

Chapter 13 Trustee's Best Practices Manual¹

by

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¹ **DISCLAIMER:** These materials are *not* an official statement of the Chapter 13 Trustee's policies or procedures. 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 Code² is the bankruptcy statute, referred to as the “Bankruptcy Code,” and 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); and 18 U.S.C. §§ 151 – 158 (bankruptcy crimes).

The national rules relating to bankruptcy are the Federal Rules of Bankruptcy Procedure (FRBP). These “Bankruptcy Rules” are numbered 1001 – 9037. The Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE) 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 the local rules, which are located at the Court’s website.³

State law may also be applicable in bankruptcy proceedings. For example, parties might assert certain state law causes of action in bankruptcy lawsuits, called “adversary proceedings.” Another example is how in Washington State, debtors may also choose to utilize either the state or federal exemption schemes (but not both).⁴

Bankruptcy appellate decisions may be rendered by the Bankruptcy Appellate Panel of the Ninth Circuit, District Courts, the Ninth Circuit, or the United States Supreme Court.

The district court has “original and exclusive jurisdiction of all cases under title 11.”⁵ Moreover, the court has jurisdiction over cases, even if debtor is not an

² 11 U.S.C. §§ 101 – 1532

³ www.wawb.uscourts.gov

⁴ 11 U.S.C. § 522; Wash. Rev. Code §§6.13.010-40, .070-80

⁵ 28 U.S.C. § 1334(a)

eligible chapter 13 debtor.⁶ In addition, confirmation of a plan is a binding determination of a debtor's eligibility and is not subject to collateral attack.⁷

B. Chapter 13 Basics

i. Overview

Chapter 13 bankruptcy, or adjustment of debt of individuals with regular income, involves trustee administration of a confirmed debt repayment plan filed by the debtor. A Chapter 13 bankruptcy is where the debtor “proposes” and the court “confirms” a plan for the financial recovery of the debtors by “ordering, organizing, and modifying their payments to creditors.”⁸ The Bankruptcy Code requires that a Chapter 13 plan provide that all of a debtor's projected disposable income (PDI) in the applicable commitment period will be applied to make payments to unsecured creditors.⁹

Only the debtor may file a plan in a Chapter 13 case; corporations and partnerships are ineligible to be debtors under Chapter 13.¹⁰ Additionally, only married persons may file a joint bankruptcy case;¹¹ unmarried persons may not.¹² Despite this, unless substantively consolidated, married debtors' petition technically involves two separate bankruptcy estates for the two.¹³

Reasons to file for Chapter 13 bankruptcy include:

1. Saving a house from foreclosure;
2. Paying priority tax debt over the life of the plan;
3. “Stripping” off junior mortgages;
4. Protecting a codebtor from creditor collection;
5. Changing loan terms (i.e., a “cramdown” of a vehicle from contract price to market price);
6. Avoiding loss of assets that would be sold in a Chapter 7 case; and

⁶ *FDIC v. Wenberg (In re Wenberg)*, 94 B.R. 631, 636-37 (B.A.P. 9th Cir. 1988) (internal quotations and citation omitted)

⁷ *In re Jarvis*, 78 B.R. 288, 289 (Bankr. D.Or. 1987)

⁸ *See In re LaMont*, 740 F.3d 397, 402 (7th Cir. 2014)

⁹ 11 U.S.C. § 1325(b)(1)

¹⁰ 11 U.S.C. § 1321

¹¹ 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).

¹² *See Bone v. Allen (In re Allen)*, 186 B.R. 769, 774 (Bankr. N.D.Ga. 1995) (noting that “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)

¹³ 11 U.S.C. § 302(b), *In re Ageton*, 14 B.R. 833, 835-36 (9th Cir. BA[P] 1981)

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

Unlike Chapter 7, which requires the debtor to surrender non-exempt assets to the trustee for an immediate discharge,¹⁴ Chapter 13 allows the debtor to keep his or her assets with a repayment plan. This repayment plan must be completed within 36 months or, with leave of court, no later than 60 months.¹⁵ This period begins running from the date the Chapter 13 debtor is first obligated to begin making payments to the trustee under the confirmed plan, not when the first payment becomes due.¹⁶ The discharge is entered once the debtor has completed his or her obligations under the confirmed plan.¹⁷

Contents of the plan are determined by the Bankruptcy Code and local rules.¹⁸ Local Bankruptcy Form 13-4 is the mandatory form plan.¹⁹ The Court periodically revises the plan, most recently on December 1, 2017.²⁰ The plan must provide treatment to creditors that is at least the same as the creditors would receive in a Chapter 7 case.

ii. Eligibility

A debtor must be eligible for Chapter 13 on the petition date itself, determined by the debtor's originally filed schedules.²¹ A debtor may not sell or surrender collateral post-petition to become eligible and "ordinary events" occurring after filing (e.g., paying down debt) do not affect the eligibility determination.²² Ineligibility mandates dismissal of the case.²³ To be eligible for Chapter 13, an individual must:²⁴

- 1) Be an individual with income sufficiently stable and regular to ensure that the individual can make the proposed plan payments;²⁵
- 2) Have noncontingent, liquidated, unsecured debt of less than \$465,275.00;

¹⁴ 11 U.S.C. § 727

¹⁵ 11 U.S.C. § 1322(c)

¹⁶ See *Nicholes v. Johnny Appleseed of Washington (In re Nicholes)*, 184 B.R. 82, 87 (B.A.P. 9th Cir. 1995) (citations omitted)

¹⁷ 11 U.S.C. § 1328(a)

¹⁸ See generally 11 U.S.C. § 1322 and Local Bankr. R. 3015-1

¹⁹ Local Bankr. R. 3015-1(a)

²⁰ Gen. Ord. No. 2017-5 (Bankr. W.D.Wa. Aug. 31, 2017)

²¹ See *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001)

²² *Id.* at 984

²³ 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)

²⁴ 11 U.S.C. § 109

²⁵ 11 U.S.C. § 101(30); 11 U.S.C. § 109(e); 11 U.S.C. § 110(30)

and

3) Have noncontingent, liquidated, secured debt of less than \$1,395,875.00.

Gifts and gratuitous payments do not qualify as regular income without direct evidence of commitment, such as filing a sworn declaration.²⁶

II. Debtor Responsibilities and Information

A. Required Information Preparation

Attorneys need information from their clients sufficient to prepare all schedules, statements, Means Test forms (Form B122C-1 and Form B122C-2), the plan, and other documents. Attorneys filing bankruptcy cases must satisfy their reasonable inquiry responsibilities under FRBP 9011.²⁷ Too much information is better than not enough. Information required to properly prepare all required documents include:

- Proof of Income for at least the two months, and longer if necessary, before the petition date, including all paystubs, unemployment benefits, and information about any other income received;²⁸
- 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, because debtors should schedule all parties to whom debtors may owe obligations to in their Chapter 13 paperwork;
- Last sixty days of bank statements from all bank accounts;
- Last sixty days of checkbook entries/registers, including outstanding uncashed checks;
- All coupon books, including for home loans, home equity lines of credit, and auto loans;
- All agreements for the purchase or lease of cars, trucks, motorcycles, and other vehicles;
- All other contracts and agreements with clients' creditors;
- All tax notices;

²⁶ *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); *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)

²⁷ See, e.g., *In re Chapman*, No. 19-26731, 2020 WL 1212773 (Bankr. E.D. Wis. March 11, 2020) (attorney sanctioned for not checking Pacer prior to a "short form" filing)

²⁸ 11 U.S.C. § 521(a)(1)(B)(iv)

- Federal (and, if applicable, State) income tax returns for the last four (4) years;
- All foreclosures and repossession papers received by clients;
- All papers, if any, concerning prior bankruptcy cases a client and/or a spouse have filed;
- Copies of clients' credit report;
- Picture ID and Social Security Number proof.

B. Debtor Responsibilities and Duties

Client and attorney responsibilities are generally set forth in the *Rights and Responsibilities of Chapter 13 Debtors and Their Attorney (Consumer Case)*.²⁹ Attorneys need to review this document with their clients, sign it, have 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.

Additionally, Debtors must complete a credit counseling class *pre-petition* and file a completion certificate from the counseling agency alongside the Chapter 13 petition and other documents. A list of approved credit counseling agencies is available on the Court's website at www.wawb.uscourts.gov or on the US Trustee's website at www.justice.gov/ust.

After debtors file the petition, debtors must complete a post-filing financial education class before they receive a discharge. Clients should complete this requirement shortly after filing their Chapter 13 case to not lose their right to discharge at the end of their case for failure to complete this required step. The list of approved financial management course providers is also available on the Court's and U.S. Trustee's website. Each debtor must obtain a certificate upon completion of the course and provide it for their attorney to file with the Court. A free post-filing financial management course is available through the Chapter 13 Trustee's office in Seattle for those debtors with cases assigned to the Seattle Chapter 13 Trustee.

