Great Debates

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ABI Vice President - Education
Pachulski Stang Ziehl & Jones LLP; Los Angeles

Past Presidents' Debate

Pro: Michael P. Richman
Hunton & Williams LLP; New York

Con: Deborah D. Williamson
Cox Smith Matthews Incorporated; San Antonio

Judicial Debate

Pro: Hon. Kevin J. Carey
U.S. Bankruptcy Court (D. Del.); Wilmington

Con: Hon. Frank J. Santoro
U.S. Bankruptcy Court (E.D. Va.); Norfolk

Consumer Debate

Pro: John Rao
National Consumer Law Center; Boston

Con: Brett Weiss
Brett Weiss Attorneys at Law, PC; Greenbelt, Md.

Feature

By Richard A. Robinson

All Good-Faith Impairments of Classes Are Created Equal

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All chapter 11 debtors need to have an impaired accepted class under § 1129(a)(10) of the Bankruptcy Code. The limits on a debtor's ability to "artificially" impair a class to satisfy § 1129(a)(10) may determine whether a debtor can reorganize. In *Western Real Estate Equities LLC v. Village at Camp Bowie I LP* (*In re Village at Camp Bowie I LP*),[1] the U.S. Court of Appeals for the Fifth Circuit addressed "artificial" impairment. Under the plan proposed by the debtor, Village at Camp Bowie I LP, there were two impaired classes of creditors. One class included the oversecured claim of Western Real Estate Equities LLC,[2] and a second class included unsecured claims.[3]

With respect to Western's fully secured claim, the plan provided for payments, including interest, on a five-year note with a balloon payment due at the end of the term on all unpaid principal and interest.[4] With respect to the class of unsecured creditors, the plan provided for payment in full, without interest, within three months of the effective date.[5] The holders of all 38 unsecured claims in the case, with claims aggregating approximately $59,000, voted to accept the plan.[6] Western, on account of its secured claims in excess of $30 million, voted to reject the plan.[7]

Not surprisingly, Western argued that the Village at Camp Bowie had the financial wherewithal to pay the unsecured claims in full on the effective date and that it impaired such unsecured claims "solely" to create an accepting impaired class to satisfy § 1129(a)(10).[8] Western further argued that such "artificial" impairment constituted an "abuse of the bankruptcy process" and, accordingly, that the plan was not proposed in good faith as required by § 1129(a)(3).[9]

Noting that the definition of impairment in § 1124 of the Bankruptcy Code does not "require any particular degree of impairment," the bankruptcy court refused to distinguish "between artificial and economically driven impairment."[10] The bankruptcy court declared that "in the usual case, artificial impairment does not amount *per se* to a failure of good faith."[11] Thus, the bankruptcy court held that the plan was proposed in good faith because it was proposed for "legitimate bankruptcy purposes of reorganizing its debts, continuing its real estate venture and preserving its nontrivial equity in its real estate."[12]

On appeal, the Fifth Circuit recognized the split of authority on whether a plan may be confirmed notwithstanding "artificial" impairment of a class of claims. The Eighth Circuit and certain lower courts have held that a class of claims should not be considered impaired for purposes of § 1129(a)(10) if the impairment is the result of the plan proponents' exercise of "discretion" and not "driven by economic 'need.'"[13] Conversely, the Ninth Circuit and certain other lower courts adopted a plain-language interpretation of § 1129(a)(10) consistent with the holding of the bankruptcy court in *Village at Camp Bowie*.[14]

Aligning itself with the Ninth Circuit, the Fifth Circuit declined to recognize any distinction between "artificial" and "economically driven" impairment.[15] The Fifth Circuit reasoned:

1 *Western Real Estate Equities LLC v. Village at Camp Bowie I LP (In re Village at Camp Bowie I LP)*, No. 12-10271, 2013 WL 690497 (5th Cir. Feb. 26, 2013).
2 *Id.* at page 2.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at page 3.
13 *Matter of Windsor on the River Associates Ltd.*, 7 F.3d 127, 132 (8th Cir. 1993) ("If this impairment has been manufactured, then the plan must be regarded as having circumvented the purpose of the statute, namely, consensual reorganization."); *In re All Land Investments LLC*, 468 B.R. 676, 690 (Bankr. D. Del. 2012) (citations omitted) ("I conclude that it is appropriate to consider whether Classes 1 and 3 are artificially impaired; that is, are Classes 1 and 3 impaired for a proper business purposes solely to satisfy § 1129(a)(10)?"); *In re Daly*, 167 B.R. 734, 737-37 (Bankr. D. Mass. 1994) (citations omitted) ("This contrived and artificial impairment can be viewed as a violation of the requirement of an accepting impaired class, § 1129(a)(10), or as a violation of the requirement that the plan be proposed in good faith, § 1129(a)(3), or as both. Whichever way it is viewed, it prevents confirmation of the plan."); *In re N. Washington Ctr. Ltd. P'ship*, 165 B.R. 805, 810 (Bankr. D. Md. 1994) (citations omitted); *In re Miami Ctr. Assocs. Ltd.*, 144 B.R. 937, 943 (Bankr. S.D. Fla. 1992) (citations omitted) ("A debtor cannot artificially impair a class to satisfy the requirements of § 1129(a)(10)."); *Willows Convalescent Ctrs. Ltd. P'ship v. Unum Life Ins. Co. (In re Willows Convalescent Ctrs. Ltd. P'ship)*, 151 B.R. 220, 222-23 (D. Minn. 1991) (citations omitted) ("The law is clear that a debtor may not manufacture impaired classes merely for the purpose of gathering votes in favor of its Plan."); *In re Lettick Typografic Inc.*, 103 B.R. 32, 39 (Bankr. D. Conn. 1989) (citations omitted) ("While the debtor may have achieved literal compliance with § 1129(a)(10), this engineered impairment so distorts the meaning and purpose of that subsection that to permit it would reduce (a)(10) to a nullity."); *In re Club Assocs.*, 107 B.R. 385, 401 (Bankr. N.D. Ga. 1989) (citations omitted) ("An alteration [that] is clearly intended only to create an impaired class to vote in favor or a plan so that a debtor can effectuate a cramdown, however, will not be allowed.").
14 *Matter of L&J Anaheim Assocs.*, 995 F.2d 940,943 (9th Cir. 1993); *Conn. Gen. Life Ins. Co. v. Hotel Assocs. of Tucson (In re Hotel Assocs. of Tucson)*, 165 B.R. 470, 475 (B.A.P. 9th Cir. 1994) (citations omitted) ("[N]owhere does the Code require a plan proponent to use all efforts to create unimpaired classes. Such a requirement should not be imposed by judicial fiat."); *In re Greate Bay Hotel & Casino Inc.*, 251 B.R. 213, 240 (Bankr. D.N.J. 2000) (citations omitted); *In re Duval Manor Assocs.*, 191 B.R. 622, 628 (Bankr. E.D. Pa. 1996) (citations omitted) ("This Court agrees that restricting 'artificial' impairment could itself give rise to a veritable Pandora's box of related problems, as Courts perforce grapple with disputes over the particular degree of class impairment needed to pass muster."); *In re The Beare Co.*, 177 B.R. 886, 889 (Bankr. W.D. Tenn. 1994) (citations omitted).
15 *Camp Bowie* at page 4.

