

Midwest Regional Bankruptcy Seminar

Consumer Session

Emerging Issues in Consumer Bankruptcy

Edward J. Boll, III, Moderator

Dinsmore & Shohl LLP | Cincinnati

Edward A. Bailey

Chapter 13 Trustee | Westerville, Ohio

Stuart P. Brown

Stuart P. Brown, PLLC | Covington, Ky.

Hon. Beth A. Buchanan

U.S. Bankruptcy Court (S.D. Ohio) | Cincinnati

John G. Jansing

Office of the Chapter 13 Trustee | Dayton, Ohio

Paul J. Minnillo

Minnillo Law Group Co., LPA | Cincinnati

What the Appellate and Bankruptcy Courts are saying now.

Panelists:

Hon. John P. Gustafson, U.S. Bankruptcy Court, N.D. of Ohio (Toledo)
David Cox, Cox Law Group PLLC (Lynchburg, VA)
Tiffany M. Cornejo, Chapter 13 Standing Trustee (D. New Mexico), *Moderator*

I. Intro

- A. Panelists/Moderator
- B. Statement about Presentation
 - 1. Who benefits from the appreciation in property during a chapter 13 case?
 - 2. Hot topic over the last few years, but has received more litigation due to BOOM in real estate across the nation.

II. Where to begin?

- A. Property of the Estate, §§ 541 and 1306
 - 1. Chapter 13 context
 - a. Property acquired prior to the petition date;
 - b. Property acquired post-petition, but pre-confirmation; and
 - c. Property acquired post-confirmation.
 - 2. Section 541 assets as of the petition date and those acquired within 180d of the DOF.
 - 3. Section 1306 items identified in § 541, plus "property ... that the debtor acquires... before the case is closed, dismissed, or converted".
- B. Vesting, § 1327
 - 1. <u>Provides</u>: confirmation "of a plan vests all of the property of the estate in the debtor" absent a plan or order confirming plan providing otherwise.
 - a. A bankruptcy trustee cannot pay creditors money received after debtors obtained a discharge because the couple's plan said estate property vested in them at confirmation, *even with debtors' consent. See, In re McCrorey*, 2024 Bankr. Lexis 188 (Bankr. D. Idaho 2024).
 - 2. The Metaphysics of Vesting **5 Approaches**, See, In re Maynor, 2023 WL 9102137, 2023 Bankr. LEXIS 2884 (Bankr. E.D.N.C. Nov. 27, 2023) for a breakdown of all 5 approaches, citing, In re Baker, 620 B.R. 655 (Bankr. D. Colo. 2020).
 - a. Estate Termination Approach at confirmation the estate ceases to exist, and all property of the estate, regardless of when acquired, becomes property of the debtor. Post-petition appreciation in value remains with the debtor, § 1327 controls;
 - b. Estate Preservation Approach post-petition appreciation remains with the estate/trustee, § 1306 controls;
 - c. Estate Transformation Approach at confirmation, all property becomes property of the debtor, except that needed to fund the plan regardless of when acquired. Thus, appreciation remains with the estate;

- d. Conditional Vesting Approach at confirmation, vesting gives the debtor an immediate and fixed right to use estate property, BUT that right is not final until the debtor completes the plan and obtains a discharge. Thus, the property remains with the debtor and estate/trustee; and
- e. Estate Replenishment Approach at confirmation, all property of the estate becomes property of the debtor. The chapter 13 estate continues to exist and "refills" with property defined in § 1306. Courts look to certain key dates in a case resulting in any post-confirmation appreciation belonging to the estate.

III. Other Considerations

- A. Judicial Estoppel *See, In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023) In paying the nonexempt personal injury settlement proceeds to trustee, proceeds would be applied to debtors' cases at confirmed percentages, rather than on top of debtors' confirmed plan payments to increase the percentage paid to unsecured creditors.
- B. Exempt Property
 - 1. When is the Exemption Determined?
 - a. Petition Date.
 - (1) Redstone Fed. Credit Union v. Brown, No. 5:18-CV-00161-MHH, 2019 WL 582459 (N.D. Ala. Feb. 13, 2019) Exemptions are determined by law in effect on petition date, not date on which underlying debt was incurred.
 - (2) *Barclay v. Boskoski*, 52 F.4th 1172 (9th Cir. 2022) Exemptions determined on Petition Date, not date on which Judgment Lien attached by recording pre-petition.
 - (3) *In re Gomez*, 646 B.R. 523 (Bankr. D. Colo. 2022) Homestead exemption at the time of filing applied, not the greater amount (due to an amended statute) at the time of the amendment to Schedule C.
 - b. Other Considerations?
 - (1) Judicial Estoppel in other topics Courts always consider judicial estoppel. Should a debtor be allowed to amend the schedule C to claim the full amount of the allowed exemption at the time of filing?
 - (a) *In re Gomez*, 646 B.R. 523 (Bankr. D. Colo. 2022) Homestead exemption at the time of filing applied, not the greater amount (due to an amended statute) at the time of the amendment to Schedule C.
 - (2) Debtors are free to amend their schedules, but there may be a substantive reason why an exemption may not be allowed, i.e. incorrect amount, bad faith, etc. *See Mendoza v. Montoya*, 595 B.R. 849 (B.A.P. 10th Cir. 2019).
- C. Best Interest of Creditors Test Application to Modifications
 - 1. Section 1325(a)(4): [T]he value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

- 2. Value of assets as of the petition date is determined, once and for all, at confirmation [or "effective date of the plan"]. *In re Vellegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017)(Judge Lynch).
 - a. See also, The phrase "on such date" has been held to relate back to the earlier phrase, "the effective date of the plan." Forbes v. Forbes (In re Forbes), 215 B.R. 183, 189 (8th Cir. BAP 1997) First Nat'l Bank v. Hopwood (In re Hopwood), 124 B.R. 82, 85 (E.D. Mo. 1991) (chapter 12 case); In re Lupfer Bros., 120 B.R. 1002, 1004 (Bankr. W.D. Mo. 1990) (chapter 12 case); In re Bremer, 104 B.R. 999, 1002–08 (Bankr. W.D. Mo. 1989) (chapter 12 case); and In re Statmore, 22 B.R. 37, 38 (Bankr. D. Neb. 1982)).
- 3. Motion to Modify Does BICT Apply?
 - a. BICT does NOT apply.
 - (1) On a Motion to Modify, post-petition assets are not included in the BICT. *In re Taylor*, 631 B.R. 346 (Bankr. D. Kan. 2021).
 - (2) *In re Gibson*, 415 B.R. 735 (Bankr. D. Ariz. 2009). "The 'effective date of the plan,' as it relates to the 'best interest' test applies only once and, therefore, is the same date under a modified plan as it was under the original plan." *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183, 189 (8th Cir. BAP 1997) ("We thus conclude that the "best efforts" test is not a factor to be considered by a court in approving postconfirmation modifications."); *In re Marsh*, 647 B.R. 725, 739 (Bankr. W.D. Mo. 2023); *In re Villegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017)(Judge Lynch)("Value of assets in existence as of filing is determined, once and for all, at confirmation.")
 - b. Modification does trigger a new BICT.
 - (1) Barbosa v. Solomon (In re Barbosa), 236 B.R. 540, aff'd 243 B.R. 562 (D. Mass. 2000), aff'd 235 F.3d 31 (1st Cir. 2000). The Barbosa case held that the effective date of a modified plan for purposes of liquidation value is the date of the plan modification.
 - (2) See also, In re Auernheimer, 437 B.R. 405 (Bankr.D.Kan.2010) ("The majority position ... is that the effective date of a plan modification is the date of the modification rather than the effective date of the initial confirmed plan." A decrease to unsecured creditors permitted based on decline in the value of the personal property.)
 - (3) Additional Issue If BICT applies at a postconfirmation modification, may run into additional problems if a "change in circumstances is required. . See, In re Nachon-Torres, 520 B.R. 306 (Bankr. S.D. Fla. 2014). A mistake of an over-valuation on a vehicle was apparently not a change in circumstances that was neither known nor virtually certain at the time of confirmation. Thus, the modification was not permitted.
 - c. Practical Issues
 - d. Date of Determining Value
 - (1) Date of filing;
 - (2) Date of confirmation generally no valuation hearing/appraisal, etd. is done, so how is higher value realized?

- (a) Upon sale of real estate giving way to "new equity"; or
- (b) An understatement of value at filing?
- (3) Practical Application value is determined on 'date of filing' unless a party in interest asks for a later date.
 - (a) See, In re Goudreau, 530 B.R. 783, 788 (Bankr. D. Kan. 2015)("The Court finds that the better view is that the date the Chapter 13 petition was filed should be considered the "effective date of the plan" for purposes of the § 1325(a)(4) liquidation analysis. Choosing this date allows a court to make the Chapter 7 analysis using the information in the original schedules, including the property of the estate under § 541, the non-exempt portion of the debtor's property, the value of the non-exempt property, and the identification and value of the debtor's claimed exemptions."); In re Fleishman, 372 B.R. 64, 71 (Bankr. D. Or. 2007) (dicta) ("Most courts deciding 'best-interests-ofcreditors' test issues in Chapter 13 have considered a hypothetical liquidation of the debtor's assets in Chapter 7 as of the petition date, and consequently have determined that for purposes of § 1325(a)(4), the petition date, in effect, is the 'effective date of the plan.'"); In re Green, 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994)("The Court interprets the "effective date of the plan" as the date the petition was filed."); Matter of Statmore, 22 B.R. 37, 38 (Bankr. D. Neb. 1982)("Viewed with that historical perspective, I read the statutory language "on such date" to refer to the effective date of the plan but not to the assets in existence on the effective date of the plan. I read the statutory provision to suggest that if the estate of the debtor were liquidated under Chapter 7 on the effective date of the plan, the rights of creditors would refer back to the petition date."); see also, In re Nielsen, 86 B.R. 177 (Bankr. E.D. Mo. 1988)(Chapter 12 case).

D. Ongoing Duty to Disclose

- 1. Applicable Code and Rules
 - a. §§ 521(a)(1), 541(a)(7), and FRBP 4002(a) These sections, which provide the requirement to list assets, that property of the estate includes post-petition assets, and an ongoing duty to cooperate with the trustee, respectively, requires an ongoing duty to disclose when read in conjunction with one another.
 - b. FRBP 1007(h) A debtor is obligated to report § 541(a)(5) property, such as life insurance proceeds that are either paid or payable to the debtor within one hundred and eighty (180) days of filing.
- 2. Required To Disclose
 - a. 5th Cir. Allen v. C & H Distribs., L.L.C., 813 F.3d 566 (5th Cir. 2015)
 - b. 11th Cir. Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1274-75 (11th Cir. 2010); Waldron v. Brown (In re Waldron), 536 F.3d 1239, 1244 (11th Cir. 2008).
 - c. W.D. TX In re Pautin, 521 B.R. 754 (Bankr. W.D. Tex. 2014).

- d. E.D. VA- In re Ilyev, 2022 Bankr. LEXIS 2046, 2022 WL 2965029 (Bankr. E.D. Va. July 26, 2022); In re Robinson, 2023 Bankr. Lexis 699 (Bankrs. E.D. VA, 2023)
- e. **D. S.C.** *In re Ingram*, 531 B.R. 121 (2015)
- f. U.S. District Court of New Jersey Coles v. Carlini, 2013 U.S. Dist. Lexis 101873.

3. No Duty to Disclose

- a. Under Rule 1007(h) the specific requirement to amend is only for property set forth in 541(a)(5). There is no provision in the Code or Rules that requires a debtor to report the receipt of postpetition assets or increases in income, except the narrow class of inheritances. *See* Keith M. Lundin, <u>Lundin on Chapter 13</u>, § 127.9, at ¶ 23, lundinonchapter 13.com (last visited Aug. 17, 2022).
- b. It is also important to note that while Rule 1007(h) requires scheduling of property of the estate pursuant to section 541(a)(5), it does not require scheduling of property acquired postpetition that becomes property of the estate only due the operation of section 1207(a) or section 1306(a). Because all property acquired postpetition can become property of the estate, at least until confirmation of the plan, to require scheduling of such property would be completely impracticable. The debtor's cash on hand could, literally, change every day, as items are purchased and new paychecks are received. Similarly, every item purchased or discarded could provide cause for amending the schedules. The primary purpose of sections 1207 and 1306 is to give the protection of section 362(a) to property acquired postpetition in order to ensure the debtor's ability to perform under a plan. 9 Richard Levin & Henry J. Sommer, Collier on Bankruptcy ¶ 1007.08 (16th ed. 2022) (footnote omitted); see In re Boyd, 618 B.R. 133 (Bankr. D. S.C. 2020).
- c. See In re Poe, 2022 Bankr. Lexis 2338 (Bankr. N.D. Ohio 2022) "[t]his court is not aware of any Code, Rule...or confirmation order, that places an obligation on Debtor to self-report an voluntarily pay increased wage earnings to Trustee." "But that doesn't mean postpetition changes in income are immaterial or not subject to disclosure." The court suggests the requirement to turnover income requires disclosure, but may not require self-reporting.

4. Other Options

- a. Include the requirement in the Plan.
- b. Include the requirement in the Order of Confirmation.
- 5. Exceptions Judicial Estoppel.
 - a. In many courts there is a clear duty to update litigation assets that arise postpetition or there are negative consequences for the debtor based upon judicial estoppel.
 - b. If there is a general duty to disclose or no general duty to disclose, where there are inconsistencies in the positions taken in the bankruptcy schedules

and in the tort litigation, that prevents the debtor from being able to go forward with the litigation on their own behalf. The problem is – how is there reliance by the bankruptcy court if there is no duty to disclose the postpetition tort rights? There are some fairly extreme examples in the Sixth Circuit's case law.

- IV. Who gets the INCREASE in Value When the Property is Actually Sold During the Chapter 13?
 - A. Case Law
 - 1. See Chart.
 - 2. Debtor
 - a. *In re Baker*, 620 B.R. 655 (Bankr. D. Colo. 2020). Debtor gets the non-exempt surplus on sale during the Chapter 13.
 - b. *In re Elassal*, 654 B.R. 434 (Bankr. E.D. Mich. 2023). Proceeds from post-confirmation sale of home were not "disposable income," of kind that debtor could be required to devote to payments under plan.
 - c. In re Klein, No. 17-19106-JGR, 2022 Bankr. Lexis 2418 (Bankr. D. Colo. 2022). Appreciation in property in Chapter 13 case belongs to debtor. Debtor owned minority interest in LLC that Debtor valued at \$15,000.00, which was not exempt and fully accounted for in calculating best interest of creditors and determining plan payment and dividend to unsecured creditors. After confirmation, LLC sold primary asset and distributed \$75,000.00 to Debtor as his proportionate share of proceeds. Chapter 13 Trustee attempted to claim proceeds for benefit of creditors arguing that proceeds were post-petition property that belong to the estate under Section 1306. Court noted that while Section 1306 sweeps into estate any new property, Section 1327 vests in Debtor property existing at confirmation, free and clear of any claim or interest of any creditor provided for the plan. Section 1327 is more specific than Section 1306. Section 1306 protects assets acquired post-petition by imposing protection of automatic stay while Section 1327 revests property in Debtor and allows Debtor to dispose of property and retain proceeds. Proceeds of sale of asset during a Chapter 13 do not become disposable income regardless of whether property is exempt. While Debtor may voluntarily use proceeds to make payments under Chapter 13 plan; Debtor cannot be compelled to do so.

3. Estate/Trustee

- a. *In re Marsh*, 647 B.R. 725 (Bankr. W.D. Mo. 2023). Proceeds from post-confirmation sale of debtors' residence, but before end of case, were property of estate under estate replenishment approach.
- b. *In re Calixto*, 648 B.R. 119 (Bankr. S.D. Fla. 2023). A post-petition litigation claim is property of the estate as it is one described under § 541 in that it is a legal or equitable interest of the debtor in property and was acquired after the commence of the case, but before it closed, § 1306(a)(1).

- c. Rodriguez v. Barrera, 22 F4th 1217 (2022). Post-confirmation proceeds from sale of debtor's residence do not constitute property of the estate due to the plain language of § 1327(b), because confirmation "vests all of the property of the estate in the debtor". Proceeds generated from the debtor's property after confirmation does not become POE as the underlying property no longer belongs to the estate.
- B. Realizing the Value At Confirmation or Post-petition Increase.
 - 1. Issue because valuations are not commonly done in chapter 13, how do parties know if the increase in value is from a low-value at filing or a post-petition increase?
 - 2. Objecting to When Property of the Estate Vests, *see In re Adams*, 654 B.R. 703 (Bankr. M.D.N.C. 2023). *See also* §§ 1322(b)((9) and 1327(b) and (c).
 - a. Can a Trustee avoid the problem of a shaky valuation or a post-petition increase by objecting to when POE actually vests?
 - 3. If still property of the estate....?
 - a. Is a Modification of Plan required? OR
 - b. BICT done post-confirmation?
 - c. Is the increase income?
- V. Who gets the Increase in Value if Converted?

A. Debtor

1. Due to case being converted, POE in the converted case shall consist of POE as of the date of filing the petition. Post-petition appreciation is a *different* asset, § 348(f)(1)(a). *See In re Barrera*, 22 F.4th 1217 (10th Cir. 2022). [NOTE: If remained a chapter 13, the result would be different. The 10th Cir. points out that § 348(f)(2) provides a recourse if the conversion is in bad faith.]

B. Estate/Trustee

- 1. Appreciation goes to Chapter 7 Trustee upon conversion. *In re Goetz*, 647 B.R. 412 (Bankr. W.D. Mo. 2022), *aff'd*, 651 B.R. 292 (B.A.P. 8th Cir. 2023) Distinguishes "equity" as being an interest and something that stems from the underlying asset, which is the real estate. The RE was POE at filing and is still at conversion.
- 2. In re Castleman, No. 2:21-CV-00829-JHC, 2022 WL 2392058 (W.D. Wash. July 1, 2022), aff'd sub nom. Matter of Castleman, 75 F.4th 1052 (9th Cir. 2023) Post-petition pre-conversion equity in Chapter 13 becomes property of estate in Chapter 7. Section 348 unambiguously sweeps into Chapter 7 estate any property acquired after commencement of Chapter 13 and before conversion. Section 541 sweeps in all property owned by Debtor as of commencement including proceeds, profits and rents except to extent resulting from earnings from services performed by individual debtor post-petition. Post-petition appreciation is not separate, after-acquired property interest but is part of property itself. Property becomes property of Chapter 7 estate at conversion, including appreciation in value from commencement of case. If Debtors made mortgage payments post-petition Debtor may apply for administrative claim status under Section 503(b).
- 3. Section 348 sweeps in all POE on DOF in debtor's possession at conversion. Section 541 sweeps in all legal or equitable interests as of the commencement

- of case. Value is not a separate asset, but an attribute or incident of the property itself. *In re Adams*, 641 B.R. 147 (Bankr. W.D. Mi. 2022).
- 4. Insurance proceeds acquired in month 60, for fire that destroyed a business, were POE, because the Trustee filed a timely Motion to Modify and would have to be used to satisfy the BICT. *In re Scholl*, 605 B.R. 163 (Bankr. S.D. Ohio 2019).

C. Other Outcomes/Thoughts

- 1. Valuations of *property* and claims in a chapter 13 are not binding in a chapter 7, § 348(f)(2).
- 2. Claiming homestead exemption of "100% of FMV" included post-petition appreciation where there was no timely exemption in chapter 11 conversion to chapter 7, despite the "snapshot" rule.
- 3. *In re Snyder*, 645 B.R. 595 (Bankr. N.D. Ohio 2022). Under Ohio law, each debtor's homestead was limited to the debtor's interest in the parcel of real property used as a residence by debtor. (Two co-owned parcels of real estate with Debtors living separately.)
- 4. What compels a Trustee to go after the increase in value postconfirmation and/or what is the statutory basis for a Trustee to recover the increase in value.

Vesting Approaches:

ETA Estate Termination Approach – POE in debtor.
 EPA Estate Preservation Approach – POE in estate.
 ETRA Estate Transformation Approach – POE in estate,

but only to fund plan.

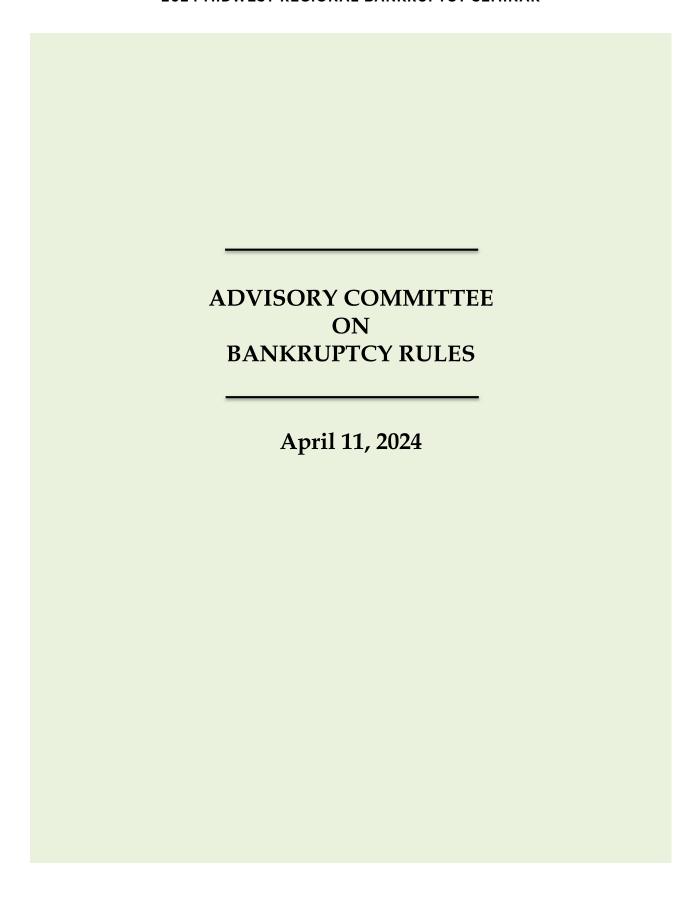
CVA Conditional Vesting Approach – POE in estate, until debtor

receives discharge.

ERA Estate Replenishment Approach – POE in debtor and Estate (weighs dates).

<u>Circuit</u>	<u>District</u>	<u>Case</u>	<u>Approach</u>	<u>Duty to</u> <u>Disclose*</u>
1 st	1 st Cir.	Barbosa v. Soloman, 235 F.3d 31 (2000)	ERA	
2 nd	D. VT	In re Holden, 236 B.R. 156	ERA	
3 rd	E.D. PA	In re Clouse, 446 B.R. 690 (2010)	EPA	Yes and in W.D. PA
	D. NJ	In re Larzelere, 633 B.R. 677	ERA	
4 th	4 th Cir.	In re Murphy, 474 F.3d 143 (2007) [See also Carroll v. Logan, 735 F3d 147 property acquired post-pet. is property of the estate.]	Not specified, <i>but</i> likely not ETA. Most likely EPA/CVA/ERA	Perhaps, see In re Boyd, 618 B.R. 133 (D. S.C. 2020)
	E.D. VA (Richmond)	In re Robinson, 2023 Bankr. Lexis 699	EPA, <i>not specified</i> , but holding seems to suggest this approach.	Yes
	E.D. VA (Norfolk)	In re Leavell, 190 B.R. 536	EPA	Yes
5 th	N.D. TX	Woodard v. Taco Bueno Rests, Inc. (2006)	CVA	Yes, incl.
	W.D. LA	In re Wilson, 555 B.R. 547 (2016)	ERA	W.D. TX
6 th	E.D. Mich (S. Div.)	In re Elassal, 654 B.R. 434 (2023)	ERA	No, N.D. OH – BUT ERA
7 th	7 th Cir.	In re Cherry, 963 F.3d 717 (2020)	ERA, but only based upon case-specific reasons to turnover to trustee.	
8 th	W.D. MO	In re Marsh, 647 B.R. 725 (2023)	ERA	
	E.D. NC (Fayettev.)	In re Maynor, 2023 Bankr. Lexis 2884 (2023)	EPA, CVA, or ERA	
	W.D. NC	Trantham v. Tate 647 B.R. 139 (2022)	CVA (per plan language)	
9 th	9 th Cir. BAP	Cal. Franchise Tax Bd. V. Jones (In re Jones) 420 B.R. 506 (2009)	ЕТА	Yes (S.D. CA)
		Black v. Leavitt (In re Black) 609 B.R. 518 (2019)		
	D. Idaho	In re McCrorey, 2024 Bankr. Lexis 188 (2024)	CVA, <i>not stated</i> but holding seems to suggest.	
10 th	10 th Cir.	Rodriguez v. Barrera, 22 F4th 1217 (2022)	ETA	
	D. KS	In re Goodwin, 2022 Bankr. Lexis 2848	NOT ETA	
	D. Colo	In re Baker, 620 B.R. 655 (2020)	ETA	
	D. NM	In re Gonzales, 587 B.R. 363 (2018)	ETRA	
11 th	11 th Cir.	Telfair vs. First Union Mort. Corp. 216 F.3d 1333 (2000)	ЕТА	Yes
D.C.				

