# Concurrent Session

# Confirmation Issues in Chapter 13: Modification, Conversion, Discharge by Declaration and More

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2010
Educational Materials

# SELECTED CHAPTER 13 ISSUES

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**Chapter 13 Lien Stripping**

1. Does there have to be an allowed proof of claim?
    a. *In re Ireland*, 137 B.R. 65 (Bankr. M.D.Fla. 1992)(Since the first mortgagee did not file a proof of claim, it does not hold an allowed claim, and therefore the lien cannot be invalidated pursuant to section 506(d)(2)).
    b. 11 U.S.C. Section 506(d)(2) – "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless – (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of claim under section 501 of this title."
    c. 11 U.S.C. Section 501(c) – "If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim." "The purpose of this subsection is mainly to protect the debtor if the creditor's claim is nondischargeable. If the creditor does not file, there would be no distribution on the claim, and the debtor would have a greater debt to repay after the case is closed than if the claim were paid in part or in full.in the case or under the plan." S. Rep. No. 989, 95th Congr. 2d Sess. 61 (1978). The 1983 Advisory Committee Note to Rule 3004 further provides that the option accorded to a debtor to file a claim in the creditor's stead does not depend upon the dischargeability of the claim.

2. Standing
    a. *In re Barrios*, 257 B.R. 626 (Bankr. S.D.Fla. 2000)(Unsecured creditors have standing to object to confirmation of a chapter 13 plan that does not provide for the stripping-off of a wholly unsecured mortgage lien.)
    b. Section 502(a) – any party in interest can object to a proof of claim.
    c. "For purposes of section 506(d) of the House amendment, the debtor is a party in interest." 124 Cong. Rec. H11095 (daily ed. Sept. 28, 1978); S17411 (daily ed. Oct. 6, 1978); remarks of Rep. Edwards and Sen. DeConcini.

3. When is the lien void?
    a. Is the lien void at the time the Petition is filed and the estate created?
        i. Bifurcation and 109(e) eligibility
            1. Debt limits are based upon bifurcation; *In re Grenchik,* 386 B.R. 915 (Bankr. S.D.Ga. 2007)(undersecured portion of second mortgage counted as unsecured debt for purposes of 109(e))
                a. Eligibility would not be impacted by lien stripping
            2. Debt limits are not determined by the bifurcation of claims as of petition date; *In re Holland*, 293 B.R. 425 (Bkrtcy. N.D.Ohio 2002) (bifurcation is a post-petition event that should not be used in determining debtor's eligibility on the date of the filing of the petition.); *but see In re Toronto*, 165 B.R. 746 (Bankr. D.Conn. 1994)(unsecured claim arising from postpetition lien avoidance as a preference has

to be considered in determining debtor's chapter 13 eligibility)

b. Is the lien void when the order is entered?
    i. Effect of conversion
        1. *In re Marante*, 2003 WL 21361675 (Bkrtcy.S.D.Fla.)(Upon conversion, creditor is not bound by confirmed chapter 13 plan provision which stripped off its mortgage lien.); *but see, contra, In re Jean*, 306 B.R. 708 (Bankr. S.D.Fla. 2004)(A lien stripped off with proper notice in a chapter 13 case is *not* reinstated upon conversion to chapter 7)
        2. Section 348(f)(1)(C) effect of conversion – "the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security …."
            a. Holding security"
                A. Section 101(49) – definition of "security"
                B. "Holding security" versus "a claim secured by a lien on property in which the estate has an interest"
            b. "as of the date of the petition"
                A. on actual day filed (e.g. just prior to filing the case); or
                B. at the moment the case is filed
                    1. If it means upon the filing of the case, and the lien is void as a matter of law under 506, is the creditor holding security as of the petition date?
    ii. If security equals lien and it is void, then how does it "continue'?
        1. Congress could have used the term "reinstates" as it did in Section 349; and
        2. How does this affect orders granting 522 motions?
    iii. Effect of Dismissal
        1. 11 U.S.C. Section 349(b)(1)(C) – dismissal reinstates any lien voided under section 506(d).
    iv. What happens if case is closed without a discharge?
    v. Automatic Stay implications?
        1. Risks involved under section 362(d)(2) when bringing a motion to strip
            a. Inviting a motion for relief?
            b. Conceding no equity
        2. Does stripped lien creditor have standing to bring motion for relief if –
            a. It does not receive payments during the life of the plan? *In re King,* 290 B.R. 641 (Bkrtcy. C.D.Ill. 2002)(Motion for relief from stay denied where

movant's mortgage lien had been stripped upon confirmation of the debtor's plan)
- b. If the debtor defaults in payments to the senior lienholder?
- c. Lien stripping probably will result in more motions to dismiss and less motions for relief from the stay.

