AMERICAN
BANKRUPTCY
INSTITUTE

2020 Consumer Bankruptcy Forum

Advanced Issues in Chapter 13 Practice

Presented by the Hon. Steven W. Rhodes
Consumer Bankruptcy Conference

Caralyce M. Lassner
Caralyce M. Lassner, JD | Rochester, Mich.

Lisa K. Mullen
Office of the Chapter 13 Standing Trustee | Southfield, Mich

Hon. Daniel S. Opperman
U.S. Bankruptcy Court (E.D. Mich.) | Bay City

Kelly L. Scola
Butler Rowse-Oberle PLLC | Saint Clair Shores, Mich.

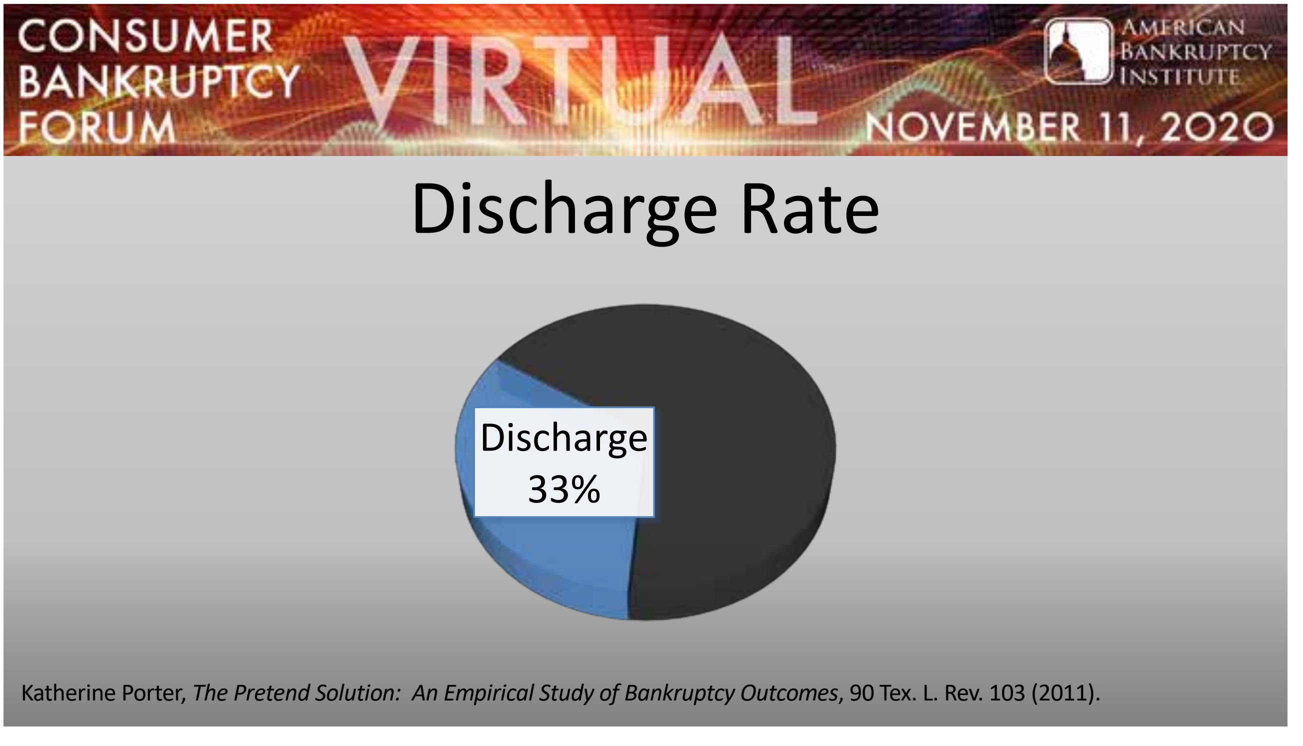
CONCURRENT SESSION

2020


AMERICAN
BANKRUPTCY
INSTITUTE
AMERICAN
BANKRUPTCY
INSTITUTE
CONSUMER
BANKRUPTCY
FORUM
VIRTUAL
NOVEMBER 11, 2020


CONSUMER
BANKRUPTCY
FORUM
VIRTUAL
AMERICAN
BANKRUPTCY
INSTITUTE
NOVEMBER 11, 2020
Success in Chapter 13


CONSUMER
BANKRUPTCY
FORUM
VIRTUAL
AMERICAN
BANKRUPTCY
INSTITUTE
NOVEMBER 11, 2020
How do you define "success"?


CONSUMER
BANKRUPTCY
FORUM
VIRTUAL
AMERICAN
BANKRUPTCY
INSTITUTE
NOVEMBER 11, 2020
Discharge Rate
Discharge
33%
Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103 (2011).

CONSUMER BANKRUPTCY FORUM VIRTUAL — AMERICAN BANKRUPTCY INSTITUTE — NOVEMBER 11, 2020

	Total	Chapter 13 Plan Completed	Percent with a Completed Plan
All Cases in Sample	123,185	47,849	38.8%
Joint Filings	40,492	20,669	51.0%
Solo Cases	82,693	27,180	32.9%
Filed *Pro Se*	10,560	240	2.3%
Filed with an Attorney	110,449	45,805	41.5%
Unknown	2,176	1,804	82.9%
Prior Filing	34,513	7,898	22.9%
No Prior Filing	77,635	30,999	39.9%
Unknown	11,037	8,952	81.1%
Fees Paid in Full at Filing	101,851	41,848	41.1%
Fees Not Paid at Filing	20,228	5,025	24.8%
Unknown	1,106	976	88.2%

Ed Flynn, *Success Rates in Chapter 13, Bankruptcy by the Numbers*, ABI Journal, August 2017, at 38.

CONSUMER BANKRUPTCY FORUM VIRTUAL — AMERICAN BANKRUPTCY INSTITUTE — NOVEMBER 11, 2020

Is it that simple?

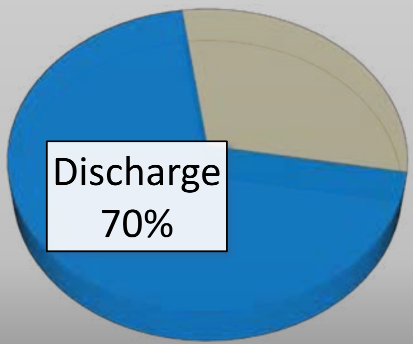
Discharge Rate = Success Rate ?

CONSUMER BANKRUPTCY FORUM VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
NOVEMBER 11, 2020

Discharge Rate of Which Cases?

CONSUMER BANKRUPTCY FORUM VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
NOVEMBER 11, 2020

Confirmed Cases



Brian D. Lynch, *Measuring Success in Chapter 13*, CONSIDER CHAPTER 13 (June 5, 2016), https://considerchapter13.org/2016/06/05/measuring-success-in-chapter-13/.

CONSUMER BANKRUPTCY FORUM VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
NOVEMBER 11, 2020

CHAPTER 13 TRUSTEES CASE COMPLETION SURVEY FOR CASES FILED 1/1/13 TO 12/31/13

58%
CASE COMPLETION PERCENTAGE

70%
CASE CONFIRMED PERCENTAGE

124,576
CASES FILED
Sample Size

CONSUMER BANKRUPTCY FORUM VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
NOVEMBER 11, 2020

Other Metrics of Success in Chapter 13

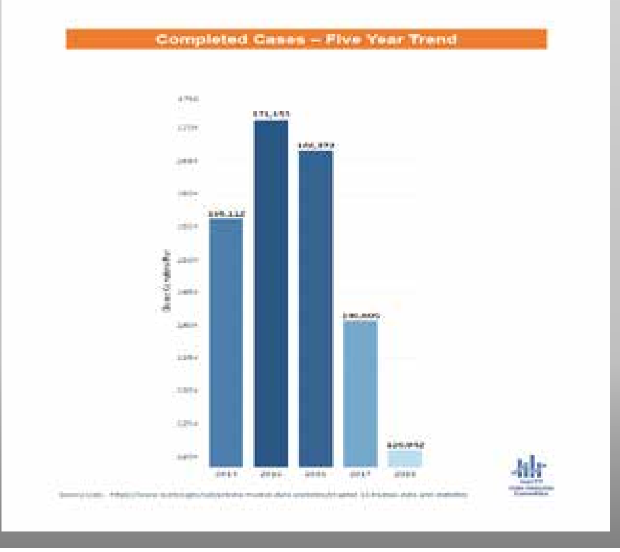
- Delayed Discharge – Extended Breathing Spell – Creditors Held at Bay
- Surrender Real or Personal Property
- Retain Assets (Homes, Vehicles)
- Negotiate Loan Modification
- Pay Arrearages on Homes and Vehicles – Reduce Interest Rate on Personal Property

