# Concurrent Workshop

## Chapter 13: Does Anything Stay the Same?

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2010 Educational Materials

# Chapter 13: Does Anything Stay the Same

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## Converting the Chapter 13 Case

### I. The Scenario

You are sitting in your office getting ready for another day of confirmation hearings, when your client Mr. Hardluck Jones calls you, or you get an email from him, or you get a message slip from your assistant with the news, "I lost my job."[1] You search your memory and your file cabinet and finally remember Mr. Jones. He came to you two years ago. He had about $40,000 in credit card debts, $5,000 in medical bills, and was several months behind in paying his mortgage and the payment on his 2007 Ford F-150 (Harley Davidson Edition).

You filed a Chapter 13 for Mr. Jones, which the court confirmed. He has been paying on the plan (via an employer deduction order) for two years, but he just got his last paycheck. He is not going to be able to finish the plan.

In this circumstance there are three options that you will generally consider:

- Dismissing the case
- Converting the case to a Chapter 7
- Seeking a hardship discharge

### II. Dismissal

In the real world, this is frequently the option that is most often exercised by clients. It is not exercised by any sort of careful analysis or choice, but by default. When enough payments have been missed the Chapter 13 Trustee will file a motion to dismiss for nonpayment and set a hearing. The Trustee will mail a copy of the motion and hearing notice to Mr. Jones. You will mail a copy of the motion and hearing notice to Mr. Jones with a letter to contact you to discuss the matter. The client will not respond. When the matter comes up on the calendar you will not have had any recent contact with Mr. Jones. In that circumstance there is little else to do but let the case be dismissed on the Trustee's motion.

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[1] I recognize that at least this part of the scenario is unrealistic. In reality what usually happens is that you get a Motion to Dismiss from the Chapter 13 Trustee for nonpayment. It is when you call or write your client that you learned that he lost his job three months ago and just has not gotten around to telling you about it.

There are sometimes good reasons for dismissal, too. Depending on how long the client has been in the case, perhaps he has caught up on his house payment. Maybe he has received an inheritance that he doesn't want to pay over to the Trustee. Maybe there is too much equity in his residence or some other property that a Chapter 7 Trustee will want to liquidate. In those circumstances Mr. Jones might choose dismissal of the case. But you need to be careful in your analysis. There are several factors that you should consider.

The first question is whether the case can be dismissed. Section 1307(b) says that "on request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable." However, ever since *Marrama v. Citizens Bank*, 549 U.S. 365 (2007), the word "shall" just does not have the same force that it used to. If a debtor's ability to convert from Chapter 7 to Chapter 13 under section 706 is subject to a requirement of good faith, it is possible that a conversion from Chapter 13 to Chapter 7 is also subject to a good faith requirement. *Compare In re Armstrong*, 408 B.R. 559 (Bankr. E.D. N.Y. 2009) (finding that *Marrama* imposed a good faith requirement on a debtor's motion to dismiss a Chapter 13) with *In re Hamlin*, 2010 Bankr. LEXIS 636 (Bankr. E.D. N.C. March 1, 2010) (finding that a debtor has an absolute right to a dismissal of a Chapter 13 case).

Next you have to consider the effect of the dismissal. There are two different negative possibilities. One is section 109(g)(2), which prevents a party from filing a new bankruptcy case for 180 days after voluntarily dismissing a case "following the filing of a request for relief from the automatic stay provided by section 362." If Mr. Jones voluntarily dismisses his case and then needs the shelter of the bankruptcy court again he could find himself in difficulty.[2]

The second consideration in analyzing a voluntary dismissal is the effect of section 349(b). The dismissal of a case undoes a number of actions you might have taken on behalf of Mr. Jones. Perhaps you avoided a judicial lien or a nonpossessory nonpurchase money lien under section 522. Or perhaps you stripped a lien. All of these liens will be reinstated under section 349(b).

[2] There is a very practical solution to the problem of the 180 day bar to refiling after a voluntary dismissal: let the case be dismissed on the Chapter 13 Trustee's motion rather than the debtor's motion. This will generally avoid the application of 11 U.S.C. § 109(g)(2).

Finally, in considering dismissal you should consider the effect of section 349(a). Under section 349(a), a court may for cause, order that the dismissal of a bankruptcy case bars the discharge of some or all of the debts that were dischargeable in the case being dismissed. In the case of questionable activity by Mr. Jones, it is possible that he could find himself in the same circumstance as he would have after losing a case under section 523 or 727. *See, e.g., In re* Norton, 319 B.R. 671 (Bankr. D. Utah 2005); *In re Cooper,* 146 B.R. 843 (Bankr. D. Colo. 1992), *aff'd*, 153 B.R. 898 (D. Colo. 1993), *aff'd*, 13 F.3d 404 (10th Cir. 1993).

III. Converting the case to a Chapter 7

Conversion of a failed Chapter 13 case is probably the most frequently chosen option when a choice is made. The effect of conversion is governed by several different provisions of the Bankruptcy Code and the Rules. Generally, one will be looking at applying the provisions of Section 348 as well as Rules 1019, 4006, and 4007.

One very large advantage a client can get from converting a case is that debts incurred during the pendency of the Chapter 13 case are dischargeable in a converted Chapter 7 case. Section 348(d) provides that "a claim against the estate or the debtor that arises after the order for relief but before conversion . . . shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition."

This provision has the effect of making all debts that arose after the filing of the bankruptcy case but before the conversion to Chapter 7 dischargeable in the converted case. Technically, preconversion administrative expense claims are not treated as prepetition debts, being specifically exempted in section 348(d). However, there is no practical effect to the debtor, since administrative expenses are expenses of the bankruptcy estate and do not attach to the debtor.[3]

Because of the ability to discharge preconversion debts in a converted case, Rule 1019(5) requires the debtor to file a schedule of unpaid debts incurred after the filing of the petition.

[3] A creditor will have an entirely different view of this question. A preconversion debt that is treated as an administrative expense has a priority in distribution under section 507(a)(2), while preconversion debts that are not administrative expenses are paid on par with the general unsecured debts.

A second advantage of conversion of a Chapter 13 case to Chapter 7 is found in what is considered property of the bankruptcy estate. Section 348(f)(1)(A) provides that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." There is, however, an exception, for bad faith conversions, in which case the property of the estate is all property of the debtor as of the date of conversion.

