AMERICAN BANKRUPTCY INSTITUTE

2019 Annual Spring Meeting

CONCURRENT SESSION

Consumer

All Things 13

Hon. Michael A. Fagone
U.S. Bankruptcy Court (D. Me.); Bangor

James J. Haller
Haller Law Group; Mundelein, Ill.

Hon. Michael B. Kaplan
U.S. Bankruptcy Court (D. N.J.); Trenton

Richardo I. Kilpatrick
Kilpatrick & Associates, PC; Auburn Hills, Mich.

2019

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Presented by:

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Outline of Session

- Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case.
- Chapter 20 Lien Stripping: Still No Definitive Answers, Just Questions
- Potential Issues With Verbose Confirmation Orders
  (Why Every Term Should be Included in the Proposed Plan)
- Delinquent Post-Petition Mortgage Payments and Discharge

Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case

Applicable Statutes

- 11 U.S.C. § 103
- 11 U.S.C. § 349
- 11 U.S.C. § 362
- 11 U.S.C. § 1306
- 11 U.S.C. § 1307
- 11 U.S.C. § 1326
- 11 U.S.C. § 1327

Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case

Pre-Confirmation Dismissal

- Upon dismissal of a bankruptcy case, property of the estate revests in the entity in which such property was vested before the commencement of the case. 11 U.S.C. § 349(b)(3).
- Dismissal also dissolves the protections of the automatic stay that formerly extended to both property of the estate and property of the debtor. *See* 11 U.S.C. § 362(c)(2)(B).
- When a chapter 13 plan is not confirmed, section 1326(a)(2) requires the trustee to return post-petition plan payments to the debtor, after the payment of allowed administrative expenses. 11 U.S.C. § 1326(a)(2).

Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case

Pre-Confirmation Dismissal

- Discussion
  - When a chapter 13 case is dismissed prior to confirmation, are the debtor's post-petition earnings in the trustee's possession protected from levy or garnishment by creditors?
  - Courts are divided on the issue
    - Some hold that such funds are generally subject to levy or garnishment in the absence of the protections of the stay
    - Others conclude that such funds must be returned to the debtor under section 1326.

Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case

Post-Confirmation Dismissal

- Discussion
  - What happens to funds in the trustee's possession upon dismissal post-confirmation?
  - Courts are divided on the interplay between sections 349(b)(3) and 1326(a)(2)
    - Some courts hold that section 1326(a)(2) requires the trustee to disburse any funds on hand pursuant to the confirmed plan, even when the debtor's case is dismissed.
    - Others hold that, under section 349(b)(3), dismissal revests post-petition earnings in the debtor – as property of the estate under section 1306(a)(2) in which the debtor has a contingent right at the time of the petition – requiring the trustee to return any undistributed post-petition payments to the debtor upon dismissal.

Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case

Deviating from the Rule of Revesting "For Cause"

- Section 349(b)(3) establishes a default rule of revesting property of the estate upon dismissal, the statute also gives the court the power to deviate from the default "for cause."
- The term "cause" is not defined by the Code, and there appears to be little consensus among the courts.

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Applicable Statutes

- 11 U.S.C. § 1322 Contents of a Plan
- 11 U.S.C. § 1325 Confirmation of a Plan
- 11 U.S.C. § 1328 Discharge
- 11 U.S.C. § 109 Who May be a Debtor
- 11 U.S.C. § 102 - Rules of construction

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Background

- Prior to 1993, bankruptcy courts allowed a chapter 13 debtor to use 11 U.S.C. § 1322(b)(2) to avoid both wholly and partially underwater liens. In 1993, however,
- the Supreme Court decided *Nobelman v. Am. Savs. Bank*, 508 U.S. 324 (1993), which limited a chapter 13 debtor's ability to use § 1322(b)(2) to avoid liens to only those circumstances where the junior lien was wholly underwater. *Id.* at 332.
- After *Nobelman*, a chapter 13 debtor was still permitted to use § 1322(b)(2) to avoid liens which were "secured" by their principal residence, if such lien was wholly underwater (and thus, pursuant to § 506(a)(1), not "secured").

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Background

- What is a "strip off?"
  - Wholly unsecured junior mortgage is avoided.
- What is a "Chapter 20?"
  - Initial chapter 7 discharge eliminates in personam liability.
  - Subsequent chapter 13 strips off a wholly unsecured 2nd mortgage.

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Background

- *Johnson v. Home State Bank*, 501 U.S. 78 (1991), is the Supreme Court's definitive ruling on the Code's permissibility of a Chapter 20 case.
- The holding in *Johnson* was affected by BAPCPA
  - Section 1328(f) prohibits a Chapter 13 discharge within four (4) years of filing a Chapter 7.

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Issues of good and bad faith

- Is it bad faith to follow the Chapter 20 procedure because it allows the debtor to achieve a strip off which is not allowable in a Chapter 7?
  - Slim Majority - No

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Minority arguments

- The BAPCPA amendments foreclose a Chapter 20.
- Pursuant to Section 1325(a)(5)(B) a creditor retains its lien until discharge. Since there is no discharge in a Chapter 13 filed within 4 years of the previous Chapter 7, no lien strip is allowable.
- Section 349 unwinds any lien strips upon dismissal of the subsequent Chapter 13 case.
- Allowing a strip off would circumvent the prohibition against lien strips in Chapter 7 under in *Dewsnup v. Timm*, 502 U.S. 410 (1992).

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Majority arguments

- Nothing in the Bankrupty Code prohibits Chapter 20 strip offs.
- Section 1325(a)(5)(B) is inapplicable to wholly unsecured junior mortgages because they are no "secured."
- Discharge and lien strips are different concepts. Lien strip is permanent upon completion of the plan.
- The inclusion of the new lien retention provision in BAPCPA, § 1325(a)(5)(B), which requires that liens supported by value await the entry of a discharge so as to be permanently "stripped-off", implicitly mandates different treatment for Chapter 20 valueless liens.

Chapter 20 Lien Stripping: Still not Definitive Answers, Just Questions

Other considerations

- How is the in rem, wholly unsecured junior mortgage, factored into Section 109(e)'s debt limitations?
- How Does the "Good Faith" Requirement Factor into the Analysis of chapter 20 Lien Stripping?

Potential Issues With Verbose Confirmation Orders (Why Every Term Should be Included in the Proposed Plan)

Inconsistency

- What controls if the order is inconsistent with the plan?
  - 11 U.S.C. § 1327 states the "provisions of a confirmed plan bind the debtor and each creditor…whether or not such creditor has objected to, has accepted, or has rejected the plan."
  - If the confirmation order adds determinations not mirrored in the plan (eg. typo regarding amount of secured value of a vehicle contrary to the plan), is the plan confirmation valid?
  - How does the debtor amend payments to creditors, under 11 U.S.C. § 1329 or by motion to reconsider the confirmation order?

Potential Issues With Verbose Confirmation Orders (Why Every Term Should be Included in the Proposed Plan)

Res judicata

- What if the confirmation order adds new additional requirements for the debtor or creditors?
  - *Espinosa* stands for the "limited proposition that a confirmed plan is binding on all parties in interest, *provided the plan proponent afforded such parties adequate notice*, consistent with the Due Process Clause of the United States Constitution-even if the plan violates the Bankruptcy Code in some particulars."
  - So if a debtor or creditor did not have notice of new requirements found in the confirmation order, is the confirmation order res judicata of those requirements?