^{*}For additional info related [no] Duty to Disclose: *See* Keith M. Lundin, <u>Lundin on Chapter 13</u>, § 127.9, at ¶ 23, lundinonchapter 13.com (last visited Aug. 17, 2022).



AGENDA Meeting of the Advisory Committee on Bankruptcy Rules April 11, 2024 | Denver, CO

1.	Greetings, Introductions (Judge Connelly)				
		Tab 1	Committee Roster6Subcommittee Liaisons11Chart Tracking Proposed Rules Amendments15Pending Legislation Chart22Federal Judicial Center Research Projects27		
2.	Appr	oval of minute	es of September 14, 2023, meeting (Judge Connelly)		
		Tab 2	Draft minutes		
3.	Oral reports on meetings of other committees:				
	A.	Standing Committee – January 4, 2024 (Judge Connelly, Professors Gibson and Bartell)			
		Tab 3A1 Tab 3A2	Draft minutes of the Standing Committee meeting		
	B.	Advisory Committee on Appellate Rules – April 10, 2024 (Judge Bress)			
	C.	Advisory Committee on Civil Rules – April 9, 2024 (Judge McEwen)			
	D.	Bankruptcy Committee – December 7-8, 2023 (Judge Sarah Hall)			
4.	Intercommittee items.				
	A.	Report of Reporters' Privacy Rules Working Group (Tom Byron)			
		Tab 4A	March 19, 2024, memo by Tom Byron and Zachary Hawari97		
	B.	Oral Report on Unified Bar Admissions (Professor Struve)			
	C.	Oral Report on the work of the Pro-se-electronic filing working group (Professor Struve)			
5.	Repo	Report of the Consumer Subcommittee (Judge Harner)			
	A.	Recommendation for final approval of proposed amendments to Rule 3002.1.			
		Tab 5A	March 19, 2024, memo by Professor Gibson107		

AGENDA

Meeting of the Advisory Committee on Bankruptcy Rules April 11, 2024 | Denver, CO

			Rule 3002.1, Committee Note, and Summary of Comments114	
6.	Repo	ort of the Form	s Subcommittee (Judge Kahn)	
	A.	Reconsideration of proposed amendments to OF 309A and 309B (suggest E) concerning deadlines for filing a financial management course certification.		
		Tab 6A	March 19, 2024, memo by Professor Gibson147	
	В.	Recommendation for final approval of new official forms related to proposed Rule 3002.1 amendments.		
		Tab 6B	March 19, 2024, memo by Professor Gibson	
	C.	Consider technical amendments to conform certain bankruptcy forms to the Restylec Bankruptcy Rules.		
		Tab 6C	 February 29, 2024, memo by Professor Bartell	
	D.	Recommendation for final approval of proposed amendment regarding the Unifor Claim Identifier field in Official Form 410.		
		Tab 6D	February 29, 2024, memo by Professor Bartell	
7.	Report of the Technology, Privacy, and Public Access Subcommittee (Judge Oetken)			
	A.	Continued consideration of suggestions 22-BK-I, 23-BK-D, and 23-BK-J con SSN redaction in bankruptcy filings and the elimination of truncated SSNs ir form captions.		
		Tab 7A	March 17, 2024, memo by Professor Bartell	

AGENDA

Meeting of the Advisory Committee on Bankruptcy Rules April 11, 2024 | Denver, CO

	B.	Consider suggestion 23-BK-C addressing remote testimony in contested matters.		
		Tab 7B	March 6, 2024, memo by Professor Bartell	
8.	Report	oort of the Business Subcommittee (Judge McEwen)		
	A.	Recommendation regarding suggestion 23-BK-F to publish proposed amendments to Rule 3018(c).		
		Tab 8A	March 19, 2024, memo by Professor Gibson	
	B. Consideration of suggestion 24-BK-A to allow masters in bankruptcy cases and proceedings.		of suggestion 24-BK-A to allow masters in bankruptcy cases and	
		Tab 8B	March 19, 2024, memo by Professor Gibson252	
9.	Appellate Rules Subcommittee (Judge Bress)			
	A. Recommendation for final approval concerning proposed amendment to Rule 8006(g).		ion for final approval concerning proposed amendment to Rule	
		Tab 9A	March 5, 2024, memo by Professor Bartell	
10.	New business.			
11.	Future meetings: The next meeting will be on September 12, 2024, Washington, DC.			
12.	Adjourn.			

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: COMMENTS ON RULE 3002.1 AMENDMENTS

DATE: MARCH 19, 2024

Last August the Standing Committee republished for comment proposed amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence). Ten sets of comments concerning the rule were submitted. They range from addressing specific wording issues and proposed deadlines to raising some broader issues, such as the scope of the rule and whether limitations should be placed on the authority to file a motion to determine the status of a mortgage.

The Subcommittee considered these comments during its meeting on March 5 and now recommends the changes discussed in this memo in response to the comments. Following the memo in the agenda book are a draft of Rule 3002.1 as proposed for the Advisory Committee's approval and a summary of all the comments that were submitted.

Subdivision (a) - In General

The Subcommittee recommends that the word "contractual" be deleted from line 9 and that instead the clause read, "for which the plan provides for the trustee or debtor to make payment on the debt." Several comments were submitted suggesting this deletion. They explained that sometimes home mortgages may be modified in chapter 13—such as those paid in full or short-term mortgages—and they are paid according to the terms of the plan, rather than strictly according to the terms of the contract. The Subcommittee thought that the rule should apply in this situation and that making this change would not require republication.

Comments suggested other expansions of the rule's applicability that the Subcommittee decided against. These included making the rule applicable to mortgages on property other than the debtor's principal residence and to liens not created by agreement, such as statutory liens. These suggestions may have merit, as they would assist debtors in emerging from chapter 13 with mortgages and other types of real-property liens current or paid in full. However, because proposed amendments to the rule have now been published twice, the Subcommittee did not want to propose any changes to subdivision (a) that would require yet another publication. It thought that expanding the rule beyond the debtor's principal residence or making it applicable to statutory liens runs that risk. Otherwise, new types of creditors could be affected who were not given notice that the rule would apply to them.

The Subcommittee also declined to recommend any additional change to subdivision

(a)—beyond deleting "installment"—to clarify that the rule applies to reverse mortgages for which there has been a default. Instead it recommends an expanded discussion in the Committee Note (lines 298-300) to clarify the rule's applicability to mortgages of that type.

<u>Subdivision (b) – Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection</u>

In response to several of the mortgage organizations' comments, the Subcommittee recommends stating in subdivision (b)(3)(B) that a payment decrease is effective on the actual payment due date, even if that date is in the past. There are instances where a payment decrease is retroactively applied, and the debtor should get the benefit of that decrease. As revised, (b)(3)(B) would state that the effective date of the new payment amount is, "when the notice concerns a payment decrease, on the actual payment due date, even if prior to the notice."

The National Bankruptcy Conference ("NBC") commented that Official Form 410-S1 should be modified to provide for the new HELOC disclosures. That matter has already been acted on. On the Advisory Committee's recommendation, the Standing Committee at its January meeting approved amendments to the form for publication in August.

Subdivision (e) – Determining Fees, Expenses, or Charges

The Subcommittee recommends no changes to the published version of subdivision (e). Two mortgage organizations commented that the time to challenge fees, expenses, or charges that have been noticed should be shorter. The existing rule has a one-year deadline because the amount involved might be so small that it would be more cost effective to challenge several in one motion. The proposed provision allows the court to shorten the period if requested by a party in interest. It was added with late-in-the-case motions in mind. The Subcommittee also does not recommend authorizing an extension of the deadline beyond one year, as the NBC suggested. One year seems adequate, especially given the mortgage groups' assertion that the time period is too long.

Subdivision (f) – Motion to Determine Status; Response; Court Determination

The Subcommittee recommends making two changes to this subdivision. First, in (f)(2) it recommends extending the deadline for responding to a trustee's or debtor's motion from 21 to 28 days. Mortgage organizations commented that they need that amount of time to respond properly, and it is the amount of time that subdivision (g)(3) provides for responding to the trustee's end-of-case notice.

Second, the Subcommittee agrees with the NBC's comment that on line 157 the phrase "and enter an appropriate order" should be added at the end of the sentence in order to be consistent with other provisions in the rule about the court's determination.

Mortgage organizations suggested a number of limitations that they thought should be added to prevent the abusive use of this subdivision. Those restrictions included limiting the time period during which a motion to determine the status of a mortgage could be filed or limiting the number of times it could be filed, specifying potential remedies for the mortgage claimant if the provision is misused, providing that a pro se debtor must provide an attestation as to the facts set forth in the motion, and providing that it is a ground for setting aside an adverse order if the movant failed to name and serve the correct mortgage claimant/servicer. The Subcommittee recommends that no changes be made in response to the comments. If a debtor, debtor's attorney, or trustee files a motion under this provision, Rule 9011 applies and could result in sanctions if the court determines that the motion was filed "for any improper purpose" or that the factual allegations lack evidentiary support. Furthermore, relief would be available outside of this rule if an adverse order is entered against a party that was not served.

<u>Subdivision (g) – Trustee's End-of-Case Notice of Payments Made; Response; Court Determination</u>

The Subcommittee recommends that in the title and in subdivision (g)(1), the words "payments" and "paid" be changed to "disbursements" and "disbursed." That terminology better describes the role of chapter 13 trustees; they are disbursing agents, not payors. The Subcommittee also recommends deleting two uses of "contractual" in (g)(1)(B) to be consistent with the recommended change to subdivision (a).

4

In subdivision (g)(1)(A), the Subcommittee recommends deleting "if any" on line 167 after "what amount" in order to avoid suggesting that a trustee who makes no disbursements to the mortgage claim holder does not need to file an end-of-case notice. It also recommends adding to the Committee Note at lines 359-362 the statement that "If the trustee has disbursed no amounts to the claim holder under either or both categories, the notice should be filed stating \$0 for the amount disbursed."

Several comments noted that in subdivision (g)(4)(A), no deadline was stated for filing a motion to determine the status of the mortgage if the claim holder responded to the trustee's notice. It merely said that the motion could be filed "[a]fter service of the response." Agreeing with the comments, the Subcommittee recommends that the first sentence of subparagraph (A) be rewritten to make a 45-day deadline applicable to that situation as well as to when the claim holder does not respond to the notice.

In subdivision (g)(4)(B), the Subcommittee recommends that the time for the claim holder to respond to the motion be changed from 21 to 28 days, just as in subdivision (f)(2).

Subdivision (h) - Claim Holder's Failure to Give Notice or Respond

The Subcommittee recommends no changes to this subdivision. The NBC suggested that subdivision (h) include sanction provisions similar to Civil Rule 37(b)(2) for failure to comply with a court order entered under the rule. These sanctions would include holding the disobedient party in contempt, directing that the matters embraced in the order or other designated facts be taken as established for purposes of a contested matter or adversary proceeding arising in or related to the case, and prohibiting the claim holder from supporting or opposing designated claims or defenses or from introducing designated matters in evidence.

The Subcommittee concluded that the sanction of contempt is not appropriate here and that subdivision (h)(1) already sufficiently addresses the NBC's other proposed sanctions. The orders authorized by Rule 3002.1 are unlike the orders for which Civil Rule 37(b)(2) applies. The latter rule provides sanctions, including contempt, for the failure "to provide or permit discovery," including disobeying an order under Rule 37(a) compelling discovery. These are orders requiring a party to do something. *See, e.g., Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to 'coerce the defendant into compliance' with an injunction or 'compensate the complainant for losses' stemming from the defendant's noncompliance with an injunction."). The orders authorized by Rule 3002.1, by contrast, do not compel action. Instead, they are in the nature of declaratory judgments, determining the status of the mortgage. As such, they are enforceable by precluding the losing party from relitigating the issues or taking positions contrary to the orders, but not by civil contempt.

Committee Note

In addition to the changes discussed above, the Subcommittee recommends conforming changes to the Committee Note.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

SUBJECT: COMMENTS ON RULE 3002.1 FORMS

DATE: MARCH 19, 2024

Last August the Standing Committee published for comment six new official forms that were proposed to implement proposed amendments to Rule 3002.1 (Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence). Ten sets of comments concerning these forms were submitted.

The Subcommittee carefully considered these comments during its meetings on February 26 and 28. This memo explains the Subcommittee's recommendations for changes to the forms and Committee Note in response to the comments. Following in the agenda book are summaries of all of the comments, with brief discussions, and the six forms and Committee Note as proposed for final approval by the Advisory Committee.

The Motion Forms:

Official Form 410C13-M1(Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim) and Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)

The Subcommittee recommends that the following changes be made to both of these forms:

- Change "paid" to "disbursed" in Part 2b, d, and e. Chapter 13 trustees act as disbursement agents; they do not "pay" the mortgage.
- Delete "and allowed" before "under" in Part 3a and add "and not disallowed" at the end of that item. As noted by the National Bankruptcy Conference, postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3001(f), the fees are not

1

deemed allowed. If, however, the court did rule on them and disallowed them, they should not be included.

- Delete "contractual" in Part 4 before "obligations." This change conforms to a change to Rule 3002.1(a) being recommended by the Consumer Subcommittee.
- Add a new section 5 in brackets to allow the trustee or debtor to add other relevant information. This change was suggested after the Subcommittee's meetings and has not been discussed or approved by it. The Advisory Committee should consider whether this change should be made in order to accommodate plans that provide for a less conventional treatment of the home mortgage.
- Add lines for address, phone number, and email after the moving party's signature to comply with Rule 9011(a).

In addition to the changes listed above, the Subcommittee recommends the following change to Form 410C13-M2:

• Add "the" before "Mortgage" in the title of the form to be consistent with the other forms.

The Motion Response Forms:

Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim) and Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of the Mortgage Claim)

The Subcommittee recommends that the following changes be made to both of these forms:

- Add at the beginning of Part 2: "The total amount received to cure any arrearages as of the date of this response is \$______." This will directly respond to Part 2e of the motion.
- Create separate responses for prepetition and postpetition arrearages to correspond with the breakdown of those amounts in the motion.
- Change the direction to "Check all that apply" since now more than one statement could be asserted.
- Put all three check boxes at the beginning of Part 3, and make that section subpart (a). Move the direction to attach a payoff statement to subpart (b), along with the seven items of information to be supplied. These changes respond to the comments that a payoff

statement and the information requested are needed in situations in which the claim holder says that the debtor is not current, as well as when current.

- Delete "contractual" before "payments" in Part 3(a) for the reason previously stated.
- In Part 4 delete the requirement to use the format of Official Form 410A, Part 5. Mortgage groups commented that this format does not work for distinguishing between prepetition arrears and postpetition defaults.
- In the third bullet point of Part 4, change "assessed to the mortgage" to "that the claim holder asserts are recoverable against the debtor or the debtor's principal residence." This language tracks the language of Rule 3002.1(c) and is clearer.

The Trustee's Notice:

Official Form 410C13-N (Trustee's Notice of Payments Made)

The Subcommittee recommends that the following changes be made to this form:

- In the title, change "Payments" to "Disbursements" to reflect more accurately the trustee's role.
- In Part 2, delete the space for the date of the debtor's completion of payments. Trustees commented that the date is ambiguous and is not needed.
- Change the title of Part 3 from "Amount Needed to Cure Default" to "Arrearages." If the debtor has been making direct payments, the trustee may not be aware of defaults.
- For the same reason, delete the request for "Allowed amount of postpetition arrearage, if any." Also delete the question asking whether the debtor has cured all arrearages.
- In 3b, c, and d, change "paid" to "disbursed" for the reason previously stated.
- In Part 4, delete "contractual" for the reason previously stated.
- Add a check box for "other" to allow for hybrid situations.
- Change the statement in Part 4c to the date of the trustee's last disbursement, rather than when the next mortgage payment is due. Commenters noted that by the time the notice is filed, additional payments may have already come due and might have been paid by the debtor. Add a statement explaining that future payments are the debtor's responsibility.
- In Part 5, delete "Amount of allowed postpetition fees, expenses, and charges." The trustee may not have this information.
- Delete "as of the date of this notice" as unnecessary.

Response to Notice

Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)

The Subcommittee recommends that the following changes be made to this form:

- In the title, change "Payments" to "Disbursements" to be consistent with the proposed change to the title of the notice.
- In the first line, correct the citation. Change to Rule 3002.1(g)(3).
- Change the title of Part 2 to "Arrearages" to correspond with Part 3 of the notice.
- Add at the beginning of Part 2: "The total amount received to cure any arrearages as of the date of this response is \$______." This will capture amounts paid by both the trustee and the debtor.
- In Part 3, delete "contractual" for the reason previously stated.
- Put all three check boxes at the beginning of Part 3, and make that section subpart (a). Move the direction to attach a payoff statement to subpart (b), along with the seven items of information to be supplied. These changes respond to the comments that a payoff statement and the information requested are needed in situations in which the claim holder says that the debtor is not current, as well as when current.
- In Part 4, delete the requirement to use the format of Official Form 410A, Part 5. Mortgage groups commented that this format does not work for distinguishing between prepetition arrears and postpetition defaults.
- In the third bullet point of Part 4, change "assessed to the mortgage" to "that the claim holder asserts are recoverable against the debtor or the debtor's principal residence." This language tracks the language of Rule 3002.1(c) and is clearer.

Committee Note

The Subcommittee recommends that the following changes be made to the Committee

Note to conform to the changes proposed to be made to the forms and Rule 3002.1 and in
response to comments. Line references are to the Committee Note as published.

- Delete "contractual" throughout the note when referring to postpetition payments.
- On line 11, change the title of the trustee's notice.
- On line 20, change "21 days" to "28 days" to conform to the proposed change to Rule 3001.2(f)(2).

- On line 27, change "or" to "and."
- On line 30, delete "using the format of Official Form 410A, Part 5."
- On line 38, add this sentence: "If the trustee did not disburse any funds, the trustee should report in Parts 3 and 4 that she has paid \$0.00."
- On line 39, add "or provide the web address where it can be accessed" to the end of the sentence.
- On line 45, add "It must also provide a payoff statement."
- On line 48, delete "using the format of Official Form 410A, Part 5."
- On line 64, change "21 days" to "28 days" to conform to the proposed change to Rule 3001.2(g)(4)(B).
- On line 71, change "or" to "and."
- On line 74, delete "using the format of Official Form 410A, Part 5."

COMMENTS ON THE RULE 3002.1 FORMS

General Comments

2023-0002-0007 – **Kurt Anderson.** The entire form numbering system needs to be revamped to track with the rules numbering. It is confusing for a non-regular practitioner on a specific issue such as this one—despite references in the rules themselves—to try to correlate a 400 series form with a 3000 series rule. I note that my district's local form numbers closely track the related rule numbering.

2023-0002-0008 – Minnesota State Bar Association. We support the proposed new forms.

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** It would be helpful to have a set of instructions for the forms.

2023-0002-0014 – Mortgage Bankers Assoc. Prepare instructions for the forms.

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Consider better ways to exchange data anticipated by this proposed rule. One suggestion is to leverage the National Data Center for the electronic exchange of information required for determinations of status and final cure. The electronic exchange of information is efficient and cost-effective and allows for automated analysis of data and identification of variances. Also provide line-by-line instructions on what information needs to be provided, and define terms.

Instructions for the forms, including any necessary definitions, will be written prior to the December 1, 2025, effective date of the forms. Instructions do not need to be approved by the Standing Committee or the Judicial Conference.

No action should be taken on Mr. Anderson's and ICE Mortgage's suggestions. With respect to Mr. Anderson's suggestion to renumber the official forms, such an undertaking would require amending all of the restyled rules that refer by number to relevant forms. Because the restyling project was just completed, further widespread revision is not advisable now. Furthermore, there is a rationale for the current numbering system, and the new form references in the rules should be helpful to users.

ICE Mortgage's suggestion for the electronic exchange of information is beyond the scope of the current project of revising Rule 3002.1 and related forms.

Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** This form should require a debtor to sign an oath or affidavit to ensure the accuracy of the information provided and to deter abuse.

023-0002-0013 — **United States Foreclosure Network and Mortgage Bankers Association.** This form should require a debtor to execute an affidavit or oath.

No action needs to be taken in response to these comments. A debtor who files this motion must sign it. Rule 9011 provides that the signature constitutes a certification that, among other things, the motion is not being filed for an improper purpose and that factual contentions have evidentiary support.

Part 2

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Define the following terms: "prepetition arrearage" (Do postpetition arrearages that are reported as supplements to the proof of claim become prepetition arrearages? If not, where are they reported?); "allowed amount of postpetition arrearage" and "total amount of postpetition arrearage" (Do these amounts include all delinquent postpetition payments, including agreed orders related to postpetition amounts due? Do these amounts include approved postpetition fees that remain unpaid?); "total amount of arrearages paid" (Is that the sum of 2.b. and 2.d.?).

No change needs to be made to the form. The instructions can clarify if necessary.

Part 3

2023-0002-0009 – **National Bankruptcy Conference.** Part 3.a. asks the debtor or trustee to state the amount of postpetition fees, expenses, and charges noticed and allowed under Rule 3002.1(c). Postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3001(f), the fees are not deemed allowed. Suggested change:

Delete "and allowed." The instructions for the form might indicate that the amount should not include any fees, expenses, and charges that the court has determined are not required to be paid under Rule 3002.1.

The point is well taken. Make the suggested change.

Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim)

Part 2

2023-0002-0009 – **National Bankruptcy Conference.** Unlike the motion form (M1), Part 2 of this response form does not require a breakdown of arrearages between prepetition and

postpetition. That breakdown would be helpful and would make this form consistent with Form 410C13-NR (Response to Trustee's Notice of Payments Made).

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Define "any arrearage." (Is this just prepetition arrearages, or does it include delinquent postpetition payments? Should just be prepetition, and postpetition amount should be reported in Part 3).

Asking separately for prepetition and postpetition arrearages will make the form consistent with the motion form.

Part 3

2023-0002-0009 – **National Bankruptcy Conference.** Consistent with our suggestion that "contractual" be deleted in Rule 3002.1(a), we suggest that the references to "postpetition contractual payments" be changed to "postpetition payments."

This part would provide more helpful responses if the information were requested in the following three categories: 1) the debtor is current on all postpetition payments (which would be limited to periodic payments for principal, interest and escrow), 2) the debtor is not current on all postpetition payments, and 3) the debtor has fees, expenses and costs due and owing. By including fees, costs and expenses as part of the "postpetition contractual payments," the proposed form fails to distinguish between our designated categories 1 and 3.

The claim holder is required to provide a payoff statement and important account information about the status of the loan only if the debtor is current with postpetition payments. If the claim holder believes the debtor is not current, then it need only provide the date of the postpetition payment that first became due. Access to detailed information about the status of the loan by the trustee and debtor is even more critical when a default is being asserted. Suggested change:

Request the claim holder to provide a payoff statement and a response to the seven listed data points even if the debtor is not current with postpetition payments.

2023-0002-0013 – **United States Foreclosure Network and Mortgage Bankers Association.** With respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry, which is usually limited to the whether the subject loan is current. The recommendation is that the requirement be removed.

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Define "<u>negative escrow</u> <u>amount.</u>" When should it be reported here rather than on the line for "balance of the escrow account"?

The form should conform to the Consumer Subcommittee's decision to delete "contractual." With regard to the checkbox statements, the intent was to have the claim holder state that everything is current (box 1) or, if not, indicate what is in arrears: postpetition periodic payments (box 2) and/or postpetition fees, expenses, charges, etc. (box 3). It does not appear that the NBC's suggested categories are preferable.

The form should require all respondents to provide the information Part 3 and attach a payoff statement, not just those who say that payments are current. This can be achieved by putting the three checkboxes first in Part 3 and then including the statement "The claim holder attaches a payoff statement and provides the following information as of the date of this response"

Part 4

2023-0002-0009 – **National Bankruptcy Conference.** The claim holder is required to disclose in a payment history, if applicable, the amounts for "all fees, costs, escrow and expenses assessed to the mortgage." It is not clear what "assessed to the mortgage" means. Change to: "all fees, costs, escrow and expenses assessed to the debtor."

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** The requirement to use the format of the Official 410A, Part 5 for the payment history should be deleted, or the forms should state that the claim holder may use the Official 410A format but is not required to do so. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a prepetition payment history and does not lend itself to distinguishing between outstanding prepetition arrears from any postpetition delinquency.

2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association. Rather than requiring the respondent to use the format of Form 410A, Part 5, this form should just ask for a payment history. The Part 5 format does not distinguish between prepetition arrears and postpetition defaults. Remove the requirement to use that format, or specify that the claim holder "may" use the Official 410A format but is not required to do so.

2023-0002-0014 – **Mortgage Bankers Assoc.** Either remove the requirement to use the format of Form 410A, Part 5; make using the form optional; or explain how this information can be provided on the form.

