AMERICAN BANKRUPTCY INSTITUTE

2017 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Bankruptcy and Elder Law

CONCURRENT SESSION

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2017

The Increase in Elders filing for Bankruptcy Relief and Death in Bankruptcy

Honorable Steven W. Rhodes Consumer Bankruptcy Conference

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Somerset Inn, Troy, Michigan

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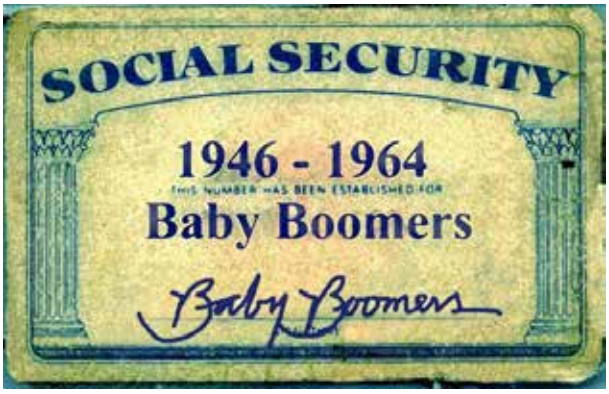
Betty (70) & Fred (71)

			
Mortgage Payment **$1,500**	**Car Payment** **$375**	**$60,000 Credit Card Debt** **$1,500**	**Student Loan Payment** **$250**

	
FAIR MARKET VALUE - $200,000 **MORTAGE (175,000)** **EQUITY $ 25,000**	**$200,000**

INCOME	$3,300
EXPENSES:	
Mortgage Payment (PITI)	1,500
Car Payment	375
Car Insurance/Fuel	350
Utilities	500
Credit Card Payments (.025 x 60,000)	1,500
Student Loan Payment for Grandson	250
Medicare Gap Coverage	175
Food/Misc.	600
Total Expenses	**$5,250**
NET SHORTFALL	$1,950

NET (SHORTFALL)	$1,950
Amount of Annual IRA Depletion (without regard to tax consequences ($1950 x 12)	$23,400
Anticipated IRA Exhaustion Point ($200,000 /23,400)	**8.5 Years**



ELDERLY AS A PERCENT OF USA POPULATION	
2011	13%
2030	20%
ELDERLY POPULATION USA	
1988	30 million
2019	50 million

Total Expenses (Reduced from $5,250 to $3,750 by elimination of $1,500/month of Credit Card Debt)	**$3,750**
NET (SHORTFALL)	**$450**
Amount of Annual IRA Depletion (without regard to tax consequences ($1950 x 12)	$5,400
Anticipated IRA Exhaustion Point ($200,000 /23,400)	**37 Years**

Fred
1946 - 2029

	**BETTY ELECTS SURVIVOR BENEFIT** **FRED'S BENEFIT - $2,500 / MONTH** **BETTY LOSES HER $800/ MONTH**
BETTY'S MONTHY INCOME GOES FROM $3,300 TO $2,500 PER MONTH	

INCOME (Reduced from $3,300 TO $2,500 per month by Betty electing Fred's social security benefit following his death)	**$2,500**
NET (SHORTFALL)	**$1,250**
Amount of Annual IRA Depletion (without regard to tax consequences ($1,250 x 12)	$15,000
Anticipated IRA Exhaustion Point ($135,200 /15,000)	**9 Years**

Car Payment	$ 375
Auto Insurance & Fuel	350
Student Loan (assume Fred was only guarantor)	250
Food & Misc	200
Total Potential Savings	**$1,175**

The Biggest Problem for the Elderly

FICO™

What about my credit score ?

What we need to do . . .

The day the Debtor died . . .

FBRP 1016
DEATH OR INCOMPENTCY OF DEBTOR

Chapter 7	Chapter 13
case "shall be administered"	case "may be dismissed" or "may proceed"

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Chapter 7 Procedure

- File Suggestion of Death (death certificate)
- Seek relief from Section 1328(g)(1) requirement for debtor to certify completion of the financial management course

Chapter 13 Issues

- Rule 1016 tied to Hardship Discharge Section 1328(b)
- Rule and statute vest discretion to the Court
- Standing
- Who are the Parties the “best interest of the parties” applies to under R. 1016

Rule 1016 Chapter 13
Best Interest of the Parties

- Uncured Secured Claims
- Acting promptly
- Equity

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The Increase in Elders filing for Bankruptcy Relief and Death in Bankruptcy

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The current growth of the population ages 65 and older is one of the most significant demographic trends in the history of the United States.[1]

Meet Betty and Fred. They are 70 and 71, respectively. They own their home that has returned to limited equity of $25,000 following the financial crisis. Their mortgage payment is $1,500 per month and their car payment is $375. In addition, they have $60,000 of credit card debt that has evolved over the last 20 years and they are paying $250 per month on their grandson's student loan which they have guaranteed. They are retired and their combined Social Security income is $3,300 per month. The FMV of their home is $200,000 and the balance on the mortgage is $175,000. The balance of their IRA is $200,000. They are in good health and with luck will live well into their 90's. Betty and Fred's monthly budget is:

BETTY & FRED MONTHLY BUDGET	
Income	$3,300
Expenses:	

[1] Population Bulletin 70.2, *Aging in the United States* (2015) www.prb.org

Mortgage Payment (PITI)	1,500
Car Payment	375
Car Insurance/Fuel	350
Utilities	500
Credit Card Payments (60,000 x .025)	1,500
Student Loan Payment for Grandson	250
Medicare Gap Coverage	175
Food/Misc.	600
Total Expenses	**$5,250**
NET (SHORTFALL)	**$1,950**
Amount of Annual IRA Depletion (without regard to tax consequences) ($1950 x 12)	$23,400
Anticipated IRA Exhaustion Point ($200,000 /23,400)	**8.5 Years**

Betty and Fred are a typical couple. They are no longer working and have limited income, which is exceeded by their monthly expenses. While they have their IRA as savings – it is rapidly being exhausted. Their current shortfall is $1,950 per month, which equates to $23,400 per year. At this rate, the Anticipated IRA Exhaustion Point – the point at which the IRA is gone - is 8.5 years. If Betty and Fred take no action, their savings which they are relying upon to fund their shortfall will be gone before they reach 80 – and then what will they do?

Because Betty and Fred were born after mid-1946 and before mid-1964, they are part of the baby boomer generation.[2] The baby boomers began turning 65 in 2011. In 2011, there were 77 million baby boomers in the population. By 2030, all the baby boomers will be 65 or older, and they will comprise 20% of the total US population, in contrast to 13% in 2010. The number of Americans ages 65 and older was 46 million in 2015 and will increase to over 98 million by 2060.[3] So what accounts for the increase in bankruptcy filings among the elderly? Apart from all other factors, the increase is explained by the population shift. We simply have more elderly people than we did before.

There exist other reasons for the increase in bankruptcy filings by the elderly. Among them: (1) the elimination or reduction of equity in homes due to the financial crisis, (2) the increase of student loan debt among the elderly, (3) the historical rise of credit card debt, (4) social security increases that do not keep pace with inflation for the elderly; (5) overcoming of the "stigma" the elderly often placed on filing; and (6) plain old need. These explanations are often referred to as the "reasons" for filing rather than as an explanation for the cause in the increase number of filings. There is little to distinguish. An increase in the occurrence of financially detrimental events will cause an increase in filings. Such was the case when filings increased during the financial crisis, due to job losses, underwater homes and individuals faced with credit card balances with no remaining available credit. These "events" cut across the entire adult population, but for seniors, the impact was magnified then and continues to be magnified today because seniors are retired, living on a fixed income and do not have the time or ability to recover from hardship absent assistance.

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[2] United State Census Bureau, US Dept of Commerce, *The Baby Boom Cohort in the United States: 2012 to 2016,* May 2014.
[3] Population Bulletin 70.2, *Aging in the United States* (2015) p3.

Among the many factors, the increase in student loan debt among the elderly is an alarming number. Consumers age 60 and older now hold $66.7 billion in student loan debt and nearly 40% of student loan borrowers who are over 65 are in default. The number of Americans over 60 who have outstanding loans has increased from 700,000 in 2005 to 2.8 million in 2015, with the average amount per borrower up from $12,100 in 2005 to $23,500 in 2015.[4] As practitioners, we recognize that the current state of the law precludes discharging student debt except in the most extreme cases. Nonetheless, the budgetary pressure incurred by seniors required to pay student loan increases the need to take affirmative action to discharge other dischargeable obligations.[5]

Let's return to Betty and Fred. For the practitioner, filing a Chapter 7 in this scenario is a simple task. By discharging the credit card debt and holding all other items constant, their monthly shortfall is decreased from $1,950 per month to $450 per month. The $200,000 IRA can subsidize the shortfall at the rate of $5,400 per year, which, without interest, will increase the Anticipated IRA Exhaustion Point from 8.5 years to 37 years, thus allowing Betty and Fred ample cash flow beyond age 105.

[4] Chicago Tribune, Bhattarai, Abha, *Student debt now affects a staggering number of elderly Americans,* January 16, 2017.

[5] Chapter 13 is also an avenue available to address student debt when all avenues seeking an affordable payment plan are exhausted. While there is no discharge, it provides relief with the hope of a legislative solution arising during the life of the plan.

Total Expenses (Reduced from $5,250 to $3,750 by elimination of $1,500/month of Credit Card Debt)	**$3,750**
NET (SHORTFALL)	**$450**
Amount of Annual IRA Depletion (without regard to tax consequences) ($450 x 12)	$5,400
Anticipated IRA Exhaustion Point ($200,000 /5,400)	**37 Years**

While a good start, Betty and Fred, for the long term, are still not totally secure. When one of them passes away, the smaller of the social security payments will drop off. Let's assume Betty's monthly Social Security benefit is $800 and Fred's is $2,500. If Fred passes away, Betty can elect survivor benefits and collect the $2,500 per month that Fred was receiving instead of her benefit. In this situation, the household income will be reduced to $2,500 per month, thus increasing the monthly shortfall $800, from $450 to $1,250 per month. Let's assume Fred unfortunately passes away at 83. The IRA balance then remaining will be $135,200, having been reduced from $200,000 by $5,400 per year for 12 years. At that point, assuming all other costs remain constant, the IRA will be exhausted at the rate of $15,000 per year ($1,250 x 12), thus leaving the Anticipated IRA Exhaustion Point at 9 years, which would last for Betty until she was 91.

