Chapter 13: Post-Confirmation Issues

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MODIFICATION ISSUES

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INTRODUCTION

The Debtor files a Plan upon the filing of the Chapter 13 Petition. The Plan receives scrutiny by the Trustee. No creditors object to the valuations. The matter proceeds to confirmation, and the Court, upon the recommendation of the Chapter 13 Trustee, enters an order confirming the Plan, pursuant to 11 U.S.C. § 1325. Subsequently, at some point during the applicable commitment period, the Debtor's situation changes. And either the Debtor, or the Trustee, files a motion to modify the confirmed Plan, pursuant to 11 U.S.C. § 1329, to either decrease or increase payments. Or, to alter the treatment of a particular creditor, usually one with security that has gone bad for whatever reason, - *ie,* destruction, casualty damage, or just lack of payment by the Debtor.

However, the Debtor may find that modification is not always either authorized or permitted. The Plan, sometimes, is characterized a breathing document to allow the Courts and the parties to take into account events that arise that alter the Debtor's situation. However, Courts are increasingly giving preclusive effect to the Order of Confirmation in ways that had not been previously expected or considered. A review of a few scenarios may provide Counsel guidance to be aware of fact patterns that should give Counsel pause.

FINALITY OF CONFIRMATION

Perhaps no case best exemplifies the finality and preclusive effect provided by an order of confirmation than the *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). In the *Espinosa* case, the Supreme Court upheld an order confirming a Chapter 13 Plan, which clearly and unambiguously discharged a student loan without the use of an adversary proceeding by inserting a provision in the Special Provisions of the Plan. While admonishing practitioners for the use of patently illegal provisions, the Supreme Court, nevertheless, upheld the discharge

provision of the student loans in this particular case. The Confirmation Order was given preclusive effect, particularly in light of the finding by the Court that the student loan agency had received sufficient notice for Due Process, and received timely noticed that it could have objected to the proposed plan to avoid the result. The *Espinosa* case dealt with a plan that was ultimately confirmed. It did not deal with post-confirmation issues of modification.

However, courts are beginning to provide preclusive effect, following *Espinosa*, in ways that counsel perhaps had not considered. In a recent case, debtor failed to object to the secured portion of an asserted proof of claim filed by the Internal Revenue Service. Subsequently, when the debtor moved to modify, pursuant to 11 U.S.C. § 1329, to lower the valuation of the secured portion of the IRS claim, the bankruptcy court overruled the proposed modification and gave preclusive effect to the finding that the IRS' secured claim was at the amount of the value of the claim, rather than the asserted value proposed by the debtor post-confirmation.

In the case of *In re: Ridings*, 2015 WL 9434769 Case No. 11-61253 (Bkrtcy. E.D.KY. December 22, 2015), an opinion issued by Judge Schaaf, the Court looked at the language in the confirmed Plan. Like most Districts, the Eastern District of Kentucky requires one to use a Chapter 13 form plan. In this particular plan, any secured claim that is not specifically addressed in the plan was to be classified in a junior class of secured claims and would be paid pro rata with all other allowed secured claims. The language of the plan specifically stated that each allowed secured claim would be paid to the extent of the value of the collateral set forth in the creditor's proof of claim or the amount of the allowed claim, whichever was less. The IRS filed a secured claim in the amount of $199,000.00. The debtors contended that the secured claim should actually be allowed in the amount of nearly $161,000.00 in a post-confirmation motion to modify. The IRS objected to the motion and stated that it was too late to revalue the claim. The

court agreed. Even though the proof of claim did not list a value of security, it did list that its secured claim was $199,000.00 out of a claim that total claim in excess of $467,000.00. The court found that since the debtors did not seek to value the secured claim by requesting a valuation of collateral prior to confirmation, the debtors were barred, once confirmation passed, from further modification of the status and the amount of the IRS claim.

In a case out of the Fifth Circuit, the bankruptcy court in Texas recently denied the debtors' right to receive a discharge, and further denied the debtors' motion to modify the plan at the end of the case to address a large post petition mortgage arrearage. In *In Re: Ramos*, 2015 WL 7180663, 540 B.R. 580 (Bkrtcy. N.D. Tx 2015), the debtors proposed a classic 1322(b)(5) provision in their confirmed plan that cured an existing pre-petition arrearage in the plan and provided for the regular payment of mortgage payments outside of the plan process post-petition. The debtors failed to maintain those post petition mortgage payments. Upon the conclusion of the plan payments, after the Trustee filed a notice of final cure payment, and after the lender, Ocwen, had enumerated that the debtors had missed several post-petition mortgage payments, the debtors moved to modify their plan to surrender their home. The debtors had missed approximately three years worth of payments, post-petition, even though they made all of their plan payments and "cured their pre-petition arrearage." The court denied the discharge and further denied modification. The court did allow an opportunity for the debtors to consider conversion to Chapter 7 so they could receive a discharge.

However, delay until the end of the case to seek modification is not the only bar.

The Sixth Circuit has ruled that a secured value provided a creditor on a car in a confirmed plan remains, notwithstanding the fact that the debtors either agreed to post-confirmation relief or that the debtors were unable to complete payments to the creditor.

Chrysler Financial Corporation v. Nolan (In Re: Nolan), 232 F.3d 528 (6th Cir. 2000). The Sixth Circuit followed *Nolan* with the case of *Ruskin v. DaimlerChryslerServs. North Am. LLC (In Re: Adkins)*, 425 F.3d 296 (6th Cir. 2005). In *Adkins*, the court ruled that a Debtor could not modify a plan to alter the position of the secured creditor at confirmation to an unsecured deficiency creditor, after relief had been provided.

The secured creditor is entitled to receive the benefit conferred by the confirmed plan. The Sixth Circuit rejected the attempt of the Debtor to surrender the vehicle in full satisfaction of the claim, or allow a deficiency that enlarged the amount of the unsecured debt class. Since the value on the secured claim was fixed by the confirmed plan, the Debtor had to pay that amount, whether the debtor retained actual possession or enjoyment of the vehicle that secured the claim. The *Nolan* and *Adkins* cases precedes both BAPCPA and the *Espinosa* decision; but the rationale from those cases rationale still apply.

Be aware that the applicable commitment period cannot be modified. In a recent case of *In re: Groner*, 2016 WL 2865060, 2016 Bankr. Lexis 1978 (Bkrtcy. M.D.Tn. May 11, 2016), the bankruptcy court sustained the Chapter 13 Trustee's objection to a motion filed by the debtor to shorten her plan from 60 to 39 months. The debtor had borrowed money from an exempt asset, her 401(k), to pay all of the sums that she would have paid if she had made her payments for the entire 60-month period, and otherwise complied with the provisions of her plan. However, the Trustee argued that the applicable commitment period was temporal and that the debtor is required to remain in her plan for the full 5 years, as she was an above median income debtor; and, unless the debtor proposed to pay all creditors in full, she was required to remain in the plan for the entire 60-month period. The court agreed and overruled the motion, notwithstanding the

debtor's lump-sum payment to the Trustee, following *Whaley v. Tennyson*, 611 F.3d 873 (11th Cir. 2010).

Modification is a two-way street. The statute, 11 U.S.C. § 1329(a)(1), allows, upon a request by a trustee or an unsecured creditor, to *increase* the plan payments during the course of the applicable commitment period. Many times the debtor seeks to modify payments by either lowering the payment, or eliminating certain payment due to exigent circumstances that have arisen. In a recent case decided by the Seventh Circuit Court of Appeals, the Trustee sought to increase plan payments because the debtors' tax returns indicated that they were earning substantially more than when the case was confirmed. In the case of *Germeraad, Trustee v. Powers*, _ F.3d _, 2016 US APP LEXIS 11433 (7th Cir. June 23, 2016), the Seventh Circuit held that the confirmation order did not give preclusive effect to a subsequent increase in payments. Specifically, the Court held that the language in the modification statute of 11 U.S.C. § 1329 clearly provided for a sought increase. The debtor had raised several arguments, including jurisdiction, and issue preclusion that the confirmation order barred further any subsequent motion. The Seventh Circuit held it had jurisdiction, that the order denying the Trustee's motion at the bankruptcy court was final for purposes of appellate review, and reversed the bankruptcy court and district court and remanded the proceedings for the court to hear the motion on the merits.

A review of the modification statute in some respects runs counter to these decisions. The Sixth Circuit in the case of *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011) set forth that the applicable commitment period would in fact be temporal, either 36 or 60 months at a minimum, depending upon whether the debtor was above or below median. However, in § 1329(a)(2), modification is allowed to "extend or reduce the time for such payments." While the court, in

Baud, does not address this issue squarely, it appears that the decision in the *Groner* case would indicate that temporal restrictions are to be enforced regardless of the language in the modification statute. In a motion to modify a confirmed plan curing a mortgage arrearage, where the debtors fell behind on their post-petition payment, a court in Michigan overruled a subsequent motion to modify, even when the court found that the debtors had the ability to pay the post-petition arrearage inside the plan, and it did not otherwise affect creditors. The debtors had fallen behind through no fault of their own on post-petition mortgage payments. The debtors recovered and then filed a motion to modify the plan when the mortgage lender, Cendent, filed a motion for relief. The modification provided for an increase in payments to pay the post-petition arrearage. In the case of *In re: Long*, 453 B.R. 283 (Bkrtcy. W.D. Mich. 2011), Judge Hughes found that 11 U.S.C. § 1329 could not be used to pay the lender, over its objection, even though the debtors could afford to cure the post-petition arrearage. The lender asserted that the debtors' motion to modify fell outside the scope of § 1329(a). Citing the case of *Storey v. Pees (In Re Storey)*, 392 B.R. 266 (6th Cir. BAP 2008), Judge Hughes found that the Sixth Circuit has mandated that proposed modifications must strictly fall within the parameters of § 1329 due to the binding effect of confirmation under § 1327. In the *Storey* decision, the BAP, in 2008, had found only three cases dealing with modifications. Two of them had been discussed. Those are the *Nolan* and the *Adkins* cases. The third was *Ford Motor Credit Co. v. Parmenter (In re Parmenter)*, 527 F.3d 606, (6th Cir. 2008). The court, in *Parmenter*, held that modifications were to be centered on the amount and timing of payments, not the creation of a new obligation. In the *Long* decision, the court held that the post-petition arrearage would indeed be creating an additional obligation, which was not permitted, pursuant to § 1329(a). In fact, the court rejected an argument that had been advanced by the debtor, which argued that § 1329(b) allowed the

proposed modification. The court held that § 1329(b) did not come into play until the requirements of § 1329(a) were met.

The *Storey* case is interesting in that preclusive effect was in force to prevent the Chapter 13 Trustee from raising the percentage to unsecured creditors from 7 percent (7%) to 50 percent (50%) because of a finding of a mathematical error that occurred pre-confirmation. The BAP held that 11 U.S.C. § 1327, "Precludes modification of a confirmed plan under § 1329 to address issues that were or could have been decided at the time the plan was originally confirmed." *Storey*, 392 B.R. 266, 272. The rationale that was used by the BAP in *Storey* was also applied by the bankruptcy court in Columbus in the case of *In re: Ragland*, 544 B.R. 393. In *Ragland*, the debtor proposed to modify his confirmed plan three years after confirmation. He asserted that the applicable commitment period should have only been three years due to a drafting error. In fact, the confirmed plan found that the applicable commitment period was five years. Judge Caldwell held, "In this case, the Debtor is asking the Court to modify the Plan that the Debtor, the Trustee, the Court, and the creditors have all been operating under for over three years. There are times in cases were circumstances change and creditors have to accept less as a natural result of the bankruptcy process, but here Debtor asks creditors to accept less when nothing about the estate has changed whatsoever, save a past due attempt to remove the above-median income label from his confirmed plan. With no allegation of a change in circumstances, and the binding effect of § 1327(a) of the Code in force, there is simply no recourse for the Debtor to modify his Plan under § 1329(a) of the Code." *In re: Ragland*, 544 B.R. at 396-397.

While the Sixth Circuit has not ruled in a case that requires a change in circumstances, the Fourth Circuit has in fact held that a change in circumstances must occur. In the case of *In re: Murphy*, 474 F.3d 143 (4th Cir. 2007), the Fourth Circuit held that the debtor must experience

a substantial and unanticipated change in his post-confirmation financial condition so that the doctrine of res judicata does not prevent the modification of his confirmed plan, pursuant to § 1329(a)(1) or (a)(2). *In re: Murphy*, 474 F.3d 151.

MODIFICATION PER THE STATUTE

So, after reviewing a list of cases, and not receiving any clear direction, I turn to the statute itself, 11 U.S.C. § 1329, Modification of the Plan after Confirmation. The first portion of the statute allows confirmation between confirmation and completion of payments. The request may be made not just by the debtor, but also by the trustee or any unsecured creditor to either increase or reduce the amount of payments of a particular class, extend or reduce the time for payments, or alter the amount of distribution to a creditor, and reduce the amounts in the plan so that the debtor can obtain health insurance. Section B of the Statute requires that any proposed modification must meet the requirements set forth in what is required to get a plan confirmed in § 1322(a), (b), and § 1323(c). The modification will become effective unless the court overrules it, and the proposed modification cannot exceed the length of the plan, or five years at its maximum. The Statute seems simple. A party can seek to alter the amount paid into the plan. What it unstated in this statute is what can be done with secured creditors.

The cases that have been enumerated, for the most part, have addressed the rights of secured creditors. Certainly the cases enumerated in the Sixth Circuit, including the *Nolan*, *Adkins*, and *Parmenter* cases have all addressed the rights of secured creditors, and altering those rights has been limited or disallowed. Changing a creditor from a secured status to an unsecured status has been prohibited by the Sixth Circuit. Additionally, the Fourth Circuit has added the requirement that a substantial change of circumstances must have occurred. The Fourth Circuit is reading the finality of the confirmation order and the preclusive effect given a final and un-

appealed order to deter modification of plans unless a substantial change in circumstances has arisen.

For counsel to provide guidance to clients who are already in Chapter 13, it appears that two overriding themes exist. The first is that one wishes to alter the rights, values, or terms of secured creditors, it must be done before confirmation.

The second is that unsecured creditors are subject to the needs of the debtor and what is approved by the court. There appears to be very little that unsecured creditors can demand.

Only in the cases where there has been an unforeseen increase in income can a creditor or a trustee seek to increase the requirements of a confirmed plan.

Counsel must also read the strictures of the confirmed plan with 11 U.S.C. § 1306, which holds that all post-petition acquired property rights also become property of the bankruptcy estate during the pendency of a Chapter 13. So, a trustee and an unsecured creditor do have the right to request either an increase in payments when good fortune smiles upon a debtor, or to snatch an inheritance when a lump sum becomes available to the debtor.