c. Is the lien void only when the debtor receives a discharge?
   i. Automatic Stay implications?
   ii. *In re Blosser*, 2009 WL 1064455 (Bkrtcy. E..D.Wis.)(citing *In re Jarvis,* 390 B.R. 600 (Bankr. C.D.Ill. 2008)(The ability of debtors to strip off liens in chapter 13 cases is contingent upon the debtor completing the plan and receiving a discharge); *In re King*, 290 B.R. 641 (Bankr. C.D.Ill. 2003)(The lien-avoiding effect of the confirmed plan, while established at confirmation, is contingent upon a discharge under section 1328 and the creditor has no duty to release it mortgage until then. If the debtors do not receive a discharge under section 1328, the creditor's mortgage lien remains in effect.); *but see In re Jean*, 306 B.R. 708 (Bankr. S.D.Fla. 2004)(lien is not reinstated upon conversion).

4. Valuation
   a. Extent of Proof
      i. Contested
      ii. Uncontested

5. Service
   a. Rule 7004
      i. *In re Jean*, 306 B.R. 708 (Bankr. S.D.Fla. 2004)(creditor's actual notice of the commencement of the debtor's case was not a substitute for service of the proposed plan pursuant to Rule 7004 where debtor's plan proposed to strip the creditor's lien)
   b. Section 342(g) – is service under Rule 7004 *effective notice* for purposes of 342(g)(1)?
      i. *In re 5th Ave. Real Estae Development, Inc.,* 2008 WL 4371336 (Bkrtcy. S.D.Fla. 2008)(Section 342(g) applies when notice has not been effectd by a debtor serving a creditor with a Code-required notice at an address provided by the creditor in prebankruptcy communications.)(citing *In re Harvey*, 388 B.R. 440, 445 (Bankr. D.Me. 2008))
      ii. Rule 2002(b) – provides for the required 25-day notice to parties-in-interest for hearing and objections on confirmation of chapter 13 plans.

6. Nature of the Proceeding
    a. May be by motion (Majority View); *In re Sadala*, 294 B.R. 180 (Bankr. M.D.Fla. 2003)(strip off can be done by motion if dispute does not involve determination of validity, priority or extent of underlying lien)
    b. Must be an adversary proceeding (Minority View); *In re Forrest,* 410 B.R. 816, 819 (Bankr. N.D.Ill. 2009); *In re Enriquez*, 244 B.R. 156 (Bankr. S.D.Cal. 2000)
    c. May be part of the plan confirmation process;
        i. Plan plus separate motion: *In re Bennett*, 312 B.R. 843 (Bkrtcy. W.D.Ky. 2004)(motion to strip off must be filed with proposed plan);
        ii. Plan only: *In re Perry*, 337 B.R. 649 (Bkrtcy. N.D.Ohio 2005)(boilerplate language in plan was not specific enough to put the creditor on notice that the debtor intended to strip its lien.); *In re Stassi*, 2009 WL 3785570 (Bkrtcy. C.D.Ill.)(Lien stripping matters are contested matters and may be brought by motion or included within the terms of the proposed plan as long as service of the plan or motion meets the requirement of Rule 7004)

7. Recordation/Title Issues
    a. What to record?
    b. Who is to do the recording?
        i. *In re Dendy*, 396 B.R. 171 (Bankr. D.S.C. 2008)(second mortgagee whose lien was "stripped off" pursuant to provisions of debtor-mortgagors' confirmed plan, simply by failing to take any action to release, satisfy or cancel its mortgage after debtors were discharged of any personal liability on their unsecured debt to it, did not thereby violate discharge injunction)
    c. When to do the recording?

**Phantom Expenses for Unencumbered Vehicles**

Purpose of Means Test is to insure that debtors repay their creditors as much as they can afford. *See In re Ransom*, 577 F.3d 1026 (9th Cir. 2009).

a. Means Test is mechanical formula that provides bottom line what has to be paid – allowing phantom expenses is contrary to this goal
b. Means Test is not ambiguous
    i. although not necessary to resort to it, legislative history supports not allowing phantom expenses
c. IRS Guidelines
    i. "applicable" means 'actual"
        1. guidelines incorporated by reference into bankruptcy code
        2. IRS interpretation should be binding in bankruptcy context
        3. IRS interpretation should be given deference in bankruptcy proceedings
d. Debtors can modify their plans if they need new transportation