Potential Issues With Verbose Confirmation Orders (Why Every Term Should be Included in the Proposed Plan)

Effect on subsequent bankruptcies

- 11 U.S.C. § 109(g)(1) makes ineligible debtors who previous "…case was dismissed by the court for willful failure of the debtor to abide by orders of the court…"
- If so, a debtor is in eligible to be a debtor for 180 days. 11 U.S.C. §109(g).
- If the plan includes a requirement for the debtor to turnover tax returns and refunds every year, then does failure to turn them over create a 180 bar on refiling?

Potential Issues With Verbose Confirmation Orders (Why Every Term Should be Included in the Proposed Plan)

How to challenge the order

- Appeal order of confirmation
- Sue the court?
- Don't sue the trustee

Delinquent Post-Petition Mortgage Payments and Discharge

Issue and background

- Issue: whether payments on a mortgage paid directly to mortgage holder and referenced in a chapter 13 plan are "payments under the plan" for purposes of 11 U.S.C. §1328(a).
  - 11 U.S.C. § 1328(a) states in pertinent part: "as soon as practicable after completion by the debtor of ***all payments under the plan***... the court shall grant the debtor a discharge of all debts ***provided for by the plan***..." (Emphasis added.)
  - 11 U.S.C. § 1307(c)(6) allows a trustee to move to dismiss for cause including "material default by the debtor with respect to a term of a confirmed plan;..."
  - As a result several chapter 13 trustees file motions to dismiss if they discover that a debtor is delinquent in mortgage payments.
  - Why now?
    - Fed. R. Bankr. P. 3002.1

Delinquent Post-Petition Mortgage Payments and Discharge

Majority

- "Payments under the plan" refer to any payment made pursuant to a chapter 13 plan, regardless of whether such payment is made by a debtor directly to the creditor or through the trustee.

Delinquent Post-Petition Mortgage Payments and Discharge

Minority

- "Payments under the plan" refer to monthly plan payments made to the trustee.
- Rationale:
  - Congress intended a distinction between "All Payments Under the Plan" vs "Provided For By The Plan.
  - Interpretation consistent with similar language in Section 1328(a).
  - Consistent with rule resolving ambiguities in debtor's favor.

Delinquent Post-Petition Mortgage Payments and Discharge

What to do if you are in a majority district and the trustee moves to dismiss the case

- Advise clients in writing before filing of the requirement to be current on direct payments.
- Don't rely upon a secured creditor filing a motion for relief from stay to warn the Debtor of delinquent payments.
- Seek a hardship discharge under 11 U.S.C. §1328(b).
- Anti-Nike argument: Just Don't Do It. Don't refer to direct payments in the plan and instead in schedule J.

ABI Annual Spring Meeting
Washington, DC
April 12, 2019

Disposition of Estate Funds Upon Dismissal of a Chapter 13 Case

Michael A. Fagone
United States Bankruptcy Judge
District of Maine

I. APPLICABLE STATUTES

11 U.S.C. § 103

(i) Chapter 13 of this title applies only in a case under such chapter.

11 U.S.C. § 349

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—
(1) reinstates—
(A) any proceeding or custodianship superseded under section 543 of this title;
(B) any transfer avoided under section 542, 544, 545, 547, 548, 549, or 724(a) of this Title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
(C) any lien voided under section 506(d) of this title;
(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 362

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—
(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
(2) the stay of any other act under subsection (a) of this section continues until the earliest of—
(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied[.]

11 U.S.C. § 1306

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—
(1) all property of the kind specified in such section that the debtor acquires after the

commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

11 U.S.C. § 1307

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1326

(a) (1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount—
(A) proposed by the plan to the trustee[.]
…
(2) A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).
…
(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

11 U.S.C. § 1327

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has accepted, or has rejected the plan.
(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all the property of the estate in the debtor.
(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

II. DISCUSSION

i. Pre-Confirmation Dismissal

Upon dismissal of a bankruptcy case, property of the estate revests in the entity in which such property was vested before the commencement of the case. 11 U.S.C. § 349(b)(3). Dismissal also dissolves the protections of the automatic stay that formerly extended to both property of the estate and property of the debtor. *See* 11 U.S.C. § 362(c)(2)(B). When a chapter 13 plan is not confirmed, section 1326(a)(2) requires the trustee to return post-petition plan payments to the debtor, after the payment of allowed administrative expenses. 11 U.S.C. § 1326(a)(2). When a chapter 13 case is dismissed prior to confirmation, are the debtor's post-petition earnings in the trustee's possession protected from levy or garnishment by creditors? Courts are divided on the issue, with some holding that such funds are generally subject to levy or garnishment in the absence of the protections of the stay, and others concluding that such funds must be returned to the debtor under section 1326. *See* Massachusetts v. Pappalardo (In re Steenstra), 307 B.R. 732, 738-39 (B.A.P. 1st Cir. 2004) (describing split of authority and citing cases on either side).

The First Circuit Bankruptcy Appellate Panel has taken the former position, ruling that funds held by the chapter 13 trustee after estate administration are not generally protected from levy or garnishment upon pre-confirmation dismissal because dismissal dissolves the statutory safeguards of the automatic stay. In re Steenstra, 307 B.R. at 739-40. In the latter camp, courts prioritize section 1326(a)(2)'s mandate that the trustee return post-petition payments to the debtor upon pre-confirmation dismissal, concluding that mandate preempts garnishment or levy efforts under state law. *See, e.g.,* In re Davis, No. 04-30002-DHW, 2004 WL 3310531, at *2 (Bankr. M.D. Ala. Jan. 2, 2004). This fidelity to section 1326(a)(2) conforms with the policies of (a) encouraging attempts to confirm a chapter 13 plan free from the threat of penalty, and (b) ensuring the efficient disposition of unconfirmed, dismissed chapter 13 cases by forestalling the "race to the trustee" that might occur if funds in the trustee's possession were subject to levy or garnishment. *See* In re Davis, 2004 WL 3310531, at *2. In the event of pre-confirmation dismissal, a return of post-petition payments to the debtor also accords with the policy of undoing the case and returning the parties to their pre-petition positions under section 349(b).

ii. Post-Confirmation Dismissal

Courts also split as to the disposition of funds in the trustee's possession upon dismissal of a chapter 13 case after confirmation of a plan. The disagreement stems from the interplay of section 349(b)(3) and section 1326(a)(2), and most fall into one of two camps. Some courts hold that section 1326(a)(2) requires the trustee to disburse any funds on hand pursuant to the confirmed plan, even when the debtor's case is dismissed. Others hold that, under section 349(b)(3), dismissal revests post-petition earnings in the debtor – as property of the estate under section 1306(a)(2) in which the debtor has a contingent right at the time of the petition – requiring the trustee to return any undistributed post-petition payments to the debtor upon dismissal.[1] Outside of that dichotomy, at least one court has observed gaps in the Code's provisions for post-confirmation disbursement upon dismissal and filled those gaps by resorting

[1] The holding requiring post-dismissal distribution to creditors under section 1326(a)(2) has been labeled the minority position, while the holding prioritizing revesting of such funds in the debtor under section 349(b)(3) has been dubbed the majority position. *See* In re Beaird, 578 B.R. 643, 646 (Bankr. D. Kan. 2017); In re Edwards, 538 B.R. 536, 539 (Bankr. S.D. Ill. 2015). This author has not undertaken a formal tally but believes the labels to be warranted.

to the federal policies of voluntary chapter 13 engagement and limited federal jurisdiction, and by resort to presumptively applicable state law governing escrowed funds. *See* In re Gonzalez, 578 B.R. 627, 630-32 (Bankr. W.D. Mich. 2017) (concluding that section 349(b)(3) governs only prepetition property while section 1326(a)(2) applies only to pre-confirmation payments, treating the failed plan like a failed escrow under state law, and requiring refund of post-confirmation plan payments to the debtor).