CONCLUSION

Counsel, in preparing the plan that will be confirmed, must be aware of all of the circumstances of the debtor's life. Creative counsel may be able to insert provisions in the Special Provisions section of the form plan to protect the debtor from an expected request for a future increase in plan payments by a trustee. Counsel can really do very little about the unexpected changes that occur in the debtor's life, but counsel can address what changes may result that are anticipated and expected, and if the trustee has not required an increase when those changes occur, then counsel may have a defense to a motion to increase payments.

The trustees, being the wised and seasoned trustees that they are, will not miss these events often. Trustees regularly address 401(k) loans that mature during the Chapter 13 plans; substantial increases in income, such as bonuses; requirements to turnover tax returns and tax refunds; and other events that can be anticipated and regularly occur. Additionally, trustees have the right to demand turnover of inheritances that occur post-petition because they become property of the estate.

The best and most practical advise for counsel is to deal with the reality of the debtor's situation. Whatever circumstances have occurred require a response that are tailored to the debtor's abilities and debtor's needs. Few trustees would object to well-prepared budgets that demonstrate what financial needs of the debtor must be met. Arguments do occur over the necessity of what kind of car that needs to be required, what repairs that need to be made, or how much of a bonus is necessary to meet expenses that the debtors have incurred. These must be answered on a case-by-case approach. My suggestion is to keep that approach on a case-by-case basis. For the overriding theme that is noticed in the review of these decisions is that the debtors are not likely to win a broad and sweeping argument. As stated by the Supreme Court, the purpose of Chapter 13 is to maximize the recovery for unsecured creditors. With that overriding principal in mind, debtors are best advised to seek relief on a case-by-case basis.

TITLE 11 - BANKRUPTCY
CHAPTER 13 - ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME
SUBCHAPTER II - THE PLAN

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that—

(A) such expenses are reasonable and necessary;

(B) **(i)** if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325 (b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b) **(1)** Sections 1322 (a), 1322 (b), and 1323 (c) of this title and the requirements of section 1325 (a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325 (b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2651; Pub. L. 98–353, title III, §§ 319, 533, July 10, 1984, 98 Stat. 357, 389; Pub. L. 109–8, title I, § 102(i), title III, § 318(4), Apr. 20, 2005, 119 Stat. 34, 94.)

Historical and Revision Notes

senate report no. 95–989

At any time prior to the completion of payments under a confirmed plan, the plan may be modified, after notice and hearing, to change the amount of payments to creditors or a particular class of creditors and to extend or reduce the payment period. A modified plan may not contain any provision which could not be included in an original plan as prescribed by section 1322. A modified plan may not call for payments to be made beyond four years as measured from the date of the commencement of payments under the original plan.

Amendments

2005—Subsec. (a)(4). Pub. L. 109–8, § 102(i), added par. (4).

Subsec. (c). Pub. L. 109–8, § 318(4), substituted "the applicable commitment period under section 1325 (b)(1)(B)" for "three years".

1984—Subsec. (a). Pub. L. 98–353, §§ 319, 533 (1), (2), inserted "of the plan" after "confirmation", substituted "such plan" for "a plan", and inserted provisions respecting requests by the debtor, the trustee, or the holder of an allowed unsecured claim for modification.

Subsec. (a)(3). Pub. L. 98–353, § 533(3), substituted "plan to" for "plan, to".

Effective Date of 2005 Amendment

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

IN RE

JAMES ARNOLD RIDINGS and
BRENDA LYNN RIDINGS

CASE NO. 11-61253
CHAPTER 13

DEBTORS

MEMORANDUM OPINION AND ORDER

The Debtors filed a Motion to Modify Confirmed Chapter 13 Plan [ECF No. 57] and Objection to Proof of Claim of Internal Revenue Service [ECF No. 58], and the IRS objected [ECF Nos. 63, 66]. The parties also filed supplemental briefs [ECF Nos. 81, 82] in accordance with an agreed briefing schedule, and the matter is now submitted for decision.

The Motion and Objection are an attempt to reduce the secured claim of the IRS from $199,040.60, as set out on Proof of Claim 1-2 (the "Secured Claim"), to $160,921.43. POC 1-2 was timely filed on September 28, 2011, and amended December 19, 2011. The Debtors assert that $160,921.43[1] "is the equity that Debtors have in their personal and real property." [ECF No. 57.] The IRS argues that the Debtors may not change the treatment of the Secured Claim after confirmation of a plan that provides for payment based on the allowed secured claim of the creditor. If the Debtors cannot, then the Objection and Motion will not succeed.

1. Treatment of the IRS Claim by the Confirmed Plan.

The Debtors Amended Chapter 13 Plan [ECF No. 20] (the "Plan") was filed on February 21, 2012, and confirmed on April 25, 2012. [ECF No. 31.] The Debtors' statement that the "the secured claim of the IRS was not addressed in Debtors' Plan in any meaningful way

[1] Other papers filed by the Debtors reference a different reduced value for the IRS secured claim ($161,266.33). [*See* ECF Nos. 57, 58, and 82.] The discrepancy is minimal and has no effect on the analysis.

(except [in Section VII])" is incorrect. Although the Plan did not specifically address the IRS claim, it is provided for in the catchall provision of Section II.F:

> An allowed secured claim not provided for in the plan shall be classified in a junior class of secured claims that will be paid through the plan on a pro rata basis with all other allowed secured claims in the class. **Each allowed claim in the class will be paid to the extent of the value of the collateral set forth in the Creditor's proof of claim or the amount of the allowed claim, whichever is less**, with interest at the WSJ Prime Rate on the date of confirmation or the date on which the proof of claim is filed, whichever is later, plus 2 percentage points. Allowed administrative expenses shall be paid in full prior to distribution to this class of secured claims.

[ECF No. 20 (emphasis supplied).]

Section VII.A of the Plan incorporates a Chapter 13 Plan Payment Schedule that provides: "Debtors' Chapter 13 Plan shall pay out 100 percent of the secured and priority claims." [*Id.*] The Plan Payment Schedule further provides that the Debtors will borrow money (by mortgaging unencumbered real estate) or sell property if plan payments are insufficient to pay all secured and priority claims in full. [*Id.*]

On March 28, 2013, the Chapter 13 Trustee filed its Notice of Allowance of Claims (the "Trustee's Notice"), which is a document filed in every chapter 13 proceeding that "gives notice to the creditors listed below, debtor, and debtor's counsel, of the allowance of claims . . . ." [ECF No. 36.] The Notice listed the "United States Treasury" with an allowed claim of $199,040.60 and designated the agency as a "SECURED PRO-RATA CREDITOR" based on POC 1-2. [*Id.*] The Trustee's Notice also provides: "To the extent the allowance of claims contradicts the treatment of any claim in the confirmed plan, this Notice shall constitute a modification of the plan pursuant to 11 U.S.C. 1329." [*Id.*] No party objected within the 30-day objection period in the Trustee's Notice.

Under 11 U.S.C. § 1327(a), "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not

such creditor has objected to, has accepted, or has rejected the plan." Treatment of the IRS Secured Claim is therefore controlled by Sections II.F and VII.A of the Plan. Classification within the "junior class of secured claims" provided for in Section II.F is further confirmed by the Trustee's Notice, which designated the agency as the sole "SECURED PRO-RATA CREDITOR" provided for by the Plan.

2. An Allowed Claim Addressed in the Confirmed Plan Is Paid According to the Plan.

The Debtors' Plan provided for payment of the Secured Claim at either "the value of the collateral set forth in the Creditor's proof of claim or the amount of the allowed claim, whichever is less . . . ." [ECF No. 20.] The IRS Secured Claim was an allowed claim at the time the Plan was confirmed. 11 U.S.C. § 502(a) (a claim is deemed allowed if no party objects). Thus, the IRS has an allowed secured claim that should receive payment in full over the term of the plan, i.e., $199,040.60. The Debtors argue that, despite the treatment in the Plan, they may still object to the secured amount of the IRS claim because they believe the collateral is only worth $160,921.43. This argument does not succeed.

The Objection is a means to put into effect the modification of the Plan sought in the Motion. The Motion seeks to reduce the IRS Secured Claim so that the Debtors' Plan remains feasible. If the Secured Claim is not reduced, the Debtors are likely unable to make sufficient payments to satisfy all secured and priority claims as required by the Plan. *See* Trustee Response to Motion to Modify Confirmed Chapter 13 Plan [ECF No. 65].

But a debtor may not modify a plan to reclassify a secured claim as unsecured. *See* 11 U.S.C. § 1329(a); *see also Chrysler Fin. Corp. v. Nolan (In re Nolan)*, 232 F.3d 528, 533-535 (6th Cir. 2000) ("A modification that reduces the claim of a secured debtor would add a claim to the class of unsecured creditors, a change prohibited by section 1329(a)."); *Charlick v. Cmty.*

Choice Credit Union (In re Charlick), 444 B.R. 762, 766-67 (Bankr. E.D. Mich. 2011) (relying on *Nolan* to deny debtors' post-confirmation motion to reclassify a junior lienholder's claim from secured to unsecured in order to "strip off" a lien). As recognized in *Nolan*, a plan modification cannot "violate section 1325(a)(5)(B), which mandates that a secured claim is fixed in amount and status and must be paid in full once it has been allowed." *Nolan*, 232 F.3d at 533. Any doubt the Secured Claim was allowed at the secured value set out in the IRS proof of claim–$199,040.60–was eliminated by the Trustee's Notice.

The Debtor argues that POC 1-2 never valued the collateral because the space for the "Value of the Property" was blank. But POC 1-2 conspicuously asserts a secured claim of $199,040.60 by listing that amount as the secured portion of its total claim of $467,353.22. As previously explained, the Secured Claim was allowed at this amount under § 502(a). Further, the Trustee's Notice evidences the Chapter 13 Trustee's intent to pay the IRS as a SECURED PRO-RATA CREDITOR with a total claim of $199,040.60.

Some courts have allowed post-confirmation challenges to the valuation of secured claims, most often due to a creditor's failure to file its proof of claim prior to plan confirmation. *See, e.g., In re Adams*, 270 B.R. 263, 271 (Bankr. N.D. Ill. 2001) (finding no bar to such a challenge "where a debtor has no pre-confirmation opportunity to litigate the extent of a creditor's allowed secured claim under § 506(a)"). The Debtors could have, but did not, seek to reduce the Secured Claim by valuing the collateral at a reduced amount pursuant to 11 U.S.C. § 506(a). [*See, e.g.,* ECF No. 20, Section II.A.] *See also Storey v. Pees (In re Storey)*, 392 B.R. 266, 272 (B.A.P. 6th Cir. 2008) (A plan modification may not address issues that were or could have been decided at the time of confirmation.). Further, cases that allowed a subsequent objection do not suggest the existence of a notice filing like the Trustee's Notice. The Trustee's

Notice is primarily for her benefit, but it also puts the Debtors' and their counsel on notice of the allowance and treatment of the Secured Claim by the Plan.

POC 1-2 was filed prior to confirmation and was allowed at the time of confirmation. There is no justification for the Debtors' failure to timely raise the valuation issue in this case. It is therefore ORDERED that the Debtors' Objection to Proof of Claim of Internal Revenue Service [ECF No. 58] is OVERRULED and related Amended Motion to Modify Confirmed Chapter 13 Plan [ECF No. 57] is DENIED.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Tuesday, December 22, 2015
(grs)

Postconfirmation Mortgage Issues Affecting Discharge

Materials Prepared by

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for

ABI Midwest Regional Bankruptcy Seminar
Cincinnati, OH

August 18, 2016

The materials generally reflect my interpretation of the provisions of the Bankruptcy Code (as amended by BAPCPA), of local rules and forms, and of case decisions relating to chapter 13 practice.

As the trustee in the EDKY, I reserve the right to take a contrary position in any particular case depending on the facts of that case, and I reserve the right to argue an interpretation of the law that may differ from that set forth in these handouts.

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POSTCONFIRMATION MORTGAGE ISSUES AFFECTING DISCHARGE IN CHAPTER 13 CASES

BY
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CHAPTER 13 TRUSTEE, EDKY

I. THE § 1322(B)(5) EXCEPTION TO DISCHARGE

If the debtor defaults in mortgage payments after confirmation and the creditor subsequently gets relief from stay and/or the debtor modifies the plan to surrender the collateral, is any resulting deficiency claim discharged upon completion of the plan?[1]

Consider the following fact scenario:

> Debtors propose a plan to cure mortgage arrearages through the plan while making ongoing postpetition mortgage payments directly to the creditor per 11 U.S.C. § 1322(b)(5). Plan is confirmed.
>
> Two years into the case, the debtors' financial condition changes, and they get behind on their mortgage. They file a motion to modify the plan to surrender their home and to lower their plan payments. The motion to modify the plan is sustained.
>
> Because the debtors are postpetition delinquent in their mortgage payments, creditor requests and obtains relief from stay. Debtors relocate.
>
> The debtors continue making all plan payments and after 60 months, they complete their plan payments to the trustee and get a discharge.
>
> After discharge, the mortgage creditor starts sending the debtors written notices that they are delinquent in their mortgage payments. The creditor also begins calling the debtors attempting to collect the debt.

[1] Even in instances where the foreclosing creditor "credit bids," a deficiency claim may still arise. *See U.S. National Bank Assoc. v. American General Home Equity, Inc.*, 387 S.W. 3d 345 (Ky. Ct. App. 2012). Furthermore, if property is surrendered postconfirmation, the impact on any claims of junior mortgage holders needs to be considered as well.

> The debtors and their attorney repeatedly instruct the creditor to stop collection efforts on the basis that the debt had been discharged.
>
> Ultimately, the debtors, by counsel, reopen the chapter 13 case and file a motion for sanctions against the creditor for violating the discharge injunction.
>
> The creditor's response? That the claim was provided for in the confirmed plan as a section 1322(b)(5) claim, and as such, the debt was not discharged under section 1328(a)(1).
>
> ISSUE: Does the debtors' discharge bar the mortgage creditor from collection efforts against the debtors personally?

Before addressing the myriad of nuanced issues raised in the above fact scenario, let's look at a paraphrased summary of relevant Code provisions:

- A plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2).
- A plan may provide for the curing of defaults and maintenance of payments while the case is pending on any claim that matures after the last plan payment would be due (even if the claim is secured by the debtor's residence and not subject to modification). 11 U.S.C. § 1322(b)(5).
- The provisions of a confirmed plan bind the debtor and creditors. 11 U.S.C. § 1327(a).
- After confirmation, the debtor may modify the plan to:
    - Increase or reduce the amount of payments on claims of a particular class provided for by the plan;
    - Extend or reduce the time for such payments; or
    - Alter the amount to be paid to a creditor to account for any payment of the claim other than under the plan. 11 U.S.C. § 1329(a).

- Upon completion of all payments under the plan, the court shall grant the debtor a discharge of all debts provided for by the plan, except any debt provided for under section 1322(b)(5). 11 U.S.C. § 1328(a)(1).