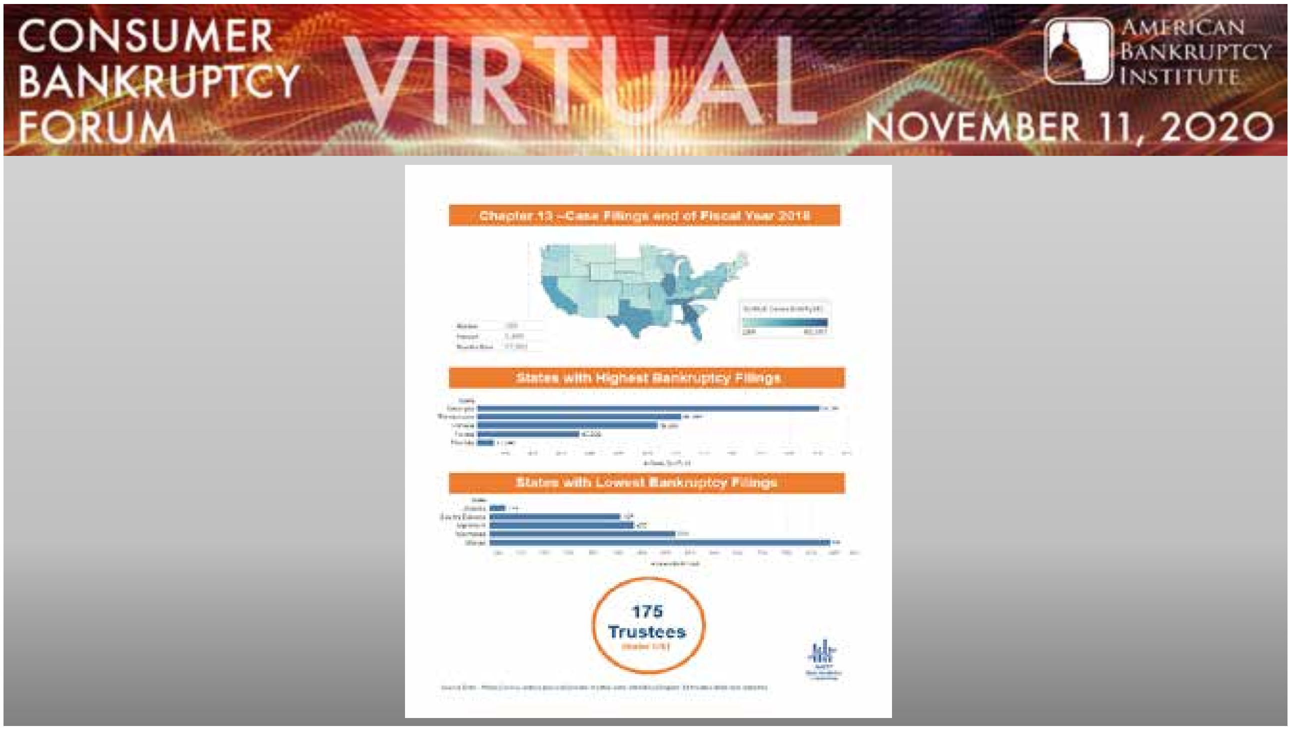
CONSUMER BANKRUPTCY FORUM VIRTUAL NOVEMBER 11, 2020
AMERICAN BANKRUPTCY INSTITUTE

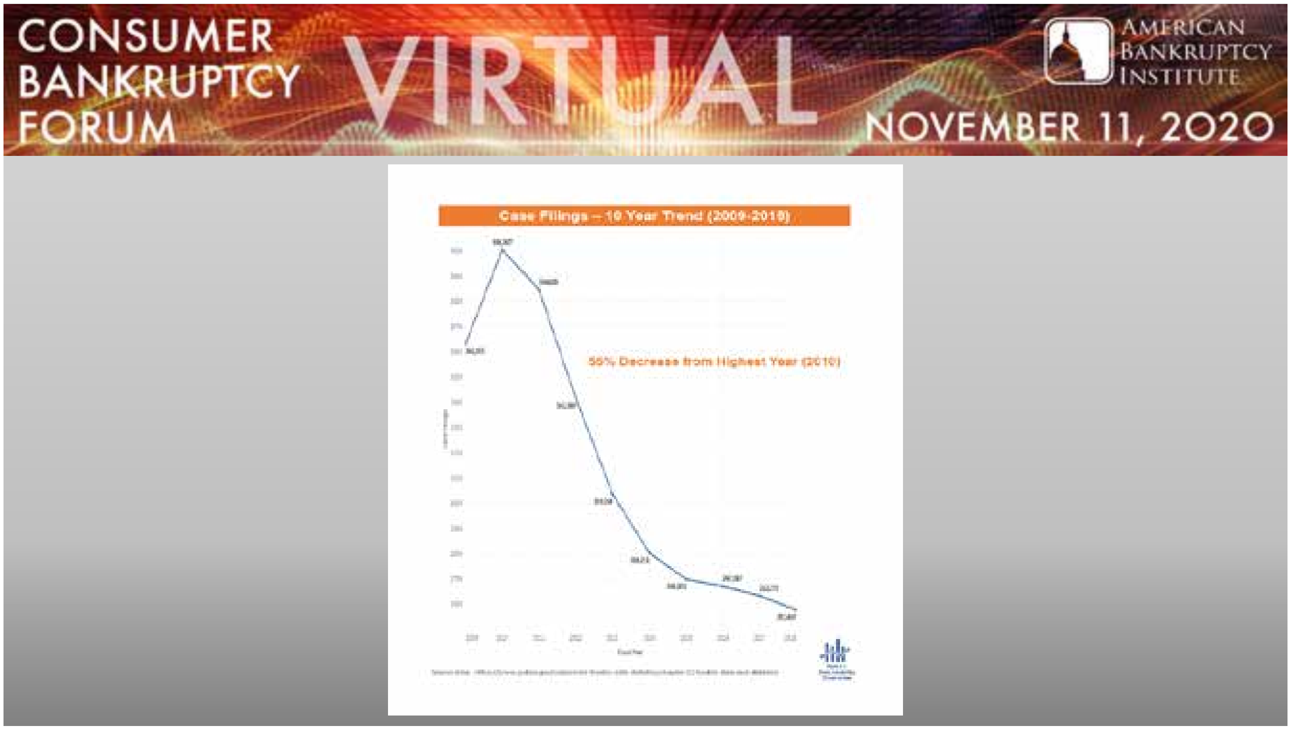
Other Metrics of Success in Chapter 13

- Deal with Non-Dischargeable Debts (Mortgage Debt, Student Loans, DSOs, Taxes)
- Recover Repossessed, Levied, Impounded Property
- Distribution to Unsecured Creditors
- Enhanced Quality of Life

CONSUMER BANKRUPTCY FORUM VIRTUAL NOVEMBER 11, 2020
AMERICAN BANKRUPTCY INSTITUTE




CONSUMER BANKRUPTCY FORUM
VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
NOVEMBER 11, 2020
Chapter 13 –Case Filings end of Fiscal Year 2018
States with Highest Bankruptcy Filings
States with Lowest Bankruptcy Filings
175
Trustees


CONSUMER BANKRUPTCY FORUM
VIRTUAL
AMERICAN BANKRUPTCY INSTITUTE
NOVEMBER 11, 2020
Case Filings – 10 Year Trend (2009-2018)
55% Decrease from Highest Year (2010)

ADVANCED CHAPTER 13 ISSUES – STUDENT LOANS

By: Daniel S. Opperman

I. Continual and Constant Issue

A) The issue has been active since at least the mid-1980s, as witnessed by the standard articulated in *Brunner v. New York State Higher Educ. Servs. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987).

