So Let It Be Written: What a Chapter 13 Plan Says vs. What the Trustee Can Do

Contributing Editor:
Dianne Crandell Kerns[1]
Standing Chapter 13 Trustee; Tucson, Ariz.
dckerns@dcktrustee.com

The consumer filing rush is well underway, and the atmosphere in the consumer bankruptcy legal world is starting to feel a lot like it did in the fall of 2005. Back then, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) had been passed into law and was set to become effective on Oct. 17, 2005. With the law would come the new "means test," which purported to limit the access to a chapter 7 discharge. This consequence was widely acclaimed and spurred a run on the bankruptcy courts until the very moment that the clock struck midnight on the congressionally-enchanted date. Last-minute chapter 7 bankruptcies were filed by almost anyone who had ever considered bankruptcy or who thought they might ever need to file for bankruptcy in the future. Lawyers, trustees, judges and bankruptcy court staff worked around the clock for months, if not years. The subsequent lull in filings almost came as a welcome relief to the fatigued consumer bankruptcy community.

Here We Go Again

While there are no legislative deadlines looming, economic pressures are again driving consumers into the offices of almost anyone willing to file a bankruptcy case. While this upsurge in filings is fairly recent, fatigue is already setting in and the pressure is not expected to abate any time soon. In the struggle to keep up with the workload, it is easy to fall victim to what this author calls "Yul Brynner Syndrome." The objective of this article is to illustrate this condition and suggest ways to avoid its pitfalls.

Yul Brynner Syndrome

Recall the epic depiction of Pharaoh Ramesses II in the 1956 Cecil B. DeMille movie "The Ten Commandments." As the supreme ruler and embodiment of deity, Egyptian pharaohs had the authority to proclaim that anything should be done upon command. Even if the proclamation was ridiculous or impossible to fulfill, the authority of the decree could not to be questioned and the logistical details were of no consequence to the dictator. As Ramesses, Brynner became famous for his proclamation "So let it be written. So let it be done."[2] Pity the subject charged with accomplishing a patently impossible decree and who faced an ignoble death as a consequence of failure.

In the chapter 13 world, plans of reorganization can become the modern-day equivalent of an impossible mini-pharisaic charge. Far too often lawyers write plans that are difficult, if not impossible, to understand and administer. Granted, this is usually unintentional, but the chapter 13 trustee is still stuck trying to pull the proverbial rabbit out of his or her hat. While such writings do not carry the consequence of death (at least not to date), they unnecessarily slow down the administrative process. Fortunately, they are almost entirely avoidable by keeping the following suggestions in mind.[3]

About the Author

Dianne Crandell Kerns is the standing chapter 13 trustee for Southern Arizona, appointed in 1996.

Number Crunching

First, watch the basic math in the plan. The debtor must pay enough money into the plan to pay all amounts required by the plan. If the plan funding is inadequate, the trustee will not be able to pay all of the claims. For example, the plan may be written to provide that the debtor will make payments to the trustee totaling $6,000 and that the trustee will pay claims totaling $6,000 *plus interest*. Obviously, the trustee cannot do what is written. The trustee cannot pay all of the claims with interest if the debtor only pays enough to cover the principal. No matter how you slice it, two plus two will always be four, at least for the trustee.

This may seem obvious on its face, but it is extremely common for plans to be underfunded from the get-go. Claims are fluid and are often undetermined for several months after the plan is drafted and sometimes even after it is confirmed. Calculating interest and amortizing claims can be a daunting task, particularly with the many variables that can exist.

Math issues can still largely be overcome by utilizing the available resources. Widely used bankruptcy computer-software programs include calculation tools that are the first step in the process. Other resources include, but are not limited to, funding wizards and amortization tools that are available on the Internet.[4] Of course, there is a simple manual review. It is impossible to overstate the value of proofreading the plan after the software and legal assistants have done their work.

Consumer Corner

Another precautionary tool is to defer to the trustee for number crunching. Most chapter 13 trustees have specialized software that allows them to project, with a fair degree of accuracy, the necessary funding for whatever treatment is proposed in the plan. The trustee is eager to review the terms of the plan and to let everyone know, in advance, if the plan will work. Most problems can be avoided by making sure that the trustee has the chance to weigh in on the mechanics of the plan, including the final resolution of all claim and plan objections, before a final order confirming is entered.

Provide Complete Information

Second, consider what you actually want the trustee to do and whether you have provided enough information for him or her to do it. In jurisdictions where ongoing mortgage payments are made

continued on page 71

1 Special thanks to my staff attorney, Craig A. Morris, for his stylistic contributions. It must be noted that if Mr. Morris had written this article it would have been much more scholarly!

2 Yul Brynner followed this same theme in his portrayal of Mongkut, the king of Siam, in the Rodgers & Hammerstein musical *The King and I*. As king, he would dictate correspondence and decrees with a brief statement of the directive followed by "etcetera, etcetera, etcetera...."

3 The author recognizes that these suggestions are elementary. However, experience shows that even experienced practitioners can overlook the obvious, especially when pressured by a heavy caseload.

4 One example is the funding wizard at www.maney13trustee.com/mcfndwz.htm. Another is a model/uniform plan that includes formulas located at www.lasvegas13.com. Whatever jurisdiction you are in, your chapter 13 trustee is likely to have a Web site with helpful links.

from page 12

by the trustee, the following example is painfully common: "Postpetition mortgage payments will be paid via the chapter 13 plan." When read by a trustee, these words are followed by the unmistakable chirping of crickets in the chapter 13 night.