ANALYSIS:

Did the plan provide for the creditor's debt? A claim is "provided for by the plan" when the plan "makes a provision" for, "deals with," or even "refers to" the claim. *Rake v. Wade*, 508 U.S. 464, 474 (1993); *see also In re Holman*, 2013 WL 1100705 (Bankr. E.D. Ky. 2013) (Case No. 12-50023, Memorandum Opinion and Order entered March 15, 2013, Doc. #34) (Wise, J.) (claim is provided for under a plan whereby debtor cures arrearages through the plan while maintaining payments directly to creditor). *But see In re Huyck*, 252 B.R. 509 (Bankr. D. Colo. 2000) (to the extent the plan calls for the debtors to make direct payments to the creditor, the claim is not provided for under the plan; thus, the debt is not discharged because a discharge under § 1328(a) only discharges debts provided for by the plan); *accord In re Dukes*, 2015 WL 3856335 (Bankr. M.D. Fla. 2015) (*appeal pending*, Case No. 2:15-cv-00420-UA (M.D. Fla.)).

Did the plan provide for the debt under section 1322(b)(5)? *Compare In re Rogers*, 494 B.R. 664 (Bankr. E.D.N.C. 2013) (section 1322(b)(5), which says cure AND maintain, is not implicated where there is no prepetition default or arrearages for the debtor to cure; thus, claim can be discharged if debtor was not in default at the time of the petition); *with In re Hunt*, 2015 WL 128048 (Bankr. E.D.N.C. 2015) (any long-term debt provided for by a plan is a 1322(b)(5) claim excepted from discharge).

Did the granting of stay relief to the creditor after confirmation change the nature of the claim? In the case of *In re Holman*, 2013 WL 1100705 (Bankr. E.D. Ky. 2013) (Case No. 12-50023, Memorandum Opinion and Order entered March 15, 2013, Doc. #34) (Wise, J.), the court

held that the provisions of Bankruptcy Rule 3002.1, which is applicable to claims secured by the debtor's residence and provided for under section 1322(b)(5), continue to apply even after a creditor is granted relief from stay. In rejecting the creditor's and the trustee's arguments that upon the granting of relief from stay, the claim was no longer a claim provided for under § 1322(b)(5), the Court stated:

> PNC argues that once stay relief is granted, Rule 3002.1 no longer applies to a creditor because the debt is no longer "provided for" under the cure and maintain provision of § 1322(b)(5) of the plan as required by Rule 3002.1(a)(2). The Court disagrees. While it is true, the debt is no longer being paid as part of the cure and maintain provision, this does not alter that the claim remains provided for under that section of the plan.
> . . . .
> The Court discerns no reason why a different interpretation of the phrase "provided for" should be used in the context of Rule 3002.1 and concludes that a "cure and maintain" claim remains "provided for" in a plan after stay relief. Relief from the stay does not change the essential fact that a plan was confirmed as a cure and maintain plan pursuant to § 1322(b)(5). A conclusion that Rule 3002.1 is no longer effective after stay relief seems to require a determination that the plan as confirmed is not the same plan after relief from the stay. This logic ignores the lack of any court-approved modification of the confirmed plan as would be required by § 1329. 11 U.S.C. § 1329.

Holman, 2013 WL 1100705 at *3, Memorandum Opinion at pages 4-5 (underlined words original; emphasis added in italics).

In the *Holman* case, the court focused on the purpose of Rule 3002.1 and sought to protect debtors' need for information from the creditor after relief from stay is granted.[2] The greater issue of whether the debt would continue to be excepted from discharge as a section 1322(b)(5) claim

[2] Interestingly, Rule 3002.1 is slated for amendment to specify that continued notices are not required after a creditor gets relief from stay, unless the court orders otherwise. The court in *Holman* suggested that perhaps continued Rule 3002.1 notices are more important in judicial foreclosure states where the delay between stay relief and the actual foreclosure sale is longer than in a nonjudicial foreclosure state, so the court might still apply Rule 3002.1 to cases after stay relief is granted.

was not before the court. In describing why debtors need to have the information provided by Rule 3002.1 even after stay relief is granted, the court stated:

> It is easy to contemplate the need for the information required by Rule 3002.1 after stay relief is granted. Stay relief does not prevent a debtor from attempting to keep his home. Following stay relief, a debtor may seek to defend a foreclosure action, enter into a loan modification, propose further plan amendments, or sell the residence by private sale. Required Rule 3002.1 disclosures, such as changes in rates, late fees and penalties, will assist a debtor in any of these post-stay relief options and thus serve the Code's policy of a fresh start. Requiring continued disclosure may further benefit the debtor and chapter 13 trustee in their review of a creditor's post-foreclosure deficiency claim.

Holman, 2013 WL 1100705 at *3, Memorandum Opinion at page 5 (emphasis added).

The holding in *Holman* has the (perhaps) unintended consequence of binding a chapter 13 debtor to personal liability on a deficiency claim on the debtor's residential mortgages even though the creditor obtained relief from stay during the case, and that personal liability would survive discharge.

Does the outcome change if the debtors modified their confirmed plan to surrender the property? This is a hard one to answer. In *Holman*, the Court found that the plan as confirmed was the same plan after relief from stay was granted, and that to hold otherwise would ignore the lack of a court-approved modification under section 1329. If there is a court-approved plan modification under section 1329, it would seem that the plan as confirmed is no longer the same as the plan that was modified. So, is the modification to surrender the property sufficient to support a determination that the mortgage creditor's claim is no longer a section 1322(b)(5) claim and is not excepted from discharge under 11 U.S.C. § 1328(a)(1)?

Not necessarily. In the recent opinion of *In re Spata*, Case No. 09-52154 (Order Entered April 22, 2016, Doc. #122) (Bankr. E.D. Ky. 2016) (Wise, J.), the court held that the debtors' modification, which merely said "the real property at [address] shall be surrendered," did nothing

to change the nature of the claim. "In this modified plan, 'surrender' does not mean payment. No provision of the modified plan limits payment to Chase via the foreclosure action." *Id.* at page 4. Continuing, the court stated: "There is no provision that surrenders the property in full satisfaction of the debt. Upon stay modification, the plan expressly provides for the filing of a deficiency claim. The Court need go no further in its analysis." The creditor's collection efforts did not violate the discharge injunction.

In *Spata*, the mortgage creditor had not yet commenced a foreclosure sale, even though it had obtained relief from stay (and the debtors had surrendered possession of their home) about 2-1/2 years before the debtors received their discharge. While this may be grounds to distinguish *Spata* and argue that a deficiency claim arising while the case is still open would be discharged, the court's opinion doesn't make that distinction. Moreover, the court's suggestion that the modified plan could have (and should have?) surrendered the property in full satisfaction of the claim is enigmatic. The issue should not be whether the creditor is allowed to file a deficiency claim; instead, the issue should be whether the deficiency claim is (a) unsecured; and (b) discharged upon completion of the plan.[3] *See In re Long*, 519 F.3d 288, 291 (6th Cir. 2009) ("Wiping out the deficiency altogether undermines reasonable obligations created by the contract between the parties."); *In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015) (mortgage creditor must not be prevented from asserting an unsecured deficiency claim against the debtor after stay

[3] The EDKY form plan at the time the case was filed included the following provision:

> D. Orders Granting Relief From Stay. If at any time during the life of the plan an order terminating the stay is entered, no further distributions shall be made to the Creditor until such time as an amended claim for any deficiency is filed and allowed. Any allowed claim for a deficiency shall be treated as a general unsecured claim.

The form plan has since been amended to delete the sentence that a deficiency claim shall be treated as unsecured.

relief and foreclosure, or else its rights have been modified in contravention of 11 U.S.C. § 1322(b)(2)).

The *Spata* and *Holman* opinions read together indicate that a section 1322(b)(5) long-term debt is not altered either by postconfirmation stay relief or surrender, and that the debtors' personal liability on the debt continues after discharge.

Can the original confirmed plan provide a contingency provision that any deficiency claim arising from any postpetition surrender will be discharged? Maybe. In the case of *In re Ratliff*, Case No. 14-21064, Order entered Nov. 10, 2014, Doc. #43 (Bankr. E.D. Ky. 2014) (Wise, J.), the court confirmed a plan with the following special provision:

> In the event that relief from stay is granted to any creditor addressed in Section II, or in the event that the Debtor surrenders the collateral to the creditor after confirmation, any resulting deficiency, after liquidation of the collateral, shall be classified and paid only as a general unsecured claim, but only up to the amount of said deficiency. Any amount unpaid on said deficiency claim shall be discharged upon completion of the plan. This special provision is intended to cover any and all secured claims, whether payment on the claims are to be made through the plan by the Trustee or to be made directly by the Debtor.

Ratliff, Case No. 14-21064, Doc. #43. The court held that such a provision does not violate the Sixth Circuit's *Nolan/Adkins*[4] doctrine.

> Nolan and Adkins involved post-confirmation attempts to reclassify and pay claims that varied from the terms of a confirmed plan in violation of §§ 1329 and 1327, not whether the treatment of a secured claim is permissible when the creditor is deemed to have accepted the plan.
> . . . .
> Here, unlike either Nolan or Adkins, the bifurcation of the claim and the potential change in the claim's classification, is set forth as part of the original plan confirmation process. Thus, absent an objection from a

[4] *See In re Nolan (Chrysler Financial Corp. v. Nolan)*, 232 F.3d 528 (6th Cir. 2000) and *In re Adkins (Ruskin v. DaimlerChrysler Services North America, LLC)*, 425 F.3d 296 (2005) (Section 1329 does not authorize the "reclassification" of a claim from secured to unsecured after a debtor surrenders collateral or the creditor obtains relief from stay).

> secured creditor, each has accepted the chapter 13 plan and this treatment of its claim.

In re Ratliff, Case No. 14-21064, Order entered Nov. 10, 2014, Doc. #43 (Bankr. E.D. Ky. 2014) (Wise, J.). *Compare In re Kurtz*, 502 B.R. 238, 244 (Bankr. D. Colo. 2013) ("It is not the surrender of collateral postconfirmation which is prohibited by sections 1327 or 1329 of the Code. What a debtor cannot do postconfirmation is, as *Nolan* holds, recalculate the amount of the "allowed secured claim" . . . after surrender and sale of the collateral."); *In re Bell*, 2013 WL 6898251 (Bankr. S.D. Tex. 2013) (postconfirmation plan modification to surrender residence not permitted; modification would alter creditor's rights in contravention of section 1322(b)(2)); and *In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015) (mortgage creditor must not, in a plan modification, be prevented from asserting an unsecured deficiency claim against the debtor after stay relief and foreclosure, or else its rights have been modified; however, if the creditor had sought relief from stay upon postpetition default and the debtor had modified the plan sooner than at the end of the case so that the unsecured deficiency claim could have been addressed in the modified plan, the debtors would have been able to receive a discharge).

Debtors' attorneys may need to be more attentive to this issue in drafting plans and filing motions to modify plans to surrender property after a "cure and maintain" plan has been confirmed. At a minimum, attorneys need to counsel their clients that if they change their mind after confirmation and decide to surrender their home, their discharge might not protect them from future collection efforts. A dismissal and re-file, a conversion to chapter 7, a "reverse chapter 20" (a discharged chapter 13 followed by a chapter 7 to the extent allowed by 11 U.S.C. § 727(a)(9)), or a "chapter 26" (a discharged chapter 13 followed by another chapter 13 case at least two years after the petition date of the first chapter 13) need to be considered as alternatives.

II. CHAPTER 13 DISCHARGE: COMPLETION OF "ALL PAYMENTS UNDER THE PLAN" AND A DEBTOR'S DIRECT-PAY MORTGAGE PAYMENTS

Is a debtor's direct payment of a mortgage (what we often call making payments *outside the plan*) a "payment under the plan" that must be completed in order for the debtor to get a discharge under 11 U.S.C. § 1328(a)?

Consider this fact scenario:

> Debtors propose a plan to cure mortgage arrearages through the plan while making ongoing postpetition mortgage payments directly to the creditor per 11 U.S.C. § 1322(b)(5). Plan is confirmed.
>
> Two years into the case, the debtors' financial condition changes, and they get behind on their mortgage payments. The mortgage creditor does not seek stay relief.
>
> The debtors continue making all plan payments and after 60 months, they complete their plan payments to the trustee.
>
> The trustee files the Rule 3002.1 "Notice of Final Cure" and asserts that all prepetition defaults have been cured.
>
> The creditor files the required response and agrees that prepetition defaults have been cured but sets forth the postpetition arrearage that arose during the chapter 13 case.
>
> The trustee (or the court, sua sponte), seeks to deny the debtors' discharge on the grounds that the debtors have not completed all payments under the plan because they did not complete the postpetition mortgage payments that came due during the time the debtors were in chapter 13.

Regardless of whether a direct-pay mortgage claim is excepted from discharge as a section 1322(b)(5) claim, there remains a broader issue of whether the debtor may get a discharge of <u>*any*</u> debts if the debtor is delinquent in postpetition mortgage payments at the time s/he completes payments to the trustee under the plan.

Section 1328(a) says in essence: "As soon as practicable <u>after completion by the debtor *of all payments under the plan*</u>, the court shall grant the debtor a discharge of all debts provided for by the plan . . . ."

Courts seem to be equating "payments under the plan" with payments on "debts provided for by the plan" to conclude that if the debtor has not made all payments on claims "provided for

by the plan," including direct-pay mortgage claims, the debtor has not completed "all payments under the plan" and thus is not entitled to receive a discharge.

The seminal case on this issue is the case of *In re Heinzle*, 500 B.R. 69 (Bankr. W.D. Tex. 2014) (Gargotta, J.). The *Heinzle* decision has been followed by the following courts (listed by state):

- Texas: *See In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015) (Jernigan, J.); *In re Kessler*, 2015 WL 4726794 (Bankr. N.D. Tex. 2015) (Jones, J.), *aff'd sub nom Kessler v. Wilson*, Civil Action No. 6:15-cv-040-C (N.D. Tex. November 19, 2015); *appeal pending In re Kessler (Kessler v. Wilson)*, Case No. 15-11252 (5th Cir. December 18, 2015);
- Colorado: *See In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015) (Tallman, J.); *In re Formaneck*, 534 B.R. 29 (Bankr. D. Colo. 2015) (Romero, J.); *In re Doggett*, 2015 WL 4099806 (Bankr. D. Colo. 2015)(Tallman, J.), and *In re Hoyt-Kieckhaben*, 2016 WL 1089383 (Bankr. D. Colo. 2016) (Brown, J.);
- Virginia: *See In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2015) (St. John, J.));
- Oklahoma: *See In re Tumblson*, 2016 WL 889772 (Bankr. E.D. Okla. 2016) (Veith, J.).

The *Kessler* case has made its way to the Fifth Circuit Court of Appeals, where briefing was completed April 27, 2016.

So far courts and trustees have been looking only at mortgage claims, even though there may be other direct-pay claims in a case such as long-term car loans or student loan debts. Why only mortgage claims? Because the evidence is there, compliments of Bankruptcy Rule 3002.1.

Bankruptcy Rule 3002.1 "applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan." Fed. R. Bankr. P. 3002.1(a).