The protection for after-acquired property can be significant. It provides protection for money saved during the Chapter 13 case as well as property purchased during that same time period. According to the House Report on BAPCPA, H.R. Rep. No. 835, 103 Cong. 2d Sess. 57 (1994), it also protects equity developed in prepetition assets, although the logistical difficulty in proving what portion of the equity developed postpetition but preconversion is mindboggling.

Conversion is not a panacea, however. There is at least one negative possibility that you should consider when deciding whether to convert a case to Chapter 7. Generally speaking, conversion of a Chapter 13 case to Chapter 7 creates time periods for objection to discharge under section 727 and for determining the dischargeability of debts under section 523.[4] Under Rule 4004(a) all parties in interest have until 60 days after "the first date set for the meeting of creditors" to object to a discharge. Similarly, Rule 4006(c) gives parties a similar time to object to the dischargeability of a debt under section 523(a)(2), (4), or (6).

When considering whether to convert a case to Chapter 7 you will have to consider whether the client has any creditor that might raise an objection to discharge or a complaint to determine dischargeability. In those circumstances it would be prudent to consider the possibility of obtaining a hardship discharge for the client to avoid the risks involved in litigating such questions.

An additional consideration when converting a case is the effect on secure claims. Prior to BAPCPA, in a case converted from Chapter 13 to Chapter 7 valuations made in the Chapter 13 case continued to apply in the converted case. Thus one could convert a case in which the

[4] The exception to the general rule is in cases that started as Chapter 7 cases and were converted to Chapter 13 after the deadline for an objection to discharge or a determination of dischargeability had already passed. In those circumstances the reconversion of the case back to Chapter 7 does not create a new time period for filing such an action. Fed. R. Bankr. Pro. 1019(2).

automobile claim had been paid in full and obtain the vehicle. With the adoption of BAPCPA, however, the law changed. Now, under section 348(f)(1)(C) in cases converted from Chapter 13 to Chapter 7 a secured creditor retains its lien on the new property until its entire claim determined under applicable nonbankruptcy law is paid. The result is in conversion of a case any cramdown of value or interest rate under the Chapter 13 plan is lost.

A final consideration of whether to convert a case to Chapter 7 is one of timing. Since the adoption of BAPCPA a debtor cannot obtain a discharge under Chapter 7 if he was previously granted a Chapter 7 discharge in a case "commenced within 8 years before the date of the filing of the petition." 11 U.S.C. § 727(a)(8). Similarly, a debtor cannot get a Chapter 7 discharge if he was previously granted a Chapter 13 discharge in a case "commenced within six years before the date of the filing of the petition" unless it was a 100% plan or a 70% plan that the court determines was filed in good faith and was the debtor's best effort. 11 U.S.C. § 727(a)(9). The measuring period is 8 years from filing date to filing date and is not changed by the conversion of the case under section 348. If the debtor was previously a debtor in a Chapter 7 or Chapter 13 you will have to be careful to consider whether the debtor can get a discharge if his case is converted. In such circumstances the debtor would likely be better off seeking a hardship discharge under Chapter 13.

IV. Seeking a hardship discharge

There are several circumstances in which you should consider applying for a hardship discharge rather than converting a case and seeking a discharge under Chapter 7. They include:

- Maintaining the benefit of the cramdown of a secured claim under section 1325(a)(5)(B)
- Avoiding the creation of a new time period for determining the dischargeability of a debt under section 523(a)(2) or (4)
- Obtaining a discharge for a debtor that would not qualify under Chapter 7 because of a previously filed case
- Obtaining a discharge for a client that cannot provide a certificate that he is current on all domestic support obligations

The procedure for obtaining a hardship discharge is contained in Rule 4007(d). The rule requires the debtor to file a motion seeking a hardship discharge and for the court to enter an order giving all creditors at least 30 days to file a complaint to determine dischargeability of any debt that might not be dischargeable under section 523(a)(6). The burden is on the debtor to determine each of the three elements.

To obtain a hardship discharge the debtor must establish three elements. First, the debtor must show that his "failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1). Exactly what event is sufficient to meet this standard is a subject of some debate. The recent trend, as exemplified by *In re Edwards*, 207 B.R. 728 (N.D. Fla. 1997), is towards allowing a hardship discharge in less than catastrophic circumstances, such as the loss of a job. A list of factors considered can be found in *Bandilli v. Boyajian (In re Bandilli),* 231 B.R. 836 (Bankr. 1st Cir. 1999). The factors considered in Bandilli were:

> a) whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;
>
> b) whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
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> c) whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;
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> d) whether the intervening event or events are expected to continue in the reasonably foreseeable future;
>
> e) whether the debtor had control, direct or indirect, of the intervening event or events; and
>
> f) whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.

*Id* at 840.

The second factor to consider is whether the debtor can meet the Chapter 7 liquidation test with payments made through the date of the motion. 11 U.S.C. § 1328(b)(2). The language used in subsection (b)(2) is essentially identical to the confirmation requirement in section 1325(a)(4), and requires that the property distributed to creditors total at least as much as the creditor would get if the debtor had been liquidated. Like section 1325(a)(4), the date for determining values for purposes of section 1328(b)(2) is the effective date of the plan, or the date of confirmation. *In re Gibson*, 415 B.R. 735 (D. Ariz. 2009).

The third and final prong of the requirements for a hardship discharge is the requirement that modification of the chapter 13 plan be "impracticable." 11 U.S.C. § 1328(b)(3). This essentially requires the debtor to establish that there is no plan payment that he could manage and that could be approved under section 1329.

Espinosa and "Discharge by Declaration"

The Supreme Court has been unusually active in the field of bankruptcy law recently, having rendered decisions in *United Student Aid Funds, Inc. v. Espinosa*, 176 L. Ed. 2d 158, 130 S.Ct. 1367 (2010), and *Milavetz, Gallop & Milavetz, PA v. United States*, 176 L. Ed. 2d 79, 130 S.Ct. 1324 (2010). It has heard argument on and will be ruling shortly in *Hamilton v. Lanning*, and has recently granted certiorari in *Ransom v. MBNA*. These decisions are likely to keep lawyers practicing bankruptcy law busy reading Supreme Court cases for some time.