> By shoehorning a motive inquiry and materiality requirement into § 1129(a)(10), *Windsor* [the decision of the Eighth Circuit] warps the text of the Code, requiring a court to "deem" a claim unimpaired for purposes of § 1129(a)(10) even though it plainly qualifies as impaired under § 1124. *Windsor*'s motive inquiry is also inconsistent with § 1123(b)(1), which provides that a plan "proponent" *may* impair or leave unimpaired any class of claims," and does not contain any indication that impairment must be driven by economic motives.[16]

The Fifth Circuit rejected the Eighth Circuit's determination that allowing "artificial" impairment would render § 1129(a)(10) a "nullity."[17] Specifically, the court declared:

> The *Windsor* court also reasoned that condoning artificial impairment would "reduce [§ 1129](a)(10)] to a nullity." But this logic sets the cart before the horse, resting on the unsupported assumption that Congress intended [for] § 1129(a)(10) to implicitly mandate a materiality requirement and motive inquiry. Moreover, it ignores the determinative role [that] § 1129(a)(10) plays in the typical single-asset bankruptcy, in which the debtor has negative equity and the secured creditor receives a deficiency claim that allows it to control the vote of the unsecured class. In such circumstances, secured creditors routinely invoke § 1129(a)(10) to block a cramdown, aided rather than impeded by the Code's broad definition of impairment.[18]

In *Village at Camp Bowie*, Western was oversecured, and accordingly, § 1129(a)(10) did not aid Western's attempt to thwart confirmation. Turning its attention to the good-faith requirement of § 1129(a)(3), the Fifth Circuit could not conclude that the lower court "erred in its § 1129(a)(3) analysis, particularly as we have recognized that a single-asset debtor's desire to protect its equity can be a legitimate Chapter 11 objective."[19] The court noted that although artificial impairment alone does not evidence a lack of good faith where a single-asset debtor seeks to protect its equity through a chapter 11 plan, "the [§]1129(a)(3) inquiry is fact-specific, fully empowering the bankruptcy courts to deal with chicanery."[20] The Fifth Circuit's holding in *Village at Camp Bowie* will significantly alter the balance of power in plan negotiations and intensify the debate regarding the propriety of "artificial" impairment.

The importance of the Fifth Circuit's holding in *Village at Camp Bowie* is well illustrated by a recent decision of the U.S. District Court for the Western District of Tennessee.[21] In *In re Village Green*, the plan proponent was relying on the vote of a *de minimis* class of unsecured claims of approximately $2,400 that was being paid in full in two equal installments payable on the 30th and 60th day after the effective date.[22] Not surprisingly, the undersecured creditor (which held an unsecured deficiency claim of in excess of $2 million) objected to confirmation.[23] The plan proponent argued that the *de minimis* class, which had accepted the plan, was an impaired class for purposes satisfying § 1129(a)(10). In reversing and remanding the bankruptcy court on the issue of "artificial" impairment, the district court noted that the plan proponent "must demonstrate some economic justification for delaying payment [and thereby creating impairment] to the *de minimis* creditors."[24] In contrast, the Fifth Circuit's holding in *Village at Camp Bowie*—depending on the applicable, controlling precedent, if any, or separate classification of the unsecured deficiency claim—would appear, on its face, to leave the door open for a plan proponent to attempt to use a *de minimis* class as an impaired accepting class for purposes of § 1129(a)(10).

[T]he ability to gerrymander or manipulate classes of creditors and to "artificially" impair classes of creditors is likely to affect venue choices as federal courts line up with the Eighth Circuit or the Ninth and Fifth Circuits.

Notably, bankruptcy courts in the most popular venues for filing business bankruptcy cases, the Southern District of New York and the District of Delaware, have addressed the propriety of utilizing the vote of an "artificially" impaired class to satisfy the requirement of § 1129(a)(10).[25] The majority of these cases, following the Eighth Circuit, have denied confirmation under § 1129(a)(10) due to a lack of a legitimate business purpose (other than seeking to confirm a plan) for the impairment of the class of claims.[26] There is, nevertheless, one case in the Southern District of New York in which the bankruptcy court does not address whether "artificial" impairment precludes a finding that § 1129(a)(10) has been satisfied because the court determined that the same underlying conduct constitutes bad faith under § 1129(a)(3).[27]

Conclusion

Absent guidance from the U.S. Supreme Court, the ability to gerrymander or manipulate classes of creditors and to "artificially" impair classes of creditors is likely to affect venue choices as federal courts line up with the Eighth Circuit or the Ninth and Fifth Circuits. "Artificial" impairment to satisfy § 1129(a)(10) is likely to be more successful in cases where (1) secured creditors are oversecured and (2) secured creditors are undersecured, in jurisdictions where there is no controlling precedent prohibiting the separate classification of unsecured deficiency claims. abi

16 *Id.* at page 4 (citations omitted).
17 *Id.* at page 5.
18 *Id.*
19 *Id.* at page 7 (citations omitted).
20 *Id.* at pages 7-8.
21 *Federal National Mortgage Ass'n v. Village Green I GP (In re Village Green I GP)*, No. 12-2163, 2012 WL 6045896 (W.D. Tenn. Dec. 5, 2012).
22 *Id.* at page 2.
23 *Id.*
24 *Id.* at page 7.
25 *See In re All Land Investments LLC*, 468 B.R. 676, 692 (Bankr. D. Del. 2012); *In re Fur Creations by Varriale Ltd.*, 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995); *cf.*, *In re Global Ocean Carriers*, 251 B.R. 31, 42 (Bankr. D. Del. 2000); *In re Quigley Co. Inc.*, 437 B.R. 102, 126, fn.31 (Bankr. S.D.N.Y. 2010); *cf.*, *In re Combustion Engineering Inc.*, 391 F.3d 190, 244 (3d Cir. 2004) (citations omitted) ("On the facts here, the monitoring function of § 1129(a)(10) may have been significantly weakened. This type of manipulation is especially problematic in the asbestos context where a voting majority can be made to consist of nonmalignant claimants whose interests may be adverse to those of claimants with more severe injuries.").
26 *Id.*
27 *Quigley* at page 126, fn.31 (citations omitted) ("There is a split of authorities as to whether the creation of an artificially impaired accepting class violates § 1129(a)(10) or, instead, is a species of lack of good faith under § 1129(a)(3)…. Because the Court concludes that the voting manipulation in this case constituted bad faith under § 1129(a)(3), it does not address whether the same conduct is also prohibited under § 1129(a)(10).").

Must a Secured Creditor "Pay to Play" in Chapter 11?

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Recently, the American Bankruptcy Institute held its annual Winter Leadership Conference in Tucson, Ariz. One of the programs was a part of ABI's "Great Debates" series—one was entitled "Resolved: Administratively Insolvent Cases Should Be Administered Solely for the Benefit of Secured Creditors." The pro argument was advocated by **Jeffrey Sabin** of Bingham McCutchen LLP in New York, and the con viewpoint was advanced by **Deborah Thorne** of Barnes & Thornburg LLP in Chicago. Although the authors did not have the pleasure of listening to the Great Debate, Ms. Thorne prepared materials outlining her con position.[1]


Andrew L. Turscak Jr.

The question presented at the Great Debate pertaining to administratively insolvent cases is by no means confined to such cases. Indeed, just as commonly, the question is implicated in cases where administrative claims are likely to be paid in full, but one or more of the other classes of unsecured claims may not receive a distribution. In either instance, general unsecured creditors have little or no expectation of recovery.[2]

Accordingly, the question posed in the Great Debate has significant relevance for a chapter 11 case where—regardless of whether the estate is administratively insolvent—general unsecured creditors have minimal or no realistic hope of any recovery after the secured creditors are paid. On such an occasion, the same question arises: Whether the chapter 11 case should be administered primarily for the benefit of the secured creditor, or the secured creditor must make some concession that is beneficial to the general unsecured creditors in order to keep the case in chapter 11. In other words, must the secured creditor pay to play in chapter 11?