Income (Reduced from $3,300 to $2,500 per month by Betty electing Fred's social security benefit following his death)	**$2,500**
NET (SHORTFALL)	**$1.250**
Amount of Annual IRA Depletion (without regard to tax consequences) ($1,250 x 12)	$15,000
Anticipated Exhaustion of IRA ($135,200 /15,000)	**9 Years**

The situation for Betty, as the survivor, is not all rosy, but workable. By that time, the car payment of $375 should be eliminated and Betty will likely not be driving, thus eliminating auto insurance and fuel expense. Betty's Food and Miscellaneous expense will also be reduced because Fred is no longer among the living. Hopefully, only Fred guaranteed the student loan for the grandchildren and if that's the case, another $250 of expense is eliminated. All told, assuming no car payment or related expense, Food and Miscellaneous reduced from $600 to $400 and no student loan, Betty's position will improve by $1,175 per month, leaving her with a shortfall of only $75 per month. The $75 per month, translates to $900 per year. With an IRA balance of $135,000, the IRA Anticipated Exhaustion Point is now 150 years. Betty and Fred, and Betty alone will be fine.

The most troubling aspect of Betty's and Fred's situation is that the clear majority of seniors like them do not realize they need to file the Chapter 7 on an urgent basis to preserve their IRA so that it can provide them the essential funding needed to live out their lives. More often, seniors such as Betty and Fred plod along, paying the minimum payments on the credit cards until one day - they look at their IRA statement and see it is under $50,000. It is at this point that they realize they are in trouble and begin to investigate their options. In this scenario, with only $50,000 of the IRA remaining, the Anticipated IRA Exhaustion Point with both Social Security incomes

totaling $3,300 will extend only 9.25 years in contrast to 37 years. Worse yet, when you evaluate the situation of Fred dying in 12 years, there no longer exists an IRA to cover any shortfall.

What about my Credit Score?

A factor that explains why people like Betty and Fred wait too long before taking the necessary action to protect their future and why the number of elderly Americans filing for bankruptcy is not a higher number is the sustained effort of the financial industry to brain wash Americans to believe their credit score is sacrosanct. Sad as it is, most couples in situations such as faced by Betty and Fred, are more concerned about their credit score than recognizing that they are 8.5 years from not having enough money for food and shelter. I see this every day in my practice and experienced this issue first hand with my father. He was in his late 80's, with no savings, but receiving social security, a veteran's disability benefit and working part time. He had $15,000 of credit card debt for which he was making his minimum payments of $375 per month religiously. I'd meet him for breakfast every Sunday and the same conversation occurred. I'd say, "Dad, give me the credit card bills, I will take care of them - you don't need to pay them." He'd say okay, but the following week he refused to turn over the bills arguing with me that he did not want to hurt his credit score. I'd say, "You don't need a credit score, you're 88 years old," and he'd reply, "What if I need a new car!" This process went on for about 4 years, until he needed to move from his apartment to an independent living community and needed some financial help. Though helping him out financially, I was certainly not going to pay the credit cards. While he qualified for a simple Chapter 7, if needed, there was no need. When the credit card companies called, I responded via his Durable Power of Attorney and informed them he was living on social security, had no assets and would not pay. I told them if they wished to sue, that I would accept service. As it turned out, none of them pursued their claims. To this day, however, I still think

about the $375 per month he paid over the four years I debated this with him and the countless additional funds paid during the previous years. Had he stopped earlier, he would have saved the funds paid on the credit cards and would have had the needed savings to cover the additional expense when he moved to the independent living community. As an aside, when he was 89, the transmission on his Ford failed and he did need a new car. At that point, I was in control over his finances and had not paid his credit cards for over a year. He was still able to finance a purchase of a new used Ford Focus – and it took him the better part of an hour to do so. So much for his credit score!

The credit score discussion is endless. I'm often invited to speak at community events for seniors where there are multiple speakers. Inevitably, one of the speakers espouses to the group the importance of maintaining their credit score for financial stability. Naturally, I cringe when listening to the presentation. With diplomacy, I endeavor to point out that the credit score is relevant if you are a senior seeking credit, but in a world in which we must make choices, sometimes it is necessary to sacrifice the credit score in favor of preserving the necessary income to meet future expenses.

The Baby Boomers now represent our elderly class. They lived in an America that witnessed the boom of available credit via the credit card – from the first Diner's Club that was issued in February 1950 to the amassing of $1.02 trillion in credit card debt as of May 2017.[6] Student loan debt has surpassed $1.4 trillion and it continues to climb.[7] In the 1980s through the beginning of the Great Recession, the solid growth in the value of homes allowed refinancing of

[6] CNBC, www.cnbc.com, July 11, 2017.
[7] Average credit card debt for Families 65 and older was $1,626 in 1989 and $4,041 in 2001, which was a 149% gain. *Borrowing to Make Ends Meet, The Growth of Credit in the '90's*, Tamara Draut and Javier Silva (2003). In 2017, the Average Credit Card Debt for persons 65 to 69 is $6,876, for 70-74 is $6,465 and for 75 and over is $5,638. *Average Credit Card Debt in America: 2017 Facts & Figures,* www.valuepenguin.com

homes to reduce or eliminate credit card debt. The result was not financially sound, but in a circumstance like that of Betty and Fred, the value of the home supported the mortgage debt and would create a means to eliminate the credit card debt via the refinance. In the end, this cycle usurped the equity from the home leaving seniors with the continued burden of making a mortgage payment in retirement, but at least there was little or no credit card debt to pay in retirement. Following the recession, homes had to first recover from being underwater before returning to an equity status and the result has been less available equity to refinance and eliminate the credit card debt, thus putting seniors at an even greater shortfall per month on their monthly budget. On the positive, seniors in this situation are better off not refinancing their mortgages to eliminate the credit card debt and for many, since the equity is not available to do so – they won't. As to those who have sufficient equity, the message they need to receive is that **they should not** refinance. When at home watching TV, our seniors need to know they should ignore the famous television personalities of the past who, with the American flag in the background, encourage the refinancing of homes to eliminate the credit card debt. The better course is to seek available relief under the Code, discharge all of the credit card debt and preserve whatever appreciation is realized in their homes.[8] The equity in the home can then become a become a secondary cushion for needed cash down the road if their income is insufficient.

In the end, the solution for the elderly is education. There are lessons which need to be conveyed. The average American needs to understand that if he or she is in good health at 60, they will probably live well into their 90's.[9] The social security income he or she will receive will not be adequate to address the costs of housing and day to day expenses. These two points create the

[8] In the situation where there is too much equity in the home to protect in bankruptcy, consideration should be given to resolving the credit card debt through Debt Resolution, via strategic negotiated settlement with the card providers.
[9] Population Bulletin 70.2, *Aging in the United States* (2015) p11.

basis of a simple concept for adequate retirement– at the date you retire, you must own your own home free and clear, have zero debt and have some surplus savings - in a tax deferred account or direct. Those seniors who effectuate this plan will have adequate cash flow for retirement without the need of the protections afforded by the Bankruptcy Code.

As practitioners, we need to increase our efforts at educating the middle aged and senior Americans who will likely make the same mistake of waiting too long to take essential action to eliminate dischargeable debt. Each time we succeed, we save people from undergoing undue hardship and stress in their senior years – a time in which they should be able to relax and enjoy the twilight.

When the Debtor Dies in a Pending Bankruptcy Case

Betty and Fred did get the proper message and elected to file a Chapter 7 bankruptcy. But what happens if Betty or Fred die during the pendency of the case? Under FRBP 1016, Death or Incompetency of Debtor, the case continues "so far as possible, as though the death or incompetency has not occurred."[10] This rule accomplishes the important task of allowing the deceased Debtor's estate to obtain the discharge and thereby confirm that the exempt assets at the time of filing are not subject to creditor claims. If the case was dismissed, the result would be to subject the formerly exempt assets (of the deceased spouse) to creditor claims. Procedurally, if the debtor dies, a Suggestion of Death should be filed with the court, attaching a copy of the death certificate to confirm the date and time of death.[11] To obtain the discharge, Section 1328(g)(1) requires that the debtor files certification of completion of the financial management course. If as

[10] FRBP 1016.
[11] Other personal information in the death certificate, such as cause of death, etc. can be redacted to maintain privacy.

of the debtor's demise or declaration of incompetency this has not occurred, the proper course is to move for an order excusing the requirement of the debtor.[12]

The situation gains complexity when the spouse of a joint debtors dies. If the spouse dies within 180 days of the filing of the case, the assets of the deceased spouse that transfer to the debtor spouse by "bequest, devise, or inheritance" become pre-petition assets of the surviving debtor under Section 541(a)(5)(A).[13] When the newly acquired assets are added to those of the surviving spouse at the time of filing, the result can cause the surviving spouse to hold non-exempt assets that are now subject to the trustee's obligations to liquidate and distribute for the benefit of the creditors. Of equal significance and critical to planning opportunities for the practitioner are the assets that pass to the debtor during the 180-day period *that are not subject to* Section 541(a)(5)(A). Assets transferred to the debtor post-petition from an intervivos trust (in contrast to a testamentary trust), transfers by operation of law and POD designations appear to be outside the reach of Section 541(a)(5)(A). There are several cases outside of Michigan addressing this issue. The cases indicate that the definition of the terms "bequest, devise or inheritance" under state law are controlling and if the terms mean testamentary transfers then 541(a)(5)(A) is limited to transfers by will, intestate succession or testamentary trusts.[14] While there appears to be no Michigan cases specifically defining these terms collectively, provisions of EPIC and cases addressing tenancy by the entireties in real property make it quite clear that nontestamentary transfers are not within the grasp

[12] References to the Bankruptcy Code provisions have replaced "11 USC" with "Section." Section 109(h)(4) provides the basis to exclude the deceased debtor as a "debtor" under the meaning of Section 109(h)(1).