B) Since *Brunner*, Congress and the Courts have grappled with various formulas and approaches to balance the issues among debtors, creditors, and the public.

C) As a result, today the estimated student loan debt is at least $1.67 trillion, trailing mortgage debt and ahead of credit card and vehicle loan debt. Federal student loan debt is about $1.5 trillion.

D) The average student loan debt is approximately $30,000 per student spread across 43 million borrowers.

E) About 12% of these loans are in default or 90 days past due, and 20% are in deferment or forbearance status.

II. Possible Solutions

A) For a great overview and report about the problem and solutions, the ABI Commission on Consumer Bankruptcy is an excellent source.

B) Positive Congressional action is needed and is the best avenue.

C) Short of Congressional action, consider:

1) Direct inquiry to the lender for relief. Many lenders have reduced payment plans with eventual release of debt or abeyance programs that allow either a release or reduction of payments.

2) Chapter 7; with utilization of various tests or approaches articulated by the 6th Circuit and Courts within the 6th Circuit.

3) Chapter 13; with classification and treatment as may be allowed by trustees and judges in your district.

4) Regardless of which approach is taken, realize that these cases are very fact driven, as well as dependent on the judge or trustee assigned to the case. When possible, emphasize the age of the debtor, the years the debtor has paid the loan, the health

status of the debtor, the current employment status of the debtor, the future prospects of the debtor's employment, and the familial status of the debtor.

III. Cases to Consider

A) Within the Sixth Circuit

1) *Hutsell v. Navient* (*In re Hutsell*), No. 18-06038, 2020 Bankr. LEXIS 2204 (Bankr. N.D. Ohio, Aug. 19, 2020). The Bankruptcy Court did not allow the inclusion of support from Debtor's parents for purposes of calculating available income to repay student loans. Debtor who was 47, was unable to retain employment because of health issues. As a result, Debtor was granted a discharge.

2) *Pierson v. Educ. Credit Mgt. Corp.* (*In re Pierson*), No. 17-03096, 2018 WL 4849658 (Bankr. N.D. Ohio, Oct. 4, 2018). Functionally illiterate and disabled, the 47 year old Debtor living near poverty line was granted a discharge of student loan.

B) Back to *Brunner* Basics

1) *Rosenberg v. N.Y. State Higher Educ. Servs. Corp.* (*In re Rosenberg*), 610 B.R. 454 (Bankr. S.D.N.Y. 2020). The Bankruptcy Court reviewed the original *Brunner* test as well as cases imposing stricter standards than *Brunner*, but not necessarily consistent with *Brunner*. In *Rosenberg*, Debtor received a discharge of his student loans after paying portions of his student loans for over 15 years, with occasional deferments because of low income.

C) Back to 11 U.S.C. § 523(a)(8) Basics

1) *Navient Solutions, LLC v. McDaniel*, (*In re McDaniel*) 973 F.3d 1083 (10th Cir. 2020) and *Crocker v. Navient Solutions, LLC* (*In re Crocker*), 941 F.3d 206 (5th Cir. 2019). Not all loans are a "qualified education loan" or "loan made, insured, or guaranteed by a governmental unit or nonprofit institution." In opinions that directly and indirectly cite Justices Holmes, Scalia and Gorsuch, the Fifth and Tenth Circuits conclude that the debts owed to Navient were discharged.

A Non-Academic Discussion on Good faith in Chapter 13

By: Caralyce M. Lassner, JD
Rochester, MI

"[H]e who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage." *Keystone Driller Co v General Excavator Co*, 290 US 240 (US Sup Ct 1933), internal citation omitted.

Debtor's counsel, when was the last time you had to really 'drill down' and evaluate the good faith of your client? Recently I had to do just that and let me tell you, it wasn't as easy as one might think! In preparation for an evidentiary hearing on objections to confirmation I had to get much more familiar with the technical requirements of good faith than just what my gut was telling me as I'm unaware of the proper method to cite such a belief in pleadings or oral advocacy and frankly, I don't think the Court would have cited my gut in deciding in our favor.

And while these materials have been prepared from the point of view and evaluation of a traditionally debtors' counsel, as I do engage in the representation of the occasional individual creditor, I believe these materials may be of use to creditors' counsel as well.

Please note that I may use "bad faith" and "lack of good faith" interchangeably for easier communication.

Overview.

11 USC 1325. For express purposes of this particular topic, let's boil down 1325 to simple terms: 1325 provides that the Court shall confirm a plan so long as the debtor, and by extension the plan, meet nine (9) affirmative requirements:

1. The plan complies with the Code,
2. Any filing or other fee required by the Code has been paid,
3. The plan has been proposed in good faith and doesn't violate a law,
4. The plan proposes to pay at least the amount required under liquidation,
5. Each secured creditor has approved of the plan, will be paid what it is owed (or some variance thereof), or the secured property will be surrendered,
6. The debtor will be able to make the plan payments,

7. The act of the debtor in filing the petition was in good faith,
8. The debtor has continued to pay all child support and spousal support that came due after the petition date, and
9. The debtor has filed all tax returns required by law.

OK, so you've filed your client's plan and now you've received objections based on, at least, 1325(a)(7) and 1325(a)(3) – the objecting party states that your client did not file the case or the plan in good faith. Now what?

Elements, considerations, and case law.

1325(a)(7)

Good faith objection:	Burden:	Elements:	Case law/notes/comments:
1325(a)(7) – Filing <u>petition</u> was not in good faith.	Shifting: Objecting party must offer evidence supporting lack of good faith. Then burden on debtor to overcome.	(i) whether the debtor has been forthcoming with the bankruptcy court and the debtor's creditors; (ii) whether the debtor accurately scheduled the debtor's debts and property; (iii) the debtor's motive in filing the petition; and (iv) the debtor's treatment of creditors both before and after the petition was filed.	'The key inquiry in evaluating whether a petition has been filed in good faith is determining "whether the debtor is seeking to abuse the bankruptcy process."' Judge Shefferly, citing *In re Alt*, in his decision in *In re Woodberry*. See "Additional cases addressing good faith in Chapter 13" below for full citation. • Is there any indication the debtor has not forthcoming? Any inconsistencies noted during intake or evaluation of the financial documents like bank statements, paystubs, and/or tax returns? • Did debtor schedule debts to the best of his/her knowledge? • Did debtor disclose all assets? • Why did debtor file the case? *Filing to save home from foreclosure or stop collection activities does not equal bad faith.* • Has the debtor been cooperative and abided by all orders of the Court? Appeared at the 341?

			Made all plan payments as required? Reasonably cooperated with the Trustee and/or creditors? Appeared at a 2004 exam if scheduled? Provided documents as requested and/or subsequently ordered? Note: Debtors may address objections and be cooperative with all parties to whatever extent doing so will not compromise his or her right to advocate on their own behalf or the protections afforded them under the bankruptcy code.

Specific scenarios:

Allegation:	Response to consider and/or factors to evaluate:
Multiple filings = bad faith.	• Title 11 allows individuals to file bankruptcy more than once and has outlined additional requirements (see 11 USC 362) to prevent abuse. • Objecting party should explain how “prior cases demonstrate a lack of good faith in *this* case.” *In re Cruz*, 19-51697, ED MI Bankr (10/12/20) (emphasis in original)
Scheme to “hide” from creditor.	• Did the filing of the petition actually make it easier for the creditor to question the debtor? Obtain documents and financial information? Force communication? Likely not bad faith. • How old is the debt? The petition likely frustrated collection efforts but that does not = bad faith.
Inaccuracies in the Schedules.	• Did the debtor make a good faith effort to provide truthful, accurate, and complete information? If so, honest or unintentional mistakes will not likely rise to the level of bad faith.
Budget is too tight.	• This is a feasibility issue however, the Court need only find that the debtor has the ability to make the proposed plan payments; there is no requirement to “guarantee that every plan payment will be made.” *In re Cruz*, supra.
Objections appear to be based solely on creditor’s disappointment that Title 11 is	• While it is unfortunate that creditor disagrees with the existence of Title 11, use of same does not give rise to bad faith. Further, bad faith cannot be

available and debtor has filed bankruptcy. This usually appears when creditor is an individual or has only ever made a single extension of credit.	extracted simply by the use of one's legal options. • Typically this approach will be taken by a party with the intent to have the case ultimately dismissed and will be indicated by the objecting party's refusal to identify an acceptable resolution short of a full hearing. Again, this approach is typically going to be advanced by an individual creditor, not a corporate creditor.