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Do not require a specific form or format to report the information requested in this section.

The requirement for a specific format for the payment history should be removed. Change "all fees, costs, escrow and expenses assessed to the mortgage" to "all fees, costs, escrow, and expenses that claim holder asserts are recoverable against the debtor or the debtor's principal residence." That's the language of Rule 3002.1(c).

Official Form 410C13-N (Trustee's Notice of Payments Made)

Part 2

4

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** Part 2 asks for the date the debtor completed all payments due to the trustee. What date is to be given: the date the debtor submitted the payment to the trustee, the date the trustee received the payment, or the date the trustee was assured that the payment was made with good funds following the expiration of any applicable payment hold? Is the date even needed?

2023-0002-0016 — **N.D. Ga. Chapter 13 Trustees.** Eliminate the requirement of entering the date of the debtor's last payment to complete the chapter 13 plan. This information may not always be easily discernible, and the inclusion of this date does not seem to serve any function. There is also a contradiction between the form and the committee note with regard to the second sentence of Part 2. While the Official Form states that the trustee may attach a disbursement ledger for the claimant *or* provide the web address where such a ledger may be found, the committee note at lines 38 and 39 states that the ledger must be attached to the form.

Change to "On	_, <u>The</u> debtor <u>has</u> c	completed all payments due	the
trustee under the chapter 13 plan. A copy	of the trustee's dis	sbursement ledger for all pa	yments to
the claim holder is attached or may be ac	cessed here:	(web address)."	Change
lines 38-39 of the Committee Note as fol	llows: "The trustee	e must also provide her disb	ursement
ledger for all payments she made to the c	claim holder <u>or pro</u>	vide the web address where	it can be
accessed."			

Part 3

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** In a nonconduit plan, the trustee may not know whether a postpetition payment default has occurred and therefore may not know if there is a postpetition arrearage, the amount of that arrearage, or whether that arrearage has been cured. This would make it impossible to complete Part 3 accurately.

2023-0002-0012 – **Pam Bassel.** The trustee may not know about postpetition arrearages if the debtor has been making mortgage payments directly. Suggested change:

- c. Total amount of postpetition arrearage to be paid by the trustee as of the date of the notice.
 - e. Total amount of arrearages paid by the trustee as of the date of the notice. Has the trustee paid all arrearages known to the trustee?

Yes

No

2023-0002-0015 — **ICE Mortgage Technology Holdings, Inc.** Define the following terms: "<u>prepetition arrearage</u>" (Do postpetition arrearages that are reported as supplements to the proof of claim become prepetition arrearages? If not, where are they reported?); "<u>amount of postpetition arrearages</u>" and "<u>total amount of postpetition arrearages</u>" (Do these amounts include all delinquent postpetition payments, including agreed orders related to postpetition amounts

due? Do these amounts include approved postpetition fees that remain unpaid?); and "total amount of arrearages paid" (Is that the sum of 3.b. and 3.d.?).

2023-0002-0016 – **N.D. Ga. Chapter 13 Trustees.** Lines b, c, d, and e are problematic for trustees with direct-pay mortgage cases. While it is common for postpetition mortgage arrearages to arise in direct-pay cases, how these are addressed can vary greatly. Because of this, a trustee in such a jurisdiction may simply lack the knowledge, without conducting extensive research, to correctly complete this part of the form.

The items listed should allow for different practices regarding what the trustee disburses. Also in line b., add "of" before "prepetition." In a direct-pay (non-conduit) plan, the trustee can state \$0 if that is the case. The instructions can address any of the uncertainties raised by ICE Mortgage.

Part 4

2023-0002-0011 – NACTT Mortgage Committee (Subcommittee on Rule 3002.1). There could be confusion as to how the trustee is to complete this part of form in the situation in which a postpetition payment default occurs and the debtor modifies the plan to pay the defaulted payments through disbursements by the trustee. Which box should the trustee mark when a portion of the postpetition payments were disbursed directly by the debtor to the mortgage claimant and part of the postpetition payments was disbursed by the trustee? The trustee will also not be in a position to state whether the debtor is current on all of the postpetition contractual payments or when the next mortgage payment is due. With respect to stating when the next mortgage payment is due, there can be confusion because by the time the trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. It is unclear what "next" means in that situation. It would be better to ask for the date of the next payment following completion of the plan or the date of the trustee's last payment pursuant to the plan.

2023-0002-0012 – Pam Bassel. Part 4 contains a statement about when the next mortgage payment is due. Even when a conduit trustee has made all the postpetition contractual payments, by the time the trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. Suggested change:

c.	The last ongoing mortgage payment made by the trustee was the payment due on
	All subsequent ongoing mortgage payments must be made
di	rectly by the debtor to the mortgage claimant.

2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association. An issue with stating when the next mortgage payment is due, even when the trustee has made all the postpetition contractual payments, is that by the time the trustee files the Notice of Payments Made, other ongoing contractual payments will have come due and may have been paid by the debtor following completion of the plan payments. Ask instead for the date the next mortgage payment following the completion of the plan is due.

2023-0002-0014 – **Mortgage Bankers Assoc.** Part 4 of this form requires the claim holder to state when the next mortgage payment is due. However, by the time a debtor receives this form, it is possible that this next payment date has already passed. The form should specify which of the next possible due dates to use.

2023-0002-0016 – **N.D. Ga. Chapter 13 Trustees.** As outlined in our comment regarding the rule, we suggest that the term "contractual" be removed from this part of the form. Furthermore, we suggest adding a third and maybe a fourth checkbox. This third checkbox could be used for other scenarios that do not lend themselves to the first two checkboxes. Such a scenario could include total debt claims in which the trustee is paying the entire mortgage debt, but as provided for in the chapter 13 plan rather than the mortgage contract. A third checkbox might be "Trustee paid claim in full," and fourth might be "Other."

Change "Next mortgage payment due," and make Pam Bassel's suggested change. Delete "contractual" in response to the Consumer Subcommittee's recommendation to make that change to the rule. Add a third checkbox for "Other" and a space to explain.

Part 5

2023-0002-0009 – National Bankruptcy Conference. Delete "allowed."

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** In nonconduit jurisdictions, the trustee does not track the allowed amount or payment of postpetition fees, expenses, and charges. While the trustee could insert -0- in the blank next to "Amount of postpetition fees, expense, and charges paid by the trustee as of the date of notice," the trustee will not be able to state the allowed amount of those fees, expenses, and charges.

2023-0002-0012 – Pam Bassel. In direct pay cases, the trustee does not track the allowed amount or payment of post-petition fees, expenses, and charges. Suggested change:

Delete the line reading, "Amount of allowed postpetition fees, expenses, and charges" or change the language to read, "Amount of allowed postpetition fees, expenses, and charges to be paid by the trustee."

2023-0002-0016 – **N.D. Ga. Chapter 13 Trustees.** Delete this part of the form for direct pay cases. The first line of this part requires the trustee to list the total amount of allowed postpetition fees, charges, and expenses. However, lenders are already required to file notices of these fees, charges, and expenses under Rule 3002.1(c). Furthermore, it is the practice in our

jurisdiction for the trustee to not automatically pay these post-petition fees, charges, and expenses unless specifically directed to do so by the chapter 13 plan or an order of the court. Requiring the trustee to tally and list them when they are already in the record is burdensome and unnecessary.

Just ask for the "Amount of postpetition fees, expenses, and charges disbursed by the trustee."

Official Form 410C13-NR (Response to Trustee's Notice of Payments Made)

Part 2

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Indicate whether "the amount to cure the postpetition arrearage" includes unpaid fees and charges.

If this is a problem, the instructions can clarify.

Part 3

2023-0002-0006 – **January Bailey.** In addition to stating the unpaid principal balance, the claim holder should have to check a box indicating whether this balance matches the amortization schedule from the note or the last loan modification. Sometimes the lender says that the debtor is now current, but it has applied payments differently, and the principal balance remaining does not match what the amortization schedule would have been.

2023-0002-0009 – **National Bankruptcy Conference.** Consistent with our suggestion that "contractual" be deleted in Rule 3002.1(a), we suggest that the references to "postpetition contractual payments" be changed to "postpetition payments."

This part would provide more helpful responses if the information were requested in the following three categories: 1) the debtor is current on all postpetition payments (which would be limited to periodic payments for principal, interest and escrow), 2) the debtor is not current on all postpetition payments, and 3) the debtor has fees, expenses and costs due and owing. By including fees, costs and expenses as part of the "postpetition contractual payments," the proposed form fails to distinguish between our designated categories 1 and 3.

The claim holder is required to provide a payoff statement and important account information about the status of the loan only if the debtor is current with postpetition payments. If the claim holder believes the debtor is not current, then it need only provide the date of the postpetition payment that first became due. Access to detailed information about the status of the loan by the trustee and debtor is even more critical when a default is being asserted. Suggested change:

Request the claim holder to provide a payoff statement and a response to the seven listed data points even if the debtor is not current with postpetition payments.

2023-0002-0012 – **Pam Bassel.** Part 3 should be rearranged slightly. As the form is currently drafted, the respondent must provide the detailed information in the seven lines in Part 3 only if the respondent agrees that the account is current and in good standing. However, the information in those seven lines is also very useful if the respondent asserts that the debtor is not current on all postpetition payments or that the debtor owes fees, charges, expenses, negative escrow amounts, or other costs. Suggested change:

Move all the check boxes so that they are above the line beginning "Date next postpetition payment from the debtor is due." The respondent can then check the applicable box and include the relevant information.

2023-0002-0013 – **United States Foreclosure Network and Mortgage Bankers Association.** With respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry, which is usually limited to the whether the subject loan is current. The recommendation is that this requirement be removed.

2023-0002-0015 – ICE Mortgage Technology Holdings, Inc. Define "negative escrow amount." When should it be reported here rather than on the line for "balance of the escrow account"?

Make the same changes as made to Part 3 of Official Form 410C13-M1R. The information referred to by Ms. Bailey is not needed.

Part 4

2023-0002-0009 – **National Bankruptcy Conference.** The claim holder is required to disclose in a payment history, if applicable, the amounts for "all fees, costs, escrow and expenses assessed to the mortgage." It is not clear what "assessed to the mortgage" means. Change to: "all fees, costs, escrow and expenses assessed to the debtor."

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** The requirement to use the format of the Official 410A, Part 5 for the payment history should be deleted, or the forms should state that the claim holder may use the Official 410A format but is not required to do so. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a prepetition payment history and does not lend itself to distinguishing between outstanding prepetition arrears from any postpetition delinquency.

2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association. Rather than requiring the respondent to use the format of Form 410A, Part 5, these forms should just ask for a payment history. The Part 5 format does not distinguish between prepetition arrears and postpetition defaults. Suggested change:

Remove the requirement to use the format of the Official 410A or specify that the claim holder "may" use the Official 410A format but is not required to do so.

2023-0002-0014 – **Mortgage Bankers Assoc.** Either remove the requirement to use the format of Form 410A, Part 5; make using the form optional; or explain how this information can be provided on the form.

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Do not require a specific form or format to report the information requested in this section.

Make the same changes as made to Part 4 of Official Form 410C13-M1R.

Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim)

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** This form should require a debtor to sign an oath or affidavit to ensure the accuracy of the information provided and to deter abuse.

2023-0002-0013 — United States Foreclosure Network and Mortgage Bankers Association. This form should require a debtor to execute an affidavit or oath.

Judge Bates – He noted that, unlike the response form, there is no "the" before "Mortgage Claim" in the title of this form.

Add "the" to the title. Do not require an oath or affidavit.

Part 2

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Define the following terms: "prepetition arrearage" (Do postpetition arrearages that are reported as supplements to the proof of claim become prepetition arrearages? If not, where are they reported?); "allowed amount of postpetition arrearage" and "total amount of postpetition arrearage" (Do these amounts include all delinquent postpetition payments, including agreed orders related to postpetition amounts due? Do these amounts include approved postpetition fees that remain unpaid?); "total amount of arrearages paid" (Is that the sum of 2.b. and 2.d.?).

No action needs to be taken on the form. The instructions can clarify if necessary.

Part 3

2023-0002-0009 – **National Bankruptcy Conference.** Part 3.a. asks the debtor or trustee to state the amount of postpetition fees, expenses, and charges noticed and allowed under Rule 3002.1(c). Postpetition fees, expenses, and charges are not "allowed" under Rule 3002.1(c). If no motion is filed under Rule 3002.1(e), there is no court determination that the fees are allowed. Moreover, because the notice of fees is not subject to Rule 3002.1(f), the fees are not deemed allowed. Suggested change:

Delete "and allowed." The instructions for the form might indicate that the amount should not include any fees, expenses, and charges that the court has determined are not required to be paid under Rule 3002.1.

Make the suggested change.

Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)

Part 2

2023-0002-0009 – **National Bankruptcy Conference.** Unlike the motion form (410C13-M2), Part 2 of this response form does not require a breakdown of arrearages between prepetition and postpetition. That breakdown would be helpful and would make this form consistent with Form 410C13-NR (Response to Trustee's Notice of Payments Made).

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Define "any arrearage." (Is this just prepetition arrearages, or does it include delinquent postpetition payments? Should just be prepetition, and postpetition amount should be reported in Part 3).

Make the same changes as made to Part 2 of Official Form 410C13-M1R.

Part 3

2023-0002-0009 – **National Bankruptcy Conference.** Consistent with our suggestion that "contractual" be deleted in Rule 3002.1(a), we suggest that the references to "postpetition contractual payments" be changed to "postpetition payments."

This part would provide more helpful responses if the information were requested in the following three categories: 1) the debtor is current on all postpetition payments (which would be limited to periodic payments for principal, interest and escrow), 2) the debtor is not current on all postpetition payments, and 3) the debtor has fees, expenses and costs due and owing. By

including fees, costs and expenses as part of the "postpetition contractual payments," the proposed form fails to distinguish between our designated categories 1 and 3.

The claim holder is required to provide a payoff statement and important account information about the status of the loan only if the debtor is current with postpetition payments. If the claim holder believes the debtor is not current, then it need only provide the date of the postpetition payment that first became due. Access to detailed information about the status of the loan by the trustee and debtor is even more critical when a default is being asserted. Suggested change:

Request the claim holder to provide a payoff statement and a response to the seven listed data points even if the debtor is not current with postpetition payments.

2023-0002-0013 – **United States Foreclosure Network and Mortgage Bankers Association.** With respect to the requirement that the responding creditor attach a payoff statement in support of its response, such requirement is somewhat onerous and exceeds the scope of a typical Notice of Final Cure/Motion to Determine inquiry, which is usually limited to the whether the subject loan is current. The recommendation is that the requirement be removed.

2023-0002-0015 – ICE Mortgage Technology Holdings, Inc. Define "negative escrow amount." When should it be reported here rather than on the line for "balance of the escrow account"?

Make the same changes as made to Part 3 of Official Form 410C13-M1R.

Part 4

2023-0002-0009 – **National Bankruptcy Conference.** The claim holder is required to disclose in a payment history, if applicable, the amounts for "all fees, costs, escrow and expenses assessed to the mortgage." It is not clear what "assessed to the mortgage" means. Change to: "all fees, costs, escrow and expenses assessed to the debtor."

2023-0002-0011 – **NACTT Mortgage Committee (Subcommittee on Rule 3002.1).** The requirement to use the format of the Official 410A, Part 5 for the payment history should be deleted, or the forms should state that the claim holder may use the Official 410A format but is not required to do so. Questions and confusion may arise, in part, because Part 5 of the 410A is intended to capture a prepetition payment history and does not lend itself to distinguishing between outstanding prepetition arrears from any postpetition delinquency.

2023-0002-0013 – United States Foreclosure Network and Mortgage Bankers Association. Rather than requiring the respondent to use the format of Form 410A, Part 5, this form should just ask for a payment history. The Part 5 format does not distinguish between prepetition arrears and postpetition defaults. Remove the requirement to use that format, or specify that the claim holder "may" use the Official 410A format but is not required to do so.

2023-0002-0014 – **Mortgage Bankers Assoc.** Either remove the requirement to use the format of Form 410A, Part 5; make using the form optional; or explain how this information can be provided on the form.

2023-0002-0015 – **ICE Mortgage Technology Holdings, Inc.** Do not require a specific form or format to report the information requested in this section.

Make the same changes as made to Part 4 of Official Form 410C13-M1R.

Official Form 410C13-M1 (12/25)

			United	States Bankruptcy Cou	ırt	
District of						
				, Debtor	Case No.	Chapter 13
The	e [t	rustee/debtor] :	states as follo	ws:		
1.	Th	ne following info	ormation relate	es to the mortgage claim	າ at issue:	
Nar	ne	of Claim Holo	ler:	Court claim	no. (if known):
Las	st 4	4 digits of any	number used	to identify the debtor's a	ıccount:	
Pro	ре	erty address: _				
		_				
		-	City	State	ZIP	Code
		of the date of t ages as follows	_	have/the trustee has] di	sbursed payn	nents to cure
	a.	Allowed amoun	t of the prepetit	tion arrearage, if any:	\$	
	b.	Total amount of if known:	f the prepetition	arrearage disbursed,	\$	
,	c.	Allowed amoun	t of postpetition	arrearage, if any:	\$	
,	d.	Total amount of if known:	f postpetition ar	rearage disbursed,	\$	
,	e.	Total amount of	arrearages dis	bursed:	\$	
				have/the trustee has] dis harges as follows:	sbursed payn	nents for
,	a.			xpenses, and charges and not disallowed:	\$	
	b.	Amount of post disbursed:	petition fees, ex	xpenses, and charges	\$	

4. As of the date of this motion, [I have/the trustee has] made the following payments on the postpetition obligations:						
[5. If needed, add other information relevant to the motion.]						
6. I ask the court for an order under Rule 3002.1(f)(3) determining the status of the mortgage claim addressed by this motion and whether the payments required by the plan to be made as of the date of this motion have been made.						
Signed:			Date://			
	(Trustee/Debtor)					
Address						
	Number Street					
	City	State	ZIP Code			
Contact phon	e ()	En	nail			

Official Form 410C13-M1R (12/25)

		ates Bankruptcy C _ District of		
In re		, Debtor	Case No.	Chapter 13
Resp	oonse to [Trustee's/Debtor's] N Status of	Motion Under Rul f the Mortgage Cl		o Determine the
	(c	laim holder) states	s as follows:	
1. Th	ne following information relates to	the mortgage cla	im at issue:	
Name	e of Claim Holder:	Court clai	m no. (if knowr	n):
Last	4 digits of any number used to i	dentify the debtor'	s account:	
Prop	erty address:			
	011		715	
	City	State	ZIF	Code
2. Ar	rrearages			
The t	otal amount received to cure any	arrearages as of	the date of this	response is
\$				
Check	all that apply:			
	As of the date of this response, cure any arrearage on this mor		aid in full the an	nount required to
	As of the date of this response, required to cure any prepetition prepetition arrearage amount re	arrearage on this	mortgage clair	n. The total
	\$			
	As of the date of this response, required to cure any postpetition postpetition arrearage amount	n arrearage on the	e mortgage clai	m. The total
	\$			

3. Postpetition Payments					
(a) Check all that apply:					
☐ The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.					
☐ The debtor is not current on all postpetition payments. The debtor is obligated for the postpetition payment(s) that first became due on:/					
☐ The debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing. The total amount remaining unpaid as of the date of this response is \$					
(b) The claim holder attaches a payoff statement and provides the as of the date of this response:	following information				
i. Date last payment was received on the mortgage:	//				
ii. Date next postpetition payment from the debtor is due:	/				
iii. Amount of the next postpetition payment that is due:	\$				
iv. Unpaid principal balance of the loan:	\$				
v. Additional amounts due for any deferred or accrued interest:	\$				
vi. Balance of the escrow account:	\$				
vii. Balance of unapplied funds or funds held in a suspense account:	\$				
4. Itemized Payment History					
Include if applicable:					
Because the claim holder asserts that the arrearages have not been paid in full or states that the debtor is not current on all postpetition payments or that fees, charges, expenses, escrow, and costs are due and owing, the claim holder attaches an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:					
 all prepetition and postpetition payments received; the application of all payments received; 					

Response to Motion to Determine the Status of the Mortgage Claim

Official Form 410C13-M1R

page 2

- all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and
- all amounts the claim holder contends remain unpaid.

			Date / /				
Signature							
Print			Title				
	Nam	ne					
Company							
If different fro applies:	om the notice addre	ss listed on	the proof of claim to which this response				
Address							
	Number	Street					
	City	State	ZIP Code				
Contact phor	Contact phone () Email						
The person completing this response must sign it. Check the appropriate box:							
	he claim holder. he claim holder's au	uthorized aç	gent.				

Official Form 410C13-M1R

Response to Motion to Determine the Status of the Mortgage Claim

page 3

tor 1		
tor 2		
use, if filing) ed States Bankruptcy Court for	the: District of	
e number	(State)	
oial Farms 410C	42 N	
cial Form 410C ustee's Notic	e of Disbursements Made	1
rustee must file this not 1(g)(1).	ice in a chapter 13 case within 45 days after the debtor complet	tes all payments due to the trustee.
rt 1: Mortgage Infor	mation	
me of claim holder:		Court claim no. (if known
ine of claim noider.		
and the state of the second control of	er you use to identify the debtor's account:	
st 4 digits of any number	· ———	
	·	
operty address:	Number Street	_
		_
		_
operty address:	Number Street City State ZIP Code	
	Number Street City State ZIP Code	
operty address: rt 2: Statement of C	Number Street City State ZIP Code ompletion	
operty address: The debtor has co	Number Street City State ZIP Code	
operty address: rt 2: Statement of C The debtor has co	Number Street City State ZIP Code ompletion completed all payments due the trustee under the chapter 13 plan	
rt 2: Statement of C The debtor has condisbursement ledgaddress).	Number Street City State ZIP Code ompletion completed all payments due the trustee under the chapter 13 plan	
rt 2: Statement of C The debtor has condisbursement ledgaddress).	Number Street City State ZIP Code ompletion completed all payments due the trustee under the chapter 13 plan	
The debtor has codisbursement ledgaddress).	Number Street City State ZIP Code ompletion completed all payments due the trustee under the chapter 13 plan	
The debtor has codisbursement ledgaddress).	Number Street City State ZIP Code ompletion completed all payments due the trustee under the chapter 13 plan	ccessed here: (web
rt 2: Statement of C The debtor has condisbursement ledgaddress).	Number Street City State ZIP Code ompletion ompleted all payments due the trustee under the chapter 13 plar ger for all payments to the claim holder is attached or may be ac	ccessed here: (web
The debtor has condisbursement ledgaddress). Arrearages Allowed amount of prep	Number Street City State ZIP Code ompletion ompleted all payments due the trustee under the chapter 13 plar ger for all payments to the claim holder is attached or may be ac	ccessed here: (web
The debtor has codisbursement ledgaddress). Arrearages Allowed amount of prepetitions.	Number Street City State ZIP Code ompletion ompleted all payments due the trustee under the chapter 13 plar ger for all payments to the claim holder is attached or may be acceptable.	Amount \$ \$
The debtor has condisbursement ledgaddress). Arrearages Allowed amount of prepetition of the properties of the propert	Number Street City State ZIP Code ompletion ompleted all payments due the trustee under the chapter 13 plar ger for all payments to the claim holder is attached or may be acceptable. Detition arrearage, if any: tion arrearage disbursed by the trustee:	Amount

Official Form 410C13-N

Trustee's Notice of Payments Made

page 1

Advisory Committee on Bankruptcy Rules | April 11, 2024

Page 173 of 266

Part 4: Po	ostpetition Payments						
Check one:							
☐ Postpetition payments are made by the debtor.							
☐ Postpeti	☐ Postpetition payments are paid through the trustee.						
Other: _							
If the tru	If the trustee has made postpetition payments, complete a-c below; otherwise leave blank.						
	· · · · · · · · · · · · · · · · · · ·						
	last ongoing mortgage payment disbursed by the trustee was All subsequent ongoing mortgage payments musi ortgage claimant.						
Part 5:	ostpetition Fees, Expenses, and Charges						
Amo	ount of postpetition fees, expenses, and charges disbursed by	the trustee: \$					
Part 6: A	Response Is Required by Bankruptcy Rule 3002.1(g)(3	3)					
Within 28 da	rys after service of this notice, the holder of the claim mus	st file a response using Official Form 410C13-NR.					
×		Date / /					
	Signature	Date					
Trustee	First Name Middle Name Last Name						
Address	Number Street						
	City State ZIP Code						
Contact phone	()	Email					

Official Form 410C13-N

Trustee's Notice of Payments Made

page 2

Fill in this information to identify the case		
•		
Debtor 1		
Debtor 2 (Spouse, if filing)		
United States Bankruptcy Court for the:	District of(State)	
Case number		
Official Form 410C13-NR		
Response to Trustee's	s Notice of Disbursemer	nts Made
The claim holder must respond to the Tru	ustee's Notice of Payments Made within 28 da	ays after it was served. Rule 3002.1(g)(3).
Part 1: Mortgage Information		
Name of claim holder:		Court claim no. (if known):
		
Last 4 digits of any number you use to	identify the debtor's account:	
Property address:		
Numb	er Street	
City	State ZIP Code	
Part 2: Arrearages		
Tait 2. Airealages		
The total amount received to cure any arr	rearages as of the date of this response: \$.
Check all that apply:		
	petition arrearage has been paid in full.	
	petition arrearage has not been paid in full. Amo	ount of prepetition arrearage remaining unpaid
as of the date of this notice: \$,	
The amount required to cure any pos	stpetition arrearage has been paid in full.	
The amount required to cure the posunpaid as of the date of this notice:	stpetition arrearage has not been paid in full. Am \$	nount of postpetition arrearage remaining
I		
Official Form 410C13-NR	Response to Trustee's Notice of Payments M	Made page 1

Advisory Committee on Bankruptcy Rules | April 11, 2024

Page 175 of 266

Par	t 3:	Postpetition Payments				
(a)	Check all	l that apply:				
۵	The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.					
۵	The debtor is not current on all postpetition payments. The claim holder asserts that the debtor is obligated for the postpetition payment(s) that first became due on: /					
	The clair	tor has fees, charges, expenses, negative escrow amounts, or m holder asserts that the total amount remaining unpaid as of				
(b)		n holder attaches a payoff statement and provides the following his response:	g information as of the			
	i.	Date last payment was received on the mortgage:				
	ii.	Date next postpetition payment from the debtor is due:				
	iii.	Amount of the next postpetition payment that is due:	\$			
	iv.	Unpaid principal balance of the loan:	\$			
	v. <i>A</i>	Additional amounts due for any deferred or accrued interest:	\$			
	vi.	Balance of the escrow account:	\$			
	vii. l	Balance of unapplied funds or funds held in a suspense account:	\$			
Par	t 4	Itemized Payment History				
pay	Itemized Payment History If the claim holder disagrees that the prepetition arrearage has been paid in full, states that the debtor is not current on all postpetition payments, or states that fees, charges, expenses, escrow, and costs are due and owing, it must attach an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response: • all prepetition and postpetition payments received;					
	 the application of all payments received; all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and 					
	• all a	amounts the claim holder contends remain unpaid.				