e. Debtors get $200 extra for older cars with high mileage

2. Purpose of the Means Test is to insure that similarly-situated debtors are treated the same way in bankruptcy. *See In re Kimbro*, 389 B.R. 518 (6th Cir. B.A.P. 2008)
    a. Means Test provides a way to determine a presumptive amount that hypothetical, similarly-situated debtors should be able to repay their creditors. – it is an additional, threshold test to be applied in conjunction with the Good Faith Test, the Liquidation Test, and the Best Efforts Test.
    b. Means Test is ambiguous
        i. legislative history shows that Congress considered incorporating the guidelines and then took them out of the statute
    c. "Applicable" means those expenses that apply to a family of that household size and income within the particular geographic range
    d. IRS guidelines do not apply
        i. The expenses are allowances not caps
        ii. Congress has never given the IRS authority to administer bankruptcy cases
        iii. The guidelines as applied in bankruptcy are not administrative rules arising out of an agency's particular knowledge or expertise in that particular area of the law.
        iv. The guidelines are simply policy statements of how the IRS intends to exercise its discretion in collecting debts. Policy statements are not entitled to deference
    e. Disallowing the expense punishes the frugal debtor and awards the extravagant debtor
    f. Allowing the expense helps to insure uniformity.

**Above or Below "the Line" – Business Expenses and the Marital Adjustment in Chapter 13 Cases**

1. Why it matters – it determines the ACP
    a. "[T]he B22C form is a key document in Chapter 13 cases because it is used to calculate "current monthly income" which, in turn, is used to determine the applicable commitment period or required term of the plan, the methodology for calculating disposable income and, in some cases, disposable income." *In re Sharp*, 394 B.R. 207, 210 (Bankr. C.D. Ill 2008)

2. Business cases
    a. The Majority Viewpoint:
        i. *In re Wiegand*, 386 B.R. 238 (9th Cir. B.A.P. 2008)
            A. The statutory definition of disposable income is plain and unambiguous; Section 1325(b)(2)(B) requires deductions for "payments of expenditures necessary for the continuation, preservation, and operations" of debtor's business *after* disposable income has been determined. "[I]f business expenses are deducted from gross receipts to determine a chapter 13 debtor's current

monthly income, then there would be no need for Section 1325(b)(2)(B) which provides for the same deductions." 386 B.R. at 242.

B. The definition of income in Section 101(10A) reflects a clear congressional intent that Tax Code concepts for determining taxable income are inapplicable to a determination of current monthly income

C. To the extent that Form 22C allows debtors to take business expenses at line 3b, it is in conflict with substantive law and, to that extent, the form must be disregarded.

D. Over-the-median debtors may take the business expenses at "Other Necessary Expenses" in Form 22C. Allowing them to take them at line 3b as well would lead to double-dipping.

ii. *See also,In re Sharp*, 394 B.R. 207 (Bankr. C.D.Ill. 2008); *In re Bembenek*, 2008 WL 2704289 (Bkrtcy. E.D.Wis.); *In re Arnold*, 376 B.R. 652 (Bankr. M.D.Tenn. 2007);

b. The Minority Viewpoint:

i. Robert M. Lawless, *A Few Recent Developments in the Bankruptcies of Small Businesses and Their Owners,* 29 No. 1 Bankruptcy Law Letter 1 (January, 2009; Mark A Redmiles and Saleela Khanum Salahuddin, *The Net Effect*, 27-OCT Am. Bankr. Inst. J. 16 (2008).

A. "Other Necessary Expenses" as listed in the IRS's Financial Analysis Handbook do not include a category for "business expenses" – therefore, chapter 13 debtors who are self-employed would have no place to account for these expenses

B. Form 22C prevents double-dipping because it instructs debtors to not deduct in Part IV any business deductions taken at Line 3.

C. If courts do not include in CMI the income of a non-filing spouse which is not contributed to the household income (the marital adjustment), then why should business income which is not available for the household (i.e. paid for necessary income generating expenses) be included?

D. Congress adopted the Census Bureau's standard for determining median income. The Census Bureau employs net business income and rents to determine above- and below-median debtors. Using net business income as the definition of CMI is therefore consistent with the Census Bureau's definition of income. It also is consistent with the IRS approach and follows normal accounting principles (i.e. income = receipts – expenses).

E. Disallowing the line 3b expenses illogically discriminates between debtors based upon their choice of business structure – sole proprietor versus LLC. Allowing the line 3b expenses promotes uniform treatment of similarly-situated debtors.

F. Section 1325(b)(2)(B) has no parallel provision in chapter 7;

using it to justify disallowing deductions for business expenses at line 3b works against expressed congressional intent to steer more debtors into chapter 13 and away from chapter 7.

