),* 803 F.3d 477 (9th Cir. 2015); *Boukatch v. Midfirst Bank et al. (In re Boukatch),* 533 B.R. 292 (B.A.P. 9th Cir. 2015) (the Panel reviewed the three approaches to this issue).

While there is not a time limitation to file a motion to avoid a lien under 11 U.S.C. § 506(a) (e.g., to avoid a wholly unsecured junior mortgage lien), in order to bring such a motion after debtor has received a discharge or the case is closed, the debtor must meet the following conditions: (1) the confirmed plan must call for avoiding the wholly unsecured junior lien and treat any claim as unsecured; (2) the chapter 13 trustee must treat the claim as unsecured pursuant to the plan; and (3) the creditor must not be sufficiently prejudiced so that it would be inequitable to allow avoidance after entry of discharge or closing of the case. *Chagolla v. JPMorgan Chase Bank (In re Chagolla)*, 544 B.R. 676, 681 (B.A.P. 9th Cir. 2016).

If a debtor intends to "cram down" the value of non-residential property to its current value, the debtor must pay the crammed down secured claim amount over the plan term (i.e., the debtor may not propose to pay the crammed down value over a period longer than five years). *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1172 (9th Cir. 2004). In addition, "the plain language of 11 USC § 1325(a)(5)(B)(iii)(I) requires repayment plans to secured creditors to provide equal periodic payments, which necessarily excludes balloon payments." *In re Bollinger*, 2011 WL 3882275, at *4 (Bankr. D.Or. Sept. 2, 2011). *See also In re Nguyen,* 2012 WL 1110022, at *2 (Bankr. D.Or. April 2, 2012) (reluctantly agreeing to follow *Bollinger* because "I am bound by the published opinion of another judge of this court"); *In re Schultz,* 363 B.R. 902, 906 (Bankr. E.D.Wa. Wis. 2007) (holding that Section 1325(a)(5)(B)(iii) requires periodic payments to be equal even when the default is cured and only current payments and the arrearage are being paid pursuant to the plan under Section 1322(b)(5) and when a long-term or matured debt are paid in full under the plan). *But see In re Davis*, 343 B.R. 326, 328 (Bankr. M.D.Fla. 2006) (holding that equal monthly payments are not required under Section 1325(a)(5)(B)(iii) when the claim at issue is one in which arrears on long term debt are being cured) and *In re Cochran*, 555 B.R. 892 (Bankr. M.D.Ga. 2016) (holding that "balloon payments are not within the ambit of the 'periodic payments' under the plain language of § 1325(a)(5)(B)(iii)I), and, as such, need not be equal to preceding payments" because "'periodic' payments are regularly reoccurring and balloon payments are not"). These cases should be kept in mind when considering whether to "cram down" non-residential real property values.

A debtor can likely "cram down" even a mortgage secured solely by the debtor's principal residence if the mortgage matures before or during the term of the debtor's plan. *See American General Finance v. Paschen (In re Paschen),* 296 F.3d 1203, 1209 (11th Cir. 2002) ("§ 1322(c)(2) permits the modification of claims (through bifurcation and "cramdown") secured by those short-term home mortgages that mature prior to the completion of a debtor's Chapter 13 plan."); *Geller v. Grijalva (In re Gijalva),* 2012 WL 1110291, at *2 (Bankr. D.Az. April 2, 2012) ("Section 1322(c)(2), therefore, permits modification of a claim secured by a principal residence in the limited circumstance where: (1) the obligation matures and becomes due in full before or during the Chapater 13 plan term, and (2) the Plan complies with § 1322(a)(5)."); *but see Witt v. United Companies Lending Corp. (In re Witt),* 113 F.3d 508, 511 (4th Cir. 1997) (a debtor can only change the payment schedule, but not cram down the claim).

Moreover, if the non-residential property has negative cash flow, a debtor whose income is below the state median (pursuant to the means test) generally has to surrender the property. *But see Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) (above median debtors generally may choose which secured debt to retain and claim as deductions on their means test). For example, if the below median debtor receives $1,000.00 monthly rent and the monthly "cram down" payment over the plan is $1,500.00, retention of that property is not reasonable because that generally impacts unsecured creditors.

2. DELINQUENT MORTGAGES

When mortgages are in default on the petition date, the plan must provide for payment of both the pre-petition arrearage claim and the post-petition payment through the debtor's plan (i.e, by the Chapter 13 Trustee). Local Bankr. R. 3015-1(j). This practice is necessary for the effective administration and execution of chapter 13 plans. The Trustee is able to monitor the debtor's mortgage payments and, importantly, provide an independent accounting in the event a dispute arises between the debtor and the mortgage creditor.

By making payments to creditors, a trustee can

> more effectively exercise her supervisory duty by taking the responsibility of collecting and disbursing the payments to the creditors, leaving to [the trustee] the hassle of insuring the payments are being made and of bringing to the attention of the court when the payments are in arrears and the plan is not being carried out as confirmed.
>
> Furthermore, if a payment dispute arises, the availability of a trustee's regularly-audited records is exceedingly helpful to the parties and the court. By interposing a trained, regulated, and independent neutral between debtor and creditor, the 'trustee pays' presumption contributes to the feasibility of many chapter 13 plans, and inspires creditor confidence and participation in the system. . . . [T]he presumption under § 1326(c) that a trustee will make payments to creditors ensures better record-keeping and, in the court's experience, a greater chance of success under chapter 13. The presumption, rebuttable only at confirmation, promotes feasibility.

In re Vela, 526 B.R. 230, 237 (Bankr. W.D.Mich. 2015) (citation and quotations omitted).