Official Form 410C13-NR

Response to Trustee's Notice of Payments Made

page 2

Part 5:	Sign Here	
The person of	ompleting this response must sign it. Check the appropriate b	OX:
☐ I am the	claim holder.	
☐ I am the	claim holder's authorized agent.	
I declare und knowledge,	der penalty of perjury that the information provided in this information, and reasonable belief.	s response is true and correct to the best of my
×	Signature	Date/
	First Name Middle Name Last Name	
	Number Street	
	City State ZIP Code	
Contact phone	()	Email

Official Form 410C13-NR

Response to Trustee's Notice of Payments Made

page 3

Official Form 410C13-M2 (12/25)

			United	States Bankruptcy Co.	urt	
District of						
ln ı	re _			, Debtor	Case No.	Chapter 13
	M	otion Under R	Rule 3002.1(g)(4) to Determine Final Mortgage Claim	Cure and Pa	yment of the
Th	e [t	rustee/debtor]	states as follow	ws:		
1.	Tł	ne following inf	formation relate	es to the mortgage clain	n at issue:	
Na	me	of Claim Hol	der:	Court claim	no . (if known):
La	st 4	4 digits of any	number used t	to identify the debtor's a	account:	
Pro	ope	erty address:				
			City	State	ZIP	Code
		of the date of ages as follow	-	nave/the trustee has] di	sbursed payn	nents to cure
	a.	Allowed amou	nt of the prepetit	ion arrearage, if any:	\$	
	b.	Total amount of if known:	of the prepetition	arrearage disbursed,	\$	
	c.	Allowed amou	nt of postpetition	arrearage, if any:	\$	
	d.	Total amount of if known:	of postpetition ar	rearage disbursed,	\$	
	e.	Total amount o	f arrearages disl	bursed	\$	
				nave/the trustee has] di narges as follows:	sbursed payn	nents for
	a.			openses, and charges and not disallowed:	\$	
	b.	Amount of pos disbursed:	tpetition fees, ex	openses, and charges	\$	

	date of this motion, etition obligations:	[I have/the tru	stee has] made the following payments \$
[5. If needed	l, add other informa	tion relevant to	the motion.]
debtor has cu		if any, and pa	2.1(g)(4) determining whether the id all postpetition amounts required otion.
Signed:	(Trustee/Debtor)		
Date:			
Address	Number	Street	
	City	State	ZIP Code
Contact phor	ne ()	E	mail

Official Form 410C13-M2R (12/25)

	United States Bankruptcy Court District of						
In re_		, Debtor	Case No				
Resp	oonse to [Trustee's/Deb	tor's] Motion to Determin the Mortgage Claim	e Final Cure and Payment of				
		(claim holder) states	as follows:				
1. Th	e following information re	elates to the mortgage clair	n at issue:				
Name	e of Claim Holder:	Court claim	no. (if known):				
Last 4	4 digits of any number ս։	sed to identify the debtor's	account:				
Prope	erty address:						
	City	State	ZIP Code				
2. Ar	rearages						
The to	otal amount received to c	ure any arrearages as of th	ne date of this response is				
\$							
Check a	all that apply:						
	As of the date of this rescure any arrearage on the		d in full the amount required to				
	As of the date of this response, the debtor has not paid in full the amount required to cure any prepetition arrearage on this mortgage claim. The total prepetition arrearage amount remaining unpaid as of the date of this response is:						
	\$.					
	As of the date of this response, the debtor has not paid in full the amount required to cure any postpetition arrearage on this mortgage claim. The total postpetition arrearage amount remaining unpaid as of the date of this respons is:						
	\$						

3. Postpetition Payments							
(a) Check all that apply:							
☐ The debtor is current on all postpetition payments, including all fees, charges, expenses, escrow, and costs.							
The debtor is not current on all postpetition payments. The debtor is obligated for the postpetition payment(s) that first became due on:/							
☐ The debtor has fees, charges, expenses, negative escrow amounts, or costs due and owing. The total amount remaining unpaid as of the date of this response is \$							
(b) The claim holder attaches a payoff statement and provides the following information as of the date of this response:							
i. Date last payment was received on the mortgage://							
ii. Date next postpetition payment from the debtor is due://							
iii. Amount of the next postpetition payment that is due: \$							
iv. Unpaid principal balance of the loan: \$							
v. Additional amounts due for any deferred or accrued interest:							
vi. Balance of the escrow account: \$							
vii. Balance of unapplied funds or funds held in a suspense account:							
4. Itemized Payment History							
Include if applicable:							
Because the claim holder disagrees that the arrearages have been paid in full or states that the debtor is not current on all postpetition payments or that fees, charges, expenses, escrow, and costs are due and owing, the claim holder attaches an itemized payment history disclosing the following amounts from the date of the bankruptcy filing through the date of this response:							
all prepetition and postpetition payments received;the application of all payments received;							

Motion to Determine the Status of the Mortgage Claim

Advisory Committee on Bankruptcy Rules | April 11, 2024

Official Form 410C13-M2R

Page 181 of 266

page 2

- all fees, costs, escrow, and expenses that the claim holder asserts are recoverable against the debtor or the debtor's principal residence; and
- all amounts the claim holder contends remain unpaid.

			Date / /				
Signature							
Print			Title				
	Nam	ne					
Company							
If different from the notice address listed on the proof of claim to which this response applies:							
Address							
	Number	Street					
	City	State	ZIP Code				
Contact phone () Email							
The person completing this response must sign it. Check the appropriate box:							
I am the claim holder.I am the claim holder's authorized agent.							

Official Form 410C13-M2R

Motion to Determine the Status of the Mortgage Claim

page 3

Official Form 410 (Committee Note) (12/25)

Committee Note

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are new.
They are adopted to implement new and revised provisions of Rule 3002.1 that prescribe procedures for determining the status of a home mortgage claim in a chapter 13 case.

Official Forms 410C13-M1 and 410C13-M1R implement Rule 3002.1(f). Form 410C13-M1 is used if either the trustee or the debtor moves to determine the status of a home mortgage at any time during a chapter 13 case prior to the trustee's Notice of Disbursements Made. If the trustee files the motion, she must disclose the payments she has made to the holder of the mortgage claim so far in the case. If the debtor, rather than the trustee, has been making the postpetition payments, the trustee should state in part 4 that she has paid \$0.00. If the debtor files the motion, he should provide information about any payments he has made and any payments made by the trustee of which the debtor has knowledge.

Within 28 days after service of the trustee's or debtor's motion, the holder of the mortgage claim must file a response, using Official Form 410C13-M1R, if it disputes any facts set forth in the motion. See Rule 3002.1(f)(2). The claim holder must indicate whether the debtor has paid the full amount required to cure any arrearage and whether the debtor is current on all postpetition payments. The claim holder must provide a payoff statement, and, if the claim holder says that the debtor is not current on all payments, it must attach an itemized payment history for the postpetition period.

Official Form 410 (Committee Note) (12/25)

 Official Form 410C13-N is to be used by a trustee to provide the notice required by Rule 3002.1(g)(1) to be filed at the end of the case. This notice must be filed within 45 days after the debtor completes all payments due to the trustee, and it requires the trustee to report on the amounts the trustee paid to cure any arrearage, for postpetition mortgage obligations, and for postpetition fees, expenses, and charges. If the trustee did not disburse any funds, the trustee should report in Parts 3 and 4 that she has paid \$0.00. The trustee must also provide her disbursement ledger for all payments she made to the claim holder or provide the web address where it can be accessed.

Within 28 days after service of the trustee's notice, the holder of the mortgage claim must file a response using Official Form 410C13-NR. See Rule 3002.1(g)(3). The claim holder must indicate whether the debtor has paid the full amount required to cure any arrearage and whether the debtor is current on all postpetition payments. It must also provide a payoff statement. If the claim holder says that the debtor is not current on all payments, it must attach an itemized payment history for the postpetition period. The response, which is not subject to Rule 3001(f), must be filed as a supplement to the claim holder's proof of claim.

Official Forms 410C13-M2 and 410C13-M2R implement Rule 3002.1(g)(4). Form 410C13-M2 is used if either the trustee or the debtor moves at the end of the case to determine whether the debtor has cured all arrearages and paid all required postpetition amounts. If the trustee files the motion, she must disclose the payments she has made to the holder of the mortgage claim. If the debtor, rather than the trustee, has been making the postpetition payments, the

Official Form 410 (Committee Note) (12/25)

62

63

64 65 trustee should state in part 4 that she has paid \$0.00. If the debtor files the motion, he should provide information about any payments he has made and any payments made by the trustee of which the debtor has knowledge.

66 Within 28 days after service of the trustee's or debtor's motion, the holder of the mortgage claim must file 67 a response, using Official Form 410C13-M2R, if it disputes 68 69 any facts set forth in the motion. See Rule 3002.1(g)(4)(B). 70 The claim holder must indicate whether the debtor has paid the full amount required to cure any arrearage and whether 71 the debtor is current on all postpetition payments. The claim 72 holder must provide a payoff statement, and, if the claim 73 74 holder says that the debtor is not current on all payments, it 75 must attach an itemized payment history for the postpetition period. 76



Bifurcated Fee Enforcement Guidelines

As the bankruptcy "watchdog," the United States Trustee Program (USTP) works to protect and preserve the integrity of the bankruptcy system, including by promoting fair access for and fair treatment of all participants.

The Bankruptcy Code generally prohibits the postpetition payment of attorney's fees arising from prepetition retention agreements in chapter 7 cases. Bifurcated fee agreements are an alternative structure to the traditional attorney's fee model that some have suggested is a barrier to debtors who are unable to pay their attorney's fees in full before filing. There are differing views among courts and stakeholders in the bankruptcy community on the propriety of bifurcated agreements, and the USTP works to balance the worthy goal of promoting access to the bankruptcy system against the risk that bifurcated fee arrangements could harm debtors if not properly structured.

The memorandum posted below provides general guidelines for USTP personnel to follow in evaluating bifurcated fee agreements in individual chapter 7 cases. It is the USTP's position that, absent contrary local authority, bifurcated fee agreements are permissible, provided they do not harm debtors or the integrity of the bankruptcy system. The guidelines generally provide that attorney's fees under bifurcated agreements must be fair and reasonable, that attorneys must provide adequate disclosures to their clients and obtain their fully informed consent to a bifurcated agreement, and that attorneys must make adequate public disclosures in compliance with the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.

Guidelines for United States Trustee Program (USTP) Enforcement Related to Bifurcated Chapter 7 Fee Agreements

Updated June 13, 2022



U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director

Washington, DC 20530

June 10, 2022

MEMORANDUM

TO: **United States Trustees**

FROM: Ramona D. Elliott

Acting Director

SUBJECT: Guidelines for United States Trustee Program (USTP) Enforcement Related to

Bifurcated Chapter 7 Fee Agreements

I. Introduction

In our role as the "watchdog" of the bankruptcy process, one of the USTP's core responsibilities is to protect and preserve the integrity of the bankruptcy system. In doing so we seek to promote fair access to the bankruptcy system while ensuring that no participant is treated improperly. Enhancing access to justice not only includes removing barriers to entry but also ensuring that all debtors who seek bankruptcy protection in good faith and comply with the Bankruptcy Code's requirements receive the relief the law affords them. This includes ensuring that debtors are properly and adequately represented by their attorneys, who in turn are negotiating the terms of their fee arrangements and representation in good faith.

The Bankruptcy Code's 1 statutory framework generally prohibits postpetition payment of attorney's fees arising from prepetition retention agreements in chapter 7 cases. The Supreme Court held in Lamie v. United States Trustee² that chapter 7 debtors' attorney's fees may not be paid out of the bankruptcy estate, and almost all courts that have considered the issue have held that attorney's fees owing under a prepetition retainer agreement are a dischargeable debt.³ As a

¹ 11 U.S.C. §§ 101 et seq.

² 540 U.S. 526, 537 (2004). The Court's reasoning was that 11 U.S.C. § 330(a) only authorizes compensation to professionals employed under § 327, which does not include the debtor's attorney in a chapter 7 case unless employed by the trustee under § 327(e).

³ See, e.g., Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005).

result, the traditional model for representation in chapter 7 cases is payment of the entire attorney's fee for the case⁴ in full before the case is filed.

"Bifurcated" fee agreements—which split an attorney's fee between work performed prior to the filing of a bankruptcy petition and work performed postpetition—have become increasingly prevalent in chapter 7 consumer bankruptcy cases. Bifurcated agreements are generally structured so that minimal services—limited to those essential to commencing the case—are performed under a prepetition agreement for a modest (or no) fee, while all other services are performed postpetition, under a separate postpetition retention agreement, arguably rendering those fees nondischargeable.

Courts and stakeholders in the bankruptcy community have expressed differing views on the propriety of bifurcated fee agreements. Some courts have held that bifurcation by its nature violates certain local rules governing the professional responsibilities of counsel owed to their debtor clients. Other courts have held that nothing is inherently improper about bifurcation, provided that certain guardrails are obeyed.

Absent contrary local authority, it is the USTP's position that bifurcated fee agreements are permissible so long as the fees charged under the agreements are fair and reasonable, the agreements are entered into with the debtor's fully informed consent, and the agreements are adequately disclosed. Bifurcated agreements provide an alternative under the current statutory framework to the traditional attorney's fee model, which some have noted present a barrier to accessing the bankruptcy system for debtors who may need relief but are unable to pay in full before filing. The benefits these type of agreements provide—increasing access and relief to those in need—must be balanced against the risk that these fee arrangements, if not properly structured, could harm debtors and deprive them of the fresh start afforded under the Bankruptcy Code.

⁴ Typically, a flat fee for all services essential to the successful completion of the case.

⁵ This Memorandum only addresses enforcement guidelines for bifurcated fee arrangements. The exclusion from these guidelines of other alternative fee arrangements—such as the practice of filing chapter 13 cases solely to pay attorney's fees over time—should not be construed as acceptance of the propriety of such arrangements. When any fee arrangement violates the Bankruptcy Code or Rules, the USTP will take enforcement actions as appropriate.

⁶ See, e.g., Terrence L. Michael, There's A Storm A Brewin: The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform, 94 AM. BANKR. L.J. 387 (2020); Adam D. Herring, Problematic Consumer Debtor Attorney's Fee Arrangements and the Illusion of "Access to Justice", ABI JOURNAL, Vol. XXXVII, No. 10, Oct. 2018; Daniel E. Garrison, Liberating Debtors from "Sweatbox" and Getting Attorneys Paid, ABI JOURNAL, June 2018, at 16. See also Adam D. Herring, "Great Debates" at the ABI Consumer Practice Extravaganza (Nov. 5, 2021).

⁷ See, e.g., In re Baldwin, No. 20-10009, 2021 WL 4592265 (Bankr. W.D. Ky. Oct. 5, 2021); In re Prophet, 628 B.R. 788 (Bankr. D.S.C. 2021), rev'd and remanded No. 9:21-cv-01082-JMC, 2022 WL 766352 (D.S.C. Mar. 14, 2022).

⁸ See, e.g., In re Kolle, No. 17-41701-CAN, 2021 WL 5872265 (Bankr. W.D. Mo. Dec. 10, 2021); In re Brown, 631 B.R. 77, 101 (Bankr. S.D. Fla. 2021); In re Carr, 613 B.R. 427 (Bankr. E.D. Ky. 2020); In re Hazlett, No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019).

The USTP's enforcement approach to bifurcated agreements balances these concerns. The USTP will review bifurcated fee agreements to ensure that they harm neither the debtors who rely on the bankruptcy system to obtain relief nor the integrity of the system. When appropriate, we will bring enforcement actions to address these harms. This document sets forth general guidelines that United States Trustees and their staff should use to assist them in determining whether to take enforcement action with respect to bifurcated fee agreements.

II. Attorney's Fees Under Bifurcated Agreements Must Be Fair and Reasonable

When reviewing attorney fee agreements in consumer cases, our first consideration is to ensure that the agreements serve the best interests of clients, not their professionals. This tension is most evident—and the potential for the greatest harm to debtors exists—in the structuring of fees under bifurcated agreements. The three most common fee-related issues we see in cases involving bifurcated fee agreements relate to the allocation of fees and services, the reasonableness of the fees, and third-party financing.

First, it is important to ensure that there is a proper allocation of prepetition and postpetition fees and services. This issue commonly arises in no- or low-money down cases. It is the USTP's position that fees earned for prepetition services must be either paid prepetition or waived, because the debtor's obligation to pay those fees is dischargeable. This is particularly important to ensure—and to clearly document—that debtors receive appropriate prepetition consultation and legal advice, including with respect to exemptions and chapter selection. Debtors who enter into bifurcated fee agreements should receive the same level of representation as debtors who enter into traditional fee agreements. Bifurcation must not foster cutting corners in properly preparing the case for filing by eliminating tasks that should be performed prepetition or postponing all or some of those services until after the petition is filed to ensure that the attorney can bill for those services postpetition. Additionally, fees for postpetition services must be rationally related to the services actually rendered postpetition, so that a flat postpetition fee is not a disguised method to collect fees for prepetition services. Attorneys also should not advance filing fees and seek their reimbursement postpetition. Advanced filing fees are generally held to be dischargeable prepetition obligations.

Second, attorney's fees charged to debtors in bifurcated cases—as in all cases—must be reasonable. Bifurcated fee agreements should not be viewed as an opportunity to collect higher fees than those collected from clients who pay in full, before filing. For example, it would be inappropriate for an attorney to offer a debtor a fee of \$1,500 if they pay upfront, and \$2,000 if they pay over time postpetition, particularly given that fees for prepetition work should have been paid or waived.

⁹ The Bankruptcy Code requires attorneys to certify, by signing the petition, that they have performed a reasonable investigation into the facts and circumstances of the case and that the attorney, after performing an adequate inquiry, has no knowledge that the information in the schedules is incorrect. 11 U.S.C. §§ 707(b)(4)(C–D).

¹⁰ See Brown, 631 B.R. at 93 (citing Hazlett, 2019 WL 1567751).

¹¹ See, e.g., Matter of Riley, 923 F.3d 433, 439-40 (5th Cir. 2019); Brown, 631 B.R. at 102-03.

¹² 11 U.S.C. § 329(b).

Third, arrangements that employ outside parties to finance bifurcated fee agreements, including (but not limited to) factoring, assignment of the attorney's accounts receivable, and direct lending to clients, warrant significant additional scrutiny. The particulars of arrangements under which a third party finances the debtor's postpetition attorney's fees must be fully disclosed under Bankruptcy Rule 2016(b), including the details of the attorney's relationship with the entity providing the financing. The nature of these arrangements may incentivize overcharging, because the attorney generally receives only a percentage of the total fee charged or otherwise incurs financing costs. It is improper for an attorney using third-party financing to pass along the cost of that financing to their clients. Third-party financing arrangements may also create unwaivable conflicts of interest between the attorney and their clients and may violate applicable state ethical rules. ¹³

The USTP should bring enforcement actions where bifurcated fee agreements adversely affect the client's representation, seek recovery of unreasonable fees, improperly allocate fees or services, improperly burden debtors with financing costs, or otherwise result in conflicts of interest.

III. Ensuring Adequate Attorney Disclosure and Fully Informed Debtor Consent to Bifurcated Agreements

In addition to ensuring that bifurcated agreements are fair and reasonable, courts examining and permitting bifurcated agreements have emphasized the importance of adequate disclosure and the client's fully informed consent. One court permitting the use of bifurcated agreements noted that "the propriety of using bifurcated fee agreements in consumer chapter 7 cases is directly proportional to the level of disclosure and information the attorney provides to the client and the existence of documentary evidence that the client made an informed and voluntary election to enter into a postpetition fee agreement." Similarly, professional conduct standards governing fee sharing and limited scope representation fee need for disclosure and informed consent. The requirement of informed consent to bifurcated agreements is derived directly from the Bankruptcy Code's requirements that attorneys representing consumer debtors deal forthrightly and honestly with their clients, that they not make misrepresentations about the services they will provide or the benefits and risks of filing bankruptcy, and that they make certain disclosures and promptly enter into a clear and conspicuous written contract explaining the services the attorney will render and the terms of any fee agreement. In the provide of the autorney will render and the terms of any fee agreement.

The following disclosure and consent factors can assist your review of bifurcated fee agreements and determination whether an enforcement action is appropriate:

• Whether the attorney has clearly disclosed the services that will be rendered prepetition and postpetition, and the corresponding fees for each

¹³ *Brown*, 631 B.R. at 99, n. 34.

¹⁴ In re Hazlett, No. 16-30360, 2019 WL 1567751 at *8 (Bankr. D. Utah Apr. 10, 2019).

¹⁵ See, e.g., Model Rules of Prof. Conduct R. 1.2(c), 5.4(a) (Am. BAR ASS'N 1983).

¹⁶ 11 U.S.C. §§ 526–528.

segment of the representation, including that certain listed services may not arise in a particular case.

- Whether the attorney has disclosed their obligation to continue representing the debtor regardless of whether the debtor executes a postpetition agreement, unless the bankruptcy court permits the attorney's withdrawal.
- Whether the attorney has clearly disclosed that the client is being provided
 the option to choose a bifurcated fee agreement, any difference in the total
 attorney's fee between the bifurcated fee agreement and a traditional fee
 agreement, ¹⁷ and the client's options with respect to the postpetition fee
 agreement. ¹⁸
- Whether the agreement includes clear and conspicuous provisions explaining the options, costs, and consequences of entering into a bifurcated fee agreement and providing the debtor with an option to rescind the agreement.

The disclosure and consent considerations described above are not exhaustive and should not be mechanically applied, but instead qualitatively assessed to determine whether adequate disclosures were made and whether those disclosures permit a consumer debtor considering a bifurcated fee agreement to give informed consent. Additionally, when applying these criteria we must consider local authority and act accordingly where local rules or jurisprudence have imposed other clear standards for adequate client disclosures and conditions of informed consent—whether more or less stringent. ¹⁹

IV. Ensuring Adequate Public Disclosure

The Bankruptcy Code and Rules also require public transparency in professionals' dealings with their clients, and the USTP regularly enforces these requirements. All attorneys representing debtors must promptly file disclosures of the particulars of their fee agreements and the amounts they have been paid under section 329(a) of the Bankruptcy Code and Bankruptcy

¹⁷ As discussed *supra*, it is the USTP's position that fees under bifurcated agreements should not be higher than those under traditional fee agreements for the same services.

¹⁸ Generally, these options are for the client to sign the postpetition agreement for the attorney's continued representation; to hire other counsel; or to proceed in the case *pro se*.

¹⁹ We are aware that some courts have found that bifurcation is impermissible under local rules governing representation of debtors. *See, e.g., Baldwin*, 2021 WL 4592265; *Prophet*, 628 B.R. 788. The existence and wording of such local rules varies, and bankruptcy courts within a district may interpret them differently. In determining whether to take an enforcement action with respect to a bifurcated fee arrangement, the USTP will consider and follow applicable local authority but also should be mindful to exercise discretion in accordance with these guidelines to focus on those cases where the debtor is harmed or the integrity of the bankruptcy process is jeopardized.