The rule favoring post-dismissal disbursement pursuant to the confirmed plan finds support in the unconditional terms of section 1326(a)(2) – a directive that is "not contingent on who holds title to the funds or whether or not the case has been dismissed." In re Darden, 474 B.R. 1, 8 (Bankr. D. Mass. 2012). The holding may rest on the inference that confirmation orders are not vacated by the dismissal of a case because those orders are not listed among the other orders vacated by dismissal under section 349(b)(2). *See* id. According a confirmed plan effect post-dismissal may also comport with the binding nature of a confirmed plan under section 1327, barring parties from assuming positions contrary to those provided by the plan. *See* In re Cox, 381 B.R. 525, 528 (Bankr. E.D. Tenn. 2008).

The contrary view, in favor of post-confirmation post-dismissal revesting under section 349, may be buttressed by the conclusion that dismissal of a chapter 13 case makes the confirmation order in that case ineffective. *See, e.g.,* In re Edwards, 538 B.R. 536, 540 (Bankr. S.D. Ill. 2015) ("[T]he dismissal of a case renders the Chapter 13 plan effectively vacated and so prevents the trustee from distributing funds in accordance with its terms."). Courts in the revesting camp may also look to Harris v. Viegelahn, 135 S. Ct. 1829 (2015), where Supreme Court held that plan payments held by a chapter 13 trustee upon post-confirmation conversion to chapter 7 may not be distributed to creditors pursuant to the plan but must instead be returned to the debtor. As in Harris, courts may reason that the general case administration rules of Chapter 3 should control because dismissal suspends the more particular provisions of Chapter 13, *see* 11 U.S.C. § 103(i), rendering section 1326 ineffective upon dismissal. *See* In re Beaird, 578 B.R. 643, 649 (Bankr. D. Kan. 2017); In re Bateson, 551 B.R. 807, 812 (Bankr. E.D. Mich. 2016) (concluding that the duties imposed by section 1326 "continue in effect only while a Chapter 13 case is pending"). If the confirmation order is null and the strictures of Chapter 13 no longer hold sway upon dismissal, then section 349's revesting provision has obvious primacy over the potentially conflicting dictates of section 1326(a)(2). It may also be asserted that there is no conflict at all because "[s]ection 1326 does not address distribution after dismissal[,]" In re Beaird, 578 B.R. at 649, or even distribution of funds received after confirmation, *see* In re Edwards, 538 B.R. at 540 (concluding that section 1326(a)(2)'s directive to distribute pursuant to the confirmed plan applies only to payments made prior to confirmation because subsection (a)(2) refers to "such" payments, which must be the payments pursuant to the "proposed plan" identified in subsection (a)(1)(A)).

iii. Deviating from the Rule of Revesting "For Cause"

Although section 349(b)(3) establishes a default rule of revesting property of the estate upon dismissal, the statute also gives the court the power to deviate from the default "for cause." The

term "cause" is not defined by the Code, and there appears to be little consensus among the courts.

On one hand, courts have found cause where:

> in view of the duration of the time in which the debtor enjoyed the benefit of the automatic stay, it would be inequitable to creditors to authorize dismissal without distribution of monies accumulated during the case for payment to them, the quid pro quo for their having suffered the effects of bankruptcy's automatic stay.

In re Darden, 474 B.R. at 13. Courts have also found cause to distribute post-petition wages in the trustee's possession on dismissal to the debtor's counsel where the fee agreement between the debtor and counsel gave counsel the right to recover such funds from the trustee to satisfy fees due for counsel's work in the case. *See* In re Beaird, 578 B.R. at 650.

On the other hand, some courts deny that counsel's work on the debtor's behalf constitutes "cause" to order post-dismissal distribution of estate funds to satisfy a claim for attorney fees. *See* In re Demery, 570 B.R. 220, 225-26 (Bankr. W.D. La. 2017) (reasoning that the "for cause" exception exists to redress bad faith or inequity, and that the Code does not require payment of attorney fees before payment of other creditors). Other courts have declined to find cause where, in the absence of bad faith, the debtor enjoyed the automatic stay for thirty months and attempted, but failed, to make the payments required by her confirmed chapter 13 plan. In re Bateson, 551 B.R. at 814.

Given the lack of clarity on this issue, counsel may be wise to include a standard retention-of-jurisdiction provision in a form of dismissal order submitted with a motion to dismiss, in order to delay revesting and provide a window for counsel to seek distribution otherwise "for cause."

ABI Annual Spring Meeting
Washington, DC
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Chapter 20 Lien Stripping: Still No Definitive Answers, Just Questions

Hon. Michael B. Kaplan
United States Bankruptcy Judge
District of New Jersey

APPLICABLE STATUTES

11 U.S.C. § 1322 Contents of a Plan
(b) Subject to subsections (a) and (c) of this section, the plan may—

***
(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1325 Confirmation of a Plan
(a) Except as provided in subsection (b), the court shall confirm a plan if—
***
(5) with respect to *each allowed secured claim* provided for by the plan—

***
(B)(i) the plan provides that—
(I) the holder of such claim retain the lien securing such claim until the earlier of-
(aa) the payment of the underlying debt determined under nonbankruptcy law; or
(bb) *discharge under section 1328; and*
(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
***

11 U.S.C. § 1328 Discharge

***
(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—
(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

11 U.S.C. § 109 Who May be a Debtor

***

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, *unsecured debts* of less than $394,725 and noncontingent, liquidated, secured debts of less than $1,184,200 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $394,725 and noncontingent, liquidated, *secured debts* of less than $1,184,200 may be a debtor under chapter 13 of this title. (emphasis added)

11 U.S.C. § 102 - Rules of construction

***

(2) "claim against the debtor" includes claim against property of the debtor;

Prior to 1993, bankruptcy courts allowed a chapter 13 debtor to use 11 U.S.C. § 1322(b)(2) to avoid both wholly and partially underwater liens. In 1993, however, the Supreme Court decided *Nobelman v. Am. Savs. Bank*, 508 U.S. 324 (1993), which limited a chapter 13 debtor's ability to use § 1322(b)(2) to avoid liens to only those circumstances where the junior lien was wholly underwater. *Id*. at 332. After *Nobelman*, a chapter 13 debtor was still permitted to use § 1322(b)(2) to avoid liens which were "secured" by their principal residence, if such lien was wholly underwater (and thus, pursuant to § 506(a)(1), not "secured"). *See, e.g*., *In re McDonald,* 205 F.3d 606 (3d Cir. 2002) (a wholly unsecured mortgage is not subject to the anti-modification provisions of Section 1322(b)(2) and may be stripped off); *see also*, *In re Pond*, 252 F.3d 122 (2d Cir. 2001) ; *In re Tanner*, 217 F.3d 1357, 1359-60 (11th Cir. 2000). While the Supreme Court in *Nobleman* and the cases which followed confirmed the ability of a debtor to "strip off" wholly underwater liens, nothing in the Code or subsequent caselaw raised serious doubts about a debtor's ability to undertake a "strip off" in chapter 13 cases which immediately

followed a chapter 7 case in which the debtor received a discharge ("chapter 20"). That all changed in 2005 as a result of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").