3. STATUE OF LIMITATIONS

An action upon a contract or agreement in writing must be commenced within six years. Wash. Rev. Code § 4.16.040. "Mere default will not alone accelerate the payments due on an installment promissory note. Some affirmative action is required by the holder of the note that makes it clear and unequivocal to the payor that the holder has, in fact, declared the entire debt due." *Merceri v. The Bank of New York Mellon*, 434 P.3d 84 (Wash. App. 2018), *review denied*, 430 P,3d 244 (Wash. 2018).

In addition, a bankruptcy discharge does not commence the statute of limitations under an installment note. *In re Griffith,* No. 18-12420-TWD (Bankr. W.D. Wa. Dec. 7, 2018) (oral

ruling). In *Griffith*, the debtors asserted that Real Time's ability to enforce its deed of trust expired six years after the debtors' personal liability was discharged in the debtors' prior Chapter 7 bankruptcy case, treating the discharge as an acceleration under the note from which the six year statute of limitations would begin to run. The Court disagreed. The debtors received their discharge in the Chapter 7 case on September 15, 2010. Reviewing the Washington State Court of Appeals decision in *Edmundson v. Bank of America*, the Court held that a bankruptcy discharges a debtor's *in personam* liability, but not the debtor's *in rem* liability or the validity of the underlying deed of trust. *Citing Edmundson v. Bank of America*, 378 P.3d 272, 276 (Wash. App. 2016) (Finding that "nothing under either federal or state law supports the conclusion that the discharge of personal liability on the note also discharges the lien on the deed of trust securing the note. The deed of trust is enforceable."). The Court reviewed the second part of the Court of Appeals decision in *Edmundson* regarding the statute of limitations, finding that part of the decision to be dicta only and not central to the Court of Appeals' decision.

The *Griffith* Court specifically discussed the Court of Appeals' contention that "the statute of limitations for each subsequent monthly payment accrued on the first day of each month after November 1, 2008 until the Edmundsons no longer had personal liability under the note." The Court noted that the first part of that statement was well-supported by Washington State case law, but that the Court of Appeals cited no authority for the second part of the statement. The Court found that the Court of Appeals lost track of the two separate remedies of the lender, the *in personam* liability that was discharged in the bankruptcy and the surviving *in rem* claim under the deed of trust. The Court specifically rejected the implied notion in *Edmundson* that a bankruptcy discharge could be an acceleration under the promissory note that would commence the running of the six year statute of limitations for enforcement of the obligation. The Court rejected the implication that a bankruptcy discharge was the equivalent of an acceleration under the note.

The *Griffith* Court observed that "Washington State law is clear that acceleration of an installment note does not occur automatically, is the lender's option and must be exercised by some unequivocal, affirmative action by the lender." *In re Griffith,* No. 18-12420-TWD (Bankr. W.D. Wa. Dec. 7, 2018) (oral ruling) (*citing Merceri v. The Bank of New York Mellon*, --- P.3d ---, 4 Wash.App.2d 755 (Wash. App. 2018)). The Court also noted that:

> There is no provision of the Bankruptcy Code that says discharge equates to acceleration or maturation of an installment note. The effect of the bankruptcy discharge is to eliminate the personal liability on the installment note, not to accelerate the amounts due under an installment note. Since *in rem* liability remains unaffected by a bankruptcy discharge and acceleration can only occur by affirmative action of the lender, it does not follow that a bankruptcy discharge can be a substitute for acceleration and start the statute of limitations on the non-discharged *in rem* obligation. After the bankruptcy discharge, the terms of the deed of trust govern when the six year statute of limitations starts on the surviving *in rem* claim.

In re Griffith, No. 18-12420-TWD (Bankr. W.D. Wa. Dec. 7, 2018) (oral ruling). Because the lender never accelerated the note and the discharge was not an acceleration, the statute of limitations had not commenced and the Court overruled the debtors' objection to claim.

4. CONSENSUAL MORTGAGE MODIFICATION AND CLAIMS

It is not uncommon for a judgment lien to attach to the debtor's residence prior to the petition date. 11 U.S.C. § 522(f)(1) provides a mechanism for the debtor to avoid any judgment lien that "impairs" the debtor's homestead exemption. If the debtor intends to avoid the lien in the plan rather than by a separate a motion or adversary proceeding, the debtor will need to carefully review and comply with Local Bankruptcy Rule 3015-1(g).

Effective December 1, 2017, secured creditors must file a proof of claim or interest for the claim or interest to be allowed, except as provided. Fed. R. Bankr. P. 3002(a). This is an important addition to the rules. At the same time, however, a lien that secures a claim against the debtor is not void due only to the failure of an entity to file a claim. Fed. R. Bankr. P. 3002(a). In addition, the holder of a claim secured by a security interest in the debtor's principal residence must file its claim not later than 70 days after the petition date, although the holder has 120 days from the petition date to file certain attachments. Fed. R. Bankr. P. 3002(c)(7).

Debtors and their counsel should carefully review mortgage creditors' proofs of claim to make sure that the mortgage creditor has not overstated the pre-petition arrearage amount or post-petition payment amount. If the debtor believes the claim is inaccurate, the debtor will need to object to the proof of claim. Pre-petition arrearage items in the proof of claim to pay particular attention to include escrow deficiency or shortage items and items labeled "corporate advance" or the like.

MORTGAGE MODIFICATIONS: A debtor may make a written request to the Trustee for authority to enter a temporary or trial modification of a mortgage. Local Bankr. R. 4001-2. The debtor's request must include a copy of the trial mortgage modification. If the debtor was delinquent on the mortgage at the petition date, the Trustee *must* make the trial mortgage modification payments (i.e., the debtor *may not* make the payments directly to the mortgage lender). *See also* Local Bankr. R. 3015-1(j). The debtor has to make the plan payment in amount sufficient (including the Trustee's fee) so that the Trustee can timely make the trial mortgage modification payments. The Court must approve any final mortgage modification.