[13] Section 541(a) provides in relevant part that the debtor's estate "is comprised of all the following property, wherever located and by whomever held:" Subsection (5)(A) states: "Any interest in property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and the debtor acquires or becomes entitled to acquire within 180 days after such date – (A) by bequest, devise or inheritance."

[14] *In re Hall,* 441 BR 680 (10th Cir 2009); *In re Rogove,* 443 BR 182 (Bankr SD Fla 2010).

of Section 541(a)(5)(A). EPIC defines "devise" to mean "when used as a noun, a testamentary disposition of real or personal property and, when used as a verb, to dispose of real or personal property by will."[15] This definition makes it clear the term refers to testamentary transfers. EPIC also clarifies in its definition of "beneficiary" that a beneficiary designation under a life or annuity policy, POD designation on a bank accounts, securities or retirement account are all nonprobate transfers.[16] To close the loop, authority that the term "nonprobate" is akin to "nontestamentary" is found in MCL 700.6101 which states such "nonprobate transfers" are "nontestamentary."[17] Transfers by operation of law are addressed in *In re Hamacher,* 535 BR 180 (Bankr ED Mich 2015), where the court held that the debtor's post petition acquisition of his deceased spouse's interest in real property held as tenants by the entirety is a transfer by operation of law and outside of the properties within the reach of Section 541(a)(5)(A),(B) and (C).[18] Proper bankruptcy planning for seniors and all debtors that may be in the position to be the recipient of assets coming to them as a result of the demise of a friend or relative requires more than stating, "You better not inherit anything for 180 days!" The better strategy, which has the added benefit of expanding the work opportunity for the lawyer, is to make sure the potential assets that could be coming to the debtor are properly funded in revocable trusts which include the standard spendthrift provision.[19]

[15] MCL 700.1103(l).
[16] MCL 700.1103(d)(iii); MCL 700.1103(e).
[17] MCL 700.6101.
[18] *In re Alderton, 179 BR 63 (*Bankr ED Mich S.D) is another Michigan case, which *Hamacher* cited as analogous. *Hamacher* at 183. In *Alderton*, the court (the Honorable Steven W. Rhodes) references Black's Dictionary for the definition of "inheritance."
[19] The spendthrift provision in the trust is necessary so that the asset is precluded from being a pre-petition asset of the debtor's estate under Section 541(c)(2). *In re Katusky,* 372 BR 910 (Bankr Minn 2007).

In a Chapter 13 case, Rule 1016 allows the case to dismissed or to proceed forward "if further administration is possible and in the best interest of the parties." While application of this rule is straightforward in a Chapter 7 case, such is not the case with a Chapter 13. The rule states:

> If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in **the best interest of the parties**, the case **may** proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.[20]

In the Chapter 13 context, the rule is inextricably tied to Section 1328(b), which is the Chapter 13 hardship discharge. It is the discharge that will result if the court concludes that the case is to proceed. The situation has similar consequences as in Chapter 7 as to unsecured debts. If the hardship discharge is ultimately granted, those claims are discharged leaving the surviving spouse with the remaining assets absent the claim of the creditors. Complication arise, however, because in Chapter 13, prior to completion of the plan there exists the potential that unsecured claims have yet to be cured or satisfied.

For the Chapter 13 case to conclude with a discharge, the requirements of both Rule 1016 and Section 1328(b) must be satisfied. There are several points to note in the rule. First, a standing issue exists as to who has the right to act on behalf of the debtor. The issue is whether the personal representative of the estate of the deceased debtor, the spouse of the debtor or the debtor's counsel can act on behalf of the debtor. *In re Shorter,* 544 BR 654 (ED Ark 2015). In *Shorter,* after extended analysis, the court held that the non-debtor surviving spouse who had not opened a probate estate for her husband met the requisite standing requirement. Meeting the standing requirement, however, does not equate to satisfying the requirement of being among the "parties whose best interests are to be evaluated" under Rule 1016. On this point, courts have concluded

[20] FRBP 1016 (emphasis added).

that the surviving spouse, as appointed through the probate process and as not appointed, is sometimes, but not always, considered to be a valid party whose interest is to be considered.[21] The interests of the various creditors are also at issue. Of concern is the case in which there are secured and priority creditor claims that are not satisfied in full or cured as of the death of the Chapter 13 debtor. Such was not the case in *Shorter* where the court held that a 1328(b) discharge was proper. Other cases, however, have held that dismissal of the Chapter 13 was proper where there were uncured secured claims. These cases rely on "the interest of the parties under Rule 1016"[22] analysis, as well as the discretionary language of both Rule 1016 and Section 1328(b) which both provide the court leeway in deciding whether to allow the case to move forward under Rule 1016 or granting the discharge under Section 1328(b).[23]

The ability of the representative of the deceased debtor to satisfy the Section 1328(b) hardship requirements rests more with convincing the court that it is the proper course given that it is a discretionary matter as set forth under subsection (b) in contrast to meeting the requirements of its three subsections. The provision states:

> (b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court **may grant a discharge** to a debtor that has not completed payments under the plan only if—
>
> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

[21] *In re Fogel*, 512 BR 659 (Bankr. D Colo 2014). In this case, the non-debtor wife of the deceased Chapter 13 debtor was the Personal Representative of the debtor's estate. The Court, focusing on her goal to gain the benefit of a lien strip on a second mortgage concluded she was not a party to be considered under Rule 1016.

[22] *In re Miller,* 526 BR 857 (USDC Col 2014); *In re Hennessy,* 2913 WL 3939886 (Bankr ND Cal 2013); *In re Sales,* 2006 WL 2668465 (Bankr ND Ohio 2015)

[23] Rule 1016 vests the court with discretion. The rule provides "the case *may* be dismissed" or the "case *may* proceed and be concluded." Similarly, Section 1328(b) states the court "*may* grant a discharge to a debtor."

> (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
>
> (3) modification of the plan under section 1329 of this title is not practicable.

Death is recognized without discussion in the cases as satisfying the first requirement. The second requirement is met for the reason that it is a restatement of the "best interest of the creditors test" which must be met as a precondition of obtaining confirmation of the plan.[24] Because the debtor has died, in the reported cases, the requirement for modification has been stipulated as not practicable or ostensibly ignored.[25] Practically speaking, upon death, the income and assets pass to his or her beneficiaries, which event accounts for the impracticality of the deceased debtor's representative seeking to modify the plan.

Just as in a Chapter 7, if the court is going to grant the discharge, the deceased debtor's representative must request a waiver of the personal financial management course required under Section 1328(g)(1). In addition, the representative should request a waiver of the Domestic Support Obligation certification required under Section 1328(a).

In cases where both spouses have filed a Chapter 13 and one spouse dies, there remains the question as to what is the best course for the surviving spouse to follow. In cases where the household income was primarily from the deceased spouse, conversion to Chapter 7 should be considered. If the surviving (spouse) debtor contributes a substantial portion of the income, the

[24] *Shorter* at 669; Section 1325(a)(4).
[25] *Shorter* at 10-11 (The trustee stipulated to 1328(b)(1) and (3) being satisfied). *In re Inyard*, 532 BR 364, 366 (2015)

surviving debtor should consider modifying the plan based on the reduced income and potentially excluding any debts that were not the obligation of the survivor.

Conclusion

The senior population is growing in number and percentage of the population. The increase in the number of seniors seeking bankruptcy relief is a function of population size and economic reality. The most compelling issue is the need to educate the elderly on the need to act sooner, rather than later. If the message is successfully conveyed, we will benefit from a senior population that is able to enjoy their years in retirement. With more seniors needing assistance, intervening death of the debtor will arise. For the practitioner, care needs to be exercised in contemplating the possibility of an intervening death during the pendency of the case and in exercising the proper course when such events occur.

Reverse Mortgages in Bankruptcy

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The Nature of Reverse Mortgages

- Government insured (90% of all reverse mortgages)
- Formal name: Home Equity Conversion Mortgage (HECM)
- FHA Administered

Requirements

- Each borrower must be 62 years or older.
- Borrowers must be homeowners and live in the house:
  - Single family
  - One to four units, one occupied by borrowers
  - HUD-approved condominium unit
- Must have at least 20% equity going into transaction

More Requirements

- Borrowers must attend HUD-approved counseling

Characteristics

- The loan is typically not income-dependent
- Repayment of the loan happens when:
  - The house is sold
  - All borrowers have not resided in the property for 12 months or more
  - Other defaults (such as failing to pay taxes)
- 2017 Limit of loan: $636,150
- **NON-RECOURSE. NON-RECOURSE. DID I SAY "NON-RECOURSE?" Let's talk more later.**

Draws from Credit Lines

- Tenure – fixed amount on a regular basis during residency
- Term – fixed amount on a regular basis for a set term
- Line of Credit – the ability to draw funds flexibly
- Modified Tenure, Modified Term

Bankruptcy Implications – Mostly Chapter 7

- Same as standard mortgage in that attorney should thoroughly review mortgage and promissory note
- The date of perfection of, not the date of draws on, the HECM is the date for Trustee avoidance actions
- Means Test: HECM is a secured debt.
  - Are they income?

Bankruptcy Implications – Mostly Chapter 7

- The Code does not define "income."
- Definition of Current Monthly Income
  - "includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)." 11 U.S.C. 101(10A)(B).
- Does this mean that term and tenure draws are income and credit line draws are not?
- Has implications for Means Test and Schedule I

Bankruptcy Implications – Mostly Chapter 7

- Unused Line of Credit: this is not an asset. The Trustee may not draw on it to pay other creditors.
- Future advances decrease equity in real estate. Can the Trustee stop the creditor from making future advances?