The Supreme Court decision in *Espinosa* does not do much to move the law. On its face, the decision appears exciting. The bankruptcy court in *Espinosa* confirmed a plan that provided for paying less than all of the debtor's student loan debt to United. The plan was confirmed without a finding of undue hardship as required by Section 523(a)(8) or the service on United of a summons and complaint in compliance with requirements of Bankruptcy Rule 7001(6). United did not object to the debtor's plan and the case was confirmed and the debtor later discharged. When United attempted to collect the unpaid

and discharged interest, the debtor reopened his case and obtained enforcement of the discharge injunction. United appealed.

United argued before the Court that it should obtain relief from the discharge order on the grounds that the same was void within the meaning of Rule 60(b)(4) or, alternatively, that it had been denied due process because of the failure of Espinosa to serve it with a summons and complaint.

The Supreme Court rejected both arguments. It determined that although the decision of the bankruptcy court was mistaken in that it entered a confirmation order permitting the debtor to discharge student loan debt without following the appropriate requirements of the Bankruptcy Code and Rules, the decision was merely a legal mistake and hence unreviewable under Rule 60(b)(4).[5] Furthermore, the court concluded, that service by the court of the debtor's plan prior to confirmation satisfied the minimum requirements of due process, and that such notice "more than satisfied" the student loan lenders due-process rights.

The interesting portions of the *Espinosa* decision come not in its actual ruling, but in other statements made by the court in the decision. Particularly, in Section 3 of the ruling, the court commented on the ability of a debtor to obtain confirmation of a plan that proposes to discharge a student loan debt. The Ninth Circuit Court of Appeals was of the opinion that absent an objection to confirmation a bankruptcy court must confirm a plan that proposes to discharge student loan debt. In the words of the Supreme Court, the Ninth Circuit ruled "that bankruptcy courts must confirm a plan proposing the discharge of a student loan debt without a determination of undue hardship in an adversary proceeding unless the creditor timely raises a specific objection." The Supreme Court expressly rejected such a conclusion, finding that "failure [to make a determination of undue hardship] should prevent confirmation of a plan even if the creditor fails to object, or to appear in the proceeding at all."

[5] With the exception of complaints to revoke a discharge or an order of confirmation, Rule 60 of the Federal Rules of Civil Procedure applies to bankruptcy cases. Fed. R. Bankr. Pro. 9024.

Milavetz and Advice to Clients Regarding Debt

The second supreme court opinion of recent note is *Milavetz, Gallop & Milavetz, PA v. United States*, 176 L. Ed. 2d 79, 130 S.Ct. 1324 (2010). The bulk of the decision in *Milavetz* (at least as measured in number of pages) can be reduced to two sentences: Lawyers are debt relief agencies as defined in section 101(12A), and must tell the public in all advertising that they are debt relief agencies and that they offer bankruptcy relief. 11 U.S.C. § 528(a)(3), (a)(4), (b)(2). The Court was simply unpersuaded by the arguments to the contrary.

The more interesting, and more practical, question addressed by the court in *Milavetz* is the extent to which a lawyer may advise a client to incur debt before filing bankruptcy. Section 526(A)(4) prohibits a lawyer from advising certain kinds of clients or potential clients "to incur more debt in contemplation of such person filing a case under [the bankruptcy code] or to pay an attorney … fee or charge for services performed as part of preparing for or representing a debtor in a case under [the bankruptcy code]." The argument of the petitioner in *Milavetz* was that this language covered advice to borrow money or otherwise incur debt if the client intended or was contemplating the filing of bankruptcy. The Supreme Court, however, concluded that the provisions of section 526(A)(4) were not so broad, stating "we conclude that § 526(A)(4) prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose."

While the court narrowed the provisions of Section 526(A)(4), it unfortunately left little guidance as to what it considered a "valid purpose." Review of the appellate court decisions leading up to *Milavetz* do not offer much more guidance. Certainly, the Fifth Circuit in *Hersh v. United States*, 553 F.3d 743 (5th Cir. 2008), concluded that the narrow interpretation would permit a debtor to, for example refinance debt at a lower payment or to purchase a car for purposes of getting to work. It would appear, therefore, that such advice is permissible.

It is also clear from the opinion of the Supreme Court what is not permissible. Two specific examples cited by the Court were taking on more secured debt for purposes of

influencing the means test or taking on debt in a manner that would harm either the debtor or creditors. Unfortunately, like in law school, the exact application of such language is left as an exercise for the student.

Applicable Commitment Period in Chapter 13

One of the more confusing aspects of BAPCPA is the interpretation of the term "projected disposable income" in section 1325(b)(1) and the calculation of the time period during which a debtor must contribute funds to a Chapter 13 plan. At its core, the question is simply one of interpretation. Must a debtor contribute all of his available income (however one determines it) for 60 months to the plan or is a debtor only required to contribute that amount of money shown as monthly disposable income on the statement of current monthly income (Form 22C) multiplied times 60 months? In other words, in calculating the base for a Chapter 13 plan, do we use applicable commitment period as a multiplier or as the definition of the length of time the debtor must contribute to the Chapter 13 plan?

The courts of appeal have gone both directions. In *Maney v. Kagenveama (In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008), the Ninth Circuit Court of Appeals determined that applicable commitment period was a temporal measurement, that it "denotes a time by which a debtor is obligated to pay unsecured creditors," *Id.* at 875, but that when a debtor has no "projected disposable income" the applicable commitment period does not matter because the debtor is only required to provide projected disposable income over the applicable commitment period. When the debtor has no disposable income, the court reasoned, he has no minimum amount that he is required to contribute in Chapter 13. *Id.* at 876. Specifically, the court ruled, that the only thing a debtor was required to do for the applicable commitment period was to provide all of his projected disposable income. Therefore, the court reasoned, when a debtor has no projected disposable income he is not mandated to remain in the case for the applicable commitment period.

A contrasting view was reached by the Eighth Circuit Court of Appeals in *Coop v. Fredrickson (In re Fredrickson)*, 545 F.3d 652 (8th Cir. 2008). In *Fredrickson*, the court

was faced with similar facts as the Ninth Circuit was in *Kagenveama*. A debtor had income above the median for his state. However, his disposable income as calculated on the statement of current monthly income was less than zero. The debtor proposed a plan to pay his creditors his net income over 48 months as opposed to 60 months. The trustee objected, and the case ended up on appeal.