1325(a)(3)

Good faith objection:	Burden:	Elements:	Case law/notes/comments:
1325(a)(3) – <u>Plan</u> was not proposed in good faith.	Debtor	(i) the debtor's income and living expenses; (ii) the duration of the debtor's proposed chapter 13 plan; (iii) the circumstances under which the debts were incurred; (iv) the amount of payments offered by the debtor as indicative of the debtor's sincerity to repay the debt; and (v) the burden which administration would place on the trustee.	• Above or below median debtor? • Proposing a 36 or 60 month plan? *i.e. despite eligibility for a 36 month plan.* • Size of household? • Monthly net income – is it just reasonable or is it tight enough that bringing attention to it supports good faith? *Example: Household of 7 with net monthly income of $4,931.12 and Schedule J expenses of $4,332.00, is that worth pointing out?* • What is the plan payment compared to the monthly net income? What percentage of the net income is the plan payment? • Of a lesser focus in this writer's opinion but perhaps worthy of note: What dividend will the plan yield? *Note: may want to mention the Trustee fee and attorney fees if either have begun eating into the initial dividend.* • How and when was the debt incurred? *May be an inquiry into a particular debt or all debts collectively.*

			• Has the Trustee asserted any indication of a burden to administer? If not, would not focus on this element.

Overall: This evaluation is based on the totality of the circumstances; a "flexible, case-by-case standard" focusing on the debtors' behavior "before and after the plan is submitted". *In re Cruz*, supra. Do the totality of the circumstances demonstrate that your client are honest but unfortunate, though perhaps naïve or financially immature or irresponsible or [insert your adjective here], debtors who are deserving of the fresh start confirmation and, ultimately, discharge in the Chapter 13 plan is designed to produce?

Specific scenarios:

Allegation:	Response to consider and/or factors to evaluate:
Plan does not substantively consolidate joint debtor estates. *See following section for more information.*	• Making use of all provisions of the bankruptcy code in the manner most favorable to a debtor is not indicative of bad faith.
Plan is paying only a fraction of [creditor's] claim.	• Is all of debtor's available income being paid into the plan? And while it may seem to duplicate arguments advanced in defense of an objection under 1325(a)(7), it is important to reiterate when the debtor is below median, proposing a maximum length plan, or has voluntarily reduced household expenses below the national standards in an effort to maximum repayment to creditors. These factors not only contribute to a positive finding under the totality of the circumstances but also independently demonstrates the sincerity with which debtor has proposed the plan.

Other factors that may touch on or influence good faith objections.

1. As to 1325(a)(4). If creditor objects to a failure to list debtor 1 or debtor 2 or both in the appropriate column on the Schedule indicating which owes the claimed debt or the incorrect debtor is listed in such column: The bottom line is creditor was listed. A clerical error or incorrect understanding by the debtor does not change the fact that creditor was timely notified of the pending case and it is a reasonable contention that the objection does not provide a legal basis on which to deny confirmation. Further, if a creditor demonstrates actual notice, by participating in the proceedings at all, an unintentional failure to list the debt at all in the original schedules should also not be construed as bad faith or prevent confirmation.

2. Substantive consolidation. In our district, the Eastern District of Michigan, the individual estates of each debtor are automatically consolidated at the time of confirmation in joint cases. It is automatic because the model plan provides for it in Section V.DD. and it doesn't typically pose an issue. Here's why it might matter: if the issue potentially preventing confirmation relates to the liquidation requirement of only one of the debtors but the other debtor does not have any unexempt property, you may want to consider striking Section V.DD. In the alternative, you may wish to make changes to the language to the effect of "[t]his case, having been filed jointly by a husband and wife pursuant to 11 USC §302, is not substantively consolidated. See also Section III.H. and III.I. and Attachments 1A, 1B, and Worksheet for additional information." Additional changes were made in the proposed plan to Sections III.H. and III.I. as well as attaching separate liquidation analysis, hence the second sentence.

3. See also 11 USC 1307(c), which may be brought separately from and concurrently with objections to confirmation yet appears to follow the same evaluation process as those applied to objections raised under 11 USC 1325(a)(7) and (a)(3). See also *In re Alt*, fully cited in the following section. "The movant carries the burden on a motion under this section and, when evaluating the motion in the Sixth Circuit, a court must consider "the totality of the circumstances" by applying a multi-factor test with a "nonexhaustive" set of factors. *In re Pfetzer*, 586 BR 421 (ED KY 2018), citing *In re Alt*, fully cited in the following section.

Additional cases addressing good faith in Chapter 13.

The following is a non-exhaustive list of cases of note or interest on this topic:

In re Alt, 305 F3d 413, 419 (6th C 2002), brought to the 6th Circuit based on dismissal for exceeding debt limit and lack of good faith; interesting facts; of relevance herein based on outline of factors to consider in evaluating good faith.

In re Hager, 572 BR 848 (WD MI Bankr 2017), retaining ownership of home (condo) where creditor argued less expensive housing available.

In re Woodberry, 604 BR 336 (ED MI Bankr 2019), citing *In re Alt*, supra.

> The Alt court noted that in determining whether a Chapter 13 plan was proposed in good faith, courts look at a non-exclusive list of factors including: (i) the debtor's income and living expenses; (ii) the duration of the debtor's proposed chapter 13 plan; (iii) the circumstances under which the debts were incurred; (iv) the amount of payments offered by the debtor as indicative of the debtor's sincerity to repay the debt; and (v) the burden which administration would place on the trustee. In addition, the Alt court noted that some of the factors that are examined to determine whether a Chapter 13 plan is proposed in good faith overlap with the factors relevant to determine whether a Chapter 13 case should be dismissed for a lack of good faith, such as: (i) whether the debtor has been forthcoming with the bankruptcy court and the debtor's creditors; (ii) whether the debtor accurately scheduled the debtor's debts and property; (iii) the debtor's motive in filing the petition; and (iv) the debtor's treatment of creditors both before and after the petition was filed.

In re Walker, Case No. 3:19-bk-33182-SHB, (ED TN Bankr 2020), objections filed by ex-husband of debtor related to debt arising from judgment of divorce.

In re Caldwell, 895 F2d 1123 (6th C 1990), debtor seeking to convert from Chapter 7 to 13 to defeat a nondischargeability action by two judgment creditors and pay less than 40% of the judgment amounts during the plan. "The good faith, or lack of it, with which the plan is proposed, distinguishes a sincere effort at repayment from a false one. Courts should not approve Chapter 13 plans which are nothing more than "veiled" Chapter 7 plans." Citing *In re Girdaukas*, 92 BR 373 at 377 (ED WI Bankr 1988)

In re Okoreeh-Baah, 836 F2d 1030 (6th C 1988), pre-BAPCPA case, outlined factors to evaluate good faith.

IMPACT OF COVID-19 ON CHAPTER 13

By: Lisa K. Mullen

I. The Evolution of Dealing with COVID-19:

The Court:

A. The courts have had to change and evolve as the pandemic has progressed. Originally the courts in the Eastern District of Michigan remained open, providing normal court services, however the “in person” services were suspended with no court personnel in intake or at the pro se help desk. The Court implemented a drop box system for paper filings and created a separate computer system for pro se documents (PEDUP). The EDM Court transitioned to telephonic hearings with a statement in favor of liberal adjournments. (*See* Admin. Order 2020-04 March 16, 2020)

B. The Court subsequently issued an Order temporarily suspending the requirement to obtain original signatures for electronic filings. The Order required the filer to obtain a digital signature of a party using any commercially available signing program or in the alternative, obtain written permission from the individual to electronically sign their name. In either event, the filer must retain the digital signature or express written authorization. (See Admin. Order 2020-05, March 19, 2020)

C. Due to a security officer testing positive for COVID-19, the Detroit bankruptcy courthouse closed but Flint and Bay City courthouses remained open. (See Notice Regarding Closing, March 25, 2020)

D. As the pandemic continued to progress, the Court extended the COVID-19 emergency procedures indefinitely. (See Admin. Order 2020-06, April 6, 2020). The Court also suspended the use of a drop box for paper filings for pro se parties in Detroit.