Rule 3002.1(f) requires the trustee, "within 30 days after the debtor completes all payments under the plan," to file a Notice of Final Cure Payment stating that the debtor has paid in full the amount required to cure the default.

Rule 3002.1(g) requires the creditor to file a response to the notice of final cure, stating (1) whether the creditor agrees that the debtor has cured defaults, and (2) "whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code." The creditor must itemize the amounts the creditor contends remain unpaid.

It is the evidence of a debtor's postpetition mortgage arrearage set forth in the creditor's response filed pursuant to Rule 3002.1(g) which triggers the trustee's or the court's action to deny the debtor a discharge for failure to complete all payments under the plan. There is no evidence in the record as to whether the debtor completed all other long-term debt payments under the plan.

The conclusion that "completion of all payments under the plan" includes payments on direct-pay claims raises some interesting questions. In most jurisdictions, the trustee files something in the record to tell the court that the debtor has completed plan payments (a Notice of Plan Completion, Plan Completion Report, or something similar). If the confirmed plan provides for the direct payment by the debtor of other section 1322(b)(5) long-term claims (like student loans or the seven- or eight-year car loans that seem so prevalent these days), must the trustee undertake some additional inquiry to determine whether the debtor is current on those other claims before filing the notice of plan completion? *See* Fed. R. Bankr. P. 9011(b)(3) – by presenting a paper to the court, the party is certifying that to the best of the party's knowledge, formed after an inquiry reasonable under the circumstances, the factual contentions have evidentiary support. Can the trustee state to the court that the debtor has completed all payments under the plan without making a reasonable inquiry to determine whether the debtor has completed payments on all direct-pay claims?

And in those jurisdictions where the debtor must file a certification that s/he has completed plan payments (either in addition to the trustee's notice or in lieu thereof), can any debtor who is

a penny behind in any direct-pay obligation properly certify to the court that s/he has completed all payments under the plan? If the debtor makes such a certification when in fact s/he has accrued some late fees or has missed a payment, should the debtor's discharge be denied or revoked for fraud?

There is a legitimate argument that a debtor who has not complied with all obligations under a confirmed plan should not receive a discharge, but that goal could be accomplished by seeking a dismissal of the case under 11 U.S.C. § 1307. The difference is that under section 1307, the court may dismiss a case for cause, including a material default by the debtor with respect to a term of a confirmed plan. The denial of a discharge (whether by dismissing the case or by closing the case without a discharge) for failure to complete all payments under the plan creates a *per se* rule: if the debtor is delinquent on a direct-pay claim by any amount, s/he may not receive a discharge of any debts. There is no consideration of materiality. There is no required showing of cause for dismissal.

The *Heinzle* case and its progeny constitute the strongest argument in favor of conduit payments through the trustee of all long-term claims, particularly for debtors who are unlikely to keep their attorney informed when they fall behind in payments on direct-pay claims.

POST CONFIRMATION ISSUES AND THEIR EFFECTS ON CREDTIORS

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DISCLAIMER: The opinions expressed in this outline the author's only, and not of his Firm or any Association with which he may be a member. The materials and opinions expressed in this outline are for informational purposes only. Use of the materials shall not create an attorney/client relationship between the author and any other party.

You represent a creditor in a Chapter 13 case. You file your objection; you resolve your dispute and the order of confirmation is entered. You job is through, right? Do not be so quick to shred that file. Matters that come up post-confirmation can affect your client's collateral, claim and discharge of that claim. The following materials shall discuss a few of those and possible approaches in dealing with them.

Late Filed Claims and Post-Petition Debt – are they discharged?

11 U.S.C. §1328 details what debts are discharged in a Chapter 13 case. Generally, after completion of all payments under the plan, the court shall grant the debtor a discharge "of all debts *provided for by the plan*" . . .. What appears to be simple, straightforward verbiage has led to myriad situations, differing interpretations and splits between the courts. Here are just a few.

When is a debt "provided for" by the plan?

The Bankruptcy Code does not define this term. Judge Wise in the Eastern District of Kentucky had occasion to review this section of the Code in relations to a mortgage creditor's ongoing obligation to provide notice of changes in the payment amount to a debtor under Bankruptcy Rule 3002.1[1]. Citing from *Collier on Bankruptcy* Judge Wise wrote:

> The Code does not specifically define "provided for," and some creditors have argued that if a plan does not propose to make payments on a debt it does not

[1] In re Holman, No. 12-50023, 2013 WL 1100705 (Bankr. EDKY 2013)

> provide for that debt. The Court of Appeals for the Ninth Circuit properly rejected this argument in Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118 (9th Cir.1983), which held that to "provide for" a claim a plan need only "make a provision for it, i.e., deal with it or refer to it." This broad definition of the term "provided for" was subsequently adopted by the Supreme Court in Rake v. Wade, 508 U .S. 464, 473 (1993). Even if the plan proposes nothing to unsecured claimants, ... their claims may be discharged under section 1328(a).
>
> 8 Collier On Bankruptcy ¶ 1328.02[3][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citations added)[2].

Where can this come up? Law firms engaging in consumer debt collection will "scrub" accounts to see if the consumer has filed bankruptcy and discharged the debt. If the "scrub" reveals a bankruptcy, the collector will see if the debt was originated after the filing of the case. If the debt originated after the filing of a Chapter 7 petition, the answer is pretty easy – it is a post-petition debt not subject to discharge. With the filing of a Chapter 13 petition, the answer is not so easy.

11 U.S.C. §1328(a)(2) excepts from discharge the kind of debt specified in 11 U.S.C. §523(a)(3), which concerns debts:

> (3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—
>
> > (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, **unless** such creditor had notice or actual knowledge of the case **in time for such timely filing**; or
> >
> > (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

When I see a collection case like this, then I have several questions that I need to ask:

[2] Id at *3.

1. Did the creditor have any knowledge of the bankruptcy? For instance, if the creditor ran a credit bureau report, did the Chapter 13 filing show up? If an application was taken, was the Chapter 13 filing noted? Is there any indication that the creditor has either actual or constructive notice of the filing of the Chapter 13 bankruptcy?
2. Did the consumer amend his/her schedules after the filing of the petition but before the bar claim period? Did the creditor have time *then* to file its claim?
3. Does the plan provide for late filed claims? If there is no such provision, then the claim is not "provided for by the plan". Query whether such a debt can be discharged.

Post-petition debt

11 U.S.C. §1305 provides for the filing and allowance of *post-petition* claims. Generally, those are certain tax claims, and for purposes of this outline, "a **consumer debt** that arises after the after the date of the order for relief under this chapter, and that is **for property or services necessary for the debtor's performance under the plan**[3]". A provision in a Chapter 13 plan for the payment of Section 1305 claims would need to insure those creditors were given notice sufficient to file their claim and for that claim to be allowed under 11 U.S.C. §502(a)-(c) or disallowed under 11 U.S.C. §502(d)[4].

However, note that the creditor must chose to file the claim[5]. Claims are "allowed" if filed with no objection[6]. If no claim is filed, then there is no "allowed" claim to discharge. If a creditor chooses not to file the claim, it may be prohibited from collecting the debt from property of the estate until the Chapter 13 plan has paid and closed, but that debt then would not be discharged. The creditor must weigh the chances of the debt being disallowed, or paid only a small percentage and discharged against the possibility of conversion of the Chapter 13 to Chapter 7.

[3] See 11 U.S.C. §1305(a)(2).
[4] See 11 U.S.C. §1305(b). and (c).
[5] See, In re Spencer, No. 10-36589, 2014 WL 1599869, at *1 (Bankr. N.D. Ohio Apr. 21, 2014) ("Congress specifies in this section [§1305] that certain post-petition creditors may elect to participate in a Chapter 13 plan by filing a proof of claim in the case. The use of the word "may" makes it clear, however, that the court cannot force such post-petition creditors to participate in a confirmed plan, as Debtors request, if they do not want to. Only the holder of the post-petition claim may file a claim and choose to become involved in the case"); In re Sims, 288 B.R. 264, 267 (Bankr. M.D. Ala. 2003) ("For the reasons set forth below, the Court finds that the permissive language in Section 1305(a) gives the holder of a post-petition claim the election of whether it wishes to participate in the Chapter 13 proceeding.") See also, In re Benson, 116 B.R. 606, 607 (Bankr. S.D.Ohio 1990); In re Woods, 316 B.R. 522, 524–25 (Bankr.N.D.Ill.2004); In re Davenport 534 B.R. 1 (Bankr, E.D. Ark 2015)
[6] 11 U.S.C. §502(a).

The post-petition creditor has the exclusive right to file its claim (or not). This cannot be forced on the creditor by a post-petition modification of a Chapter 13 plan[7], or an amendment to schedules[8]. Even if the plan has a provision to provide for claims filed under §1305, and a claim is filed it is still not certain those claims may be discharged.

11 U.S.C. §1328(d) says:

> Notwithstanding any other provision of this section, a discharge granted under this section **does not** discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

So, even if a claim is filed under 11 U.S.C. §1305, there remains many interesting questions:

- Will a boilerplate provision in a plan providing for the payment of claims filed and allowed under §1305, stating that it was not practicable for the debtor to obtain the trustee's approval suffice to allow the claim to be discharged?
- If the claim is filed and there is no objection, is it clear that the loan was for personal, family or household purposes, i.e., a *consumer loan*? If not, is the claim discharged?
- If the claim is filed and there is no objection, is it clear that the loan is for property or services *necessary for the debtor's performance under the plan*? If not, is the claim discharged?
- Does there need to be a *judicial* determination of these items[9]?

11 U.S.C. §348(d) makes it clear that a claim that arises after the order for relief under Chapter 13, but before a conversion under 11 U.S.C. §1307 (other than an administrative claim under 11 U.S.C. §503(b)) shall be treated as a pre-petition claim in the Chapter 7 and discharged. Again, debt collectors must be careful to note this timing in considering if a claim has been discharged.

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[7] Many courts that have addressed this would not allow a post-confirmation modification of the plan to discharge the debt. E.g. In re Lynch, No. BR 09-01894, 2011 WL 1060978, at *2 (Bankr. N.D. Iowa Mar. 22, 2011) "Debtors may not "sidestep" § 1305(a)'s requirements through post-confirmation modification of a Chapter 13 plan under § 1329."

[8] See, In re Layman 360 B.R. 902 (Bankr. E.D. Ark. 2007)

[9] Cases suggest that this is required. E.g., In re Sims, 288 B.R. 264, 267 (Bankr. M.D. Ala. 2003). See also other cases cited in footnote 5, above.

The issues surrounding the discharge of post-petition debts in Chapter 13 proceedings are complex and very fact dependent. Beware the assumption that a §1305 claim is discharged simply because it is filed and no objection is filed.

Destruction of collateral post confirmation

A couple of scenarios to get the creative juices flowing

Scenario 1 – Plan is confirmed. The creditor's claim is secured by an automobile. The creditor timely filed a claim, to which there is no objection and all parties are satisfied the creditor's lien is properly perfected. The automobile is involved in an accident and is totaled. Assume that the creditor is undersecured, that there is $7000 left to pay on the allowed secured claim, a unsecured claim of $3000 and insurance proceeds equaling $8,000. Who gets how much and from whom?

Scenario 2 – Plan is confirmed. The note which forms the basis of creditor's allowed secured claim provides for credit life and/or credit disability insurance. Presume the creditor's claim is undersecured. Debtor dies or becomes disabled. Who receives payments on the disability policy? What claim does the debtor's estate have in those insurance proceeds.

With a show of hands -

Scenario 1, who says:

- The proceeds are paid to the trustee who then disburses the insurance proceeds to the unsecured creditors.
- The proceeds are paid to the trustee who then disburses the insurance proceeds to the creditor sufficient to pay the allowed secured claim, plus accrued and unpaid interest fees and costs (yes, they filed an amended proof of claim with a Supplement 2 with no objection). The remainder is then distributed by the trustee pursuant to the confirmed plan.
- The proceeds are paid to the trustee who then disburses ALL the insurance proceeds to the creditor since it is the equivalent of their collateral that has been destroyed.

Scenario 2, who says

- The estate gets the money?
- The debtor gets the money
- The creditor gets the money?

The correct answers?????

- As with most things involving bankruptcy, it depends
- The basic question is whether the proceeds are property of the estate:

§ 541 Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case....

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, ... becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Moreover, in addition to the property set forth in § 541, the Chapter 13 estate includes "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." 11 U.S.C. § 1306(a)(1).

So are the proceeds from the insurance policy in our example property of the estate? This could depend on the wording of the plan. Here are some local examples:

- Eastern District of Kentucky – the form plan does not speak to retention of property of the estate upon confirmation, but, Section II (B)(4) states that the holder of any allowed secured claim provided for by the plan shall retain a lien until a condition specified in 11 U.S.C. §1325(a)(5)(B)(i)(I) occurs, at which time the lien shall be released.

- Northern District of Ohio: **Canton Division** does not directly speak to the retention of property of the estate, but Section B(4) states that a holder of any claim secured by property of the estate other than a mortgage shall retain its lien until the earlier of payment of the entire balance under applicable non-bankruptcy law or entry of the discharge under 11 U.S.C. § 1328, at which time the lien shall terminate and be released by the creditor; **Cleveland Division** – (Paragraph 10) leaves the choice when property will revest up to the Debtor. If the Debtor fails to make a designation, then the property of the estate shall revest in the Debtor upon confirmation; **Youngstown Division** – (Article VII) leaves the choice to the Debtor, but if no choice is indicated in the plan, the property revests in the Debtor upon completion of payments called for by the plan and the issuance of the Debtor's discharge.
- Southern District of Ohio: **Cincinnati Division** (Paragraph 2) – vests in Debtor at confirmation; **Columbus Division** (Paragraph G(4)) vests in Debtor at confirmation unless other option chosen; **Dayton Division** (Paragraph 9)– remains property of the estate. Note also that all three form plans have provisions relating to casualty loss proceeds and substitution of collateral.

The answers are all over the board, but there seems to be a growing majority that holds:

- The creditor's security interest in the vehicle extends to the insurance proceeds which are deemed a substitute for the wrecked collateral.
- That if the claim is bifurcated, the trustee is to pay the remaining balance of the creditor's allowed secured claim, plus accrued interest.
- There is a difference of opinion on what happens to the rest, but the recent trend is those proceeds are held to see if the debtor successfully completes their Chapter 13 plan.
- It also seems that if the insurance in question is credit insurance, that is not property of the estate and is paid directly to the creditor.

A review of some of the existing case law on these issues is illustrative. The following is presented in chronological order. When reading these cases, remember that when BAPCPA was enacted in 2005, there was a ***significant*** change to 11 U.S.C. §1325(a)(5)(B) making it clear that a creditor did not have to release its lien until complete payment of the underlying debt (not just the allowed secured claim) or discharge, whichever was earlier.