The Eighth Circuit focused on congressional intent in its resolution of this issue. Noting a long line of cases and the congressional record itself, the court concluded that it was the intent of Congress in adopting BAPCPA "to ensure that debtors repay creditors the maximum they can afford." *Id*. at 657. Having reached that determination, the Eighth Circuit ruled in short order that the appropriate requirement for an above-median debtor is that he remain in his Chapter 13 case for 60 months and that his "projected disposable income" be determined from an examination that starts with the disposable income calculation on Form 22C and "takes into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J." *Id*. at 659.

Like the appellate courts, the bankruptcy and district courts have reached conclusions all over the board. In fact, Professor Waxman of William and Mary has concluded that the bankruptcy courts have taken five different approaches to determining projected disposable income and the applicable commitment period. Ned W. Waxman, *"Projected Disposable Income": Legislative Lunacy and Judicial Gyrations*, 46 Hous. L. Rev. 867 (2009). These include:

- The starting point approach (begin with the income on Form 22C and make adjustments for current and future circumstances). Examples: *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009); *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008), *cert.granted* 129 S. Ct. 2820, 174 L. Ed. 2d 288 (2009)

- The mechanical/multiplier approach (multiply disposable income from Form 22C by the applicable commitment period). Example: *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008).

- Ignoring disposable income on Form 22C and calculating projected disposable income over the applicable commitment period from Schedules I and J. Example: *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

- Begin with disposable income from Form 22C and make adjustments pursuant to anticipated changes in income and expenses over the applicable commitment period. Example: *in re Johnson*, 400 B.R. 639 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

- Don't file Schedule I and recalculate current monthly income pursuant to Section 101(10A)(A)(ii). Example: *In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009).

All of this is likely to be revised by the decision of the Supreme Court in *Hamilton v. Lanning*. Arguments were held in *Lanning* in March 2010. We will hopefully have a decision out of the Supreme Court that will resolve most of this uncertainty.

# Chapter 13: Does Anything Stay the Same?

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This section of our manuscript includes a brief survey of the more recent cases relevant to post-BAPCPA issues that have been developing in Chapter 13 cases related to the topics of (1) phantom expense deductions; (2) post-confirmation plan modifications; (3) treatment of domestic support obligations; (4) equal monthly payments to secured creditors pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii); and (5) claims covered by the new "hanging paragraph" to 11 U.S.C. § 1325(a).

I. Phantom Expense Deductions.

A. Deductions for property owned outright

- ***ECAST Settlement Corp. v. Washburn (In re Washburn)***, 579 F.3d 934 (8th Cir. 2009). Above-median income debtors can claim vehicle ownership expense for a vehicle that is owned outright with no liens, however, nothing prevents the bankruptcy court from departing from Form B22C to project disposable income (can consider no car payment when coming up with "projected disposable income" vs. "disposable income"). Dissenting opinion agrees with 9th Circuit analysis to the contrary in *Ransom*.
- ***Ransom v. MBNA America Bank, N.A. (In re Ransom)***, 577 F.3d 1026 (9th Cir. 2009). Above-median income debtors cannot claim vehicle

[1] Ms. Keenan gratefully acknowledges the substantial contribution of Krista Norstog Leonard , also of Kirschbaum, Nanney, Keenan & Griffin, P.A., in preparing these materials.

ownership expense for a vehicle that is owned outright with no liens. On April 19, 2010, the Supreme Court granted a writ of certiorari to review this decision during its 2010-2011 term.

- ***In re Wenzel***, 415 B.R. 510 (Bankr. D. Kan 2009) Above median income debtors cannot claim vehicle ownership expense for a vehicle that is unencumbered. Decision draws support from analysis of the 10th Circuit Court of Appeals in *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008) (oral arguments heard by Supreme Court on April 22, 2010).
- ***In re Houser***, No. 07-50529, slip op. (Bankr. W.D.N.C. Dec. 14, 2007). Relying on the analysis and holding in *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006), the Court found that the word "projected" must be given independent significance from "disposable income" such that the Court must consider both future and historical finances of the debtor in order to reach a conclusion that is both mandated by the plain meaning of Sec. 1329(b), and effectuates the congressional purpose and avoids an absurd result.
- ***In re Rabener***, No. 809-75719-reg, slip op (Bankr. E.D.N.Y. Jan. 21, 2010). Rejecting the 9th Circuit's analysis in *Manney v. Kagenveama (In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008), the Court found that the use of the word "projected" and the reference to income "to be received" during the plan period to be determinative in finding that the calculation of the debtor's disposable income using the standardized expenses in Sec.

707b) is only the first step in calculating "projected disposable income" in a Chapter 13 case.

- ***In re Alvarado***, No. 09-40855-R, 2009 WL 3617655 (Bankr. E.D. Tex. Oct. 29, 2009). Above median income debtors cannot claim vehicle ownership expense for a vehicle that is unencumbered. Decision rejects as inapplicable to Chapter 13 cases the analysis in *Tate v. Bolen (In re Tate)*, 571 F.3d 423 (5th Cir. 2009) finding such an expense deduction to be appropriate in a Chapter 7 case.

B. Deductions for full standardized expense allowance vs. actual expense of lesser amount

- ***Spears v. Reding (In re Spears)***, No. 3:09cv31-MHT, slip op. (M.D. Ala. Sept. 24, 2009). Court rejected the mechanical approach to income determination and, relying on the analysis in *In re Nowlin*, 576 F.3d 258 (5th Cir.) and *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008), found that Bankruptcy Courts still have some discretion post-BAPCPA to make a forward-looking calculation of the debtor's "projected disposable income." The Court also cited the 10th Circuit Court of Appeals decision in *Lanning* wherein it stated that "[t]he second reading, *i.e.,* the forward-looking approach, strikes us as the better one."

C. Deductions for loans secured by surrendered property

- ***In re Turner***, 574 F.3d 349 (7th Cir. 2009). Court refused to allow the debtor to deduct mortgage expenses on a property being surrendered as part of his proposed Chapter 13 plan, finding that "the deduction of

mortgage expense from the Chapter 13 debtor's disposable income is not intended to enrich the debtor to the expense of his unsecured creditors."