Hearings:

A. In mid-March, United States Trustee Program (“USTP”) postponed Section 341 Meetings so that they could be held telephonically to reduce in person interaction due to the global pandemic. The USTP required the use of telephonic or video appearance to hold 341 Meetings for all cases filed through at least May 10,2020. On June 12, 2020, the requirement was extended to all cases filed through October 10, 2020. The date has been subsequently extended until 60 days after the National Emergency Declaration has been terminated.

B. The shift to electronic meetings required the chapter 13 trustees and attorneys to revise their current procedures and presented some challenges including:

1. How will the identification and social security card for the debtor be verified? How will debtors attend debtor orientation programs? How will debtors and their attorneys produce documents provided to the trustees at the meetings? Will debtors be able to navigate remote appearances?

2. As all parties continued to adapt, debtor attorneys had to set up remote meetings with their clients to verify identification and social security number and otherwise prepare for the 341 Meeting. Chapter 13 Trustees created new procedures to ensure accurate verification of identification and the validity of the bankruptcy documents filed. Some offices required counsel to provide verification through secure means to the Trustee. Others required debtor's counsel to verify the identification and make a statement at the recorded Meeting as to how they verified the identification and whether it was accurate.

3. As for the process, attorneys and debtors seem to like the process because they can appear from home or work ensuring that safety measures remain in place, including the prevention of mass gatherings. The electronic process also saves vacation time and travel time for debtors and counsel alike and saves on the high cost of parking in Detroit. In fact, in some districts they are considering the possibility of retaining this process in the future.

4. The courts and the trustee offices have experienced challenges in the remote environment including technical difficulties with the parties calling in via telephone or Zoom:

i. placing the call on mute;

ii. speaking loudly enough to be heard;

iii. background noise;

iv. talking during a different case;

v. need for the presentation of evidence;

vi. holding trials in a remote setting;

vii. impermissible recordings of hearings.

5. As the requirement for electronic hearings continues to be extended, one has to ask if the perception of the formality of the process has changed? Have remote appearances lessened the formality of the process?

i. In order to get a feel for the answer to this question, I polled the staff attorneys at different chapter 13 trustee offices across the country. What they shared is likely familiar to many practitioners across the country. The attorneys reported issues with the process including debtors appearing while driving, excessive road noise and other background noise that inhibited debtor's testimony, distracted debtors and environmental factors such as family interference. One has to wonder if the formality of the process is somewhat lost without appearing in the courtroom setting and in front of the presiding judge on the case.

ii. Bottom line: These examples demonstrate the possible need to remind debtors and attorneys that even though the hearings are remote, they are still serious legal proceedings.

II. The Coronavirus Aid, Relief, and Economic Security (CARES) Act:

A. The CARES Act was passed by Congress on March 27, 2020 and included some provisions pertinent to Chapter 13 cases:

1. Section 1113(b)(1)(A)(iii) of the CARES Act amended sections 101 and 1325 providing that "payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. Sec. 1601 *et seq.)* with respect to the coronavirus disease 2019 (COVID-19) are excluded." This means that any such payments will not be considered in determining a debtor's disposable income in a chapter 13 case.

*Note: the USTP issued a Notice to Chapter 7 and 13 Trustees on April 7, 2020 regarding "recovery rebates" paid to consumer debtors under the CARES Act within 6 months prior to filing. The Notice provided that payments made with respect to COVID-19, are excluded from the statutory definitions of current monthly income and disposable income and should be excluded from the calculation of projected disposable income in a chapter 13 plan. The notice did have one caveat in that it stated in "rare chapter 13 cases filed on or after March 27, 2020, the recovery rebate may be relevant to the confirmation standard contained in 11 U.S.C. §1325(a)(4). In any event, trustees were directed to notify the United States Trustee prior to taking any action to recover these payments.

2. Section 1113(b)(1)(C) of the CARES Act further added section 1329(d) to permit modification of the plan upon request of the debtor if, "the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; and the modification is approved after notice and a hearing." The modified plan "may not provide for payments over a period that expires more than 7 years after the time the first payment under the original confirmed plan was due."

3. These amendments are due to sunset one year from enactment.

III. Analyzing plan modifications under the CARES Act:

A. In analyzing whether to modify a plan under the CARES Act, counsel must first establish whether the debtor qualifies. Counsel should determine:

1. Was the debtor's plan confirmed before March 27, 2020?

2. Is the debtor experiencing or has experienced a material financial hardship due directly or indirectly from COVID-19?

3. How long does the debtor need to extend the plan?

B. In evaluating a debtor's options, counsel should:

1. review the debtor's current sources of income, if any;

2. amend schedules I and J to reflect those current sources of income.

Note: LBR 3015-2(b)(4) requires all necessary amended schedules to be filed with the plan modification.

3. provide proof of the current income to the chapter 13 trustee;

4. discuss with the debtor what impact the debtor has experienced due to COVID-19 and what documentation the debtor may have to support the request. If no documentation is available, consider filing an affidavit of the debtor detailing the direct or indirect impact the debtor has experienced;

5. If the debtor has experienced unemployment due to COVID-19, determine what, if any, sources of income the debtor received during the period of unemployment. Compare the monthly benefit received to the income disclosed on Schedule I to determine the net impact. Remember, the debtor has the burden of proof when filing a plan modification.

6. discuss with the debtor the pros and cons of a plan extension up to 7 years with full consideration given to the following:

* debtor will be in bankruptcy for 7+years depending on the pre confirmation phase;

* a plan extension extends the obligations to remit tax refunds, profit sharing/bonuses, etc.-if the plan is extended, all provisions are extended.

* increased chance of "life happens."

7. ensure that any plan medication filed under the CARES Act is filed prior to the expiration date for this provision of the Act.

IV. Procedural Considerations with Seeking Relief Under the CARES Act:

A. Can modification of the plan be sought by stipulation with the trustee?

Judge Shefferly answered this question in the case of *In re Glover,* Case No. 19-46483 (Bankr. E.D. Mich. April 14, 2020). In that case, the debtors and the chapter 13 trustee, entered into a stipulation to provide for a temporary suspension of plan payments as the debtor's income had been impacted due to COVID-19. The Court entered the Order but then vacated the order on the basis that stipulating to the relief, without notice to all of debtor's creditors, was not a proper way to seek relief. Judge Shefferly noted that the Bankruptcy Code does not recognize or permit a "suspension" of plan payments. He noted that the Code provides for a mechanism by which the debtor can seek relief – upon the filing of a plan modification under 11 U.S.C. Section 1329 with notice as required by Federal Rule of Bankruptcy Procedure 3015(h). He further stated that the debtor can seek expedited relief through Federal Rule of Bankruptcy Procedure 9006(c) and L.B.R. 9006-1. The court was sympathetic to the debtor's need for relief but required the debtor to follow well-established law and procedures.

B. Can a debtor seek modification of a plan under the CARES Act if the plan was confirmed after March 27, 2020?

Judge Tucker answered this question in the case of *In re Drews*, Case No. 19-52728 (Bankr. E.D. Mich. July 30, 2020). In the *Drews* case, the plan was confirmed on April 15, 2020. Debtor sought to modify the plan on July 3, 2020 to extend the length of the plan to 84 months. Judge Tucker's opinion correctly pointed out that the CARES Act and new section 11 U.S.C. Section 1329(d) apply only to cases where a plan has been confirmed before the enactment of the CARES Act. Since the plan was confirmed subsequent to the passing of the legislation, the plan modification was denied.

C. May a court use its discretion under Section 105 of the Bankruptcy Code to confirm a plan with an effective date prior to the enactment of the CARES Act such that a debtor can utilize the plan extension provision provided in Section 1329(d)?

Judge Grandy of the Bankruptcy Court for the Southern District of Illinois answered this question in the case of *In re Bridges*, Case No. 19-31012 (Bankr. S.D. Ill. July 30, 2020). In that case, the debtor's plan had been pending for several months pre-confirmation with several hearings on confirmation. A hearing on the chapter 13 trustee's objection was set for April 30, 2020. At the hearing, the debtor asked the Court to utilize its discretion under Section 105(a) to retroactively confirm the debtor's plan so she could take advantage of the plan extension provided for in the CARES Act. Citing the plain language of the CARES Act and the applicability of section 1329, the Judge rejected the debtor's argument finding that the Court cannot "ignore the explicit mandates of the CARES Act amendments." Further, the Court had no authority to exercise its power under Section 105(a) to set a fictional "effective" confirmation date nor could the Court use its authority "to enter *nunc pro tunc* orders to "back date" confirmation of the Debtor's Plan."