Case Law (in chronological order)

Case	Estate Property	Not estate property	Ruling
In re Tucker, 35 B.R. 35 (Bankr. M.D. TN 1983)	x		Held that creditor bound by confirmed plan. Property vested back in debtor free and clear of liens, but creditor's allowed, secured claim paid pursuant to request by debtor, with the remainder paid to the debtors. See also, **In re McDade**, 148 B.R. 42 (Bankr. S.D. Ill. 1992); **In re Pourtless**, 93 Bankr. 23, 26 (Bankr. W.D.N.Y. 1988);
In re Suter, 181 B.R. 116 (Bkrtcy.N.D.Ala. 1994)	x	x	Not property of the estate to the extent of the remaining portion of the allowed secured claim, but is property of the estate in excess of that amount. Decided based upon AL law.
In re Hill, 174 B.R. 949 Bankr..S.D.Ohio 1994)	x		The court opined that the language of the insurance policy controlled the issue of who is the owner of the proceeds. The insurance policy in question read that any loss as a result of damage to the car is payable as interest may appear to named insured [the debtor] and above loss payee [the creditor]. The court found that this language did not make the creditor either the primary or sole beneficiary of the proceeds. The court therefore found that the insurance proceeds were property of the estate. *Great review of the law at that time.*
In re Hoffmeister, 98 F.3d 1349 (C.A.10, 1996) - unpublished	x		Court took the position that the proceeds were property of the estate, subject to the superior interest of the loss payee. Allowed secured claim paid, rest to unsecureds.
In re Stevens, 130 F.3d 1027 (11th Cir. Ga. 1997)	x		Where the debtor has an interest in the insurance proceeds, the proceeds are considered property of the bankruptcy estate and distribution of the proceeds is governed according to the terms of the bankruptcy plan. Proceeds act as a substitute for the insured collateral. Creditor's interest in the insurance proceeds flowing from the destruction of the secured collateral is only as great as its interest in the collateral itself. Distinguishes proceeds from property

			insurance versus proceeds from credit life insurance (**McAteer** – below). Recovery limited to allowed secured claim.
In re Gibson, 218 B.R. 900 (Bkrtcy.E.D.Ark. 1997)	x		The court found that this "property" was subject to the superior rights of the loss payee to the extent of its interest in those funds (i.e., the remaining portion of its allowed secured claim).
McRoberts v. Associates Commer. Corp. (In re Derickson), 226 B.R. 879 (Bankr. S.D. Ill. 1998)			Trustee not entitled to deduct fee from insurance proceeds. The entire purpose of property insurance is to protect the insured. Any proceeds from such insurance serve as a substitute for the insured collateral and are not payment from the debtor's income or other property but flow from destruction of the creditor's security and serve as a replacement of that collateral. Query – if there are excess proceeds over and above the allowed secured claim, can the trustee claim a fee thereon? What if excess proceeds held in trust pending completion of plan and case is dismissed or converted?
In re Nolan (232 F.3d 528 (6th Cir. 2000)			While not an insurance case, the 6th Circuit refused to allow a debtor to surrender a vehicle, post-confirmation and reclassify the claim as unsecured. One would suppose that would be true in the situation where the unit was destroyed. This is a pre-BAPCPA case. See also **In re Adkins**, *supra*.
In re Witherspoon, 281 B.R. 321 (Bankr. S.D. Ala. 2001)	x		Post-confirmation destruction. Insurance proceeds used to pay creditor's allowed secured claim PLUS its unsecured claim at the percentage set forth in the confirmed plan. *Query* – what if plan amended and percentage changed? What if dismissed or converted?
In re Jones, 2004 Bankr. LEXIS 1520 (Bankr. S.D. Ga. June 4, 2004)	x		Vehicle destroyed post-petition. Creditor filed motion to retain all insurance proceeds, claiming both a contractual right under the contract of insurance and rights to proceeds under the Uniform Commercial Code. Policy of insurance not introduced into record, so court could rule only on UCC/proceeds argument. Court held that creditor had security interest in insurance as "proceeds", and permitted remaining portion of allowed secured claim to be paid. Remaining

			proceeds to be turned over to trustee and paid to unsecured creditors.
In re Torres, 336 B.R. 839 (Bankr. M.D. Fla. 2005)	x		Post-petition destruction of vehicle. Insurance proceeds plus payments from trustee DID NOT satisfy allowed secured claim in full. Debtor prohibited from reclassifying claim as unsecured and remaining portion of allowed secured claim to be paid by trustee. Debtor bound by confirmed plan.
In re Huff, 332 B.R. 661 (Bankr. M.D. Ga. 2005)		x	All proceeds paid to creditor. Post-confirmation destruction of collateral. Claim was bifurcated. Vehicle co-owed by non-bankrupt spouse and debtor. *Insurance is in the name of the non-bankrupt co-owner, only.* **Note that the policy was admitted into evidence.** Policy read: "Loss or damage under this policy will be paid, as interest may appear, to the named insured and the loss payee shown in the Declarations…" Court denied motion to substitute collateral. Insurance proceeds exceeded creditor's claim, so debtor not allowed to substitute collateral. See, **In re Monroe**, 2001 Bankr. LEXIS 2265 (Bankr. N.D. Tex. Nov. 6, 2001) for consequences of not admitting policy.
In re Adkins 425 F.3d 296 (6th Cir. 2005)			Extends the In re **Nolan** holding to situations where the creditor moved to terminate the stay (**Nolan** was a voluntary surrender). Still a pre-BAPCPA decision, but could be read in concert with change in to 11 U.S.C. § 1325(a)(5)(B
BAPCPA EFFECTIVE OCTOBER 17, 2005			
In re Turnbull, 350 B.R. 429 (Bankr. N.D. Ill. 2006)	x		Vehicle destroyed post-confirmation. Debtor delinquent on plan and filed motion to modify plan to cure delinquency and that insurance proceeds be applied as payments on plan. Court allowed modification as it related to unsecured claims, but held that the creditor was permitted to apply the proceeds to its claim and its remaining, unsecured claim would be paid on par with other unsecured claims. *The court also held that the creditor was under no obligation to allow a substitution of collateral.*
In re West, 343	x		Vehicle destroyed post-petition. Insurance proceeds paid

B.R. 541 (Bankr. E.D. Va. 2006)			over to trustee. At that time, only amount owed to creditor with lien on vehicle was interest on its allowed secured claim. Trustee moved to pay the remaining interest and then for turnover of title, suggesting he would hold on to proceeds to see if debtors successfully completed their plan. Creditor objected stating it was entitled to remaining proceeds as the loss payee and that the trustee had no interest in those proceeds since that property had vested back in the debtor upon confirmation. Held: under Virginia law insurance proceeds did not constitute proceeds of the vehicle, but rather of the insurance policy. Insurance proceeds NOT property of the estate.
In re Van Stelle, 354 B.R. 157 (Bankr. W.D. MI 2006)		x	Vehicle destroyed post-petition, pre-confirmation, but insurance check not tendered until plan confirmed. Plan that was confirmed showed creditor secured on vehicle. Creditor's claim bifurcated. *Court found that creditor could not be compelled to allow debtor to use proceeds and substitute collateral*. Court noted that debtor could have amended plan, pre-confirmation, and sought to use the proceeds and provide for the creditor's allowed secured claim in the plan, but did not. Court also noted that since upon confirmation, property of the estate vested back in the debtor, that the insurance proceeds were not the property of the estate and Section 363(b) relates only to "property of the estate". Court found, upon confirmation, an absolute transfer of the bankruptcy estate's interest in property was made to the debtor, so Section 363(b) was not applicable. Court overruled the motion to use the insurance proceeds. Very detailed reasoning in this case.
In re Bell 339 B.R. 309 (Bankr. W.D. NY 2006)			Where vehicle was destroyed, post-confirmation, debtor could reclassify remaining portion of claim as unsecured upon application of insurance proceeds. Court refused to render a decision based "simply on the language of the Plan" noting that only 1-2% of the Chapter 13 cases in that district "ever implicate the language of the Plan and the "binding effect" of its Confirmation" … thus a "change in decades-long practice is not warranted." The facts in the reported decision do not

			detail whether the insurance proceeds were insufficient to pay in full the unpaid, secured portion of the creditor's bifurcated claim.
In re Hardin, 375 B.R. 506 (Bankr. E.D. Wisc. 2007)			Vehicle wrecked post-confirmation. Creditor filed motion to terminate stay to allow it to post ins. proceeds to loan and release lien. *Policy that was paying loss was from third party, i.e., not the debtor's insurance, so question were those proceeds property of the estate.* Creditor had bifurcated claim. The insurance policy was not admitted into evidence, and it is unclear if payment of the proceeds was directed to creditor as sole loss payee or jointly to the debtors and creditor. Court decided case based upon creditor's security interest in proceeds under Section 9-102 definition of "proceeds" which read: "To the extent of the value of collateral". Court held creditor's interest therefore only to extent of unpaid portion of its allowed secured claim.
Ridge v. Union Acceptance Corp. (In re Ridge), 2007 Bankr. LEXIS 3389 (Bankr. N.D. Ga. Aug. 6, 2007)	x		Post confirmation destruction of vehicle. Creditor paid remainder of allowed secured claim, but excess goes to debtor since automobile revested in debtor at time of confirmation. Cites to Ford Motor Credit Co. v. Stevens (In re Stevens), 130 F.3d 1027, 1030 (11th Cir. 1997), which is pre-BAPCPA and does not discuss 1325(a)(5)(B)(i). *Query* - If insurance is simply replacement of vehicle, then 11 U.S.C. §1306(a)(1) will not apply. If policy is separate, contingent property right that does not come into existence until a post-petition triggering event, then is property of the CH 13 estate. Also, would it make a difference if the debtor were able to exempt the excess proceeds?
In re Lane 374 B.R. 830 (Bankr. D Kan 2007)			Debtor allowed to reclassify 910 claim as unsecured when vehicle destroyed post-petition, stating that 11 U.S.C. §502(j) is broad and can be applied to allow the *reclassification* of a claim, not merely the *allowance* or *disallowance* of that claim.
In re Belcher 369 B.R. 465 (Bankr. E.D. Ark 2007)			Debtor not allowed modify plan and reclassify a 910 claim where collateral destroyed in accident post-petition concluding that the res judicata effect of 11 U.S.C. §1327 prohibited such a change.

In re Guthrie, 2009 Bankr. LEXIS 2363 (Bankr. D. Kan. July 20, 2009)	X		**Pre**-confirmation destruction of collateral. Claim by creditor was a 910 claim. Debtor moved to use insurance proceeds to purchase replacement vehicle. Creditor objected (as did trustee to extent debtor would have to incur additional credit). Plan not confirmed so not revested in debtor. Court considered proceeds property of the estate and cash collateral subject to creditor's security interest. *Court recognized that as a 910 creditor, that claim had to be paid in full. Since proceeds less than claim, debtor was going to have to pay rest of claim not covered by insurance in full.* Court sustained debtor's motion to use proceeds to purchase replacement vehicle ordering that creditor would have a lien on the unit that would serve as its adequate protection as mandated under 11 U.S.C. §363(c)(2).
In re Norred, 2011 Bankr. LEXIS 3610 (Bankr. D. Or. Sept. 21, 2011)	x		Post-confirmation destruction of vehicle. Court held that creditor entitled to payment of allowed secured claim only, **BUT** under 11 U.S.C. § 1325(a)(5)(B), the creditor would retain its lien until plan successfully completed. If not, creditor entitled to excess.
In re Perry, 2011 Bankr. LEXIS 4513 (Bankr. E.D.N.C. Oct. 24, 2011)	x		Vehicle destroyed post-petition and creditor had bifurcated claim. Creditor argued that if insurance proceeds in excess of its allowed secured claim were paid out and case then dismissed or converted, it would be denied the benefit of bargain of the insurance contract. Court held that allowed secured claim was to be paid, and that remaining proceeds held by trustee for the debtor pending completion of the plan and discharge. *If case converted or dismissed prior to completion of the plan and discharge, the trustee shall pay the proceeds to creditor pursuant to its lien, reinstated by § 349(b)(1)(C).* See also, **In re Feher**, 202 B.R. 966 (Bankr. S.D. Ill. 1996).
In re Kelley, 2012 Bankr. LEXIS 5252 (Bankr. E.D. KY 2012)	x		Creditor had a 910 claim. Plan confirmed and property vested back in the debtor. Vehicle destroyed. Insurance proceeds in excess of creditor's remaining claim. Debtor moved Court to use proceeds to purchase new vehicle and substituted that as security for creditor's claim which was later withdrawn. Creditor amended claim to include post-petition charges to

			which the trustee objected. Held: creditor paid its claim including interest per the confirmed plan (4.25% v. contract rate of 20.95%) and remaining proceeds to be held by debtor's attorney pending further order of the court. Query – even if creditor's claim is paid in full, plus interest per the rate set out in the plan, can the creditor ask the excess proceeds be held until the end of the plan if its interest rate has been crammed down? That way, if the case is dismissed or converted, the creditor could be paid the difference between the contract rate of interest and the crammed down rate of interest.
In re Strzelecki 509 B.R. 671 (Bankr. W.D. Ark. 2014)			An undersecured creditor retained its lien on motor vehicle securing its claim even after Chapter 13 debtors had made payments to creditor in excess of secured amount of its claim, such that creditor, following damage to vehicle covered by debtor's automobile insurance policy, was entitled to insurance proceeds. The case has an excellent discussion of the pre and post-BAPCPA case law and the effect that the changes to §1325(a)(5)(B) had on the holdings.
In re Granville 2014 WL 1347039 (Bankr. E.D. KY 2014)	x		Vehicle totaled post-confirmation. *Third party insurance* paid proceeds that debtor (and trustee) asserted were property of the estate. Creditor argued that insurance proceeds were not property of the estate since the vehicle revested in the debtor upon confirmation. Court opined that whether insurance proceeds are property of the estate is a fact specific question that must be analyzed in light of the facts of each case. Determinative factor in this case was that the insurance proceeds came from a third party insurer. Third party committed a tort against the debtor and that cause of action/right to payment would be property of the estate under 11 U.S.C. §1306. The Court recognized the creditor's security interest extended to any proceeds of the car. However, it held the payment of insurance in this case, while due to the destruction of the car were "not the same as the car". Debtor allowed to use proceeds to purchase a new vehicle with the caveat that the debtor would provide adequate protection to the creditor with a first lien on the replacement vehicle. The Court further ordered that if there