3. The Marital Adjustment
    a. Issue: Whether the gross income of a debtor's non-filing spouse should be included in the calculation of the debtor's current monthly income for determining the applicable commitment period.
        i. Minority ("Trustees") Viewpoint: *In re Aryaserbsiri*, 2008 WL 5191200 (Bkrtcy.E.D.Tex.)
            A. The instructions in Form 22C for completing line 13 are different than the instructions for completing line 19.- therefore they must serve different purposes.
            B. 11 U.S.C. Section 1325(b)(4) requires the current monthly income of the debtor and the debtor's spouse in determining applicable commitment period.
            C. Line 13 should be employed in instances where the debtor is married but truly separated and the estranged spouse pays nothing to the household expenses of the debtor or the debtor's dependents, otherwise the marital adjustment should only be allowed at line 19 for determining disposable income.
            D. This approach would promote a more uniform treatment of similar households based upon the household's as an economic unit..
        ii. Majority Viewpoint: *In re Clemons*, 2009 WL 1733867 (Bankr. C.D.Ill.); *In re Borders*, 2008 WL 1925190 (Bkrtcy.S.D.Ala.); *In re Grubbs*, 2007 WL 4418146 (Bkrtcy.E.D.Va.):
            A. Current monthly income is defined by statute.
            B. The non-filing spouse is not the debtor's dependent
            C. The non-filing spouse's contributions are the equivalent of other regular contributions to the household.
            D. By definition, a non-filing spouse does not have current monthly income.
            E. Policy arguments:
                1. Not all marriage are stable, allowing the marital adjustment prevents additional strain on already stressed family unit.
                2. It provides a very practical assessment of what *the debtor* can afford to repay his creditors.
                3. This approach promotes uniformity – if the debtor had a live-in companion that contributed to the household expenses, only those contributions would be included in the debtor's current monthly income.
    b. What can be included in marital adjustment?

i. Non-filing spouse's house and car payments (filing spouse is not personally liable on either, although mortgage is on the family's residence). *In re Shahan,* 367 B.R. 732 (Bankr. D.Kan. 2007)
ii. Non-filing spouse's paycheck withholdings. *Shahan, supra.*
iii. Non-filing spouse's credit card bills. *In re Borders*, 2008 WL 1925190 (Bkrtcy.S.D.Ala.)
iv. Non-filing spouse's insurance payments. *Borders, supra.*
v. Non-filing spouse's student loan payments.
vi. Non-filing spouse's payments for alimony, support or care of children who are not the debtor's dependents. *In re Sharp,* 392 B.R. 207 (Bankr. C.D.Ill. 2008)
vii. Any excess income that the non-filing spouse may have which is not contributed to the household expenses of the debtor or the debtor's dependents. *In re Sharp, supra.* .

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**Miscellaneous Issues Resulting from Conversion to Chapter 7**

1. What Constitutes Property of the Estate in the Converted Case?
   a. *In re Bostick*, 400 B.R. 348 (Bankr. D.Conn. 2009)(section 727(a)(2)(B) does not apply to property acquired during chapter 13 phase of case converted to chapter 7)(debtors won $100,00 four days after chapter 13 case case was filed and subsequently converted to chapter 7))
   b. *In re Morrison*, 403 B.R. 895 (Bankr. M.D.Fla. 2009)(Glenn, C.J.)(life insurance proceeds received more than 180 days after filing of petition but prior to conversion from chapter 13 to chapter 7 was not property of the debtor's chapter 7 estate)
   c. *In re Mullican*, 417 B.R. 408 (D.C. E.D.Tex. 2009)(When debtors convert their Chapter 13 bankruptcy to a Chapter 7 in bad faith, any inheritance or windfall the debtors received during the Chapter 13 bankruptcy becomes part of the Chapter 7 bankruptcy estate.)
   d. *In re Laflamme*, 397 B.R. 194 (Bankr. D.N.H. 2009)(Chapter 7 trustee may seek turnover of Debtor's commission proceeds to the extent of the amount of such proceeds still held by Debtor on the conversion date and dependent upon her use of such proceeds prior to that date.)
   e. *In re Brown*, 375 B.R. 362 (Bankr. W.D.Mich. 2007)(Chapter 7 trustee in case converted from chapter 13 cannot recover property lawfully removed from the estate pre-conversion.)

2. Filing Date.
   a. *In re Burt*, 2009 WL 2386102 (Bkrtcy.N.D.Ala.)(Pre-BAPCPA law applied to case filed before effective date of BAPCPA but converted to chapter 7 afterward)

3. Order for Relief
   a. *In re Corio*, 2008 WL 4372781 (D.N.J.)( Pursuant to section 348(b) the "order of relief under this chapter" as used in Section 727(b) refers to the date of

conversion. U.S.C. § 348(b). Thus, the date of conversion is used to determine the scope of debtors' Section 727(b) discharge.).