As most understand, "strip off" involves a scenario in which the underlying collateral securing a junior mortgage has insufficient value beyond the amount owing on the senior mortgage. As a result, the entirety of the junior mortgage lien is avoided. A chapter 20 case arises where the debtor files a chapter 13 petition shortly after receiving a chapter 7 discharge, thus becoming a "chapter 20" debtor. The chapter 7 discharge first eliminates the *debtor's in personam* liability with respect to the junior mortgage. As a result, the remaining debt is nonrecourse. In the subsequently filed chapter 13 case, the debtor modifies the junior mortgagee's *in rem* rights by avoiding the wholly unsecured mortgage lien. This "strip off" requires the new chapter 13 filing because avoidance is not available in the initial chapter 7, as a result of the U.S. Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992).[1]

A debtor's use of chapter 20 offends some courts and parties due to the ostensible unfairness in allowing a debtor to accomplish in a tandem filed chapter 13, what he cannot achieve in a chapter 7—to "strip off" an underwater mortgage lien. Are these chapter 13 cases, filed with the sole purpose of "stripping off" liens, undertaken in good faith? The weight of authority now suggests that the answer is "yes", but not by a wide margin at all. We start the analysis with *Johnson v. Home State Bank,* 501 U.S. 78 (1991), which is the Supreme Court's definitive ruling on the Code's permissibility of a chapter 20 case. In *Johnson,* the Court held that Congress expressly prohibited the sequential and serial filings of a variety of bankruptcy

[1]. Prior to the Supreme Court decision in *Dewsnup*, a debtor could avoid liens in chapter 7 under § 506. The debt is secured to the extent of the value of the property under § 506(a) and void to the extent it is unsecured under § 506(d). At the time, the reasoning was that this process put the creditor in the same position it would have been in a sale of the property. The holding in *Dewsnup* prevents a chapter 7 debtor from stripping down the value of a lien on real property to the value of the underlying collateral under § 506(d).

cases but did not prohibit the sequential filing of a chapter 7 and chapter 13 case; thus a chapter 20 case is not prohibited under the Code. *Id*. at 87. Notwithstanding, the Court noted the importance of filing in good faith under § 1325(a)(3). *Id.* *Johnson* further holds that a lien in a chapter 13 bankruptcy is a claim that remains after a chapter 7 discharge. *Id.* at 80. In reaching this conclusion, the Court identified two distinct features of a mortgage lien: the *in personam* and *in rem* claims. Once the *in personam* claim has been discharged under chapter 7, the *in rem* claim against the property survives for the full amount of the debt. *Id.* Employing § 101(5) of the Code, the Court resolved that the *in rem* claim is carried into the chapter 13 and can be treated under a chapter 13 plan filed in good faith. While the Supreme Court may not have been enamored with serial bankruptcy filings, it noted that it was within the province of Congress only to legislate a prohibition on chapter 20 filings, which it had failed to do. *Id*. at 87.

So what changed as a result of BAPCPA? Well, Congress answered the call of the Supreme Court in *Johnson* and drafted a legislative fix for serial filings. It did so by modifying the discharge provisions in chapter 13. Section 1328(f) prohibits a discharge in a chapter 13 case within four years of receiving a discharge in a chapter 7 case. A chapter 13 debtor's inability to receive a discharge within four years of a chapter 7 discharge serves as a hurdle in a chapter 20 case, where the debtor seeks to "strip off" a valueless lien. Inasmuch as § 1325(a)(5) requires an "allowed secured claim" to be held until the earlier of payment or discharge, it has been argued and accepted by countless courts that the absence of a discharge in the tandem chapter 13 filing precludes "strip off" efforts. These courts take the view that § 1325(a)(5) requires either discharge or payment in full for an allowed secured claim, and thus a discharge is necessary for a permanent lien strip. In contrast, courts permitting post-BAPCPA chapter 20 "strip offs" rely primarily upon the absence of an express prohibition against such

practice in either § 1328(f)(1) or § 1325(a)(5)(B). Remarkably, we have two opposing views, with each argument bottomed on the "plain meaning" of the text. Several courts, in choosing sides in this battle, have expanded upon these base arguments, but the general breakdown is as follows:

Arguments Against Chapter 20 Lien Strips[2]:

1. "Stripping off" liens in Chapter 20 are improper because Congress modified § 1328(f)(1) in BAPCPA to address the statutory gaps which allow serial filings, identified by the Supreme Court in *Johnson.* The very purpose of these changes was to foreclose relief in chapter 20 cases, including lien "strip offs". In *Johnson*, the Supreme Court noted "[t]he absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief." *Johnso*n, 501 U.S. at 87. Congress answered the call and enacted provisions to limit serial filings. It is nonsensical to suggest that Congress did so, but yet intended lien stripping in chapter 20 cases to survive.

2. The plain language of § 1325(a)(5)(B) mandates that secured creditors, absent consent, retain their liens until discharge—which is categorically unavailable in a chapter 20.

[2] Sampling of cases not permitting "strip off: in chapter 20: In re Judd, 6:11-bk-04093-ABB, 2011 WL 6010025, at *3 (Bankr. M.D. Fla. Dec. 1, 2011); In re Pierre, 468 B.R. 419, 424 (Bankr. M.D. Fla. 2012); Grandstaff v. Casey (In re Casey), 428 B.R. 519, 523 (Bankr. S.D. Cal. 2010); In re Sadowski, 473 B.R. 12, 16 (Bankr. D. Conn. 2011); In re Trujillo, No. 6:10-bk-02615-ABB, 2010 WL 4669095, at *2 (Bankr. M.D. Fla. Nov. 10, 2010); In re Colbourne, 458 B.R. 598, 590 (Bankr. M.D. Fla.), amended and superseded by, 458 B.R. 598 (Bankr. M.D. Fla. 2010); In re Jazo, No. 09-16609-JM13, 2010 WL 3947303, at *2 (Bankr. S.D. Cal. Sept. 28, 2010); In re Woolsey, 438 B.R. 432, 438 (Bankr. D. Utah 2010), aff'd, Woolsey v. Citibank, N.A. (In re Woolsey), 696 F.3d 1266 (10th Cir. 2012); In re Quiros-Amy, 456 B.R. 140, 146 (Bankr. S.D. Fla. 2011); Bank of the Prairie v. Picht (In re Picht), 428 B.R. 885, 890 (B.A.P. 10th Cir. 2010); In re Gerardin, 447 B.R. 342, 349 (Bankr. S.D. Fla. 2011); In re Jarvis, 390 B.R. 600, 603 (Bankr. C.D. Ill. 2008); Orkwis v. MERS (In re Orkwis), 457 B.R. 243, 248 (Bankr. E.D.N.Y. 2011); Lindskog v. M&I Bank FSB (In re Lindskog), 451 B.R. 863, 866 (Bankr. E.D. Wis. 2011), aff'd, 480 B.R. 916, 919 (E.D. Wis. 2012); Erdmann v. Charter One Bank (In re Erdmann), 446 B.R. 861, 868 (Bankr. N.D. Ill. 2011).

