

## Chapter 13 from the Trustee's Perspective

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Disclaimer: This document was compiled based on my observations and thoughts, with input from others including Marsha L. Combs-Skinner and Ken Siomos, this does not provide the official statement or position of the Trustee on any of the below items, and the Trustee could file an Objection or Response, if warranted.

Are the Debtor(s) Above median?

1. Yes,
  - a. The plan must be 60 months, if less than 60 months, the Plan must pay 100% to the unsecured creditors.
  - b. The plan must pay line 45 of Official Form 122C-2 to the unsecured.
    - i. May be reduced for a *Lanning*<sup>i</sup> change in circumstances (include the adjustment within line 46).
    - ii. You should include the projected Plan payment on line 36. Because you include the projected Plan payment on line 36, the Trustee fee is already calculated into the line 45 and therefore the Trustee fee must be paid in addition to the amount on line 45.
2. No,
  - a. The term of the plan should be 36 months.
    - i. If less than 36 months, the Plan must pay 100% to the unsecured creditors.
    - ii. The plan can be extended up to 60 months, but only for cause.

What must be included in the plan?

1. Priority claims under 11 U.S.C. §507 must be paid in full through the plan
  - a. Pursuant to 11 U.S.C. §1322(a)(2) may be paid differently with the agreement of the parties.
  - b. DSO claims must be paid in full through the Plan, unless the plan provides for all of the debtor(s) projected disposable income to be paid over a 5- year period,
  - c. You cannot pay interest on any non-dischargeable priority claims, unless you pay all of the unsecured claims in full 11 U.S.C. §1322(b)(10).
2. Secured claims: The plan must state at least one of the following:
  - a. The debtor(s) will pay through the plan.
    - i. Specify an interest rate based on *Till*<sup>ii</sup>
    - ii. Do not include the regular monthly payment on Schedule J
    - iii. Any pre-petition arrearage claim must be objected to or paid through the Plan
  - b. The debtor(s) will pay direct.

- i. If the creditor has a claim that does not need to be paid back during the course of the Plan, (for example a HUD mortgage that requires no payments for 30 years) then the Plan should state it will be paid directly pursuant to the terms of the contract,
    - c. The debtor(s) are surrendering the underlying property to the Secured creditors. (provide the creditor time to file an unsecured claim)
- 3. Unsecured creditors should be paid at least the greater of the following:
  - a. The amount listed on line 45 of the Official Form 122C-2
  - b. Liquidation analysis
- 4. Trustee Fee:
  - a. Calculate the Trustee Fees at 10%
  - b. Total all amounts included in the Plan and multiply by 1.111111111
- 5. Student Loans:
  - a. Are general unsecured creditors
  - b. Since the obligation is not dischargeable, interest will continue to accrue
  - c. You are not allowed to unfairly discriminate in favor of a student loan and against the other general unsecured creditors.
  - d. You cannot pay interest on any student loan claims, unless you pay all of the unsecured claims in full 11 U.S.C. §1322(b)(10)
  - e. Bonuses (in cases where the debtor(s) have received a Bonuses, except where Official Form 122C-2 takes into account the bonuses received in the 6 months prior to filing and the bonus remains consistent over the life of the Plan):
    - “Within 14 days of the receipt of any bonus, the debtor(s) shall turnover 100% of the bonus received by the debtor(s) during the pendency of the debtor’s Plan. The additional amount shall be used to increase the pro rata payment to the unsecured creditors, up to 100%”

Tips for the Model Plan for the Central District of Illinois:

- 1. Make sure you check the boxes in paragraph 1, if needed,
- 2. The Trustee will probably object if you mark that the debtor(s) are not required to turn over tax refunds to the Trustee, unless there is a good reason,
- 3. Use 2C. to include turnover of bonus money, or the proceeds from a sale, etc,
  - a. In the event of a sale, include a date upon which the sale must be completed.
- 4. Secured Creditors:
  - a. Maintaining payments use 5A,
  - b. Curing a pre-petition default use 5B,
  - c. Paying the claim as filed use 5C, the Trustee will have to pay the full claim
  - d. Paying the value of the vehicle use 5D, the value/estimated claim is the amount you want the Trustee to pay, plus interest.
  - e. Separate each real estate tax year.