- ***Morris v. Quigley (In re Quigley)***, No. 5:08CV126, 2009 WL 2761296. (N.D. W.Va. Aug. 27, 2009) The Court found that that Sec. 1325(b)(3) does not alter the language or application of Sec. 707(b)(2), and therefore Chapter 13 debtors like Chapter 7 debtors are allowed to take a deduction for payments on loans secured by personal property that is being surrendered.
- ***In re White***, 409 B.R. 330 (Bankr. D. Md. 2009). Court finds that while Sec. 1325 test to determine disposable income is identical to the means test in Sec. 707, the result is only "the presumptive projected disposable income" for application in Chapter 13 cases and must be analyzed and may not in fact be commensurate with a fair projection of a debtors' budget in the future (*i.e., projected* disposable income).
- ***In re Amidon***, No. 09-02445-JDP, slip op. (Bankr. D. Idaho February 2, 2010). While acknowledging that decisions holding contra are "highly defensible," the Court ultimately followed the majority approach taken in *Am. Express Bank, FSB v. Smith (in re Smith)*, 428 B.R. 359 (9th Cir. BAP 2009) and held that, "at the end of the day, the Court prefers the common-sense interpretation given to the Code in *Smith*," and refuse to allow debtors to "significantly reduce payments to their unsecured creditors based on fictitious expenses."

D. Deductions for avoided liens

- ***In re Lukaszewski***, No. 08-21228 (D. Conn. Oct. 6, 2009). The Court acknowledges the split of authority on the issue of whether Chapter 13 debtors can appropriately calculate their projected disposable income using expense deductions for loan which they intend to avoid, but aligns itself with those Circuits that have adopted the forward looking approach. According to the Court, such approach is consistent with the plain language of the relevant sections of the Bankruptcy Code and the underlying purposes of Chapter 13.
- ***In re Grant***, No. 09-04223-PB13, 2010 WL 1610113. (Bankr. S.D. Cal. January 26, 2010). Relying on the reasoning in *Ransom*, the Court found "[i]ronic it would be if debtor could claim a junior lien wholly unsecured for lien strip purposes under Sec. 1322(b) while also claiming it is a secured debt for purposes of deducting payments 'contractually due' under Sec. 707."

II. Plan Modifications

- ***In re Pak,*** 378 B.R. 257 (9th Cir. BAP 2007). Chapter 13 debtor who wanted to modify his Chapter 13 plan could not rely on "disposable income" determined as of the petition date but must use current income and expenses as shown on Schedules I and J filed at the time of the proposed modification to determine amount required to be paid to creditors post-confirmation.
- ***In re Ireland,*** 366 B.R. 27 (Bankr. W.D. Ark. 2007). Finding that pre-BAPCPA case law on the issue was still good law in light of Congress'

failure to add any reference to § 1325(b) in § 1329 via BAPCPA, the Court acknowledged a pre-BAPCPA split of authority but adopted the view that the debtors were *not* bound by the calculation of their disposable income at the time their case was initially confirmed. *See Forbes v. Forbes (In re Forbes)*, 215 B.R. 183 (8th Cir. BAP 1997)(citing *In re Anderson*, 153 B.R. 527 (Bankr. M.D. Tenn. 1993) (opposing §1325(b)(2)(B) inclusion in plan modification requirements); *In re Moss*, 91 B.R. 563 (Bankr. C.D. Cal. 1988) (same); *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997) (in favor of including § 1325(b)(2)(B) in plan modification requirements); *In re Jackson*, 173 B.R. 168 (Bankr. E.D. Mo. 1994) (same); *In re Klus*, 173 B.R. 51 (Bankr. D. Conn. 1994) (same); *In re Solis*, 172 B.R. 530 (Bankr. S.D.N.Y. 1994) (same). *See also Sunahar v. Burchard (in re Sunahara)*, 326 B.R. 768 (9th Cir. BAP 2005) (gathering cases on the issue of whether disposable income test of §1325(b) applies to plan modifications and holding that "[t]he incorporation of § 1325(a) is not ... the functional equivalent of an indirect incorporation of §1325(b)") .

- ***In re White,*** No. 07-30899, slip op. (Bankr. W.D.N.C. April 18, 2008). Debtors not bound by calculations on Form B22C when computing minimum payment to unsecured creditors under proposed plan modification. Also relies on pre-BAPCPA cases which Court found to still be applicable in light of no amendment to § 1329 modification requirements relative to § 1325(b)(2)(B).

- ***In re Self,*** No. 06-40226, 2009 WL 2969489 (Bankr. D. Kan. Sept. 11, 2009). Debtors' schedule I and J income and expenses as of date of proposed modification control over calculation of disposable income using Form B22C as of filing date.
- ***In re Palmer,*** 419 B.R. 162 (Bankr. N.D.N.Y. 2009). Good faith is still a requirement of any modified Chapter 13 plan, the same as the original plan. Accordingly, Court denied Chapter 13 debtor's request to modify plan to surrender inoperable vehicle on the basis that they could have reasonably anticipated that the vehicle would need repairs at the time of confirmation.

III. Treatment of Domestic Support Obligations.

A. What is encompassed in the term "domestic support obligation" as applied by the courts?

- ***Smith v. Pritchett (In re Smith),*** 586 F.3d 69 (1st Cir. 2009). "Penalties" awarded in connection with DSO's may or may not be dischargeable in Chapter 13 cases. In *Smith*, an obligation to pay a late fee related to alimony payments was found to fall outside the scope of a "domestic support obligation" and was therefore dischargeable.
- ***In re Lopez***, 405 B.R. 382 (Bankr. S.D. Fla. 2009). Attorneys' fees awarded in state litigation based upon the bad faith litigation misconduct of the former wife were encompassed in the scope of a "domestic support obligation" and therefore were not dischargeable.

- ***In re Sonntag***, 115 Fed.Appx. 680 (5th Cir. 2004). Attorneys' fees that were awarded related to a child custody dispute were part of a DSO and therefore not dischargeable.
- ***In re Lopez***, 405 B.R. 382 (Bankr. S.D. Fla. 2009). Aattorneys' fees awarded in state court litigation was not support and therefore were dischargeable.
- ***Marvin v. Marvin (In re Marvin)***, 332 Fed.Appx. 9 (4th Cir. 2009). Debt for attorneys' fees awarded in connection with a DSO were non-dischargeable.