The question typically arises in the context of a preplan confirmation §363 sale involving the proposed disposition of substantially all of a debtor's assets where sale proceeds will be less than the aggregate value of existing liens. One common method of appeasing an agitated creditors' committee under these circumstances is for the secured lender to carve out a portion of its recovery for the benefit of unsecured creditors.[3]

Carve-outs in Chapter 11

Carve-outs for Professional Fees

It is quite common for a secured lender in a chapter 11 case to set aside an agreed-upon portion of the proceeds of its collateral for the purpose of paying professional fees incurred during a chapter 11 case. This type of "carve out" is designed to provide or guarantee a minimal level of compensation for counsel to the debtor and the creditors' committee—and possibly other professionals. Though the terms vary, carve-out agreements typically provide for how much money is to be set aside, with attendant restrictions on how it is to be applied, and may also provide for the effect of the occurrence or nonoccurrence of certain events on the continuing availability of the carve-out.[4] In fact, some courts have insisted that proposed orders authorizing the use of cash collateral and debtor-in-possession (DIP) financing include a reasonable professional fee carve-out.[5]

Rationale for Professional Fee Carve-outs


Alan R. Lepene

There are several public-policy rationales at work that persuade courts to require a professional fee carve-out in connection with DIP financing.[6] For one thing, in the absence of a carve-out, the ability of anyone to investigate potential preference, fraudulent conveyance, lender liability and subordination claims of the estate would be lost. Additionally, in some cases, neither the debtor's nor the committee's counsel would be able to receive payment for its work, including any work associated with a dispute with the secured lender.[7] Such a result would destroy the adversary process and rob the estate of its rights and powers, thus jeopardizing the provision of essential chapter 11 services and hindering reorganization efforts.[8]

Does the Same Rationale Apply to Carve-outs for Unsecured Creditors' Claims?

It is also routine for a secured creditor to carve out funds for the benefit of unsecured creditors for the purpose of ensuring at least a nominal distribution for unsecured claimants where there might not otherwise be any return on such claims. The carve-out usually is the result of extensive negotiations and, as a practical matter, it helps to pave the way forward for the §363 sale and resolution of the chapter 11 case with the general consensus and cooperation of the major constituents, namely, the debtor, committee, secured lender, U.S. Trustee and possibly others.

Unlike professional-fee carve-outs, it can be argued that the absence of a carve-out for unsecured creditors would neither

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1 Conference materials are accessible online by ABI members at consumer.abiworld.org.

2 As mentioned below, the question presented herein could, under certain circumstances, potentially yield justifiably different answers for an administratively insolvent estate on one hand, and an administratively solvent estate on the other. The position advocated in this article is premised on an estate's administrative solvency.

3 Because this article's focus is on the propriety of administration of a case in chapter 11 where the primary or only beneficiary is the secured creditor and where unsecured creditors have nothing to gain or lose, the permissibility of such carve-outs, including their structure, timing and scope, is not addressed herein; however, the following cases, among others, contain detailed discussions on the topic: *In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir. 1993); *In re Armstrong World Industries Inc.*, 432 F.3d 507 (3d Cir. 2005); and *In re World Health Alternatives Inc.*, 344 B.R. 291 (Bankr. D. Del. 2006).

4 *See, e.g., In re California Webbing Industries Inc.*, 370 B.R. 480, 483 (Bankr. D. R.I. 2007).

5 *See, e.g., In re Ames Department Stores*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (it is appropriate for court to insist on reasonable carve-out designed to provide for payment of fees of debtor and committee counsel in order to preserve adversary system; absent this protection, collective rights and expectations of all parties-in-interest are sorely prejudiced).

6 The need for professional-fee carve-outs has been said to be a matter of public policy because the absence of a fee carve-out would remove incentives for professionals to provide essential chapter 11 services and hamper reorganization efforts. *In re California Webbing Industries Inc.*, 370 B.R. at 484.

7 In some cases in which the prepetition secured lender is also the postpetition DIP lender, the professional-fee carve-out will provide a limited amount to cover the cost of investigating potential claims against the secured lender, but not the cost of prosecuting such claims.

8 *In re California Webbing Industries Inc.*, 370 B.R. at 484; *see also In re Ames Department Stores*, 115 B.R. at 38. Of course, there may be cases where the prospects appear so bright at the outset that a professional fee carve-out will neither be requested nor required. For a lesson on the potential pitfalls associated with such an approach, *see In re California Webbing Industries Inc.*, 370 B.R. at 484 (discussing prospect of disgorgement in case turned administratively insolvent).

hamper the bankruptcy process, nor rob the estate of its ability to protect its rights or perform its duties. In addition, unlike the professionals who invest their time and effort in a case, unsecured creditors who have nothing to lose (other than what has already been lost) or gain from a case remaining in chapter 11 are more akin to unaffected bystanders.[9] Still, for the sake of expediency and other reasons, such carve-outs are usually arranged. Nonetheless, the question arises regarding whether a secured creditor *must* make such concessions. In other words, is there anything in the Bankruptcy Code or elsewhere that mandates that a secured creditor must ensure that there be a recovery for unsecured creditors in order for a §363 sale to proceed in chapter 11? A creditors'committee should have veto power over a §363 sale where it has no stake in the outcome.

With the new wave of chapter 11 filings likely to reach a crescendo during the coming months, and with many cases likely to present scenarios where the secured debt is well in excess of the value of the collateral securing the debt, these questions assume greater significance. Indeed, the answers to the questions may dictate whether unsecured creditors enjoy any distribution whatsoever in many cases going forward.

Not many courts have directly decided the question.[10] Of the few that have, two approaches—each illustrative of those set forth at the aforementioned Great Debate—have emerged, one of which may eventually gain momentum as the preferred approach in the absence of legislation.

The Two Approaches

The "Con" View: Secured Creditor Must Pay to Play in Chapter 11

One case adopting reasoning that parallels the con approach advocated at the Great Debate is *In re Encore Healthcare Associates*.[11] In *Encore Healthcare,* the court confronted the question of the necessity for a carve-out for unsecured creditors in the context of a proposed §363 sale.[12] The debtor's assets consisted of a nursing facility and on-site office equipment and fixtures, together valued at about $2.5 million. The assets secured a debt to the secured lender of approximately $8.4 million. The debtor sought authority to sell the assets for $2.5 million, with the sale proceeds to pay the costs of sale and then all of the remainder to be remitted to the secured creditor in partial satisfaction of its claim.[13]

With no party objecting to the proposed sale, the *Encore Healthcare* court raised its own concerns *sua sponte*.[14] The court began its analysis with the proposition that §363 does not grant a debtor an absolute right to sell its assets outside the ordinary course free and clear of an interest in property so long as the interest-holder consents; nor does §363 confer a *carte blanche* right to conduct a §363 sale outside of a plan of reorganization.[15] Instead, there must be some business justification (other than appeasement of major creditors) before the court may approve an asset disposition. For example, the debtor must demonstrate that a sale will aid the debtor's reorganization. In *Encore Healthcare,* there was not going to be a reorganization as the debtor admittedly planned to convert the case to chapter 7 following the sale.[16]

The court acknowledged the by-then widely accepted proposition that preconfirmation sales of assets are often an important step in furtherance of a reorganization proceeding.[17] For example, if a sale is proposed at a juncture when the debtor lacks funds to continue operating, the assets are about to significantly decline in value and the proceeds will allow for payment of administrative claims and also provide some funds for unsecured creditors, a sale outside a plan may be proper.[18] Similarly, if a quick sale is necessary to maximize value for the estate and the proceeds will exceed all liens and encumbrances, a preplan §363 sale may be appropriate. This was not such a case. Here, the sale would generate funds solely for the secured creditor. As noted by the court, the secured creditor could just as easily foreclose and sell the assets itself outside of bankruptcy, or the debtor could simply abandon the assets to the secured creditor for it to sell on its own.[19] In addition, the sale advanced no purpose of a chapter 11 proceeding, as it would preserve no operating business with continued employment for workers, and the debtor intended to convert the case to chapter 7 after consummation of the sale.[20]