3. While no-discharge chapter 13 cases may be confirmed under § 1327, lien strips are only temporary because once the case fails to close with a discharge, dismissal will occur and § 349 unwinds any vesting of property with the debtor.

4. The ability to "strip off" a lien when a discharge is prohibited by BAPCPA's new § 1328(f)(1) would give rise to improper "de facto" discharges and reflect a "bad faith" attempt to circumvent *Dewsnup*'s bar to lien stripping in chapter 7 cases.

Arguments in Favor of Chapter 20 Lien Strips[3]:

1. Lien strips in Chapter 20 are permitted because nothing under the Bankruptcy Code or caselaw (pre or post BAPCPA) prohibits such efforts.

2. § 1325(a)(5)(B) is not a bar to chapter 20 lien stripping because the unsecured status of the *in rem* claim (as determined after bifurcation under § 506(a)) precludes application of this section, which expressly applies only to allowed "secured claims".

3. Lien strips in a no-discharge chapter 13 case become permanent upon completion o plan payments, and there is nothing in the Code which requires a discharge. Discharge and lien stripping are different concepts and should not be conflated.

4. The inclusion of the new lien retention provision in BAPCPA, § 1325(a)(5)(B),

[3] Sampling of cases permitting "strip off in chapter 20: Fisette v. Keller (In re Fisette), 455 B.R. 177, 184 (B.A.P. 8th Cir. 2011); In re Crone, No. 12-11257, 2012 WL 6212856, at *1 (Bankr. N.D. Cal. Dec. 13, 2012); In re Jennings, 454 B.R. at 255; In re Waterman, 447 B.R. 324, 329 (Bankr. D. Colo. 2011), aff'd, Zeman v. Waterman (In re Waterman), 469 B.R. 334, 338 (D. Colo. 2012); In re Tran, 431 B.R. 230, 235 (Bankr. N.D. Cal. 2010), aff'd, 814 F. Supp. 2d 946 (N.D. Cal. 2011); In re Hill, 440 B.R. 176, 182 (Bankr. S.D. Cal. 2010); In re Scantling, 465 B.R. 671, 682 (Bankr. M.D. Fla. 2012); In re Miller, 462 B.R. 421, 431 (Bankr. E.D.N.Y. 2011); In re Scotto-DiClemente, 459 B.R. 558, 566 (Bankr. D.N.J. 2011); In re Gloster, 459 B.R. 200, 206 (Bankr. D.N.J. 2011); In re Dang, 467 B.R. 227, 237 (Bankr. M.D. Fla. 2012); In re Fair, 450 B.R. 853, 857 (E.D. Wis. 2011); In re Davis, 447 B.R. 738, 745 (Bankr. D. Md. 2011), aff'd, TD Bank, N.A. v. Davis, No. CIV. PJM 11-1270, CIV PJM 11-1718 & CIV. PJM 11-1940, 2012 WL 439701 (D. Md. Jan. 12, 2012); Pollard v. Suntrust Bank (In re Pollard), No. 10-17396PM, 2010 WL 3779096, at *1 (Bankr. D. Md. Sept. 15, 2010); In re Pollard, No. 11-17396PM, 2011 WL 576599, at *2 (Bankr. D. Md. Feb. 9, 2011); In re North, No. 11-72843, 2012 WL 4919788, *3 (Bankr. N.D. Cal. Oct. 15, 2012); In re Frazier, 448 B.R. 803, 807 (Bankr. E.D.Cal. 2011), aff'd, Frazier v. Real Time Resolutions, Inc., 469 B.R. 889, 895 (E.D. Cal. 2012).

which requires that liens supported by value await the entry of a discharge so as to be permanently "stripped-off", implicitly mandates different treatment for chapter 20 valueless liens.

As indicated, the recent trend of the courts has been in favor of chapter 20 "strip offs". A clear illustration may be found in *Boukatch v. MidFirst Bank (In re Boukatch),* 533 B.R. 292 (B.A.P. 9th Cir. 2015) which involved a typical chapter 20 factual scenario: one year after obtaining a discharge in a chapter 7 case, the debtors filed a subsequent chapter 13 case in which, the debtors identified two liens against their residence—a first lien held by Wells Fargo and a second, wholly underwater mortgage lien held by MidFirst Bank. Thereafter, the debtors filed a motion seeking to "strip off" MidFirst's lien, to which no one had objected. However, the Bankruptcy Court for the District of Arizona denied the lien stripping motion, ruling that a "chapter 20" debtor, who is not receiving a discharge, is not permitted to strip off liens. On the debtors' appeal from that order, the Bankruptcy Appellate Panel for the Ninth Circuit held that a "chapter 20" debtor can strip off a wholly underwater junior lien even though the debtor is not receiving a discharge. The panel held that nothing in the Bankruptcy Code prevented the debtors from "stripping off" a wholly underwater lien against their principal residence, notwithstanding that the debtors were not eligible for a discharge. The panel further concluded that the only way the lien would survive the attempted "strip off" would be if the debtors failed to complete all of the payments required under their chapter 13 plan and the case was subsequently converted or dismissed.

A few months after the decision in *Boukatch*, the Ninth Circuit addressed these same issues in *In re Blendheim*, 803 F.3d 477 (9th Cir. 2015) and held "that chapter 20 debtors may permanently void liens upon the successful completion of their confirmed chapter 13 plan

irrespective of their eligibility to obtain a discharge." *Id*. at 497. The court in *Blendheim* found it significant that Congress did not prohibit outright the filing of a chapter 13, after a chapter 7, and did not choose to prohibit lien strips in the chapter 20 scenario; thus, there were no obvious reasons why chapter 20 debtors could not avail themselves of all chapter 13 tools, including lien "strip-offs".

Other Chapter 20 Considerations-

1. What is the *in rem* claim and how is it factored into § 109(e)'s debt limitations?

Do we even need to examine the appropriateness of chapter 20 lien "strip offs" if the debtor may not be a debtor under § 109(e)? There is caselaw which suggests that a debtor's efforts to "strip-off" a valueless lien may be stymied by his or her inability to qualify for chapter 13 in the first instance. In *In re Scotto-DiClemente*[4], the U.S. Bankruptcy Court for the District of New Jersey held that the debtor was entitled to "strip off" wholly unsecured junior mortgages and that sufficient indicia of good faith existed to deny a motion to dismiss on that ground. Nevertheless, the court dismissed the case on the basis that the stripped-off junior mortgages became unsecured debt that exceeded the debt limits for chapter 13 eligibility under § 109(e) of the Bankruptcy Code, even though the debtor had no personal liability because of the previous chapter 7 discharge.