Finally, Debtors have the ongoing duty to file a statement of any change in address, employment situation, marital status, phone number, or mortgage payments.³⁰ Service on the address the debtor designates constitutes effective

²⁹ Local Bankruptcy Form 13-5

³⁰ Fed. R. Bankr. P. 4002(a)(5)

service on the debtor.³¹ The burden is squarely upon the debtor to apprise the clerk of the bankruptcy court of any change of address.³²

III. Drafting Schedules, Statements, And Means Tests

A. Means Test Generally

The Means Test was adopted by Congress to “ensure that debtors who can pay creditors *do* pay them.”³³ 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 period must complete Form B122C-2.³⁴

On Form B122C-1, current monthly income is based on income derived during the “look-back period,” or the average monthly income received from all sources, including bonuses and VA benefits, during the six calendar months prior to filing the bankruptcy petition without regard to whether such income is taxable income (other than benefits received under the Social Security Act).³⁵ For example, if the debtor filed the case during the month of July, the six month period is January 1 – June 30. Post-petition changes in income do not change the debtor’s “current monthly income” as defined.³⁶ After taking certain deductions, the debtor determines whether his or her income is above or below the applicable median family income. The United States Census Bureau determines and the United States Trustee publishes the applicable median family income.

Debtors whose income is below the state median for their household size have an applicable commitment period of 36 months.³⁷ Debtors whose income is above the state median for their household size have an applicable commitment

³¹ 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”)

³² Local Bankr. Rule 4002(a)(5) & 7004(b)(9); *Ruiz v. Loera (In re Ruiz)*, 2006 WL 6811033 (B.A.P. 9th Cir. 2006)

³³ See *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 64-65 (2011) (case citations, quotations, and footnote omitted) (emphasis added)

³⁴ 11 U.S.C. § 521(a)(1)(B)(v); 11 U.S.C. § 1325(b)

³⁵ 11 U.S.C. § 101(10A)

³⁶ See *In re Tengan*, No. 13-00225, 2014 WL 5306620, at *2 (Bankr. D.Haw. October 15, 2014)

³⁷ 11 U.S.C. § 1325(b)(4)(A)(i)

period of 60 months regardless of if the debtors have positive or negative monthly disposable income on Line 45 of Form B122C-2.³⁸

Above median income debtors with positive monthly disposable income (MDI) reflected on Line 45 of Form B122C-2 must either indicate that they will pay 100% of nonpriority unsecured claims or include their PDI in Section IV.E. of the plan. 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 in Section IV.E. is \$30,000.00. This PDI is the minimum amount the debtor must pay to nonpriority unsecured claims.³⁹

Specifically, line 43 of Form B122C-2, Deduction for special circumstances, is commonly misunderstood. This category is for "special circumstances that justify additional expenses for which there is *no reasonable alternative*" and must be explained in detail, justified, and documented.⁴⁰ Such evidence must be attested to under oath.⁴¹ In other words, this line should almost always be zero.

Generally, above median debtors may choose which secured debt to retain and claim as deductions on their means test.⁴² Despite this, 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).⁴³ That may be prohibitive for debtors who cannot afford to keep the secured debt they wish to claim as deductions on the means test.

B. Deviation from Means Test Results for Above Median Debtors

i. Changes in Circumstances

When calculating a debtor's PDI, bankruptcy courts may account for changes in the debtor's income or expenses that are "known or virtually certain at the time of confirmation."⁴⁴ Thus, if a debtor's means test is clearly not representative of the debtor's known or virtually certain financial situation at confirmation, such as if the debtor lost their job during the look-back period and now gets paid less, a bankruptcy court may take those circumstances into

³⁸ 11 U.S.C. § 1325(b)(4)(A)(ii); *Danielson v. Flores (In re Flores)*, 735 F.3d 855 (9th Cir. 2013)

³⁹ See *In re Renteria*, 420 B.R. 526, 529 (Bankr. S.D. Cal. 2009).

⁴⁰ 11 U.S.C. § 707(b)(2)(B)(i) (emphasis added)

⁴¹ See *In re Dittrich*, No. 11-42382, 2011 WL 3471090 (Bankr. W.D.Wa. August 8, 2011)

⁴² See *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013)

⁴³ Local Bankr. R. 3015-1(j)

⁴⁴ See *Hamilton v. Lanning (In re Lanning)*, 560 U.S. 505, 524 (2010)

consideration after the debtor establishes and documents that change. Alternatively, certain changes apply in the opposite direction and can lead to an increase in PDI, such as if the debtor pays off a loan.⁴⁵

Debtors who assert that they cannot pay their PDI must:⁴⁶

- (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) Mark “Yes” in Section I.A. of the plan and include the following in Section X:

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.

ii. Changes in Expenses

Congress established what expenses are “reasonably” necessary for the maintenance and support of the debtor or a dependent.⁴⁷ These expenses are not reflective of the actual costs that debtors incur. Accordingly, if a debtor’s actual expenses exceed the expected amounts, the debtors should consider the “specified sum” deemed “reasonably” necessary, and not the actual costs incurred.⁴⁸ This means that debtors will have more difficulty establishing that expenses sufficiently increased post-petition to enable deviation from the Means-Test results.

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

⁴⁵ See *Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045, 1050 – 51 (9th Cir. 2009) (“loans... paid off within the commitment period of a Chapter 13 case... 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*.”).

⁴⁶ Local Bankruptcy Rule 3015-1(e) (*Deviation from Means Test*)

⁴⁷ 11 U.S.C. § 1325(b), 707(b)(2)

⁴⁸ See *Ransom v. FIA Card Services* at 727

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.

C. Completing Section IV.E of the Plan: Five Scenarios

There are five scenarios for completing Section IV.E. based on the Means Test.

SCENARIO 1: This takes priority over all other scenarios. Do not assert *Lanning* and complete Section IV.E. by marking 100% IF:

- The debtor's PDI from the means test (Line 45 on Form B122C-2 multiplied by sixty) exceeds the amount in unsecured claims;
- The liquidation value exceeds the amount in unsecured claims; or
- The debtor's income is such that the plan will pay 100% to unsecured claims.

SCENARIO 2: If the debtor is below median on Form B122C-1, complete Section IV.E. like this: **X At least \$0**

SCENARIO 3: If the debtor is above median on Form B122C-1 and Line 45 of Form B122C-2 is a zero or negative number, complete Section IV.E. like this: **X At least \$0**

SCENARIO 4: If the debtor is above median on Form B122C-1 and the number in Line 45 of Form B122C-2 is greater than zero, put the PDI in Section IV.E.

For example, if Line 45 is \$1,000, then Section IV.E. becomes: **X At least \$60,000**

SCENARIO 5: If the debtor is above median on Form B122C-1 and the number on Line 45 of Form B122C-2 is greater than zero, but the debtor asserts she is unable to pay the PDI, the debtor needs to:⁴⁹

- 1) Complete Line 46 of Form B122C-2;
- 2) Provide evidence of the change in circumstances included on Line 46;
- 3) Mark "Yes" in Section I.A. of the plan and include in Section X. the following:

⁴⁹ Local Bankr. R. 3015-1(e)

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.

and

4) Include in Section IV.E. the amount the debtor can pay after deducting the amount on Line 46 from Line 45 and multiplying that amount by sixty. If that number is negative or zero, put zero in Section IV.E. instead.

Example of Scenario 4: If Line 45 is \$1,000 and debtor has a valid change in circumstances on Line 46 of \$500 monthly, Section IV.E. and Section X. would look like this:

Section IV.E.: **X** **At least \$30,000**

Section X:

*The debtor is unable to pay all or part of the debtor's **\$60,000** 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.*

If the number in Line 45 was \$500 and Line 46 was \$1,000 instead, the **number** in Section IV.E. and Section X would be \$0 instead of \$30,000.

D. Supporting Information

The debtor must timely file supporting information, such as schedules and the statement of financial affairs (SoFA). The debtor signs these documents under penalty of perjury. The debtor has an “absolute duty” to ensure that the filed schedules and SoFA are complete and accurate.⁵⁰ Debtors are presumed to have read the documents before signing and are responsible for their contents and the accuracy thereof.⁵¹ Debtors and their attorneys must properly and thoroughly review the

⁵⁰ See *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)

⁵¹ *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”).

schedules in each case and not simply reuse schedules from a prior case.⁵² Failure to present accurate documents raises issues in the bankruptcy case, including dismissal of the case, even after case conclusion.⁵³

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, as it lists the debtor's secured debt. This determines what non-exempt equity is available to pay unsecured creditors and is especially important to determine liquidation value. Schedule E/F lists a debtor's nonpriority and priority debt. Priority debts include certain domestic support obligations, administrative expenses, and taxes.⁵⁴ Unless the priority creditor agrees to different treatment, a debtor's plan must fully pay all priority claims under Section 507.⁵⁵ It is important to check if the unsecured claims, including priority and under-secured claims, exceed the unsecured debt limit of Chapter 13.⁵⁶ If so, the debtor is not eligible for Chapter 13 and must instead file under another chapter. Schedules I and J list the debtor's income and expenses, respectively.