Although chapter 11 is appropriately utilized to liquidate assets, there are limits to that ability under §363, and chapter 11 liquidations remain subject to Code requirements, such as the filing of a plan. According to the *Encore Healthcare* court, in recognition of these limits and requirements, most secured creditors understand the necessity of making some distribution available to other creditors as the price of a court-approved §363 sale.[21] Based on the facts surrounding the proposed sale, including the lack of any benefit to unsecured creditors, the court denied the sale motion. *Id.*

The "Pro" View: Chapter 11 May Be Utilized for the Sole Benefit of a Secured Creditor

Under a somewhat different set of facts, another court reached a contrary conclusion, determining that chapter 11 administration is appropriate for a liquidation where the secured creditor will enjoy a benefit, but the unsecured creditors will not. In *GPA Technical Consultants,* the debtor was in the process of liquidating its assets in an orderly fashion and filed a liquidating plan for that purpose.[22] The U.S. Trustee filed a motion to dismiss or convert the case, citing the fact that the debtor had lost money since the petition date, that there was no longer any ongoing business left to liquidate and that the only parties that stood to receive any distributions were the secured creditor and counsel for the debtor.[23] Under these circumstances, the U.S. Trustee urged that a chapter 7 trustee would be in the best position to determine if the secured lender's security interest was valid, to abandon assets to the secured creditor without added expense to the estate and to collect accounts receivable and prosecute avoidance actions.[24]

The debtor and secured creditor opposed the U.S. Trustee's motion, pointing out that the secured creditor was absorbing losses to the estate, that the debtor was using cash collateral to pay payroll and operating expenses and that the lender had subordinated its position to the claim of debtor's counsel for fees and expenses.[25] Moreover, any losses to the estate were more

9 *See In re Western Pacific Airlines Inc.,* 218 B.R. 590 (Bankr. D. Colo. 1998) (DIP lender was only beneficiary of chapter 11; there was no estate as far as unsecured creditors were concerned).

10 One likely explanation for the relative shortage of case law decisions on the precise question posed is that, from a standpoint of practicality and expedience, secured lenders usually opt to make agreeable concessions to creditors' committees in order to avoid or resolve objections, create peace and avoid the expense and uncertainty—and sometimes most importantly, the delay—associated with litigating the matter to judgment. For another point of view on the topic, *see* Harley E. Reidel and Edward Peterson, "Practical Issues Surrounding Section 363 Sales," 19 U. Fla. J.L. & Pub. Pol'y 75 (2008).

11 312 B.R. 52 (Bankr. E.D. Pa. 2004).

12 *Id.*

13 *Id.* at 53-54.

14 One party had previously objected, but the objection was subsequently withdrawn. *Id.* at 53.

15 *Encore Healthcare Associates,* 312 B.R. at 55.

16 *Id.* at 55.

17 At one time, this proposition was very much in question. *See, e.g., In re D. M. Christian Co.,* 7 B.R. 561 (Bankr. N.D. W.Va. 1980), and *In re White Motor Credit Corp.,* 14 B.R. 584 (Bankr. N.D. Ohio 1981).

18 *Encore Healthcare Associates,* 312 B.R. at 57.

19 *Id.* at 56-57.

20 *Id.* at 57.

21 *Encore Healthcare Associates,* 312 B.R. at 56. *Cf. In re Fremont Battery Co.,* 73 B.R. 277, 279-80 (Bankr. N.D. Ohio 1987) (court approval of §363 sale where no funds will be left to propose plan would contravene chapter 11 policies).

22 *In re GPA Technical Consultants Inc.,* 106 B.R. 139 (Bankr. S.D. Ohio 1989). The procedural posture in *GPA Technical Consultants* (motion to convert or dismiss) also differed from the one in *Encore Healthcare* (sale motion).

23 *Id.* at 140.

24 *Id.*

25 *Id.* at 140-41.

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than offset by ongoing asset recoveries, including asset liquidations and accounts receivable collections.[26]

The court sided with the debtor and denied the U.S. Trustee's motion. For one thing, the unsecured creditors stood to gain or lose nothing, regardless of whether the estate was liquidated in chapter 11 or chapter 7, or under state law. The secured claim was greater than any realistic recoveries; therefore, there was no estate as far as the unsecured creditors were concerned.[27] Meanwhile, the secured creditor was absorbing all "losses" to the estate because it hoped to recover a greater dividend by keeping the business afloat to collect receivables and pursue avoidance actions. The court likened this expenditure by the secured creditor to an investment by the secured creditor, rather than a loss to the estate.[28]

Importantly, in the *GPA Technical Consultants* case, while the unsecured creditors had nothing to gain or lose in chapter 11, at least the secured creditor stood some chance of making a partial recovery. Also, as pointed out by the court, there were other beneficiaries in chapter 11 as well. For example, the burdens on principals who personally guaranteed the debtor's debts would be alleviated to the extent that those debts were reduced in chapter 11. For this reason, the principals would be more motivated than a chapter 7 trustee to vigorously prosecute avoidance actions and liquidate receivables. By allowing the debtor to remain in chapter 11 for the purpose of liquidating, creditor distributions would actually be maximized, even though unsecured creditors would not benefit.[29]

Under the Bankruptcy Code, the best interests of creditors and the estate are taken into account in the determination of whether to convert or dismiss a case.[30] Because entities holding secured claims are "creditors" under the Code,[31] it follows that the secured creditor's interests must be taken into account.[32] In fact, according to the *GPA Technical Consultants* court, there need not be any unsecured creditors in a bona fide reorganization, and thus the *only* creditor interests to be taken into account may sometimes be secured creditors.[33]

In chapter 11, the debtor could continue its efforts to recover assets and pursue causes of action. While these actions would only benefit the secured creditor, they would not adversely affect the recovery of unsecured creditors or equity-holders because they stood to recover nothing in the event of liquidation or dismissal anyway.[34] It was in the interest of the secured creditor that the case not be dismissed, and because that interest was not detrimental to the interests of unsecured creditors, equityholders or the estate, the court determined that conversion or dismissal would not promote the best interests of creditors, and that the case should remain in chapter 11 to be administered solely for the secured creditor's benefit.[35] As stated by the court: "Even if the only reason for the chapter 11...is to maximize the return to the secured creditor...the interests of the secured creditor are legitimate interests to be taken into account in deciding whether to convert or dismiss a chapter 11 case."[36]

Summary

The views expressed in the *Encore Healthcare* and *GPA Technical Consultants* cases, as well as those set forth at the Great Debate, reflect the current doubt surrounding the question posed. At this juncture, it is worth noting several points.

First, the lack of clarity is not necessarily a bad thing. For example, it often encourages the secured creditor to make modest (usually) concessions to unsecured creditor bodies in return for support and cooperation from the creditors' committee, and that, in turn, helps to ensure a degree of certainty, assurance and expedition in the process going forward.

Second, the answer to the pay-to-play question may well be different for cases that are administratively solvent, as opposed to those that are administratively insolvent. It is possible in an administratively insolvent case for a scenario to occur where the administrative claimants would, in essence, partially bear the costs associated with the secured creditor's recovery.[37] In such an instance, the secured creditor would, in fact, enjoy a benefit at the expense of other creditors.

Finally, it is worth pointing out that the two approaches outlined in the cases above are not necessarily irreconcilable. That is, despite the broad bankruptcy policy pronouncements in support of the outcomes in the *Encore Healthcare* and *GPA Technical* cases, it is not inconceivable that the judge in *Encore Healthcare* might have reached a similar conclusion as the judge in *GPA Technical* based on the facts presented in *GPA Technical*—or vice versa.