Bankruptcy Implications – Mostly Chapter 7

- Ipso facto clauses in reverse mortgages: critical to determine if reverse mortgage is executory.
  - In Michigan, mortgages are typically not executory (most courts holding that the act of granting a discharge upon the debtor completing payments is ministerial and not of sufficient magnitude to make the mortgage executory).
  - However, if mortgagee still has an obligation to continue making distributions to debtor is the contract executory? Good discussion on what is executory by Judge Shapero: *In the Matter of DMR Financial Services, Inc.*, 274 B.R. 465 (2002).
- If executory, some ipso facto clauses are enforceable. 11 U.S.C. 365(e)(2). (ipso facto clause enforceable if non-debtor party excused from accepting performance from Trustee or an assignee).
- If not executory, ipso facto clause invalid and creditor can be forced to continue to perform.

Bankruptcy Implications – Mostly Chapter 13

- Distributions from a reverse mortgage is incurring debt
- There is no Code provision requiring debtors to acquire court permission to incur debt except for the incurring of trade debt. 11 U.S.C. 1304(b). See also *In re Fields*, 2016 BL 170873, Bankr. D. Minn., No. 4:14-bk-40969, 05/27/2016. But see *In re Ward*, 546 B.R. 667 (Bankr. N.D. Tex. 20016).
- Our district requires permission of the Court to incur debt post-confirmation because of standard plan provisions ($2,000.00)

Bankruptcy Implications – Mostly Chapter 13

- However, even if the Debtor may incur debt, pre-confirmation, without permission of the Court, doing so can impact plan/confirmation as follows:
  - More cash to fund plan / pay off other priority or secured debt
  - Impact on fresh start
  - Impact on ability to move to new residence during the plan

Bankruptcy Implications – Mostly Chapter 13

- Modifiability of Reverse Mortgages
  - Just like conventional mortgages, subject to limits of 11 U.S.C. 1322(b)(2) (on secured by security interest on real property that is principal residence of debtor). By definition, reverse mortgage is a residence of Debtor.
  - Also, subject to 11 U.S.C. 1322(c)(2): if last payment on the original payment schedule is due before the date on which the final payment is due under the plan, then mortgage is modifiable.

Bankruptcy Implications – Mostly Chapter 13

- Big Question: in a reverse mortgage, when is the last payment due on the original payment schedule?
  - No *in personum* liability
  - No payment schedule
  - Payment only due on demand on sale, death or default
- Therefore, if the debtor defaults on the reverse mortgage and the last payment is the acceleration payment that may be due pre-petition or post-petition, is a reverse mortgage in default always modifiable?
- See *In re Domingue*, No. 11-40437, Bankr. S.D. Texas, 09/10/2012 (holding such a reverse mortgage was modifiable in Chapter 13).

Bankruptcy Implications – Mostly Chapter 13

- Post-confirmation, the Plan governs.
  - No incurring debt in excess of $2,000.00 without Court permission
  - Make sure Plan covers the reverse mortgage, in detail, including drawing ability of Debtor
  - Any deviation to Plan would require a Plan Modification under 11 U.S.C. 1329.

Bankruptcy Implications – Mostly Chapter 13

- Creating a reverse mortgage in Chapter 13.
  - FHA will not disqualify because debtor is in bankruptcy.
  - Requires permission of the Court.
  - Will likely require a plan modification.

External Sources

- Makoto Nakajima, Everything You Always Wanted to Know About Reverse Mortgages but Were Afraid to Ask, Business Review Q1 2012, philadelpiafed.org.

Copies of this Powerpoint

- http://tinyurl.com/decm2017

SOCIAL SECURITY AND VETERANS' BENEFITS: ADVISING ELDER CLIENTS AS TO THE IMPACT OF A BANKRUPTCY PROCEEDING

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I. Introduction

Several factors have contributed to a dramatic increase in the number of bankruptcy filings by seniors, age 50 and older, in recent years.[1] Having not fully recovered from the housing collapse, many seniors now have little to no equity in their homes.[2] In addition, seniors are often targeted for refinancing and sub-prime loans based on accumulated equity and the need for funds.[3] Credit card debt and healthcare costs are also contributing factors, with more bankruptcies caused by the combination of low income and high everyday living expenses than any single financial event.[4] Moreover, even a small increase in living expenses may cause financial distress for seniors with limited and fixed incomes.[5]

Contributing to the financial challenges faced by seniors is the fact that health costs are significantly higher for people as they get older.[6] Moreover, the upward adjustment of Social Security benefits is outpaced by the rising cost of healthcare. For 2017, Social Security recipients received a cost-of-living adjustment of 0.3%, which will impact more than 70 million people living in the United States, including those that receive Supplemental Security Income (SSI).[7] As Medicare B premiums also increased for 2017, and because such premiums are typically deducted from a Social Security recipient's monthly payment, the average monthly Social Security payment

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[1] *Growth in Seniors Filing for Bankruptcy Outpaces Younger Americans*, The Senior Citizens League, September 26, 2011, http://seniorsleague.org/growth-in-seniors-filing-for-bankruptcy-outpaces-younger-americans/.
[2] Id., citing John Golmant and James Woods' related article in the September 2010 issue of the American Bankruptcy Institute Journal.
[3] Id.
[4] Id.
[5] Id.
[6] *Many Seniors Anticipate Financial Struggles in 2017 as Social Security Benefits Only Go Up Slightly*, American Bankruptcy Institute, www.abi.org/feed-item/many-seniors-anticipate-financial-struggles-as-social-security-benefits-only-go-up.
[7] Id.

has not increased.[8] This is the fifth consecutive year where Social Security benefits were not increased or were minimally increased.[9] In comparison, national health spending has increased an average of 4.3% from 2010-15.[10]

These facts and circumstances make it imperative that bankruptcy practitioners advising elder clients have an understanding of how Social Security payments, as well as veterans' benefits, are treated in Chapter 13 and Chapter 7 bankruptcies.

II. Are Social Security Payments Part of the Bankruptcy Estate?

Whether or not Social Security payments are part of a bankruptcy estate requires a reconciliation of conflicting statutes. In a Chapter 7 bankruptcy case, section 541 of the U.S. Bankruptcy Code (the "Code") provides that a bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." Code § 541(a)(1). Code § 541 is expressly made applicable to chapter 13 cases by Code § 103(a).[11] Code § 1306 expands the definition of what constitutes property of the estate for Chapter 13 bankruptcy cases to include all property delineated in Code § 541 that is acquired after the case is filed and before it is closed, as well as all earnings from services performed by the debtor after the case is filed and before it is closed.[12]

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8 *How Does Social Security's Cost of Living Adjustment Affect Medicare?*, Phillip Moeller, http://www.pbs.org/newshour/making-sense/social-securitys-cost-living-adjustment-affect-medicare/.
9 *Many Seniors Anticipate Financial Struggles in 2017 as Social Security Benefits Only Go Up Slightly*, supra.
10 See *The Rising Cost of Health Care by Year and its Causes*, the balance, Kimberly Amadeo, July 10, 2017, https://www.thebalance.com/causes-of-rising-healthcare-costs-4064878.
11 Pursuant to the relevant part of Code § 103(a), "…[C]hapter 5…of this title appl[ies]in a case under chapter…13 of this title." Code § 103(a).
12 Per Code § 1306, "[p]roperty 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. Code § 1306.

In contrast, 42 U.S.C. § 407 provides, in relevant part:

> **(a)IN GENERAL**
> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> **(b)AMENDMENT OF SECTION**
> No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407.

These two statutes conflict, and "courts have struggled to determine when Social Security proceeds should be included in a debtor's bankruptcy estate."[13] However, the courts that have addressed the issue recently seem to be in agreement that pursuant to the clear language of 42 U.S.C. § 407, Social Security benefits are not part of the bankruptcy estate.

In Carpenter v. Ries (In re Carpenter), 614 F.3d 930 (8th Cir. 2010), the debtor received a lump sum payment for retroactive benefits in the amount of $17,165 from the Social Security Administration, and shortly thereafter filed a Chapter 7 bankruptcy in which the debtor claimed, in relevant part, that such proceeds were exempt and were protected by 42 U.S.C. § 407. Id. at 931-32. The bankruptcy trustee objected and argued that such funds were not exempt and were in fact property of the bankruptcy estate. Id. at 931. The bankruptcy court found that the Social Security proceeds were property of the bankruptcy estate pursuant to Code § 541, as that Code

[13] Carpenter v. Ries (In re Carpenter), 614 F.3d 930, 934 (8th Cir. 2010), citing United States v. Devall, 704 F.2d 1513, 1518 (11th Cir. 1983) and Toson v. United States, 18 B.R 371, 373 (Bankr. Bankr. N.D.Ga. 1982) (each holding that Congress implicitly repealed 42 U.S.C. § 407 by enacting the Bankruptcy Reform Act of 1978); and Walker v. Treadwell (In re Treadwell), 699 F.2d 1050, 1052 (11th Cir. 1983) and In re Lazin, 217 B.R. 332, 334 (M.D.Fla. 1998) (each holding that 42 U.S.C. § 407 is an exemption that a debtor must claim).

section does not exclude Social Security payments. Id. On appeal, the United States Bankruptcy Appellate Panel for the Eight Circuit reversed, holding that the Social Security payment was excluded from estate property pursuant to 42 U.S.C. § 407. Id. On subsequent appeal, the Eighth Circuit, in relevant part, has held that "… [42 U.S.C.] § 407 operates as a complete bar to the forced inclusion of past and future Social Security proceeds in the bankruptcy estate." Id. at 936-37, citing Hildebrand v. SSA (In re Buren), 725 F.2d. 1084, 1086 (6th Cir. 1984) (noting that Social Security payments in chapter 13 cases are only property of the bankruptcy estate if the debtor chooses to include them), and *Collier on Bankruptcy* ¶ 522.09[10][a] n.76 (16th ed. 2010) ("Congress amended 42 U.S.C. § 407 to clarify that the inalienability of Social Security benefits was not repealed by the Bankruptcy Code, so that such benefits should not even become property of the bankruptcy estate."). In so holding, the Eighth Circuit noted that 42 U.S.C. § 407 was not included in the list of statutory provisions that the Code explicitly repealed and modified, nor does 42 U.S.C. § 407 contain any qualifying language. Id. at 936. Rather, "[i]t explicitly demands that no past or future Social Security payments may be subject to the operation of any bankruptcy law," and that "…it is not to be limited by any other provision of law…." Id., citing 42 U.S.C. § 407.