Rule 2016(b).²⁰ The nature of bifurcated agreements requires detailed disclosures in order to satisfy the Bankruptcy Code's standards. Failure to make adequate public disclosures required under the Bankruptcy Code and Rules may be a basis to bring an enforcement action.²¹

V. Conclusion and Important Notes

It is vital that the USTP acts consistently across jurisdictions in these and other legal matters. Please ensure that all staff who engage in civil enforcement in consumer cases are familiar with these guidelines. Each case will have unique facts that should be considered in a manner consistent with these guidelines.

Please consult the Office of the General Counsel if there are any questions regarding these guidelines or their application in specific cases. This memorandum is an internal directive to guide USTP personnel in carrying out their duties, but the final determination of whether a bifurcated fee agreement complies with the Bankruptcy Code and Rules resides solely with the court. Nothing in this memorandum has any force or effect of law or imposes on parties outside the USTP any obligations beyond those set forth in the Bankruptcy Code and Rules.²²

Thank you for your continued cooperation and diligence in this important area of responsibility.

²⁰ The default remedy for failure to make proper disclosures under section 329(a) is return of all fees. *See, e.g., SE Prop. Holdings, LLC v. Stewart*, 970 F.3d 1255, 1266 (10th Cir. 2020).

²¹ Postpetition attorney's fee installment payments should be disclosed as monthly expenses on the debtor's Schedule J. This allows courts and the USTP to quickly evaluate whether the debtor can actually afford the attorney's fees charged under the postpetition contract, which is a factor in determining whether the bifurcated agreement is in the debtor's best interest. However, note that we do not take the position that Rule 2016(b) requires that attorneys using bifurcated agreements file a supplemental compensation disclosure each time they receive a postpetition payment, provided that the terms of the postpetition agreement have been previously disclosed and there have been no material changes.

²² Additionally, nothing in this memorandum: (1) limits the USTP's discretion to request additional information, conduct examinations under Bankruptcy Rule 2004, or conduct discovery with respect to its review of a particular fee arrangement; (2) limits the USTP's discretion to take action with respect to any particular fee arrangement; or (3) creates any private right of action on the part of any person enforceable against the USTP, its personnel, or the United States.



BLOG POST

Ensuring "Access" and "Justice" -USTP's Enforcement Guidelines for Bifurcated Fee Agreements

Thursday, September 1, 2022

Courtesy of Adam Herring, Associate General Counsel for Consumer Practice, EOUST; and Scott Bomkamp, Trial Attorney, Orlando, FL.

This article originally appeared in the ABI Journal (Vol. LXI, No. 9, September 2022).

The Bankruptcy Code generally prohibits the post-petition payment of a chapter 7 debtor's attorney's fees based on a pre-petition retainer agreement. [Footnote 1] As a result, the debtor must traditionally pay the entire fee for the case in full before the case is filed, unless the debtor's attorney is willing to file the case with no recourse to compel post-petition payments. [Footnote 2] Many have suggested that this statutory structure presents a barrier to accessing the bankruptcy system for those who may most need relief. [Footnote 3]

The increasingly prevalent practice of "bifurcating" attorney fees has arisen as an alternative. However, stakeholders have expressed starkly varying views on the propriety of bifurcated fee arrangements.[Footnote 4] Similarly, some courts have expressly prohibited bifurcation based on local rules and attorneys' professional duties,[Footnote 5] while others have held that there is nothing inherently impermissible about bifurcated agreements if properly done.[Footnote 6]

In jurisdictions that allow them, bifurcated arrangements may help debtors who are unable to quickly come up with the full fee for a chapter 7 case. However, they also present substantial risks for abuse. If bifurcation is permitted, the benefits must be balanced against those risks,

and the arrangements must be properly disclosed, structured and implemented to prevent harm to debtors and the integrity of the system.

Bifurcated Fee Agreements in Practice

Under a bifurcated fee arrangement, the client first executes a pre-petition retainer agreement limited to the attorney preparing and filing a "skeletal" chapter 7 petition.[Footnote 7] The fee for pre-petition services may be as little as \$0.[Footnote 8] Most pre-petition agreements in bifurcated models describe the debtor's post-petition options as (1) hiring the attorney under a post-petition agreement to provide full representation through the remainder of the case; (2) hiring other counsel to complete the case; or (3) completing the case pro se.

After the petition has been filed, the client executes the post-petition retainer agreement, under which the debtor agrees to pay post-petition fees in installments.[Footnote 9] Next, the attorney prepares and files the remaining bankruptcy documents, including the schedules and statement of financial affairs, attends the § 341 meeting of the creditors with the client and otherwise represents the client in the bankruptcy case.[Footnote 10] The fee charged under the post-petition agreement is the remainder of the fee for the case that was not paid pre-petition.

Some attorneys use third-party financing to support their bifurcated fee business model. While the specific terms vary, outside financing generally pays the attorney an immediate lump sum and relieves the attorney of the burdens of collection. Typical financing models involve the attorney factoring, or granting a security interest in, their accounts receivable, [Footnote 11] In exchange, the finance company charges a fee, which is often a substantial percentage of the total attorney's fee charged, [Footnote 12]

Recent Case Law Developments

Decisions have generally either approved bifurcation subject to protective conditions, or disapproved it entirely. In two recent decisions, the U.S. Bankruptcy Court for the Western District of Missouri addressed bifurcation using third-party financing models.[Footnote 13] The court held that bifurcation was not per se forbidden. However, in both cases, the debtors' attorneys failed to make adequate disclosures and charged unreasonable fees. The court put it succinctly: "All attorney fee agreements must be reasonable. And, in bankruptcy cases, all fee agreements, payments, terms, and sources must be fully, completely, and accurately disclosed in addition to being reasonable. Period."[Footnote 14]

The U.S. Bankruptcy Court for the Southern District of Florida has followed similar principles and provided guidance for proper bifurcation in the district. [Footnote 15] It was particularly

concerned with adequate client disclosures and informed consent, and set out detailed requirements. [Footnote 16] The court also outlined the attorney's duties and services that must be performed pre- and post-petition. [Footnote 17] As for attorneys' fees, the court concluded that it would assess the reasonableness of a post-petition fee on its own, and not in comparison to the pre-petition fee charged. [Footnote 18] In other words, the court would not be concerned with a \$0 pre-petition fee as long as the post-petition fee is reasonable in light of actual or potential post-petition services. The court noted that attorneys may not recoup filing fees advanced pre-petition, because such advances are dischargeable pre-petition loans. [Footnote 19] In addition, although none of the firms at issue in the decision employed third-party financing, the court stated in a footnote that factoring post-petition fees is impermissible because it creates an inherent conflict of interest and violates the Florida Rules of Professional Conduct. [Footnote 20]

Some courts have found bifurcation to be *per se* impermissible. These cases reason that bifurcation involves inherent violations of an attorney's duties and common local rules requiring that the attorney who files a case is responsible for performing all essential tasks in the case, unless the court permits withdrawal. In *Prophet*, the U.S. Bankruptcy Court for the District of South Carolina said:

Separate representations and bifurcation are not permitted. Counsel cannot walk the debtor client to the courthouse door, file only a few of the required documents, and insist that the representation has been completed even if maintaining that additional (but in counsel's mind uncontracted) services will be provided until the Court acts on a motion to withdraw. This strains too much the bankruptcy attorney/client relationship, especially given the disparity between the contracting parties over issues that otherwise are the inherent subject of the attorney/client relationship — claims, debts, personal liability and the right to payment.[Footnote 21]

On appeal, the district court reversed, concluding that the bankruptcy court had misapplied its own local rule, and remanded the case for consideration of the U.S. Trustee's arguments regarding the attorney's disclosures and fees, [Footnote 22] Subsequent cases have adopted the Prophet court's reasoning, which remains good law in those districts. [Footnote 23] Recently, the Siegle and Suazo bankruptcy courts held that the debtors' attorneys violated local rules and § 526 of the Bankruptcy Code because the bifurcated agreements misrepresented the attorneys' obligation to continue to represent the debtors post-petition under the applicable local rules. [Footnote 24]

The USTP's Enforcement Guidelines

To balance the worthy goal of expanding access to the bankruptcy system with the risk of harm from abusive practices, the "Guidelines for U.S. Trustee Program (USTP) Enforcement Related to Bifurcated Chapter 7 Fee Agreements" were released in June 2022. [Footnote 25] The Guidelines are an internal directive designed to guide USTP personnel and promote a consistent enforcement approach, and they have been made publicly available to inform the bankruptcy community about the USTP's enforcement positions.

As a starting point, the USTP's position is that absent contrary applicable authority, bifurcated fee agreements are permissible provided that three criteria have been met: (1) the fees charged under the agreement must be fair and reasonable; (2) the attorney must provide adequate disclosures to clients, and clients must provide fully informed consent; and (3) the attorney must make sufficient public disclosures related to the fee agreement. The USTP's guiding principle in determining whether to take an enforcement action is redressing harm — to debtors or the integrity of the bankruptcy system — resulting from noncompliant arrangements. Each of these criteria is discussed in greater detail herein.

Fair and Reasonable Fees

Bifurcated agreements present a potential for harm in the structuring of fees. The USTP's first consideration in reviewing any fee arrangement in a consumer case is ensuring that it serves the best interests of clients rather than professionals.

Attorneys' fees under a bifurcated agreement must be properly allocated between pre-and post-petition fees and services. The USTP's position is that fees earned for pre-petition services must either be paid pre-petition or waived, because they are a dischargeable pre-petition debt. This ensures that attorneys comply with their professional and statutory duty to provide appropriate pre-petition counseling, including regarding chapter selection and exemptions. [Footnote 26] Concomitantly, post-petition fees must be rationally related to post-petition services, so that a flat post-petition fee is not a vehicle to collect fees for work that was performed or should have been performed prior to the filing of the case.[Footnote 27] Finally, attorneys should not advance filing fees and seek post-petition reimbursement, as advanced filing fees are dischargeable pre-petition loans.[Footnote 28]

Attorneys' fees must also be reasonable. Bifurcation is not an invitation nor an entitlement to collect higher fees than would be collected from similarly situated clients who pay in full before filing. In addition, bifurcated fee models that employ outside financing invite significant scrutiny. These arrangements may incentivize overcharging because the attorney incurs (often substantial) financing costs that they may attempt to pass along to their clients. For example, in *Baldwin*, the court evaluated reasonableness by comparing the amount charged in cases in which the client paid the full fee up front to cases in which fees were bifurcated. [Footnate 29]

After finding that fees were \$950 higher in the bifurcated fee cases because the attorney passed on a financing charge to his client, the court held that the convenience provided to the debtor was not worth such a hefty upcharge and that the increased fee was unreasonable and contrary to chapter 7's fresh start policy.[Footnote 30]

Client Disclosures and Fully Informed Consent

Debtors must understand the fee agreements into which they are entering. The requirement that debtors provide fully informed consent to bifurcated agreements is derived from both the Bankruptcy Code and relevant rules of professional conduct. Sections 526-528 of the Code require, among other things, that attorneys representing "assisted persons" (most consumer debtors) deal honestly with their clients, not misrepresent the services they will provide or the benefits and risks of bankruptcy, make thorough required disclosures, and timely enter into a clear and conspicuous written agreement detailing services to be provided and the terms of any fee agreement. The court in *Hazlett*, an early decision permitting bifurcation, wrote that "the propriety of using bifurcated fee agreements in consumer chapter 7 cases is directly proportional to the level of disclosure and information the attorney provides to the client and the existence of documentary evidence that the client made an informed and voluntary election to enter into a post-petition fee agreement."[Footnote 31]

In *Milner*, the bankruptcy court opined that pre-and post-petition contracts, which were prepared by a third-party finance company, were full of legalese and beyond the comprehension of the debtor or any average layperson seeking bankruptcy services.[Footnote 32] Even debtor's counsel conceded that the debtor did not understand the distinction between the duties imposed by the pre-and post-petition contracts.[Footnote 33] The court ordered disgorgement of the attorney's fees because §§ 329 and 528 of the Bankruptcy Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure require thorough "plain English" disclosures to the client that are "simplistic, clear, and concise."[Footnote 34] In addition, Rule 2016 requires disclosure of fee-sharing, and the court found that the debtor's attorney and the financing company were engaged in fee-sharing that was inadequately disclosed because both retained a portion of the debtor's payments.[Footnote 35] Similarly, in *Baldwin*, the court was particularly concerned that the disclosures to the debtor did not explain the effect of default on the post-petition contract and did not fully explain the financial relationship between the financing company and the debtor's attorney.[Footnote 36] In evaluating whether a debtor has given fully informed consent to a bifurcated fee agreement, the USTP will consider the following factors:

whether the debtor's attorney has clearly disclosed both the services that will be rendered
pre-and post-petition and the corresponding fees for each segment of the representation,
including that certain listed services might not arise in a particular case;

- whether the attorney has disclosed their obligation to continue representing the debtor regardless of whether the debtor executes a post-petition agreement, unless the bankruptcy court permits the attorney's withdrawal;
- whether the attorney has clearly disclosed that the client is being provided the option to choose a bifurcated fee agreement, any difference in the total attorney's fee between the bifurcated fee agreement and a traditional fee agreement, and the client's options with respect to the post-petition fee agreement; and
- whether the agreement includes clear and conspicuous provisions explaining the options, costs and consequences of entering into a bifurcated fee agreement and providing the debtor with an option to rescind the agreement.

This should not be considered an exhaustive list, nor will the USTP apply these factors mechanically in determining whether a particular fee agreement is objectionable.[Footnote 37] Instead, the USTP will qualitatively assess whether an attorney's disclosures were adequate to permit the debtor to give fully informed consent.

Public Disclosures

Full disclosure of professionals' dealings with their client is a hallmark of the Bankruptcy Code and Rules. [Footnote 38] Attorneys employing bifurcated agreements must take particular care to fully and accurately make detailed disclosures of the particulars of their fee agreements and the amounts they have been paid and expect to be paid. Failure to make adequate disclosures is a basis for the USTP to take an enforcement action, and attorneys should be aware that the presumptive remedy under § 329(a) for inadequate disclosure of fees is full disgorgement. [Footnote 39]

Conclusion

Enhancing access to justice must consist of both removing barriers to entry "access" and ensuring that debtors who act in good faith and comply with legal requirements receive the relief the law affords them: "justice." Absent amendments to the Bankruptcy Code, [Footnote 40] where allowed, bifurcation on fair and reasonable terms presents a viable alternative to the traditional chapter 7 fee model and may enhance consumer debtors' ability to access the bankruptcy system. Consistent with its mission, the USTP will continue to enforce the Code in a uniform, balanced fashion to protect consumers and the integrity of the bankruptcy system.

Footnotes:

- [1] See Lamie v. United States Trustee, 540 U.S. 526, 537 (2004) (chapter 7 debtors' attorneys generally may not be compensated by bankruptcy estate); Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005) (chapter 7 debtor's attorneys' fees owing under prepetition retainer agreement are dischargeable debt).
- [2] Adam D. Herring, "Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of 'Access to Justice,'" XXXVII ABI Journal 10, 32, 58-59, October 2018, available at abi.org/abi-journal (unless otherwise specified, all links in this article were last visited on July 26, 2022).
- [3] See, e.g., § 3.01, ABI Comm'n on Consumer Bank. Final Report, available at consumercommission.abi.org; Daniel E. Garrison, "Liberating Debtors from 'Sweatbox' and Getting Attorneys Paid: Bifurcating Consumer Chapter 7 Engagements," XXXVII ABI Journal 6, 16, 66-68, June 2018, available at abi.org/abi-journal.
- [4] See Herring, supra n.2. See also, e.g., Terrence L. Michael, "There's a Storm a Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform," 94 Am. Bankr. L.J. 387 (2020); David Cox, "Why Chapter 7 Bifurcated Fee Agreements Are Problematic," XL ABI Journal 6, 30-31, 53-54, June 2021, available at abi.org/abi-journal; Garrison, supra n.3.
- [5] See, e.g., In re Suazo, No. 20-17836, 2022 WL 2197567 (Bankr. D. Colo. June 17, 2022); In re Siegle, 639 B.R. 755 (Bankr. D. Minn. 2022); In re Baldwin, 640 B.R. 104 (Bankr. W.D. Ky.); In re Prophet, 628 B.R. 788 (Bankr. D.S.C. 2021), rev'd and remanded, 639 B.R. 664 (D.S.C. 2022).
- [6] See, e.g., In re Rosema, No. 20-40366, 2022 WL 2662869 (Bankr. W.D. Mo. July 8, 2022); In re Kolle, No. 17-41701-CAN, 2021 WL 5872265 (Bankr. W.D. Mo. Dec. 10, 2021); In re Brown, 631 B.R. 77, 101 (Bankr. S.D. Fla. 2021); In re Carr, 613 B.R. 427 (Bankr. E.D. Ky. 2020); In re Hazlett, No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah April 10, 2019).
- [7] See, e.g., Walton v. Clark & Washington PC, 469 B.R. 383, 385 (Bankr. M.D. Fla. 2012).
- [8] Id.; see also Hazlett, 2019 WL 1567751 at *1.
- [9] Walton, 469 B.R. at 385.
- [10] Id.
- [11] See, e.g., In re Milner, 612 B.R. 415, 422 (Bankr. W.D. Okla. 2019).
- [12] Id.

- [13] Rosema, 2022 WL 2662869; Kolle, 2021 WL 5872265.
- [14] Rosema, 2022 WL 2662869 at *26.
- [15] Brown, 631 B.R. 77.
- [16] Id. at 98-100.
- [17] Id. at 96-98.
- [18] Id. at 94.
- [19] Id. at 102-03.
- [20] Id. at 97, n.30.
- [21] Prophet, 628 B.R. at 804.
- [22] Prophet, 639 B.R. at 676.
- [23] Baldwin, 640 B.R. at 118-19.
- [24] Suazo, 2022 WL 2197567 at *17 ("[T]he two-contract model ... was wholly illusory."); Siegle, 639 B.R. at 759.
- [25] Guidelines, available at justice.gov/ust/page/file/1511976/download.
- [26] See 11 U.S.C. § 707(b)(4). See also U.S. Trustee v. Ashcraft, et al., No. 17-ap-01271-mw, ECF No. 45 (Bankr. C.D. Cal. Aug. 8, 2019) (attorneys using factoring model stipulated as part of settlement with USTP that they routinely filed initial inaccurate schedules that had to be later amended and that they did not conduct any meaningful analysis of whether their clients could afford post-petition payments).
- [27] But see Brown, 631 B.R. at 92-93 (rejecting U.S. Trustee's argument that court should compare charge for pre-petition services to fee for post-petition services given that majority of bankruptcy services in chapter 7 are rendered pre-petition).
- [28] See, e.g., Matter of Riley, 923 F.3d 433, 439-40 (5th Cir. 2019); Brown, 631 B.R. at 102-03.
- [29] Baldwin, 640 B.R. at 125-26.
- [30] Id.
- [31] Hazlett, 2019 WL 1567751 at *8.
- [32] Milner, 612 B.R. at 428, 443.

1001			100
1331	Id	- at	428

[34] Id.

[35] Id.

[36] Baldwin, 640 B.R. at 122.

[37] The USTP will also take into account local rules or controlling authority that impose clear standards for adequate disclosures and conditions of informed consent, and act accordingly.

[38] 11 U.S.C. § 329(a); Fed. R. Bankr. P. 2016(b).

[39] See, e.g., SE Prop. Holdings LLC v. Stewart, 970 F.3d 1255, 1266 (10th Cir. 2020).

[40] The ABI Commission on Consumer Bankruptcy made recommendations for Bankruptcy Code amendments that would permit post-petition payment of chapter 7 debtors' attorneys' fees. See Final Report, supra n.3.

Updated March 28, 2024

End of Case Attorney Fees – Chapter 13

In Dayton, a typical situation where we see attorneys getting involved at the end of a Chapter 13 case is where the Notice of Final Cure becomes complicated.

Occasionally we will see an attorney become involved at the end of a case if there is an "unusual" issue that remains unresolved.

Best Practice(s) for attorneys seeking fees at end of Chapter 13 case:

When the fee application is filed for end of case attorney fees, if fees are available, the Trustee will pay the attorney the requested amount of fees or the amount available in the case.

In the application, counsel should specifically provide that there may not be funds in the case to pay the requested fees.

If fees are not available, the application should request an Order determining the amount of fees to be paid and a prayer that fees will be paid by debtor post-discharge.

Counsel, <u>remember to submit an Order</u> granting the fees that were requested in the fee application. If no Order is submitted to Court, this creates an administrative problem for the Trustee's office. We can't close the case without an Order.

Finally, all fees requested must be reasonable and necessary.

Attorney Fee Cases:

In Re Village Apothecary, 45 F.4th 940 (6th Cir, 2022)

In Re Spear, 636 B.R. 765 (Bankr. S.D. Ohio 2022)

In Re Henson, 637 B.R. 13 (Bankr. S.D. Ohio 2022)

In Re Pochron, 21-31410 (Bankr. S.D. Ohio 2022)

In Re Spurlock, 642 B.R. 269 (Bankr. S.D. Ohio 2022)

In Re Combs, 22-30644 (Bankr. S.D. Ohio January 25, 2023)

In Re Vaughn, 23-30280 (Bankr. S.D. Ohio June 20, 2024)

Early Plan Payoffs:

Applicable Commitment Period – Plan length must meet it, or else pay 100% to unsecured creditors per §1325(b)(4)(B), in order to comply with requirement to devote full disposable income to the plan.

<u>Baud v. Carroll.</u> 634 F.3d 327 (6th Cir. 2011) – unless the plan provides for full recovery for unsecured claimants, plan must provide for payment of all disposable income for the applicable commitment period.

Post-confirmation modifications, however, fall under §1329, which specifically omits reference to 1325(b) when listing sections that apply for a modification. It does list 1325(a), but does not list 1325(b).

So, per 1325(a), modified plans still must pass the best interest test on the effective date of modification. See <u>Barbosa v. Soloman</u>, 235 F.3d 31 (1st Cir. 2000)

Paying off a plan prior to ACP being met, at any amount less than 100%, would not meet best interest, assuming that remaining in the plan longer would allow them to hit the higher, original dividend. "Chapter 13 Plans cannot be crammed down over a Trustee's objection without paying all projected disposable income over the course of the commitment period." In re Alverado, 2015 Bankr. LEXIS 4584 (Bankr. N.D. OH, 2015)

However, if payoff is sought after the ACP is met, Debtor does not need to pay 100%, but they still must pay an amount equal to what the plan originally provided for unsecured creditors. Paying off early at a lower percentage to unsecured creditors would draw an objection from most Trustees. This type of modification would appear to be a disguised hardship discharge instead of a good faith modification.

What does the plan say? Confirmation binds all parties, but what did it bind them to?

The form plan in Southern Ohio offers two options: a percentage plan or a pot plan. The percentage plan language says that it cannot complete prior to payment of the listed percent to unsecured creditors. The Pot Plan language says the total amount to be paid into the plan by the Debtor, with an estimated amount that unsecured creditors will receive.

The Eastern Kentucky form plan lays out a dollar amount per payment, a payment frequency, and the number of months that the plan will last. It then estimates the total amount of payments to be made. As for what is to be paid to unsecured creditors, it relies on the Trustee to calculate the pool of available funds, ensuring that creditors receive the greater of:

- 1. The projected disposable income for the applicable commitment period, or
- 2. The amount required to satisfy the liquidation test.

How are Debtors able to pay off cases early?

Refinance existing debt on real estate
Inheritances

Sale of property

Mortgage Cure Issues:

The purpose of bankruptcy is the famed "fresh start".

With long term debt, particularly with mortgages on principal residences, the transition between normal contract status to bankruptcy, then back again after a discharge, can be difficult.

FRBP 3002.1 was added to attempt to make a transition back to "normal" status as smooth as possible and to keep Debtors, their counsel, the Trustee and other parties-in-interest apprised of changes to the Debtors' mortgage payment. Too often debtors would come out of bankruptcy and be placed right back into a default status.

