



AMERICAN
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INSTITUTE

2020 Southeast Virtual Bankruptcy Workshop

Consumer Panel: Hot Topics & More

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Hot Topics in Consumer Cases – The CARES Act

- Passed on March 27, 2020
- Section 1325(b)(2) amended to exclude, from disposable income, payments made under federal law related to the emergency
- Payments received pursuant to federal law related to the emergency are also excluded when calculating “current monthly income”
- Section 1329(d) added, which provides that “confirmed” plans may be extended to 7 years, after notice and a hearing, if debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease (2019 COVID-19) pandemic” – this provision may only be exercised for 1 year (cannot take advantage of this after March 27, 2021)
- Student loan payments may be deferred from March 13, 2020 – September 30, 2020, and the interest during this period is waived.

AMERICAN BANKRUPTCY INSTITUTE

SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

JULY 24, 2020

The banner features a dark teal background on the left with the American Bankruptcy Institute logo and the workshop title in white. The right side has a lighter teal background with a faint image of a hand pointing at a screen and various circular icons representing legal and financial concepts.

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SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

Are Medical Bills Consumer Debts?

Section 101(8): “The term ‘consumer debt’ means debt incurred by an individual primarily for a personal, family, or household purpose.”

The slide features a light gray background with a white keyboard and a black stethoscope in the upper right corner. The text is centered and presented in a clean, sans-serif font.



Some Examples:

- **Tax debts.** Most courts have held that taxes are not consumer debts within the meaning of the Bankruptcy Code. IRS v. Westberry (In re Westberry), 215 F.3d 589, 592 (6th Cir. 2000)
- **Negligence/tort liabilities** are not consumer debts. In re Peterson, 524 B.R. 808, 812 (Bankr. S.D. Ind. 2015) (collecting cases).
- **Travel charges** incurred on credit card in connection with debtor’s business are not consumer debts. Compass Bank v. Meyer (In re Meyer), 296 B.R. 849 (Bankr. N.D. Ala. 2003)
- **Home mortgage** debt is a consumer debt unless the proceeds of the loan are used for business purposes. Zolg v. Kelly (In re Kelly), 841 F.2d 908, 18 C.B.C.2d 560 (9th Cir. 1988)



- 547(c)(9) – preference amounts
- 707(b) – dismissal for abuse
- 1301 – codebtor stay.

Why does it matter?



Medical Bills are Consumer Debts.

In re Zgonina, 2019 Bankr. LEXIS 3571 *; 68 Bankr. Ct. Dec. 8; 2019 WL 6170776

Debtor argued: “involuntary,” medically necessary, not elective

But... the Court found that receiving medical treatments and services **is personal** and provides a direct traceable benefit to a debtor or the debtor's dependents

The Court looked to Truth in Lending Act and the Fair Debt Collection Practices Act application to the collection of medical debts



Emergency Medical Bills are NOT Consumer Debts

In re Sijan, 19-53347 (Bankr. S.D. Ohio Feb. 12, 2020).

Court focused on “intent” – were the bills voluntarily incurred?

Routine doctor’s appointments and elective procedures would be different

Limited holding to emergency medical debts

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Should an exempt asset be included in the calculation of “projected disposable income” in chapter 13?



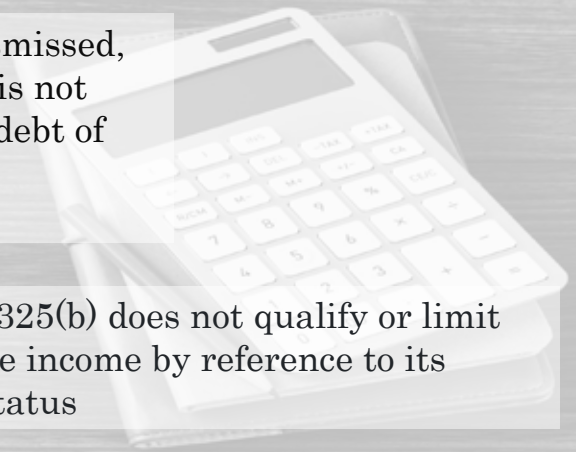
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Can You Reconcile 522(c) with 1325(b)?

Section 522(c): “[u]nless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case...”

Section 1325(b) does not qualify or limit disposable income by reference to its exempt status





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DEBTOR ARGUED:

Exempt Property should be included in the Chapter 13 Debtor's disposable income.

In re Adamson, 19-10304 (Bankr. D. Colo. May 12, 2020).

Trustee sought the inclusion of the Debtor's exempt personal injury recovery in plan funding

- **the plain language of 11 U.S.C. § 522(c) expressly shields exempt assets from pre-petition creditors**
- **a debtor must pay unsecured creditors the value of his non-exempt assets**
- **a personal injury recovery is not “disposable income” as that term is defined in 11 U.S.C. § 1325(b)(2), therefore it cannot be “projected disposable income” under 11 U.S.C. § 1325(b)(1).**



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In re Adamson, 19-10304 (Bankr. D. Colo. May 12, 2020).

The Court held that the net proceeds from the personal injury recovery should generally be included in the calculation of the Debtor's projected disposable income, less some portion of the recovery reasonably necessary for the support of the Debtor.



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*Exempt Property
should not be
included in
Chapter 13 debtor's
disposable income.*

- In re Daniels, 2018 Bankr. LEXIS 3029 (Bankr. E.D. Va. Oct. 1, 2018). The Court found that the Debtors could retain and not apply to the plan the proceeds from the sale of their exempt home.
- In re Daniels, 2013 WL 365107 (Bankr. E.D. N.C., Jan. 29, 2013) (case no. 8:11-bk-8830). A postpetition personal injury settlement received by the Chapter 13 debtor husband, which he successfully exempted, was not included in the debtors' disposable income and therefore could not provide the basis for the Chapter 13 trustee's motion to modify the debtors' confirmed plan.