E. Exemptions

Under the “snapshot” rule, a debtor's bankruptcy exemptions and the value that a debtor is entitled to claim in them are determined by the law applicable on the date of filing and thus are fixed at that date.⁵⁷ In Washington State, the debtor may claim exemptions under either state or federal statutory exemption schemes, but not both.⁵⁸

A specific exemption with additional literature is the homestead exemption. Washington State's homestead exemption statute indicates a “legislative intent to limit application to homestead protection in Washington” and so does not apply to

⁵² See *In re Thomas*, 612 B.R. 46 (Bankr. E.D. Pa. 2020) (the court sanctioned an attorney under Fed. R. Bankr. R. 9011 for failing to make a reasonable inquiry into the debtor's schedules after the attorney filed nearly identical schedules in the second case he filed for the debtor)

⁵³ See, e.g., *Harris v. Fortin*, 333 P.3d 556 (Wash. App. 2014) (where debtors were judicially estopped from collecting on a promissory note post-discharge due to misrepresenting in their bankruptcy schedules that their interest in the promissory had no value and was uncollectable)

⁵⁴ 11 U.S.C. § 507

⁵⁵ 11 U.S.C. § 1322(a)(2).

⁵⁶ 11 U.S.C. § 109

⁵⁷ 11 U.S.C. § 522(b)(3)(A); *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193, 1199 (9th Cir. 2012); *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))

⁵⁸ See 11 U.S.C. § 522(b)

property located in other states.⁵⁹ Additionally, a debtor may not claim a homestead exemption in real property owned by an entity such as a corporation or a limited liability company.⁶⁰

IV. Drafting the Plan

A. Use the Correct Form

Debtors must file all chapter 13 plans (original and amended) using ***the current version*** of Local Bankruptcy Form 13-4 (Form Plan) located on the Bankruptcy Court’s website.⁶¹ Debtors may *not* create their own plan form. In addition, debtors must complete all appropriate blanks on the Form Plan and must include any case-specific provisions in Section X. Both the debtors and counsel certify that the form used does not alter the Form Plan, except as provided in Section X, and any revision to the Form Plan not set forth in Section X is void.⁶²

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.⁶³

B. Calculating Payments

Overall plan payments must be enough to pay the scheduled installments each month and allow the Chapter 13 Trustee to take an administrative fee on all disbursements made through the plan. The Trustee’s fee is subject to change but averages around 7.5% of the funds received. The proposed plan payment numbers should be rounded (e.g., \$600.00 rather than \$599.00).

Even if the debtors’ means test yields no requirement to pay funds to unsecured creditors, their plan must still provide that unsecured creditors will be paid at least as much as if their case was liquidated under Chapter 7 of the Bankruptcy Code. This “liquidation value” of the debtors’ estate must be paid to

⁵⁹ See *In re Wieber*, 347 P.3d 41, 45 (Wash. 2015)

⁶⁰ See *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)

⁶¹ Local Bankr. Rule 3015-1(a)

⁶² Local Bankr. Form 13-4, Section X

⁶³ See *In re Grantham*, No. 03-00165-W13 (Bankr. E.D. Wa. May 21, 2003)

allowed unsecured claims over the life of the Chapter 13 plan.

Plan payments are determined in part by reviewing the debtor's documented income for the most recent 60 days, including pay stubs or other documentation. Preparing a plan based solely on the debtor's words results in objections, amended plans, and a great deal of frustration for everyone involved (leaving aside the reasonable inquiry required under FRBP 9011(b)).

Debtors must cure mortgage and real estate tax arrears with the plan if the debtors pay through the plan enough to cure the arrears within five years.⁶⁴ The debtors must also provide for a cure of arrears in property taxes and/or condo dues that includes interest to be paid on the delinquency over the life of a plan.

All secured claims must be listed in Section IV.C of the plan. Any secured claim not provided for in the plan to be paid will not be paid.

C. Procedural Considerations

i. Payment Process

The first plan payment is due within 30 days of filing the Chapter 13 petition. If the debtor is employed, a wage deduction will generally be issued by the Trustee to the employer requesting the plan payments be deducted from each paycheck and forwarded to the Trustee lockbox in Memphis, Tennessee. If not, the debtor will be responsible for making direct payments to the Trustee until the wage deduction takes effect. Debtors that are self-employed, receive unemployment benefits, or have social security/disability will need to remit their plan payments directly to the Trustee's lockbox address by way of cashier's checks or money orders. Alternatively, debtors may pay through www.TFSbillpay.com. Additional information is on the Trustee's website.

ii. Non-Standard Provisions

Provisions 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. There are many reasons for this, including that unnecessary or extraneous provisions in Section X. of the plan merely create confusion.

⁶⁴ Local Bankr. R. 3015-1(j)

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

D. Common Mistakes to Avoid in Completing and Filing the Form Plan

1. Failure to properly complete Section I relating to disclosure of nonstandard provisions and modification of secured debt;
2. Failure to indicate if 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 properly complete Section IV.E. of the plan, which provides the distribution to nonpriority unsecured creditors.**
 - a. **This is one of the most common errors in plan drafting.**
 - b. **For a full explanation, see *Completing Section IV.E. of the Plan Based on the Means Test* in Section IV. above.**
6. Failure to list the liquidation value of the bankruptcy estate in Section IX. The liquidation value and the PDI 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 within sixty *total* months);⁶⁵
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;⁶⁶
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 have the Trustee make payments on vehicles (other than

⁶⁵ 11 USC §1322(d)(1), and (d)(2).

⁶⁶ Local Bankr. R. 3015-1(c)(2)

leases) and delinquent mortgages (*both* pre-petition arrearages and post-petition payments).⁶⁷

V. Filing Documents and Paying the Court Filing Fee

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

The court filing fee can be paid at the time of filing, which is typically charged on the attorney's credit card, or the debtor can pay the \$310.00 court filing fee in installments through the Chapter 13 plan. To pay the fee in installments, the attorney must file an application and order with the court.⁶⁸ The debtor generally must pay the full filing fee within 120 days of the date of the filing of the petition. 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.

The Chapter 13 plan and other schedules, statements, and forms should be filed with the Chapter 13 petition, credit counseling certificates, and the creditor matrix. However, if the petition is initially filed with only the minimum filing requirements, the balance of schedules, statements, forms, and Chapter 13 plan must be filed 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.⁶⁹ Additionally, if the plan was not filed with the petition, the debtor must serve copies of the plan on creditors at least 14 days prior to the originally scheduled meeting of creditors.⁷⁰ This common mistake will result in delaying confirmation.

VI. Attorney Fees

All applications for compensation must conform to Local Bankruptcy Form 13-9 and all orders must conform to Local Bankruptcy Form 13-10.⁷¹ These applications must be served on both the debtor and the Chapter 13 trustee.⁷² The Bankruptcy Court must approve all attorney fees regardless of if the fees are to be paid through the Chapter 13 plan. Accordingly, while it is not prohibited, generally

⁶⁷ Local Bankr. R. 3015-1(j)

⁶⁸ Local Bankr. R. 1006-1

⁶⁹ Local Bankr. R. 1017-1

⁷⁰ Local Bankr. R. 3015-1(c)(2)

⁷¹ Local Bankr. R. 2016-1(e)(3)

⁷² *Id.*

no attorney fees will be paid until the debtor's case has been confirmed.

By default, the presumptive (“no look”) fee is \$5,000.00.⁷³ This “administrative creation” of the bankruptcy court is counsel compensation that is “presumptively reasonable and easy to administer.”⁷⁴ Under the terms of the Court’s confirming order, “the attorney for the Debtor’s compensation is approved in the lesser amount of \$5,000 or the estimated amount listed in section IV.A.3 of the Plan.” The attorney seeking fees in addition to the \$5,000 presumptive fee only needs to seek approval of the amount over what was already approved in the confirmation order, but must still include itemized time records for all services rendered to justify the presumptive fee in the first application.⁷⁵ For example, if the Court approved the no look fee of \$5,000 in the confirming order and the attorney has an additional \$2,000 in incurred fees, the attorney’s fee application request and order should provide for \$2,000 and the time records justifying \$7,000 should be included with the application.

