

SELECTED CHAPTER 13 CONFIRMATION ISSUES

**Judge Margaret A. Mahoney
U.S. Bankruptcy Court
Southern District of Alabama
Mobile, Alabama**

This paper examines a few of the current issues in chapter 13 cases. It is meant to be a guide to the issues and the paper does not intend to be a full exposition of all of the cases or arguments as to each issue. The paper can serve as a starting point for further research on the points if an attorney has the issue arise in a case.

910 CAR CLAIMS

Several issues have arisen in regard to 910 car claims and their treatment in chapter 13 cases. BAPCPA states that section 506 of the Bankruptcy Code does not apply to the treatment under section 1325(a) of the claims of creditors for cars purchased within the 910 days preceding a bankruptcy filing. This is stated in the “hanging paragraph” that is placed after section 1325(a) of the Bankruptcy Code.

The section states

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day (sic) preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

11 U.S.C. 1325(a)(*)

This paragraph has caused much debate in the bankruptcy courts on at least 3 points.

1. **Can a 910 car be surrendered in a plan in full satisfaction of a creditor’s claim?**

Yes- *In re Adams*, 403 B.R. 387 (Bankr. E.D. La. 2009) (collecting and citing all preceding cases); Eleventh Circuit cases - *In re Carter*, 2008 WL 410275 (M.D.Ga. 2008); *In re Moon*, 359 B.R. 329 (Bankr. N.D.Ala. 2007), *vacated and remanded*, 2008 WL 4831458 (N.D.Ala. 2008); *In re Barrett*, 2007 WL 2081702 (Bankr. M.D.Ala. 2007), *vacated and remanded*, 543 F.3d 1239(11th Cir. 2008); *In re Bivins*, 2007 WL 624385 (Bankr. M.D.Ga. 2007); *In re Vanduyyn*, 374 B.R. 896 (Bankr. M.D.Fla. 2007); *In re Brown*, 346 B.R. 868 (Bankr. N.D.Fla. 2006).

No- *In re Barrett*, 543 F.3d 1239 (11th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10th Cir. 2008); *Capital One Auto Fin. v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Long*, 519 F.3d 288 (6th Cir. 2008); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Wright*, 492 F.3d 829 (7th Cir. 2007); *In re Rodriguez*, 375 B.R. 535 (9th Cir. BAP 2007).

2. Does a 910 claim include negative equity or not?

The hanging paragraph states that one of the requirements for a claim to be a 910 claim is that the creditor must have a “purchase money security interest” in the collateral. If an auto loan includes other charges such as negative equity, is such a charge part of the purchase money security interest and, thus, part of the 910 claim?

910 claim includes negative equity - *Ford Motor Credit Co. v. Mierkowski (In re Mierkowski)*, 580 F.3d 740 (8th Cir. 2009); *Ford v. Ford Motor Credit Corp. (In re Ford)*, 276 F.3d 424 (10th Cir. 2009); *In re Price*, 562 F.3d 618 (4th Cir. 2009); *Graupner v. Nuvel Credit Corp. (In re Graupner)*, 537 F.3d 1295 (11th Cir. 2008).

910 claim does NOT include negative equity - *In re Pernod*, 392 B.R. 835 (9th Cir. BAP 2008) (using Uniform Commercial Code analysis); *In re Whipple*, 417 B.R. 86 (Bankr. C.D.Ill. 2009) (holding that determination was a federal not state law issue); *In re Pruitt*, 401 B.R. 546 (Bankr. D.Conn. 2009) (using federal law); *In re Hall*, 400 B.R. 516 (Bankr. S.D. W.Va. 2008) (using state law); *In re Crawford*, 397 B.R. 461 (Bankr. E.D.Wis. 2008) (using state law); *In re Muldrew*, 396 B.R. 915 (E.D.Mich.2008) (using federal law analysis).

3. How does a court determine whether a claim is a 910 claim or not in a second filing?

If a creditor files a chapter 13 case and has a car claim that is a 910 claim and, after dismissal of case #1, files a second case and the 910 day period has run, is the car claim a 910 claim or not in case #2? No courts have used the doctrine of equitable tolling to prevent the running of the 910 day period in case #2, but they have discussed it. Others have dismissed cases on bad faith grounds under proper circumstances.

Equitable tolling - No cases

NO Equitable tolling - *In re Maas*, 416 B.R. 767 (Bankr.Kan. 2009)

Cases discussing issue in terms of good faith - *In re Walker*, 2008 WL 2559420 (Bankr.M.D.N.C. 2008); *In re Robinson*, 2008 WL 2095349 (Bankr.Kan. 2008); *In re Murphy*, 375 B.R. 919 (Bankr.M.D.Ga. 2007).

DISCHARGE BY DECLARATION

This issue is presently before the U.S. Supreme Court in *United Student Aid Funds v. Espinosa*, Docket No. 08-1134, 553 F.3d 1193 (9th Cir. 2008). The questions presented to the Court are

1. Student loans are statutorily nondischargeable in bankruptcy unless repayment would cause the debtor an “undue hardship”. Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders

confirming the plan and discharging debtor void?