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July 24, 2020

Plan Confirmation – Good Faith, Exempt Assets and Excluded Income

The CARES Act and Consumer Bankruptcies

Kelly M. Barnhart
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I. Hot Topic: Good Faith, Confirmation, Exempt and Excluded Assets

The requirement of good faith when proposing a chapter 13 plan for confirmation, as set forth in § 1325(a)(3), is a topic that has resulted in legions of written material. One of the most contested considerations of whether a plan is proposed in good faith is whether this test has an economic aspect to it, in other words, whether courts are to consider how much unsecured creditors are to receive under the proposed plan in determining the existence or lack of good faith.

At least one of the co-panelists has discussed whether debtors are required to include exempt assets when calculating projected disposable income for purposes of § 1325(b). Tied to this conversation, however, is whether, even if chapter 13 debtors are excused from including exempt assets when determining their projected disposable income, a failure to pledge such assets may result in denial of confirmation of proposed plans due to a lack of good faith due to the exclusion of such assets.

A. Social Security Benefits/Income

Although a chapter 7 case, *In re Meehean*, 611 B.R. 574 (Bankr. E.D. Mich. 2020), has an in-depth discussion of cases discussing the interplay between social security income and confirmation of chapter 13 plans, focusing on the good faith test. In *Meehean*, the Court determined that chapter 7 debtors were not entitled to receive a discharge since they could fund a chapter 13 plan with their social security income, which would enable them to result in their maintaining their mortgage payments, vehicle expenses, and repay all of their unsecured debt, in full, in less than four years. While the debtors argued that the Court could not find a lack of good faith based upon their failure to pledge their social security income for funding a plan, as a matter of law, the Court rejected this argument, concluding that the Sixth Circuit had not definitively ruled on the matter. *Id.* at 587-88. One of the most often cited cases in support of the premise that a debtor may need to pledge social security income in order to satisfy the good faith test is *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007). In this case, the Court concluded that the good faith analysis did include a consideration of whether a debtor pledged social security benefits, and if a debtor failed to do so when the effect of this income results in a surplus and the debtor is not committing it for the benefit of unsecured creditors. *Upton*, 363 B.R. at 536; *see also In re Bartelini*, 434 B.R. 285 (Bankr. N.D.N.Y. 2010) (concluding that a failure to pledge social security income may be considered, along with other factors, in determining good faith as required by § 1325(a)(3)). Other courts have concluded that chapter 13 debtors must pledge their social security income to their chapter 13 plans. *See in re Hermann*, 2011 Bankr. LEXIS 578, 2011 WL 576753 (Bankr. D.S.C. Feb. 9, 2011)(including social security income into calculation resulted in a surplus income not being made available for benefit of creditors and there was also, perhaps importantly, a failure to disclose the social security income by the debtor); *Mains v. Foley*, 2012 U.S. Dist. LEXIS 23802, 2012 WL 612006 (W.D. Mich. Feb. 24, 2012) (chapter 13 debtors held back 75% of their of their net monthly income, demonstrating a lack of good faith; court found that nothing in 42 U.S.C. § 407 precluded consideration of pledging social security income when determining good faith).

Not surprisingly, other courts have reached the opposite conclusion, finding that failure to pledge social security income/benefits to fund chapter 13 plans cannot be the basis for finding a lack of good faith pursuant to §1325(a)(3). One of the most cited cases on this point is *In re Barfknecht*, 378 B.R. 154 (Bankr. W.D. Tex. 2007). In this case, as a result of the debtors not proposing to pledge social security income as funding for the plan, the chapter 13 trustee objected to confirmation of the plan, alleging a lack of good faith on the part of the debtors. In reaching its conclusion, the Court questioned whether a debtor is proposing to retain some or all of social security benefits could ever be a factor considered in determining good faith for purposes of §1325(a)(3) since the enactment of BAPCPA resulted in an exclusion of those benefits from the calculation of debtors' income. Similarly, the Bankruptcy Court for the Eastern District of Louisiana reached the same conclusion in *In re Ragos*, 466 B.R. 803 (Bankr. E.D. LA. 2011). In this case, the debtors proposed to pledge a portion of their social security income to repayment of obligations owed to their unsecured creditors and the trustee objected to confirmation, arguing that the failure to pledge all of that income demonstrated a lack of good faith on the debtors' part. In *Ragos*, the Court noted that while exclusion of the benefits from funds available to pay to creditors would not constitute bad faith per se, and would not, by itself be an indication of a lack of good faith, it may be one factor in determining the totality of the circumstances consideration of good faith versus bad faith. *Ragos*, 466 B.R. at 812-13. The Fourth Circuit, in *Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013), explained in a footnote "[w]e note, however, that the exclusion of Social Security income from disposable income, as required by statute, by itself, does not constitute bad faith." *Ranta*, 721 F.3d at 253-54 (citing *Ragos*, 700 F.3d at 227). As it relates to social security income and good faith, it appears that while there is no per se rule, retention of social security income alone may not be a basis for a finding of a lack of good faith and denying confirmation pursuant to § 1325(a)(3), due to Congress's purposeful exclusion of this type of income from calculating debtors' current monthly income.