Similarly, in Charnetsky v. Buenviaje (In re Buenviaje), 2017 Bankr. LEXIS 735 (B.A.P. 9th Cir. Mar. 10, 2016), the debtor received Social Security benefits which were deposited into a segregated bank account. At the time the debtor filed a Chapter 11, the account contained $30,000. Id. at *1. The debtor claimed the benefits were exempt pursuant to an exemption provided by California law, and the appellants objected. Id. at *2. The bankruptcy court overruled the objection and upheld the exemption, and the Buenviaje Court affirmed the ruling but based its decision on a different rationale. Id. at *3-11. The Buenviaje Court held that 42 U.S.C. § 407 applied to the benefits, and therefore "the social security benefits are excluded from and never

enter the [bankruptcy] estate." Id. at *8-9. As the benefits were not property of the bankruptcy estate, the debtor was not required to claim any exemptions in the benefits. Id. at *9, citing In re Franklin, 506 B.R. 765, 776 (Bankr. C.D. Ill. 2014) ("It follows that since a debtor's right to receive future social security benefits and proceeds traceable to benefits already paid do not become property of the bankruptcy estate, there is no need to claim them exempt, as the exemption process applies only to property of the estate.").[14] See also In re Manzo, No. 16-7218 (N.D. Ill. Aug. 25, 2017) (similarly holding that 42 U.S.C. § 407 excludes Social Security benefits from the property of a bankruptcy estate).

However, even if Social Security benefits are not property of the bankruptcy estate, they nevertheless are an important factor in elder clients' bankruptcy cases, as discussed below.

III. Are Social Security Payments in a Chapter 13 Included in Determining a Debtor's Income?

Jurisprudence has developed a near consensus that Social Security benefits are not included in determining "projected disposable income." Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), if the Chapter 13 trustee objected to the confirmation of the debtor's plan, then the plan could only be confirmed if it (1) called for full payment of unsecured claims or (2) provided that "all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan."[15] The Code, in turn, defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended…for the maintenance or support of the debtor or a dependent of the

[14] Code § 522(d)(10)(A) does provide an exemption, in relevant part, for the debtor's right to receive a social security benefit.
[15] Baud v. Carroll, 634 F.3d 327, 331 (6th Cir. 2011), cert. denied, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012), quoting Code § 1325(b)(1) (2000).

debtor...."[16] Under these Code provisions, in the context of Chapter 13 bankruptcies, the typical practice was to include benefits paid under the Social Security Act in the calculation of disposable income.[17]

Subsequently, BAPCPA redefined the term "disposable income" in Code § 1325(b)(2). Code § 1325(b)(1) and (b)(2) now read, in relevant part, as follows:

> (b)(1) If the trustee ...objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-
>
> ....
>
> (B) the plan provides that all of the debtor's *projected disposable income* to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.
>
> (2) For purposes of this subsection, the term "*disposable income*" means *current monthly income* received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended-
>
> (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
>
> (ii) for charitable contributions . in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

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[16] Id., quoting Code § 1325(b)(2) (2000).
[17] Id. at 343.

Code § 1325(b)(1)-(2) (emphasis added). Based on the new definition of "disposable income" in Code § 1325(b)(2), one must first determine "current monthly income." Code § 101(10A) defines "current monthly income" as the average gross monthly income that the debtor receives during the six months prior to the bankruptcy filing, excluding, in relevant part, "benefits received under the Social Security Act."[18]

However, Code § 1325(b)(1) requires that all of the debtor's "*projected* disposable income" be applied over the period of the plan, and determining what the term "projected" adds to the definition of "disposable income" found in Code § 1325(b)(2) has resulted in a split among courts as to the calculation of "projected disposable income."[19] The Supreme Court weighed in on the issue, rejecting a "mechanical approach", where the debtor's projected disposable income was simply multiplied by the number of months in the commitment period.[20] Rather, the Supreme Court adopted a "forward-looking" approach, where the debtor's projected disposable income takes into account "known or virtually certain" changes in the debtor's disposable income at the time of plan confirmation.[21] The discretion the Lanning decision allows courts in calculating projected disposable income "…does not permit bankruptcy courts to alter BAPCPA's formula for calculating disposable income (i.e., does not permit the court to alter the items to be included in and excluded from income."[22] As such, courts hold that because Social Security benefits are

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[18] Id., citing Code § 101(10A).
[19] Id., at 334; see also In re Barfknecht, 378 B.R. 154, 157 n.5 (Bankr. W.D. Tex. 2007) (describing the seven schools of thought for calculating projected disposable income).
[20] Id. at 334, citing Hamilton v. Lanning, 130 S. Ct. 2464, 2473-77 (2010).
[21] Id., citing Lanning at 2478.
[22] Id., at 345. In Lanning, the debtor had received a one-time cash buyout from her employer prior to filing a bankruptcy. Lanning at 2470. As this occurred just prior to her bankruptcy filing, the one-time payment was necessarily included in the calculation of disposable income, as that calculation looks at income for the six months prior to the bankruptcy filing. The debtor argued, however, that the one-time payment should not be included in the calculation of projected disposable income, as the debtor would then be obligated to make plan payments which she could not afford. Id. The Supreme Court held that while projected disposable income and disposable income will normally be the same, courts may account for changes in the debtor's income that are known or virtually certain at the time of debtor's confirmation. Id. at 2478.

excluded from calculating "current monthly income," such benefits are not a factor in calculating "projected disposable income. See Baud, *infra*; see also Fink v. Thompson (In re Thompson), 439 B.R. 140 (8th Cir. BAP 2010); Anderson v. Cranmer (In re Cranmer), 697 F.3d 1314 (10th Cir. 2012); Beaulieu v. Ragos (In re Ragos), 700 F.3d 220 (5th Cir. 2012); Drummond v. Welsh (In re Welsh), 711 F.3d 1120 (9th Cir. 2013); and Adinolfi v. Meyer (In re Adinolfi), 543 B.R. 612, 614 (9th Cir. BAP 2016); In re Mihal, 2015 Bankr. LEXIS 1683 (Bankr. E.D. Mich. May 6, 2015).

In Barfknecht, a Chapter 13 trustee objected to two different Chapter 13 plans for, in relevant part, the same reason: the debtors did not include Social Security benefits when calculating projected disposable income for purposes of Code § 1325(b).[23] In each case, the debtors did not list their Social Security income on Form B22C – Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income for Use in Chapter 13, pursuant to the form's instructions and in accordance with Code § 101(10A).[24] The debtors did, however, list their Social Security benefits on their respective Schedule I, per the schedule's direction.[25] The Chapter 13 trustee objected to confirmation of the plans arguing, in relevant part, that the Social Security benefits should be treated as "projected disposable income."[26] The trustee acknowledged that "disposable income" is calculated with "currently monthly income," a defined term which explicitly excludes benefits received under the Social Security Act.[27] However, the trustee argued that "projected disposable income" was not a defined term, and that use of the term "projected" means the calculation should be forward looking.[28] In contrast, argued the trustee,

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[23] Barfknecht at 155.
[24] Id. at 155-56.
[25] Id. at 156.
[26] Id. at 157.
[27] Id.
[28] Id.

"disposable income" from Form B22C is backwards looking as of the petition date.[29] As such, continues the trustee, the backwards looking data on Form B22C should be ignore in calculating the forward-looking "projected disposable income"; instead, "disposable monthly income" should be calculated with the forward-looking income information provided on Schedule I, which includes the debtors' Social Security benefits.[30] The Debtors argue that even if the term "disposable monthly income" is forward looking, the phrase nevertheless incorporates a defined term which specifically excludes benefits received under the Social Security Act.[31]

The Barfknecht court began by analyzing the case of In re Hardacre, 338 B.R. 718 (N.D. Tex. 2006), one of the first cases to address the issue of calculating "projected disposable income," which was cited by the trustee as supportive.[32] The Hardacre Court ruled that the "plain" language of amended Code § 1325(b)(1)(B) evidences that "projected disposable income" means something other than "disposable income," as such term is redefined by BAPCPA.[33] The addition of the word "projected" indicates the figure to be forward-looking, while BAPCPA defined "disposable income" as a figure based on historical figures.[34] The trustee in Barfknecht argued that this holding justified or required the court to ignore historical data, and instead look solely to Schedules I and J to determine *projected* disposable income.[35] However, the Hardacre Court specifically held "[t]his does not mean that section 101(10A)'s definition of current monthly income is irrelevant to the calculation of projected disposable income. Section 101(10A) continues to apply insomuch

[29] Id.
[30] Id. at 157-58.
[31] Id. at 158.
[32] Id. at 160.
[33] Id. (citations omitted).
[34] Id. (citations omitted).
[35] Id.

as it describes the sources of revenue that constitute income, as well as those that do not." Barfknecht at 161, quoting Hardacre at 723.

Moreover, it is logical to assume that the definition of "disposable income" must be the starting point for calculating a debtor's "projected disposable income." Id. The trustee cited no authority or rule of statutory construction supporting his argument that a defined term can mean two different things when used twice in the same statutory subsection. Id. at 162. Rather, the Barfknecht Court held that courts are constrained by the Code's definitions, and therefore benefits received under the Social Security Act cannot be used to calculate projected disposable income. Id.