For example, one issue that clearly troubled the judge in *Encore Healthcare* was that the only apparent reason for the chapter 11 sale was that the buyer of the debtor's assets had entered into a prepetition agreement to purchase the assets, with the condition that the debtor-seller obtain bankruptcy court approval of the sale in order to insulate the purchaser from future claims, as well as to provide a federal forum to litigate any contract issues.[38] Additionally, unlike in *Encore Healthcare*, a liquidation plan had been filed in *GPA Technical* (though not confirmed). These factors, combined with others—including the failure of the *Encore Healthcare* debtor to provide a sufficient business justification for the sale and primarily the fact that the debtor was about to convert the case after the sale—prompted the court to question whether it should assume jurisdiction over the proposed sale, a question that it answered in the negative.

Though they are not wholly incompatible, the two approaches are nonetheless illustrative of the divergent views expressed at the Great Debate on the question of whether a secured creditor must pay in order to play in chapter 11—in connection with a §363 sale or otherwise—which reamins an open question. The authors believe there is no principled rationale supportive of a *per se* proscription against the administration of a chapter 11 case for the primary benefit of the secured creditor, particularly where chapter 11 represents the last, best alternative to salvage value for the estate. Although there is no statutory prohibition regarding the use of chapter 11 for this purpose, there are

26 *Id.*
27 *Id.* at 141. *See also In re Western Pacific Airlines Inc.*, 218 B.R. at 594 (same).
28 *GPA Technical Consultants*, 106 B.R. at 141.
29 *Id.* at 141 (court noted, as aside, that debtor disputed lender's security interest in any funds recovered as preferences).
30 *Id.* at 142 (citing §1112(b)).
31 *Id.* at 142 (citing §§101(9) and 101(4)(A)).
32 *Id.* at 142.
33 *Id.* at 142-43.
34 *Id.* at 143.
35 *Id.*
36 *Id.* at 142.
37 *See, e.g., In re Summit Global Logistics Inc.*, 2008 Bankr. LEXIS 896, No. 08-11566 (Bankr. D. N.J. Mar. 26, 2008). In *Summit Global Logistics*, no creditors' committee was formed. The debtors sought authority under §363 to sell all of their assets to insiders. The purchase price (in the $65-70 million range) was far below the aggregate amount of the senior and junior liens (around $140 million). The senior and junior lienholders supported the sale. One unsecured creditor opposed the sale, partly on the basis that it provided no recovery for administrative claimants or unsecured creditors. The court approved the sale over the objection, finding that sale of the operations as a going-concern would be far more lucrative than the alternative: an imminent shutdown of the debtors' operations. As a result, there was no other responsible alternative. With respect to the administrative claimants, a $3 million wind-down budget had been set aside for satisfaction of administrative claims. It is unclear from the *Summit Global Logistics* opinion if unsecured creditors had any realistic expectation of sharing in those funds.
38 *Encore Healthcare Associates*, 312 B.R. at 56.

several overarching bankruptcy policies that, when viewed in isolation, arguably could be construed as advising against the use of chapter 11 for this purpose. On the other hand, there are a number of other policies that argue equally as strongly or even more strongly in favor of the approach. Chief among these is the goal of maximizing returns to the bankruptcy estate for distribution according to priority.[39]

A fundamental purpose of the chapter 11 process in general, and of a §363 sale in particular, is to maximize the benefit to the debtor's entire estate. If a sale is in the best interest of the estate, it follows that the estate suffers in the absence of the sale.[40] In other words, a §363 sale benefits the estate by minimizing the loss to the estate. There is nothing in the language of §363 that requires a sale to provide any distribution to unsecured creditors.[41] From an equitable standpoint, it hardly makes sense to abandon a venue that will promote a material benefit to *someone* in favor of a venue where *everyone's* interests are impaired.

There are some cases, like *GPA Technical Consultants,* where the unsecured creditors are out of the money no matter what forum is utilized; meanwhile, the secured creditor stands little or no chance of recovering the full amount of its debt. In such instances, if chapter 11 appears to be the vehicle that will generate the greatest return under the circumstances for that creditor, and if no other creditors will be prejudiced in the process, then it should be utilized for this purpose. To require otherwise would be tantamount to granting creditors' committees' unilateral veto power over the ability of a debtor to conduct an orderly liquidation through the sale of its business under chapter 11.[42] As pointed out by the *GPA Technical Consultants* court, secured creditors are creditors whose interests must be taken into account in chapter 11. Most significantly, there is no Code requirement that a secured creditor that is already substantially under water should make further sacrifices simply to pacify unsecured creditors whose prospects are hopeless in any event.

Conclusion

For now, there is no clear authority on the question of whether a secured creditor must, as a rule, pay to play.[43] Given the narrow time constraints typically associated with a §363 sale, the inclination of some courts to require that there be a benefit to unsecured creditors, and a secured creditor's general lack of incentive to play "chicken,"[44] perhaps no clear answer will be forthcoming any time soon.

The ultimate fact remains that nothing in the Bankruptcy Code specifically obliges a secured creditor, as a rule, to pay to play in chapter 11—whether in connection with a §363 sale or otherwise—particularly where no other creditors' interests are being prejudiced. As with all questions to which the Code offers no clear answer, Congress is free to weigh in by enacting a statutory provision that would provide clear direction either way. Until it does, the Great Debate will continue. ■

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39 Liquidation under chapter 11 maximizes value where there is some value that would otherwise be lost outside of bankruptcy. *Santa Fe Minerals Inc. v. BEPCO LP (In re 15375 Memorial Corp.),* 386 B.R. 548 (Bankr. D. Del. 2008).

40 *In re Trans World Airlines Inc.,* 2001 Bankr. LEXIS 980, No. 01-00056, *32-33 (Bankr. D. Del. Apr. 2, 2001).

41 *Id.* at *33.

42 Importantly, in most instances, there are other avenues for potential recoveries for unsecured creditors, such as avoidance actions, D&O actions and the like—regardless of the outcome of the §363 sale. A committee's exercise of its hypothetical veto power could well result in a forfeiture of what little might be salvaged under the chapter 11 process. On the other hand, a committee that is faced with uncertain prospects for minimal recoveries could hardly be faulted—depending on the circumstances—for making an informed decision to essentially roll the dice.

43 Assuming a carve-out for unsecured creditors is appropriate or required, the question then becomes how big a carve out is necessary? Naturally, this is a question for another day.

44 According to Wikipedia, "the game of chicken models two drivers, both headed for a single lane bridge from opposite directions. The first to swerve away yields the bridge to the other. If neither player swerves, the result is a costly deadlock in the middle of the bridge, or a potentially fatal head-on collision. It is presumed that the best thing for each driver is to stay straight while the other swerves (since the other is the "chicken" while a crash is avoided). Additionally, a crash is presumed to be the worst outcome for both players. This yields a situation where each player, in attempting to secure his best outcome, risks the worst. A similar version, under the name of 'chickie run,' is a central plot element in the movie *Rebel Without a Cause* where the characters played by James Dean and Corey Allen race their cars towards a cliff instead of each other." en.wikipedia.org/wiki/game_of_chicken.

Trustee Talk

By Ronda J. Winnecour

New Form Plan May Nationalize Chapter 13 Practice

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The biggest national change in consumer bankruptcy since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is lurking on the horizon. The Advisory Committee on Bankruptcy Rules, through its Chapter 13 Form Plan Working Group, has recommended both a new national Official Form for the Chapter 13 plan and many amended rules attendant to all areas of consumer bankruptcy. The new form and amended rules will materially transform bankruptcy practice in chapters 7, 12 and 13.

The memorandum from the Working Group is available online[1] and contains both the draft National Plan Form and the recommendations of the committee for changes with regard to the rules. The draft rules and form have not yet been forwarded to the Advisory Committee on Bankruptcy Rules. Unusually, the Working Group seeks comments from the bankruptcy community concerning the changes, and the opportunity is ripe for all stakeholders to share concerns and recommendations for improvement. The decision of the Working Group to share its work product and encourage comment affords an amazing opportunity to judges, trustees, creditors, debtors and their counsel to influence the project in meaningful ways.