The following is a list of other cases that have concluded it is not bad faith to retain social security income or have concluded that the social security income contribution is not an element of the good faith test of § 1325(a)(3):

- *In re Alexander*, 344 B.R. 742 (Bankr. E.D. N.C. 2006);
- *Fink v. Thompson (In re Thompson)*, 439 B.R. 140 (8th Cir. BAP 2010);
- *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314 (10th Cir. 2012);
- *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220 (5th Cir. 2012)
- *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013);
- *Vandenbosh v. Waage (In re Vandenbosh)*, 459 B.R. 140 (M.D. Fla. 2011);
- *In re Mihal*, 2015 Bankr. LEXIS 1683 (Bankr. E.D. Mich. May 6, 2015);
- *In re Manzo*, 577 B.R. 759 (N.D. Ill. 2017);

The following is a list of additional cases that have concluded social security income may be considered as part of the good faith determination:

- *In re Ward*, 359 B.R. 741 (Bankr. W.D. Mo. 2007);
- *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007);

- *In re Allawas*, 2008 Bankr. LEXIS 588, 2008 WL 6069662 (Bankr. D.S.C. 2008);
- *In re Bartelini*, 434 B.R. 285 (Bankr. N.D.N.Y. 2010);
- *In re Thomas*, 443 B.R. 213 (Bankr. N.D. Ga. 2010);
- *In re Mains*, 451 B.R. 428 (Bankr. W.D. Mich. 2011), *aff'd sb nom.*, *Mains v. Foley*, 2012 U.S. Dist. LEXIS 23802, 2012 WL 612006 (W.D. Mich. 2012);

B. Charitable Donations

Another allowable exclusion from the calculation of disposable income that may yet result in a finding of a lack of good faith and doom confirmation of proposed chapter 13 plans is that of a charitable donation. For instance, in *In re Wade*, 612 B.R. 70 (Bankr. E.D.N.C. 2019), the chapter 13 debtors, post-petition, began tithing to the church where one of the debtors was employed on a part-time basis. The trustee objected to confirmation and the Court conducted an evidentiary hearing on the matter. As part of the testimony elicited from the debtors, it was clear that they had not made charitable donations or tithings to the Church, for at least 2 years, due to their inability to afford to do so, and they had not tithed ten percent of their income for at least 10 years. The proposed budget in support of the plan proposed to tithe \$756/month, with disposable income at approximately \$2,000. The plan proposed to pay approximately 39% to their unsecured creditors but would leave approximately \$100,000 in general unsecured debt left unpaid. The Bankruptcy Court concluded that given the circumstances of the case, including the fact that the debtors had not contributed regularly pre-petition, the plan that proposed to contribute \$756.00/month to the Church to the detriment of the unsecured creditors, was not proposed in good faith. *Wade*, 612 B.R. at 75. It stated that “[t]he Debtors should not be permitted to pursue their salvation on the backs of their unsecured creditors.” *Id.* Although Congress chose to exclude charitable donations and contributions from the calculation of disposable income for purposes of § 1325(b)(2), such donations and contributions may still be considered when determining whether a chapter 13 debtor has met the requirements of § 1325(a)(3) and proposed a plan in good faith and is a factor when looking at the totality of the circumstances in making such a determination. *Id.* (citing *In re Evje-Cavanagh*, 250 B.R. 107, 114 (B.A.P. 9th Cir. 2000)). As is the case with social security income, whether a debtor makes religious and charitable contributions will not be per se an indication of bad faith resulting in a denial of confirmation pursuant to § 1325(a)(3), but they are also not automatically acceptable expenses simply because they are not considered in calculating disposable income. Debtors and creditors alike should take heed that barring precedent on the issue within a jurisdiction, they should be prepared to convince a court, through evidence of their position, when unsecured creditors are not being paid in full. If counsel represents a debtor who wishes to make such contributions, counsel should gather evidence to establish the history of contributions, the amount of such contributions and the amount as compared to the amount to be paid to the unsecured creditors.

Other cases discussing good faith and charitable contributions, post-BAPCPA, include:

- *In re Petty*, 338 B.R. 805 (Bankr. E.D. Ark. 2006);
- *In re Lott*, 2001 Bankr. 1983, 2011 WL 1981740 (Bankr. N.D. Ala. 2011);
- *In re Styerwalt*, 610 B.R. 356 (Bankr. D. Colo. 2019).

C. Retirement Contributions

In a similar vein, courts have also split on whether chapter 13 debtors may make “substantial” post-petition retirement contributions while offering little to no recovery to their unsecured creditors. It is clear that Congress, with the enactment of BAPCPA intended to allow contributions to ERISA-qualified employee benefit or deferred compensation plans for purposes of calculating disposable income as determined by § 1325(b)(2), however courts struggle with whether making such contributions result in a lack of good faith on the part of the debtors. However, such contributions alone should not be a basis for finding a lack of good faith for purposes of § 1325(a)(2). When applying the totality of the circumstances test, it should be just one factor in determining good faith. There will be situations where a lack of good faith may be demonstrated involving voluntary post-petition contributions to a retirement plan, when the contributions begin post-petition. *See, e.g., In re Jensen*, 496 B.R. 615, 623 (Bankr. D. Utah 2013) (holding that a debtor’s retirement contributions are subject to a good faith inquiry); *In re Rodriguez*, 407 B.R. 275, 285-86 (Bankr. D.N.M. 2013). In reviewing the caselaw on this point, it is clear that key to the consideration of whether making such retirement contributions may be considered bad faith, is when such contributions began and how much they are in relation to the proposed distribution to unsecured creditors under the proposed chapter 13 plan. If it appears a debtor is shielding his income from the claims of creditors, it is likely that a court may find the debtor lacks good faith in the proposing of the plan. If, on the other hand, the contributions have been made historically, and the amounts are proportionate to the sums being paid to unsecured creditors, it is likely that the good faith test of § 1325(a)(3) will be satisfied.