Similarly, in In re Ragos, the court addressed the issue of whether Social Security benefits could be included in the calculation of projected disposable income. Holding that they could not, the Fifth Circuit held that "[i]f Congress excluded social security income from current monthly income and disposable income, it makes little sense to circumvent that prohibition by allowing social security income to be included in projected disposable income." Ragos at 223. The court also found support for its holding in 42 U.S.C. § 407(a), which clearly states that Social Security benefits are not subject to the operation of any bankruptcy law. Id. at 223-24.[36] After some bankruptcy courts were including Social Security benefits from income available to pay creditors in Chapter 13 bankruptcies, Congress enacted 42 U.S.C. § 407(b), which require laws enacted after 42 U.S.C. § 407 to specifically cite the statute if the newly enacted law is to limit, supersede, or modify the statute. Id. Reading 42 U.S.C. § 407(b) together with the Code, it is clear that Congress

[36] See also Mihal at*7.

intended to protect Social Security payments from the bankruptcy process. Id. See also In re Ranta, 721 F.3d 241, 261 (4th Cir. 2013).

The Sixth Circuit has likewise held that Social Security benefits are not included in the calculation of projected disposable income. See Baud. To hold otherwise would be to essentially "…read out of the Code BAPCPA's revisions to the definition of disposable income." Id. at 345. In its opinion, the Baud Court cited a litany of decisions, both before and after Lanning, reaching the same conclusion. Id. at 345-46.[37]

IV. Can Social Security Payments be Considered as to a Chapter 13 Plan's Feasibility?

In a Chapter 13 bankruptcy, plan confirmation requires, among other things, that the value of the property to be distributed under the plan to allowed unsecured creditors is not less than what such creditors would receive had the debtor file a Chapter 7. Code § 1325(a)(4). Moreover, to be confirmed, a debtor must be able to make all payments required by the Chapter 13 plan. Code § 1325(a)(4). The ability to make plan payments is referred to as the "feasibility" requirement. Having noted above that Social Security benefits are not property of the bankruptcy estate and are

[37] Citing Kibbe v. Sumski (In re Kibbe), 361 B.R. 302, 311-12 (B.A.P. 1st Cir.2007) ("[I]n its adherence to Schedule I, the bankruptcy court abandoned the new definition for 'disposable income.' But Congress apparently intended to exclude certain categories of income when it defined 'disposable income' generally and then in the chapter 13 context. Not to be included in the income determination under chapter 13 are benefits received under the Social Security Act."); In re Bartelini, 434 B.R. 285, 295-96 (Bankr.N.D.N.Y.2010) (same); Lanning at ___ n. 21 (same); Barfknecht at 161-62 (same); In re McCarty, 376 B.R. 819, 825 (Bankr.N.D.Ohio 2007) (same); In re Upton, 363 B.R. 528, 534-35 (Bankr.S.D.Ohio 2007) (same); In re Schanuth, 342 B.R. 601, 605 (Bankr.W.D.Mo.2006) (same); In re Johnson, 382 Fed. App'x 503, 506 (7th Cir. June 21, 2010) (unpublished) (affirming, post-Lanning, the bankruptcy court's " 'harmonizing' approach" to the projected disposable income calculation, which "employ[s] the inclusions and exclusions from 'current monthly income' set forth in section 101(10A), but appl[ies] them not in the retrospective manner specified by that provision but rather in the forward-looking manner envisioned by section 1325(b)"); In re Welsh, 440 B.R. 836, 851 (Bankr.D.Mont.2010) ("Current monthly income defined under BAPCPA, § 101(10A)(B), excludes benefits received under the Social Security Act; Section 101(10A)(B) is a clear indication that Congress intended a departure from pre-BAPCPA practice and [to] exclude SSI income from the disposable income calculation."). But see In re Cranmer, 433 B.R. 391, 399 (Bankr .D.Utah 2010) (holding that a case where the debtor has Social Security benefits is the " 'unusual' case the Supreme Court meant in [Lanning] where there are other known sources of income that should be included in the calculation of [projected disposable income]").

not part of calculating the projected disposable income that must be committed to a Chapter 13 plan, what happens to elder debtors whose income (minus Social Security benefits) is less than their expenses, such that they would have no projected disposable income from which to fund a Chapter 13 plan? Can elder debtors voluntarily commit a portion of their Social Security benefits to their Chapter 13 plans such that they can meet the feasibility requirement of plan confirmation?

These were the issues addressed by the Fourth Circuit in Ranta v. Gorman (In re Ranta), 721 F.3d 241 (4th Cir. 2013). In Ranta, a Chapter 13 trustee objected to a debtor's chapter 13 plan, in relevant part, based on the plan's feasibility. Id. at 244. The bankruptcy court sustained the trustee's objection, reasoning that if Social Security income is excluded from determining "disposable income," then it must also be excluded when determining if a plan is feasible. Id. at 253. The debtor, on the other hand, argued that he could commit Social Security benefits to a Chapter 13 plan in order to meet the feasibility requirement. Id. at 245.

The Ranta Court held that nothing in the Code supported the trustee's position; rather, Code § 1325(a)(6) simply requires that a debtor be able to make the payments under a plan, but does not dictate that only "disposable income" can be used to fund a plan." Id. at 253. To the contrary, "[t]here is no indication Congress intended to throw this kind of obstacle to relief in the way of Social Security recipients when it revised the definition of 'projected disposable income' with the BAPCPA." Id. at 254. In remanding the case back to the bankruptcy court in light of its ruling, the Ranta case held that "…in evaluating whether a debtor will be able to make all payments under the plan…, the bankruptcy court must take into account any Social Security income the debtor proposes to rely upon, and may not limit its feasibility analysis by considering only the debtor's 'disposable income.' If the debtor's actual net income, including Social Security income, is sufficient to cover all of the required payments, the plan is feasible." Id. In support of its ruling,

the Ranta Court noted "…it has long been established that Social Security income may be used to fund a Chapter 13 plan. Id. at 253 (citations omitted).

The Ranta Court noted that it's decision was in agreement with the Sixth Circuit's ruling in Baud. Id. In that case, the Sixth Circuit likewise held that "[u]nder BAPCPA, a debtor with zero or negative income may propose a confirmable plan by making available income that falls outside of the definition of disposable income – such as…benefits under the Social Security Act – to make payments under the plan to administrative, priority and secured creditors and to make payments to unsecured creditors required to satisfy other confirmation requirements." Baud at 352, n. 19. The Baud court cited the holding in In re Alexander, 344 B.R. 742 (E.D.N.C. 2006) as supporting its ruling. Id. at 351-52.

In Alexander, the court noted that BAPCPA changed the analysis as to a Chapter 13 plan's feasibility. Alexander at 750. "To veterans of Chapter 13 practice, it runs afoul of basic principles to suggest that a debtor with no disposable income can nonetheless propose a confirmable plan. Yet BAPCPA permits precisely that." Id. The Alexander Court explained that because, prior to BAPCPA, disposable income took into account all of the debtor's income and expenses, a debtor without a positive disposable income number had no ability to fund a Chapter 13 plan. Id. The result, however, is different under BAPCPA, as "…a debtor under the new 'disposable income' test may show a zero or negative number, yet be able to make the required showing that she actually has enough income [not counted in the current definition of current monthly income] to fund a confirmable plan. The debtor is at least entitled to try." Id. See also In re Kibbe, 361 B.R. 302, 314 n. 11 (B.A.P. 1st Cir. 2007) (noting that the "…definition of 'projected disposable income does not preclude a debtor's use of available monies excluded from the definition to support feasibility of the debtor's plan.); In re Manzo, No. 16-7218 (N.D. Ill. Aug. 25, 2017) (holding that

a Chapter 13 debtor may voluntarily contribute non-estate property to a plan); Mihal at *7 ("No one argues that a Chapter 13 debtor cannot *voluntarily* utilize his or her Social Security income to pay creditors through a confirmed plan or even outside of bankruptcy.").

The cases cited above outline the current majority view that non-estate property, such as benefits received under the Social Security Act, may be used by a debtor to fund a Chapter 13 plan and meet the feasibility requirement. While there is at least one case to the contrary,[38] that decision relied on pre-BAPCPA decisions and otherwise failed to account for BAPCPA and how its revised definition of "disposable income" affects a feasibility analysis. See Ranta at 254. We next look at whether the failure of a debtor to contribute benefits received under the Social Security Act has an impact on whether or not a Chapter 13 plan was proposed in good faith.

V. Are Social Security Payments in a Chapter 13 Considered When Determining Whether a Plan Has Been Proposed in Good Faith?

Among other requirements, a Chapter 13 plan must be proposed in good faith in order to be confirmed. Code § 1325(a)(3). Neither the Code, nor its legislative history, defines the term "good faith."[39] As such, the term has been the subject of extensive litigation."[40] The appellate courts have developed a "totality of the circumstances" test to be applied by bankruptcy courts in determining "good faith," and have proscribed a non-exhaustive list of non-exclusive factors to consider under the test with similar, but slightly varying, language.[41] The weight of each factor depends on the circumstances of each case, and no one factor is determinative.[42]

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[38] See In re Schanuth, 342 B.R. 601 (Bankr. W.D. Mo. 2006).
[39] Davis, Casey J. (2014) "Not So Secure: Should Social Security Benefits Be Considered in the Good Faith Analysis Under 11 U.S.C. § 1325(A)(3)?," *Akron Law Review*: Vol. 47: Iss. 1, Article 12; p. 267 (citations omitted).
[40] Id. (citations omitted).
[41] Id. at 270-71 (citations omitted).
[42] Id. at 271 (citations omitted).