The concept of the National Plan Form was proposed by a group of bankruptcy judges and chapter 13 trustees in 2001 at the National Association of Chapter 13 Trustees (NACTT) annual conference in San Juan, P.R. The rationale behind the proposal is to eliminate the parochial aspects of chapter 13 practice, to nationalize and standardize the treatment of creditors, valuation proceedings and avoidance of secondary liens, and to minimize the work of debtors' attorneys in multi-plan jurisdictions.

There are more than 200 plan forms currently in use across the country, and many districts have no recommended or required plan form at all. Creditors, particularly national lenders, are precluded from using data-enabled technology to download their treatment and are required to waste resources individually reviewing each chapter 13 plan. Simultaneously, debtor practice varies dramatically from district to district with respect to matters such as lienstripping, valuation and the effect of confirmation. Some jurisdictions require that matters such as valuation, claim disputes and lien avoidance be brought by motion, some allow the confirmed plan to control, and many require adversary proceedings. The Working Group is attempting to standardize practice in consumer cases in a manner that consistently improves the process.

The concept is a single, uniform plan coupled with significant changes to the rules that govern consumer bankruptcy. Creditors, debtors and trustees are materially affected by these changes and the form, but the primary impact of the changes in the National Plan Form and Rules falls upon chapter 13 standing trustees.

One mandatory, nine-page, data-enabled, official plan form will be required in all chapter 13 cases.[2] The draft rule precludes nonstandard provisions unless they are delineated in the section of the official form that is specially designated for nonstandard provisions.[3] Nonstandard provisions must be identified in accordance with the requirements of the National Plan Form.[4]

Creditors must receive a copy of the plan prior to confirmation.[5] Creditors must file objections to confirmation seven days before the scheduled confirmation, or plan confirmation (and the resulting resolutions of contested matters) will occur by default.[6] Contested matters—such as valuation, lien avoidance under 11 U.S.C. § 522(f), fixing mortgage arrears and many other claim disputes—will be resolved by the confirmation process in chapter 12 or 13 cases. The Working Group envisions that the draft uniform plan will obviate the need to file a motion, adversary proceeding or objection to claim to resolve most matters.

The value of a secured claim, as well as the amount of a claim that is to be given priority status, may be asserted in the draft plan. Determination of mortgage arrears may also be resolved through the confirmation process. Because these matters are significant to creditors, the draft rules also require enhanced service; notice must be consistent with the requirements of Rule 7004.[7]

Avoidance of liens under 11 U.S.C. § 522(f) may also be provided for in the plan.[8] A plan that

1 *See* www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2012-09.pdf.

2 *See* Advisory Committee on Bankruptcy Rules (2012) at 187, www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2012-09.pdf.
3 *Id.* at 174.
4 *Id.* at 174.
5 *Id.* at 174.
6 *Id.* at 174.
7 *Id.* at 172.
8 *Id.* at 176.

proposes to avoid such a lien must also be served in accordance with Rule 7004.[9]

Because confirmation will resolve most contested matters, creditors will be well served to carefully review the plan and object promptly. Debtors' attorneys and trustees will no longer be required to file objections to proofs of claim, motions or adversaries to resolve most claims, secondary liens or valuation.

Draft Rule 3015(g) provides that the confirmation of chapter 13 plans controls over contrary proofs of claim,[10] and the rule is consistent with *United Student Aid Funds Inc. v. Espinosa*.[11] Failure to object in a timely fashion will result in confirmation by default.

Trustees and debtors have long been frustrated by the nonsensical glitch in existing rules that allows secured creditors to fail to assert a claim, ignore the plan and confirmation orders, and subsequently pounce on the debtor for asserted delinquencies post-discharge. The Working Group has addressed this concern by requiring that secured creditors actually file proofs of claim or be bound by the order confirming the plan. The Working Group reasoned that "it would be helpful to have a proof of claim from each secured creditor filed before the confirmation hearing. That way, any differences between the debtor's plan and the proof of claim could be addressed at the confirmation hearing."[12] Therefore the draft of new Rule 3002(a) requires that "[a] secured creditor, unsecured creditor and equity security-holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim."[13] The primary result of the changes is that virtually all creditors must file a proof of claim or risk a confirmation order that limits the right of the creditor to be paid in full.

Perhaps the most controversial proposal is the draft amended Rule 3002(c), which resets the claims bar date for nongovernmental creditors.[14] In all consumer cases, but particularly in chapter 12 and 13 matters, early confirmation and resolution of issues can only occur if there is certainty about the funds—how much money and to whom the trustee is being asked to disburse. To raise the level of certainty and accelerate the timing of certainty, the bar date for nongovernmental creditors is set at 60 days from the filing of the petition. This change dramatically shortens the current bar date of 90 days from the first meeting of creditors. The new bar date applies not only to chapter 13 cases but also to voluntary chapter 7 cases and all chapter 12 cases as well. The bar date is set at 90 days from the date of the order for relief in an involuntary chapter 7 case.[15]

The bar date change has been criticized by secured creditors, particularly mortgage creditors, who claim that it fails to afford them sufficient time to evaluate and support the claim. This argument does not seem well reasoned since bankruptcy often follows a notice of foreclosure, and the creditor should already have a supported assessment of arrears by that time. Additionally, creditors will benefit significantly from the shortened time period between the petition and first distribution in chapter 12 and 13 cases. Further, the Working Group envisions the confirmation hearing as the time to resolve all issues attendant to claims disparities. By forcing the creditor to clarify the extent of the claim and to file written objections to confirmation of a plan that provides otherwise, the creditor will be forced to review the debt and its treatment by the debtor and assert its rights in a timely fashion. Creditors will be rewarded for this review by earlier payment of allowed claims. They will also benefit from standard chapter 13 practices, reducing the time constraints on their staff, which will minimize the time necessary to file accurate proofs of claims.

> **[T]he draft National Form is a collection of ideas from many local plans and is an attempt to incorporate many of the common denominators of chapter 13 practice.**

An exception to the claims bar date is provided in the event that the debtor fails to include a creditor on the list or if the notice was mailed to a creditor at a foreign address. The court is permitted to extend the time by 60 days from the date of the court's determination of insufficient notice.[16] This is the first time that the rules have addressed the problem of unscheduled creditors. The current FRBP 3007 will be amended to provide an exception to the need to file an objection to a claim if it is allowed pursuant to confirmation of chapter 12 or chapter 13 plans,[17] which is consistent with the Working Group's commitment to confirmation as the resolution of claims issues.

Creditors should be alerted to the proposed changes to FRBP 3012.[18] The new provision is entitled "Determination of the Amount of Secured and Priority Claims," under which the debtor is permitted to seek a determination of valuation under 11 U.S.C. § 506(a) and pre-petition cure and priority status under § 507. The debtor is authorized to seek these determinations by objection to claim or motion, or by proposing it in a chapter 12 or 13 plan. The Working Group specially notes that it decided to add the determination of mortgage cure in the confirmed plan. To protect the creditor, it also added a provision that requires service of the plan on creditors in accordance with Rule 7004.

Many chapter 13 trustees are concerned by FRBP 3015, which requires that an official form be used for all chapter 13 plans.[19] The rule precludes nonstandard provisions except in conformity with the official plan form. Creditors must receive a copy of the plan prior to confirmation. Confirmation will occur by default if no objection to confirmation has been

9 *Id.* at 172.
10 *Id.* at 175.
11 130 S.Ct. 1367 (2010).
12 *See* Advisory Committee on Bankruptcy Rules (2012) at 168.
13 *Id.* at 169. The draft rule not only applies in consumer cases, but may also affect business chapter 11s.
14 *Id.* at 169.
15 *Id.* at 169.
16 *Id.* at 170.
17 *Id.* at 170.
18 *Id.* at 172.
19 *Id.* at 174.