To whom should the mortgage payments be made? To what address? What is the account number? Are there prepetition arrears to be paid? How much are the mortgage payments? Are the mortgage payments included in or are they in addition to the stated plan payment? If not in addition, what happens to the plan payments if the mortgage payment goes up or down? What portion of the plan payment is being proposed to fund the other claims treated in the plan? How is the trustee supposed to determine whether the debtor is paying enough to unsecured creditors?

On a very practical level, unless and until these questions are answered in the proposed plan, the trustee cannot administer the case. The trustee will have to search for the answers from sources other than the original plan, further delaying confirmation and/or disbursements.

Don't Bury Things

Third, resist the urge to bury things. Some lawyers bury claim treatment in a boilerplate or flowery plan language in hopes that the affected creditor or the trustee will miss the provision and fail to object. Indeed, if a party fails to object to plan treatment for whatever reason, that party may ultimately be bound by the confirmation order.[5] While using this approach is sometimes rewarded, it does not promote the efficient and accurate administration of chapter 13 cases.

Even if the law technically binds a trustee to perform as written in the plan and the confirmation order, the trustee remains human and limited by the laws of physics and finance. A trustee cannot pay creditors more than he or she receives from the debtor. A trustee cannot read minds and cannot perform magic. If there is a real-world impediment to administering the plan, the trustee will have to seek relief, and the entire process will be slowed and burdened until the impediment is overcome. There is no alternative.[6] There simply is no legal shortcut to the dollars-and-cents[7] realities of chapter 13 reorganization plans.[8]

Extra steps delay case administration, and as we all know, case administration is code for disbursing money. Money flows fastest when plans are written with precision, completeness and clarity at the outset. So, if you want to see the money...let it be written, so that it can actually be done.

Use the Model/Uniform Plan

Finally, if a model/uniform plan form is available in your jurisdiction, use it! Uniform plan forms are the most effective tool for bringing together what is written and what can be done. In most jurisdictions the model/uniform plan is carefully reviewed by the judges, trustees, debtor attorneys and creditor attorneys before the form is adopted. When the same plan language is used by all attorneys, all parties to the process know what is expected and can, in turn, perform efficiently and effectively. Model/uniform plans do the routine writing in advance so that the doing is easy. Model/uniform plans reduce mistakes and fatigue.

Granted, most attorneys pride themselves in the content of their chapter 13 plan form. These attorneys seek to set themselves apart from the competition with their unique plan form and creative claims treatment. While these motives are laudable, they do not trump the benefits of using the model/uniform plan.

Model/uniform plans do not limit the creativity of attorneys. They typically include a paragraph for "varying provisions," which is the place where lawyers can state any provision they think is allowed or helpful to their client, the debtor. This is the place where lawyers can state the provisions that set their plans apart from others and is where lawyers can establish their legal superiority over the competition. The only difference between a custom plan drafted by an attorney and the model/uniform plan is transparency. Model/uniform plans are easy to read and understand; custom plans are not. Model/uniform plans attempt to bring uniformity to *form,* not to *substance.* However, the practical reality is that model/uniform plans improve the substance by removing ambiguity. Good lawyers become great lawyers when they learn to use the model/uniform plan to their advantage.[9]

If You Want to See the Money

Ultimately, chapter 13 plans of reorganization are all about doing, not writing. While Ramesses II may have had the luxury of giving a dictate and leaving the logistical details to his subjects, modern bankruptcy mortals are inextricably linked together in the chapter 13 administrative dance. If the plan does not cover *the who, what, when, where and how,* the trustee will have to take steps to bridge the gap between what is written and what must be done. Extra steps delay case administration, and as we all know, case administration is code for disbursing money. Money flows fastest when plans are written with precision, completeness and clarity at the outset. So, if you want to see the money...let it be written, so that it can actually be done. ■

5 *See, e.g., Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083 (9th Cir. 1999). In *Pardee,* the Ninth Circuit held that an otherwise nondischargeable student loan was discharged because said treatment was stated in the plan and there was no timely objection by the creditor.

6 Admittedly, in some extreme circumstances, there may be issues of trustee liability that provide an alternative. However, that discussion is beyond the scope and purpose of this article.

7 Ironically, in the original draft of this article, the author wrote "dollar and sense." This was clearly a Freudian slip, but it underscores the message. Sometimes more common sense is needed to keep our cents in line.

8 Admittedly, the strategy of burying provisions is inadvertently employed at times by competent attorneys who are simply experiencing fatigue. Indeed, with overwhelming caseloads that increase daily, it is tempting to hope for a binding result without the burden of litigation. However, this approach is penny-wise and pound-foolish. Once a creative new treatment is established as legitimate in one case, it can often be repeated in subsequent cases without the need for duplicate effort in court. As is discussed in the context of model/uniform plans, transparency is not a threat to legitimate plans of reorganization.

9 Some lawyers cut off their noses to spite their faces with the varying-provisions paragraph of the model/uniform plan. They cut and paste the text of their custom plans into the varying-provisions paragraph without regard to whether they have duplicated, contradicted or otherwise complicated the standard treatment language in the model/uniform plan. This approach provides no benefit to the attorney's client, the debtor, and should be avoided. This is not an approach that sets the attorney apart in a good way.

Copyright 2009 American Bankruptcy Institute.
Please contact ABI at (703) 739-0800 for reprint permission.