Direct pay cases:

- If no arrears at filing, and non-conduit Trustee will most likely not file a Notice of Final cure.
- FRBP 3002.1(f) allows Debtors to file one, if the Trustee does not.
 - o Counsel for Debtor should be filing these in every direct pay case.
 - o Forces creditor to respond and agree/disagree per 3002.1(g)
- After response is filed, Debtor can file a Motion to Determine per 3002.1(h) to get an order binding the creditor to definitive dates and amounts for what is next due and owing.
- If creditor fails to respond, the Court can preclude them from presenting omitted evidence in the case per 3002.1(i). The court is also permitted to award other relief, which could include reasonable expenses and attorney fees.
 - See In re Dewitt, 651 B.R. 215, S.D. Ohio. (2023)
 - Debtor was in arrears on mortgage at filing.
 - Case was set up as a conduit case, BUT Debtor was supposed to pay taxes directly.
 - Creditor advances taxes a few times during the CH.13 case, but with the last advance did not properly notice the third advance they had made.
 - Trustee filed a Notice of Final Cure once all required payments were made on their part, and the Creditor filed an agreeing response stating that debtor was current on "all postpetition payments due, including all fees, charges, escrow, and costs".
 - Post-bankruptcy, the Creditor began to attempt to collect the third advance they made during the bankruptcy as a part of ongoing escrow.
 - Debtor paid only the normal monthly payments, omitting the amount of escrow added due to the third advance.
 - Creditor eventually filed a foreclosure complaint.
 - Debtor reopened the bankruptcy court and sought relief.
 - The bankruptcy court ultimately determined that the Debtor was entitled to:

- Attorney's fees and expenses for all legal services related to defending the state court action, as well as reopening the bankruptcy case and pursuing remedies in the bankruptcy court.
- NOT entitled to compensatory damages.
- BUT, they ARE entitled to punitive damages per 3002.1(i)(2) and §105, which the Court would determine later.
- The bankruptcy case itself was ultimately settled between the parties and was dismissed with prejudice

Conduit Cases:

Trustee actions

- Notice of Final Cure FRBP 3002.1(f)
 - o If agreeing response, Motion to Deem Current
 - If disagreeing response: Motion for Determination FRBP 3002.1(h)

<u>Hybrid cases:</u> – cases that began as direct and were amended to be conduit:

Trustee will only be able to put in the Notice of Final Cure that any pre-petition arrears were cured. Trustee will be unable to state with certainty what the next due payment is, unless they have all the necessary records from when it was a direct pay case. This would be a pay history, list of payment changes, etc.

In general, the Trustee will probably not take the extra steps of getting the mortgage deemed current and/or file a request for determination. In these cases, the Debtor's attorney should take these steps to "true up" the mortgage before the case closes.

As of: August 6, 2024 3:45 PM Z

In re Dewitt

United States Bankruptcy Court for the Southern District of Ohio, Western Division

May 19, 2023, Decided

Case No. 11-36341, Chapter 13

Reporter

651 B.R. 215 *; 2023 Bankr. LEXIS 1340 **
In re: CONSTANCE E. DEWITT, Debtor.

Core Terms

Mortgagee, bankruptcy court, mortgage, notice, punitive damages, discovery, attorney's fees, courts, postpetition, sanctions, authorizes, bankruptcy case, compensatory damages, appropriate relief, violations, charges, damages, remedies, Cure, harmless, default, foreclosure, escrow, parties, argues, cases, taxes, substantial justification, summary judgment motion, mortgage payment

Case Summary

Overview

HOLDINGS: [1]-The court exercised its authority under Fed. R. Bankr. P. 3002.1(i)(2) and 11 U.S.C.S. § 105(a) to preclude the mortgagee from citing to or referencing a third tax payment as the basis for default under the terms of the mortgage in any court proceeding in perpetuity, including in any foreclosure; [2]-The court awarded reasonable attorney fees and expenses to the debtor for all legal services performed in response to the mortgagee's Rule 3002.1(g) violation, including legal work related to both reopening the bankruptcy case and pursuing remedies in the bankruptcy court and also those incurred in defending a state court foreclosure action; [3]-Rule 3002.1 did not allow for the recovery of actual or compensatory damages beyond the attorney fees and expenses provided for by the rule. Accordingly, the debtor's request for damages on account of emotional distress was denied.

Outcome

The debtor's motion for summary judgment was granted in part and denied in part.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

<u>HN1[</u>... Entitlement as Matter of Law, Appropriateness

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A factual disagreement is genuine if a rational trier of fact could find in favor of either party on the issue. A fact is material if it might affect the outcome of the suit under substantive law. When reviewing a motion for summary judgment, a court views all evidence and draws all inferences in the light most favorable to the nonmoving party.

Bankruptcy Law > Individuals With Regular Income > Plans > Payments Under Plan

HN2[| Plans, Payments Under Plan

Chapter 13 of the Bankruptcy Code allows individuals

Edward Bailey

Page 2 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

with regular income to retain their primary residence and effect. Rule 3002.1(b). Such changes are usually due to other real or personal property by proposing a plan which provides for the payment of their creditors over a three or five-year period. The plan is funded through the debtors' income and must be confirmed by the bankruptcy court. 11 U.S.C.S. §§ 1322 and 1325. Chapter 13 permits debtors to cure arrearages on those loans and continue to make their regular mortgage payments through their Chapter 13 plans. 11 U.S.C.S. § 1322(b)(5) and (e).

Bankruptcy Law > Individuals With Regular Income > Plans > Payments Under Plan

HN3[2] Plans, Payments Under Plan

Fed. R. Bankr. P. 3002 is added to aid in the implementation of 11 U.S.C.S. § 1322(b)(5), which permits a Chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, Fed. R. Bankr. P. 3001(c)(2), and the amount of the postpetition payment obligations. In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, Fed. R. Bankr. P. 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee.

Bankruptcy Law > Individuals With Regular Income > Plans > Payments Under Plan

HN4[] Plans, Payments Under Plan

Fed. R. Bankr. P. 3002.1 both facilitates information sharing during the Chapter 13 case and provides a mechanism for an end of the case reconciliation. During the case, mortgagees must comply with two reporting requirements that help to ensure mortgages are current when the plan ends. First, mortgagees are required to file and serve notices of payment changes on the debtor, debtor's counsel, and the Chapter 13 trustee no later than 21 days before a payment change takes

a change in the interest rate or a need to adjust the escrow account. Second, mortgagees are required to file notices itemizing all recoverable post-petition fees, charges, or expenses incurred in connection with the claim within 180 days of the date these amounts are incurred. Rule 3002.1(c). At the end of the case, within 30 days of the debtor's final plan payment, the Chapter 13 trustee is to serve a Notice of Final Cure Payment stating that the debtor has paid in full the amount required to cure any default on the claim and advising the mortgagee that it must file and serve a response. Rule 3002.1(f).

Bankruptcy Law > Individuals With Regular Income > Plans > Payments Under Plan

HN5[♣] Plans, Payments Under Plan

Under Fed. R. Bankr. P. 3002.1(g), mortgagees are required to file and serve a response to the trustee's Notice of Final Cure Payment. The response must indicate whether they agree that the debtor has cured any default on the claim and whether the debtor is otherwise current on all payments consistent with 11 U.S.C.S. § 1322(b)(5). This statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. By requiring the mortgagee to share accurate and complete information on a timely basis, rule 3002.1 provides a system whereby any outstanding amounts can be addressed by the debtor, the Chapter 13 trustee, and the court while the Chapter 13 case is pending. This information sharing mechanism is central to the integrity of Chapter 13.

Business & Corporate Compliance > Bankruptcy > Case Administration > Bankruptcy Court Powers Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Individuals With Regular Income > Plans > Payments Under Plan

HN6[2] Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1 was adopted in December 2011 to address a significant problem caused when

Page 3 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

mortgage companies applied fees and costs to a debtor's mortgage while the debtor was in bankruptcy without giving notice to the debtor and then, based on these post-petition defaults, sought to foreclose upon the debtor's property after the debtor completed the plan. Rule 3002.1 deals with this problem by requiring notice of payment changes and providing an opportunity for the debtor to contest them during the chapter 13 case. Accurate representations are required under rule 3002.1 to prevent the very problem that the debtors are facing. Providing information to a debtor about the status of his or her mortgage loan is why the procedures outlined in rule 3002.1 were enacted. The bankruptcy court considers the give and take between the trustee, creditor, and debtor outlined in rule 3002.1 to be a critical part of the administration of a Chapter 13 case. Put simply, timing is central to rule 3002.1.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Bankruptcy Law > Individuals With Regular Income > Plans > Payments Under Plan

HNT Case Administration, Bankruptcy Court Powers

While the case is still open and the plan ongoing, the debtor can readily use bankruptcy specific tools to address a noticed mortgage payment change or an added fee. Among other actions, the Chapter 13 plan may be modified to ensure that these amounts are paid before the case concludes. 11 U.S.C.S. § 1329. If there is a dispute as to any such charge, a motion can be filed and the court can resolve that dispute pursuant to Fed. R. Bankr. P. 3002.1(h). Rule 3002.1(h) invites the bankruptcy court to engage in a broad inquiry to determine the status of the mortgage. "All required postpetition amounts" includes consideration whether postpetition installment payments and postpetition fees, expenses and charges have been paid.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

HN8 Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1 not only provides a mechanism to ensure that the debtor has cured all arrearages and is current with respect to all mortgage obligations at the end of the case, but it also provides the information which the parties need to address any outstanding amounts due under the mortgage so that there are no surprises later.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

<u>HN9</u>[♣] Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1(i)(1) authorizes bankruptcy courts to bar mortgagees from presenting information that should have been noticed under the rule in any proceeding within the bankruptcy case. In determining whether to exclude evidence, the courts consider whether a violation occurred, and if so, whether the resulting failure to comply with the rule was either substantially justified or harmless. A violation is not substantially justified or harmless if the debtor is prejudiced as a result of the mortgagee's failure.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

<u>HN10</u>[≛] Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1(i)(1) explicitly authorizes the court to exclude evidence of undisclosed charges in any contested matter or adversary proceeding in the case. But for debtors who have completed their plan, this protection is incomplete. Disallowing evidence of an undisclosed charge during the Chapter 13 case but permitting the mortgagee to later present evidence of the charge or reference it as an act of default leaves the debtor exposed to the negative consequences that rule 3002.1 was enacted to avoid.

Page 4 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

HN11 & Case Administration, Bankruptcy Court Powers

The remedy authorized by Fed. R. Bankr. P. 3002.1(i)(1) appears to limit the treatment of a disputed advance during the debtor's pending Chapter 13 case if the creditor's failure was not substantially justified or harmless, but rule 3002.1(i)(2) is not so limited and expands the court's authority to provide a remedy by authorizing it to award other appropriate relief.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Evidence > Burdens of Proof > Allocation

<u>HN12</u> dase Administration, Bankruptcy Court Powers

Courts have consistently interpreted Fed. R. Bankr. P. 3002.1(i)(1) to place the burden on the mortgagee to demonstrate that its conduct was substantially justified or harmless.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

The broad language of 11 U.S.C.S. § 105(a) grants the court the power to prevent abuses of process and to issue orders necessary or appropriate to carry out provisions of the Bankruptcy Code, court orders, and rules.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

Civil Procedure > ... > Costs & Attorney Fees > Costs > Costs Recoverable

<u>HN14</u>[≛] Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1(i)(2) authorizes bankruptcy courts to award attorney's fees and reasonable expenses.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

<u>HN15</u>[≛] Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1(i)(2) does not limit reasonable expenses and attorney fees caused by the failure to the bankruptcy case. Instead, the court is given broad discretion to craft an appropriate remedy.

Civil Procedure > Remedies > Damages > Compensator y Damages

HN16[Damages, Compensatory Damages

Compensatory damages are distinct from punitive damages and are intended to compensate a debtor for loss. "Actual damages" and "compensatory damages" are synonymous terms and are intended to compensate a plaintiff for its loss. Such damages may include recompense for costs incurred and for actual injury.

Page 5 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

including emotional injury.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil

Procedure > Remedies > Damages > Compensator y Damages

<u>HN17</u>(≛) Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1(i) does not allow the recovery of compensatory damages.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Governments > Courts > Rule Application & Interpretation

HN18 Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1 is a procedural rule. Rules of procedure cannot create independent causes of action that are unavailable under applicable substantive law.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil Procedure > Remedies > Damages > Punitive Damages

<u>HN19</u>(≛) Case Administration, Bankruptcy Court Powers

Although the Rules of Bankruptcy Procedure may permit sanctions or other penalties as a part of enforcement, the rules do not allow for a private cause of action for damages from violating a rule of procedure. Instead, Fed. R. Bankr. P. 3001 gives the court authority to patrol the parties before it to achieve the efficient, speedy, and just resolution of adversarial and contested matters. While the rule does not allow for compensatory damages, it should be construed to allow courts to sanction creditors who violate the rule, including with punitive damages.

Bankruptcy Law > Administrative Powers > Automatic Stay > Violations of Stay

Governments > Legislation > Statutory Remedies & Rights

HN20[Automatic Stay, Violations of Stay

When Congress has intended to create a private right of action, it has done so expressly. Fed. R. Bankr. P. 3002.1(i)(2), providing for other appropriate relief, is quite different from 11 U.S.C.S. § 362(k), which does provide a private right of action for individuals to address violations of the automatic stay.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil

Procedure > Remedies > Damages > Compensator y Damages

HN21 S Case Administration, Bankruptcy Court Powers

While Fed. R. Bankr. P. 3002.1(i)(2) provides that the court may award other appropriate relief, the court finds that this language embodied within a procedural rule does not provide for a private right of action. Accordingly, rule 3002.1 does not allow for the recovery of actual or compensatory damages beyond the attorney fees and expenses provided for by the rule.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case

Page 6 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

Administration > Bankruptcy Court Powers

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Because 11 U.S.C.S. § 102(3) of the Bankruptcy Code defines the term "including" as "not limiting," a plain reading of Fed. R. Bankr. P. 3002.1 (i)(2) suggests that a court may award other appropriate relief (beyond the evidence preclusion authorized in rule 3002.1(i)(1), including, but not limited to, attorney's fees and reasonable expenses.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil Procedure > Sanctions

HN23[₺] Case Administration, Bankruptcy Court Powers

Although Fed. R. Bankr. P. 3002.1(i)(1) does allow the violator to avoid the sanction if the failure to provide the requisite notice was harmless, it also allows for the imposition of the drastic sanction of exclusion regardless of the precise nature or amount of such harm. In other words, the sanction is not required to be proportionate to the harm-i.e., compensatory in nature - but rather seeks to punish with the broad brush of evidence-preclusion to deter such violations in the future. Indeed, it is noted that in other contexts the preclusion of evidence can be a more extreme sanction than monetary sanctions. Once the evidence-preclusion penalty in rule 3002.1(i)(1) is properly classified as a potentially punitive sanction that also operates as a deterrent, then the other appropriate relief language in rule 3002.1(i)(2) naturally includes, from a textual standpoint, punitive monetary sanctions because they are part of the same class of matters contained within the related penalty provision.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Civil Procedure > Remedies > Damages > Punitive Damages

HN24 S Case Administration, Bankruptcy Court

Compliance with Fed. R. Bankr. P. 3002.1 is fundamental to the integrity of Chapter 13. Accordingly, the ability of courts to award appropriate punitive damages is a critical deterrent to induce mortgage holders and servicers to make systemic changes that ensure future compliance.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Civil Procedure > Remedies > Damages > Punitive Damages

Governments > Legislation > Interpretation

HN25(Case Administration, Bankruptcy Court Powers

Compensatory damages for actual harm are unavailable under Fed. R. Bankr. P. 3002.1 because the rule does not and cannot create a private right of action without congressional authorization. Because of this, the language "other appropriate relief" must be read to authorize punitive damages unless it is to be rendered meaningless altogether. It is a cardinal principle that courts must give effect, if possible, to every clause and word of a statute. While general terms should be construed in the light of the specific examples that are expressly identified, the court finds no contradiction of this axiom when rule 3002.1(i)(2) is read to authorize the imposition of remedies appropriate to patrol the parties and obtain compliance rather than to compensate for actual loss.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > ... > Costs & Attorney

Page 7 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

Fees > Attorney Fees & Expenses > Reasonable Fees

HN26 Basis of Recovery, American Rule

Evidence preclusion is a particularly harsh punitive sanction, warranted only under rare circumstances. Reasonable expenses and attorney's fees do not conclusively establish that only compensatory awards are appropriate either. The explicit mention of attorney's fees is necessary for courts to depart from the American Rule when considering fee shifting and therefore provides little indication as to how courts should interpret other appropriate relief.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN27 (Case Administration, Bankruptcy Court Powers

Fed. R. Bankr. P. 3002.1(i) is a procedural rule intended to facilitate the sharing of information that is integral to the Chapter 13 system, and these remedies are properly interpreted as tools for the court to compel compliance.

Business & Corporate Compliance > Bankruptcy > Case Administration > Bankruptcy Court Powers Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Governments > Courts > Authority to Adjudicate

HN28[≛] Case Administration, Bankruptcy Court Powers

Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct.

Business & Corporate Compliance > Bankruptcy > Case Administration > Bankruptcy Court Powers Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Civil Procedure > Sanctions

<u>HN29</u> dase Administration, Bankruptcy Court Powers

11 U.S.C.S. § 105(a) vests bankruptcy courts with the power to prevent abuses of the bankruptcy process, including the power to sanction parties for such conduct where appropriate. Bankruptcy courts may, within their discretion, fashion an appropriate sanction for conduct which abuses the judicial process.

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties Business & Corporate Compliance > Bankruptcy > Debtor Benefits & Duties > Debtor Duties

HN30[2 Debtor Benefits & Duties, Debtor Duties

An abuse of process occurs when a creditor engages in a maneuver or scheme sufficient to undermine the integrity of the bankruptcy system that disrupts the bankruptcy process and prejudices debtors.

Business & Corporate
Compliance > Bankruptcy > Case
Administration > Bankruptcy Court Powers
Bankruptcy Law > Case
Administration > Bankruptcy Court Powers

Governments > Courts > Authority to Adjudicate

<u>HN31</u>[≛] Case Administration, Bankruptcy Court Powers

While 11 U.S.C.S. § 105 is not a panacea for all ills confronted, bankruptcy courts may exercise § 105 authority and inherent authority when necessary to enforce provisions of the Bankruptcy Code or Rules, including to fill the gaps left by the statutory language.

Business & Corporate Compliance > Bankruptcy > Case Administration > Bankruptcy Court Powers

Page 8 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Civil Procedure > Remedies > Damages > Punitive Damages

HN32 Case Administration, Bankruptcy Court

The bankruptcy court's sanctioning authority includes the power to impose mild noncompensatory punitive damages, but not serious noncompensatory punitive damages. Because bankruptcy courts are courts of limited jurisdiction, the general sanctioning power of bankruptcy courts does not encompass the imposition of criminal-like sanctions, absent other statutory authority.

Civil Procedure > Sanctions

Governments > Courts > Authority to Adjudicate

HN33[] Civil Procedure, Sanctions

Monetary sanctions imposed under a court's inherent powers require a finding that the misconduct constituted or was tantamount to bad faith.

Bankruptcy Law > Procedural Matters > Jurisdiction > Noncore Proceedings

HN34 Jurisdiction, Noncore Proceedings

By statute, bankruptcy courts only submit proposed findings of fact and conclusions of law to the district court in two situations. First, the bankruptcy court does so when addressing non-core proceedings, absent consent of all the parties. 28 U.S.C.S. § 157(c). Second, even if the proceeding is designated as core, absent the knowing and voluntary consent of the parties, the court may not enter final judgment on Stern claims that otherwise can only be determined by an Article III court.

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

HN35 Adversary Proceedings, Causes of Action

Stern claims do not include actions covered by Fed. R. Bankr. P. 3002.1 that function as part and parcel of the claims-allowance process in bankruptcy.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN36 Discovery, Relevance of Discoverable Information

Fed. R. Civ. P. 26 authorizes extremely broad discovery. Rule 26(b)(1) defines the scope of discovery as any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Indeed, information within this scope of discovery need not be admissible in evidence to be discoverable.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN37[] Judges, Discretionary Powers

Courts are vested with broad discretionary power to pare down discovery requests, which, although technically relevant, are unreasonably burdensome and overbroad. When determining whether to limit a discovery request, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, discounted by society's interest in furthering the truthseeking function.

Civil Procedure > Discovery & Disclosure > Discovery > Burdens & Expenses

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

<u>HN38</u>[≛] Electronic Discovery, Burdens & Expenses

The proportionality analysis requires consideration of a number of factors, including the importance of the

Page 9 of 24

651 B.R. 215, *215; 2023 Bankr. LEXIS 1340, **1340

issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and the importance of the discovery in resolving the issues. Consideration must also be given to whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1)'s inclusion of the proportionality factors enforces the collective obligation to consider proportionality in discovery disputes; it does not, however, permit a party to refuse discovery simply by making a boilerplate objection that the information requested is not proportional. Further, the party seeking discovery does not bear the burden of addressing all of the proportionality factors.

Counsel: [**1] For HSBC Bank USA, NA, Creditor: LeAnn E Covey, Clunk, Paisley, Hoose Co., LPA, Akron, OH; Stefanie L. Deka, McGlinchey Stafford PLLC, Cleveland, OH; Melany Kotlarek Fontanazza, Reminger Co., L.P.A., Cleveland, OH; Jerry A Meadows, 7501 Paragon Road, Dayton, OH; Matthew Murtland, LOGS Legal Group LLP, Cincinnati, OH.

For Ocwen Loan Servicing, LLC, Creditor: LeAnn E Covey, Clunk, Paisley, Hoose Co., LPA, Akron, OH; Stefanie L. Deka, McGlinchey Stafford PLLC, Cleveland, OH; Melany Kotlarek Fontanazza, Reminger Co., L.P.A., Cleveland, OH; Jerry A Meadows, Dayton, OH.

For PHH Mortgage Corporation, Creditor: Stefanie L. Deka, McGlinchey Stafford PLLC, Cleveland, OH.

For Constance E Dewitt, Debtor: Jerry A Meadows, Dayton, OH.

For Henry E Menninger, Jr, Mediator: Henry E Menninger, Jr, Cincinnati, OH.

Judges: Guy R. Humphrey, United States Bankruptcy Judge.

Opinion by: Guy R. Humphrey

Opinion

[*219] DECISION GRANTING IN PART AND DENYING IN PART DEBTOR'S MOTION FOR SUMMARY JUDGMENT (DOC. 118)

I. Factual and Procedural Background

In November 2011 Constance Dewitt ("Dewitt") filed a petition for bankruptcy [*220] relief under Chapter 13 and listed her primary residence as an asset. Doc. 114, ¶¶ 1-3. Dewitt's property was subject to a mortgage [**2] held by HSBC and serviced by Ocwen Loan Servicing LLC ("Ocwen") and later PHH Mortgage Corporation ("PHH") (collectively, "the Mortgagee"), Id. at ¶¶ 4-6, 8. This Decision follows an earlier decision in this case, 644 B.R. 385 (Bankr. S.D. Ohio 2022) ("Dewitt I"), in which this court found that the Mortgagee violated Federal Rule of Bankruptcy Procedure 3002.1(a) when it, following the closing of the case, sought to collect from Dewitt real estate taxes which it advanced during Dewitt's bankruptcy case and which it failed to disclose as outstanding in its response to the Chapter 13 Trustee's Notice of Final Cure Payment. See Fed. R. Bankr. P. 3002.1(f).

As this court detailed in Dewitt I, Dewitt's Chapter 13 Plan (the "Plan") required the Trustee to pay the Mortgagee "(1) the full amount of the pre-petition arrearages in the amount of \$19,543.56; (2) the ongoing, post-bankruptcy monthly payments due on the loan through May 2017; and (3) a post-petition fee that Ocwen incurred for paying the 2014 installment of real estate taxes in the amount of \$1,655.63 (the Second Advance) " Id. at ¶ 11. The Plan also required Dewitt to directly pay post-petition property taxes to Clark County. Id. at ¶¶ 10, 13. After she failed to do so, the Mortgagee paid the property taxes on her behalf on three [**3] occasions. While the Mortgagee waived the first tax payment and properly noticed the second under Rule 3002.1(c), which was paid through the Plan, the Mortgagee did not notice the third tax payment of \$4,155.91 made on April 26, 2017 (the "Third Advance"). Id. at ¶¶ 11-12, 14.1 The Mortgagee did not seek to collect the Third Advance during the bankruptcy case but later attempted to do so. Id., ¶ 26.

The Trustee served a Notice of Final Cure (doc. 55) pursuant to *Rule 3002.1(f)* in May 2017. *Id.*, ¶ 18. In its *Rule 3002.1(g)* Response to Notice of Final Cure (doc.

¹ The Mortgagee argued in its defense to Dewitt's contempt motion that it had no duty under <u>Rule 3002.1(c)</u> to notice the third tax payment it made because the case was concluded before the expiration of the 180-day period it had under that Rule to serve that notice. However, this court did not find a violation of <u>Rule 3002.1(c)</u> in <u>Dewitt I</u>, but rather, a violation of <u>Rule 3002.1(g)</u> because the Mortgagee did not assert that payment was due in its response to the Trustee's <u>Notice of Final Cure Payment</u> which the Trustee served pursuant to <u>Rule 3002.1(f)</u>.