Fee itemizations must contain a detailed description of the service rendered and the time spent performing the service.⁷⁶ “Block Billing,” or itemizing the total time spent working on a case instead of the time expended on specific tasks, is prohibited and may result in an objection to your application and a reduction of your fees.⁷⁷

VII. Automatic Stay and Codebtor Stay

A. Overview

The automatic stay is self-executing and effective upon filing the bankruptcy petition, but only applies to property of the bankruptcy estate as defined in 11 U.S.C. § 541(a).⁷⁸ The automatic stay protects debtors and creditors by giving the debtor time to propose a repayment plan.⁷⁹

⁷³ Local Bankr. R. 2016-1(e)(1)

⁷⁴ See *McBride v. Riley (In re Riley)*, 923 F.3d 433 (5th Cir. 2019)

⁷⁵ Local Bankr. R. 2016-1(e)

⁷⁶ *Id.*

⁷⁷ See *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007) (citation and quotations omitted); 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”)

⁷⁸ See *McCarthy, Johnson & Miller v. North Bay Plumbing (In re Pettit)*, 217 F.3d 1072, 1077 (9th Cir. 2000)

⁷⁹ See *Benedor Corp. v. Conejo Enterprises, Inc. (In re Conejo Enterprises, Inc.)*, 96 F.3d 346, 351 (9th Cir. 1996); *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074 (9th Cir. 2000).

The stay prevents “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.”⁸⁰ Mere retention of estate property after the filing of a bankruptcy petition does not violate the stay.⁸¹ A creditor may be required to return a debtor’s property, however. The stay prevents creating, perfecting, or enforcing liens against the estate and collecting, assessing, or recovering on claims against the debtor that arose prior to bankruptcy proceedings.⁸²

B. Motion to Modify the Automatic Stay

The burden of proof on a motion to modify the automatic stay shifts over time. First, the party seeking relief must establish a *prima facie* case that “cause” exists for relief. The “cause” for relief under 11 U.S.C. §362(d)(1) has no clear definition in the U.S. Bankruptcy Code and so courts must make their determination on a case-by-case basis.⁸³ Then the burden shifts to the debtor to establish that such relief is unwarranted.⁸⁴ The court does not generally conduct an exhaustive evidentiary inquiry, but instead determines whether the movant has met its burden under the relevant statute.⁸⁵ An order “unreservedly” granting or denying a motion for relief from the automatic stay is a final, appealable order.⁸⁶

C. Codebtor Stay

Under Chapter 13, a codebtor stay comes into effect upon the filing of the petition under certain conditions.⁸⁷ The language of Section 1301(a) protects “traditional cosigners, joint obligors, guarantors, sureties and others who have permitted their property to be used to secure a claim against the debtor.”⁸⁸ 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.” A debt securing a debtor’s principal residence qualifies as a consumer debt.⁸⁹ Even if the automatic stay terminates or does not come into effect, the codebtor stay is not affected.⁹⁰

⁸⁰ 11 U.S.C. § 362(a)(3)

⁸¹ See *City of Chicago v. Fulton*, 592 U.S. --, 141 S.Ct. 585, 592 (2021)

⁸² *Id.* (Sotomayor, J., concurring) (citing 11 U.S.C. §§362(a)(4), (6))

⁸³ See *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990)

⁸⁴ See *Adelson v. Smith (In re Smith)*, 389 B.R. 902, 918 (Bankr. D.Nev. 2008) (internal citations omitted)

⁸⁵ See *Biggs v. Stovin et al. (In re Luz International, Ltd.)*, 219 B.R. 837, 842 (B.A.P. 9th Cir. 1998)

⁸⁶ See *Ritzen Group, Inc. v. Jackson Masonry, LLC*, -- U.S. --, 141 S.Ct. 582, 589 (2020)

⁸⁷ 11 U.S.C. § 1301

⁸⁸ Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 84.1, at ¶ 7, Sec. Rev. May 5, 2004, www.Ch13online.com

⁸⁹ See *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 912-13 (9th Cir. 1988)

⁹⁰ See *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

D. Multiple Cases

When filing a case after a case was dismissed within the preceding 1-year period, the automatic stay “with respect to the debtor” will terminate on the 30th day after filing the second case.⁹¹ This termination can be extended if the debtor files a motion to continue the stay and the court holds a hearing within the 30 day period.⁹² The bankruptcy courts are divided whether the language in the statute means the stay terminates with respect to debtors and debtors’ property or to the property of the entire bankruptcy estate. Judge Timothy W. Dore believes in the former while Chief Judge Christopher M. Alston believes in the latter.

When debtors have three cases pending in one year, the automatic stay by default does not go into effect for the third case.⁹³ Despite this, the court may order the stay to take effect in the case as to any or all creditors if a party in interest requests.⁹⁴ The debtor must file the motion within 30 days of the later bankruptcy filing, there must be notice and a hearing, and the debtor must show that the new case was filed in good faith as to creditors to be stayed.⁹⁵

A debtor ordinarily has the burden to prove by a preponderance of the evidence that the debtor filed the second case in good faith.⁹⁶ Furthermore, there are three situations under the statute where the bankruptcy case is presumed to be filed not in good faith:⁹⁷

to 11 U.S.C. § 362(c)(3)); *See also 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)).

⁹¹ 11 U.S.C. §362(c)(3)(A)

⁹² 11 U.S.C. § 362(c)(3)(B); *Reswick v. Reswick et al. (In re Reswick)*, 446 B.R. 362, 372-73 (B.A.P. 9th Cir. 2011); *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.”); *In re Ferguson*, No. 19-13990-CMA (Bankr. W.D. Wa. Dec. 5, 2019) (oral ruling)

⁹³ 11 U.S.C. § 362(c)(4)(A)(i)

⁹⁴ 11 U.S.C. § 362(c)(4)(B)

⁹⁵ *See 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 §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); *See also 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... for protection of the automatic stay notwithstanding her multiple bankruptcy filings”)

⁹⁶ *See Timurshin v. Smagina (In re Timurshin)*, No. C17-1189-JCC (W.D. Wa. Jan. 24, 2018) (citing *In re Montoya*, 342 B.R. 312, 316 (Bankr. S.D. Cal. 2006))

⁹⁷ 11 U.S.C. § 362(c)(3)(C)(i)(I)-(III)

1. The debtor filed more than one previous Chapter 7, 11, or 13 bankruptcy case within the preceding one-year period;
2. A previous Chapter 7, 11, or 13 bankruptcy case was dismissed within such one-year period because the debtor failed to file or amend their petition as required without a substantial excuse, failed to provide adequate protection as ordered by the court, OR failed to perform the terms of a plan confirmed by the court;
3. There has been no substantial change in the financial or personal affairs of the debtor since the dismissal of the most recent chapter 7, 11, or 13 case.

To overcome this presumption, the debtor must provide clear and convincing evidence that the debtor did not file the bankruptcy case in bad faith.⁹⁸ Clear and convincing evidence produces “an abiding conviction” that the factual contentions are “highly probable.”⁹⁹

The Courts establish good faith by looking at the totality of the circumstances.¹⁰⁰ These circumstances include:¹⁰¹

1. Timing of the second petition;
2. How the debts arose;
3. Debtor’s motive in filing the second petition;
4. How the debtor’s actions affected creditors;
5. Why the prior case was dismissed;
6. Likelihood that debtor will have steady income throughout the bankruptcy case;
7. Whether trustee or creditors object to the motion to extend the stay.

Bankruptcy courts also consider the debtor’s post-petition conduct.¹⁰² A Debtor’s good efforts post-petition, such as meeting deadlines, making plan payments, and proposing a feasible plan, can be considered to establish the debtor’s good faith.

E. *In Rem* Relief

⁹⁸ 11 U.S.C. § 362(c)(3)(C)

⁹⁹ See *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (quotations omitted)

¹⁰⁰ See *In re Elliott-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006)

¹⁰¹ *Id.* at 814-15

¹⁰² See *In re Christianson*, 23-10055-MLB (Bankr. W.D. Wa. Feb. 8, 2023) (oral ruling)

The court may grant *in rem* relief from the automatic stay as to real property if, at the request of a party in interest and after notice and hearing, the court finds that the petition was filed as part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filings affecting such real property or transferring interest in real property without secured creditor consent or court approval.¹⁰³ Accordingly, an evidentiary hearing is not necessary to determine the scheme if it can be inferred from the fact of the debtor's multiple bankruptcy filings.¹⁰⁴

The court cannot provide *in rem* relief if the claim of the creditor is not secured by an interest in the debtor's real property.¹⁰⁵ Additionally, 11 U.S.C. § 105(a) does not provide authority for courts to grant *in rem* relief from the automatic stay.¹⁰⁶

F. Annulment

Acts in violation of the automatic stay are void rather than voidable.¹⁰⁷ However, bankruptcy courts may grant retroactive relief from the automatic stay.¹⁰⁸ A determination whether to annul the automatic stay retroactively for cause requires a balance of the equities.¹⁰⁹ The courts use numerous non-exclusive factors to make this determination, including:¹¹⁰

1. Whether the creditor was aware of the bankruptcy case;
2. Whether the debtor engaged in unreasonable or inequitable conduct; and
3. Whether prejudice would result to the creditor.