To request approval for the trial mortgage modification, upload the trial mortgage modification documents through the Trustee's website:

1) Log in to the Trustee's website at www.13documents.com
2) Proceed to Document Filing
3) Select "Jason Wilson-Aguilar" as the trustee
4) Type the case number in the field (do not include the hyphen)
5) Choose "Trial Mortgage Modifications"
6) Click "Upload File"

The Trustee considers submission of the trial mortgage modification as a request for approval of the modification. You do not need to submit a separate request. Assuming the submission is made by 2:00 pm, the Trustee will make every effort to respond the same day. If you have not received an answer (likely by electronic message) by end of the next business day or if you need expedited approval, please contact the Trustee's office for status. Again, please keep in mind

that the Trustee will make payments on delinquent mortgages and you should advise the debtors of this.

D. HOMEOWNER / CONDOMINIUM ASSOCIATIONS

Post-petition condominium assessments are dischargeable in Chapter 13 cases. *Goudelock v. Sixty-01 Ass'n (In re Goudelock)*, No. 16-35384, 2018 WL 3352883, at *4-5 (9th Cir. July 10, 2018). "Unmatured contingent debts are . . . dischargeable under Section 1328(a)." *Id*. at *4. As explained by the Ninth Circuit,

> Subsections 1328(a)(1)–(4) enumerate the only exceptions to the broad discharge of debts under Section 1328(a).[4] In addition, under 11 U.S.C. § 523(a)(16), post-petition association assessments are excepted from discharge for petitions under Sections 727 (Chapter 7), 1141 (Chapter 11), 1228(a) and (b) (Chapter 12), and Section 1328(b) (Chapter 13 cases where the debtor is discharged without completing her payments). Notably absent from the list of discharge exceptions in Section 1328(a) is a reference to Section 523(a)(16), the only provision which excepts post-petition association assessments from discharge.

Id.

E. JUDGMENT LIENS

A judgment lien creditor who wants his or her judgment to attach to the value of a homestead in excess of the Washington State homestead exemption must record the judgment in the county in which the property is situated (pursuant to Wash. Rev. Code § 6.13.090), but he or she does not need to also file an abstract of the judgment under Wash. Rev. Code § 4.56.200(2). *Mehl v. Roberts (In re Deal)*, 933 P.2d 1084, 1086-87 (Wash. Ct. App. 1997).

A debtor may only avoid the judgment lien "to the extent" that lien impairs the debtor's homestead exemption. 11 U.S.C. § 522(f). A judgment creditor's lien can thus survive in part and be avoided in part. *Bank of America v. Hanger (In re Hanger)*, 217 B.R. 592, 595 (B.A.P. 9th Cir. 1997) (the Panel conducted a thorough analysis of how judgment lien avoidances work in practice), *aff'd*, 196 F.3d 1292 (9th Cir. 1999).

F. LIQUIDATION VALUE

Unsecured creditors must receive as much in a Chapter 13 case as they would have received in a Chapter 7 case filed at the same time. 11 U.S.C. § 1325(a)(4). The liquidation value is generally arrived at by taking the collateral value and reducing that amount by the available exemption and costs of sale. The liquidation value, even if it is zero, must be listed in Section IX of the Form Plan. If the liquidation value exceeds the amount of the unsecured debt, Section IX must also include interest for the unsecured creditors. Unsecured claims are entitled to interest at the federal judgment rate when the bankruptcy estate is solvent. *Onink v. Cardelucci (In re Cardelucci),* 285 F.3d 1231, 1234 (9th Cir. 2002). The interest rate used is the

federal judgment rate of interest, which can be found on the Trustee's website (www.seattlech13.com).

G. PREFERENCES

The Trustee has the authority to pursue preference actions against creditors. A preference is any transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made within 90 days before the petition date or within one year of the petition date if the creditor was an insider; and (5) that enables the creditor to receive more than the creditor would have received if the case was a Chapter 7, the transfer had not been made, and the creditor received the payment to the extent provided by the Bankruptcy Code. 11 U.S.C. § 547(b). An "insider" includes, but is not limited to, a debtor's relative, general partner, partnership, and corporation. 11 U.S.C. § 101(31).

A debtor must fully and accurately disclose these payments in Part 3 of the Statement of Financial Affairs. The debtor must list the name, address and relationship of the creditor, the dates of the payments, the amounts paid and the balance remaining.

In some cases, the Trustee will agree to not pursue a preference against an insider in exchange for *all* of the following:

1) A tolling agreement signed by *both* the creditor and debtor that tolls the statute of limitations to a period six months after a conversion of the case to a Chapter 7 case. This is necessary because the statute of limitations to pursue a preference is generally two years from the petition date. 11 U.S.C. § 546(a).

2) The value of the preference included in Section IX of the plan (this amount would be *in addition to* any other liquidation value).

The Trustee always reserves his right to exercise his discretion in determining how to proceed with preference claims.

H. DIFFERENT NOTICE PERIOD FOR PRE- AND POST-CONFIRMATION AMENDED PLANS

Service of a motion to approve a pre-confirmation amended plan requires twenty-eight days' notice from the date of service to the hearing date. Fed. R. Bankr. P. 2002(b) (twenty-eight days).