5. Unsecured Creditors:
  - a. Do not change the “\$0”, in paragraph 6A, if you have equity, after a Liquidation Analysis, that must be included within Paragraph 11.
  - b. 6C should be the amount on line 45 of Official Form 122C.
  - c. Only include unsecured co-debtor claims within paragraph 6D.
  - d. Pay attention to the options available within paragraph 6E.
6. Paragraph 8, the Plan should provide for vesting at confirmation, the Trustee will object to vesting at discharge.
7. Paragraph 11, allows you to modify the Plan, provide for a transition of payments from the debtor(s) to the Trustee, if the Trustee will not be able to make the first payment or two on the debtor(s) post-petition mortgage, etc. Do not use Paragraph 11 to explain the Plan or to provide for a creditor that should be included in other parts of the Plan.

Can the vehicle payment be made directly by the debtor(s)?

In Springfield:

Yes, the debtor(s) may make payments on the vehicle directly. However, the Trustee strongly recommends that the vehicle payments are made through the Trusteeship. In any case where the interest rate is greater than *Till* plus the Trustee fee, it is in your client’s best interest to have the vehicles paid through the Plan.

In Urbana, Peoria, and Rock Island:

The debtor(s) may make direct vehicle payments, if a payment, according to the original terms of the contract, would become due after the conclusion of the Plan. All other vehicles, that are owned and paid for by the debtor(s), should be paid by the Trustee through the Plan.

What are the benefits of paying a Secured creditor through the Plan?

1. Payments are made monthly by the Trustee and you are able to track the amount paid by your debtor(s) to the Trustee and the amount paid from the Trustee to the secured creditor.
2. If the debtor(s) become delinquent the Trustee is involved in any Motion for Relief from Stay that gets filed. The Trustee may allow for more beneficial repayment terms that could include spreading the delinquency over the remainder of the Plan.
3. Till interest rate can be used.
  - a. Calculated by adding 1 or 2 to the Federal Reserve prime rate. (prime is currently 5%)
  - b. Cannot be used on a mortgage for the debtor(s) primary residence.

- c. Typically must pay the entire debt through the Plan.
  - d. Currently if the debtor(s) are paying more than 15.00% interest the *Till* rate should save the debtor(s) money.
4. If the vehicle is paid outside of the plan, the Trustee will request that the debtor(s) increase their monthly payments after the vehicle loan has been completed, depending on the amount listed on line 23(c) of Schedule J.

When does the Trustee require an increase in plan payments?

1. An increase in the monthly plan payments will be required in the following situations:
  - a. 401K loan is paid off prior to the completion of the plan,
  - b. Vehicle loan (if being paid directly by the debtor(s)) is paid off prior to the completion of the plan, and
  - c. Other direct payment concludes during the course of the Plan.

How can I tell if my plan is feasible?

1. Line 23(c) of Schedule J projects what the debtor can afford on a monthly basis.
2. If line 23(c) of Schedule J is less than the debtor(s) monthly plan payment then the plan is not feasible.
3. The debtor(s) monthly plan payment should be the same amount as the net available on Schedule J.
4. Schedule J and Official Form 122C-2 are different calculations and the debtor(s) may not be able to afford the payment required by Official Form 122C-2, but that is the amount that must be paid to the unsecured creditors.

What is the liquidation analysis?