G. Relief to Proceed in State Court

In determining whether to grant relief to allow parties to continue litigation in a non-bankruptcy forum, many courts analyze twelve nonexclusive factors in determining whether to lift the stay.¹¹¹

¹⁰³ 11 U.S.C. § 362(d)

¹⁰⁴ See *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))

¹⁰⁵ See *Ellis v. Yu*, 523 B.R. 673, 678-79 (B.A.P. 9th Cir. 2014)

¹⁰⁶ See *Johnson v. TRE Holdings LLC (In re Johnson)*, 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006)

¹⁰⁷ See *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992)

¹⁰⁸ *Id.* at 572; See also *Phoenix Bond & Indemnity Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 126 (9th Cir. 1989)

¹⁰⁹ See *Hobdy v. Lien et al. (In re Fjeldsted)*, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003)

¹¹⁰ *Id.* at 25 (the Panel set forth an additional twelve factors the courts may consider)

¹¹¹ See *In re Curtis*, 40 B.R. 795, 799-80 (Bankr. D. Utah 1984). See also *Kronemyer v. American Contractors Indemnity Co. (In re Kronemyer)*, 405 B.R. 915, 921 (B.A.P. 9th Cir. 2009) (in determining whether relief from the automatic stay should be granted to allow state court proceedings to continue, courts may consider judicial economy, expertise of the state court, prejudice to parties and whether exclusively bankruptcy issues are involved);

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 specific 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."

H. Defending a Lawsuit Brought by the Debtor as a Plaintiff

Where the debtor has initiated a prepetition lawsuit against a creditor, the policy considerations enacting an automatic stay do not exist, so the automatic stay does not prohibit a defendant in an action brought by a plaintiff/debtor from defending itself in that action.¹¹²

VIII. Meeting of Creditors

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)

¹¹² See *In re Way*, 229 B.R. 11, 13 (B.A.P. 9th Cir. 1998); see also *In re White*, 186 B.R. 700, 707 (B.A.P. 9th Cir. 1995); *In re Merrick*, 175 B.R. 333 (9th Cir. BAP 1994); *Petheram v. Wells Fargo Bank*, No. C13-1016JLR, 2013 WL 4761049, at *2 (W.D. Wash. Sept. 3, 2013)

A. Attendance Requirement

Debtors are required to appear at a meeting of creditors.¹¹³ The meeting allows for identifying “possible factual matters and attendant legal issues... of major significance to the debtor.”¹¹⁴ An attorney is expected to also appear at the § 341 meeting.¹¹⁵ Debtors sending appearance counsel to avoid attendance raises numerous problems, including adequate disclosure, fee sharing, and ethical issues. Appearance attorneys lack formal association and raise questions about the ability and authority to speak for debtors.¹¹⁶

Creditors are permitted, but not required, to attend and ask questions at the meeting. Given the number of meetings at each calendar, the time a creditor is permitted 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 FRBP 2004.

B. Required Documentation for § 341 Meetings

AT LEAST SEVEN DAYS PRIOR TO THE MEETING OF CREDITORS, a debtor is required to provide:¹¹⁷

1. Copies of sixty days payment advices or other evidence of payment;
2. A copy of the debtor’s most recently filed federal income tax return; and
3. A completed Chapter 13 Trustee Information Sheet.

At the meeting of creditors, a debtor must produce proof of identification (ID) and social security number. For remote meetings, these must be provided in advance to the Trustee’s Office.

Acceptable forms of ID include:¹¹⁸

- 1) Driver’s license;
- 2) Government ID;
- 3) State picture ID;
- 4) Student ID;
- 5) U.S. passport;

¹¹³ 11 U.S.C. §§ 341(a), 343(a)

¹¹⁴ See *In re Johnson*, 291, B.R. 462, 469 (Bankr. D. Minn. 2003)

¹¹⁵ See *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001)

¹¹⁶ See *In re Bradley*, 495 B.R. 747, 786 (Bankr. S.D. Tex. 2013) (citation omitted)

¹¹⁷ 11 U.S.C. § 521; Local Bankruptcy Form 13-2, amended; Interim Fed. R. Bankr. P. 4002(b); Local R. Bankr. P. 4002-1; Local R. Bankr. P. 3015-1(e)

¹¹⁸ Local Bankr. R. 2003-1(a)

- 6) Military ID;
- 7) Resident alien card; and
- 8) Consulate card.

Acceptable forms of proof of social security number include:¹¹⁹

- 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.

To submit these documents to the Trustee's Office, 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 is due to circumstances beyond the debtor's control.¹²⁰ This is the most common reason why § 341 meetings are continued. 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 the Trustee disfavors requests to reschedule the meeting.¹²¹

¹¹⁹ *Id.*

¹²⁰ 11 U.S.C. § 521(e)(2)

¹²¹ Local Bankr. R. 2003-1(b)

➔ Please send all requests to reschedule §341 meetings to courtmail@seattlech13.com

C. Procedure of the § 341 Meetings

Generally, the Chapter 13 Trustee or his representative will conduct a 11 U.S.C. § 341(a) meeting of creditors within 20 – 40 days after the petition is filed. At the meeting, the Trustee will question the debtor about the schedules and the submitted plan, 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 needed information and/or amendments 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.¹²² Accordingly, the sooner debtors provide the requested information and make any necessary amendments, the sooner the debtors' plan can be confirmed.

IX. Plan Confirmation Issues

A. Overview

Debtors and their counsel are responsible for the plan that they file and so should carefully review the plan and confirm its contents. A software provider mistake is not an adequate explanation for problems with a plan. Mistakes slow down confirmation and negatively impact the debtor. Note that the plan must comply with all relevant subsections of Chapter 13; Congress chose to enact all eleven subsections, so a debtor cannot ignore any of them.¹²³

B. Trust Office Contacts

The Trustee's website 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.¹²⁴

The Trustee's staff includes attorneys and paralegals that assist the Trustee in reviewing plans and cases for confirmation. These attorneys and paralegals are good

¹²² 11 U.S.C. § 521(a)(3)

¹²³ See *Jordahl v. Burrell (In re Jordahl)*, No. 15-6009 (B.A.P. 8th Cir. Nov. 2, 2015)

¹²⁴ www.seattlech13.com

contacts and great sources of information (other than legal advice, which the Trustee and his staff cannot provide).

C. Motor Vehicle Collateral

Collateral issues are central in Chapter 13 cases. Motor vehicles used as collateral for secured loans are classified as either 910 vehicles or non-910 vehicles. 910 vehicles were purchased within 910 days of the petition date and the creditor has a purchase money security interest in the motor vehicle. Alternatively, the vehicle is also a 910 vehicle if the debtor incurred credit and used it to purchase other personal property within one year of the petition date.¹²⁵ 910 vehicles are valued at contract price. Non-910 vehicles are valued at its replacement value without deduction for costs of sale or marketing.¹²⁶ This means that a debtor cannot “cram down” the value of a 910-motor vehicle.¹²⁷ A debtor may, however, cram down the interest rate on a 910 vehicle.¹²⁸ For non-910 motor vehicles, a debtor may cram down both the value and the interest rate. The Form Plan includes specific sections for 910 and non-910 collateral.

While in a minority, the Ninth Circuit held that a creditor does not have a purchase money security interest in the total negative net trade-in amount or “negative equity,” of a vehicle traded in during a new vehicle purchase.¹²⁹ A down payment may be applied toward the negative equity if made when trading in a vehicle with negative equity, especially if there is a contract, as the contract manifests the debtors’ “intent to apply the down payment against the negative equity.”¹³⁰

Collateral is typically valued according to creditor’s proof of claim unless the debtor limits the amount of a secured claim in Section I.B on the plan. Debtors may value collateral through the plan process but must fully comply with Local Bankruptcy rules 3015-1(f). Objecting to a claim is generally a better option, as it is less likely to result in a delay in plan confirmation.

¹²⁵ 11 U.S.C. § 1325(a)

¹²⁶ 11 U.S.C. § 506(a)(2)

¹²⁷ 11 U.S.C. § 1325(a)

¹²⁸ See *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].”)