Local Bankruptcy Rule 9013-1(d)(2)(F) provides that "[a]ll other motions and/or notice thereof shall be filed and served upon the appropriate parties at least 21 days preceding the date fixed for hearing *unless a longer period of notice is ordered by the court or prescribed by the Federal Rules of Bankruptcy Procedure or these Local Bankruptcy Rules*" (emphasis added). Because Rule 2002(b) requires a twenty-eight day notice period, Rule 2002(b) controls over Local Bankruptcy Rule 9013-1(d)(2)(F).

Service of a motion to approve a post-confirmation amended plan requires twenty-one days' notice from the date of service to the hearing date. 11 U.S.C. § 1329; Local Bankr. R. 9013-1(d)(2)(F) (twenty-one days).

X. BINDING EFFECT OF CONFIRMATION

A confirmed plan binds the debtor and each creditor. 11 U.S.C. § 1327(a*); United States Aid Funds, Inc. v. Espinosa (In re Espinosa),* 559 U.S. 260 (2010). "A confirmation order which provides for payments to a creditor is binding upon that creditor notwithstanding the fact that the creditor obtained relief form the automatic stay prior to confirmation of the plan. In the instant case, although [the mortgage creditor] obtained relief from the automatic stay, it failed to object to or appeal from the Confirmation Order." *In re Sullivan*, 321 B.R. 306, 308 (Bankr. M.D.Fla. 2005); *see also Multnomah County v. Ivory (In re Ivory),* 70 F.3d 73, 75 (9th Cir. 1995) (the county was bound by the confirming order even though the confirming order may have been erroneously entered on jurisdictional grounds because it allowed the debtor to redeem property subsequent to expiration of the redemption period and the creditor was no longer a creditor); *Enewally v. Enewally (In re Enewally),* 368 F.3d 1165, 1172 ("if a creditor fails to timely object to a plan or appeal a confirmation order, it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code") (citations and quotations omitted); *Kurtzahan v. Sheriff of Benton County, Minnesota (In re Kurtzahn),* 342 B.R. 581, 585 (Bankr. D.Minn. 2006) (noting that a creditor could have objected to a plan based on issue preclusion, but it did not and was thus bound by the confirmed plan); *In re Mercier,* No. 16-12703-CMA (Bankr. W.D.Wa. Nov. 3, 2016) (oral ruling).

XI. ROLE OF THE CHAPTER 13 TRUSTEE

The Chapter 13 Trustee is often considered the "guardian" for unsecured creditors. The Trustee and his staff will conduct the necessary analysis of the plan to determine if it is objectionable and whether it complies with the Bankruptcy Code. Once the plan is confirmed, the Trustee will administer the plan by accepting the required payments and disbursing payments to creditors pursuant to the plan. The Trustee may object to the debtor's plan and/or move to dismiss or convert the debtor's case for various reasons, including the debtor's failure to make payments, failure to present a feasible plan, failure to provide requested documents, failure to file tax returns, and failure to comply with the debtor's obligations under the Bankruptcy Code and rules.

However, the Trustee's duties extend beyond being the "guardian" for unsecured creditors. The Trustee has the duty to appear and be heard at any hearing (confirmation hearings, most particularly) that concerns the value of property subject to a lien, confirmation of a plan or modification of a plan after confirmation. 11 U.S.C. § 1302(b)(2). The Trustee has standing to object to a plan that fails to comply with any provision of the U.S. Bankruptcy Code, including those provisions that affect secured creditors. *Andrews v. Loheit (In re Andrews),* 49 F.3d 1404, 1408 (9th Cir. 1995); *In re Rosa*, 495 B.R. 522, 523-24 (Bankr. D.Haw. 2013).

Under the terms of the form Order Confirming Plan,

1) The Debtor shall incur no additional debt except after obtaining permission from the Trustee pursuant to Local Bankruptcy Rule 3015-2 or permission from the Court;

2) The Debtor shall promptly notify the Trustee if the Debtor's projected gross annual income increases by more than 10% above the gross amount disclosed in the most recently filed Schedule I;

3) The Debtor shall promptly comply with the Trustee's requests for financial information;

4) The Debtor shall timely file required tax returns with the appropriate taxing authority during the life of the Plan;

5) The Trustee shall charge the percentage fee as periodically set pursuant to 28 U.S.C. § 586(e);

6) Nothing in this order or the Plan shall restrict the Trustee from recovering on claims on avoidance actions or otherwise, including claims pursuant to 11 U.S.C. §§ 544, 547, 548, 550 and/or 551 and the estate retains the right and standing to pursue all claims under the previously enumerated sections;

7) All property of the Debtor and the estate shall remain under the exclusive jurisdiction of the Court;

8) The attorney for the Debtor's compensation is approved in the lesser amount of $4,000 or the estimated amount listed in section IV.A.3 of the Plan; and

9) Each creditor (including successors and assigns) to which the Debtor is surrendering property in Section VI of the Plan is granted relief from the stays of 11 U.S.C. §§ 362(a) and 1301(a) to enforce its security interest against the property identified in Section VI of the Plan including taking possession and sale.

The Chapter 13 Trustee may, at any time after confirmation of a plan but before completion of the plan, move to modify the debtor's plan to increase or reduce the amount of payments on claims; extend or reduce the time for plan payments; alter the amount of the distribution to a creditor under certain circumstances. 11 U.S.C. § 1329(a).

XII. BANKRUPTCY ABUSE

Courts may dismiss cases for bad faith. Bad faith as cause for dismissal involves a totality of the circumstances test. *Leavitt v. Soto (In re Leavitt),* 171 F.3d 1219, 1224 (9th Cir. 1999). A court should consider whether the debtor misrepresented facts in the petition or plan, unfairly manipulated the Bankruptcy Code or otherwise filed the petition or plan in an inequitable manner; the debtor's history of filings and dismissals; whether the debtor intended to defeat state court litigation; and whether egregious behavior is present. Id.