Alternatively, some courts have concluded that since retirement contributions are excluded from the calculation of disposable income then making such contributions may not be viewed as bad faith for purposes of § 1325(a)(3). *In re Mati*, 390 B.R. 11 (Bankr. D. Mass. 2008). This is so, even if the debtor did not make contributions to a retirement plan pre-petition. *See Baxter v. Johnson (In re Johnson)*, 346 B.R. 256 (Bankr. S.D. Ga. 2006); *In re Gallichio*, 2019 Bankr. LEXIS 110, 2019 WL 171468 (Bankr. D.N.J. Jan. 9, 2019); *In re Cantu*, 563 B.R. 565 (Bankr. E.D. Va. 2016), *aff’d Gorman v. Cantu*, 713 Fed. Appx. 200 (4th Cir. 2017) (affirmed on good faith issue).

Whether a chapter 13 debtor is attempting to (a) exclude social security benefits from funding of the plan, (b) exclude funds in order to make charitable donations, or (c) make retirement contributions, the debtor should be prepared to present evidence as to good faith since the debtor bears the burden of proof on all elements of §1325 in pursuit of confirmation of a plan. If the debtor’s plan payments to creditors are significantly

lower than the money being held back for any purpose, the debtor may have an uphill battle convincing a bankruptcy court that the plan has been proposed in good faith, although such showing is not impossible. If the debtor's plan appears to offend the purpose and spirit of chapter 13, it is unlikely to be confirmed. If, on the other hand, it appears that the debtor is balancing the interests and proposing a reasonable distribution to unsecured creditors, the proposed plan is likely to be confirmed. Ultimately, it will come down to a balance of the interests of the debtor and the creditors.

In addition to the cases discussed in the section above that have considered retirement contributions as part of the good faith analysis of §1325(a)(3) include:

- *In re Shelton*, 370 B.R. 861 (Bankr. N.D. Ga. 2007);
- *In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014);
- *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013)

Additional cases that hold the debtor is not entitled to any deduction for voluntary retirement contributions, whether or not he was making them pre-petition, if any party objects, include:

- *In re Prigge*, 441 B.R. 667 (Bankr. D. Month. 2010);
- *In re McCullers*, 451 B.R. 498 (Bankr. N.D. Cal. 2011);
- *In re Seafort*, 669 F.3d 662 (6th Cir. 2012);
- *Parks v. Drummond (In re Parks)*, 475 B.R. 703 (9th Cir. BAP 2012)

Cases that hold a debtor may make voluntary retirement contributions as long as there is a history of such contributions and may take a deduction for same, include:

- *In re Noll*, 2010 Bankr. LEXIS 4868, 2010 WL 533916 (Bankr. E.D. Wis. Dec. 21, 2010);
- *Miner v. Johns*, 589 B.R. 51 (W.D. La. 2018)

Finally, some courts have held that a debtor may make post-petition retirement contributions, as long as consistent with pre-petition contributions AND the plan was filed in good faith:

- *In re Read*, 515 B.R. 586 (Bankr. E.D. Wis. 2014);
- *In re Garza*, 575 B.R. 736 (Bankr. S.D. Tex. 2017);
- *In re Thompson*, 2018 Bankr. LEXIS 555, 2018 WL 1320171 (Bankr. S.D. Ala. Feb. 28, 2018)

II. Hot Topic - COVID-19/CARES Act & Consumer Bankruptcies

On March 27, 2020 the Coronavirus Aid, Relief and Economic Security Act (Pub.L. 116-136) (the “**CARES Act**”) was signed into law in an effort to deal with the economic impact of the pandemic. While much publicity has been given to the relief this Act gave to small businesses (think PPP), it also included some relief for individuals,

including stimulus checks, unemployment compensation, forbearance of some loan obligations and relaxed standards for retirement withdrawals. It also included relief for those individuals either considering whether to file and those who already filed.

As part of the CARES Act, Congress amended § 1325(b)(2) exclude from “disposable income” payments made under Federal law related to the national emergency declared by the President with respect to COVID-19, providing as follows:

- (b)
- (2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19), child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

In addition, the CARES Act provides that any coronavirus-related payments, such as the stimulus funds, are not to be included in calculating “current monthly income”. Whether it also excludes the additional benefits from unemployment is not yet clear, although since they are in a similar vein, it is foreseeable that debtors will argue this point.

For individuals already in bankruptcy, and who have confirmed plans, the CARES Act created § 1329(d), which provides that confirmed plans may be extended to 7 years, after notice and a hearing, if a debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease (2019 (COVID-19) pandemic”. This subsection provides that:

- (1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if—
 - (A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; and
 - (B) the modification is approved after notice and a hearing.
- (2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due.
- (3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) [11 USCS §§ 1322(a), (b), 1323(c) and 1325(a)] shall apply to any modification under paragraph (1).

This provision, however, may only be relied upon for 1 year and therefore the chance to extend the plan to seven years ends after March 27, 2021. If the debtor does not have a confirmed plan at the time of the enactment of the CARES Act, however, the debtor may not seek to extend beyond a 60-month term. *See, e.g., In re Errico*, 2020 Bankr. LEXIS 1625, *11, n.50 (Bankr. M.D. Fla. June 22, 2020).