Page 10 of 24

651 B.R. 215, *220; 2023 Bankr. LEXIS 1340, **3

56), the Mortgagee "agreed that Debtor was current on all postpetition payments due, including all fees, charges, escrow and costs, and stating that the next postpetition payment was due June 1, 2017." Id. at ¶ 19. Subsequently, the Trustee filed a Certification of Final Payment and Case History (doc. 58) to which HSBC did not object. Id. at ¶ 20. This court entered an order granting Dewitt's discharge in June 2017. Doc. 60; Id. at ¶ 24. Dewitt continued to make monthly mortgage payments of principal and interest after her bankruptcy case concluded. Debtor Affidavit, Doc. 72.

In May 2018 the Mortgagee began attempts to collect the Third [**4] Advance through an escrow payment change. Doc. 114, ¶ 25. Dewitt did not pay the monthly escrow amount and continued to make only her monthly principal and interest payments. Doc. 118 at 3-4. The Mortgagee continued attempts to collect the Third Advance by contacting Dewitt, returning her monthly mortgage payments, and ultimately filing a foreclosure complaint. Doc. 114 at ¶ 28.

After failed settlement attempts, Dewitt filed a motion to reopen the present bankruptcy case (doc. 64). Id. at ¶ 36-37; Doc. [*221] 118 at 5. The court granted the motion to reopen the case to resolve this contested matter (doc. 75). Id. at ¶ 37. In accordance with the court's scheduling order which bifurcated the issues of whether a violation of Rule 3002.1 occurred and any remedies (doc. 112), both Dewitt and the Mortgagee filed cross-motions for summary judgment as to the Rule 3002.1 violation issues. Docs. 118, 121. On September 30, 2022 the court entered its decision in Dewitt I determining that the Mortgagee violated Rule 3002.1(g) but did not violate the discharge injunction. After a status conference, the parties briefed the bifurcated issues relating to available damages and remedies. Docs. 147-49.

II. Jurisdiction

This court has jurisdiction [**5] pursuant to 28 U.S.C. § 1334(b) and the Standing Order of Reference (Amended General Order 05-02) of the District Court for the Southern District of Ohio in accordance with 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), and this court has constitutional authority to enter a final judgment. See Waldman v. Stone, 698 F.3d 910, 920 (6th Cir. 2012) (bankruptcy courts may enter final judgment for matters "part and parcel of the claims allowance process in bankruptcy.").

III. Summary Judgment Standard

HN1 A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (made applicable in this contested matter by Federal Rule of Bankruptcy Procedure 7056). A factual disagreement is genuine if "a rational trier of fact could find in favor of either party on the issue." SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.), 224 B.R. 27, 30 (B.A.P. 6th Cir. 1998) (citing Schaffer v. A.O. Smith Harverstone Prods., Inc., 74 F.3d 722, 727 (6th Cir. 1996)). A fact is material if it might affect the outcome of the suit under substantive law. Niecko v. Emro Mktg. Co., 973 F.2d 1296, 1304 (6th Cir. 1992) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). When reviewing a motion for summary judgment, a court views all evidence and draws all inferences in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

IV. Statement of the Parties' Positions

Dewitt argues that Rule 3002.1(i) allows the court to award attorney fees and costs; other compensatory damages, including damages for emotional distress; [**6] and punitive damages. If the court declines to award punitive damages under Rule 3002.1, Dewitt asks the court to do so under Bankruptcy Code § 105 and the court's general powers or, in the alternative, to make punitive damage recommendations to the district court so that it could enter such damages against the Mortgagee. Dewitt also asks the court to enjoin the Mortgagee from presenting evidence concerning or otherwise referencing the Third Advance as a basis for default under Dewitt's mortgage contract in any court or proceeding, including in the state court foreclosure. Finally, Dewitt asks the court to permit discovery into the Mortgagee's other alleged violations of Rule 3002.1 in other cases across the country and to consider such evidence when determining the amount of any punitive damages to be awarded in this case.

The Mortgagee argues that no damages should be awarded because its actions were harmless. The Mortgagee asserts that unless Dewitt can establish that she [*222] would have paid the Third Advance and avoided default had the charge been properly disclosed

Page 11 of 24

651 B.R. 215, *222; 2023 Bankr. LEXIS 1340, **6

during the case, the court cannot find harm to Dewitt as a result of the Mortgagee's violation. The Mortgagee urges the court to adopt the Second Circuit's reasoning [**7] in In re Gravel and find that Rule 3002.1(i) does not authorize the award of punitive damages. The Mortgagee also asserts that the court should limit any attorney fee award to legal fees incurred in reopening the bankruptcy case and pursuing the present contempt action, eliminating Dewitt's recovery of attorney fees she incurred in the foreclosure proceeding. Finally, the Mortgagee contends that compensatory damages for emotional and mental distress are likewise unavailable under Rule 3002.1.

V. Legal Analysis

A. Chapter 13 and Bankruptcy Code § 1322(b)(5)

HN2[1] Chapter 13 of the Bankruptcy Code allows individuals with regular income to retain their primary residence and other real or personal property by proposing a plan which provides for the payment of their creditors over a three or five-year period. The plan is funded through the debtors' income and must be confirmed by the bankruptcy court. See 11 U.S.C. §§ 1322 and 1325; see also Seafort v. Burden (In re Seafort), 669 F.3d 662, 663 (6th Cir. 2012) ("Chapter 13 of the Bankruptcy Code permits 'individual[s] with regular income' whose debt falls within statutory limits . . . to keep their property if they agree to a court-approved plan to pay creditors out of their future 'disposable income."). Frequently a debtor files a Chapter 13 case to hold onto their residence after they have defaulted on their mortgage loans. Chapter 13 permits debtors [**8] to cure arrearages on those loans and continue to make their regular mortgage payments through their Chapter 13 plans. See 11 U.S.C. § 1322(b)(5) and (e); Fed. Land Bank of Louisville v. Glenn (In re Glenn), 760 F.2d 1428, 1442 (6th Cir. 1985) (holding that a Chapter 13 debtor may cure a mortgage loan default on their principal residence even after the debt has been accelerated and a foreclosure judgment has been granted, unless the foreclosure sale has occurred).

B. Background of Bankruptcy Rule 3002.1

<u>Rule 3002.1</u> was implemented in response to widespread challenges faced by debtors and Chapter 13 trustees in obtaining accurate information from mortgagees and mortgage servicers. See <u>In re Gordon</u>

No. 10-13885 EEB, 2011 Bankr. LEXIS 3848, at *9 (Bankr. D. Colo. Mar. 25, 2011) (noting that debtors sometimes struggle to ascertain the amount of a mortgage arrearage because "the mortgage holder . . . fails to adequately communicate with the debtor"); see also Harker v. Wells Fargo Bank, NA (In re Krause), 414 B.R. 243, 251 (Bankr. S.D. Ohio 2009) (stating that "growth over the last decade of the secondary mortgage market . . . has engendered numerous problems in bankruptcy courts . . . related to the documentation of motions for relief from stays, proofs of claim, and foreclosure actions filed by the banking and mortgage industry"). Mortgage servicers often misapplied plan payments, added undisclosed fees to the debtor's loan balance, or recalculated escrow payments without advance notice, among other actions. [**9] See In re Pillow, No. DK 11-11688, 2013 Bankr. LEXIS 5711, at *6, 2013 WL 10252924, at *2 (Bankr. W.D. Mich. Mar. 18, 2013) (describing the types of undisclosed charges that mortgage servicers frequently added to mortgage loan balances prior to the implementation of Rule 3002.1); see also Ameriquest Mortg. Co. v. Nosek (In re Nosek), 609 F.3d 6, 9 [*223] (1st Cir. 2010) (citing Katherine Porter, Misbehavior and Mistake in Bankruptcy Mortgage Claims, 87 Tex. L. Rev. 121, 123-24 (2008)) ("Studies have shown that mortgage holders and servicers routinely file inaccurate claims, some of which may not be lawful.").

These failures frequently meant that debtors completed the rigorous Chapter 13 requirements to obtain a discharge and reinstate their home mortgage only to emerge from bankruptcy and find themselves immediately facing foreclosure once again. See Pillow, No. DK 11-11688, 2013 Bankr. LEXIS 5711, at *6, 2013 WL 10252924, at *2 (explaining the history of Rule 3002.1 and noting that "the drafters hoped that by requiring lenders to give periodic notice of payment changes, debtors could avoid the shock that some have experienced at the end of their plan terms upon discovering that, despite having made all payments in good faith, their mortgage arrears quietly grew — in some instances, substantially").²

²For a discussion of these challenges, see Keith M. Lundin, Lundin on Chapter 13, § 131.3 at ¶¶ 10-21 (last visited May 1, 2023) (discussing the impact of mortgage servicer accounting issues in Chapter 13); see also Is Misconduct in Bankruptcy Fueling the Foreclosure Crisis?: Three ABI Members Testify Before U.S. Senate Judiciary Subcommittee, 27-5 ABIJ 10, 43 (2008) ("The upsetting reality is that the current bankruptcy system routinely forces borrowers to pay bloated amounts and

Page 12 of 24

651 B.R. 215, *223; 2023 Bankr. LEXIS 1340, **9

Before Rule 3002.1 took effect in 2011, bankruptcy courts responded to this issue [**10] by implementing various local procedures to verify that debtors' Chapter 13 mortgage payments were current and that no postpetition mortgage fees or charges remained outstanding at the time of discharge entry and closing of the bankruptcy case.3 These procedures were intended to ensure that the debtors had clean slates in making their mortgage payments going forward and the chance for a "fresh start" as they exited Chapter 13.4 In this district. as in many other districts. Chapter 13 Trustees filed and served "Motions to Deem the Chapter 13 Case Current" or similar motions, to achieve that result.5 Those motions compelled mortgagees to in effect "speak or forever hold their peace" if they believed they were owed any arrearage, pre-petition or post-petition. Upon adjudication, courts entered an order finding the mortgage current to effectuate the debtors' fresh start. These orders determined that the mortgage loan had been brought current and instructed debtors to continue making their regular mortgage payments to their lenders on a monthly basis in accordance with the contractual terms.

The adoption of <u>Bankruptcy Rule 3002.1</u> brought [**11] uniformity to such local practices [*224] used to effectuate the debtors' fresh start in Chapter 13 cases at the conclusion of the cases.⁶ The Advisory Committee

permits mortgage servicers to misbehave without serious consequence. This situation significantly threatens bankruptcy's purpose of helping families save their homes."); USTP Actions against Mortgage Fraud, Abuse Are Part of FFETF Sweep, 29-6 ABIJ 20 (2010) (discussing bankruptcy settlements involving mortgage servicer abuse that occurred before the implementation of Rule 3002 1).

³ See Keith M. Lundin, Lundin on Chapter 13, § 131.3 at ¶ 25 (last visited May 12, 2023) (noting that prior to Rule 3002.1, home mortgage issues were addressed by local "best practices" with "lackluster" results).

⁴ See <u>Stellwagen v. Cium.</u> 245 U.S. 605, 617, 38 S. Ct. 215, 62 L. Ed. 507 (1918) ("The federal system of bankruptcy . . . Intends to aid the unfortunate debtor by giving him a fresh start Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.").

⁵ See In re Shaw, No. 2:05-bk-53828 (docs. 37 and 40) for examples of a Motion to Deem Mortgage Current and an Order Deeming Mortgage Current.

⁶ See Eugene R. Wedoff, Proposed New Bankruptcy Rules on

Note to the Rule, in pertinent part, states:

This rule is new. <u>HN3[1]</u> It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, see Rule 3001(c)(2), and the amount of the postpetition payment obligations. If the latter amount changes over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment. Compliance with the notice provision of the rule should also eliminate any concern on the part of the holder [**12] of the claim that informing a debtor of a change in postpetition payment obligations might violate the automatic stay.

Fed. R. Bankr. P. 3002.1, Advisory Committee Note (2011).

HN4[*] Rule 3002.1 both facilitates information sharing during the Chapter 13 case and provides a mechanism for an end of the case reconciliation. During the case, mortgagees must comply with two reporting requirements that help to ensure mortgages are current when the plan ends. First, mortgagees are required to file and serve notices of payment changes on the debtor, debtor's counsel, and the Chapter 13 Trustee no later than 21 days before a payment change takes effect. Fed. R. Bankr. P. 3002.1(b). Such changes are usually due to a change in the interest rate or a need to adjust the escrow account. Second, mortgagees are required to file notices itemizing all recoverable postpetition fees, charges, or expenses incurred in connection with the claim within 180 days of the date these amounts are incurred. Fed. R. Bankr. P.

Creditor Disclosure and Court Enforcement of the Disclosures, 83 Am. Bankr. L.J. 579 (2009) ("The existence of a national rule on this subject would also have the effect of making more uniform what has become a range of responses at the local level, through court orders, model plans, and local rules.").

Page 13 of 24

651 B.R. 215, *224; 2023 Bankr. LEXIS 1340, **12

3002.1(c). At the end of the case, within 30 days of the debtor's final plan payment, the Chapter 13 Trustee is to serve a Notice of Final Cure Payment "stating that the debtor has paid in full the amount required to cure any default on the claim" and advising the mortgagee that it must [**13] "file and serve a response." Fed. R. Bankr. P. 3002.1(f). HN5(*) Under subsection (g), mortgagees are required to file and serve a response to the Trustee's Notice of Final Cure Payment. The response must indicate whether they agree that the debtor has cured any default on the claim and whether the debtor is "otherwise current on all payments consistent with § 1322(b)(5) of the Code." Fed. R. Bankr. P. 3002.1(g). This statement "shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement." Id.

By requiring the mortgagee to share accurate and complete information on a timely basis, *Rule 3002.1* provides a system whereby any outstanding amounts can be addressed by the debtor, the Chapter 13 Trustee, and the Court while the [*225] Chapter 13 case is pending. This information sharing mechanism is central to the integrity of Chapter 13. As one court explained:

HN6[1] Rule 3002.1 was adopted in December 2011 to address a significant problem caused when mortgage companies applied fees and costs to a debtor's mortgage while the debtor was in bankruptcy without giving notice to the debtor and then, based on these post-petition defaults, sought to foreclose upon the debtor's property after the debtor completed the plan. Rule 3002.1 deals with this problem [**14] by requiring notice of payment changes and providing an opportunity for the debtor to contest them during the chapter 13 case. Accurate representations are required under Bankruptcy Rule 3002.1 to prevent the very problem that the [debtors] are facing. Providing information to a debtor about the status of his or her mortgage loan is why the procedures outlined in Bankruptcy Rule 3002.1 were enacted. This Court considers the give and take between the Trustee, creditor, and debtor outlined in Bankruptcy Rule 3002.1 to be a critical part of the administration of a Chapter 13 case.

Culberson v. Nationstar Mortg., LLC (In re Culberson), Nos. 1:15-bk-15519-SDR, 1:21-ap-01012-SDR, 2022 Bankr. LEXIS 1629, at "32-33, 2022 WL 2111268, at "10 (Bankr. E.D. Tenn. June 10, 2022) (cleaned up). Put simply, timing is central to Rule 3002.1. After the case

concludes, these issues are significantly more difficult to resolve and may require the debtor to expend time and resources to reopen the bankruptcy case and seek relief. HNT While the case is still open and the plan ongoing, the debtor can readily use bankruptcy specific tools to address a noticed mortgage payment change or an added fee. Among other actions, the Chapter 13 plan may be modified to ensure that these amounts are paid before the case concludes. 11 U.S.C. § 1329. If there is a dispute as to any such charge, a motion can be filed and the court can resolve that dispute pursuant to Rule 3002.1(h).

<u>Bankruptcy Rule 3002.1(h)</u> invites the bankruptcy court to engage [**15] in a broad inquiry to determine the status of the mortgage. "All required postpetition amounts" includes consideration whether postpetition installment payments and postpetition fees, expenses and charges have been paid.

Keith M. Lundin, Lundin on Chapter 13, § 131.3 at ¶ 144 (last visited May 1, 2023).

HN8[*] In sum, Rule 3002.1 not only provides a mechanism to ensure that the debtor has cured all arrearages and is current with respect to all mortgage obligations at the end of the case, but it also provides the information which the parties need to address any outstanding amounts due under the mortgage so that there are no "surprises" later. See In re Ferrell, 580 B.R. 181, 184 (Bankr. D.S.C. 2017) (citing the Advisory Comm. Note to Rule 3002.1) ("Rule 3002.1 was added 'to aid in the implementation of § 1322(b)(5),' and to ensure that chapter 13 trustees and debtors receive timely notice of any changes or charges to their mortgage loans to enable them 'to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claim adjustment."").7

⁷ Recognizing that <u>Rule 3002.1(i)</u> is titled "Failure to Notify" and references the failure to provide information in accordance with <u>Rule 3002.1</u>, courts have explained how a <u>Rule 3002.1(g)</u> response which contains inaccurate information is as troubling as the failure to file a response or the filing of a response with no information. See <u>In re Heard, No. 15-35564-pcm13, 2021 Bankr. LEXIS 2193, at *4-5, 2021 WL 3540412, at *2 (Bankr. D. Or. Aug. 11, 2021) (determining that a mortgagee who provides an inaccurate response violates <u>Rule 3002.1(g) In re Howard, 563 B.R. 308, 315 (Bankr. N.D. Cal. 2016)</u> (noting that an inaccurate response "complies with neither the letter nor the spirit" of the rule); <u>In re Ferrell, 580 B.R. 181, 187</u></u>

Page 14 of 24

651 B.R. 215, *225; 2023 Bankr. LEXIS 1340, **15

[*226] C. Remedies Available Under Rule 3002.1(i)

Rule 3002.1(i) outlines remedies for violations of Rule 3002.1. It is titled "Failure to Notify" and provides that:

If the holder of a claim fails to provide any information as required [**16] by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Fed. R. Bankr. P. 3002.1(i); see In re Legare-Doctor, 634 B.R. 453, 458 (Bankr. D.S.C. 2021) (explaining that "the Court has authority to fashion a remedy under Rule 3002.1(i), including the award of reasonable attorney's fees and costs.").

1. Rule 3002.1(i) Authorizes Evidence Exclusion as a Sanction

HN9[1] Rule 3002.1(i)(1) authorizes bankruptcy courts to bar mortgagees from presenting information that should have been noticed under the rule in any proceeding within the bankruptcy case. In determining whether to exclude evidence, the courts consider whether a violation occurred, and if so, whether the resulting failure to comply with the rule was either "substantially justified" or "harmless." A violation is not substantially justified or harmless if the debtor is prejudiced as a result of the mortgagee's failure. See In re Navarro, No. 15-10301-SMG, 2020 Bankr. LEXIS 1406, at *7-8, 2020 WL 2843033, at *4 (Bankr. S.D. Fla. May 29, 2020) (finding a mortgagee's failure to comply with [**17] Rule 3002.1's procedures for disclosing additional fees to be unjustified because the mortgagee's position was unsupported by relevant authority and the mortgagee was required to comply with Rule 3002.1); Legare-Doctor, 634 B.R. at 462 (finding that the mortgagee's violation was not substantially justified or harmless because the debtor

was prejudiced by the late disclosure at the end of her case); In re Roe, No. 18-50046, 2021 Bankr. LEXIS 1849, at *10-12, 2021 WL 2946167, at *4-5 (Bankr. W.D. Mo. July 13, 2021) (finding that the mortgagee's violation was not substantially justified or harmless because the debtor was unfairly surprised by the late disclosure and the mortgagee offered no evidence to show its failure was justified); Figueroa v. Banco Popular de P.R. (In re Figueroa), Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337, at *12-14, 2021 WL 5815641, at *5 (Bankr. D.P.R. Dec. 7, 2021); In re Howard, 563 B.R. 308, 315-17 (Bankr. N.D. Cal. 2016) (finding that the mortgagee's violation was not harmless or justified because the mortgagee's repeated actions in filing "wildly inaccurate" responses and in failing to attach an itemization of fees as required by the rule prevented the debtor from requesting that the court resolve the matter on the record in accordance with Rule 3002.1(h)): In re Kinderknecht, No. 17-12530-13, 2023 Bankr. LEXIS 129, at *18-20, 2023 WL [*227] 320984, at *8 (Bankr. D. Kan. Jan. 18, 2023) (excluding evidence of undisclosed fees because the court was not persuaded that the mortgagee's violation was harmless or justified); but see In re Tollios, 491 B.R. 886, 892 (Bankr. N.D. III. 2013) (declining to exclude evidence as a sanction because the debtors were not harmed by the mortgagee's failure to provide notice of an escrow fee change). [**18]

HN10[] Subsection (i)(1) explicitly authorizes the court to exclude evidence of undisclosed charges in "any contested matter or adversary proceeding in the case." Fed. R. Bankr. P. 3002.1(i)(1). But for debtors who have completed their plan, this protection is incomplete. Disallowing evidence of an undisclosed charge during the Chapter 13 case but permitting the mortgagee to later present evidence of the charge or reference it as an act of default leaves the debtor exposed to the negative consequences that Rule 3002.1 was enacted to avoid. See Legare-Doctor, 634 B.R. at 462-63 (noting that allowing a creditor to present evidence of an undisclosed charge after a bankruptcy case has concluded would jeopardize the debtor's fresh start and circumvent Rule 3002.1's very purpose). For this reason, other courts have relied on the broader grant of authority in subsection (i)(2) to expand evidence exclusion of an undisclosed charge to any proceeding, including those outside the bankruptcy case. Id. at 463; see also In re Roper, 621 B.R. 899, 903 (Bankr. D. Colo. 2020) (noting that additional charges properly disclosed to a debtor during a bankruptcy case remain due and are not included in the general discharge). HN11[*] As another bankruptcy court explained, "[t]he

(Bankr. D.S.C. 2017) (stating that an incorrect statement may be "worse than no statement").

Page 15 of 24

651 B.R. 215, *227; 2023 Bankr. LEXIS 1340, **18

remedy authorized by Rule 3002.1(i)(1) appears to limit the treatment of the disputed advance during Debtor's pending Chapter 13 case if the [**19] creditor's failure was not substantially justified or harmless, but Rule 3002.1(i)(2) is not so limited and expands the Court's authority to provide a remedy by authorizing it to 'award other appropriate relief[.]" Legare-Doctor, 634 B.R. at 461 (citing In re Lescinskas, 628 B.R. 377, 382 n.9 (Bankr. D. Mass. 2021)). See also Ferrell, 580 B.R. at 188-89 (Ordering that "[t]o the extent that there exists any other postpetition amounts for fees, charges, and/or expenses that Shellpoint might assert were incurred in connection with Claim #5 and are recoverable against the Debtors or their property, these sums are deemed waived, cancelled, and discharged [and] . . . [a]ny attempt by Shellpoint to collect[] the Disputed Amounts or any other postpetition amounts for fees, charges, and or expenses, is and shall be a willful violation of this Order and the discharge injunction of § 524, and punishable by the contempt powers of this Court.").

Dewitt asks the court to issue an order enjoining the Mortgagee from presenting evidence regarding the Third Advance or otherwise referencing it as an act of default under her mortgage in this case or any other case before any court, including the pending state court foreclosure case. The Mortgagee argues that relief under <u>subsection (i)(1)</u> is unavailable because its actions were harmless. In support, the Mortgagee [**20] cites <u>Tollios</u> and states that Dewitt has not demonstrated that she would have been able to pay the Third Advance or taken different actions had the Mortgagee timely disclosed the fee. <u>491 B.R. at 892-93</u>.

While Tollios also involved joint debtors who failed to pay property taxes in accordance with their Chapter 13 plan, those circumstances differed from the case at bar in important ways. The Tollios mortgagee added an escrow payment to the debtors' monthly statement without appropriately noticing the change under Rule 3002.1(b) after the debtors failed to pay the property taxes directly. Id. at 888. [*228] There, the debtors did not make the escrow payments and admitted during the proceeding that they were financially unable to pay the taxes or the escrow payments. Id. Seven months after the improperly noticed escrow payment change, the debtors sought sanctions against the mortgagee, while the case was still ongoing. Id. While the court found a Rule 3002.1(b) violation and awarded attorney fees, the court declined to exclude evidence of the improperly disclosed escrow charges because courts were at that time split regarding the applicability of Rule 3002.1 to mortgagees in the absence of a pre-petition arrearage.