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filed seven days before the hearing and, most importantly, confirmation of a chapter 13 plan trumps any contrary proof of claim. The form itself starts by alerting the creditors to the possibility of modification of a secured claim, avoidance of judicial lien and avoidance of a nonpurchase money security interest or nonstandard provisions. Thereafter, it proposes plan payments and length of plan, treatment of secured claims including determination and claim modification, administrative and priority claims, nonpriority unsecured claims, executory contracts and unexpired leases, as well as the order of distribution, summary of plan disbursements, governmental units and vesting options.

There are many districts already using a local mandatory plan form, and most have a recommended form of some sort. The trustees, their staff (the people responsible for policing the provisions of the plan), and the local judiciary and bar are concerned that the national form will erode the differences in local practice. Many trustees pay only pre-petition obligations, some trustees are conduit trustees paying post-petition obligations in many cases, and at least one trustee pays all post-petition debts in every case. Some districts have an early confirmation process, while some do not confirm until both the regular and governmental bar dates have expired. It is hard to envision a single plan form that will resolve all of the variations.

Chapter 12 and 13 plans may provide for the avoidance of liens in accord with 11 U.S.C. § 522(f). Confirmation of the plan will establish the terms of lien avoidance and valuation.[20] A draft rule permits the debtor to obtain an order establishing that secured claims have been satisfied.[21] The debtor will be permitted to request such an order at any time after the lien is satisfied. A chapter 7, 12 or 13 case will be deemed fully administered and closed when the trustee has filed a final report and final account and certified that the estate was fully administered.[22]

Clearly, the goals of the Working Group are uniformity and clarity. By inviting comments, the Working Group has tried to avoid engaging in disputes about who has the "best" local plan form. Instead, the draft National Form is a collection of ideas from many local plans and is an attempt to incorporate many of the common denominators of chapter 13 practice. All stakeholders should review the form and draft rules and offer their assistance to the Working Group in the form of constructive comment. Suggestions and comments can be sent to **Troy McKenzie** and/or Hon. **Eugene Wedoff**. This is everyone's chance to influence the process.[23] abi

20 *Id.* at 176.
21 *Id.* at 176.
22 *Id.* at 176.
23 *Id.* at 187.

4.7.14 Draft

COMMITTEE NOTE

Official Form 113 is new and is the required plan form in all chapter 13 cases. See Bankruptcy Rule 3015. Alterations to the text of the form or the order of its provisions, except as permitted by the form itself, must comply with Bankruptcy Rule 9009. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced. Portions of the form provide multiple options for provisions of a debtor's plan, but some of those options may not be appropriate in a given debtor's situation or may not be allowed in the court presiding over the case. Debtors are advised to refer to applicable local rulings.

Part 1. This part sets out warnings to both debtors and creditors. For creditors, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 9 of the plan proposes a provision not included in, or contrary to, the Official Form, that nonstandard provision will be ineffective if the appropriate check box in Part 1 is not selected.

Part 2. This part states the proposed periodic plan payments, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments from each check, that should be indicated in § 2.1. If the debtor proposes to make payments according to different "steps," the amounts and intervals of those payments should also be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make regular payments to the trustee. If the debtor selects the option of making payments pursuant to a payroll deduction order, that selection serves as a request by the debtor for entry of the order. Whether to enter a payroll deduction order is determined by the court. See Code § 1325(c). If the debtor selects the option of making payments other than by direct payments to the trustee or by a payroll deduction order, the alternative method (*e.g.*, a designated third party electronic funds transfer program) must be specified.

Part 3. This part provides for the treatment of secured claims.

Section 3.1 provides for the treatment of claims under Code § 1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage amount listed on the creditor's proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a non-governmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Bankruptcy Rule 3002 contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does

not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for an interest rate other than the contract rate to be applied to payments on such a claim. If appropriate, a claim may be treated under § 3.1 instead of § 3.3.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). This section includes space for the calculation of the amount of the judicial lien or security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. See Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and consent to termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of trustee's fees and claims entitled to priority status. Section 4.1 provides that trustee's fees and all allowed priority claims (other than those domestic support obligations treated in § 4.5) will be paid in full. In § 4.2, the plan lists an estimate of the trustee's fees. Although the estimate may indicate whether the plan will be feasible, it does not affect the trustee's entitlement to fees as determined by statute. In § 4.3, the form requests the balance of attorney's fees owed. Additional details about payments of attorney's fees, including information about their timing and approval, are left to the requirements of local practice. In § 4.4, the plan calls for an estimated amount of priority claims. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in § 4.4. In § 4.5, the plan may propose to pay less than the full amount of a domestic support obligation that has been assigned to, or is owed to, a governmental unit, but not less than the amount that claim would have received in a chapter 7 liquidation.

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.2, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or also provide that a defined percentage of the total amount of unsecured claims will be paid. In § 5.4, the plan may provide for the separate classification of nonpriority unsecured claims (such as co-debtor claims) as permitted under Code § 1322(b)(1).

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part. If the plan proposes neither to assume nor reject an executory contract or unexpired lease, that treatment would have to be set forth as a nonstandard provision in Part 9.

Part 7. This part provides an order of distribution of payments under the plan. Other than the trustee's fees, the order of distribution is left to be completed by the debtor in keeping with the requirements of the Code. The debtor may instead elect to have the trustee direct the order of distribution.

Part 8. This part defines when property of the estate will revest in the debtor or debtors. One choice must be selected—upon plan confirmation, upon closing the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 9. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or are contrary to, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015.

Part 10. The plan must be signed by the attorney for the debtor or debtors. If the debtor or debtors are not represented by an attorney, they must sign the plan, but the signature of represented debtors is optional.

Debtor _____

United States Bankruptcy Court for the:_____ [Bankruptcy district] _____

Case number: _____ Chapter you are filing under: _____

❑ Check if this is an amended plan

Official Form 113

Chapter 13 Plan

12/15

Part 1: Notices

To Debtors: **This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district.**
In the following notice to creditors, you must check each box that applies.

To Creditors: **Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.**

You should read this plan carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance to you. *Boxes must be checked by debtor(s) if applicable.*

❑ **The plan seeks to limit the amount of a secured claim, as set out in Part 3, section 3.2, which may result in a partial payment or no payment at all to the secured creditor.**

❑ **The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, section 3.4.**

❑ **The plan sets out nonstandard provisions in Part 9.**

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

$ _____ per_____ for _____ months

[and $ _____ per_____ for _____ months.] *Insert additional lines if needed.*

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in Parts 3 through 6 of this plan.

2.2 Regular payments to the trustee will be made from future earnings in the following manner:

Check all that apply.

❑ Debtor(s) will make payments pursuant to a payroll deduction order.

❑ Debtor(s) will make payments directly to the trustee.

❑ Other (specify method of payment):_____.

2.3 Federal income tax refunds.

Check one.

❑ Debtor(s) will retain any federal tax refunds received during the plan term.

❑ Debtor(s) will supply the trustee with a copy of each federal tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all federal income tax refunds, other than earned income tax credits, received during the plan term.

❑ Debtor(s) will supply the trustee with federal tax returns filed during the plan term and will turn over to the trustee a portion of any federal income tax refunds received during the plan term as specified below.

_____

_____

2.4 Additional payments.

Check one.

- ❑ **None.** If *None* is checked, the rest of section 2.4 need not be completed or reproduced.
- ❑ Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

_____

_____

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is $ _____.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default.

Check one.

- ❑ **None.** If *None* is checked, the rest of section 3.1 need not be completed or reproduced.
- ❑ The debtor(s) will maintain the contractual installment payments on the claims listed below, with any changes required by the applicable contract, and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	**Collateral**	**Current installment payment** (including escrow)	**Amount of arrearage**	**Interest rate on arrearage** (if applicable)	**Monthly plan payment on arrearage**	**Estimated total payments by trustee**
_____	_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	_____%	$_____	$_____
_____	_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	_____%	$_____	$_____

Insert additional claims as needed.