2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?

The case was argued in December 2009.

Discharge by Declaration allowed - *Espinosa v. United Student Aid Funds*, 553 F.3d 1193 (9th Cir. 2008) (holding that notice of filing of case and notice of plan was constitutionally adequate notice even though the creditor did not have the benefit of an adversary proceeding in which the court determined whether there was undue hardship); *Needleman v. Penn Higher Educ. Assistance Agency*, 399 B.R. 695 (S.D.Cal. 2009) (citing *Espinosa*).

Discharge by Declaration NOT allowed - *Educational Credit Management Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (holding that discharge by declaration violates the Bankruptcy Rules requiring individual service of a summons on a defendant and therefore the discharge is void); *Wheaton v. Educational Credit Management Corp. (In re Wheaton)*, 432 F.3d 150 (2d Cir. 2005) (same); *Ruehle v. Educational Credit Management Corp.*, 412 F.3d 679 (6th Cir. 2005) (same); see also *In re Mansaray-Ruffin*, 530 F.3d 230 (3rd Cir. 2008) (holding that plan confirmation was not final when an adversary proceeding was necessary to invalidate a lien).

MECHANICAL VS. FORWARD LOOKING MEANS TESTING

There are two main theories (with subparts) that courts have used to determine what a debtor's "projected disposable income" is for purposes of determining how much a debtor must pay monthly to the trustee in a chapter 13 case. One theory is the "forward-looking" approach that holds that the Form B22 disposable income number "creates a starting point or presumption that can be adjusted based on consideration of financial circumstances going forward." Herring, Adam & Tulis, Chelsey, NORTON BANKRUPTCY LAW ADVISER, 2009 No. 12 Norton Bankr. L. Adviser 2 (December 2009). A case using this theory is before the U.S. Supreme Court in *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1270 (10th Cir. 2008), cert. granted in part, 2009 WL 273221 (2009). The Fifth Circuit adopted this approach in *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009). The Eighth Circuit, in *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), cert. denied, 129 S.Ct. 1630, 173 L. Ed.2d 997 (2009), also used a forward-looking approach to determining what income must be committed to a chapter 13 plan. See also *eCAST Settlement Corp. v. Lashburn (In re Lashburn)*, 579 F.3d 934 (8th Cir. 2009)(holding that phantom auto expense was proper in determining projected disposable income) and *McCarthy v. Lasowski (In re Lasowski)*, 575 F.3d 815 (8th Cir. 2009)(holding that payments to unsecured creditors had to take into account that 401(k) loan repayments would end before end of plan). The Seventh Circuit also used a forward looking approach in deciding a

debtor could not deduct as an expense mortgage payments for a home the debtor was surrendering. *In re Turner*, 574 F.3d 349 (7th Cir. 2009). The 6th Circuit BAP and the 1st Circuit BAP have also followed this approach. *Hildebrandi v. Petro (In re Petro)*, 395 B.R. 369 (6th Cir. BAP 2008); *Kibbe v. Sumski (In re Kibe)*, 361 B.R. 302 (B.A.P.1st Cir. 2007). Some Florida judges have adopted the forward-looking approach. *In re Becquer*, 407 B.R. 435 (Bankr. S.D.Fla. 2009) (Mark); *In re Raulerson*, 395 B.R. 157 (Bankr. M.D.Fla. 2008) (Funk); *In re Hughey*, 380 B.R. 102 (Bankr. S.D.Fla.2007) (Hyman); *In re Purdy*, 373 B.R. 142 (Bankr. N.D.Fla. 2007); *In re Arsenault*, 370 B.R. 845 (Williamson); *In re LaPlana*, 363 B.R. 259 (Bankr. M.D.Fla.2007) (Jenneman).

The Ninth Circuit BAP has distinguished the *Kagenveama* decision of the Ninth Circuit, cited below, that used the mechanical approach in a recent decision. *In re Martinez*, 418 B.R. 347 (B.A.P. 9th Cir.2009) (stating that “we do not read *Kagenveama* as binding precedent with respect to the calculation of expenses under sections 1325(b)(2) and (b)(3)”).

The Ninth Circuit took a totally different tack. In *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008), it held that the means test must be mechanically applied to determine what a debtor’s “projected disposable income” is. Judge Olson has adopted the mechanical approach. *In re Neclerio*, 393 B.R. 784 (Bankr. S.D.Fla. 2008).

In *Whaley v. Tennyson (In re Tennyson)*, 2009 WL 2507686 (N.D.Ga. 2009), discussing the issue raised in this paper’s 4th issue below, used the reasoning of the 9th Circuit in *Kagenveama*. This case is now on appeal to the 11th Circuit, *Whaley v. Tennyson*, U.S.C.A. No. 09-14628-EE.

IS THE “APPLICABLE COMMITMENT PERIOD” A TEMPORAL OR A MONETARY CONCEPT?