B. Dischargeability of "DSO" dependent on payee

- ***Tucker v. Oliver***, 423 B.R. 378 (W.D. Okla.2010). A former daughter-in-law of the debtors did not qualify as a "spouse, former spouse, or child" and, therefore, the debt was dischargeable. Note that there is presently a split of authority with respect to determining the dischargeability of a "DSO" based on construing the requirement that the recipient be an authorized payee (*i.e.*, a spouse, former spouse, or child). Generally, post-BAPCPA cases follow the reasoning of pre-BAPCPA cases in the applicable jurisdiction on this issue.
- ***Kassicieh v. Battisti (In re Kassicieh)***, ___ B.R. ___, 2010 WL 1254573 (Bankr. S.D. Ohio 2010). Determination on issues was held in abeyance as total fees owed to guardian *ad litem* had not yet been set by state court and no precedent in the Sixth Circuit.

- ***In re Rose,*** No. 08-30051, 2008 WL 4205364 (Bankr. E.D. Tenn. September 10, 2008). As guardian *ad litem*'s actions were on behalf of minor child, fees were for support and maintenance and, therefore, due priority payment under Chapter 13 plan.
- ***Levin v. Greco (In re Greco),*** 397 B.R. 102 (Bankr. N.D. Ill. 2008). "Child representative" under Illinois law did not meet the definition of the appropriate payee under § 101(14A)); *but compare Kelly v. Burnes (In re Burnes),* 405 B.R. 654 (Bankr. W.D. Mo. 2009) (in Chapter 7 case, although guardian *ad litem* was not specified as qualified payee under § 101(14A), debt for services rendered to child in custody was a "DSO").
- ***Leo, Warren, Rosenfeld, Katcher, Hibbs & Windsor, P.C. v. Brooks (In re Brooks),*** 371 B.R. 761 (Bankr. N.D. Tex. 2007) (§ 523(a)(5). Action dismissed where debtor was solely liable for a debt to collecting law firm, not to spouse..
- ***Golio v. Golio (In re Golio),*** 393 B.R. 56 (Bankr. E.D.N.Y. 2008). Payment of legal fees to attorney instead of former spouse was not relevant in final analysis of whether award was or was not a "DSO")
- ***In re Siegel,*** 414 B.R. 79 (Bankr. E.D.N.C. 2009). Mortgage payments required to be made by the debtor are analyzed from both a payee perspective and a "nature of the obligation" perspective, *i.e.*, what is the payment really for? Timing is key: the inquiry is as to the intent of the parties at the time the agreement was reached. *See, e.g., Zeitchik v. Zeitchik (In re Zeitchik),* 369 B.R. 900 (Bankr. E.D.N.C. 2007). *See also*

*In re Westerfield,* 403 B.R. 545 (Bankr. E.D. Tenn. 2009), *In re Johnson,* 397 B.R. 289 (Bankr. M.D.N.C. 2008), *In the Matter of Braun,* No. BK08-80400-TJM, 2008 WL 2130313 (Bankr. D. Neb. May 15, 2008). While in *Siegel* the debtor's obligation to former spouse to pay line of credit was determined by the bankruptcy court to be a property settlement, not alimony or child support and, therefore, dischargeable in Chapter 13, the opposite conclusions were reached in *Johnson* and *Braun*. *See also In re Westerfield,* 403 B.R. 545 (Bankr. E.D. Tenn. 2009). In the *Siegel*, *Johnson*, and *Braun* cases, the bankruptcy courts rejected the argument that the mortgages were not payable to a spouse or former spouse and focused their analysis on the nature of the debt.

C. Overpayment of child or spousal support

- ***State of Wisconsin v. Schauer (In re Schauer),*** 391 B.R. 430 (Bankr. E.D. Wisc. 2008). Child care overpayments to debtor by governmental unit was "DSO" and therefore non-dischargeable. *See also Norbut v. Norbut (In re Norbut),* 387 B.R. 199 (Bankr. S.D. Ohio 2008).
- ***Lankford v. Drinkard (In re Drinkard),*** 245 B.R. 91 (Bankr. N.D. Tex. 2000). Judgment for overpayment of child support didn't benefit the child nor the obligee (the debtor) and, therefore, was merely a money judgment.
- ***In re Vanhook,*** ___ B.R. ___ 2010 WL 1131443 (Bankr. N.D. Ill. 2010). Wrongful child support payments by creditor that was later found to not be the father of the debtor's children held only a state court money judgment and not a priority claim.

D. Is It Bad Faith To File Chapter 13 Solely/Primarily To Discharge Marital Claims?

- ***In re McCreary,*** No. 09-81743, 2009 WL 5215587, slip op. (Bankr. C.D. Ill. December 29, 2009). Purposefully filing a Chapter 13 case to avoid full payment and obtain discharge of a property settlement was found to not be bad faith under 11 U.S.C. §1325(a)(7). In *McCreary*, the debtor filed the case after his bank accounts were garnished by the former spouse. The debtor had only two unsecured creditors and two secured creditors, one of which became an unsecured creditor after repossession of its collateral. The court found that the debtor was entitled to avail himself of the relief afforded by Chapter 13 with regard to the property settlement owed to his former spouse and, therefore, did not file Chapter 13 in bad faith, although such discharge was the primary purpose for his bankruptcy filing.

IV. Equal Monthly Payment Requirements

A. Amount of the requisite "equal monthly payments"

- ***Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton)***, 401 B.R. 539 (B.A.P. 1st Cir. 2009). The debtor proposed to payoff a mortgage over 60-month life of plan, effectively providing for a balloon payment. The plan also did not propose monthly payments, but instead stated that the trustee was to make payments as "administratively convenient." The court noted that overwhelmingly the courts had determined that a plan calling for a balloon payment did not meet the new requirement for "equal monthly

payments," citing *inter alia*, *In re Lemieux*, 347 B.R. 460 (Bankr. D. Mass. 2006), *In re Wagner*, 342 B.R. 766 (Bankr. E.D. Tenn. 2006), *In re DeSardi*, 340 B.R. 790 (Bankr. S.D. Tex. 2006). "Periodic" payments are not "equal monthly payments." The debtor could not "sidestep statutory requirements by attaching a label to his plan payments other than the one that actually applies."