4. Means Testing in Cases Converted to Chapter 7
   a. *In re Guarn*, 2009 WL 450476 (Bkrtcy.D.Mass.)(The means test does not apply to debtors who have converted to chapter 7 from another chapter.)
   b. *In re Dudley,* 405 B.R. 790 (Bankr. W.D.Va. 2009)(Section 707(b)(1) Means Testing does not apply to a case converted to chapter 7 from another chapter.)
   c. *In re Fox*, 370 B.R. 639 (Bankr. D.N.J. 2007)(Congress plainly meant to limit reach of "means" test to cases originally commenced under Chapter 7, to exclusions of cases filed under other chapters and then converted to Chapter 7.)
   d. *In re Willis*, 408 B.R. 803 (Bankr. W.D.Mo. 2009)( Language of 707(b)(1) is broad enough to include a case originally filed under some other chapter and converted to a case under Chapter 7.)
   e. *In re Perfetto*, 362 B.R. 27 (Bankr. D.R.I. 2007)(Debtors are required to complete Form 22A upon conversion to chapter 7.)

5. Utility Service
   a. *In re Jones,* 369 B.R. 745 (1st Cir. B.A.P. 2007)(The reason a utility cannot terminate service post-conversion, based on arrears in the Chapter 13 case, is because 11 U.S.C. § 348(d) provides that such a claim is to be treated as if it had arisen immediately before the date of the filing of the petition. Thus, it is treated as a prepetition claim and the automatic stay would bar the utility from seeking to recover a debt which is dischargeable in the Chapter 7.)
   b. *In re Davis*, 311 B.R. 923 (Bankr. M.D.Ga. 2004)( Utility could not demand, as prerequisite to continuing utility service postconversion, that debtor pay for electric service received during the postpetition, pre-conversion period.)

6. Deadlines
   a.. *In re Hines*, 2008 WL 2783351 (Bkrtcy.M.D.N.C.)(In a case converted from Chapter 13 to Chapter 7, the period for objecting to exemptions under Rule 4003(b) begins to run from the conclusion of the post-conversion Section 341 meeting of creditors.
   b. *In re Brown*, 375 B.R. 362 (Bankr. W.D.Mich. 2007)(In converted case, parties in interest have new opportunity to object to debtor's exemption claims, as long as they do so within 30 days of conclusion of meeting of creditors following conversion)

**Paying Mortgages Through the Plan**

1. Pro's
   a. Record keeping
      i. On-going payments
      ii. Final accounting
   b. Eliminates discretion
      i. Insures payments

ii. Less MFRS motions

2. Con's
    a. Eliminates discretion
    b. Removes responsibility
    c. Extra costs of administration
    d. Can create hardship
3. Various Practices
    a. If in arrears, must be paid through plan.
        i. *In re Carey*, 402 B.R. 327 (Bkrtcy. W.D.Mo. 2009)(Chapter 13 plan which propose to make direct payments on mortgages where debtors have defaulted in the past are not feasible without the trustee's oversight to make sure that the mortgage payments are being made.)
    b. Always paid through plan.
        i. *Perez v. Peake*, 373 B.R. 468 (D.C. S.D.Tex. 2007)(Local rule providing that home mortgage payments would be made through the chapter 13 trustee did not violate the Bankruptcy Code.)
    c. Not paid through the plan.
        i. *In re Miles*, 415 B.R. 108, 116 (Bankr. E.D.Pa. 2009)(Various factors utilized to determine whether to allow debtors to make direct payments on their mortgages: (1) the ability of the trustee and the court to monitor future direct payments; (2) the potential burden on the trustee; (3) the possible effect upon the trustee's salary or funding the U.S. Trustee system; (4) the potential for abuse of the bankruptcy system; (5) the number of payments proposed to pay the targeted claim; (6) the plan treatment of each creditor to which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the ability of the debtor to reorganize absent direct payments; and (9) the good faith of the debtor in proposing direct payments.)
        ii. *In re Stonier*, 417 B.R. 702 (Bankr. M.D.Pa. 2009)(There is no provision in the Bankruptcy Code or Federal Rules of Bankruptcy Procedure requiring regular, post-petition mortgage payments to be made through the trustee.)(involved plan modficiation)

# SELECTED CHAPTER 13 CONFIRMATION ISSUES

**Judge Margaret A. Mahoney**
**U.S. Bankruptcy Court**
**Southern District of Alabama**
**Mobile, Alabama**

This paper examines a few of the current issues in chapter 13 cases. It is meant to be a guide to the issues and the paper does not intend to be a full exposition of all of the cases or arguments as to each issue. The paper can serve as a starting point for further research on the points if an attorney has the issue arise in a case.

## 910 CAR CLAIMS

Several issues have arisen in regard to 910 car claims and their treatment in chapter 13 cases. BAPCPA states that section 506 of the Bankruptcy Code does not apply to the treatment under section 1325(a) of the claims of creditors for cars purchased within the 910 days preceding a bankruptcy filing. This is stated in the "hanging paragraph" that is placed after section 1325(a) of the Bankruptcy Code.

The section states

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day (sic) preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

11 U.S.C. 1325(a)(*)

This paragraph has caused much debate in the bankruptcy courts on at least 3 points.