1. In a Chapter 13 case the unsecured creditors must receive at least what they would through a hypothetical Chapter 7.
2. In order to determine the amount that must be paid to the unsecured creditors you must perform a liquidation analysis.
3. The test is as follows:
  - The Value of the Property,
  - Minus the cost of sale (there is no cost of sale for property that is already liquidated),
  - Minus any perfected security interests,
  - Minus any claimed exemptions,
  - Minus the hypothetical Chapter 7 Trustee fee,
  - Equals the amount that must be paid to the unsecured creditors through the Chapter 13 Plan.

When and how can my client make payments?

1. First payment must be made within 30 days of the date of filing. (If you don't have a plan on the date of filing, the first payment should be the amount listed on line 23(c) of Schedule J).
2. Four forms of payment are available
  - a. Wage Order - payments are taken directly from the debtor(s) wages, based on an order from the Court.
  - b. ACH – payments are taken directly from the debtor(s) bank account, can only be taken out on the 5th and/or the 17th. Requires an agreement to be signed and sent to the Trustee.
  - c. Direct – payments are mailed directly to a lockbox in Tennessee. Must be in the form of money order or cashier's check.
  - d. ePay – debtor(s) initiate a payment on the internet. Money is paid directly from the debtor(s) bank account. Debtor(s) can schedule a few payments in advance. The bank charges a small fee, currently \$2.
3. If the debtor(s) fails to make the first payment, the Trustee will file a wage order or a Motion to Dismiss.

What should I send to the Trustee and when should I send it:

1. Check with the Trustee to get a list of their requirements,
2. The Trustee will want the following:
  - a. Paystubs for the CMI period: 6 full months prior to filing.
  - b. Bank statements:
    - i. between 90 days and 6 months of Bank statements,
    - ii. Should include the balance as of the date of filing,
  - c. Tax Returns: between 1 and 4 years,
  - d. Documentation that proves the value of the debtor'(s) real and personal property,
  - e. 401K Loan maturity statements.
  - f. Insurance declarations.
  - g. Business questionnaires.
  - h. Domestic Support Questionnaires.
  - i. Recent Divorce documentation,
  - j. Documentation for anything of value sold within the last 2 years.
3. Send in the documentation as soon as possible, but make sure it is received at least 7 days before the 341 meeting.
  - a. The Trustee needs time to review the documentation. If the Trustee does not have enough time to review the documentation, then the case will likely be continued.

- b. Most of the documentation requested by the Trustee is necessary for you to complete and file the petition and schedules.

#### Motions to Modify under 11 U.S.C. §1329

1. You must have a confirmed Plan to file a Motion to Modify
2. There are four reasons to modify the Plan that are expressly provided for:
  - a. Increase or reduce the payment of a class,
  - b. Extend or reduce time for payments,
  - c. Change the plan to account for outside payments,
  - d. Reduce the Plan payments by the actual cost of health insurance.
3. A Motion to Modify is effective as of the date the Motion is filed
4. Review *Germeraad v. Powers*.<sup>iii</sup> The 7<sup>th</sup> Circuit provided some nice information about the Motion to Modify process.
5. The Motion should describe the change in circumstances. Which means it should answer the question Why.
6. The debtor(s) should file an Amended Schedule I and J that supports the requested change.
7. In Springfield, if you request to reduce the amount of the monthly payment, make sure to specifically request a reduction to the unsecured class of creditors.

#### Motion for a Hardship Discharge under 11 U.S.C. §1328(b)

1. The filing must cover the 3 required elements
  - a. Through no fault of the debtor(s),
  - b. Modification is impractical, and
  - c. The unsecured creditors have received what they would have through a Chapter 7.
2. The debtor(s) should file an Amended Schedule I and J to show why modification is impractical

#### Motion for a Moratorium

1. There is no code provision or rule that allows for a Moratorium in Plan payments,
2. The Court is able to grant a temporary cessation in monthly Plan payments,
3. The Motion should indicate:
  - a. Why the debtor(s) are unable to make payments,
  - b. How long the debtor(s) need in order for the situation to improve,
4. The Trustee will typically object to a moratorium of longer than 3 months,
5. In Urbana, Peoria, and Rock Island, the Order on the Moratorium must include the month that payments will restart and amount the payments will increase to for the remainder of the Plan.