- ***In re Henning,*** 420 B.R. 773 (W.D. Tenn. 2009) (a payment is a payment and debtors may not label the payment as interest-only or adequate protection to avoid requirements of §1325(a)(5)(B)(iii)(I)).
- ***In re DeSardi,*** 340 B.R. 790 (Bankr. S.D. Tex. 2006). The most often cited case as to the issues related to equal plan payments and one of the first reported decisions to examine in detail the statutory changes in the Code related to this issue. Held that ". . . the equal payment provision requires that payments be level once they begin and terminate once the lender is fully paid." Accordingly, balloon payments at the end of the plan are not conforming with the statutory requirements and were precisely what Congress intended to avoid by the revised 1325(a)(5)(A)(iii)(I).
- ***In re Wagner,*** 342 B.R. 766 (Bankr. E.D. Tenn. 2006). Balloon payment isn't an "equal monthly payment."
- ***In re Butler,*** 403 B.R. 5 (Bankr. W.D. Ark. 2009). Purpose of BAPCPA revision was to prevent stepped-up payments over life of plan or balloon payments to creditors with depreciating collateral.

- ***In re Hill,*** 397 B.R. 259 (Bankr. M.D.N.C. 2007). The change in Section 1325(a)(5)(B) for the requirement of equal monthly payments over the term of the plan prohibits plans proposing a balloon payment at the conclusion of the plan, unless the creditor is paid in full prior to that time.

B. Is there a requisite starting date for such equal monthly payments and once commenced, do they have to continue through the entire plan?

- ***Flynn v. Bankowski (In re Flynn),*** 402 B.R. 437 (B.A.P. 1st Cir. 2009). Although balloon payment at end of plan does not satisfy equal payment requirement, equal plan payments do not need to start in month one of the plan.
- ***In re Tonioli,*** 359 B.R. 814 (Bankr. D. Utah 2007). Plan payments do not need to commence at specific time or continue throughout plan, but during payment period payments must be equal. Quoting the *DeSardi* decision, the Court in *Tonioli* found as to the construction of the statutory requirement of equal monthly payments that ". . . because Congress did not dictate either a beginning or an ending point for the payments, the Court declines to impose such an interpretation with respect to the termination of payments."
- ***In re Hill,*** 397 B.R. 259 (Bankr. M.D.N.C. 2007). No requirement that equal monthly payments to extend throughout the length of the plan. Therefore, the debtor can pay over a shorter period. However, the court in *Hill* also rejected the argument of an oversecured creditor that equal monthly payments must begin in the first month after confirmation.

- ***In re Butler,*** 403 B.R. 5 (Bankr. W.D. Ark. 2009). Agrees with *DeSardi* as to the illogical result if payments were required over the entire life of the plan and the debtor thereby was required to pay more than due the creditor.

C. "Equal monthly payments" *vis-a-vis* "adequate protection payments"

- ***In re Sanchez,*** 384 B.R. 574 (Bankr. D. Or. 2008). In what appears to be a maverick ruling, the court found that the equal monthly payment requirement cannot be met where the plan proposed that a secured creditor would receive only nominal adequate protection payments until debtor's counsel fees were paid. The *Sanchez* court found that adequate protection payments must end and equal monthly payments must start with confirmation of the plan, contrary to several other courts interpreting 11 U.S.C. § 1325(a)(5)(B)(iii), relying heavily on the rationale and holding of the minority view in *In re Denton,* 370 B.R. 441 (Bankr. S.D. Ga. 2007).
- ***In re DeSardi,*** 340 B.R. 790 (Bankr. S.D. Tex. 2006). Court found separate the requirement of equal monthly payments from that of adequate protection payments (under subsections (I) and (II)).
- ***In re Hill,*** 397 B.R. 259 (Bankr. M.D.N.D. 2007) "Consistent with Section 1325(b)(1), debtors should be able to pay Section 507(a)(2) claims before the equal monthly payments begin."

D. Objection to non-conforming plan

- ***Flynn v. Bankowski (In re Flynn),*** 402 B.R. 437 (B.A.P. 1st Cir. 2009). Creditor's failure to object may be construed to be acceptance; however,

court found creditor had inadequate notice of debtor's proposed non-conforming payment scheme. (Contains a good survey of case law to-date as to equal monthly payments at footnote 7.)

- ***In re Schultz,*** 363 B.R. 902 (Bankr. E.D. Wisc. 2007). Mortgage creditor must specifically object to confirmation of plan that provides for unequal monthly payments; if no objection, plan may be confirmed even with 60-month term ending with balloon payment.
- ***In re Tonioli,*** 359 B.R. 814 (Bankr. D. Utah 2007). Debtors requested abatement of payments due to delinquency, to which creditor didn't object. The court found that even though equal monthly payments would not be provided, without objection by the creditor, modification could be granted.
- ***In re Melillo,*** 385 B.R. 476 (Bankr. D. Mass. 2008). Finding that creditors had a reasonable expectation that the plan would conform with the provisions of the Bankruptcy Code, the court would not infer creditor's consent to proposed balloon payment even though creditor did not specifically object.
- ***United Student Aid Funds, Inc. v. Espinosa,*** ___ U.S. ___, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010). Although not a case dealing specifically with the "equal monthly payment" issue, and instead dealing with the issue of the dischargeability or non-dischargeability of a student loan, the overall issue of objection to a non-conforming plan should obviously be considered in light of the U.S. Supreme Court's recent ruling in *Espinosa*.

Generally, the Supreme Court found that for purposes of a motion under Rule 60(b)(4)(a), a creditor's actual notice of the plan more than satisfied creditor's due process rights; and (b) a plan not conforming with statutory requirements of the Bankruptcy Code ***may*** be confirmed absent a creditor's specific objection.

V. The New "Hanging Paragraph" to 11 U.S.C. § 1325(a).

A. What Is Included In "Purchase Money" ?

- ***In re Peaslee***, 585 F.3d 53 (2nd Cir. 2009). Finding that the question of whether negative equity financed as part of a new vehicle purchase was, or was not, encompassed in the applicable UCC definition of a "purchase money obligation," the Court certified the question to the Court of Appeals of New York which answered in the affirmative. Based on the same, the Court joined all of the other Circuit Courts that had to-date been presented with the question and found that although the debtor had financed negative equity from a trade-in with the purchase price for a "910" motor vehicle, the secured creditor's entire claim for the remaining balance due under that contract is protected by the hanging paragraph from strip-down under § 506(a).
- ***In re Price***, 562 F.3d 618 (4th Cir. 2008). Same.
- ***In re Dale***, 582 F.3d 568 (5th Cir. 2009). Same but also encompassing not only negative equity financed as part of the purchase of the new motor vehicle, but also a GAP insurance policy and an extended service contract..