			were funds remaining in the possession of the Debtor after purchase of the substitute vehicle shall be returned to the Trustee for distribution to the creditor on its secured debt.
In re Holtslander 507 B.R. 779 (Bankr N.D. NY 2014)	x		Vehicle destroyed post-petition. Insurance policy listed lender as sole loss payee. Court found that under NY state law that since lender had a properly perfected security interest in vehicle it had a similar interest in the insurance proceeds, *regardless* of whether it was named as loss payee on policy. Insurance proceeds were deemed property of the estate where the plan did not provide that estate property would revest in debtor upon confirmation. Insurance proceeds in excess of unpaid portion of allowed secured claim paid to trustee to be distributed pursuant to the Plan. Court recognized protections under § 1325(a)(5)(B)(ii) but not the effect of 11 U.S.C. §§ 348 or 349.
In re Ross 2015 WL 3781074 (Bankr D. S.C. 2015)			Court required insurance proceeds in excess of remaining allowed secured claim be held until debtors completed payments under the plan so conversion or dismissal no longer a concern, in recognition of § 1325(a)(5)(B).
In re Pennington 2015 WL 7746295 (Bankr S.D. TX 2015)			Creditor's allowed secured claim paid in full. Vehicle then involved in an accident and was a complete loss. Court held that: (1) creditor received all to which it was entitled under confirmed plan and (2) had no interest in insurance proceeds and (3) the debtor did not need to provide creditor adequate protection. No discussion of effect of 11 U.S.C. §§ 348 or 349.
In re Cotton 2015 WL 5601454 (Bankr. W.D. Mo. 2015)			$1,558.06 remaining on allowed secured claim at time of accident. Insurance proceeds totaled $6,684.55. Debtor moved to pay remainder of allowed secured claim plus plan percentage of unsecured claim. Court found that lien of creditor covered the insurance proceeds, that reliance on pre-BAPCA case law was not persuasive and that lien remained until either the payment in full of the entire debt or the discharge in the Chapter 13. The Court ordered the Chapter 13 trustee hold the proceeds until the Debtors receive a discharge. Upon discharge, the Trustee was to pay the remaining proceeds in accordance with the Plan. In the event

			that the Debtors did not obtain a discharge, the Trustee was to pay the proceeds over to the creditor
DISABILITY/CREDIT INSURANCE			
First Fidelity Bank v. McAteer, 985 F.2d 114 (3d Cir. N.J. 1993)		x	Credit life/disability policy purchased by debtor naming creditor as loss payee for the amount of its "claim" with and decedent's estate the secondary beneficiary. In CH 13 creditor's claim bifurcated. Debtor dies. Court holds that property of the estate is only what interests the debtor possesses at time of petition and bankruptcy does not create additional property rights. Insurance proceeds NOT property of the estate. Difference here is that credit life insurance is not substitution for or cash collateral of the vehicle.
In re Goodenow, 157 B.R. 724 (Bankr. D. Me. 1993)		x	Debtor purchased vehicle and also financed credit life and disability insurance naming creditor as beneficiary and the Debtor's estate as second beneficiary. Debtor files bankruptcy and then becomes disabled. Allowed secured claim paid in full. Creditor seeks to have ENTIRE unsecured claim paid, not just percentage due under plan and debtor seeks to re-determine creditor's claim. Court finds that creditor is the owner of the proceeds of the policy and it entitled to have its entire claim paid. This is NOT property of the estate so presumably the trustee would not be entitled to a fee on amounts paid via the insurance.
Johnson v. USAir Fed. Credit Union (In re Johnson), 162 B.R. 464 (Bankr. M.D.N.C. 1993)		x	Creditor's unsecured claim base on note that also financed credit disability insurance. Debtor made claim and proceeds paid to creditor. Debtor seeks to have proceeds deemed property of the estate. Court held proceeds belong to creditor alone.
In re Motto, 263 B.R. 187 (Bankr. N.D.N.Y. 2001)		x	Debtor seeks to fund CH 13 plan with credit disability insurance policy. Court holds that Ownership of an insurance policy, however, does not necessarily entail ownership of the proceeds payable thereunder and that under NY State insurance statute and facts of case, debtor had no ownership interest in insurance proceeds.

Stinnett v. LaPlante (In re Stinnett), 465 F.3d 309 (7th Cir. Ind. 2006)	x		Payments from insurance policies in which the debtor had a prepetition interest, to the extent that the debtor has or would have a right to receive and keep those payments when the insurer paid on a claim, are "proceeds" of estate property and thus also property of the estate.
In re Gladwell 2009 WL 140098 (Bankr. C.D. Ill 2009)		x	Debtor became disabled post-petition. Automobile contract contained a single payment, credit disability insurance policy, but note policy not put into evidence. In determining whether the insurance proceeds were property of the estate, the court noted that "[t]he overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim." Court cited to **McAteer** and **Motto** (above) as well as Illinois state law and found that debtor did not have any rights in the insurance proceeds.

Arguments gathered from case law

So, some questions to ask...

- Has the policy of insurance been placed in the record? As you can see from the *Hill* and *Huff* cases above, the decision of the court could have been different had that policy been introduced into evidence.
- What if the vehicle is fully exempt and this is not "property of the estate" [§522(b)(1) – "an individual debtor *may exempt from property of the estate*..."]. Even where a plan provides that property remain property of the estate, is that irrelevant if there if any equity in the property is exempt?
- Said differently, if a fully exempt vehicle is not property of the estate, does it follow that the insurance proceeds likewise are fully exempt, are property of the debtor, subject to the terms of the contract of insurance between the debtor and the secured creditor? In that case, should all the proceeds go to the creditor to satisfy its claim?
- Even if the property is deemed to be property of the estate, can the trustee take a fee from a distribution of those proceeds since it is NOT a payment received by the trustee under the plan, but instead is from a policy of insurance? 28 U.S.C. §586(e)(2)?

- A number of the cases noted above allowed the trustee to use the proceeds from the insurance policy under §363(b) as property of the estate or as "cash collateral" of that property.
- Is the same analysis true under §1325(a)(5)(B)?
  - This section applies "with respect to each allowed secured claim" provided for by the plan.
  - §506(a) determines that "secured claim" as it relates to a "claim of a creditor secured by a lien on property *in which the estate has an interest*..."
  - If the property is exempt, does the *estate* have an interest?
  - If not, can the creditor demand payment of all the insurance proceeds under the same theory stated above?
- Following this same line of thinking, what about a "910 claim"
  - 1325(a)(5) applies to allowed secured claims
  - §506(a) determines the extent to which a claim is deemed secured.
  - The "hanging paragraph" states that for purposes of §1325(a)(5), section 506 shall not apply.
  - 910 claims are not bifurcated into secured and unsecured portions
  - Therefore, must it not follow that a creditor with a 910 claim must receive the entirety of the proceeds from the insurance policy?
  - Must it not also follow that if those proceeds are insufficient to pay that 910 claim in full, that the remainder of the claim retains its status as a 910 claim?
  - Is the destruction of the collateral just "cause" to reconsider the claim under §502(j)?
  - Is the destruction of the collateral grounds for modifying the plan under 11 U.S.C. §1329, i.e., is that claim put is a separate class in the Chapter 13 plan such that payments on claims in that class can be reduced?
- Does state law change the answers if insurance proceeds are deemed property of the creditor and do not pass through to the debtor? In that case would the proceeds ever be property in which the debtor has an interest, i.e., property of the estate?
- If the property is claimed exempt and the vehicle is later destroyed, can the debtor utilize Section 363(b) and claim the insurance proceeds are cash collateral? (Section 522(b)(1): "... an individual may exempt *from property of the estate*..."

- If the creditor is an additional insured rather than just a loss payee or party with a security interest in the insurance proceeds, are those proceeds property of the estate or of the creditor?
- If it is determined that the proceeds are property of the estate, can the trustee use the portion of those proceeds that represent the undersecured portion of the creditor's claim until all payments are made under the confirmed plan? Does the trustee have to hold those funds to be in compliance with Section 1325(a)(5)(B) since creditor's lien extends to all those proceeds?
- If the vehicle is destroyed pre-confirmation, is there any question that the proceeds are property of the estate?

Conclusion:

- The creditor's lien in insurance proceeds extends under non-bankruptcy law to ALL the proceeds up to the unpaid amount on the note that is secured by the vehicle.
- BAPCPA added §1325(a)(5)(B)(i)(I) makes it clear that a creditor with an allowed secured claim provided for by the plan must retain its lien until that entire claim is paid.
- §1325(a)(5)(B)(i)(II) also makes it clear that if the plan is not completed, the creditor's lien shall "be retained by [the holder of the claim] to the extent recognized by applicable nonbankruptcy law."
- This meshes well with the mandates of §349(b) upon dismissal
- The entirety of the insurance proceeds must be preserved for the benefit of the creditor until at least the debtor completes payments under the plan, if not until discharge.
- Credit life and disability insurance proceeds are not property of the estate and must be used to satisfy the debt of the insured only, i.e., the creditor.

This leads into my next topic. Assuming the proceeds ARE property of the estate and that the debtor or trustee can make a motion to use the cash collateral, i.e., there is going to be a substitution of collateral that will serve as the creditor's adequate protection under Section 363, what will a creditor be looking for to make sure it is adequate protected under Section 363?

Substitution of Collateral (from a Creditor's Prospective)

As established above, the majority of the case law holds that a creditor, as the loss payee on the insurance contract, and/or secured party in those insurance proceeds, may require its allowed secured claim to be paid in full. Other cases hold that the creditor is under no obligation to permit a substitution of collateral, while we know other courts will allow it.

A creditor may be interested in allowing a substitution of collateral to serve as adequate protection for its claim. Likewise, if it wants to encourage payment on its undersecured/unsecured claim, the creditor may way to relent so the debtor can produce income necessary to the success of the plan.

If a creditor is inclined to allow use of the insurance proceeds to fund the purchase of a new car, or if the court is inclined to force the issue, what might the debtor's attorney and/or court expect to hear from the creditor? The following are a list of items, in no particular order of importance, gleaned from experience of dealing with clients on this issue over the years:

- The debtor should file a Motion that includes
  - ◇ Time frame in which the substitution will be completed – suggested 30 days
  - ◇ Do not allow the proceeds go to the debtor for their unsupervised use
  - ◇ That the proceeds will be sent to the dealership directly
  - ◇ That the creditor will have a first and perfected lien on the new unit and a copy of the title work evidencing the same
  - ◇ If known, the name of the licensed dealer from whom the unit will be purchased
  - ◇ That the creditor will be provided with a copy of the bill of sale to insure the purchase is in keeping with the agreements made
  - ◇ If the creditor provides, there be a completed substitution agreement signed by the debtor and dealer, a copy of which will go to the creditor
- The replacement unit must be of equal or greater value
  - ◇ Same or lesser mileage
  - ◇ Same model year or newer
- Creditor must be listed as first lien holder on title.
- The insurance company should request a letter of guaranty from the creditor so there is no doubt what is expected in return for the release of funds.
- There must be a total loss on the unit – insurance proceeds cannot be used to purchase a new vehicle while the debtor keeps what is left of the original vehicle
- If the selling dealership has guaranteed any portion of the original contract, their cooperation and approval may be necessary for the creditor to keep that guaranty.
- The creditor may require that they be allowed to perform a physical inspection on the substituted unit.
- Warranties and service contracts that were financed in the first contract generally are not transferable. The stay will need to be modified to allow any unpaid portion of such warranties or contracts to be canceled and the premiums rebated, where appropriate.

- The Chapter 13 trustee may want to hold the insurance proceeds and make the payment to the new dealership directly to ensure that all paperwork is completed before the funds are released.
- The creditor will want the ability to contact the new seller to make sure the deal will be funded. If the cost of the new unit exceeds the insurance check, there will need to be verified funds for the difference before the insurance check is issued to the selling dealership.
- Substitution of Collateral paperwork will need to be completed, signed and returned.
- The amount of the new loan cannot exceed the balance on the old loan, i.e., the creditor's risk cannot be increased.
- Creditor retains lien on insurance proceeds until the lien on the new vehicle is perfected.
- Proof of insurance with creditor listed as loss payee.
- That the debtor be given a set amount of time to complete all that is necessary to get the collateral substituted (generally 30 days) or the order/agreement is void, any stay relative to the proceeds is terminated and the creditor may apply the funds to its allowed secured claim.
- When the deal is complete the creditor shall release its lien on the original collateral.
- Any excess insurance proceeds shall be held by the trustee on behalf of the creditor under 11 U.S.C. 1325(a)(5)(B) – but see discussion of this issue in the last section of this outline.
- If trustee will be making payments on this claim, then an appropriate order or plan amendment must be entered.
- In the situation where the last payment on the new contract is past the date of the last payment under the plan, there must be a recognition that the debt will not be discharged under 11 U.S.C. §§1328(a)(2) and 1322(b)(5).

Modification of claim under 502(j)

11 U.S.C. 502(j) allows for the reconsideration of claims:

> (j) A claim that has been allowed or disallowed may be reconsidered **for cause.** A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the

> same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor. [Bold added]

As noted in some of the cases in the table provided above on post-confirmation modification, it has been read in concert with 11 U.S.C. §1329 for the proposition that the only modification that should be allowed is as to items listed in subsection (a) of that statute. For purposes of this presentation that would include subsection (a)(1)-(3):

> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> (2) extend or reduce the time for such payments;
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan

While there is no time limitation stated in §502(j) or Bankruptcy Rule 3008[10] such relief should not be granted unless and until there is notice and an opportunity for a hearing. Generally, a motion under §502(j) should not be considered after the case is closed or dismissed[11]. As noted in the Advisory Committee Notes to Rule 3008, authorizes disagree whether reconsideration of a claim should be allowed after a case has been reopened[12]. Neither are this Code section and the corresponding Rule intended to serve as a substitute for a timely appeal[13].

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[10] A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

[11] See Generally, In re Sheffield, 281 B.R. 67 (Bankr. S.D. Ala. 2001) and cases cited there.

[12] "The rule expands § 502(j) which provides for reconsideration of an allowance only before the case is closed. Authorities have disagreed as to whether reconsideration may be had after a case has been reopened. Compare 3 Collier, Bankruptcy ¶57.23[4] (14th ed. 1964), see generally 3 id. ¶502.10 (15th ed. 1979), with 2 Remington, Bankruptcy 498 (Henderson ed. 1956). If a case is reopened as provided in § 350(b) of the Code, reconsideration of the allowance or disallowance of a claim may be sought and granted in accordance with this rule."

[13] Matter of Colley 814 F. 2d 1008 (5th Cir. 1987).

The "*cause*" requirement under is within the discretion of the court and has been likened to the cause requirement of Federal Rule of Civil Procedure 60(b) [Bankruptcy Rule 9024]. Take the case of **In re Morningstar**, 433 B.R. 714 (Bankr. N.D. IN 2010). The Chapter 13 trustee there required more information to properly evaluate a claim filed by a mortgage lender. After making several written and oral inquires for additional information over a six month period, the trustee filed an objection to the claim. At the hearing on the matter, the creditor again asked for more time. Given the amount of time that has passed, the Court refused to grant additional time and sustained the trustee's objection.

Thereafter, the trustee brought an Adversary Proceeding to avoid the mortgage securing the claim given that claim was no longer an "allowed claim" as required by 11 U.S.C. §506(a). The creditor filed a motion under §502(j) to reconsider the disallowance of its claim. As the Court noted: "The movant has the burden of proving its entitlement to the relief sought, … and that begins with a demonstration of cause. Absent cause, a motion for reconsideration under § 502(j) should not be granted[14]."