## Motions to Borrow

For a vehicle

1. The filing should include:
  - a. the make, model, and year of the vehicle,
  - b. The amount, interest rate, and term of the loan,
2. It should detail:
  - a. why the car is needed,
  - b. what is happening with the car(s) that were in the possession of the debtor(s) at the time of filing.
3. The filing should contain a statement that the Motion to Borrow will not interfere with the debtor's ability to make payments or it should be filed with an accompanying Motion to Modify.

How much can an Attorney be paid: under either method, you should keep detailed records of your time.

1. The "No Look Fee"
  - a. This is the amount that will be approved by the Court for the typical case.
  - b. The current "No Look Fee", is \$4,000.00.
  - c. If the work of the attorney is substandard, the Court may review the fee.
  - d. Review the "Standing Order on Attorney Fees" for each Judge
    - i. Currently for Judge Perkins, you must propose a Plan that pays Creditors at least \$2,000.00 in order to be eligible for the full "No Look Fee"
2. Hourly
  - a. You should estimate, for feasibility purposes, the amount of time that you will spend on the case.
  - b. You will need to file fee applications which include itemized statements of your fees.

All Creditors must timely file a Claim in order to be paid by the Trustee:

1. Bankruptcy Rule 3002(c) governs the timing of filing a claim.
  - a. In a Chapter 13, all creditors have 70 days to file a claim
    - i. 6 exceptions are recognized within 3002(c) most will not apply
      1. Governmental units get 180 days to file a claim.
      2. The Court may extend the time to file a claim for an "Infant or incompetent person or the representative of either"
      3. An unsecured claim that arises because of a judgment, may be filed within 30 days after the judgment,

4. A claim resulting from the rejection of an executor contract or unexpired lease,
  5. A notice of insufficient assets was provided to the creditors
  6. On Motion by the creditor, the Court may extend the time to file by no more than 60 days if:
    - a. The notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor(s) failed to timely file the list of Creditor's names and Addresses or
    - b. the notice was mailed to a foreign address, and
  7. allows a mortgage holder to file any attachments to the proof of claim within 120 days, but they must file the Proof of Claim timely.
2. Rule 3004 provides the debtor(s) or the Trustee the ability to file a claim on behalf of a creditor within the 30 days after the expiration of the claims bar date.
    - a. The Trustee will not, with very rare exceptions, file a proof of claim.
    - b. It is your duty as the attorney to file a claim on behalf of the creditor, if they fail to file one,
      - i. If it is a secured creditor and the debtor(s) would like to retain the vehicle,
      - ii. If it is a priority creditor,
      - iii. If the creditor has a non-dischargeable claim,
  3. If you fail to timely file a claim on behalf of a creditor, you might be able to file a Motion under Rule 9006.
    - a. You must show that the failure to act was through excusable neglect.

#### Amended Schedules D, E, and F.

1. Creditors have 70 days from the date of filing in order to file claims.
2. In a Chapter 13 case, if the Creditor does not receive notice, they are not considered to be covered by the Plan and will not be discharged upon completion.
3. In Urbana, Peoria, and Rock Island, if you file an Amended Schedule D, E, or F, and the creditor does not have enough time to file a claim, then the Court may strike the Amended Schedule, unless you file the Proof of Claim within the 30 days after the expiration of the Bar date.

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<sup>i</sup> [Hamilton v. Lanning](#), 560 U.S. 505, 130 S. Ct. 2464 (2010)

<sup>ii</sup> [Till v. SCS Credit Corp.](#), 541 U.S. 465, 124 S. Ct. 1951 (2004)

<sup>iii</sup> [Germeraad v. Powers](#), 826 F.3d 962 (7th Cir. 2016)