

Post Petition Plan Defaults

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I. Types of Defaults

A. **Non-Monetary Defaults**

- i. failure to file tax returns (pre and post petition)
- ii. feasibility issues - failure to review and object to claims

B. **Monetary Defaults**

- i. failure to make plan payments
- ii. failure to pay post-petition taxes
- iii. failure to maintain payments on secured claims

II. Possible Remedies

A. **Amended Plans**

- i. extend term of plan if possible
- ii. roll plan arrears into plan
- iii. include post-petition claims in plan
- iv. amend plan to include all claims filed to resolve feasibility issues
- v. modify treatment of secured claims to sell or surrender collateral

B. **Agreed Orders**

- i. negotiate an agreement to cure the arrears with the Chapter 13 Trustee, the secured creditor or the taxing authority
- ii. file the outstanding tax returns
- iii. for prepetition taxes, review 11 U.S.C. sec. 1308 and

make sure the appropriate procedures are followed, i.e.,
requesting that the Section 341 meeting be held open
and/or filing the appropriate motion with the court

C. Sale of Assets

- i. if debtor is no longer able to maintain payments,
review sale options
- ii. make sure an application to employ any professional who
is going to assist with the sale is filed with the court immediately
upon retention pursuant to 11 U.S.C. sec. 327

D. Motion to Suspend Plan Payments

- i. if the debtor is temporarily unable to meet payments, the debtor
may move to suspend payments
- ii. motion to suspend must state how the debtor is going to cure the
suspended payments. Possible ways to cure suspended payments
are:
 - a. filing an amended plan to extend term or roll
payments over the remaining term of the plan;
 - b. providing a payment proposal to cure the payments
over a reasonable period of time

E. Conversion to Chapter 7

- i. if debtor is no longer able to make payments, Chapter 7 may
provide the Debtor with the fresh start needed
- ii. 11 U.S.C. sec. 1307(a) provides that a debtor may convert a case

to a case under Chapter 7 at any time

F. Dismissal of Case

- i. the debtor may choose to dismiss the case and attempt to work with creditors outside of bankruptcy
- ii. 11 U.S.C. sec. 1307(b) provides that the court shall dismiss the case upon the debtor's request at any time if the case has not been converted
- iii. 11 U.S.C. sec. 109(g)(2) provides that no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay under 11 U.S.C. sec. 362
note: the prohibition does not apply if the case was involuntarily dismissed, i.e., Trustee's Motion or other creditor's Motion

G. Hardship Discharge

- i. 11 U.S.C. sec. 1328(b) provides that debtor may receive a discharge that has not completed payments
- ii. in order to receive a hardship discharge the debtor must satisfy the following conditions:
 - a. the plan has to have been confirmed;
 - b. the debtor's failure to complete plan payments has to be due to circumstances for which the debtor should not

justly be held accountable

- c. the value of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the debtor's estate had been liquidated under Chapter 7; and
- d. modification of the plan is not possible

Chapter 13 Means Test Form

What the Chapter 13 Trustee Looks For

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- I. Report Of Income And Determination of Actual Anticipated Income For Plan
- i. review Schedule I and pay advices and compare to B22C Part I
 - ii. make sure the debtor is properly including all income on Schedule I and the B22C
 - iii. ask debtor at 341 meeting to explain the reason for any inconsistencies
 - iv. if there is a material difference between B22C and debtor's actual anticipated income, trustee will use the actual anticipated income for determining whether the debtor's plan satisfies the best efforts test set forth in 11 U.S.C. sec. 1325(b)(1)(B)

See In re Kibbe, 361 B.R. 302 (1st Cir. 2007). While Kibbe is a below median income debtor case, Kibbe's holding (the income component of "projected disposable income" as set forth in sec. 1325(b)(1)(B) is the anticipated actual income of the debtor, subject to the Income Exclusions, during the plan commitment period) can be applied to both above and below median income debtors. See Kibbe at 314.

II. Calculation Of Commitment Period

- i. check annualized current monthly income to determine if debtor is above median income
- ii. compare household size with debtor's tax return and Schedule I
- iii. make sure if household member is claimed and has income that such household member's contribution is accounted for under the Report of Income under the B22C

III. Calculation Of Deductions

- i. make sure correct standardized deductions are listed
- ii. 25B.b. make sure any mortgage expenses claimed on line 47 are listed on line 25B.b.
- iii. lines 27 – 29 - make sure vehicle deductions claimed are consistent with the number of vehicles owned on Schedule B and that debt payments are properly deducted on lines 28.b. and 29.b.
- iv. line 30 – compare deduction claimed with Schedule I, pay advices and tax return and make adjustment for any increase or decrease in deduction due to actual anticipated income adjustment
- v. lines 34 – 35 – compare amounts claimed with Schedule J expenses
- vi. line 36 – compare with Schedule J and make sure debtor has properly deducted the amount already deducted on line 24B

- vii. line 39 – compare with Schedule I and pay advices
- viii. line 47 – compare payments claimed with Schedule D and Schedule J and check if debtor is including claims which are no longer paying under plan, i.e., avoided mortgages and liens, automobile claims which are being paid through the plan, payments on secured claims for property being surrendered
- ix. line 48, 49 and 50 – make sure the amount claimed is consistent with the amounts set forth in the Plan
- x. line 55 – compare with pay advices and Schedule I
- xi. review and obtain documentation of any special circumstances deductions and additional expense claims
- xii. multiply line 59 by 60 months and make sure that sum is being paid towards the holders of general unsecured claims