Currently, it is unclear what courts may consider a “material financial hardship” sufficient to justify an extension of the plan term or what proof will need to be presented to establish an “indirect” hardship, for instance. It seems fair to say, however, that courts will allow most debtors to meet the standard due to the widespread and far-reaching effects of the pandemic. So far, chapter 13 trustees have consented to first and second moratoriums on plan payments and have been generous with the time period to bring cases current that were in default immediately prior to the outbreak of the coronavirus and bankruptcy courts have facilitated such suspensions and workouts.

In addition, the CARES Act provided that student loan payments were deferred from March 13, 2020 through September 30, 2020 and the interest during that time period has been waived. This is especially good news for those debtors making these payments directly pursuant to the terms of their confirmed plan.

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Plan Confirmation – Good Faith, Exempt Assets and Excluded Income

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At least one of the co-panelists has discussed whether debtors are required to include exempt assets when calculating projected disposable income for purposes of § 1325(b). Tied to this conversation, however, is whether, even if chapter 13 debtors are excused from including exempt assets when determining their projected disposable income, a failure to pledge such assets may result in denial of confirmation of proposed plans due to a lack of good faith due to the exclusion of such assets.

A. Social Security Benefits/Income

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Not surprisingly, other courts have reached the opposite conclusion, finding that failure to pledge social security income/benefits to fund chapter 13 plans cannot be the basis for finding a lack of good faith pursuant to §1325(a)(3). One of the most cited cases on this point is *In re Barfknecht*, 378 B.R. 154 (Bankr. W.D. Tex. 2007). In this case, as a result of the debtors not proposing to pledge social security income as funding for the plan, the chapter 13 trustee objected to confirmation of the plan, alleging a lack of good faith on the part of the debtors. In reaching its conclusion, the Court questioned whether a debtor is proposing to retain some or all of social security benefits could ever be a factor considered in determining good faith for purposes of §1325(a)(3) since the enactment of BAPCPA resulted in an exclusion of those benefits from the calculation of debtors' income. Similarly, the Bankruptcy Court for the Eastern District of Louisiana reached the same conclusion in *In re Ragos*, 466 B.R. 803 (Bankr. E.D. LA. 2011). In this case, the debtors proposed to pledge a portion of their social security income to repayment of obligations owed to their unsecured creditors and the trustee objected to confirmation, arguing that the failure to pledge all of that income demonstrated a lack of good faith on the debtors' part. In *Ragos*, the Court noted that while exclusion of the benefits from funds available to pay to creditors would not constitute bad faith per se, and would not, by itself be an indication of a lack of good faith, it may be one factor in determining the totality of the circumstances consideration of good faith versus bad faith. *Ragos*, 466 B.R. at 812-13. The Fourth Circuit, in *Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013), explained in a footnote "[w]e note, however, that the exclusion of Social Security income from disposable income, as required by statute, by itself, does not constitute bad faith." *Ranta*, 721 F.3d at 253-54 (citing *Ragos*, 700 F.3d at 227). As it relates to social security income and good faith, it appears that while there is no per se rule, retention of social security income alone may not be a basis for a finding of a lack of good faith and denying confirmation pursuant to § 1325(a)(3), due to Congress's purposeful exclusion of this type of income from calculating debtors' current monthly income.

The following is a list of other cases that have concluded it is not bad faith to retain social security income or have concluded that the social security income contribution is not an element of the good faith test of § 1325(a)(3):

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- *Fink v. Thompson (In re Thompson)*, 439 B.R. 140 (8th Cir. BAP 2010);
- *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314 (10th Cir. 2012);
- *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220 (5th Cir. 2012)
- *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013);
- *Vandenbosh v. Waage (In re Vandenbosh)*, 459 B.R. 140 (M.D. Fla. 2011);
- *In re Mihal*, 2015 Bankr. LEXIS 1683 (Bankr. E.D. Mich. May 6, 2015);
- *In re Manzo*, 577 B.R. 759 (N.D. Ill. 2017);

The following is a list of additional cases that have concluded social security income may be considered as part of the good faith determination:

- *In re Ward*, 359 B.R. 741 (Bankr. W.D. Mo. 2007);
- *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007);

- *In re Allawas*, 2008 Bankr. LEXIS 588, 2008 WL 6069662 (Bankr. D.S.C. 2008);
- *In re Bartelini*, 434 B.R. 285 (Bankr. N.D.N.Y. 2010);
- *In re Thomas*, 443 B.R. 213 (Bankr. N.D. Ga. 2010);
- *In re Mains*, 451 B.R. 428 (Bankr. W.D. Mich. 2011), *aff'd sb nom.*, *Mains v. Foley*, 2012 U.S. Dist. LEXIS 23802, 2012 WL 612006 (W.D. Mich. 2012);