In the Sixth Circuit, good faith is determined by a totality of the circumstances, with no "…precise formulae or measurements to be deployed in a mechanical good faith equation. The bankruptcy court must ultimately determine whether the debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources. The decision should be left to the bankruptcy court's common sense and judgment." Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah), 836 F.2d 1030, 1033 (6th Cir.1988). While the Sixth Circuit has yet to opine on whether Social Security benefits should be considered in the good faith analysis of Code § 1325(a)(3),[43] there is a split of authority in other courts.

A. Some Courts Have Held that Social Security Benefits Should Not be Considered in a Good Faith Analysis Under Code § 1325(a)(3).

The Ninth Circuit has held that the failure to include Social Security benefits in a Chapter 13 plan may not impact a good faith analysis. See Drummond v. Welsh (In re Welsh), 711 F.3rd 1120 (9th Cir. 2013). In Welsh, the debtors proposed a plan that excluded the debtors' Social Security income. Id. at 1122. The Chapter 13 trustee objected to the debtors' plan, arguing that the plan was not proposed in good faith because it did not include the debtors' Social Security income. Id. The bankruptcy court overruled the trustee's objection, noting that considering the fact that Social Security income was not committed to a Chapter 13 plan under a good faith analysis would erode 42 U.S.C. § 407(a), which excludes Social Security income from the operation of any bankruptcy law. Id. at 1124. The Ninth Circuit B.A.P. affirmed, and the trustee appealed the matter to the Ninth Circuit. Id.

[43] See Baud at n. 13 (recognizing that courts are split as to whether a debtor's decision not to commit Social Security benefits to a Chapter 13 plan could be considered in a good faith analysis under Code § 1325(a)(3), but declining to address the issue as the debtor in that case was committing social security to a Chapter 13 plan and therefore good faith was not at issue).

The Ninth Circuit noted that with the enactment of BAPCPA and its definition of "current monthly income" – which excludes Social Security benefits – Congress replaced bankruptcy courts' previous case-by-case discretion in assessing disposable income with a "rigid means test." Id. at 1131. Thus, under BAPCPA, the "disposable income" which must be committed to a Chapter 13 plan may be less than the actual funds a debtor has that could be paid to unsecured creditors. Id. at 1130. The Welsh Court went on to hold:

> We cannot conclude…that a plan prepared completely in accordance with the detailed calculations that Congress set forth is not proposed in good faith. To hold otherwise would be to allow the bankruptcy court to substitute its judgment of how much and what kind of income should be dedicated to the payment of unsecured creditors for the judgment of Congress. Such an approach would not only flout the express language of Congress, but also one of Congress's purposes in enacting BAPCPA, namely to "reduce[] the amount of discretion that bankruptcy courts previously had over the calculation of…debtor's income and expenses." *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 658 (8th Cir. 2008)…. When Congress speaks directly to one of the good faith factors, the judicial good faith inquiry is narrowed accordingly.

Id. at 1131. The Welsh Court further held that Code § 1325(b)'s good faith requirement focuses on a debtor's motivation in seeking relief from a bankruptcy court, while Code § 1325(a) focuses on the amount of funds a debtor is expected to devote to unsecured creditors; these are separate and distinct inquiries and consideration of disposable income has no place in a good faith analysis. Id. at 1132-33.

The Eighth Circuit B.A.P. reached a similar conclusion in In re Thompson, 439 B.R. 140 B.A.P. 8th Cir. 2010). In Thompson, a Chapter 13 trustee likewise objected to the confirmation of a debtors' plan by arguing that the debtors' failure to include Social Security income failed the good faith test. Id. at 141. In affirming the lower court's denial of the trustee's objection, the Thompson Court held that considering the exclusion of debtors' Social Security benefits from their

plan in a goof faith analysis would render Code § 1325(b)'s ability to pay test meaningless. Id. at 143 (citations omitted). Moreover, the Thompson Court found that it would be duplicative to consider the exclusion of Social Security benefits under both the ability to pay test and a good faith analysis. Id.

The Fifth Circuit also reached a similar result in Ragos, holding that excluding Social Security benefits from a Chapter 13 plan was in accordance with the Code, and that a plan could not be in bad faith merely by doing what the Code permits debtors to do. Ragos at 227. In an analogous case, the Tenth Circuit reached the same result. See Cranmer at 1319 ("When a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes [benefits received under the Social Security Act], that exclusion cannot constitute a lack of good faith."). See also, e.g., Manzo (holding that the failure to voluntarily contribute Social Security income to a Chapter 13 plan could not be a basis for a finding of bad faith); Barfknecht (a per se rule that excluding Social Security income from a Chapter 13 plan fails the good faith test is contrary to the "totality of the circumstances" inquiry required, and thus prohibited); Ranta (the exclusion of Social Security benefits from disposable income, which is required by statute, with nothing more, cannot constitute bad faith; Alexander (a debtor's disposable income must be determined under Code § 1325(b) and not as an element of good faith under Code § 1325(a)(3)); Mihal at *6 (in holding that failure to include Social Security benefits in a proposed Chapter 13 plan should not be considered in a good faith analysis, the court noted that to rule otherwise "…would be to render this specific statutory exclusion [of Social Security benefits from 'disposable income'] meaningless, and to invalidate the benefits of this exclusion under the guise of the 'good faith' requirement.").

B. Other Courts Have Held that Social Security Benefits Should be Considered in a Good Faith Analysis Under Code § 1325(a)(3).

Although all appellate courts that have opined on the issue have held that the failure to voluntarily contribute Social Security income to a Chapter 13 plan should not be considered in a good faith analysis, a number of lower courts have found to the contrary. The Western District of Michigan noted that Code § 1325(a), as currently written, does not contain any limitations as to what to consider in a good faith analysis, and that historically, a judicial inquiry into good faith requires a court to consider all facts and circumstances. Mains v. Foley, 2012 WL 612006, *4. The Mains Court further noted that while BAPCPA did expressly exclude Social Security income from the disposable income analysis of Code § 1325(b), it did not change the unqualified good faith test provided for in Code § 1325(a). Id. The Mains Court thus concluded that it was possible for a debtor to propose a plan that meets Code § 1325(b)'s objective test, but fails Code § 1325(a)'s good faith analysis, and that Social Security income could be a factor in a good faith analysis. Id. In further support of its holding, the Mains Court held that 42 U.S.C. § 407(a) prevents a third party's compelled acquisition of a person's benefits received under the Social Security Act, and thus does not impact and is inapplicable to the good faith analysis under Code § 1325(a). Id. at *4-6.

A similar result was reached in In re Upton, 363 B.R. 528 (Bankr. S.D. Ohio 2007). In Upton, the Court also noted that BAPCPA did not affect the requirement that a Chapter 13 plan be proposed in good faith. Id. at 535. The Upton Court noted that the Sixth Circuit and other courts have long considered the amounts of proposed payments and a debtor's income surplus in a good faith analysis. Id. at 536. If Congress wanted to change the good faith analysis used by courts, it would have amended Code § 1325(a)(3) when it enacted BAPCPA, and the fact that it didn't so amend indicates that Congress was presumably satisfied with courts' good faith analysis. Id.

Other Courts have also held that the exclusion of Social Security benefits from a Chapter 13 plan is a factor to consider in a good faith analysis. See In re Thomas, 443 B.R. 213 (Bankr. N.D. Ga. 2010) (in finding that a plan was not proposed in good faith, the court considered in the totality of the circumstances that the debtors proposed to pay nothing to their unsecured creditors while accumulating Social Security payments each month that were twice the proposed plan payment); and In re Bartelini, 434 B.R. 285 (Bankr. N.D. N.Y. 2010) (the failure to include Social Security income in a proposed plan is one of many factors in the totality of circumstances used in a good faith analysis).

As the issue has not been decided by the Sixth Circuit, Chapter 13 practitioners should consider both a client's pre-petition accumulated Social Security benefits, as well as the client's monthly benefit as compared to the proposed plan payment and amount proposed to be paid to unsecured creditors, in advising elder clients as to a potential objection by a Chapter 13 trustee that a plan was not proposed in good faith.

VI. In a Chapter 7, Does a Code § 707(b)(3) Analysis of a Debtor's Ability to Pay Creditors Include the Debtor's Social Security Income?

In a Chapter 7 bankruptcy case, the court may dismiss the bankruptcy case if the petition was filed in bad faith or if "the totality of the circumstances…of the debtor's financial situation demonstrates abuse." Code §§ 707(b)(3)(A) and (b)(3)(B), respectively. Under former Code § 707(b), the standard for dismissal was "substantial abuse," while the language of Code § 707(b)(3)(B) as modified by BAPCPA directs a bankruptcy court to consider the totality of the circumstances…of the debtor's financial situation." Courts have held that "substantial abuse" as determined under Sixth Circuit jurisprudence would constitute abuse under the totality of the circumstances, and thus pre-BAPCPA case law interpreting "substantial abuse" is applicable to finding abuse under the totality of the circumstances pursuant to Code § 707(b)(3)(B). See In re

Violanti, 397 B.R. 852, 855 (Bankr. N.D. Ohio 2008) (holding that the grounds for dismissal under Code § 707(b)(3)(B) are a codification of pre-BAPCPA jurisprudence); and In re Mestemaker, 359 B.R. 849 (Bankr. N.D. Ohio 2007) (applying Sixth Circuit caselaw interpreting "substantial abuse" pre-BAPCPA to Code § 707(b)(3)(B)). Historically, the Sixth Circuit factors used to determine whether "substantial abuse" existed under former Code § 707(b) include, among other things, a debtor's ability to pay their debts out of future earnings. In re Behlke, 358 F.3d 429, 437 (6th Cir. 2004), citing In re Krohn, 886 F.2d 123, 126-28). Does the ability to repay take into account benefits received under the Social Security Act in light of BAPCPA's enactment and interpreting caselaw?