D. Can a debtor seek a modification under the CARES Act if they were already delinquent in plan payments as of March 27, 2020?

Judge Grabill of the Bankruptcy Court for the Easter District of Louisiana answered this question in the case of *In re Gilbert*, 2020 WL. 5939097 (2020). The court addressed this issue in multiple cases on the docket that sought to modify the plan where the debtors were already in default prior to the passing of the CARES Act. The Chapter 13 trustee objected to the plan modifications on that basis. The Court analyzed Section 1329(d) and found that the debtors were only required to meet two requirements for modification: (1) that the debtors had a confirmed plan as of March 27, 2020 and (2) that the debtors had experienced a direct or indirect financial hardship as a result of COVID-19. The Court declined to read into Section 1329(d) a third requirement that the debtors were current in plan payments as of March 27, 2020.

E. If a plan modification is filed seeking a plan extension, does the debtor have to avail himself of the full 84 month plan term?

In some districts, trustees object to plan modifications that seek to extend to 84 months if the plan is running less than 84 months. (Utah) Some judges allow full extensions to 84 months while others limit the extension to the length the plan is running. There are no published decisions on this issue in our district.

F. Can the debtor modify the plan after the CARES Act expires?

Based on a plain reading of the statute, it does not appear that the debtor will be able to modify the plan to obtain that relief although there are no decisions on this issue. One factor to consider will be whether the debtor's plan modification filed on the day the law expires is eligible for relief under the CARES Act.

V. Mortgage Forbearances under the CARES Act:

A. Section 4022 of the CARES Act includes provisions regarding treatment of mortgage loans. There are many facets of this legislation too expansive to cover in these materials. The following "highlights" are offered:

1. The Act provides for a foreclosure moratorium for all "Federally-backed mortgage loans." The Act defines a "Federally-backed mortgage loan" to include a loan:

i. which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1- to 4- families
that is--

(A) insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. 1707 et seq.);
(B) insured under section 255 of the Nation Housing Act (12 U.S.C. 1715z-20);
(C) guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z-13a, 1715z-13b);
(D) guaranteed or insured by the Department of Veterans Affairs;
(E) guaranteed or insured by the Department of Agriculture;
(F) made by the Department of Agriculture; or
(G) purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

2. The original moratorium ran through May 18, 2020, however, it has now been extended to the end of January, 2021 for most foreclosure and eviction actions. During the moratorium, a servicer of an eligible mortgage loan cannot initiate a judicial or non-judicial foreclosure, cannot give notice or conduct a foreclosure hearing or sale and cannot proceed with a foreclosure-related eviction. The exception to this is vacant or abandoned property or a foreclosure that was commenced prior to the enactment of the CARES Act.

B. How does a borrower request a forbearance under the CARES Act?

A borrower may contact the mortgage servicer and request a forbearance. The request may be oral or written and must assert that the borrower is experiencing financial hardship due to COVID-19. The hardship may be direct or indirect and may be requested regardless of the delinquency status of the loan. The mortgage servicer may not request additional documentation regarding the hardship other than the attestation made by the borrower. The CARES Act states that the forbearance "shall" be granted for a period of up to 180 days and "shall" be extended at the borrower's request. The servicer may not charge any interest, fees or penalties during the forbearance period beyond what would have been charged had the borrower made all contractual payments timely.

C. May a borrower request to shorten the forbearance period?

Yes, the CARES Act states that, "…at the borrower's request, either the initial or extended period of the forbearance may be shortened."

D. How is the process working?

1. In polling the chapter 13 offices across the country, many debtors are requesting mortgage forbearances.

2. There have also been reports of instances where debtors have not requested a forbearance but the mortgage company has filed a notice of forbearance with the court without the consent of the debtor. Debtor's counsel should carefully review any notices of forbearance and confirm with the debtor that the forbearance has been requested.

3. A class action lawsuit was filed in the Western District of Virginia against Wells Fargo (20-00046-MFU) alleging Wells Fargo:

i. placed borrowers' loans from at least 14 states into forbearance under the CARES Act without authorization to do so as a means to increase its mortgage servicing income;

ii. failed to report to creditor reporting agencies mortgage payments made by the borrower during a forbearance period giving the appearance to a third party that the loan is in default;

iii. forbearance process was used to limit Wells Fargo's risk in the event borrowers default in the future;

iv. had a vested interest in loans in forbearance because they may receive $500-$1000 in incentive payments depending on the workout option that the borrower agrees to at the end of the forbearance period.

v. On September 22, 2020, An Agreed Order Resolving Plaintiffs' Motion for Preliminary Injunction was entered. Wells Fargo voluntarily agreed that they:

a. would not activate a COVID-19 related forbearance for any chapter 13 debtor unless the debtor requested the forbearance;

b. would not extend any forbearance for any chapter 13 debtor beyond the original term unless the debtor (or counsel) requested the extension or initially requested it but the debtor has subsequently failed to respond;

c. would not file notices of forbearance in any chapter 13 case stating that the debtor requested the forbearance or an extension of the forbearance unless the debtor actually requested it;

d. would not file a motion for relief from stay prior to January 21, 2021, in a case where a debtor was provided a forbearance without requesting it. However, the exceptions to this agreed upon provision is if the debtor consented to the relief or the motion is necessary to protect the lien or collateral.

**See* https://www.classaction.org/news/class-action-alleges-wells-fargo-placed-mortgages-into-cares-act-forbearance-without-borrowers-consent

E. What is the difference between a forbearance and a deferment?

While not defined in the CARES Act, it is important for the borrower to understand the difference between a forbearance and deferment. Generally speaking, with a forbearance, interest continues to accrue (except as provided in the CARES Act) and the repayment of the payments included in the period of forbearance are due in a lump sum at the end of the forbearance period. With a deferment, interest sometimes accrues and a borrower may be permitted to pay the deferred payments over a period of time. The CARES Act does not provide guidance in how the payments included in the forbearance period are to be treated once the forbearance period ends. Debtor's counsel will need to be in close contact with their clients to determine the debtor's options as the forbearance period is coming to a close and consider filing a plan modification to address the payments not made during the forbearance period.

F. How are the forbearances being treated by chapter 13 trustees and courts:

1. In polling the staff attorneys in the Chapter 13 offices across the country, many courts are taking the position that conduit plans cannot be modified upon the filing of a notice of forbearance alone. Any change to the plans requires a plan modification and a court order entered to effectuate the change. This approach is consistent with Federal Rule of Bankruptcy Procedure 3015 and 2002 as well as Local Bankruptcy Rule 3015-2 (EDM). Some courts also require an affidavit to be filed by the debtor to verify the reasons of financial hardship related to COVID-19 along with supporting documentation.

2. Some trustee's offices are seeing "extensions" of the forbearance but notices are not filed on the court's docket. Pre-confirmation, a few trustees are requiring the debtor's plan to address how the missed or deferred payments will be dealt with in the future while some trustees object seek an increase in payments if debtor requests a forbearance but does not file amended Schedules I and J.

i. At least one trustee in Florida has taken the position that when a notice of forbearance is filed, the trustee will file a "Notice of Intent Not to Make Further Monthly Mortgage Disbursements and to Temporarily Reduce Chapter 13 Plan Payment." The trustee's notice shows the months included in the forbearance along with the debtor's new reduced plan payment which consists of the plan payment minus the mortgage payment and the trustee fee. The trustee puts the mortgage payments on hold until the deadline to object expires. If no objection is filed, they update their system with the new payment amounts. If the debtor says that the forbearance was not requested, the trustee withdraws the notice and resumes disbursements pursuant to the confirmed plan. Once the forbearance time runs, the debtor's attorney must modify the plan to pay the missed payments.

3. Districts where they have presumptive or "no look" fees for post confirmation services are seeing a rise in the filing of plan modifications along with a corresponding rise in the fees charged for such services.