B. Charitable Donations

Another allowable exclusion from the calculation of disposable income that may yet result in a finding of a lack of good faith and doom confirmation of proposed chapter 13 plans is that of a charitable donation. For instance, in *In re Wade*, 612 B.R. 70 (Bankr. E.D.N.C. 2019), the chapter 13 debtors, post-petition, began tithing to the church where one of the debtors was employed on a part-time basis. The trustee objected to confirmation and the Court conducted an evidentiary hearing on the matter. As part of the testimony elicited from the debtors, it was clear that they had not made charitable donations or tithings to the Church, for at least 2 years, due to their inability to afford to do so, and they had not tithed ten percent of their income for at least 10 years. The proposed budget in support of the plan proposed to tithe \$756/month, with disposable income at approximately \$2,000. The plan proposed to pay approximately 39% to their unsecured creditors but would leave approximately \$100,000 in general unsecured debt left unpaid. The Bankruptcy Court concluded that given the circumstances of the case, including the fact that the debtors had not contributed regularly pre-petition, the plan that proposed to contribute \$756.00/month to the Church to the detriment of the unsecured creditors, was not proposed in good faith. *Wade*, 612 B.R. at 75. It stated that “[t]he Debtors should not be permitted to pursue their salvation on the backs of their unsecured creditors.” *Id.* Although Congress chose to exclude charitable donations and contributions from the calculation of disposable income for purposes of § 1325(b)(2), such donations and contributions may still be considered when determining whether a chapter 13 debtor has met the requirements of § 1325(a)(3) and proposed a plan in good faith and is a factor when looking at the totality of the circumstances in making such a determination. *Id.* (citing *In re Evje-Cavanagh*, 250 B.R. 107, 114 (B.A.P. 9th Cir. 2000)). As is the case with social security income, whether a debtor makes religious and charitable contributions will not be per se an indication of bad faith resulting in a denial of confirmation pursuant to § 1325(a)(3), but they are also not automatically acceptable expenses simply because they are not considered in calculating disposable income. Debtors and creditors alike should take heed that barring precedent on the issue within a jurisdiction, they should be prepared to convince a court, through evidence of their position, when unsecured creditors are not being paid in full. If counsel represents a debtor who wishes to make such contributions, counsel should gather evidence to establish the history of contributions, the amount of such contributions and the amount as compared to the amount to be paid to the unsecured creditors.

Other cases discussing good faith and charitable contributions, post-BAPCPA, include:

- *In re Petty*, 338 B.R. 805 (Bankr. E.D. Ark. 2006);
- *In re Lott*, 2001 Bankr. 1983, 2011 WL 1981740 (Bankr. N.D. Ala. 2011);
- *In re Styerwalt*, 610 B.R. 356 (Bankr. D. Colo. 2019).

C. Retirement Contributions

In a similar vein, courts have also split on whether chapter 13 debtors may make “substantial” post-petition retirement contributions while offering little to no recovery to their unsecured creditors. It is clear that Congress, with the enactment of BAPCPA intended to allow contributions to ERISA-qualified employee benefit or deferred compensation plans for purposes of calculating disposable income as determined by § 1325(b)(2), however courts struggle with whether making such contributions result in a lack of good faith on the part of the debtors. However, such contributions alone should not be a basis for finding a lack of good faith for purposes of § 1325(a)(2). When applying the totality of the circumstances test, it should be just one factor in determining good faith. There will be situations where a lack of good faith may be demonstrated involving voluntary post-petition contributions to a retirement plan, when the contributions begin post-petition. *See, e.g., In re Jensen*, 496 B.R. 615, 623 (Bankr. D. Utah 2013) (holding that a debtor’s retirement contributions are subject to a good faith inquiry); *In re Rodriguez*, 407 B.R. 275, 285-86 (Bankr. D.N.M. 2013). In reviewing the caselaw on this point, it is clear that key to the consideration of whether making such retirement contributions may be considered bad faith, is when such contributions began and how much they are in relation to the proposed distribution to unsecured creditors under the proposed chapter 13 plan. If it appears a debtor is shielding his income from the claims of creditors, it is likely that a court may find the debtor lacks good faith in the proposing of the plan. If, on the other hand, the contributions have been made historically, and the amounts are proportionate to the sums being paid to unsecured creditors, it is likely that the good faith test of § 1325(a)(3) will be satisfied.

Alternatively, some courts have concluded that since retirement contributions are excluded from the calculation of disposable income then making such contributions may not be viewed as bad faith for purposes of § 1325(a)(3). *In re Mati*, 390 B.R. 11 (Bankr. D. Mass. 2008). This is so, even if the debtor did not make contributions to a retirement plan pre-petition. *See Baxter v. Johnson (In re Johnson)*, 346 B.R. 256 (Bankr. S.D. Ga. 2006); *In re Gallichio*, 2019 Bankr. LEXIS 110, 2019 WL 171468 (Bankr. D.N.J. Jan. 9, 2019); *In re Cantu*, 563 B.R. 565 (Bankr. E.D. Va. 2016), *aff’d Gorman v. Cantu*, 713 Fed. Appx. 200 (4th Cir. 2017) (affirmed on good faith issue).

Whether a chapter 13 debtor is attempting to (a) exclude social security benefits from funding of the plan, (b) exclude funds in order to make charitable donations, or (c) make retirement contributions, the debtor should be prepared to present evidence as to good faith since the debtor bears the burden of proof on all elements of §1325 in pursuit of confirmation of a plan. If the debtor’s plan payments to creditors are significantly

lower than the money being held back for any purpose, the debtor may have an uphill battle convincing a bankruptcy court that the plan has been proposed in good faith, although such showing is not impossible. If the debtor's plan appears to offend the purpose and spirit of chapter 13, it is unlikely to be confirmed. If, on the other hand, it appears that the debtor is balancing the interests and proposing a reasonable distribution to unsecured creditors, the proposed plan is likely to be confirmed. Ultimately, it will come down to a balance of the interests of the debtor and the creditors.