The court noted the term "cause" was not defined giving rise to a variety of standards. Generally, there are three standards that courts employ:

- Option 1 - The standard found in Federal Rule of Civil Procedure 60(b)[15] as incorporated by Bankruptcy Rule 9024
- Option 2 - A four factor test used by a minority of courts[16]
- Option 3 - A "totality of the circumstances" test which considers any relevant factor[17]

So, presuming "cause" has been established under one of these standards, how then could this affect a claim filed by a creditor in a confirmed Chapter 13 plan? Generally, the *res judicata* effect of a confirmed Chapter 13 plan binds both debtors and creditors, as noted in §1327(a). Reconsideration, post-confirmation should be considered a "narrow exception to the

[14] In re Morningstar, 433 B.R. 714, 717 (Bankr. N.D. Ind. 2010) [citations omitted]

[15] (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

[16] (1) the extent and reasonableness of the delay, (2) the prejudice to any party in interest, (3) the effect on efficient court administration, and (4) the moving party's good faith. In re Gomez, 250 B.R. 397, 401 (Bankr. M.D. Fla. 1999)

[17] In re Willoughby, 324 B.R. 66, 73–74 (Bankr.S.D.Ind.2005).

otherwise unwavering bar which section 1327 places upon re-litigation of claim allowance after confirmation[18]."

First, a creditor's claim could be reconsidered after it files a motion to terminate the stay and that relief is ordered. Example[19]: stay terminated and creditor fails to send consumer notice of intent to pursue deficiency as required under state law. Reconsideration of the claim was weighed under Option 2. The Court characterized the issue as follows: "Contrary to what the creditors argue here, the issue in these cases is not whether the confirmed plans may be modified under 11 U.S.C. § 1327 and § 1329, but rather whether reconsideration of an allowed claim under 11 U.S.C. § 502(j) is appropriate under the circumstances of each case. The res judicata effect of plan confirmation and the limitations on the extent of post confirmation modifications imposed under 11 U.S.C. § 1329 are not relevant.[20] " The "cause" was the allegation that the creditor failed to follow state law such that under non-bankruptcy law the claim could not be collected. Based upon this, the deficiency claim was disallowed. NOTE TO CREDITORS – make sure that you follow all state laws in establishing your deficiency claim.

Second, a creditor's claim could be reconsidered where fees are added to a claim, post-petition: Example[21]: Mortgage creditor files an amended, post-petition claim for mortgage arrearages to be paid in plan that included late charges, foreclosure fees and costs, bankruptcy fees and costs, property inspections and fees the creditor paid to counsel for representation in a prior bankruptcy. Objections were filed, and later reported as settled, so the Court entered an order approving the claim. The case was later discharged and closed. The debtors then moved to reopen their case to file an adversary complaint regarding what it claimed were improper and illegal sums added to their arrearage balance. The Court allowed the objection to the claim to continue since the charges about which the consumers were complaining were added *after* the claim that was approved by the court. As noted by this Court and others, reconsideration of claim is proper even after confirmation.[22]

Conclusion

[18] In re Dykes, 287 B.R. 298, 303 (Bankr. S.D. Ga. 2002)
[19] In re Dykes, Id.
[20] Id at 302
[21] In re Moffitt, 408 B.R. 249 (Bankr. E.D. Ark. 2009)
[22] See, Moffitt at p. 256 and In re Adkins, 425 F.3d 296, 308 (6th Cir.2005)

Just because a Chapter 13 case has been confirmed and the creditor's claim provided for under the plan, does not mean that claim cannot be re-examined in narrow circumstances. Case law will continue to develop on the interplay between the conclusive, res judicata effect of 11 U.S.C. §1327 and the narrow exceptions to that rule found in 11 U.S.C. §502(j).

Credit Reporting During Bankruptcy and Re-establishment of Credit

Midwest Regional Bankruptcy Seminar
August 18-19, 2016
Westin Hotel Downtown
Cincinnati, Ohio

Frank M. Pees
Chapter 13 Trustee
130 East Wilson Bridge Road, Suite 200
Worthington, Ohio 43085

Credit Reporting During Bankruptcy and Credit Re-establishment:

I. Credit Reporting 101

A. Credit Reports are detailed reports of how debts are paid – Think: Financial Resume.

B. Credit Reports result in a credit score that is used by lenders to determine the risk associated with a new debt.

C. Credit Reports are created by Credit Reporting Agencies ("CRAs").
1. Equifax
2. Experian
3. TransUnion

D. Information is gathered from banks, credit unions, or other credit lenders. These companies are called "furnishers."

E. What information is on a credit report?
1. Personal Information:
    a. Name, Address, Social Security Number, Birthdate
    b. Employment information – current and former employers
    c. This information does not affect credit scoring
    d. However, incorrect personal information is evidence that some other individual's information is on your credit report.

2. Account Information:
    a. Discloses all accounts and status of accounts for at least the last seven years.
    b. Each account is a "trade line" and includes:
        i. Name of lender
        ii. Account number
        iii. Type of Account
        iv. Balance Due
        v. Amount Past Due
        vi. Initial Loan Amount or Highest Credit Amount
        vii. Open Date, Last Reporting Date, and Last Active Date
        viii. Payment History Information (Examples include: "Paid as agreed," "30-day late payment," "charged-off")
    c. Account Information greatly influences a person's credit score.

3. Inquiries
    a. Hard Inquiries - Potential lenders review your report when you apply for credit.
        i. Includes applying for new credit or an apartment
        ii. Must give permission for someone to view report
        iii. Often causes a small decrease in credit score
    b. Soft Inquiries
        i. Pre-approved offers, checking own report, accounts you already have
        ii. Does not affect credit score

4. Public Record Information
    a. Bankruptcies, Tax Liens, Civil Judgments
    b. Can remain on credit report for 10 years

II. Why is credit reporting so important?

A. Information on Credit Report directly affects Credit Score

1. FICO Score
    a. Ranges from 300 to 850
    b. Used by 94% of all lenders
    c. The higher the score, the better the credit

2. Effects of Low Credit Scores:
    1. Denial of credit
    2. Increased interest rates
    3. Increase insurance rates
    4. Requirement of security deposits for utilities
    5. Inability to gain employment
    6. Loss of professional licenses
    7. Loss of security clearance from government entities

B. Bankruptcies appear on credit reports for years

1. Credit Reporting Agencies (CRAs) typically report Chapter 7 bankruptcies for 10 years
2. CRAs can report Chapter 13 bankruptcies for 10 years, BUT typically only report for 7 years

D. Inaccurate Credit Reports impede a Debtor's Fresh Start:

1. The "fresh start" has always been considered one of the principle attributes of the Bankruptcy System of the United States as recognized by the Supreme Court:

"One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit to start afresh free from the obligations and the responsibilities consequent upon business misfortunes.'" **Local Loan v Co. v. Hunt, 292 U.S. 234, 244 (1934), quoting Williams v. U.S. Fidelity & G. Co., 236 U.S. 549, 554-555 (1915).** "This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." **Id., citing Stellwagen v. Clum, 245 U.S. 605, 617 (1917).**

2. Debtors are now spending three to five years of their lives completing a Chapter 13 Plan, but finding their fresh start impeded by low credit scores resulting from erroneous reporting on their credit reports.

III. Credit Reporting for Accounts in Chapter 13

A. Rules for Reporting once a Chapter 13 has been filed were set forth by the Consumer Data Industry Association. See Creditor Reporting Resource Guide, available at http://m2reporterhelp.weebly.com/accounts-included-in-bankruptcy.html.

1. Month Bankruptcy is filed
    a. Account must note that Chapter 13 filed
    b. Current balance = outstanding balance amount
    c. Scheduled monthly payment amount = contractual amount
    d. Amount past due = dependent on status

2. Months between petition and confirmation
    a. Current balance = outstanding balance amount
    b. Scheduled monthly payment amount = contractual amount
    c. Amount past due = dependent on status

3. Months between confirmation and completion of plan
    a. Current balance = Chapter 13 plan balance
    b. Scheduled monthly payment amount = Chapter 13 plan payment amount
    c. Amount Past Due = zero

4. Plan completed (no on-going obligation)
    a. Account must note discharge/completed through BK Chapter 13
    b. Current balance = zero
    c. Scheduled monthly payment amount = zero
    d. Amount past due = zero

5. Plan completed (on-going obligation, i.e. mortgage)
    a. Account must note discharge/completed through BK Chapter 13
    b. Account can be listed as "charged-off" only if it was charged-off prior to the bankruptcy
    c. Current balance = outstanding balance amount
    d. Scheduled monthly payment amount = updated contractual amount
    e. Amount past due = dependent on status

B. What a Post-Discharge Credit Report Should NOT Show (if debt discharged):
    1. An amount currently owed that is non-zero
    2. Payments late
    3. Account "charged-off" – UNLESS charged-off prior to filing
    4. A balance due that is non-zero
    5. Debt converted to new type of debt (new account numbers, re-aged, etc…)

IV. What can be done during bankruptcy?

A. Opt-out of "pre-approved" credit offers. Visit www.OptOutPrescreen.com or call 1-888-567-8688

B. Avoid recent collection accounts by paying utility bills, new medical bills, and living expenses on time.

C. Obtain a credit report – consumers can obtain one free credit report from each of the three major credit reporting agencies every twelve months. Available at www.annualcreditreport.com.

1. Check to see how each account is reported – should fit within the guidelines of the CDIA.
    a. Is the current balance accurate?
    b. Is the scheduled payment amount accurate?
    c. Is the amount past due listed as zero?
2. Watch for unfamiliar creditor names as this could be a debt assignment to a debt purchaser.
3. Verify all personal information is accurate.
4. Verify all public record information is accurate.
    a. Bankruptcies will still be listed
    b. Were any judgments filed post-petition?
    c. Were any tax liens filed post-petition?

B. Dispute Errors on Credit Report

1. The Fair Credit Reporting Act, 15 U.S.C. 1681, et. al., "a person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." **15 U.S.C. §1861s-2(a)(1)(A).**
2. Under the FCRA, both the Credit Reporting Agency ("CRA") and the information provider are responsible for correcting errors.
3. Duties of CRA are set forth in **15 U.S.C. §1681i(a)**
4. Duties of furnishers: **15 U.S.C. §1681s-2(B) – Reporting information after notice and confirmation of errors.** A person shall not furnish information relating to a consumer to any consumer reporting agency if –
    i. the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and
    ii. the information is, in fact, inaccurate.

5. Contact CRA in writing
    a. Send via certified mail
    b. CRA will investigate within 30 days, **15 U.S.C §1681i(a)(1)**, including providing copy of the dispute to the furnisher of the information, and must give the consumer the results upon the completion of the investigation.
    c. Copy the creditor/furnisher with the dispute as well. This will help in setting up potential punitive damages later, if the errors are not corrected and legal action necessary.
    d. See Disputing Errors on Credit Reports from Federal Trade Commission available at https://bulkorder.ftc.gov/system/files/publications/pdf-0038-how-to-dispute-credit-errors.pdf.
    e. For section by section review of FCRA visit: https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf

6. If dispute not resolved to consumer's satisfaction, you may also contact the Consumer Financial Protection Bureau (CFPB)
    a. CFBP, along with the FTC, is the co-enforcement agency of the Fair Credit Reporting Act.
    b. On October 22, 2012, CFPB began accepting consumer complaints about credit reporting.
    c. Complaints through CFPB allow consumers to check the status of the complaint through the CFPB website.
    d. Expected response time to CFPB complaint is 15 days.
    e. Consumers will have opportunity to dispute the company's response to the Complaint.
    f. Can be filed online - www.consumerfinance.gov/complaint.
    g. This step is not required but creditors take notice any time the CFPB is involved.

IV. Potential Causes of Action

A. **15 U.S.C. §1681** - Fair Credit Reporting Act

1. No liability for violations until an inaccuracy is reported and the furnisher/CRA fails to correct the error.
2. See **Jackson v. Experian Informational Solutions, Inc., et. al., 2016 U.S. Dist. LEXIS 65846 (N.D. Ill., May 19, 2016)** for good summary of FCRA litigation.
3. Damages for negligent noncompliance are limited to actual damages plus attorney fees. **15 U.S.C. §1681(o).**
4. Damages for willful noncompliance can include statutory and punitive damages, even without the showing of actual damages. **15 U.S.C. §1681(n), Beaudry v. Telecheck Services, Inc., 579 F.3d 702 (6th Cir. 1999), and Bach v. First Union National Bank., 486 F.3d 150 (6th Cir. 2007)** (granting punitive damages of $400,000.00 for violations of FCRA). **(NOTE: REMEMBER TO SERVE FURNISHERS WITH DISPUTE TO CRA.)**

B. **11 U.S.C. §1327(a)** - Contempt action for violation of the confirmation order. **See In re: Luedtke, 2008 Bankr. LEXIS 2118 (E.D. Wisc., July 31, 2008).**

C. **11 U.S.C. §524** - Contempt action for violation of the discharge injunction. See **In re: Torres. 367 B.R. 478 (Bankr. S.D.N.Y. 2007)**

D. **15 U.S.C. §1692, et. seq.** - Fair Debt Collection Practices Act

1. Need to establish that false information provided for purposes of extracting repayment of the debt.
2. Only applicable to "debt collectors" as defined in 15 U.S.C. §1692a(6).
3. Allows for statutory damages of $1,000.00 per violation.

E. Credit Defamation - Limited to cases of malice or willful intent to injure the consumer. **15 U.S.C. §1681h(e).**

F. State Consumer Protection Statutes

1. Ohio Consumer Sales Practices Act
2. Kentucky Consumer Protection Act
3. Indiana Deceptive Consumer Sales Act

V. **Steps to Re-establishing Credit Following Discharge**

A. Obtain credit reports from all three major Credit Reporting Agencies

B. Carefully review credit reports including account, personal, and public record information.

C. Dispute incorrect and outdated information
   1. Keep copies of all correspondence related to dispute
   2. Follow up with phone calls to numbers listed on credit report

D. Obtain your actual credit score – www.myfico.com

E. Be very careful of dealing with credit repair companies. Most are scams and none can do anything that Debtors cannot do for themselves.

F. Open a savings account and make regular deposits with each pay – set a goal of 5-10% from each wage earner.

G. Pay bills on time

I. Save for a down payment before buying a car

J. Before applying for credit, ask the loan officer about their lending policies for persons recently discharged from bankruptcy

K. Get a secured credit card from a national bank
   1. Pay off the balance each month
   2. Do not use more than 10% of the credit limit
   3. Look for one that becomes unsecured in 6-12 months

L. Do not co-sign for family or friends

M. **Keep the following documents for at least 10 years**
   1. Petition, Statements, Schedules of Debts
   2. Chapter 13 Plan and any amendments or modifications
   3. Notice of Intention to Pay Claims
   4. Notices of Assignment or Transfer of Claims
   5. Semi-annual Reports
   6. Certification of Final Payment and Case History
   7. Order of Discharge

RE-ESTABLISHING CREDIT AFTER DISCHARGE

Office of Frank M. Pees, Chapter 13 Trustee
130 E. Wilson Bridge Road, Worthington, OH
614-436-6700, 1-800-282-1001

What can be done during bankruptcy?