4. The forbearances that have been requested under the CARES Act raise related questions in chapter 13 cases:

i. If the debtor is in a forbearance at the time of filing, are the debtor's payments considered "current" or is the obligation required to be paid via the chapter 13 trustee in order to comply with LBR 3070-1?

ii. What happens at the end of the forbearance period if the debtor does not file a plan modification to address the payments included during the forbearance period?

iii. Who pays the taxes and insurance during the forbearance period?

iv. Will there be an influx of loan modifications offered by creditors to debtors to address the payments during the forbearance period or will notices of payment change be filed to increase the mortgage payments to address the payments included in the forbearance period?

VI. Takeaways On This Topic:

A. Stay up to date on your court's procedures for hearings and signature requirements by frequently reviewing the court's website;

B. Stay up to date on the USTP's Section 341 Meeting requirements and your applicable trustee procedures for appearances and document production;

C. Carefully analyze the requirements for seeking relief under the CARES Act taking into consideration the eligibility requirements, the timing for filing any plan modification and the advantages and disadvantages of seeking a plan extension in a chapter 13 case.

D. Be aware of issues with mortgage forbearances and contact your clients to confirm that the forbearance or extension was requested by the debtor. Review the impact of a forbearance on the debtor's Chapter 13 Plan and address any modification needed to effectuate the forbearance and address the payments upon expiration of the forbearance period.

E. Stay informed on your local judges' rulings on any relief sought under the CARES Act to better assist your clients.

DEVELOPMENTS IN DISPOSABLE INCOME

By: Kelly L. Scola
Butler Rowse-Oberle PLLC

Voluntary 401(k) Contributions

In re Davis, 960 F.3d 346 (6th Cir., 2020)

- Argued 8, 2019 and decided June 1, 2020.
- There is a lot to unpack in this case with the parties, the panel judges and the complex analysis the majority exercised in reaching its decision.
- Retired Judge Wedoff argued and briefed on behalf of the debtor/appellant and the Chapter 13 Trustee was the appellee.
    - Judge Wedoff is a past President of the ABI and current member of the Board of Directors.
    - He was also on the working committee that drafted the means test forms.
- HOLDING: In a departure from its own dictum in In re Seafort, 669 F.3d 662 (6th Cir., 2012), split Court held that a Ch 13 debtor who was making 401(k) contributions prior to filing may continue making such contributions post-Petition in the same amount because the contributions are not considered "disposable income." Vacated and remanded.
    - Judge Larsen and Judge Clay were the majority. Judge Larsen wrote the opinion. Judge Readler authored the dissenting opinion.
    - Both Judge Larsen and Judge Readler were recently appointed in 2017 and 2019 respectively.
        - Cannot attribute change in Court's view on new judges trying to make their mark and not feeling bound to follow Seafort.
- FACTS:
    - Trustee objected to failure to devote all disposable income due to debtor's $220.66 retirement contribution on line 41 of Means Test.
        - Line 41 provides: Fill in all qualified retirement deductions. The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as

specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19).

- Trustee's objections relied on that most courts have found that such contribution is included in disposable income.
- After many adjournments, a dismissal for failure of a stand-in attorney to appear at an adjourned confirmation hearing, and reinstatement of the case, parties briefed the issue.
- Bankruptcy Court sustained the Trustee's objections based upon dictum in Seafort.
  - Relying on the reasoning in In re Prigge, 441 B.R. 667 (Bankr. D. Mont. 2010), Seafort 6th Circuit Court stated that it did not agree with the assertion that retirement contributions that continue to be made from pre to post-Petition may be excluded from disposable income. The Court further stated, "[h]owever, our view is not relevant here, because this issue is not presently before us" Seafort at 674, n.7.
- Bankruptcy Judge then invited any party to take up the issue and certify it for a direct appeal to the Circuit.
- Debtor amended her Means Test to omit the retirement deduction, amended her Plan to increase the payment accordingly, and then objected to her own Plan.
- Bankruptcy Court confirmed the Plan, debtor immediately appealed, the Bankruptcy Court authorized a direct appeal and the Circuit accepted.

- ANALYSIS:
  - The disposable income issue did not rest upon 11 U.S.C. 1325(b) as one might expect, but rather turned on 11 U.S.C. 541(b)(7), which was added in 2005 as part of BAPCPA.
    - Section 541 addresses property of the estate.
    - Section 541(b)(7)(A) excludes contributions to 401(k) plans from property of the estate.

- In relevant part, § 541(b)(7)(A) provides:
  - (b) Property of the estate does not include—
  - (7) any amount—
    - (A) withheld by an employer from the wages of employees for payment as contributions—
      - (i) to—
        - (I) [a 401(k) retirement plan]
      - *except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)*. (emphasis added)
    - In addition to the hanging paragraph regarding 910 vehicle claims, the emphasized language above is also known as a hanging paragraph and it is the focus of the opinion.
      - What does that mean? Limited to amount accrued in pre-Petition contributions?
      - Does it extend to post-Petition voluntary 401(k) contributions?
- Majority opinion references four (4) different interpretations of the hanging paragraph:
  - In re Seafort, 669 F.3d 662 (6th Cir. 2012)
    The issue before the Court was whether the debtor could commence voluntary 401(k) contributions when her 401(k) loan was paid in full. The Court rejected the debtor's position that Section 541(b)(7)(A) excludes voluntary retirement contributions from disposable income whether such contributions are made pre or post filing.
    - Rejected line of cases that interpreted the hanging paragraph of Section 541(b)(7)(A) as placing retirement contributions outside the scope of disposable income regarding its availability to fund the Plan. In re Johnson, 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006).
      - As stated above, 6th Circuit Court indicated in dictum that it did not agree with the assertion that retirement contributions that continue to be made from pre to

post-Petition, may be excluded from disposable income. The Court further stated, "[h]owever, our view is not relevant here, because this issue is not presently before us" Seafort at 674, n.7.

- In re Prigge, 441 B.R. 667 (Bankr. D. Mont. 2010)
  A voluntary 401(k) contribution was excluded as disposable income on the Means Test and the Trustee objected. Court sustained the Trustee's objections. In its discussion, the Court interpreted Section 541(b)(7)(A) as focusing on excluding pre-Petition 401(k) assets from disposable income and not continuing voluntary contributions. The Court reasoned that had Congress intended for 401(k) contributions to be excluded from projected disposable income it would have specified the same similar to the exclusion of 401(k) loan repayments from disposable income under 11 U.S.C. 1322(f). Concluded that 401(k) contributions are not a necessary expense.
- In re Seafort, 437 B.R. 204 (B.A.P. 6th Cir. 2010) (Referred to as BAP-Seafort in the Davis opinion)
  In interpreting the hanging paragraph of Section 541(b)(7)(A), the Panel stated that "Congress did not intend for income which becomes available post-petition to be excluded from property of the chapter 13 estate or from the calculation of projected disposable income." (Seafort at 209) The Panel looked to the amount of the pre-Petition contributions, rather than only the accumulation of the contributions. Voluntary retirement contributions should be limited to the amounts made as of the date of filing. Under the Panel's reasoning, a debtor who was not voluntarily contributing to a 401(k) could not begin contributing post-Petition when a 401(k) loan is paid in full, but could continue making the same voluntary pre-Petition contributions post-Petition.
- In re Anh-Thu Thi Vu (2015 Bankr. Lexis 1967)
  Above median debtor voluntarily contributed an average of $877.00 per month to her Thrift Savings Plan and included such amount on her Means Test. As a result, Means Test showed only $74.00 per month as disposable income and the Plan proposed $80.00 per month. Trustee objected arguing that only pre-Petition voluntary

retirement contributions are excluded from disposable income (following Prigge and its caselaw progeny). Trustee also objected as to lack of good faith based upon the amount the debtor will pay to creditors versus the amount the debtor will contribute to her retirement over the life of the Plan—absent the retirement contributions, unsecured creditors would be paid in full.

Court's analysis started with reviewing the 6 month look-back period to determine CMI (referred to as the "CMI interpretation" Davis at 343), which the Court believed is the starting point for disposable income determination.

Court interpreted Section 541's hanging paragraph broadly as "any amount withheld by an employer from the wages of employees for payment as contributions to a qualified retirement plan "shall not constitute disposable income as defined in § 1325(b)(2)." " In re Anh-Thu Thi Vu, 2015 Bankr. LEXIS 1967, *8, 73 Collier Bankr. Cas. 2d (MB) 1568.