Once a court has determined that cause for dismissal exists, the court must determine what remedial action to take. *Ellsworth v. Lifescape Medical Associates et al. (In re Ellsworth),* 455 B.R. 904, 922 (B.A.P. 9th Cir. 2011). The court may dismiss a case with prejudice (precluding the debtor from ever again seeking to discharge debts which would have been discharged by their plan) or impose some lesser remedy such as barring a debtor from re-filing for bankruptcy relief for 180 days or longer. *Id*.

XIII. POST-CONFIRMATION ISSUES

A. CLAIMS REVIEW PROCESS

➔ **Always review your client's case after the claims bar deadlines have passed. This is an extremely critical component of representing debtors in Chapter 13 cases. By reviewing the debtor's case after the claims bar deadlines have passed, you can identify and rectify numerous issues such as feasibility problems, claim problems (e.g., perhaps the need to object to a claim), the need to file claims under Federal Rule of Bankruptcy Procedure 3004, etc. It is also critical that you review notices of mortgage payment changes, notices of fees and any amended claims to prevent any problems (e.g., feasibility problems). The bottom line is that representation of a debtor does not end at confirmation. Chapter 13 plans generally run from thirty-six to sixty months and debtors need the assistance of counsel throughout the process so that they can receive the great benefits afforded them under Chapter 13 of the U.S. Bankruptcy Code.**

B. OBJECTIONS TO CLAIMS

"Generally," the Bankruptcy Panel of the Ninth Circuit observed,

> absent a written objection from a party in interest, a claim is 'deemed allowed' upon the filing of a timely proof of claim. 11 U.S.C. §§ 501(a), 502(a); Fed.R.Bankr.P. 3002. *See Fireman's Fund Mortgage Corp. v. Hobdy (In re Hobdy),* 130 B.R. 318, 320 (9th Cir. BAP 1991) (filed claim is 'presumptively valid' unless a written objection is filed). A proof of claim properly executed and filed is *prima facie* evidence of the validity and amount of the creditor's claim. Fed.R.Bankr.P. 3001(f). Deemed allowance entitles the claimant to participate in a distribution of the estate's assets. *Ashford v. Consol. Pioneer Mortgage (In re Consol. Pioneer Mortgage),* 178 B.R. 222, 225 (9th Cir. BAP 1995), *aff'd mem.,* 91 F.3d 151, 1996 WL 393533 (9th Cir.1996); Fed.R.Bankr.P. 3021.
>
> Although a claim may initially be deemed allowed, it may thereafter be disallowed, in full or in part, following affirmative action by the debtor or trustee and by court order. I
>
> If an objection to the proof of claim is filed, a 'contested matter' is initiated, sometimes in the form of an adversary proceeding. *See* 11 U.S.C. § 502(b); Fed.R.Bankr.P. 3007. In that event, the proof of claim will not be allowed until the bankruptcy court determines the proper amount of the claim. *See* 11 U.S.C. § 502(b).

Shook v. CBIC (In re Shook), 278 B.R. 815, 821-22 (B.A.P. 9th Cir. 2002).

Objections to claims in chapter 13 cases must be filed and served no later than 270 days from the petition date, unless good cause is shown. LBR 3007-1(b). Objections to claims shall be filed and served at least 30 days preceding the date fixed for hearing. Fed. R. Bankr. P. 3007; Local Bankr. R. 9013-1(d)(2)(C). **For proper service of an objection to claim, carefully review Federal Rule of Bankruptcy Procedure 3007(a)(2), in particular the provisions on serving an insured depository institution and the United States or any of its officers or agencies.**

The Trustee distributes funds pursuant to the plan. Therefore, disputed claims and untimely claims may receive disbursements until a written objection is filed. Whether a claim is filed timely or late, it is allowed unless a party in interest objects. 11 U.S.C. § 502(a); *In re Smith,* No. 09-43823, 2010 WL 5018379, at * 2 -3 (Bankr. W.D. Wa. Dec. 3, 2010). In addition, in the absence of an objection, even an untimely proof of claim is entitled to payment through the plan in the same manner as other claims of its class. *Smith*, 2010 WL 5018379, at *3.

Whether a claim is filed timely or late, it is allowed unless a party in interest objects. 11 U.S.C. § 502(a); *In re Smith*, No. 09-43823, 2010 WL 5018379, at * 2 -3 (Bankr. W.D. Wa. Dec. 3, 2010). In addition, in the absence of an objection, even an untimely proof of claim is entitled to payment through the plan in the same manner as other claims of its class. *Smith*, 2010 WL 5018379, at *3.

A properly executed and filed proof of claim constitutes prima facie evidence of the validity and amount of the claim. *Am. Express Travel Related Serv. Co. v. Heath (In re Heath),* 331 B.R 424, 432 (B.A.P. 9th Cir. 2005); Fed. R. Bankr. P. 3001(f).

Objections to claims must be in writing and filed. Fed. R. Bankr. P. 3007(a). A copy of the objection with notice of the hearing shall be mailed or otherwise delivered to the claimant, the debtor and the trustee at least *thirty days* prior to the hearing. Fed. R. Bankr. P. 3007(a); Local Bankr. R. 9013-1(d)(2)(C).

The filing of an objection to claim creates a dispute which is a contested matter within the meaning of Federal Rule of Bankruptcy Procedure 9014. *Lundell v. Anchor Const. Specialists, Inc.,* 223 F.3d 1035, 1039 (9th Cir. 2000); *In re 701 Mariposa Project, LLC,* 514 B.R. 10, 16 (B.A.P. 9th Cir. 2014) (noting that "[c]laims objections undoubtedly are contested matters subject to the requirements of Rule 9014").