Courts are split as to this issue. In assessing a debtor's ability to repay, some courts will consider a debtor's Social Security income in a totality of the circumstances analysis under Code § 707(b)(3). See In re Booker, 399 B.R. 662, 667 (Bankr. W.D. Mo. 2009) (holding that Congress could have excluded Social Security income from a totality of the circumstances analysis under Code § 707(b)(3) analysis but shoes not to; therefore, Social Security income should be considered in a totality of the circumstances analysis under Code § 707(b)(3)); and In re Calhoun, 396 B.R. 270 (Bankr. D.S.C. 2008), *subsequently aff'd by* Calhoun v. U.S. Tr., 650 F.3d 338 (4th Circuit 2011) (same).

Other courts have ruled that a debtor's Social Security income should not be considered in assessing a debtor's ability to repay in a totality of the circumstances analysis under Code § 707(b)(3). In In re Suttice, 487 B.R. 245, 254 (Bankr. C.D. Cal. 2013), the court began its analysis with a review of case law outlining Congress's intent to remove Social Security income from the grasp of creditors vis-a-vie 42 U.S.C. § 407 and the definition of "currently monthly income" found in Code § 101(10A). Id. at 251-54. The court also noted that the debtors' ability to fund a

Chapter 13 plan would be solely based on contributing Social Security income to a Chapter 13 plan, which the debtors were not required to do. Id. 253-54. In then considering the dilemma of considering Social Security income in an abuse analysis while simultaneously excluding Social Security income from a Chapter 13 plan, the Suttice Court held that "…Congress intended social security benefits to be protected from inclusion in a § 707(b)(3) analysis, based upon § 407(a) of the Social Security Act and as shown by the Debtors' social security income being definitively excluded from the means test of § 707(b)(2)." Id. at 254. The court also noted that the decisions in Booker and Calhoun were not persuasive, noting that Calhoun's affirmation by the Fourth Circuit specifically declined to address whether Social Security income was properly a considered factor in a totality of the circumstances analysis under Code § 707(b)(3). Id. See also In re Moriarty, 530 B.R. 637, 644 (Bankr. W.D. Va. 2015) (totality of the circumstances of the debtor's financial situation under a Code § 707(b)(3)(B) analysis does not include Social Security income).

As the issue likewise has not been decided by the Sixth Circuit, Chapter 7 practitioners should consider both a client's pre-petition accumulated Social Security benefits, as well as the client's monthly benefit, in advising elder clients as to a potential motion to dismiss based on the totality of the circumstances of the debtor's financial situation under a Code § 707(b)(3)(B).

VII. Bankruptcy Treatment Veterans' Disability Benefits

The Code allows a debtor to exempt their right to receive a veterans' benefit. Code § 522(d)(10)(B). But are veterans' benefits included in the calculation of disposable income in Chapter 13 bankruptcy cases?

The court in In re Brah concluded that veterans' benefits were included in the calculation of disposable income. In re Brah, 562 B.R. 922 (Bankr. E.D. Wis. 2017). In Brah, the Chapter 13

trustee objected to the debtors' proposed plan because, by the debtors' exclusion of their veterans' benefits from the calculation of disposable income, the debtors' plan failed to commit all of their disposable income to the plan as required by Code § 1325(b)(1)(B). Id. at 923. The debtors countered that because the veterans' benefits are exempt, Code § 522(c) "…renders the benefits not liable to unsecured creditors."[44] Id. The debtors further argue that they cannot be forced to pay their veterans' benefits to creditors pursuant to 38 U.S.C. § 5301(a)(1), which exempts veterans' benefits and provides that they are not "liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever." Id., quoting 38 U.S.C. § 5301(a)(1).

The Brah Court began its analysis by noting that current monthly income is the starting point for determining disposable income, and that current monthly income is the average monthly income received by the debtor from all sources, paid on a regular basis, and used by the debtor for household expenses. Id. at 924, citing Code § 101(10A). The court held that veterans' benefits are current monthly income per the statutory definition. Id. Moreover, unlike benefits received under the Social Security Act, the definition of current monthly income does not exclude veterans' benefits, which is provided under the separate and distinct Veterans' Benefits Act. Id.[45]

The Brah Court went on to hold that exempt property is properly included in disposable income. Id. at 925. While the debtors cited a pre-BAPCPA case holding that to include exempt property in the calculation of disposable income under Code § 1325(b)(2) would directly conflict

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[44] In relevant part, Code § 522(c) provides that "…property exempted under this section is not liable during or after the case for any debt of the debtor that arose…before the commencement of the case…." Code § 522(c).

[45] Note that this same analysis would mean that pension payments, which are also not specifically excluded under the definition of "current monthly income," would be included in disposable income for Chapter 13 plan purposes. See, e.g., In re Charron, 2016 Bankr. LEXIS 2201, *9 (Bankr. E.D. Mich. May 13, 2016) ("Some might see the result of this Court's ruling as being somehow inequitable or unfair to recipients of…pensions, as compared to recipients of Social Security benefits, given that they are both forms or types of pensions. To the extent that is a concern, equating them for purposes involved in this case [i.e., including pension payments in the calculation of 'disposable monthly income'] is a matter for Congress and not this Court.").

with the language of Code § 522(c),[46] the Brah Court was persuaded by contrary decisions holding that exempt property could be included in the calculation of disposable income. Id. Citing In re Ferretti, 203 B.R. 796, 800 (Bankr. S.D. Fla. 1996), the court rejected the direct statutory conflict argument, holding that the inclusion of exempt property in the calculation of disposable income does not make the property "liable" for debts owed to unsecured creditors because the decision to file a Chapter 13 bankruptcy was voluntary. Id. The Brah Court further reasoned that:

> …[t]he disposable income limitation in § 1325(b) simply defines the terms upon which Congress has made the benefits of Chapter 13 available. In Chapter 7, exemptions serve to ensure that a debtor will not be left destitute. By contrast, in Chapter 13, debtors retain exempt and nonexempt assets and repay creditors with the income that is not reasonably necessary for their support. Although the definition of disposable income changed with BAPCPA, this general concept did not. Thus, a Chapter 13 debtor's fresh start is not endangered by a requirement that income received during the life of the plan from otherwise exempt sources be included in the calculation of disposable income. Section 522(c) does not compel courts to depart from a plain meaning reading of §§ 101(10A) and 1325(b)(2) that permits inclusion of exempt income in disposable income.

Id. (internal quotations and citations omitted). See also In re Waters, 384 B.R. 432 (Bankr. N.D. W. Va. 2008) (string-citing a number of decisions reaching the same conclusion that exempt assets are encompassed in calculating "disposable income" under Code § 1325(b)(1)(B), including Freeman v. Schulman (In re Freeman), 86 F.3d 478, 481 (6th Cir. 1996)).

For similar reasons, the Brah Court rejected the debtors' argument that veterans' benefits should not be included in disposable income pursuant to 38 U.S.C. § 5301(a)(1). Id. The court again noted that the decision to file a Chapter 13 bankruptcy was voluntarily made by the debtor, and that counting their veterans' benefits in the calculation of disposable income did not make the benefits liable to the claims of creditors. Id. (citations omitted). Rather, "[v]oluntarily seeking the

[46] In re Launza, 377 B.R. 286, 290-91 (Bankr. N.D. Tex. 2005).

relief available under Chapter 13 is different than the involuntary legal procedures enumerated in the Veterans' Benefits statute." Id.

The court in Waters reached the same conclusion.[47] In Waters, the Chapter 13 trustee objected to the debtor's proposed plan for failing to include exempt veterans' benefits in the calculation of monthly income. Waters at 433. The court recognized the pre-BAPCPA cases holding that including exempt assets in the calculation of monthly income conflicts with Code § 522(c), including the Ferretti case cited by the debtors in Brah. Id. at 435. The court also cited the pre-BAPCPA cases concluding it was proper to include exempt assets in the calculation of disposable income in Chapter 13 cases. Id. at 435-36. However, the Waters Court concluded that with the enactment of BAPCPA, "…the split of authority over whether or not exempt assets are to be included in the calculation of disposable income has been statutorily answered by Congress[]" in Code §§ 1325(b) and 110(10A). Id. at 436-37. Under the new statutory language, the calculation of current monthly income for purposes of determining disposable income "…now includes any amount paid by an entity other than the debtor on a regular basis for the household expenses of the debtor. Id. at 437. As such, veterans' benefits meet the BAPCPA-codified criteria of what assets are included in the calculation of monthly income, and no statutory exception applies.[48] Id. at 438.

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[47] See also In re Hedge, 394 B.R. 463 (Bankr. S.D. Ind. 2008) (also reaching the same conclusion).

[48] "Under this statutory language, the only exceptions are assets that are: (1) not "income" to the debtor; (2) not paid by an "entity" (which is defined in § 101(15) as a person, estate, trust, governmental unit or the United States trustee); (3) not received on a regular basis; (4) not received for the household expenses of the debtor or the debtor's dependents; (5) Social Security Act payments; (6) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and (7) payments to victims of international terrorism or domestic terrorism on account of their status as victims of such terrorism." Id.

In summary, while the rights to receive veterans' benefits are exempt in both Chapter 7 and 13 bankruptcy cases, in a Chapter 13, such benefits must be included in disposable income when proposing a plan.

VIII. CONCLUSION

In light of the increasing age of bankruptcy filers, and the expectation that the elderly will make up an increasing percentage of bankruptcy filers in the future, it is important to understand bankruptcy's effect on Social Security income and veterans' benefits. As outlined above, Social Security benefits are excluded from property of the bankruptcy estate and will not be used to calculate disposable income necessary to contribute to a Chapter 13 plan. Moreover, here in the Sixth Circuit, debtors may choose to include Social Security income in their Chapter 13 plans in order to make the plan feasible. However, it is an open issue as to whether Social Security income will be considered in determining whether a Chapter 13 plan has been proposed in good faith. It is also an open related issue as to whether Social Security benefits will be considered under the totality of the financial circumstances inquiry under Code § 707(b). As such, it is important to analyze the size how much accumulated Social Security a client has as of a potential bankruptcy, and how their Social Security income compares to the projected plan payments and the amounts to be paid to unsecured creditors.