  - The Court's method of analysis allows a debtor to deduct the average amount contributed to a 401(k) 6 months prior from disposable income.
  - Although different in approach from BAP Seafort, the results are usually the same.

In a memorandum decision, the Court overruled the Trustee's disposable income objections, but did not make a decision on the good faith argument, leaving it for the parties to resolve or request an additional hearing. Based upon the Court's records, it appears the parties resolved their issues, as the Plan was confirmed with bi-weekly Plan payments in the amount of $336.92 bi-weekly ($729.99/mo) vs original Plan payment of $80.00 per month.

- After analyzing the above cases with the varying interpretations of the hanging paragraph, the majority opinion surmises that it must decide between the debtor's argument illustrated in the BAP Seafort and "CMI interpretation" or the Prigge line of cases that support the Trustee's position.

- Court then takes a deep dive into the specific language of the statute's hanging paragraph to determine if "such amount" that "shall not constitute disposable income" includes on-going voluntary retirement contributions.
    - Debtor's position is that the "amount" of her contributions that are excluded from her disposable income is each contribution her employer withholds in every month.
    - Trustee's position is that the "amount" excluded from disposable income is the total amount of the debtor's 401(k) contributions until the date of filing.
- Language of the hanging paragraph is not well written and is grammatically challenging. Some courts have described it as "inelegantly drafted." Seafort at 671 citing Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011).
    - In analyzing the hanging paragraph to reach the result, the majority opinion takes almost 6 pages, utilizes 3 cannons of law and a Collier treatise to conclude that 401(k) contributions "shall not constitute disposable income" under Section 541(b)(7).
    - The majority opinion views BAPCPA as altering previous existing law.

- NARROW HOLDING: "We hold only that a debtor in like circumstances may deduct her monthly 401(k) contributions from her disposable income under § 1325(b)(2). *See* 11 U.S.C. § 541(b)(7)(A)." (Davis at 357)
    - The "like circumstances" under the facts are voluntary 401(k) contributions in the same amount that were withheld by the debtor's employer for at least 6 months prior to filing.
    - NOTE: Court did not decide whether to apply the interpretation of Seafort BAP or 6th Circuit Seafort (CMI).

- DISSENT:
    - Written by Judge Readler and views BAPCPA amendment to Sections 541(b)(7) as codifying prior decisions.
    - Supports the Circuit's dictum in Seafort that did not agree with the assertion that retirement contributions that continue to be

made from pre to post-Petition, may be excluded from disposable income

  - Judge Readler states that the Circuit had thoroughly analyzed the interpretations of the hanging paragraph in Seafort and rejected the conclusion reached by the majority opinion in the present matter.

- "In the Bankruptcy Abuse Prevention and Consumer Protection Act (or "BAPCPA"), Congress adopted a simple, bright-line rule: a debtor's pre-filing 401(k) contributions are protected from creditors; those sought to be made during the post-filing Chapter 13 reorganization period are not. That is the lone conclusion to draw from the statutory amendments to the bankruptcy code enacted by BAPCPA, from the case law that proceeded BAPCPA's adoption, and from the interpretive clues left by Congress." (<u>Davis</u> at 358)
- Interprets Section 541(b)(7)(A) as codifying <u>Patterson v. Shumate</u>, 504 U.S. 753, 760 (1992) and "expressly excluded pre-petition 401(k) contributions from the "property of the estate" available to creditors. 11 U.S.C. § 541(b)(7)(A)." (<u>Davis</u> at 360)
  - Had Congress intended to contradict the pre BAPCPA majority line of cases holding that disposable income includes voluntary post-Petition 401(k) contributions, it would have expressly done so and did not.
- Disagrees with the majority's interpretation of the hanging paragraph based upon the subject matter of Section 541, which addresses property of the estate for all cases commenced under Sections 301, 302 and 303 and not specifically Chapter 13 disposable income.
- Indicates that the majority opinion "upsets settled expectations" set forth in the Circuit's <u>In re Seafort</u> and followed by many courts that "post-petition 401(k) contributions are disposable income." (<u>Davis</u> at 365).
- Majority opinion "invites abuse by the debtors" to keep post-Petition funds from their creditors by building their retirement

fund. (Davis at 365). Does not believe that the good faith requirement will prevent such abuse.

- What In re Davis Did Not Hold:
    - It did not overturn the 6th Circuit's holding in Seafort that a debtor cannot start voluntary 401(k) contributions post-Petition after a 401(k) loan is paid in full.
    - It did not eliminate the good faith requirement of 11 U.S.C. 1325(a)(3).

In re Penfound, 609 B.R. 602 (Bankr. E.D. Mich., 2019) / pre-Davis
NOTE: case no. 18-48940-PJS

- Trustee's objections to voluntary retirement deduction sustained and District Court affirmed. Debtors appealed to the 6th Circuit and being held in abeyance pending result of the Modified Plan filed.
    - Debtors filed a Modified Plan on August 14, 2020 to decrease plan payments to allow for voluntary 401(k) contributions in the monthly amount of $1,374.79.
    - At the October 15, 2020 hearing on the Plan Modification, Judge Shefferly did not approve the proposed Modified Plan as the debtors were not in "like circumstances" of the debtor in Davis.
        - Debtors in Penfound did not have factual circumstances that fit either within Seafort BAP or 6th Circuit Seafort (CMI).
        - For valid reasons, no 401(k) contributions were withheld for approximately 2 ½ years prior (Seafort BAP), nor were any 401(k) contributions withheld 6 months prior to filing (6th Circuit Seafort CMI.)

In re Williams, 2020 WL 5753318 (Bankr. W.D. Mich. Sept. 24, 2020)

- Post-Confirmation Modified Plan sought to decrease the monthly Plan payment from $1,035.00 to $751.32 solely to allow both debtors to contribute voluntarily to their 401(k) Plans.

- Debtors had been contributing pre-Petition, but terminated the contributions around the time they filed their Chapter 13 case based upon the dictum in In re Seafort, 669 F.3d 662 (6th Cir. 2012)
    - Court did not agree with the assertion that retirement contributions that continue to be made from pre to post-Petition, may be excluded from disposable income. The Court further stated, "[h]owever, our view is not relevant here, because this issue is not presently before us" Seafort at 674, n.7.
- As issue occurred post-Confirmation (vs. pre-Confirmation scenarios in both 6th Circuit decisions of In re Seafort and In re Davis), Judge Dales took the approach of "balancing the binding effect of a confirmed plan against the need to address changed financial circumstances – as Congress itself contemplated when it enacted §1329."

HOLDING: Court did not approve the proposed Modified Plan finding "no reason to relieve the Debtors of the binding effect of the plan they proposed and the court confirmed, and no reason to require their creditors to bear the costs of the Debtors' retirement plans."

Child Support Made by Non-Biological Parent/Debtor

In re Rekucki, 2020 Bankr. LEXIS 2891; 2020 WL 5753318

- Among other issues, the Trustee and creditor objected to debtor's payments of $280.00 per month for child support owed by his non-filing spouse who does not work outside the home for religious reasons.
    - Interestingly, the creditor also objected that the child support payment owed by the debtor's non-filing spouse, but paid by the debtor, constitutes a fraudulent transfer under 11 U.S.C. 548(a)(1)(B)(1), but the Court did not rule on that issue.
    - Based upon the fling of the Third Amended Plan that may yield a dividend of 80% to the general unsecured creditors, the Trustee was no longer pursuing her Objection.
- In sustaining the creditor's objection, the Court relied upon the language of 11 U.S.C. 1325(b), noting the confines of the review as debtor has above median income.
    - Court accepted the stepdaughter as a dependent under 11 U.S.C. 1325(b), but found that the debtor did not prove that the $280.00

child support expense owed by the non-filing spouse was reasonable or necessary as statutorily required.

- Looking to In re Stampley, 437 B.R. 825 (Bankr. E.D. Mich. 2010), Court stated that “the Debtor and his creditors should not be expected to bear the burden of a debt owed solely by his wife, no matter how disproportional her debt is to their total monthly expenses.”
- NOTE: interesting discussion regarding how lifestyle choices, such as religious beliefs and filing bankruptcy, have consequences.