¹²⁹ See *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)

¹³⁰ See *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); *In re Burt*, 378 B.R. 352, 355 n.6 (Bankr. D.Utah 2007))

Interest rates are determined at a hearing where the debtor and any creditors present calculate the rate with a “formula approach” that adds an evidence-specific “risk adjustment” to the “national prime rate.”¹³¹

Litigation over motor vehicle valuation and interest rates is rare; it is generally more economical to reach a settlement and for the debtor to amend the plan accordingly. Financed motor vehicles must be paid through a debtor’s Chapter 13 plan by the Trustee.

D. Mortgages

i. Non-Consensual Mortgage Modification

The rights of a creditor with a security interest only in the debtor’s principal residence cannot be modified.¹³² Thus, the debtor cannot change the monthly payment or the interest rate on the debtor’s home mortgage and cannot withhold any monthly installments due on this obligation.¹³³ In addition, the debtor must make all the post-petition mortgage payments because a default cannot be created. Courts in this District generally approve plans that:¹³⁴

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 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.

The point in time where the anti-modification provision of Section 1322(b)(2) kicks in is still debated, as there is disagreement over if it begins on the petition date or the loan transaction date.¹³⁵ Regardless, there are three requirements for the applicability of the anti-modification provision:¹³⁶

¹³¹ See *Till v. SCS Credit Corp.*, 541 U.S. 465, 479-80 (2004)

¹³² 11 U.S.C. § 1322(b)(2)

¹³³ See *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)

¹³⁴ See *In re Dunn*, 399 B.R. 909, 910 (Bankr. W.D.Wa. 2009)

¹³⁵ See *Benafel v. One West Bank (In re Benafel)*, 461 B.R. 581, 591 (B.A.P. 9th Cir. 2011)

¹³⁶ See *Wages v. J.P. Morgan Chase Bank*, 508 B.R. 161, 165 (B.A.P. 9th Cir. 2014)

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.

For the third requirement, the debtor does not need to exclusively use the real property as a principal residence.¹³⁷ For example, part of the residence can be for commercial use.

Additionally, under-secured mortgage holders cannot be crammed down to the property value.¹³⁸ A wholly unsecured mortgage lien, however, can be “stripped.”¹³⁹ Accordingly, there is an issue on the property valuation which usually leads to dueling appraisers opining on property value at an evidentiary hearing. When the debtor intends to retain the property, the proper valuation is the fair market value, and the debtor may not deduct hypothetical selling costs.¹⁴⁰ The valuation date is the petition date.¹⁴¹

When a chapter 13 case is preceded by a chapter 7 case, debtors may wholly avoid unsecured mortgage liens even when not entitled to a discharge if they complete their plan.¹⁴² While there is not a time limitation to file a motion to avoid a wholly unsecured junior mortgage lien, to bring such a motion after debtor has received a discharge or the case is closed, the debtor must meet the following conditions:¹⁴³

1. The confirmed plan must call for avoiding the wholly unsecured junior lien and treat any claim as unsecured;

¹³⁷ *Id.*; See also *Lee v. U.S. Bank NA*, No. 21-13887, 2024 WL 2349896 (11th Cir. May 23, 2024) (where a mortgage on 43 acres of mostly farmland cannot be modified because the property is the only collateral for the loan and her home is located on two of those acres)

¹³⁸ See *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993)

¹³⁹ See *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002)

¹⁴⁰ See *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)

¹⁴¹ See *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”); See also *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”)

¹⁴² See *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)

¹⁴³ See *Chagolla v. JPMorgan Chase Bank (In re Chagolla)*, 544 B.R. 676, 681 (B.A.P. 9th Cir. 2016)

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.

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.¹⁴⁴ In addition, repayment plans to secured creditors must provide equal periodic payments, which necessarily excludes balloon payments.¹⁴⁵ 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.¹⁴⁶ Moreover, if the non-residential property has negative cash flow, a debtor whose income is below the state median generally has to surrender the property.

ii. 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.¹⁴⁷ This practice is necessary for the effective administration and execution of chapter 13 plans. The Trustee can monitor the debtor’s mortgage payments and provide an independent accounting if a dispute arises between the debtor and the mortgage creditor.¹⁴⁸

Plans may provide for a reasonable time to cure a delinquent mortgage obligation.¹⁴⁹ “Reasonable time” is a flexible concept determined on a case-by-

¹⁴⁴ See *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1172 (9th Cir. 2004)

¹⁴⁵ 11 USC § 1325(a)(5)(B)(iii)(I); *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 §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 §1322(b)(5) and when a long-term or matured debt is paid in full under the plan)

¹⁴⁶ 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”); See also *Geller v. Grijalva (In re Gijalva)*, 2012 WL 1110291, at *2 (Bankr. D.Az. April 2, 2012) (“§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 Chapter 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)

¹⁴⁷ Local Bankr. R. 3015-1(j)

¹⁴⁸ See *In re Vela*, 526 B.R. 230, 237 (Bankr. W.D.Mich. 2015) (citation and quotations omitted)

¹⁴⁹ 11 U.S.C. §1322(b)(5)

case basis within the sound discretion of the trial court.¹⁵⁰ Reasonableness is multi-factor analysis, including:¹⁵¹

1. The nature and repayment period of the original obligation;
2. The nature of the property held as security;
3. Debtors' payment record;
4. The amount and reason for the arrearage; and
5. Whether the debtors are putting forth their best effort to cure the default.

iii. Claims and Proof Thereof

Secured creditors must file a proof of claim or interest for the claim or interest to be allowed, except as provided.¹⁵² 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.¹⁵³ 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.¹⁵⁴

Debtors and their counsel should carefully review mortgage creditors' proofs of claims to make sure that creditors did not overstate the pre-petition arrearage amount or post-petition payment amounts. 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, shortage items, and items labeled "corporate advance" and the like.

iv. Consensual Mortgage Modification

A debtor may make a written request to the Trustee for authority to enter a temporary or trial modification of a mortgage.¹⁵⁵ 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 debtor cannot make payments directly to the

¹⁵⁰ See *Central Fed. Sav. & Loan Assoc. v. King (In re King)*, 23 B.R. 779, 781 (B.A.P. 9th Cir. 1982)

¹⁵¹ See *In re King*, 7 B.R. 110, 112-113 (Bankr. S.D. Cal. 1980); *In re Short*, No. 19-42701, 2020 WL 1213207 (Bankr. N.D. Cal. March 10, 2020)

¹⁵² Fed. R. Bankr. P. 3002(a)

¹⁵³ *Id.*

¹⁵⁴ Fed. R. Bankr. P. 3002(c)(7)

¹⁵⁵ Local Bankr. R. 4001-2

mortgage lender; the Trustee *must* make payments instead.¹⁵⁶ The debtor must make the plan payment such 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, the trial mortgage modification documents should be uploaded 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. A separate request is unnecessary. If there is no answer by the end of the next business day or if expedited approval is needed, please contact the Trustee's office for status. Remember that debtors should be advised that the Trustee makes payments on delinquent mortgages.

E. Homeowner/Condominium Associations

Post-petition condominium assessments and unmatured contingent debts are dischargeable in Chapter 13 cases.¹⁵⁷ As explained by the Ninth Circuit, the exceptions to the broad discharge of debts in the federal statute do not include a reference to post-petition association assessments.¹⁵⁸

F. Judgment Liens

A judgment lien can 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.

A debtor may only avoid the judgment lien to the extent that the lien "impairs" the debtor's homestead exemption.¹⁵⁹ 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

¹⁵⁶ Local Bankr. R. 3015-1(j)

¹⁵⁷ See *Goudelock v. Sixty-01 Ass'n (In re Goudelock)*, No. 895 F.3d 633, 638 (9th Cir. 2018)

¹⁵⁸ *Id.* (citing 11 U.S.C. §§ 1328(a)(1)-(4) & 523(a)(16))

¹⁵⁹ 11 U.S.C. § 522(f)

is situated.¹⁶⁰ He or she does not need to also file an abstract of the judgment under Wash. Rev. Code § 4.56.200(2).¹⁶¹ A judgment creditor's lien can thus survive in part and be avoided in part.¹⁶²

G. 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.¹⁶³ The liquidation value is generally the collateral value reduced 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.¹⁶⁴ The interest rate used is the federal judgment rate of interest, which is on the Trustee's website.¹⁶⁵

H. 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:¹⁶⁶

- 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," as defined below; 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.

An "insider" includes, but is not limited to, a debtor's relative, general partner,

¹⁶⁰ Wash. Rev. Code § 6.13.090

¹⁶¹ See *Mehl v. Roberts (In re Deal)*, 933 P.2d 1084, 1086-87 (Wash. Ct. App. 1997)

¹⁶² See *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)

¹⁶³ 11 U.S.C. § 1325(a)(4)

¹⁶⁴ See *Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231, 1234 (9th Cir. 2002)

¹⁶⁵ www.seattlech13.com

¹⁶⁶ 11 U.S.C. § 547(b)

partnership, and corporation.¹⁶⁷

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 and the amounts of the payments; and the remaining balance.