This issue arises when above median income debtors propose plans that are less than 60 months in length and below median income debtors propose plans that are less than 36 months in length. The scenario is as follows. When a debtor, regardless of whether his/her disposable income is figured on a mechanical or forward-looking test, has zero or negative income after application of the B22C test or I & J test, the debtor proposes a plan that pays all priority claims, arrearage cures, and attorneys fees and trustee fees in less than 36 months or 60 months. Can the debtor then obtain a discharge after the full amount of payments stated are made, even if that occurs in 21 months or 45 months?

As stated above, this issue is on appeal at present to the 11th Circuit based upon a ruling that the applicable commitment period was a monetary, not a temporal, requirement. *Whaley v. Tennyson, id.*

The majority of courts ruling on the issue have held that the “applicable commitment period” is a temporal requirement. If a debtor is an above median income debtor, he/she must stay in a chapter 13 plan for 60 months. If a debtor is a below median income debtor, he/she must stay in chapter 13 for at least 36 months. Courts base this view on the purpose of the

BAPCPA amendments— to require above median income debtors to pay more to creditors and the words, in context, seem to require that a debtor be in a case for a fixed period of time. ; *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008); *In re Moose*, 2009 WL 3808369 (Bankr. E.D.Va. 2009); *In re Hayward*, 386 B.R. 919 (Bankr. S.D.Ga. 2008); *In re Dew*, 344 B.R. 655 (Bankr. N.D.Ala. 2006).

Other courts hold that the “applicable commitment period” is a monetary requirement. Once the sum necessary to pay whatever amount is determined at confirmation to be due to unsecured creditors is paid, the plan can end. *Maney v. Kagenveama (In re Kagenveama)*, 527 F.3d 990 (9th Cir. 2008), superceded by *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008); *In re Alexander*, 344 B.R. 742 (Bankr.E.D.N.C. 2006); *In re Lawson*, 361 B.R. 215(Bankr. D.Utah 2007).

A law review article at 15 AM. BANKR. L. REV. 687 (Winter 2007) entitled “The Applicable Commitment Period: A Debtor’s Commitment to a Fixed Plan Length” by Evan J. Zucker explains the issue in depth.

**WHEN MAY A DEBTOR OR OTHER PARTY MODIFY A
CONFIRMED PLAN PURSUANT TO SECTION 1329?**

There are several issues that arise when a debtor or trustee or unsecured creditor desire to modify a confirmed chapter 13 plan. Section 1329 governs such a modification. It states

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments;
- (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan;
- (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor . . .if the debtor documents the cost of such insurance

* * * *

(b)(1) Sections 1322(a), 1322(b), and 1322(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

There are two main issues: (1) How does section 1329 deal with the “applicable commitment period” of section 1325(b); (2) How does a modification under section 1329 deal with the section 1327 res judicata effect of a confirmed plan and what is the standard to be applied to a debtor or creditor requested plan modification?

1. What is the interplay between Section 1325(b) and 1329?

Section 1325(b) requires that a debtor must pay all of his “projected disposable income to be received in the applicable commitment period” to the plan for the benefit of the unsecured creditors. Section 1329 does not mention section 1325(b) in section 1329(b)(1) which incorporates certain Bankruptcy Code sections into the working of section 1329. The great majority of the case law holds that section 1325(b) does not apply to section 1329, due to its exclusion from section 1329(b)(1), but the incorporation of section 1325(a) that requires a plan to be proposed in good faith results in courts preventing overreaching by any party. *In re Ireland*, 366 B.R. 27 (Bankr. W.D.Ark. 2007); *In re White*, 411 B.R. 268 (Bankr. W.D.N.C 2008); *In re McCully*, 398 B.R. 590 (Bankr. N.D.Ohio 2008); *In re Heyward*, 386 B.R. 919 (Bankr. S.D.Ga. 2008).

2. What is the interplay between Section 1327 and Section 1329?

Section 1327(a) of the Bankruptcy Code provides that

the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

This section gives res judicata effect to confirmation orders. How can the binding effect of the confirmation order be overcome by a debtor? Courts have stated that the existence of section 1329 means Congress intended binding confirmation orders could be modified in the limited circumstances set forth in section 1329. The section does not state what reason(s) might precipitate a debtor, a creditor or the trustee to move to modify a plan.

One line of cases holds that a modification can be requested even if there is no threshold showing of any change in circumstances of the debtor. These cases rely on the fact that section 1329 establishes no requirement of change and claims can always be reconsidered under section 502(j) of the Code. *In re Meza*, 467 F.3d 874 (5th Cir. 2006); *Matter of Witkowski*, 16 F.3d 739 (7th Cir. 1994); *In re Brown*, 219 B.R. 191 (B.A.P.6th Cir.1998); *Washington v. Countryman*, 390 B.R. 843 (E.D.Tex. 2007).

The other line of cases, the majority view, requires a substantial and unanticipated change in the debtor’s circumstances. The reason for the modification must be new, not in existence before confirmation, and not capable of being known before confirmation. This line relies on the fact that overcoming the res judicata effect of confirmation requires standards even if section 1329 does not explicitly require them. *In re Murphy*, 474 F.3d 143 (4th Cir. 2007); *In re Storey*, 392 B.R. 266 (B.A.P. 6th Cir.2008).