Contested matters must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004. Fed. R. Bankr. P. 9014(b). The Internal Revenue Service cannot be sued and the proper party in actions involving federal taxes is the United States. *Blackmar v. Guerre,* 342 U.S. 512, 514 (1952); *United States v. Levoy (In re Levoy),* 182 B.R. 827, 832 (B.A.P. 9th Cir. 1995). Under Rule 7004, service on the United States must be made by mailing a copy of the summons and complaint to the civil process clerk at the Office of the United States Attorney for the District in which the action is brought, to the Attorney General of the United States in Washington, D.C., *and* to the officer or agency of the United States. Fed. R. Bankr. P. 7004(b)(4); Fed. R. Bankr. P. 7004(b)(5); *In re Morrell*, 69 B.R. 147, 149 (Bankr. N.D.Cal. 1986). "Rule 7004(b)(5) governs service of a motion on an agency of the United States. Under Rule 7004(b)(5), the movant must serve the motion by mailing it addressed to: (1) the civil process clerk at the office of the U.S. attorney for the district in which the action is brought; (2) the U.S. Attorney General in Washington, D.C.; and (3) the agency." *Scott v. United States (In re Scott)*, 437 B.R. 376, 379 (B.A.P. 9th Cir. 2010); *see also In re Pearson*, 17-10257-MLB (Bankr. W.D. Wa. July 26, 2017) (oral ruling) (granting the Unites States' Motion for Relief from Orders regarding debtors' objection to the Internal Revenue Service's claim because the debtors did not serve the Internal Revenue Service itself

and merely served the United States Attorney General and the United States Attorney for the Western District of Washington).

The Bankruptcy Appellate Panel has held that Rule 7004 applies to objections to claims and, therefore, objections to claims of the United States must be served according to Rule 7004(b)(4). *In re Levoy*, 182 B.R. at 834; *see also Fortune & Faal v. Zumrun (In re Zumbrun*), 88 B.R. 250, 252 (B.A.P. 9th Cir. 1998) (the same due process requirements apply to both Rule 7004 and Rule 9014). However, in a rather labored, split (two-to-one) and vacated (as moot) opinion, the Panel indicated that Rule 9014(a) applies only to contested matters "not otherwise governed by these rules" and that a claim objection is otherwise governed. *Jorgenson v. State Line Hotel, Inc. (In re State Line Hotel, Inc.),* 323 B.R. 703, 711-12 (B.A.P. 9th Cir. 2005), *vacated as moot*, 242 Fed.Appx. 460, 462 (9th Cir. 2007). The *State Line Hotel* Panel concluded that "we do not think Rule 9014 nevertheless required the Objection [to claim] to be served in accordance with Rule 7004." *Id.* at 712. In a subsequent decision, the Panel noted that it had offered conflicting views about whether Rule 3007(a)'s requirements to mail and deliver are in addition to or in lieu of Rule 7004's service requirements. *701 Mariposa Project,* 514 B.R. at 16. One would probably be very unwise to rely on the Panel's vacated *State Line Hotel* opinion, even assuming it has any precedential value at all.

As explained by one court,

> Rule 9014(a) provides that "[i]n a contested matter not otherwise governed by these rules, relief shall be requested by motion. . .." Rule 9014(b) specifies how service of that motion shall be made: pursuant to Rule 7004. The *Anderson* [330 B.R. 180 (Bankr. S.D.Tex. 2005)]and *State Line* opinions hold that an objection to claim is not commenced with a "motion," and is "otherwise governed by" Rule 3007, making service under Rule 7004 unnecessary. In essence, that even though an objection to claim may be a contested matter, Rule 9014(a) defers to Rule 3007 regarding notice of an objection to claim.
>
> This Court disagrees with the reasoning in the *Anderson* and vacated *State Line Hotel* opinions. The better reasoning is found in *In re Levoy*, 182 B.R. 827 (9th Cir. BAP 1995), a Bankruptcy Appellate Panel opinion decided before *State Line Hotel,* which this Court finds to be the controlling opinion in this Circuit.
>
> > Fed. R. Bankr. P. 3007does not provide the manner for service of the objection to a proof of claim. However, the rule's Advisory Committee Note states: "The contested matter initiated by an objection to a claim is governed by rule 9014...." Fed. R. Bankr. P. 9014, which pertains to contested matters, in turn, makes applicable the service provisions of Fed. R. Bankr. P. 7004.
>
> *Id.* at 834. In essence, Rule 9014(b) provides the manner in which *service* of the objection to claim should be made, while Rule 3007(a)supplements that provision by providing more specific information about who should receive *notice* of the hearing and when. Rule 3007 is not a substitute for service of the objection to claim. The fact that a claim objection is initiated by an objection rather than a motion does not remove the matter from the service requirements of Rule 9014(b).

Monk v. LSI Title Company of Oregon et al. (In re Monk), No. 04-60712-fra, 2013 WL 4051864, at *3 (Bankr. D.Or. August 9, 2013).

Even more significantly, the Ninth Circuit determined that the filing of an objection to claim creates a dispute which is a contested matter within the meaning of Federal Rule of Bankruptcy Procedure 9014. *Lundell,* 223 at 1039. The *State Line Hotel* Panel stated that "Rule 9014 defers to Rule 3007 on the subject of claims objections: it calls for an objection, not a motion, and authorizes notice, rather than requiring service." *State Line Hotel,* 323 B.R. at 713. Undercutting the reasoning of *State Line Hotel*, the Ninth Circuit stated that an objection to claim "must be resolved after notice and opportunity for hearing upon a motion for relief." *Lundell,* 223 F.3d at 1039. Moreover, Rule 9014 specifically references Rule 7004. A debtor who does not serve an objection to a claim of the Internal Revenue Service on the United States pursuant to Rule 7004(b)(4) does not have effective service of the objection.