The debtor had argued that the debt ceilings did not apply because his chapter 7 discharge had removed any personal liability to the mortgagee. The court disagreed, relying on *Johnson v. Home State Bank*, and reasoned that the mortgagee's nonrecourse secured debt was an *in rem*

[4] In *In re Scotto-DiClemente*, 459 B.R. 558 (Bankr. D.N.J. 2011), *reconsideration denied*, 463 B.R. 308 (Bankr. D.N.J. 2012), *and aff'd sub nom. In re DiClemente,* No. BR 11-28230 MBK, 2012 WL 3314840 (D.N.J. Aug. 13, 2012),

claim that it could still enforce after the discharge against the debtor's property. Applying in tandem § 502(b)(1) and §102(2) of the Code, a claim can only be disallowed if it is neither enforceable against the debtor nor against the debtor's property. Since the *in rem* claim remained enforceable against the debtor's property, it could not be disallowed and remained a debt that factored into the § 109(e) calculus; § 506(a), the court held, merely values the secured portion of the claim but is not a disallowance provision. 463 B.R. at 312-14. The court then concluded that §109(e) offers only two alternative classifications for debt: secured debt or unsecured debt (assuming such debt is noncontingent and liquidated). Neither alternative offered the debtor much comfort towards confirmation of a plan. If the *in rem* claims were regarded as secured, the "lien retention" provisions of § 1325(a)(5) would bar the proposed "strip-off" of Amboy's liens. On the other hand, if the *in rem* claims are treated as unsecured, the Debtor must overcome § 109(e) restraints.

This author submits that the conclusion reached in *Scotto-DiClemente* finds additional support in the recent U.S. Supreme Court's decision in *Midland Funding, LLC v. Johnson*, —— U.S. ——, 137 S.Ct. 1407, 1412, 197 L.Ed.2d 790 (2017), which held that even unenforceable claims are claims. Pertinently, the Court found that a creditor's proof of claim for a debt on which the statute of limitations to collect has run remains a "right to payment" and hence a "claim" for purposes of bankruptcy law. *Id.* [5] Thus, the *in rem* claim which remains after the chapter 7 discharge and includes the amounts underlying the discharged *in personam* debt,

[5] While §109(e) speaks in terms of "debts" and not "claims", the difference is of no moment. Put simply, if there is a "claim," there is a "debt." *See, e.g*., Laws v. United Mo. Bank, N.A., 188 B.R. 263, 267 (W.D. Mo.1995) ("The Bankruptcy Code treats 'debt' as the converse of a 'claim.'"); *see also* In re Morton, 43 B.R 215, 219–20 (Bankr. E.D.N.Y.1984) ("Consequently, for purposes of the Bankruptcy Code, if UMB had a claim against KBDC, KBDC owed a debt to UMB."). In other words, "a debt and claim are essentially 'flip sides of the same coin.'"; In re Pensignorkay, Inc., 204 B.R. 676, 683 (Bankr. E.D. Pa. 1997). As a result, when a creditor possesses a claim against a debtor, that debtor owes a debt to the creditor. *See* In re Glance, 487 F.3d 317, 320 (6th Cir. 2007).

remains a "right to payment" (albeit unenforceable against the debtor individually) which should be included as part of the § 109(e) calculus.

2. How Does the "Good Faith" Requirement Factor into the Analysis of chapter 20 Lien Stripping?

For a chapter 13 plan to be confirmed by the bankruptcy court it must have been filed and proposed in "good faith" and "not by any means forbidden by law." § 1325(a)(7). This is similar to the requirement for th underlying bankruptcy case under § 1325(a)(3). Is lien stripping always undertaken in "good faith"? As discussed, many courts have answered this question in the negative. The court in *Scotto-DiClemente* provides a limited roadmap for practitioners and identifies some situations where dismissal of the case would be warranted:

> What the Court cannot abide are "no discharge" Chapter 13 cases which are filed solely to avoid liens or which undertake to cure recently "fabricated" arrears incurred as part of a stratagem to sidestep the limitations of *Dewsnup*. An illustration of such a proscribed manipulation would be if a debtor were found to have intentionally ceased paying a first mortgage after the filing of a Chapter 7 (having been current on the mortgage prior to the commencement of the case) in order to create a modest arrearage to be treated in the ensuing Chapter 13 case.

459 B.R. 558, 569–70. In sum, debtor's counsel must be able to demonstrate the bonafides of the underlying chapter 20 filing, before even consideration of the merits with regard to the lien stripping efforts.

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Washington, DC
April 12, 2019

Potential Issues With Verbose Confirmation Orders (Why Every Term Should be Included in the Proposed Plan) and Delinquent Post-Petition Mortgage Payments and Discharge

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1) Potential Issues with Verbose Confirmation Orders (or Why Every Term Should Be Included in the Proposed Plan):
   a) What controls if the order is inconsistent with the plan?
      i) 11 U.S.C. § 1327 states the "provisions of a confirmed plan bind the debtor and each creditor…whether or not such creditor has objected to, has accepted, or has rejected the plan."
      ii) If the confirmation order adds determinations not mirrored in the plan (eg. typo regarding amount of secured value of a vehicle contrary to the plan), is the plan confirmation valid?
      iii) How does the debtor amend payments to creditors, under 11 U.S.C. § 1329 or by motion to reconsider the confirmation order?
   b) Res Judicata issues
      i) What if the confirmation order adds new additional requirements for the debtor or creditors?
         (1) "'A judgment is not void,' for example, 'simply because it is or may have been erroneous.' (Citations omitted.) *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 130 S. Ct. 1367, 1377 (2010).
         (2) Courts have held that *Espinosa* stands for the "limited proposition that a confirmed plan is binding on all parties in interest, *provided the plan proponent afforded such parties adequate notice*, consistent with the Due Process Clause of the United States Constitution-even if the plan violates the Bankruptcy Code in some particulars." *In re Deavila*, 431 B.R. 178, 179 (Bankr. W.D. Mich. 2010) (emphasis added); see also *In re Brodeur*, 434 B.R. 348, 351 n.2 (Bankr. D. Vt. 2010) (noting that Espinosa "defines the binding effect of confirmation orders on interested parties *who receive sufficient notice*") (emphasis added). *United States v. Monahan (In re Monahan)*, 497 B.R. 642, 651 (B.A.P. 1st Cir. 2013). See also, *Pawtucket Credit Union v. Boyajian (In re Diruzzo)*, 527 B.R. 800, 806 (B.A.P. 1st Cir. 2015).
         (3) So if a debtor or creditor did not have notice of new requirements found in the confirmation order, is the confirmation order res judicata of those requirements?
   c) What is the effect of additional language in confirmation orders on subsequent bankruptcies by the debtor?
      i) 11 U.S.C. § 109(g)(1) makes ineligible debtors who previous "…case was dismissed by the court for willful failure of the debtor to abide by orders of the court…"
      ii) If so, a debtor is in eligible to be a debtor for 180 days. 11 U.S.C. §109(g).

iii) If the plan includes a requirement for the debtor to turnover tax returns and refunds every year, then does failure to turn them over create a 180 bar on refiling?

d) What to do if the confirmation order includes additional provisions not in the Chapter 13 plan

(1) Appeal

(a) *United States v. Carroll*, 667 F.3d 742, 745 (6th Cir. 2012)

(i) Don't sue the Trustee

(ii) Appropriate party is the court itself (if you want to go that way)

(iii)Appeal confirmation order

(b) Local Rule

(i) A local rule "may only be upheld if (a) it is consistent with the Bankruptcy Code in that it does not 'abridge, enlarge, or modify any substantive right, 'as required by 28 U.S.C. § 2075 and (b) it is 'a matter of procedure not inconsistent with' the Bankruptcy Rules as required by Bankruptcy Rule 9029." *Dworsky v. Canal St. Ltd. P'ship (In re Canal St. Ltd. P'ship)*, 269 B.R. 375, 382 (B.A.P. 8th Cir. 2001)

(ii) Example: a confirmation order requires a debtor to turn over to the trustee all tax refunds.