In addition to the cases discussed in the section above that have considered retirement contributions as part of the good faith analysis of §1325(a)(3) include:

- *In re Shelton*, 370 B.R. 861 (Bankr. N.D. Ga. 2007);
- *In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014);
- *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013)

Additional cases that hold the debtor is not entitled to any deduction for voluntary retirement contributions, whether or not he was making them pre-petition, if any party objects, include:

- *In re Prigge*, 441 B.R. 667 (Bankr. D. Month. 2010);
- *In re McCullers*, 451 B.R. 498 (Bankr. N.D. Cal. 2011);
- *In re Seafort*, 669 F.3d 662 (6th Cir. 2012);
- *Parks v. Drummond (In re Parks)*, 475 B.R. 703 (9th Cir. BAP 2012)

Cases that hold a debtor may make voluntary retirement contributions as long as there is a history of such contributions and may take a deduction for same, include:

- *In re Noll*, 2010 Bankr. LEXIS 4868, 2010 WL 533916 (Bankr. E.D. Wis. Dec. 21, 2010);
- *Miner v. Johns*, 589 B.R. 51 (W.D. La. 2018)

Finally, some courts have held that a debtor may make post-petition retirement contributions, as long as consistent with pre-petition contributions AND the plan was filed in good faith:

- *In re Read*, 515 B.R. 586 (Bankr. E.D. Wis. 2014);
- *In re Garza*, 575 B.R. 736 (Bankr. S.D. Tex. 2017);
- *In re Thompson*, 2018 Bankr. LEXIS 555, 2018 WL 1320171 (Bankr. S.D. Ala. Feb. 28, 2018)

II. Hot Topic - COVID-19/CARES Act & Consumer Bankruptcies

On March 27, 2020 the Coronavirus Aid, Relief and Economic Security Act (Pub.L. 116-136) (the “**CARES Act**”) was signed into law in an effort to deal with the economic impact of the pandemic. While much publicity has been given to the relief this Act gave to small businesses (think PPP), it also included some relief for individuals,

including stimulus checks, unemployment compensation, forbearance of some loan obligations and relaxed standards for retirement withdrawals. It also included relief for those individuals either considering whether to file and those who already filed.

As part of the CARES Act, Congress amended § 1325(b)(2) exclude from “disposable income” payments made under Federal law related to the national emergency declared by the President with respect to COVID-19, providing as follows:

- (b)
- (2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19), child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

In addition, the CARES Act provides that any coronavirus-related payments, such as the stimulus funds, are not to be included in calculating “current monthly income”. Whether it also excludes the additional benefits from unemployment is not yet clear, although since they are in a similar vein, it is foreseeable that debtors will argue this point.

For individuals already in bankruptcy, and who have confirmed plans, the CARES Act created § 1329(d), which provides that confirmed plans may be extended to 7 years, after notice and a hearing, if a debtor “is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease (2019 (COVID-19) pandemic”. This subsection provides that:

- (1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if—
- (A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; and
 - (B) the modification is approved after notice and a hearing.
- (2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due.
- (3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) [11 USCS §§ 1322(a), (b), 1323(c) and 1325(a)] shall apply to any modification under paragraph (1).

This provision, however, may only be relied upon for 1 year and therefore the chance to extend the plan to seven years ends after March 27, 2021. If the debtor does not have a confirmed plan at the time of the enactment of the CARES Act, however, the debtor may not seek to extend beyond a 60-month term. *See, e.g., In re Errico*, 2020 Bankr. LEXIS 1625, *11, n.50 (Bankr. M.D. Fla. June 22, 2020).

Currently, it is unclear what courts may consider a “material financial hardship” sufficient to justify an extension of the plan term or what proof will need to be presented to establish an “indirect” hardship, for instance. It seems fair to say, however, that courts will allow most debtors to meet the standard due to the widespread and far-reaching effects of the pandemic. So far, chapter 13 trustees have consented to first and second moratoriums on plan payments and have been generous with the time period to bring cases current that were in default immediately prior to the outbreak of the coronavirus and bankruptcy courts have facilitated such suspensions and workouts.

In addition, the CARES Act provided that student loan payments were deferred from March 13, 2020 through September 30, 2020 and the interest during that time period has been waived. This is especially good news for those debtors making these payments directly pursuant to the terms of their confirmed plan.

Killing 3 Birds with One Stone:

When Mom, Pop and the LLC need to file Bankruptcy



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COMING SOON, MANY OF OUR CONSUMER DEBTORS WILL BE FORMER BUSINESS OWNERS

'I Can't Keep Doing This:' Small-Business Owners Are Giving Up

> <https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html?referringSource=articleShare>

WOULD YOU PUT ANY OF THESE IN CH 13?

Mom and Pop own a trucking company. Some of the trucks are titled in LLC and some individually through a combination of Mom and Pop. Some debt on the trucks are in the name of Pop and some of his solely owned LLC. Mom and Pop can't afford 2 bankruptcies.

LLC owns real estate with \$100,000 equity. Loan in foreclosure. Pop owns LLC. Pop guaranteed the debt. LLC can't afford ch 11.

LLC has unsecured debts exceeding \$450,000. LLC has real estate in foreclosure. Pop guaranteed the mortgage and some of the unsecured debts but doesn't know which ones.

Business owner's home is in foreclosure. If he could sell the home, he could pay off all his \$50,000 debt and the mortgage debt. He doesn't have more than \$200/mo income to fund a plan, thinks he needs 2 years to sell but bank is tired of hearing he almost has a buyer.

Debtor and his wife have a failed business, their only income is SSI, their debts are mostly credit cards used for business, they have no house payment and \$800/mo DMI on their ch 7 Schedules I/J.

One year old truck loan, truck used for business is in the name of the failed LLC, interest rate is 18%. Debtor would like to use truck as second vehicle to haul trash to dump.

MAY A COMPANY FILE CHAPTER 13?

No, a company is not an individual. Until April 1, 2022, §109(3) provides:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent,

liquidated, unsecured debts that aggregate less than \$250,000 [2] and noncontingent, liquidated, secured debts of less than \$750,000 [2] may be a debtor under chapter 13 of this title.