- ***In re Westfall***, 599 F.3d 498 (6th Cir. 2010). Same.
- ***In re Howard***, 597 F.3d. 852 (7th Cir. 2010). Same.
- ***In re Mierkowski***, 580 F.3d 740 (8th Cir. 2009). Same.
- ***In re Ford***, 574 F.3d 1279 (10th Cir. 2009). Same.
- ***In re Graupner***, 537 F.3d 1295 (11th Cir. 2008). Same.

B. If Debtors Have To Pay In Full, Can They Surrender In Full ?

- ***Tidewater Finance Co. V. Kenney***, 531 F.3d 312 (4th Cir. 2008). Court joins all other Circuit Courts who have addressed this issue, finding that notwithstanding decisions to the contrary by most of the bankruptcy courts, nothing in the hanging paragraph alters a creditor's state law right to a deficiency claim against the debtor after collateral is repossessed and sold.
- ***Americredit Financial Services, Inc. v. Tompkins (In re Tompkins),*** ___ F.3d ___, No. 09-0022-bk (2nd Cir. May 18, 2010). Same.
- ***In re Miller***, 570 F.3d 633 (5th Cir. 2009). Same.
- ***In re Long***, 519 F.3d 288 (6th Cir. 2008). Same
- ***In re Wright***, 492 F.3d 829 (7th Cir. 2007). Same
- ***Capital One Auto Finance v. Osborn***, 515 F.3d 817 (8th Cir. 2008). Same.
- ***In re Ballard***, 526 F.3d 634 (10th Cir. 2008). Same.
- ***In re Barrett***, 543 F.3d 1239 (11th Cir. 2008). Same.

C. Can "1-Year" Claims Include Motor Vehicles ?

- ***In re Thompson***, No. 08-63957, 2009 WL 1758757 (Bankr. N.D. Ohio June 17, 2009). The Court found that the hanging paragraph consists of two separate categories of property acquired through a purchase money security interest: motor vehicles purchased by a debtor for personal use within 910 days preceding the bankruptcy filing, and any other property *except* a motor vehicle purchased by the debtor within the 1 year period preceding the bankruptcy filing.
- ***In re Horton***, 398 B.R. 73 (Bankr. S.D. Fla. 2008). The Court found that "Congress made a policy decision to treat motor vehicle collateral differently than any other thing of value," relying on the House Report that states "[w]here the collateral consists of any other *type* of property having value, section 506(b) does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case. (emphasis added)
- ***In re Balsinde***, No. 07-10093-BKC-RBR, 2007 WL 4247642 (Bankr. S.D. Fla. Nov. 29, 2007). Focusing on the word "other" the Court found the first section of the hanging paragraph deals specifically with motor vehicles and the second paragraph is inapplicable to motor vehicles.
- ***In re Ford***, No. 07-28188-svk, 2008 WL 1925153 (Bankr. E.D. Wis. Apr. 29, 2009). Court examined the majority decisions and found that their decisions "directly supports the proposition that the second clause of the hanging paragraph does not apply to motor vehicles.

- ***In Re Tanguay***, __ B.R. __, 2010 WL 1507008 (Bankr. E.D. Tenn. April 14, 2010). Court agrees with minority view that motor vehicles purchased for non-personal use within the 1-year period prior to bankruptcy fall within the "any other thing of value" catch-all of the hanging paragraph.
- ***In re Hickey***, 370 B.R. 219 (Bankr. D. Neb. 2007). In finding that motor vehicles are included in the second clause of the hanging paragraph, the Court focused on more expansive reading of both clauses, finding that the first clause consisted of not simply a "motor vehicle," but a "motor vehicle acquired for the personal use of the debtor" within the specified 910 days of filing, and the second clause consisted of any other thing of value, which would include motor vehicles that did not meet the specific requirements to be encompassed in the first clause.
- ***In re Littlefield***, 388 B.R. 1 (Bankr. D. Me. 2008). The court adopted the more expansive reading of the second clause of the hanging paragraph, finding that it was not charged with "deconstructing Congress' language when a common sense reading of it makes its application crystalline."

D. What constitutes "personal use" of the debtor?

- ***In re Hill***, 352 B.R. 69 (Bankr. W.D. La. 2006). Articulates one of three predominant views that have developed on the issue of "personal use" of the debtor, finding that the appropriate test was whether or not the acquisition of the vehicle enabled the debtor to make a significant contribution to the gross income of the family unit. Specifically, the Court found this encompassed the debtor's use of a vehicle merely for driving

back and forth to work, which would effectively eliminate virtually all Chapter 13 debtor's vehicles from the scope of the hanging paragraph.

- ***In re Solis***, 356 B.R. 398 (Bankr. S.D. Tex. 2006). Agreed with the Hill court that any analysis of this issue must be based on a "totality of the circumstances" but found that the appropriate test was whether it was used to satisfy "significant and material" personal needs of the debtor, even when it is also used for business purposes. In general, this would *not* include merely commuting back and forth to work.
- ***In re Johnson***, No. 06-50655, 2007 WL 950267 (Bankr. W,D, La. 2007). Adopted a third approach to the "substantial and matieral" test articulated in *Solis*, asking whether a vehicle is predominantly used to perform functions of a business or trade.
- ***In re Ozenkowski***, 417 B.R. 794 (Bankr. E.D. Mo. 2009). Found the *Johnson* test the most reasonable, and focused on whether the business needs served by the acquisition of the vehicle were ancillary to the personal needs of the debtor or the debtor's personal needs were secondary to the debtor's use of the vehicle in his business or trade. Also joined the majority of courts who have addressed this issue to find that the intended use of the vehicle must be examined and determined as of the time of its acquisition.
- ***In re Haskins***, No. 09-10520, 2010 WL 1286545 (Bankr. D. Vt. March 25, 2010). Agreed that the totality of the circumstances must be examined, and that intent is determined as of the date of acquisition. Also

adopted the *Joseph* test as being the most reasonable of the three predominant approaches.