1. **Can a 910 car be surrendered in a plan in full satisfaction of a creditor's claim?**

Yes- *In re Adams*, 403 B.R. 387 (Bankr. E.D. La. 2009) (collecting and citing all preceding cases); Eleventh Circuit cases - *In re Carter*, 2008 WL 410275 (M.D.Ga. 2008); *In re Moon*, 359 B.R. 329 (Bankr. N.D.Ala. 2007), *vacated and remanded*, 2008 WL 4831458 (N.D.Ala. 2008); *In re Barrett*, 2007 WL 2081702 (Bankr. M.D.Ala. 2007), *vacated and remanded*, 543 F.3d 1239(11th Cir. 2008); *In re Bivins*, 2007 WL 624385 (Bankr. M.D.Ga. 2007); *In re Vanduyn*, 374 B.R. 896 (Bankr. M.D.Fla. 2007); *In re Brown*, 346 B.R. 868 (Bankr. N.D.Fla. 2006).

No- *In re Barrett*, 543 F.3d 1239 (11th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10th Cir. 2008); *Capital One Auto Fin. v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Long*, 519 F.3d 288 (6th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Wright*, 492 F.3d 829 (7th Cir. 2007); *In re Rodriguez*, 375 B.R. 535 (9th Cir. BAP 2007).

**2. Does a 910 claim include negative equity or not?**

The hanging paragraph states that one of the requirements for a claim to be a 910 claim is that the creditor must have a "purchase money security interest" in the collateral. If an auto loan includes other charges such as negative equity, is such a charge part of the purchase money security interest and, thus, part of the 910 claim?

910 claim includes negative equity - *Ford Motor Credit Co. v. Mierkowski (In re Mierkowski)*, 580 F.3d 740 (8th Cir. 2009); *Ford v. Ford Motor Credit Corp. (In re Ford)*, 276 F.3d 424 (10th Cir. 2009); *In re Price*, 562 F.3d 618 (4th Cir. 2009); *Graupner v. Nuvell Credit Corp. (In re Graupner)*, 537 F.3d 1295 (11th Cir. 2008).

910 claim does NOT include negative equity - *In re Pernod*, 392 B.R. 835 (9th Cir. BAP 2008) (using Uniform Commercial Code analysis); *In re Whipple*, 417 B.R. 86 (Bankr. C.D.Ill. 2009) (holding that determination was a federal not state law issue); *In re Pruitt*, 401 B.R. 546 (Bankr. D.Conn. 2009) (using federal law); *In re Hall*, 400 B.R. 516 (Bankr. S.D. W.Va. 2008) (using state law); *In re Crawford*, 397 B.R. 461 (Bankr. E.D.Wis. 2008) (using state law); *In re Muldrew*, 396 B.R. 915 (E.D.Mich.2008) (using federal law analysis).

**3. How does a court determine whether a claim is a 910 claim or not in a second filing?**

If a creditor files a chapter 13 case and has a car claim that is a 910 claim and, after dismissal of case #1, files a second case and the 910 day period has run, is the car claim a 910 claim or not in case #2? No courts have used the doctrine of equitable tolling to prevent the running of the 910 day period in case #2, but they have discussed it. Others have dismissed cases on bad faith grounds under proper circumstances.

Equitable tolling - No cases

NO Equitable tolling - *In re Maas*, 416 B.R. 767 (Bankr.Kan. 2009)

Cases discussing issue in terms of good faith - *In re Walker*, 2008 WL 2559420 (Bankr.M.D.N.C. 2008); *In re Robinson*, 2008 WL 2095349 (Bankr.Kan. 2008); *In re Murphy*, 375 B.R. 919 (Bankr.M.D.Ga. 2007).

## DISCHARGE BY DECLARATION

This issue is presently before the U.S. Supreme Court in *United Student Aid Funds v. Espinosa*, Docket No. 08-1134, 553 F.3d 1193 (9th Cir. 2008). The questions presented to the Court are

> 1. Student loans are statutorily nondischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship". Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders

confirming the plan and discharging debtor void?

2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?

The case was argued in December 2009.

Discharge by Declaration allowed - *Espinosa v. United Student Aid Funds*, 553 F.3d 1193 (9th Cir. 2008) ( holding that notice of filing of case and notice of plan was constitutionally adequate notice even though the creditor did not have the benefit of an adversary proceeding in which the court determined whether there was undue hardship); *Needleman v. Penn Higher Educ. Assistance Agency*, 399 B.R. 695 (S.D.Cal. 2009) (citing *Espinosa*).