- Opt-out of "pre-approved" credit offers to limit companies from pre-screening credit reports. www.OptOutPrescreen.com or 1-888-567-8688.
- Pay utility bills, new medical bills, or any other bills or living expenses on time. Recent collection accounts have a greater negative impact than older collection accounts.

What can be done during bankruptcy?

- During first year, check credit reports to see that all accounts involved in the bankruptcy are noted as "Included in bankruptcy" or "Chapter 13" or "wage earner plan."
- Continue to monitor credit reports annually to avoid any surprises at end of case. www.annualcreditreport.com

Closing procedure for your Chapter 13 case

- Begins with payment termination letter from Trustee. I call it the "Happy Day."
- Closing Procedure takes approximately 60-90 days to complete.
- Certification of Final Payment & Case History is sent 4 to 6 weeks later.

Closing procedure for your Chapter 13 case

- Order of Discharge issued approximately 30 days after the Certification.
- Expectation is that creditors will update accounts after receipt of Discharge Order but often they are slow to do so or even fail to update.
- Keep Discharge Order and Certification of Final Payment & Case History for minimum of 10 years.

Credit Reports 101

- What is a credit report?
  A detailed report of how debt is paid.
- How do credit bureaus obtain information for the report?
  Information about debt repayment is sent from banks, credit card companies or credit lenders called providers or furnishers.
- How is the information used?
  The information on the report is used to calculate a credit score based on the user's credit score model.
- What is FICO?
  It is the most commonly used scoring system to make credit, employment, and insurance premium decisions.

Which report should you review?

- Important to check all three reports. Not all lenders report to all three bureaus.
- To check continually throughout the year, request a report every four months, alternating bureaus.
- Review each one carefully and highlight any incorrect or outdated information.
- Check all information including personal information.
- Check for duplicate accounts.
- Check inquiries listed at end of report.

This one is Safe, Approved, Regulated, and FREE:

What Information is on Credit Reports?

- All reports have sections for:
  - Personal Information
  - Account Information
  - Inquiries
  - Public Record Information
- Some reports have optional separate sections for:
  - Credit Summaries
  - Open Accounts
  - Closed Accounts
  - Derogatory Accounts
  - Satisfactory Accounts

Personal Information

- Name, address, social security number, birthdate, and employer.
- Can include both current & former addresses & employers.
- Personal information is submitted every time the provider/furnisher updates the account information.
- May be wrong if the information is entered or reported incorrectly by providers.
- Wrong information may also be indicative that some other person's information is included on your report.
- This information does not affect your credit score.

Account Information

- This section factors very heavily in your credit score.
- This section should be carefully reviewed after discharge for wrong or outdated information.
- Discloses all open, closed, satisfied, settled, derogatory accounts, and collection accounts for at least the last seven years.

Account Information

- Each account is called a trade line. Each trade line includes **Name of Lender & account no.**:
  - Some digits may be masked, xxxx5649.
  - Can include address and phone number of lender.

Account Information – Con't.

Each trade line includes:

- **Type of account** (Revolving, Installment, Mortgage, Other.) FICO score reflects types of accounts and how frequently used. The **type of lender** is a factor considered in calculating the credit score.
  - Type of lender includes banks, credit unions, mortgage lenders, auto lenders, merchant lenders, and finance companies.
  - The FICO scoring system gives a higher score to national banks and national credit car companies and lower scores to finance company accounts.

Account Information – Con't.

Each trade line includes:

- **Balance due** is the last reported balance by the provider/furnisher, not necessarily the current balance or the balance after your last payment.
- **Amount past due** will drop score significantly.
- **Initial loan amount or highest credit amount**. If amount exceeds the credit line, it can cause a drop in credit score.

Account Information – Con't.

Each trade line includes three **Dates**:

- Open date, last reporting date, & last active date.
- **Open date** is the month/year account was opened. Very important factor in credit score. Length of time accounts are open, number of accounts opened in last 12 months, & length of time since new account was opened are all factors that can increase or decrease scores.
- **Last reporting date** is most recent month/year the provider/furnisher reported the information.
- **Last active date** is the last month/year a payment was made. Recent on time payment activity is more helpful than closed accounts paid on time.

Account Information – Con't.

Each trade line includes **Payment history information**:

- Pays as agreed, late payments, derogatory accounts.
- Each creditor has its own method of reporting monthly payment information and late payments.
- Some lenders report a 30-day late payment at 31 days while other lenders may wait much longer.
- Derogatory accounts include charged-off, collection accounts, consumer credit counseling, settled accounts, foreclosures, repossessions, bankruptcy.

Inquiries

- Hard inquiries are when a potential lender is reviewing your report.
  - When you apply for credit
  - When you apply for an apartment.
  - You must give permission for someone to review your reports.
- Soft inquiries do not cost you any credit points.
  - Pre-approved offers
  - Checking your own reports
  - Inquiries by accounts you already have

Public Record Section

- Bankruptcies
- Tax liens
- Civil judgments

Public records will have less affect on your score as time passes but they can remain on your report for up to 10 years.

Completed, discharged Chapter 13 bankruptcies stay on reports for 7 years from original filing date of the bankruptcy case.

Charged-off Accounts

- Charged-off accounts are considered bad debts that are at least 180 days past due.
- Some companies refuse to remove the charge-off notation even after discharge.
- If account was already charged-off at the time the bankruptcy was filed, the notation does not have to be removed as it is correct information.
- Always ask to have derogatory info removed, however, because most companies will do so.

Credit Rehabilitation after Discharge

- The first step is to obtain all three credit reports for each person who filed bankruptcy *before* applying for new credit.
- Review each one carefully and highlight any incorrect or outdated information.
- Dispute incorrect or outdated information to the credit bureau which is reporting the information.

Credit Rehabilitation after Discharge

- Check all information including name, DOB, past and present addresses and employers.
- Check each trade line for incorrect or outdated information.
- Check for duplicate accounts.
- Check to see what inquiries are listed at end of report.

Credit Rehabilitation after Discharge

- Bankruptcy should be noted in the Public Record section as DISCHARGED.
- Balance of each discharged debt should be reported as zero balance, including unsecured debts paid less than 100% and debts listed as NOT FILED on the Certification of Final Payment.
- Past due balance of each discharged debt should be reported as zero.

Credit Rehabilitation after Discharge

- The second step is to dispute the wrong or outdated information that is on your report.
- File disputes in writing, online or by form or letter.
- Clearly identify the trade line and account number.
- Be specific about what action you expect and why.
- Send supporting documentation, if needed.

Credit Rehabilitation after Discharge

- Keep copies of what you send or who you speak with.
- Follow up with telephone call to number listed on report, if necessary.
- Credit bureaus must investigate your disputed information within 30 days.
- If creditor can't verify their information is correct, it must be removed and a new report will be sent to you.

Credit Rehabilitation after Discharge

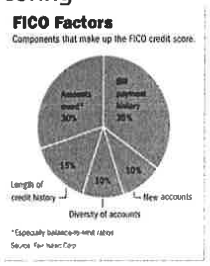
- The third step is to buy your credit scores to know what they are and how much rebuilding has to be done. FICO score is used by most creditors.
- Credit score at discharge depends, in part, on credit score at time bankruptcy was filed.
- Credit scores can be shared with future creditor grantors before applying to find out whether approval is likely or not.

Why Have Credit Reports?

- The end result of credit reports is to generate a credit score.
- Several different scoring models exist but over 94% of credit lenders and insurance companies use the FICO score.
- Your score is based on the information on the report on the day the score is requested.
- Credit score after discharge depends, in part, on what your credit score was at time bankruptcy was filed.

Credit scoring

- Credit scoring is done by computer. Gain points for positive info & lose points for negative info.
- Most creditors use FICO score: 300-850.
- FICO scores can be obtained at www.myfico.com.
- All scores you receive are estimated FICO scores & will always be higher than your FICO score.



Credit repair companies

- Understand that credit repair takes time and persistence. Most credit repair businesses are scams.
- Credit repair companies cannot do anything that you can't do yourself for less.
- Be cautious. Many companies promise far more than they can produce.
- Must give a copy of the "Consumer Credit File Rights Under State and Federal Law" before a contract is signed.
- Must provide a written contract that lists consumers' rights and obligations.
- You have a three day right to cancel contract.

ChexSystems: A special report

- Each notation submitted to ChexSystems stays on file for 5 years unless removed by the reporting financial institution.
- Reports can be obtained at www.ckfraud.org/chexsystems.html.
- If debt is discharged, report must show zero balance, discharged in bankruptcy.
- Chase offers *Access Checking*.
  US Bank offers *Second Chance Checking*.

Know your rights

- Fair Credit Reporting Act (FCRA) regulates the collection, distribution, and use of consumer credit information. 15 U.S.C. §1681
- Fair and Accurate Credit Transactions Act (FACTA), an amendment to FCRA, allows consumers easier access to receive and dispute credit reports.
- Fair Debt Collection Practices Act (FDCPA) creates guidelines for collection of consumer debts. 15 U.S.C. §1692
- Credit Repair Organizations Act (CROA) prohibits false claims about services and prohibits payment before services are performed. 15 U.S.C. §1679

To Rebuild Credit

- Open a savings account with a chosen bank or credit union and make regular deposits, each pay period or monthly.
- Save 5% - 10% of each paycheck from each wage earner.
- Pay all bills on time, including utilities.
- Before buying a car, have a down payment and select the most economical car to meet your needs.
- Before applying for credit, ask the loan officer about their lending policies for persons recently discharged from bankruptcy.

To Rebuild Credit – Con't.

- Get secured credit card
  - Use national bank. Avoid online cards.
    - US Bank ($300.00 minimum)
    - PNC Bank ($250.00 minimum)
  - Should report to all 3 credit bureaus.
  - Pay off balance *every* month. Secured cards have very high interest rates.
  - Don't use more than 10% of credit limit.
  - Look for one which becomes an unsecured line of credit after 6-12 timely payments.
  - Be cautious. Many cards have "hidden" fees.

If Credit is Denied

- Use the opportunity to find out why.
- Ask what actions would be necessary to be approved.
- Ask to be re-evaluated in 6 months if you are able to meet their conditions.
- If you have reason to believe you may not be approved, it is better to find out lending guidelines of a company, bank, or business before you apply.
- If your situation or credit score does not fall within their established guidelines, do not apply as they will not make an exception for you and your score will be reduced by at least two points.

Consumer statement

- When disputes are unresolved or accurate negative information remains, consumers may write a statement to be included in the reports.
- Statement of explanation should be 100 words or less.
- Don't use the statement to whine, use it for damage control: state the facts to explain the dispute or to clarify the situation.
- Statement will be provided to anyone requesting a report and will remain up to three years.
- Statement will not affect credit score, but may make a difference if a loan officer is doing manual underwriting.

10 costly mistakes to avoid

1. Don't cosign for family, including children.
2. Don't cosign for friends or co-workers.
3. Don't sell your car to someone who will take over the payments.
4. Don't let car insurance or homeowners insurance lapse.
5. Don't spend money you don't have, even if you know more is coming.
6. Don't pay bills before money is in your account.
7. Don't be late with regular payments so a late fee is charged or don't pay a fee to pay a bill.
8. Don't borrow from retirement funds to pay bills.
9. Don't get a second mortgage to pay unsecured debt.
10. Don't have multiple credit cards or carry a balance from month to month.

Bankruptcy documents to keep

- Petition, Statements, Schedules of Debts
- Chapter 13 Plan, any Amendments, & Modifications to Plan
- Notice of Intention to Pay Claims
- Notice of Transferred or Assigned Claims
- Semi-annual reports

Keep these documents for a minimum of 10 years:

- Certification of Final Payment and Case History
- Order of discharge

Re-establishing your Credit after Chapter 13

Step 1: Do Your Research

A. Review your bankruptcy documents.
Save these documents for life:
   1. Certification of Final Payment & Case History
   2. Order of Discharge
   3. Chap. 13 Plan, and any amendments or modifications
   4. Petition and Schedules of debts

B. Become familiar with the debts that were included in your plan and how they were treated in the plan.
   1. Did each creditor file a claim?
   2. What was the dividend for unsecured creditors?
   3. Did you receive titles for vehicles?
   4. Do you have debts that survived the bankruptcy discharge?
      a. Mortgages
      b. Taxes
      c. Student loans
      d. Child support
      e. Judgment liens
      f. Co-signed debts

Step 2: Review and Update Credit Reports

A. Before you apply for credit, you will want to make sure your report correctly reflects your credit history.

Request copies your credit report from all three major credit reporting bureaus. www.annualcreditreport.com

B. Any debt, other than a long-term debt or non-dischargeable debt, included in your Chapter 13 should state a zero balance, including unsecured debts that were paid a dividend of less than 100% and claims that were NOT FILED as listed on your final report (discharged debts).

C. In the Public Records section, it should state that your bankruptcy case is DISCHARGED.

Step 3: Credit Report Disputes

A. Your credit report is your financial resume. One of the factors that determine whether you qualify for new credit following a Chapter 13 is your credit history. Therefore, if the information in your report is inaccurate, it must be corrected; if it is obsolete (outdated), it must be deleted; and if the information can no longer be verified through the reporting creditor, it must be deleted.

1. Know your rights.
   a. Fair Credit Reporting Act
   b. Credit Repair Organizations Act
   c. Fair Debt Collection Practices Act
   d. Fair & Accurate Credit Transactions Act

B. Write a letter or fill out form or file dispute online to each of the credit reporting agencies requesting that incorrect/outdated information be deleted.
   1. Be specific about which account information is wrong and how it should be corrected.
   2. Make requests in writing, either online or by mail.
   3. Keep a record of everything you send and any phone calls, including date and name of person you've spoken to.
   4. Follow-up on Letters requesting updates.
   5. Consumer statement: Fair Credit Reporting Act (FCRA) provides the opportunity for a consumer to explain a negative credit reference or other issue in 100 words or less if the information is correct but damaging.
   6. Contact the credit grantor directly to resolve the dispute and have the disputed info deleted.

C. Violations of federal law:
Federal Trade Commission
Debt Collection
600 Pennsylvania Avenue
Washington, DC 20580

Violation of State Laws:
Attorney General
State Office Tower
30 E. Broad Street
Columbus, OH 43215

Step 4 – Re-establish Relationships with Credit Grantors

A. Open a savings account with a bank or credit union. Make regular deposits into the account: every paycheck or at least every month.
B. Talk with a financial officer at the bank or credit union to determine what you need to do to become more creditworthy in the eyes of the institution.
C. Get pre-approved for automobile or mortgage loans.
D. Be prepared to educate your credit grantors about the Chapter 13 payback process.