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 of six months after a conversion of the case to a Chapter 7 case.¹⁶⁸

2) The value of the preference is included in Section IX of the plan *in addition* to any other liquidation value.

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

I. Notice Period for Pre- and Post-Confirmation Amended Plans

Service of a motion to approve a pre-confirmation amended plan requires 28 days' notice from the date of service to the hearing date.¹⁶⁹ All other motions and notices require 21 days instead.¹⁷⁰ This includes service of a motion to approve a post-confirmation amended plan.¹⁷¹

X. Post-Confirmation Issues

A. Overview: Binding Effect of Confirmation

A confirmed plan binds the debtor and each creditor.¹⁷² This binding effect applies regardless of if creditors obtained relief from the automatic stay prior to

¹⁶⁷ 11 U.S.C. § 101(31)

¹⁶⁸ 11 U.S.C. § 546(a)

¹⁶⁹ Fed. R. Bankr. P. 2002(b)

¹⁷⁰ Local Bankruptcy Rule 9013-1(d)(2)(F) [Note that FRBP 2002(b) takes priority, so where Rule 2002(b) applies, the Local Bankruptcy Rule does not]

¹⁷¹ 11 U.S.C. § 1329; Local Bankr. R. 9013-1(d)(2)(F)

¹⁷² 11 U.S.C. § 1327(a); *United States Aid Funds, Inc. v. Espinosa (In re Espinosa)*, 559 U.S. 260 (2010)

confirmation of the plan.¹⁷³ Additionally, please remember the requirement for debtors to complete the post-filing financial education course mentioned in Section II.B. in this manual.

B. Claims Review Process

The Trustee distributes funds pursuant to the plan. Therefore, disputed claims and untimely claims may receive disbursements until a written objection is filed and the Court disallows the claim. Whether a claim is filed timely or late, it is allowed unless a party in interest objects.¹⁷⁴ Accordingly, 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.¹⁷⁵

➔ **The bottom line is that representation of a debtor does not end at confirmation.** Always review your client's case after the claims bar deadlines have passed. By reviewing the debtor's case after the claims bar deadlines have passed, issues can be identified and rectified, such as issues with feasibility, issues with claims that might need objections, and the need to file claims. It is also essential to review notices of mortgage payment changes, notices of fees, and any amended claims to prevent problems. Debtors need the assistance of counsel throughout the process to receive the great benefits afforded them under Chapter 13 of the U.S. Bankruptcy Code.

C. Objections to Claims

Although a claim may initially be allowed, it may thereafter be disallowed, in full or in part, following affirmative action by the debtor or trustee and by court order. A filed objection to the proof of claim initiates a "contested matter,"

¹⁷³ See *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 Kurtzahan)*, 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)

¹⁷⁴ 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)

¹⁷⁵ *Smith*, 2010 WL 5018379, at *3; *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

sometimes in the form of an adversary proceeding.¹⁷⁶ In that event, the proof of claim will not be allowed until the bankruptcy court determines the proper amount of the claim.¹⁷⁷ A filed objection must be adjudicated by the bankruptcy court to determine whether the claim should be allowed.¹⁷⁸

Objections to claims in chapter 13 cases must be in writing and filed.¹⁷⁹ 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.¹⁸⁰ Objections to claims must be filed and served no later than 270 days from the petition date, unless good cause is shown.¹⁸¹ Objections to claims shall be filed and served at least 30 days preceding the date fixed for hearing.¹⁸² **FRBP 3007(a)(2) controls proper service of an objection to claim. Of particular interest is the provisions on serving an insured depository institution and the United States or its officers or agencies.** For example, the Internal Revenue Service cannot be sued; the proper party in actions involving federal taxes is the United States.¹⁸³ Contested matters must be served in the manner provided for service of a summons and complaint by FRBP 7004.¹⁸⁴

Service on the United States is done by mailing a copy of the summons and complaint to:¹⁸⁵

1. The civil process clerk at the Office of the United States Attorney for the District in which the action is brought;
2. The Attorney General of the United States in Washington, D.C.; *and*
3. The officer or agency of the United States.

This requirement likely also applies to objections to claims of the United States.¹⁸⁶ While there is discussion on the specific service requirement, risking defective

¹⁷⁶ 11 U.S.C. § 502(b); Fed.R.Bankr.P. 3007; *Shook v. CBIC (In re Shook)*, 278 B.R. 815, 821-22 (B.A.P. 9th Cir. 2002); *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 Federal Rule of Bankruptcy Procedure 9014”)

¹⁷⁷ *Id.* (citing 11 U.S.C. § 502(b))

¹⁷⁸ See *Lane v. The Bank of New York Mellon et al. (In re Lane)*, 959 F.3d 1226, 1230 (9th Cir. 2020)

¹⁷⁹ Fed. R. Bankr. P. 3007(a)

¹⁸⁰ Fed. R. Bankr. P. 3007(a); Local Bankr. R. 9013-1(d)(2)(C)

¹⁸¹ LBR 3007-1(b)

¹⁸² Fed. R. Bankr. P. 3007; Local Bankr. R. 9013-1(d)(2)(C)

¹⁸³ See *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)

¹⁸⁴ Fed. R. Bankr. P. 9014(b)

¹⁸⁵ Fed. R. Bankr. P. 7004(b)(4) & (5); *In re Morrell*, 69 B.R. 147, 149 (Bankr. N.D.Cal. 1986)

¹⁸⁶ See *In re Levoy*, 182 B.R. at 834; see also *Fortune & Faal v. Zumbrun (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)

service is inadvisable; there is little consequence to serving in a more conservative manner.

United States agencies are served by mailing a copy of the motion addressed to:¹⁸⁷

- 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 itself.

A properly executed and filed proof of claim constitutes prima facie evidence of the validity and amount of the claim.¹⁸⁸ This does not, however, shift the burden of proof.¹⁸⁹

D. Post-Confirmation Plan Modifications

If debtors need to modify their plan post-confirmation, they need to file a modified plan, a motion requesting approval of said plan, and a declaration explaining the need for the modification.¹⁹⁰ Some rules governing the original plan confirmation still apply. For example, a post-petition modification of a chapter 13 plan cannot “provide for payments” beyond 5 years.¹⁹¹ The debtors also must 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.

Note that unlike motions to confirm a plan, motions to approve a post-confirmation plan modification require 21 days’ notice rather than 28 days’ notice.¹⁹² Additionally, a post-confirmation modified plan must be proposed in good faith.¹⁹³ As part of that analysis, the Court may consider if the proposed modification

¹⁸⁷ See *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 United 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)

¹⁸⁸ See *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)

¹⁸⁹ See *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 22 n.2 (2000); See also *Litton Loan Servicing v. Garvida (In re Garvida)*, 347 B.R. 697, 706 (B.A.P. 9th Cir. 2006) (citations omitted)

¹⁹⁰ Local Bankr. R. 3015-1(i)

¹⁹¹ 11 U.S.C. § 1329(c)

¹⁹² Fed. R. Bankr. P. 2002(a)(5) & (b)

¹⁹³ 11 U.S.C. §§ 1329(b)(1) & 1325(a)(3)

correlates to the debtors' change in circumstances.¹⁹⁴

E. Incurring New Debt Post-Confirmation

Under the terms of the Court's confirming order, debtors generally may not incur any debt, except after obtaining the Court's prior permission or the Trustee's permission under Local Bankruptcy Rule 3015-2. The reasons for this are many, including a danger to chapter 13 plan's performance and the existing creditors.¹⁹⁵ Consequently, post-petition activities of a chapter 13 debtor require monitoring; these events matter.¹⁹⁶ Additionally, a claim holder for consumer debt 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.¹⁹⁷

Not all debt is prohibited; Debtors can incur emergency debt such as immediately necessary medical services or motor vehicle repairs to travel to work.¹⁹⁸ This allowance is conditioned under the understanding that the consent of the Chapter 13 trustee is obtained before incurring the debt *if practicable*.¹⁹⁹ Accordingly, debtors should likely take the cautious approach and move for the Court's approval as soon as they are able.

Court approval is also not necessary to incur post-confirmation debt to finance a motor vehicle.²⁰⁰ Instead, debtors must make a written request to the Trustee for approval. Forms for vehicle purchases are located on the Trustee's website. The Trustee will not approve vehicle purchases exceeding \$18,000.00 and 20% interest. The decision is based on financial information the debtors provide. If denied, the debtor may then move for approval with the Court.