And there's always one more reason: Why risk defective service? Just serve the objection to claim correctly and then you do not have to worry about it.

C. MOTIONS FOR SALE OF PROPERTY AND TO INCUR DEBT, PURCHASING VEHICLES POST-CONFIRMATION AND INCURRING NEW DEBT

Under the terms of the Court's confirming order, debtors may not incur any debt except after obtaining the Court's prior permission or pursuant to Local Bankr. R. 3015-2 (Request to Incur Post-Confirmation Debt to Finance a Motor Vehicle in a Chapter 13 Case). The reasons for this are many, including that "Congress has recognized a danger to chapter 13 plan's performance and the existing creditors if debtors are permitted to incur unnecessary debt after the filing of a chapter 13 petition." *In re Trentham*, 145 B.R. 564, 568 (Bankr. E.D.Tenn. 1992). "As a result, § 1305 provides that a holder of a § 1305(a)(2) claim will have its claim disallowed if the holder knew or should have known that prior approval by the chapter 13 trustee of the debtor's incurring the obligation was practicable and was not obtained." *Id.*

Similarly,

> incurrence of significant postpetition debt is an action that absolutely could bear on the performance of the plan. It could absolutely impact the debtor's rehabilitation efforts. This, this court will require court approval.
>
> At a minimum, the court things that Congress expressed an intent to discourage postpetition borrowing during bankruptcy through Code sections such as 364 and 1305. Moreover, [Fifth] Circuit level jurisprudence has signaled that postpetition activities of a chapter 13 debtor require monitoring and postpetition events matter.

In re Ward, 546 B.R. 667, 678 (Bankr. N.D.Tex. 2016). *See also In re Goodman*, 136 B.R. 167, 170 (Bankr. W.D.Tenn. 1992) (noting that "this Court is faced with Chapter 13 consumer debtors who incur postpetition debt, both secured and unsecured, without prior approval of the Chapter 13 Trustee or of the Court"). The Bankruptcy Appellate Panel of the Ninth Circuit has also observed that debtors "cannot do anything with the property of the estate in their possession

without permission from the court." *Houston v Eiler et al. (In re Cohen)*, 305 B.R. 886, 897 (B.A.P. 9th Cir. 2004).

Debtors can undoubtedly incur emergency debt such as immediately necessary medical services or motor vehicle repairs so that debtors can travel to work, although the debtors should likely take the cautious approach and move for the Court's approval as soon as they are able. *See In re Perkins*, 304 B.R. 477, 482 (Bankr. N.D.Ala. 2004). As noted by one court,

> [t]he allowance of postpetition claims for consumer debts for property or services necessary for the debtor's performance under the plan is conditioned that consent of the Chapter 13 trustee must be obtained before incurring the debt, *if practicable*.

In re Webber, No. 15-11470, 2016 WL 1178330, at *4 (Bankr. W.D.La. March 23, 2016) (quoting and citing Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy 4th, § 302.1, at ¶ 9, Sec. Rev. June 17, 2004, www.Ch13online.com) (quotations omitted). *See also* 11 U.S.C. § 1304 (Debtor engaged in business) ("a debtor engaged in business may operate the business of the debtor").

However, debtors do not have to obtain court approval to incur *post-confirmation* debt to finance a motor vehicle. Local Bankr. R. 3015-2. A debtor may make a written request to the Trustee and the Trustee will either approve or deny that request. If the Trustee denies the request and the debtor still wants to purchase the vehicle, the debtor may move for approval (with proper service and notice) of the purchase. The forms to purchase the vehicle are located on the Trustee's website. The Trustee does not approve vehicle purchases that exceed $15,000.00 and 20% interest (these are the *maximum* amounts, but the approved amount and interest rate may be less). The Trustee bases his decision on financial information the debtors provide.

Debtors must promptly move / apply for approval to employ professionals, including employment of personal injury attorneys and real estate brokers the debtors want to employ to sell real property. *See* Local Bankr. R. 3015-1. Please carefully review the Local Rule to make sure you comply with the requirements for employing professionals. Debtors must obtain approval to retain the real estate / agent *immediately* rather than waiting until after the debtors have obtained an offer to purchase their real property.

The court may decline to agree to compensation for the professional if the motion to approve the professional is untimely. *See Okamoto v. THC Financial Corp. (In re THC Financial Corp.)*, 837 F.2d 389 (9th Cir. 1988); *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 973 (9th Cir. 1995) ("[i]n bankruptcy proceedings, professional who perform services for a debtor in possession cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order"); *In re Perez-Escobar*, No. 15-13368-TWD (Bankr. W.D. Wa. April 4, 2019) (denying debtor counsel's retroactive request for approval to also be compensated $22,050.00 as the debtor's real estate broker after the court had previously warned counsel about the problems with that practice in a prior case). → **Please send applications to employ professionals to courtmail@seattlech13.com**

Motions for sale of real property and motions to incur debt should be noted for hearing. Debtors cannot incur debt without the Court's approval. While this will vary from case to case, the Trustee generally will object to motions to sell real property that do not include the following:

1) An estimated settlement statement;
2) A declaration from the debtor that the sale is an arm's length transaction for fair market value;
3) The purchase and sale agreement;
4) Clear instructions / requests on how the sale proceeds will be disbursed. If funds are being sent to the Trustee's office, the Trustee recommends the following or similar language for the form of order (depending on the particulars of each situation):

The closing / escrow agent shall send the net proceeds to the Chapter 13 Trustee at the following:

Chapter 13 Trustee
PO Box 2139
Memphis, TN 38101-2139

The closing / escrow agent shall include the debtor's name and case number (Case No. XX-XXXXX-XXX) on the form of payment. Upon receipt of the funds, the Trustee is authorized to immediately pay allowed unsecured claims. If necessary for completion of the debtor's plan, the debtor shall continue to make plan payments.