(iii)Doesn't this potentially cutoff and violate the debtor's right to amend the plan under 11 U.S.C. § 1329(a) to reduce payments?

ABI Annual Spring Meeting
Washington, DC
April 12, 2019

2) Post-petition mortgage payments and discharge under 13
   a) Issue: whether payments on a mortgage paid directly to mortgage holder and referenced in a chapter 13 plan are "payments under the plan" for purposes of 11 U.S.C. §1328(a).
      i) 1328(a) states in pertinent part: "as soon as practicable after completion by the debtor of all payments under the plan,… the court shall grant the debtor a discharge of all debts provided for by the plan…" (Emphasis added.)
      ii) Similarly 11 U.S.C. § 1307(c)(6) allows a trustee to move to dismiss for cause including "material default by the debtor with respect to a term of a confirmed plan;…"
      iii) As a result several chapter 13 trustees file motions to dismiss if they discover that a debtor is delinquent in mortgage payments.
      iv) Why is this coming up now?
         (1) New reporting requirements in 3002.1: See *In re Gibson,* 582 B.R. 15, 18 (Bankr. C.D. Ill. 2018)(It is apparent that what triggered this recently identified theory of dismissal without discharge was the adoption of Rule 3002.1, added by the 2011 amendments to the Federal Rules of Bankruptcy Procedure. The Rule requires a creditor that holds a lien on the debtor's principal residence to disclose, in response to the trustee's notice of final cure payment, whether the debtor is current on the postpetition mortgage payments.)
   b) Two Schools of Thought:
      i) Majority
         (1) The initial bankruptcy court to review this issue was *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014) see *In re Gibson*, 582 B.R. 15, 18 (Bankr. C.D. Ill. 2018)("Nor has this Court's research uncovered any such cases in other jurisdictions prior to the bankruptcy court decision in *In re Heinzle*, 511 B.R. 69 (Bankr. W.D. Tex. 2014).")
            (a) *Heinzle* relied upon a 1982 decision by the 5th Circuit which held that "that mortgage payments made by the debtors directly to their lender constitute plan payments despite the debtors' characterization that the payments were being made outside the Chapter 13 plan. " *Heinzle,* at 75 citing ***In re Foster***, 670 F.2d 478 (5th Cir. 1982).
         (2) The majority of opinions hold that "payments under the plan" refer to any payment made pursuant to a chapter 13 plan, regardless of whether such payment is made by a debtor directly to the creditor or through the trustee. *See, e.g., In re Thornton*, 572 B.R. 738 (Bankr.W.D.Mo. 2017); *In re Gonzales*, 532 B.R. 828 (Bankr.D.Colo. 2015); *In re Heinzle*, 511 B.R. 69 (Bankr.W.D.Tex. 2014); *Simon v. Finley (In re Finley)*, Nos. 12-41457, 18-4011, 2018 Bankr. LEXIS 2585, at *5 (Bankr. S.D. Ill. Aug. 28, 2018): *see also In re Evans*, 543 B.R. 213 (E.D. Va. 2016) (although debtor had made all payments to the chapter 13 trustee, debtor's failure to make payments to directly to her mortgage creditor was a default under the confirmed plan that prevented debtor from receiving a discharge); *In re Kessler*, 2015 Bankr. LEXIS 1889, 2015 WL 4726794 (Bankr. N.D. Tex. June 9, 2015) *aff'd* 655 F. App'x 242 (5th Cir. 2016) (denying a discharge under § 1328(a) after holding that "payments under the plan" includes maintenance payments

made directly to the creditor under § 1322(b)(5)); *In re Hoyt-Kieckhaben*, 546 B.R. 868 (Bankr. D. Colo. 2016) (same); *In re Ferrell*, 580 B.R. 181, 187 n.9 (Bankr. D.S.C. 2017).

ii) Minority

(1) The minority position differentiates similar language in § 1328(a) so that payments on "debts provided for by the plan" (which could include direct mortgage payments) are different than "payments under the plan" which are necessary for discharge. Under this argument "payments under the plan" are solely the payments the debtor makes to the trustee. *In re Gibson,* 582 B.R. 15, 19 (Bankr. C.D. Ill. 2018). See also *In re Starkey*, 2016 Bankr. LEXIS 2053, 2016 WL 3034738 (Bankr. D.C.)(where a mortgage claim is provided for under §1322(b)(5) and thus excepted from discharge, the discharge of other debts is of no concern to the mortgage creditor and the lack of payments to the mortgage creditor is of no concern to other creditors, so that "denying a discharge in that circumstance would seem silly.")

(2)

(a) Rationale:

(i) Intended distinction between "All Payments Under the Plan"vs "Provided For By The Plan":

1. In section 1328(a), "all payments under the plan" is used to define when completion of payments occurs (thus triggering entitlement to a full compliance discharge), while the similar but different alternative phrase "provided for by the plan" is used to describe the scope of the discharge. 11 U.S.C. §1328(a). The use of different terminology implies an intended distinction. *Id.* at 19.
2. The term "provided for by the plan" describes the scope of the discharge. Congress could have stated that a discharge is available when the debtor completes all payments provided for by the plan instead of all payments under the plan. The use of two different terms denotes separate treatment.

(ii) Consistent with meaning of "all payments under the plan" in other sections of the Bankruptcy Code:

1. Interpreting the term "all payments under the plan" to mean the payments made by the debtor to the trustee is consistent with how a similar statutory provisions has been construed. Section 1329(a) provides for modification of a plan after confirmation but only "before the completion of payments under such plan." 11 U.S.C. §1329(a). It is well settled that "completion of payments" under this provision occurs when the debtor pays to the trustee the full amount required by the confirmed plan. *Matter of Casper*, 154 B.R. 243, 247 (N.D. Ill. 1993); *In re Ezzell*, 438 B.R. 108, 115-16 (Bankr. S.D. Tex. 2010); *In re Sounakhene*, 249 B.R. 801, 804 (Bankr. S.D. Cal. 2000). *In re Gibson*, 582 B.R. 15, 20 (Bankr. C.D. Ill. 2018).