Discharge by Declaration NOT allowed - *Educational Credit Management Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (holding that discharge by declaration violates the Bankruptcy Rules requiring individual service of a summons on a defendant and therefore the discharge is void); *Wheaton v. Educational Credit Management Corp. (In re Wheaton)*, 432 F.3d 150 (2d Cir. 2005) (same); *Ruehle v. Educational Credit Management Corp.*, 412 F.3d 679 (6th Cir. 2005) (same); *see also In re Mansaray-Ruffin*, 530 F.3d 230 (3rd Cir. 2008) (holding that plan confirmation was not final when an adversary proceeding was necessary to invalidate a lien).

**MECHANICAL VS. FORWARD LOOKING MEANS TESTING**

There are two main theories (with subparts) that courts have used to determine what a debtor's "projected disposable income" is for purposes of determining how much a debtor must pay monthly to the trustee in a chapter 13 case. One theory is the "forward-looking" approach that holds that the Form B22 disposable income number "creates a starting point or presumption that can be adjusted based on consideration of financial circumstances going forward." Herring, Adam & Tulis, Chelsey, NORTON BANKRUPTCY LAW ADVISER, 2009 No. 12 Norton Bankr. L. Adviser 2 (December 2009). A case using this theory is before the U.S. Supreme Court in *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1270 (10th Cir. 2008), *cert. granted in part*, 2009 WL 273221 (2009). The Fifth Circuit adopted this approach in *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009). The Eighth Circuit, in *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1630, 173 L. Ed.2d 997 (2009), also used a forward-looking approach to determining what income must be committed to a chapter 13 plan. See also *eCAST Settlement Corp. v. Lashburn (In re Lashburn)*, 579 F.3d 934 (8th Cir. 2009)(holding that phantom auto expense was proper in determing projected disposable income) and *McCarthy v. Lasowski (In re Lasowski)*, 575 F.3d 815 (8th Cir. 2009)(holding that payments to unsecured creditors had to take into account that 401(k) loan repayments would end before end of plan). The Seventh Circuit also used a forward looking approach in deciding a

debtor could not deduct as an expense mortgage payments for a home the debtor was surrendering. *In re Turner*, 574 F.3d 349 (7th Cir. 2009). The 6th Circuit BAP and the 1st Circuit BAP have also followed this approach. *Hildebrandi v. Petro (In re Petro)*, 395 B.R. 369 (6th Cir. BAP 2008); *Kibbe v. Sumski (In re Kibe)*, 361 B.R. 302 (B.A.P.1st Cir. 2007). Some Florida judges have adopted the forward-looking approach. *In re Becquer*, 407 B.R. 435 (Bankr. S.D.Fla. 2009) (Mark); *In re Raulerson*, 395 B.R. 157 (Bankr. M.D.Fla. 2008) (Funk); *In re Hughey*, 380 B.R. 102 (Bankr. S.D.Fla.2007) (Hyman); *In re Purdy,* 373 B.R. 142 (Bankr. N.D.Fla. 2007); *In re Arsenault*, 370 B.R. 845 (Williamson); *In re LaPlana*, 363 B.R. 259 (Bankr. M.D.Fla.2007) (Jenneman).

The Ninth Circuit BAP has distinguished the *Kagenveama* decision of the Ninth Circuit, cited below, that used the mechanical approach in a recent decision. *In re Martinez*, 418 B.R. 347 (B.A.P. 9th Cir.2009) (stating that "we do not read Kagenveama as binding precedent with respect to the calculation of expenses under sections 1325(b)(2) and (b)(3)").

The Ninth Circuit took a totally different tack. In *Maney v. Kagenveama (In re Kagenveama),* 541 F.3d 868 (9th Cir. 2008), it held that the means test must be mechanically applied to determine what a debtor's "projected disposable income" is. Judge Olson has adopted the mechanical approach. *In re Neclerio*, 393 B.R. 784 (Bankr. S.D.Fla. 2008).

In *Whaley v. Tennyson (In re Tennyson)*, 2009 WL 2507686 (N.D.Ga. 2009), discussing the issue raised in this paper's 4th issue below, used the reasoning of the 9th Circuit in *Kagenveama*. This case is now on appeal to the 11th Circuit, *Whaley v. Tennyson*, U.S.C.A. No. 09-14628-EE.

**IS THE "APPLICABLE COMMITMENT PERIOD" A TEMPORAL OR A MONETARY CONCEPT?**

This issue arises when above median income debtors propose plans that are less than 60 months in length and below median income debtors propose plans that are less than 36 months in length. The scenario is as follows. When a debtor, regardless of whether his/her disposable income is figured on a mechanical or forward-looking test, has zero or negative income after application of the B22C test or I & J test, the debtor proposes a plan that pays all priority claims, arrearage cures, and attorneys fees and trustee fees in less than 36 months or 60 months. Can the debtor then obtain a discharge after the full amount of payments stated are made, even if that occurs in 21 months or 45 months?