Do not forget to add a waiver of Federal Rule of Bankruptcy Procedure 6004(h) if you do not want the order stayed for fourteen days from entry. Rule 6004(h) provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise."

D. POST-CONFIRMATION PLAN MODIFICATIONS

If debtors need to modify their plan post-confirmation, they need to file a modified plan and a motion requesting approval of the modified plan, together with a declaration explaining the need for the modification. Local Bankr. R. 3015-1(i). The debtors also have to provide the Trustee payment advices or other evidence of proof of payment received within the last thirty days. The order approving the amended plan must substantially comply with Local Bankruptcy Form 13-6.

Unlike motion to confirm a plan, motions to approve a post-confirmation plan modification require twenty-one days' notice rather than twenty-eight days' notice. Fed. R. Bankr. P. 2002(a)(5); Fed. R. Bankr. P. 2002(b).

A post-confirmation modified plan must be proposed in good faith. 11 U.S.C. §§ 1329(b)(1); 1325(a)(3). As part of the good faith analysis, the Court may consider whether the proposed modification correlates to the debtors' change in circumstances. *Mattson v. Howe*, 468 B.R. 361, 371 (B.A.P. 9th Cir. 2012).

A chapter 13 plan cannot be approved if it provides for a plan length longer than five years. "No fewer than three Code provisions, §§ 1322(d), 1325(b)(4), and 1329(c), prohibit a plan exceeding five years in length. Section 1329(c) specifically prohibits the court from approving a plan modification that would "provide for payments" beyond five years." *Id.* at *8. "They argue that surrender is not a 'payment' and therefore does not violate the 60-month rule in § 1329(c). We conclude that surrender is a form of payment for purposes of § 1329(c). Numerous courts have so held." *Id.*

E. MOTIONS TO DISMISS

The Trustee may move to dismiss a debtor's case for cause, including material default by the debtor with respect to a term of a confirmed plan. 11 U.S.C. § 1307(c). The most common bases are failure to make plan payments, failure to turn over committed tax refunds, failure to comply with case-specific provisions and failure to complete a plan within sixty months. These are not the only bases for dismissal, however. "Section 1307(c) enumerates eleven *non-exclusive* grounds which may constitute 'cause' for dismissal." *Ellsworth v. Lifescape Medical Associates, P.C. et al. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011) (emphasis added).

F. VOLUNTARY MOTIONS TO DISMISS

A debtor does not have an absolute right to voluntarily dismiss his or her chapter 13 case. *Rosson v. Fitzgerald (In re Rosson),* 545 F.3d 764, 774 (9th Cir. 2008). The Court has the authority to deny dismissal on grounds of bad faith conduct or to prevent an abuse of process. *Id*. As the Supreme Court noted, bankruptcy courts have broad authority to take any action that is necessary or appropriate to prevent an abuse of process described in 11 U.S.C. § 105(a). *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 375 (2007).

XIV. DEBTOR FINANCIAL EDUCATION

Debtors are also required to complete a post-filing financial education class before they receive a discharge. Attorneys may want to recommend that their clients complete this requirement shortly after their Chapter 13 case is filed, so that they do not neglect to do so and lose their right to discharge at the end of their case because they failed to complete this required step. The list of approved financial management course providers is available on the Court's website and U.S. Trustee's website. Each debtor must obtain a certificate upon completion of the financial management/education course, and provide it to their attorney to be filed with the Court. A free post-filing financial management course is also available through the Chapter 13 Trustee's office in Seattle, for those debtors with cases assigned to the Seattle Chapter 13 Trustee.

XV. COMPLETION OF PLAN AND DISCHARGE

"[W]hen the chapter 13 plan provides for the curing of prepetition mortgage arrears and a debtor's direct postpetition maintenance payments in accordance with § 1322(b)(5), such direct payments are 'payments under the plan.' And if the debtor does not complete 'all payments

under the plan,' the debtor is not entitled to a discharge." *Derham-Burk v. Mrdutt (In re Mrdutt)*, 600 B.R. 72, 77 (B.A.P. 9th Cir. 2019). "The computation of disposable income to pay creditors under § 1325(b) takes into account the promised direct payments for housing, including § 1322(b)(5) maintenance payments. Debtors who fail to make these payments, which often amount to tens of thousands of dollars, benefit from years of living without mortgage payments at the expense of creditors." *Id*. at 81. "[A] chapter 13 debtor's direct payments to creditors, if provided for in the plan, are 'payments under the plan' for purposes of a discharge under § 1328(a) and hold that this same rule should apply in the context of postconfirmation plan modifications under § 1329(a)." *Id.*

Upon completion of the plan as confirmed and payment of all required sums, and upon completion of post-filing financial education and the filing of the appropriate certificates, the debtors who are otherwise eligible for discharge should be entitled to receive a discharge in their Chapter 13 case. The Trustee will advise the Clerk that the debtors' case is ready for discharge, and the Clerk will issue a discharge order signed by the assigned Judge. The Chapter 13 Trustee will file a final account and report indicating all payments made into the case and all disbursements made to creditors.