If Mom and Pop have too much debt together, consider filing them separately. They do not get to double these amounts in one case containing 2 debtors. *In re Archibald*, 314 B.R. 876 (Bankr. S.D. Ga. 2004). Isn't it strange though, you can double exemptions in a husband/wife filing. *Williams v. Biesiada*, 498 B.R. 746 (S.D. Tex. 2013), but see *In re Werts*, 410 B.R. 677 (Bankr. D. Kan. 2009), which held if each spouse qualified separately, then together they qualify (disagreed with by *In re Pete*, 541 B.R. 917 (Bankr. N.D. Ga. 2015)).

DOES THE FILING OF POP STOP A LAWSUIT ON THE BUSINESS DEBT GUARANTY?

No, there is no codebtor stay pertaining to business debts.

We are used to the concept of a codebtor stay in ch 13 but 1301(a) only applies to consumer debt:

... a creditor may not act, or commence or continue any civil action, to collect all or any part of a **consumer debt** of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt.

Consumer credit card used for business purchases may not be entitled to co-debtor stay. *Smith v. Capital One Bank (USA), N.A.*, 845 F.3d 256 (7th Cir. 2016). Jointly owed personal property tax is considered business debt (remember tax debt is involuntary so goes in business column) so no codebtor stay. *In re Stovall*, 209 B.R. 849 (Bankr. E.D. Va. 1997).

WHEN IS THE GUARANTOR LIABLE?

Definition of guarantor can vary depending on if conditional or unconditional. Some guarantees are worded so the guarantor only incurs liability if the maker defaults, while others guarantee the debt even if no demand is made upon the maker. Guarantee amounts can be capped to a certain limit specified in a guarantee. Review the guarantee. *In In re Gentry*, 807 F.3d 1222 (10th Cir. 2015), the court allowed a lender to enforce a guarantee as to the full amount of the debt, even though the primary borrower's liability for the guaranteed debt had been modified in bankruptcy.

MAY THE DEBTOR INCLUDE IN HIS CH 13 PLAN PROPERTY NOT IN HIS NAME?

Yes, Debtor might assert a right of redemption or resulting trust.

Debtor may be able to assert an equitable right to redeem through his bankruptcy filing to save property from being repossessed or foreclosed even if he doesn't own the property or he isn't on the note. S.C. Code Ann. §36-9-623; *In re Keisler*, 17-03304-dd, (Bankr. DSC 2017); *In re Brittain*, C/A No. 10-01515-JW (Bankr. D.S.C. Aug. 16, 2010)(also good discussion of resulting trust).

IS A GUARANTEE TERMINATED BY A BANKRUPTCY DISCHARGE?

No/Yes, Feb 2018 bankruptcy court in VA held if future charges are made postpetition on a business debt the debtor guaranteed prepetition, the individual is liable for the future charges.*Dulles v. Shaffer (In re Shaffer)*, 585 B.R. 224 (W.D.Va 2020)(good discussion of restricted and continuing guarantee); Does Schedule G stand for Guarantee, would the outcome have been different if they had rejected the guarantee on Schedule G? See otherwise from Feb 2020, *Orlandini v. Leavitt Family Ltd Partnership (In re Orlandini)*, 19-8001 (6th Cir. 2020).

GUARANTY OR GUARANTEE?

<https://abovethelaw.com/career-files/lawprose-lesson-121-whats-the-difference-between-guarantee-and-guaranty/#:~:text=Garner%20of%20LawProse%20explains%20the,guarantee%22%20and%20%22guaranty.%22&text=ANSWER%3A%20Guarantee%2C%20the%20broader%20and,Guarantee%2C%20vb.>

<https://www.merriam-webster.com/dictionary/guarantee>

WHAT IF THE ASSET RICH CASH POOR DEBTOR CAN'T AFFORD A SUBSTANTIAL PAYMENT

Consider filing a step plan or vary periodic payments. Give the debtor 2 years to sell then lift the stay.

WHAT IF THE DEBTOR EXCEEDS THE DEBT LIMITS

Think about a ch 20, filing 7 to discharge unsecured debt then 13 to reorganize secured debt payments.

DOES DISSOLVING THE LLC BEFORE THE INDIVIDUAL FILES HELP?

With the LLC dissolved creditors may feel their only recourse is the individual. The individual files and lists all creditors of the business as notice only if unsure whether the individual guaranteed the debt.

2020 SOUTHEAST VIRTUAL BANKRUPTCY WORKSHOP

Most believe the individual owner does not take on the debt of the dissolved LLC but there is grey area so to be safe, notice the creditors of the LLC to have a better chance of keeping them away.

In re Friedrich, No. 19-13843-13, 2020 WL 2306532 (Bankr. W.D. Wis. May 5, 2020) The dissolution of the LLC and the attempted transfer of the assets occurring so close in time to the state court hearing, the admission that the transfer was done to impede action by the Bank to replevin LLC assets, and the filing of the bankruptcy petition suggest the sole reason for the dissolution and transfer was to hinder or delay the Bank from realizing on its collateral and to circumvent the procedures and the protections afforded to creditors in Chapter 11 proceedings.

Might be best to dissolve then file the owner of the LLC rather than the other order. *HB Dev., LLC v. W. Pac. Mut. Ins.*, 86 F. Supp. 3d 1164 (E.D. Wash. 2015)(When Hawley and Brown dissolved their business, they did so without purchasing extended tail coverage that would have ensured continued coverage for Crook and Boughton's claims)