As stated above, this issue is on appeal at present to the 11th Circuit based upon a ruling that the applicable commitment period was a monetary, not a temporal, requirement. *Whaley v. Tennyson*, *id*.

The majority of courts ruling on the issue have held that the "applicable commitment period" is a temporal requirement. If a debtor is an above median income debtor, he/she must stay in a chapter 13 plan for 60 months. If a debtor is a below median income debtor, he/she must stay in chapter 13 for at least 36 months. Courts base this view on the purpose of the

BAPCPA amendments– to require above median income debtors to pay more to creditors and the words, in context, seem to require that a debtor be in a case for a fixed period of time. ; *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008); *In re Moose*, 2009 WL 3808369 (Bankr. E.D.Va. 2009); *In re Hayward*, 386 B.R. 919 (Bankr. S.D.Ga. 2008); *In re Dew*, 344 B.R. 655 (Bankr. N.D.Ala. 2006).

Other courts hold that the "applicable commitment period" is a monetary requirement. Once the sum necessary to pay whatever amount is determined at confirmation to be due to unsecured creditors is paid, the plan can end. *Maney v. Kagenveama (In re Kagenveama)*, 527 F.3d 990 (9th Cir. 2008), superceded by In re Kagenveama, 541 F.3d 868 (9th Cir. 2008); *In re Alexander*, 344 B.R. 742 (Bankr.E.D.N.C. 2006); *In re Lawson*, 361 B.R. 215(Bankr. D.Utah 2007).

A law review article at 15 AM. BANKR. L. REV. 687 (Winter 2007) entitled "The Applicable Commitment Period: A Debtor's Commitment to a Fixed Plan Length" by Evan J. Zucker explains the issue in depth.

**WHEN MAY A DEBTOR OR OTHER PARTY MODIFY A CONFIRMED PLAN PURSUANT TO SECTION 1329**?

There are several issues that arise when a debtor or trustee or unsecured creditor desire to modify a confirmed chapter 13 plan. Section 1329 governs such a modification. It states

> (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;
> > (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor . . .if the debtor documents the cost of such insurance
> >
> > * * * *
>
> (b)(1) Sections 1322(a), 1322(b), and 1322(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

There are two main issues: (1) How does section 1329 deal with the "applicable commitment period" of section 1325(b); (2) How does a modification under section 1329 deal with the section 1327 res judicata effect of a confirmed plan and what is the standard to be applied to a debtor or creditor requested plan modification?

1. **What is the interplay between Section 1325(b) and 1329?**

Section 1325(b) requires that a debtor must pay all of his "projected disposable income to be received in the applicable commitment period" to the plan for the benefit of the unsecured creditors. Section 1329 does not mention section 1325(b) in section 1329(b)(1) which incorporates certain Bankruptcy Code sections into the working of section 1329. The great majority of the case law holds that section 1325(b) does not apply to section 1329, due to its exclusion from section 1329(b)(1), but the incorporation of section 1325(a) that requires a plan to be proposed in good faith results in courts preventing overreaching by any party. *In re Ireland*, 366 B.R. 27 (Bankr. W.D.Ark. 2007); *In re White*, 411 B.R. 268 (Bankr. W.D.N.C 2008); *In re McCully*, 398 B.R. 590 (Bankr. N.D.Ohio 2008); *In re Heyward*, 386 B.R. 919 (Bankr. S.D.Ga. 2008).

2. **What is the interplay between Section 1327 and Section 1329?**

Section 1327(a) of the Bankruptcy Code provides that

> 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.

This section gives res judicata effect to confirmation orders. How can the binding effect of the confirmation order be overcome by a debtor? Courts have stated that the existence of section 1329 means Congress intended binding confirmation orders could be modified in the limited circumstances set forth in section 1329. The section does not state what reason(s) might precipitate a debtor, a creditor or the trustee to move to modify a plan.

One line of cases holds that a modification can be requested even if there is no threshold showing of any change in circumstances of the debtor. Theses cases rely on the fact that section 1329 establishes no requirement of change and claims can always be reconsidered under section 502(j) of the Code. *In re Meza*, 467 F.3d 874 (5th Cir. 2006); *Matter of Witkowski*, 16 F.3d 739 (7th Cir. 1994); *In re Brown*, 219 B.R. 191 (B.A.P.6th Cir.1998); *Washington v. Countryman*, 390 B.R. 843 (E.D.Tex. 2007).

The other line of cases, the majority view, requires a substantial and unanticipated change in the debtor's circumstances. The reason for the modification must be new, not in existence before confirmation, and not capable of being known before confirmation. This line relies on the fact that overcoming the res judicata effect of confirmation requires standards even if section 1329 does not explicitly require them. *In re Murphy*, 474 F.3d 143 (4th Cir. 2007); *In re Storey*, 392 B.R. 266 (B.A.P. 6th Cir.2008).