(iii)Consistent with resolving ambiguities in debtors' favor:

1. In this Court's view, whether direct payments are payments "under the plan" for purposes of section 1328(a) is not discernible from the statutory text. Either interpretation is plausible, meaning the statute is ambiguous. A general policy is recognized favoring resolution of ambiguities in the Bankruptcy Code in favor of debtors and even more so where the provision at issue affects a debtor's right to a discharge. *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989); *In re Trentadue*, 837 F.3d 743, 749 (7th Cir. 2016). *In re Gibson*, 582 B.R. 15, 18 (Bankr. C.D. Ill. 2018).

c) What to do if you are in a majority district
   i) Advise clients in writing before filing of the requirement to be current on direct payments.
   ii) Don't rely upon a secured creditor filing a motion for relief from stay to warn the Debtor of delinquent payments.
   iii) Seek a hardship discharge under 11 U.S.C. §1328(b).
   iv) Anti-Nike argument: Just Don't Do It. Don't refer to direct payments in the plan and instead in schedule J. (You will probably be bucking up against local rules and forms.)
      (1) ARGUMENT
         (a) If the court is going to take the position that even direct payments just referred to in a plan are "payments under the plan" then perhaps debtors should cease mentioning those payments in their plans and only refer to them in schedule J and the means test.
         (b) 11 U.S.C. § 1322(a) provides the only mandatory provisions that have to be included in a plan. Section 1322(b) contains only permissive provisions of the plan that the debtor may chose. Neither the trustee nor any unsecured creditor can compel a chapter 13 debtor to exercise his 1322(b) options. *In re Baines*, 263 B.R. 868, 873 (Bankr. S.D. Ill. 2001).
         (c) Pursuant to the plain language of 11 U.S.C. § 1322(a) there are only three mandatory provisions of a chapter 13 plan. The plan shall—
            (i) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
            (ii) provide for the full payment, in deferred cash payments of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and
            (iii)if the plan classifies claims, provide the same treatment for each claim within a particular class.
               1. See *In re Foster*, 670 F.2d 478, 484 (5th Cir. 1982).
         (d) Secured claims are addressed in the plan pursuant to §1322(b)(2)(modifying their rights), § 1322(b)(3) (curing defaults) or § 1322(a)(8) providing payment of claim from estate or property of the debtor). However these sections are not mandatory.
         (e) 11 U.S.C. § 1325(a)(5) does not compel inclusion of secured claims in a plan. This section only addresses the requirements for secured claims "provided for

by the plan." If the secured claim is not included in the plan per the debtor's choice under § 1322(b) then the requirements of 1325 don't apply.

ME Bk Form 2B (12/17)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: [**DEBTOR NAME(S)**], Debtor(s)	Chapter 13 Case No. [ ]

ORDER CONFIRMING CHAPTER 13 PLAN

The debtor(s) filed a chapter 13 plan [Dkt. No. _] dated [date of plan]. The chapter 13 plan and notice of the hearing on confirmation were transmitted to creditors and other parties in accordance with the applicable provisions of the Federal Rules of Bankruptcy Procedure and this Court's Local Rules.

At or before the hearing on confirmation, the debtors(s) modified the plan under 11 U.S.C. § 1323 as follows:

[describe modifications, if any, here. If none, indicate "None."]

After notice and opportunity for hearing, the Court concludes that the plan (as modified, if applicable) meets the requirements of 11 U.S.C. § 1325. It is therefore ORDERED that the plan is confirmed under section 1325.

Dated:

[Judge's Name]
United States Bankruptcy Judge
District of Maine

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: **Debtor Name**, Debtor(s)	Chapter 13 Case No. _____

ORDER CONFIRMING CHAPTER 13 PLAN
AND SETTING DEADLINES FOR CERTAIN ACTIONS

After notice and hearing on confirmation of the debtor's Chapter 13 plan, the Court finds that it complies with all provisions of Title 11 and that it is in the best interests of all creditors, the debtor and the estate. It is hereby ORDERED that the debtor's Chapter 13 plan dated [date], as appears on the court docket as Docket Entry [#], is confirmed as filed or modified as set forth below. Terms of the plan not expressly modified by this order are incorporated herein and made a part hereof by reference. The Court retains jurisdiction to make such other and further orders as may be necessary or appropriate to effect the plan and this order.

I. The following modifications to the plan are hereby ORDERED:

[ ] A. The total term of the plan shall be _____ months.

[ ] B. The debtor's monthly payment shall be $ _____ per month, commencing on [date]. The total to be paid by the debtor to the trustee is $_____, plus excess tax refunds as provided below.

[ ] C. The trustee is authorized and directed to pay debtor's counsel's fees as set forth in the plan and make interim distributions to undisputed secured, priority, executory contract and unexpired lease creditors as set forth in the plan pursuant to their timely filed claims, subject to the trustee's statutory fees (28 U.S.C. § 586). This order does not constitute final confirmation of the plan and is not a determination of any issue other than the authority of the trustee to make such payments.

[ ] D. The stipulation between or among the debtor, the trustee and [party in interest] dated [date] is approved and incorporated by reference into this order.

[ ] E. Other:

II. It is FURTHER ORDERED as follows:

A. If the plan contemplates litigation or the sale of assets as a source of funding, the debtor shall file any application to employ the necessary professionals within 30 days of the date of this order.

B. As soon as practicable after the claims bar date, but no later than 90 days thereafter, the debtor shall file a motion to allow or disallow claims. The debtor may join that motion with such other motions as may be appropriate.

C. A temporary reduction or suspension of the debtor's payments for up to ten weeks may be granted at the trustee's discretion without further notice or hearing, except that the trustee may not suspend the debtor's obligation to make the portion of any payment administered by the trustee during the plan for long-term debt that will survive the debtor's discharge (e.g., mortgage obligations). Any other reduction or suspension of payments may be allowed only after notice and hearing upon motion to the Court.

D. Whether or not provided in the plan, the debtor shall pay to the trustee as additional plan contributions all tax refunds, combined state and federal, in excess of $1,200 per year, per debtor. The debtor shall submit to the trustee copies of federal and state income tax returns each year during the term of the plan within 14 days of the filing of such returns with the appropriate tax authorities.

E. The debtor shall pay all postpetition tax liabilities as they fall due except as provided in the plan or as may be permitted by further Court order.

F. The trustee is not precluded from raising pre-confirmation defaults in any post-confirmation proceeding.

G. Tax authorities are hereby granted relief from the automatic stay for the limited purpose of setting off pre-petition tax refunds against like pre-petition tax indebtedness.

H. All property of the estate, whether in the possession of the trustee or the debtor, remains property of the estate subject to the Court's jurisdiction notwithstanding 11 U.S.C. § 1327(b).

The Clerk shall make an appropriate entry on the docket.

Date:

_____

United States Bankruptcy Judge

Chapter 13 ABI Commission Issues

1. Eligibility
- Debt limits
- Repeat fliers
- Stay limitations

2. Changes to Federal Rules of Bankruptcy Procedures
- Payment Change Notice
- Mortgages Effected
- Notice of Final Cure

3. Defining and Valuing Principle Residence

4. Loan Modifications

5. HOA Fees

6. Home Owners Issues
- Surrender
- Vesting
- Sale

7. Chapter 13 Reserve Funds

8. Resolution of Conflicts between
    - Proofs of Claim and Chapter 13 Plans

9. Conduit Payments

10. Term of the Plan 60 Month Limitations

11. Credit Reporting On Bankruptcy Cases

12. Collection of Data

13. Uniform Practices