3.2 Request for valuation of security and claim modification. *Check one.*

❑ **None.** If *None* is checked, the rest of section 3.2 need not be completed or reproduced.

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

❑ The debtor(s) request that the court determine the value of the secured claims listed below. For each non-governmental secured claim listed below, the debtor(s) state that the value of the secured claim should be as stated below in the column headed *Amount of secured* claim. For secured claims of governmental units, unless otherwise ordered by the court, the amounts listed in proofs of claim filed in accordance with the Bankruptcy Rules control over any contrary amounts listed below. For each listed secured claim, the controlling amount of the claim will be paid in full under the plan with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien until the earlier of:

(a) payment of the underlying debt determined under nonbankruptcy law, or

(b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor. See Bankruptcy Rule 3015.

Name of creditor	Estimated amount of creditor's total claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
_____	$_____	_____	$_____	$_____	$_____	___%	$_____	$_____
_____	$_____	_____	$_____	$_____	$_____	___%	$_____	$_____
_____	$_____	_____	$_____	$_____	$_____	___%	$_____	$_____

Insert additional claims as needed.

3.3 Secured claims excluded from 11 U.S.C. § 506.

Check one.

❑ **None.** If *None* is checked, the rest of section 3.3 need not be completed or reproduced.

❑ The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_____	_____	$_____	_____%	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____
_____	_____	$_____	_____%	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____

Insert additional claims as needed.

3.4 Lien avoidance.

Check one.

❑ **None.** If *None* is checked, the rest of section 3.4 need not be completed or reproduced.

The remainder of this paragraph will be effective only if the applicable box on Part 1 of this plan is checked.

❑ The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). A judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). *If more than one lien is to be avoided, provide the information separately for each lien.*

Information regarding judicial lien or security interest	**Calculation of lien avoidance**		**Treatment of remaining secured claim**
Name of creditor	a. Amount of lien	$_____	**Amount of secured claim after avoidance** (line a minus line f) $_____
_____	b. Amount of all other liens	$_____	
Collateral	c. Value of claimed exemptions	+ $_____	**Interest rate** (if applicable)
_____	d. Total of adding lines a, b, and c	$_____	_____ %
Lien identification (such as judgment date, date of lien recording, book and page number)	e. Value of debtor's interest in property	− $_____	**Monthly plan payment** $_____
_____ _____	f. Subtract line e from line d.	$_____	**Estimated total payments on secured claim** $_____

Extent of exemption impairment (*Check applicable box*):

❑ **Line f is equal to or greater than line a**. The entire lien is avoided. *(Do not complete the next column.)*

❑ **Line f is less than line a.** A portion of the lien is avoided. (*Complete the next column.)*

Insert additional claims as needed.

3.5 Surrender of collateral.

Check one.

❑ **None.** If *None* is checked, the rest of section 3.5 need not be completed or reproduced.

❑ The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	**Collateral**
_____	_____
_____	_____

Insert additional claims as needed.

Part 4: Treatment of Trustee's Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims other than those treated in section 4.5 will be paid in full without interest.

4.2 Trustee's fees

Trustee's fees are estimated to be _____% of plan payments; and during the plan term, they are estimated to total $_____.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be $_____.

4.4 Priority claims other than attorney's fees and those treated in section 4.5.

Check one.

- ❑ **None.** *If None* is checked, the rest of section 4.4 need not be completed or reproduced.
- ❑ The debtor estimates the total amount of other priority claims to be _____.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount.

Check one.

- ❑ **None**. If *None* is checked, the rest of section 4.5 need not be completed or reproduced.
- ❑ The allowed priority claims listed below are based on a domestic support obligation that has been assigned to or is owed to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4), but not less than the amount that would have been paid on such claim if the estate of the debtor were liquidated under chapter 7, see 11 U.S.C. § 1325(a)(4).

	Name of creditor	Amount of claim to be paid
a.	_____	$_____
c.	_____	$_____

Insert additional claims as needed.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 General

Nonpriority unsecured claims will be paid to the extent allowed as specified in this Part.

5.2 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

- ❑ The sum of $_____.
- ❑ _____% of the total amount of these claims.
- ❑ The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately $_____. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

5.3 Interest on allowed nonpriority unsecured claims not separately classified. *Check one.*

❑ **None.** If *None* is checked, the rest of section 5.3 need not be completed or reproduced.

❑ Interest on allowed nonpriority unsecured claims that are not separately classified will be paid at an annual percentage rate of ____ % under 11 U.S.C. §1325(a)(4), and is estimated to total $ _____.

5.4 Maintenance of payments and cure of any default on nonpriority unsecured claims. *Check one.*

❑ **None.** If *None* is checked, the rest of section 5.4 need not be completed or reproduced.

❑ The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. The allowed claim for the arrearage amount will be paid under the plan.

Name of creditor	Current installment payment	Estimated arrearage	Estimated total payments by trustee
_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____
_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____

Insert additional claims as needed.

5.5 Other separately classified nonpriority unsecured claims. *Check one.*

❑ **None.** If *None* is checked, the rest of section 5.5 need not be completed or reproduced.

❑ The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows:

Name of creditor	Basis for separate classification and treatment	Estimated amount to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	$_____	_____%	$_____
_____	_____	$_____	_____%	$_____

Insert additional claims as needed.

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. *Check one.*

❑ **None.** *If checked, the rest of section 6.1 need not be completed or reproduced.*

❑ **Assumed items.** The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Property description	Treatment (Refer to other plan section if applicable)	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	_____	_____ _____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____
_____	_____	_____ _____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____

Insert additional contracts or leases as needed.

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make the payments required in Parts 3 through 6 in the following order:

a. Trustee's fees

b. _____

c. _____

d. _____

e. _____

f. _____

g. _____

h. _____

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revest in the debtor(s) upon

Check the applicable box:

❑ Plan confirmation.

❑ Closing of the case.

❑ Other: _____.

Part 9: Nonstandard Plan Provisions

Under Bankruptcy Rule 3015(c), nonstandard provisions are required to be set forth below.

These plan provisions will be effective only if the applicable box in Part 1 of this plan is checked.

_____

_____

_____

_____

_____

Part 10: Signatures

✘ _____ Date_____

Signature of Attorney for Debtor(s)

Signature(s) of Debtor(s) (required if not represented by an attorney; otherwise optional)

✘ _____ Date_____

Signature(s) of Debtor(s)

✘ _____ Date_____

Signature(s) of Debtor(s)

Chapter 13 Plan Exhibit: Estimated Amounts of Trustee Payments

The trustee will make the following estimated payments on allowed claims in the order set forth in section 7.1:

a.	**Maintenance and cure payments on secured claims** (*Part 3, section 3.1 total*):		$_____
b.	**Modified secured claims** (*Part 3, section 3.2 total*):		$_____
c.	**Secured claims excluded from 11 U.S.C. § 506** (*Part 3, section 3.3 total*):		$_____
d.	**Judicial liens or security interests partially avoided** (*Part 3, section 3.4 total*):		$_____
e.	**Administrative and other priority claims** (*Part 4 total*):		$_____
f.	**Nonpriority unsecured claims** (*Part 5, section 5.2 total*):		$_____
g.	**Interest on allowed unsecured claims** (*Part 5, section 5.3 total*)		$_____
h.	**Maintenance and cure payments on unsecured claims** (*Part 5, section 5.4 total*)		$_____
i.	**Separately classified unsecured claims** (*Part 5, section 5.5 total*)		$_____
j.	**Arrearage payments on executory contracts and unexpired leases** *(Part 6, section 6.1 total)*	+	$_____

Total of lines a through j..... $_____