Debtors must promptly move to apply for approval to employ professionals,

¹⁹⁴ See *Mattson v. Howe*, 468 B.R. 361, 371 (B.A.P. 9th Cir. 2012)

¹⁹⁵ See *In re Trentham*, 145 B.R. 564, 568 (Bankr. E.D.Tenn. 1992)

¹⁹⁶ See *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 post-petition debt, both secured and unsecured, without prior approval of the Chapter 13 Trustee or of the Court"); See also *Houston v Eiler et al. (In re Cohen)*, 305 B.R. 886, 897 (B.A.P. 9th Cir. 2004) (noting that debtors cannot do anything with the property of the estate in their possession without permission from the court)

¹⁹⁷ *Id.* (citing 11 U.S.C. §§ 1305).

¹⁹⁸ See *In re Perkins*, 304 B.R. 477, 482 (Bankr. N.D.Ala. 2004)

¹⁹⁹ See *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")

²⁰⁰ Local Bankr. R. 3015-2

including employment of personal injury attorneys and real estate brokers.²⁰¹ For real estate agents, the debtors must obtain approval to retain them *immediately* rather than waiting until after the debtors have obtained an offer to purchase their real property. The court may deny approval if the motion to approve the professional is untimely.²⁰² In addition, court may not grant retroactive retention of professionals.²⁰³

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

F. Motions for Sale of Real Property

Motions for the sale of real property should be noted for hearing. 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) Debtor's declaration 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 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

²⁰¹ See Local Bankr. R. 2014-1

²⁰² See *Okamoto v. THC Financial Corp. (In re THC Financial Corp.)*, 837 F.2d 389 (9th Cir. 1988); See also *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 973 (9th Cir. 1995) ("[i]n bankruptcy proceedings, professionals 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)

²⁰³ See *In re Benitez*, No. 19-70230, 2020 WL 1272258 (Bankr. E.D. N.Y. March 13, 2020) (the court denied without prejudice the Chapter 7 trustee's motion to retain counsel *nun pro tunc*)

debtor shall continue to make plan payments.

A waiver of FRBP 6004(h) must be added if you do not want the order stayed for fourteen days from entry.

G. 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.²⁰⁴ The most common rationales 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. There are other non-exclusive reasons to dismiss a case, including:²⁰⁵

- 1) Unreasonable delay by the debtor that is prejudicial to creditors;
- 2) Nonpayment of any required fees and charges;
- 3) Failure to timely file a plan;
- 4) Failure to commence making timely payments;
- 5) Denial of confirmation of a plan and denial of a request made for additional time for filing another plan or a modification of a plan;
- 6) Material default by the debtor with respect to a term of a confirmed plan;
- 7) Revocation of the order of confirmation and denial of confirmation of a modified plan;
- 8) Termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
- 9) Only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition, the information required by 11 U.S.C. §521(a)(1);
- 10) Only on request of the United States trustee, failure to timely file the information required by 11 U.S.C §521(a)(2); or
- 11) Failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

Ineligibility under 11 U.S.C. § 109(e) is cause for dismissal even though ineligibility is not one of the enumerated examples under Section 1307(c).²⁰⁶ While ineligibility under 11 U.S.C. § 109(e) may not be jurisdictional, ineligibility still

²⁰⁴ 11 U.S.C. § 1307(c)

²⁰⁵ *Id.*

²⁰⁶ 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)

mandates dismissal of the case when a debtor is not eligible.

H. Voluntary Motions to Dismiss

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).²⁰⁷ However, 11 U.S.C. § 1307(b) grants the debtor an “absolute right to dismiss a Chapter 13 bankruptcy case” unless the case was converted from Chapter 7, 11, or 12 bankruptcy.²⁰⁸

XI. Completion of the Plan and Discharge

If the debtor does not complete “all payments under the plan,” including promised direct payments, the debtor is not entitled to a discharge.²⁰⁹ 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.”²¹⁰

The debtor must at a minimum pay to unsecured claims the amounts specified in Section IV.E. (Nonpriority Unsecured Claims) and Section IX. (Liquidation Analysis) of the plan, but the debtor may pay more than those amounts to unsecured claims.²¹¹

Upon plan completion as confirmed, payment of all required sums, completion of post-filing financial education, and the filing of the appropriate certificates, the debtors 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.

XII. Role of the Chapter 13 Trustee

The Trustee has a fiduciary duty to creditors and is obligated to raise issues

²⁰⁷ See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007)

²⁰⁸ See *Nichols v. Marana Stockyard & Livestock Market, Inc. (In re Nichols)*, No. 20-60043, 2021 WL 3891571, at *6 (9th Cir. Sept. 1, 2021) (citing *Law v. Siegel*, 571 U.S. 415 (2014))

²⁰⁹ See *Derham-Burk v. Mrdutt (In re Mrdutt)*, 600 B.R. 72, 77 (B.A.P. 9th Cir. 2019)

²¹⁰ *Id.* at 81

²¹¹ See *In re Begoun*, No. 13-37604, 2019 WL 3763935, at *3 (Bankr. N.D. Ill. Aug. 6, 2019) (“the plan established only the minimum her unsecured creditors would receive . . . [the plan] language established a floor, not a ceiling”)

that benefit individual secured and unsecured creditors or affect the integrity of the bankruptcy process and suggest abuse by overreaching parties.²¹² This does not mean, however, that a trustee must raise every conceivable plan defect. In fact, a Chapter 13 Trustee does not owe all the duties of a traditional trustee at common law.²¹³ The Trustee's role spans the many competing interests in Chapter 13 cases; the Trustee works with everyone and for no one.²¹⁴

The Trustee and his staff will conduct the necessary analysis of the plan to determine if it complies with the Bankruptcy Code or if there are administrative problems. After plan confirmation, 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:

- 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.

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, especially confirmation hearings, that concern the value of property subject to a lien, confirmation of a plan, or modification of a plan after confirmation.²¹⁵ 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.²¹⁶

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;

²¹² James J. Robinson, *Chapter 13 Duties, Powers, and Limitations*, at *11 (2019) (presented at the National Association of Chapter 13 Trustees 2019 Seminar, July 16 – 19, 2019, Indianapolis, Indiana)

²¹³ See *In re Escarcega*, 573 B.R. 219, 233 (B.A.P. 9th Cir. 2017)

²¹⁴ *Id.* (citing Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 58.1, www.Ch13online.com) (internal quotations omitted)

²¹⁵ 11 U.S.C. § 1302(b)(2)

²¹⁶ See *Andrews v. Loheit (In re Andrews)*, 49 F.3d 1404, 1408 (9th Cir. 1995); See also *Searles v. Riley (In re Searles)*, 317 B.R. 368, 374 (B.A.P. 9th Cir. 2004) ("the chapter 13 trustee has a duty to appear and be heard on plan confirmation")

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, 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 \$5,000 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 plan confirmation but before completion, move to modify the debtor's plan to increase or reduce the payments on claims, extend or reduce the time for plan payments, or alter the amount of the distribution to a creditor under certain circumstances.²¹⁷

XIII. Bankruptcy Abuse

Courts may dismiss cases after assessing the totality of the circumstances for bad faith.²¹⁸ 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.²¹⁹

Once a court has determined that cause for dismissal exists, the court must determine what remedial action to take. The court may dismiss a case with

²¹⁷ 11 U.S.C. § 1329(a)

²¹⁸ See *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999)

²¹⁹ *Id.*

prejudice, which precludes the debtor from seeking to discharge debts which would have been discharged by their plan, or impose a lesser remedy, such as barring re-filing for bankruptcy relief for 180 days or longer.²²⁰

XIV. Suggested Nonstandard Provisions

Section X. of the form plan provides a place to add nonstandard provisions to a plan. Many provisions included in Section X. are simply unnecessary and often add confusion to a plan. Generally, less (or nothing) is more. However, there are times when nonstandard provisions are necessary. Below are certain provisions that you may find useful in certain circumstances (if the provisions are inappropriate in the particular case, of course, the Trustee reserves the right to object to any of these provisions):

When the debtor wants a 910-vehicle claim to “survive” the plan:

The Trustee shall make the monthly payments only on the claim of _____ [creditor] regarding the _____ [vehicle description] included in Section IV.C.10. The Trustee shall not pay all available funds pro rata on this claim under Section IV.C.4. The claim may not be paid in full during the plan and any remaining balance owed at the time of plan completion will be paid directly by the debtor(s) post-discharge. However, the debtor(s) is obligated to complete the applicable commitment period provided for in Section II.

When a below median debtor with a 36-month applicable commitment period will not be paying a priority domestic support obligation in full during the plan:

The debtor’s domestic support obligation payable to _____ may not be paid in full. Notwithstanding Section II. of the plan, the debtor shall make plan payments for a sixty-month period pursuant to 11 U.S.C. § 1322(a)(4).

²²⁰ See *Ellsworth v. Lifescape Medical Associates et al. (In re Ellsworth)*, 455 B.R. 904, 922 (B.A.P. 9th Cir. 2011)