<u>Id. at 891-92</u>. In addition, the <u>Tollios</u> court found that the debtors were not harmed [**21] by the violation because they would not have taken different actions had the charges been properly noticed. <u>Id.</u>

Dewitt's case is much different than Tollios. Here, the Mortgagee filed a response under penalty of perjury affirming that Dewitt's mortgage was current, but later attempted to collect the Third Advance after the case concluded and cited Dewitt's failure to pay the Third Advance as an act of default and a basis for foreclosure. HN12[*] Courts have consistently interpreted Rule 3002.1(i)(1) to place the burden on the mortgagee to demonstrate that its conduct was substantially justified or harmless. See e.g. Legare-Doctor, 634 B.R. at 462 (discussing creditor's failure to justify conduct in violation of Rule 3002.1); Figueroa, Nos. 09-07725 (MCF), 19-00032, 2021 Bankr, LEXIS 3337, at *12-14, 2021 WL 5815641, at *5 (similar). The court does not find that the Mortgagee has met its burden. The Mortgagee's conduct harmed Dewitt by subjecting her to collection actions, including a state foreclosure proceeding, and forcing her to reopen her bankruptcy case to seek relief. She has incurred significant attorney fees in responding to the Mortgagee's actions. The Mortgagee's failure to file an accurate report indicating that one or more tax advances were owed prevented Dewitt's ability to pay any such obligation during the Chapter 13 case while she was [**22] operating under the protection of the automatic stay.8 Thus, the Mortgagee's pursuit of Dewitt on the tax advance after the case was closed harmed and prejudiced her. For those reasons, pursuant to its authority under Rule 3002.(i)(1), the court will preclude the Mortgagee from presenting any information relating to or referencing the Third Advance in Dewitt's bankruptcy case. See Legare-Doctor, 634 B.R. at 462; Roe, No. 18-50046, 2021 Bankr. LEXIS 1849, at *14, 2021 WL 2946167, at *5 (Bankr. W.D. Mo. July 13, 2021) (precluding presentation of evidence related to fees that were not timely or properly disclosed under Rule 3002,1 in any

⁸ Under Dewitt's Chapter 13 plan (doc. 5 at 8, ¶ 9), the property of the estate, including her residence, did not re-vest in her and remained property of her bankruptcy estate "until the case [was] dismissed, discharged or converted." See 11 U.S.C. § 1327(b) (property of the estate re-vests in the debtor at confirmation, unless otherwise provided in the plan or confirmation order). Therefore, the automatic stay protected both the debtor and her residence throughout the Chapter 13 case. 11 U.S.C. § 362(c). In addition, the Mortgagee was bound by the terms of the Plan. 11 U.S.C. § 1327(a).

Page 16 of 24

651 B.R. 215, *228; 2023 Bankr. LEXIS 1340, **22

proceeding arising in debtor's bankruptcy case).

Further, the court will exercise its authority under <u>Rule 3002.1(i)(2)</u> and § 105(a) to preclude the Mortgagee from citing to or referencing the Third Advance as the basis for default under the terms of the Mortgage in any court proceeding in perpetuity, including in any foreclosure. This exercise of authority is necessary to prevent the Mortgagee from benefitting from its failure to comply with <u>Rule 3002.1(g)</u> [*229] and to protect DeWitt from foreclosure on this basis. <u>Legare-Doctor</u>, 634 B.R. at 463.

Section 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed [**23] to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (emphasis added). HN13 1 The broad language of § 105(a) grants the court the power to prevent abuses of process and to issue orders necessary or appropriate to carry out provisions of the Code, court orders, and rules. See Ferrell, 580 B.R. at 188; Trevino v. HSBC Mortg. Servs. (In re Trevino), 615 B.R. 108, 145-46 (Bankr. S.D. Tex. 2020); In re Rayford. No. 16-29914, 2020 Bankr. LEXIS 3635, at *12-13, 2020 WL 8551780, at *5 (Bankr. W.D. Tenn. Dec. 17, 2020) (stating that the court has authority under Rule 3002.1(i) and § 105(a) to award appropriate relief for a violation of Rule 3002.1(g)); In re Fivecoate, 634 B.R. 720, 730 (Bankr. D.S.C. 2021) (Determining that Section 105 allowed the court to preclude the collection of three post-petition payments when the court found that the mortgagee's actions were an abuse of process and were in violation of the Court's confirmation order.); see also Amer. Hardwoods, Inc. v Deutsche Credit Corp. (In re Amer. Hardwoods, Inc.), 885 F.2d 621, 625 (9th Cir. 1985) ("[S]ection 105 permits the court to issue ... injunctions after confirmation of a plan to protect the debtor and the administration of the bankruptcy estate."); Rojas v. Citi Corp Trust Bank FSB (In re Rojas), Nos. 07-70058, 09-07003, 2009 Bankr. LEXIS 2220, at *19-26, 2009 WL 2496807, at *5-6 (Bankr. S.D. Tex. Aug. 12, 2009) (stating that Section 105 may be used to enforce Bankruptcy Rules relating to filing of

proofs of claim in addition to other possible remedies).

Precluding the Mortgagee from presenting evidence of Dewitt's failure to pay the real estate taxes in a foreclosure proceeding after it failed to disclose those taxes in [**24] its Rule 3002.1(g) response carries out the provisions of §§ 1322(b)(5), 1328(a), and § 524, in addition to Rule 3002.1. Otherwise, allowing the Mortgagee to introduce evidence of Dewitt's failure to pay those real estate taxes in the foreclosure case would eviscerate the purpose of Chapter 13 and Rule 3002.1(g). See In re Roper, 621 B.R. at 902 (stating that Rule 3002.1 "does not allow the secured creditor to silently accrue additional amounts and then spring a 'gotcha' foreclosure after the debtor has completed her plan and emerged from bankruptcy protection."). Accordingly, precluding the Mortgagee from introducing such evidence in a foreclosure proceeding is necessary to prevent an abuse of process and to enforce the Bankruptcy Code and Rule 3002.1.

2. <u>Rule 3002.1(i)(2)</u> Authorizes the Award of Attorney Fees and Expenses.

HN14[1] It is beyond dispute that Rule 3002.1(i)(2) authorizes bankruptcy courts to award attorney's fees and reasonable expenses. Here, the Mortgagee asserts that no attorney's fees should not be awarded because its actions were harmless and Dewitt cannot demonstrate that she would have avoided a default under the mortgage even if the Third Advance fee had been properly noticed. Doc. 148 at 7-8. To the extent the court does award attorney's fees, the Mortgagee contends that the award should be limited to the contempt [**25] proceeding presently before the [*230] court and exclude any work relating to the state foreclosure action. Id. The Mortgagee further argues that awarding attorney's fees for work beyond that required to reopen this case and pursue the contempt action would amount to an impermissible punitive sanction because that work is not causally related to Rule 3002.1. Id. at 8.

The Mortgagee's arguments are not persuasive. Unlike subsection (i)(1), subsection (i)(2) includes no requirement that the court consider whether the mortgagee's conduct was substantially harmless or justified before awarding appropriate relief. See Blanco v. Bayview Loan Servicing, LLC (In re Blanco), 633 B.R. 714, 756 (Bankr, S.D. Tex. 2021); Meyer v. Wells Fargo Bank, N.A. (In re Meyer), Nos. 1-12-bk-04042-RNO, 1-17-ap-00138-RNO, 2018 Bankr, LEXIS 1041, at *33,

Page 17 of 24

651 B.R. 215, *230; 2023 Bankr. LEXIS 1340, **25

2018 WL 1663292, at *12 (Bankr. M.D. Pa. Apr. 4, 2018) ("Upon examination of Rule 3002.1, I cannot find that the Debtor is required to establish harm or a lack of substantial justification in order to state a claim for relief. . . . [U]nder 3002.1(i)(2), the court may still award reasonable expenses and attorney's fees regardless of whether there was harm."). HN15[1] In addition, Rule 3002.1(i)(2) does not limit "reasonable expenses and attorney fees caused by the failure" to the bankruptcy case. Instead, the court is given broad discretion to craft an appropriate remedy. See Blanco, 633 B.R. at 754 ("The plain language of Rule 3002.1(i) places few restrictions on the types of remedies bankruptcy courts can issue."). Here, the court has already determined that [**26] the Mortgagee did violate Rule 3002.1(g). In Dewitt I, this court unequivocally stated:

Mortgagee's noncompliance did cause harm - the Debtor was forced to defend a state court foreclosure action and to reopen her bankruptcy case to assert her rights. There is no basis to find that HSBC's failure to file an accurate 3002.1(g) response and act in accordance with its sworn statements was substantially justified.

644 B.R. at 398. Accordingly, the court will award reasonable attorney fees and expenses to Dewitt for all legal services performed in response to the Mortgagee's Rule 3002.1(g) violation, including legal work related to both reopening the bankruptcy case and pursuing remedies in the bankruptcy court and also those incurred in defending the state court foreclosure action.

3. <u>Rule 3002.1(i)(2)</u> Does Not Authorize Bankruptcy Courts to Award Compensatory Damages.

Dewitt requests that this court award compensatory damages for "mental and emotional distress caused by the actions of HSBC, PHH, and Ocwen." Doc. 147 at 5. The Mortgagee argues that compensatory damages for emotional or mental suffering are unavailable under *Rule 3002.1(i)(2)* and suggests that the phrase "other appropriate relief" authorizes the court to award only remedies within the same category as attorney [**27] fees and reasonable expenses.

This issue raises the question of whether "other appropriate relief" in *Rule 3002.1(i)(2)* includes compensatory damages, such as damages for emotional distress suffered by Dewitt. *HN16* Compensatory damages are distinct from punitive damages and are intended to compensate a debtor for

loss. See In re Tapp, No. 19-62481, 2020 Bankr. LEXIS 1843, at *8, 2020 WL 4810074, at *3 (Bankr. N.D. Ohio July 10, 2020) (quoting In re Roman, 283 B.R. 1, 9 n. 9 (B.A.P. 9th Cir. 2002)) ("Generally, actual damages include compensatory damages, as opposed to noneconomic or punitive damages, and are defined as 'fain amount awarded to a complainant to compensate for a proven injury or loss; damages [*231] that repay actual losses.""). "'Actual damages' and 'compensatory damages' are synonymous terms and are intended to compensate a plaintiff for its loss." Berry v. Fay Servicing, LLC (In re Berry), Nos. 21-8005/8007, 2022 Bankr. LEXIS 2496, at *52, 2022 WL 4115752, at *18 (B.A.P. 6th Cir. Sept. 9, 2022) (citing McMillian v. F.D.I.C., 81 F.3d 1041, 1055 n.15 (11th Cir. 1996)). Such damages may include recompense for costs incurred and for actual injury, including emotional injury. See Ridley v. M & T Bank (In re Ridley), 572 B.R. 352, 366 (Bankr. E.D. Okla. 2017) (awarding \$620 in actual damages for lost wages in enforcing discharge injunction);

<u>HN17</u> The court in *In re Tollstrup* determined that the <u>Rule 3002.1(i)</u> does not allow the recovery of compensatory damages, stating:

HN18 [1] Rule 3002.1 is a procedural rule. Rules of procedure cannot create independent causes of action that are unavailable under applicable substantive law. I am unaware of any court that has viewed Rule 3002.1(i), or its close cousin, [**28] Rule 3001(c)(2)(D), to permit an award of compensatory damages for violations.

No. 15-33924-dwh13, 2018 Bankr. LEXIS 767, at *11-12, 2018 WL 1384378, at *5 (Bankr. D. Or. Mar. 16, 2018). After Tollstrup, another court drew a similar conclusion, finding that because Rule 3002.1 does not provide a private right of action, it does not allow compensatory damages. See Harlow v. Wells Fargo & Co. (In re Harlow), Nos. 17-71487, 20-07028, 2022 Bankr. LEXIS 3512, at *13-14, 2022 WL 17586716, at *5 (Bankr. W.D. Va. Dec. 12, 2022). In doing so, it relied upon an earlier decision in that district discussing Bankruptcy Rule 3001(c)(2)(D)⁹ which opined that:

⁹ <u>Bankruptcy Rule 3001</u> contains almost identical language to <u>Rule 3002.1(i)(2)</u>: "If the holder of a claim fails to provide any information required by this <u>subdivision (c)</u>, the court may, after notice and hearing, take either or both of the following actions: (i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter

Page 18 of 24

651 B.R. 215, *231; 2023 Bankr. LEXIS 1340, **28

HN19 Although the Rules of Procedure may permit sanctions or other penalties as a part of enforcement, the Rules of Procedure do not allow for a private cause of action for damages from violating a rule of procedure (in other words, as noted by Midland, there is no private cause of action to seek damages for a violation of Rule 3001). Instead Rule 3001 gives the Court authority to patrol the parties before it to achieve the efficient, speedy, and just resolution of adversarial and contested matters.

Thomas v. Midland Funding LLC (In re Thomas), 592 B.R. 99, 111-12 (Bankr. W.D. Va. 2018), aff'd by 606 B.R. 687 (W.D. Va. 2019); see also Steed v. Educ. Credit Mgmt. Corp. (In re Steed), 614 B.R. 395, 411 (Bankr. N.D. Ga. 2020) (Rule 3001 does not create "an independent cause of action."). The Harlow court concluded that while the Rule does not allow for compensatory damages, it should be construed to allow courts to sanction creditors who violate the Rule, including with punitive damages.

<u>HN20</u> When Congress has intended to create a private right of action, it has done so expressly. <u>Rule 3002.1(i)(2)</u>, providing for "other [**29] appropriate relief," is quite different from § 362(k), which does provide a private right of action for individuals to address violations of the automatic stay. [*232] The statute specifically provides for compensatory damages:

Except as provided in <u>paragraph (2)</u>, an individual injured by any willful violation of a stay provided by this section **shall recover actual damages**, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(k)(1) (emphasis added). See Pettitt v. Baker, 876 F.2d 456, 457-58 (5th Cir. 1989); Harker v. Eastport Holdings, LLC (In re GYPC, Inc.), 634 B.R. 983, 991 (Bankr. S.D. Ohio 2021).

HN21 Mhile <u>Rule 3002.1(i)(2)</u> provides that the court may "award other appropriate relief," the court finds that this language embodied within a procedural rule does not provide for a private right of action. Accordingly, this court follows <u>Tollstrup</u> and <u>Harlow</u> in finding that <u>Rule</u>

or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or (ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." Fed. R. Bankr. P. 3001(c)(2)(D).

3002.1 does not allow for the recovery of actual or compensatory damages beyond the attorney fees and expenses provided for by the Rule. Accordingly, Dewitt's request for damages on account of emotional distress is denied.

4. <u>Rule 3002.1(i)(2)</u> Authorizes Bankruptcy Courts to Award Punitive Damages.

The few courts to address <u>Rule 3002.1(i)(2)</u> have debated the meaning of "other appropriate relief" and reached opposing conclusions on whether punitive damages can be awarded under <u>Rule 3002.1(i)(2)</u>. To date, the Second Circuit is [**30] the only circuit court to have addressed this question. See <u>PHH Mortg. Corp. v. Sensenich (In re Gravel)</u>, 6 <u>F.4th 503, 508 (2d Cir. 2021)</u>. The <u>Gravel majority determined that <u>Rule 3002.1</u> does not authorize a bankruptcy court to impose punitive damages, while the dissenter found to the contrary. The bankruptcy courts who have addressed the issue are also split. ¹⁰</u>

In Gravel, a bankruptcy judge awarded \$75,000 in punitive damages in response to a mortgage servicer's Rule 3002.1 violations in three cases. In a split decision, the panel decided in favor of the mortgage servicer and concluded that punitive damage awards are beyond the scope of authority granted to bankruptcy courts in Rule 3002.1(i)(2). Id. The majority determined that the general authority implied by the language "other appropriate relief" should be read as authorizing only other remedies within the same category as the specific remedies listed in the subsection, namely attorney fees and reasonable expenses. Id. at 514-15. Because attorney fees and expenses are compensatory damages, the court concluded that Congress intended that the more general language be read to include other remedies within the same category as the specific remedies mentioned. Id. The majority explained,

10 The following bankruptcy courts have found that Rule 3002.1(i)(2) authorizes the imposition of punitive damages: Blanco v. Bayview Loan Servicing (In re Blanco), 633 B.R. 714, 755 (Bankr. S.D. Tex. 2021); In re Legare-Doctor, 634 B.R. 453, 462 (Bankr. D.S.C. 2021); Harlow v. Wells Fargo & Co. (In re Harlow), 2022 Bankr. LEXIS 3512, *13-14, 2022 WL 17586716, at *5 (Bankr. W.D. Va. Dec. 12, 2022); Trevino v. HSBC Mortg. Servs. (In re Trevino), 615 B.R. 108, 145 (Bankr. S.D. Tex. 2020) (relying on §105(a)). But see In re Tollstrup, 2018 Bankr. LEXIS 767, at *13, 2018 WL 1384378, at *5-6 (Bankr. D. Or. Mar. 16, 2018) (finding that Rule 3002.1(i)(2) does not authorize punitive damages).

Page 19 of 24

651 B.R. 215, *232; 2023 Bankr. LEXIS 1340, **30

"Because 'other appropriate relief' is a general phrase amid specific examples, [**31] it is best 'construed in a fashion that limits the general language to the same class of matters as the things illustrated." Id. (quoting Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG, 335 F.3d 52, 58 (2d Cir. 2003)). The majority also noted that the preceding remedy contained in subsection (i)(1) is [*233] also remedial in nature because evidence preclusion is a sanction imposed to limit to harm caused by the mortgagee's failure to comply with Rule 3002.1 rather than to punish the mortgagee for its conduct. Id. at 515.

Judge Bianco reached the opposite conclusion in his dissent: subsection (i)(2)'s broad language, when read plainly, authorizes bankruptcy courts to impose punitive damages. ld. at 517-18. HN22(**] Because § 102(3) of the Code defines the term "including" as "not limiting," a plain reading of subsection (i)(2) suggests that a court may award other appropriate relief (beyond the evidence preclusion authorized in subsection (i)(1)(1), including, but not limited to, attorney's fees and reasonable expenses. ld. at 520-21. Judge Bianco also concluded that subsection (i)(1)'s evidence exclusion remedy is itself a punitive sanction rather than compensatory in nature. ld. at 521. Judge Bianco explained:

HN23 Although [Rule 3002.1(i)(1)] does allow the violator to avoid the sanction if the failure to provide the requisite notice was harmless, it also allows for the imposition of the drastic sanction of exclusion regardless of the precise [**32] nature or amount of such harm. In other words, the sanction is not required to be proportionate to the harm - i.e., compensatory in nature — but rather seeks to punish with the broad brush of evidence-preclusion to deter such violations in the future. Indeed, we have noted that in other contexts the preclusion of evidence can be a more extreme sanction than monetary sanctions

Once the evidence-preclusion penalty in <u>Rule</u> 3002.1(i)(1) is properly classified as a potentially punitive sanction that also operates as a deterrent, then the "other appropriate relief" language in <u>Rule</u> 3002.1(i)(2) naturally includes, from a textual standpoint, punitive monetary sanctions because they are part of "the same class of matters" contained within the related penalty provision.

Id. at 521-22 (emphasis added) (citations omitted).

Judge Bianco also looked to the history of Rule 3002.1(i) as support for a broad interpretation. Id. Rule 3002.1(i) was modeled on Federal Rule of Civil Procedure 37(c)(1) which has long been read to authorize the award of punitive damages. 11 See e.g. Olivarez v. GEO Grp., Inc., 844 F.3d 200, 203 (5th Cir. 2016) ("Pursuant to Rule 37[(c)(1)] and the court's inherent authority, the district court imposed sanctions requiring each Appellant to pay a \$1,000 fine."); see also Memorandum from Subcomm. on Consumer Issues to Advisory Comm. on Bankr. Rules (April [**33] 7, 2010) (document at 63) (available at https://www.uscourts.gov/sites/default/files/fr_import/BK 2010-04.pdf) ("The proposed sanctions [in Rule 3001(c)(2)(D)] most closely resemble the sanction available under Civil Rule 37(c)(1) for the failure to provide information required under the disclosure provisions of Rule 26(a)."). The Gravel majority [*234] considered this analogy but ultimately rejected it for two reasons. First, the majority looked to the purpose of Rule 37 in punishing recalcitrant litigants for discovery violations and determined that this purpose justifies more severe sanctions those warranted for a Rule 3002.1 violation. Gravel, 6 F.4th at 515. While compliance with discovery is integral to the function of the courts and the ability to conduct speedy trials, compliance with Rule 3002.1 serves a more limited, though important, function. Id. The majority explained, "Federal Rule 37 protects more than the interest of a party in remedying or avoiding certain costs; it protects the interests of the parties, the court, and the public in a

If a party falls to provide information or identify a witness as required by [**34] <u>Rule 26(a)</u> or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in <u>Rulle</u> 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c)(1) (emphases added).

¹¹ Rule 37(c)(1) states:

Page 20 of 24

651 B.R. 215, *234; 2023 Bankr. LEXIS 1340, **34

speedy and just resolution of the case." Id. Second, the majority gave great weight to the inclusion of the language "further just orders" in <u>Rule 37(b)(2)(A)</u>, and its absence in <u>Rule 3002.1(i)</u>. Id.

In Blanco v. Bayview Loan Servicing, another bankruptcy court considered the question of punitive damages and adopted Judge Bianco's reasoning, 633 B.R. 714 (Bankr. S.D. Tex. 2021). The Blanco court agreed that Rule 3002.1 should be interpreted to include punitive damages in a manner similar to Rule 37. The court also concluded that Gravel majority's fundamentally mischaracterized Rule 3002.1's purpose as one existing solely to protect the more limited purpose of protecting individual debtors. The court opined that "it is equally important to the bankruptcy courts and the public who have an interest in ensuring that the "fresh start" objective of the Bankruptcy Code is not undermined, and that speedy and just resolutions of [**35] chapter 13 cases take place." Id. at 753. Two other bankruptcy courts have joined the Blanco court in rejecting the Gravel majority's interpretation and adopted Judge Bianco's reasoning. See In re Legare-Doctor, 634 B.R. 453 (Bankr. D.S.C. 2021). The third bankruptcy court phrased it in this manner:

<u>Rule 3002.1</u> must have teeth to achieve its purposes, and that, different from a private right of action for compensatory damages, punitive, noncompensatory sanctions can be warranted to achieve its purposes. Otherwise, <u>Rule 3002.1(i)</u>, the sanctions provision of the Rule (which is exactly what it is), would have little deterrent ability as to future violations. In that respect, a claim for punitive, non-compensatory sanctions for violation of <u>Rule 3002.1</u> can and should be able to be maintained.

Harlow, Nos. 17-71487, 20-07028, 2022 Bankr. LEXIS 3512, *13-14, n.6, 2022 WL 17586716, at *5 n.6.

This court respectfully disagrees with the Second Circuit's analysis regarding the availability of punitive damages for *Rule 3002.1* violations and follows *Blanco* and *Harlow* in concluding that "other appropriate relief" authorizes bankruptcy courts to award punitive damages for *Rule 3002.1* violations. The court does so for two reasons. *HN24* First, this court agrees with its sister bankruptcy courts that compliance with *Rule 3002.1* is fundamental to the integrity of Chapter 13. Accordingly, the ability of courts to award appropriate punitive [**36] damages is a critical deterrent to induce mortgage holders and servicers to make systemic

changes that ensure future compliance. Id. at 755. HN25[1] Second, as explained, this court concludes that compensatory damages for actual harm are unavailable under Rule 3002.1 because the rule does not and cannot create a private right of action without congressional authorization. Because of this, the language "other appropriate relief" must be read to authorize punitive damages unless it is to be rendered meaningless altogether. It is a "cardinal principle' that courts 'must give effect, if possible, to every clause and word [*235] of a statute." United States v. Haynes, 55 F. 4th 1075, 1080 (6th Cir. 2022) (quoting Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). While "general terms should be construed in the light of the specific examples that are expressly identified," the court finds no contradiction of this axiom when Rule 3002.1(i)(2) is read to authorize the imposition of remedies appropriate to patrol the parties and obtain compliance rather than to compensate for actual loss. In re Reynolds, 470 B. R. 138, 144 (Bankr. D. Colo. 2012) (quoting Dept. of Labor v. Perini North River Assocs., 459 U.S. 297, 327, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983)); Gravel, 6 F.4th at 514-15 (similar). As the Blanco court reasoned:

Beyond the plain language, this Court cannot conclude from the enumerated examples in (i)(2) that courts should be limited to compensatory relief.

HN26(**) Evidence preclusion is a particularly harsh punitive sanction, [**37] warranted only under rare circumstances. Reasonable expenses and attorney's fees do not conclusively establish that only compensatory awards are appropriate either. The explicit mention of attorney's fees is necessary for courts to depart from the American Rule when considering fee shifting and therefore provides little indication as to how courts should interpret "other appropriate relief."

633 B.R. at 754. This interpretation is buttressed by both the drafters' exclusion of any harm requirement in subsection (i)(2) and the language at the beginning of subsection (i), which emphasizes compliance of the creditor rather than harm to the debtor, Fed. R. Bankr. P. 3002.1(i) (framing the sanctions as available when "the holder of a claim fails to provide any information as required . . "); see also Gravel, 6 F.4th at 521 (Bianco, J., dissenting) (concluding that subsection (i)(1) is punitive in nature because its evidence exclusion sanction is not tied to the proportionality of harm caused by the creditor's action); Blanco, 633 B.R. at 755-57 (similar). HN27 [1] Rule 3002.1(i) is a procedural rule intended to facilitate the sharing of information that is

Page 21 of 24

651 B.R. 215, *235; 2023 Bankr. LEXIS 1340, **37

integral to the Chapter 13 system, and these remedies are properly interpreted as tools for the court to compel compliance.

D. Remedies Available Under § 105 and the Court's Inherent Power

In addition [**38] to seeking remedies under Rule 3002.1(i), Dewitt requests that the court issue sanctions against the Mortgagee pursuant to § 105(e). HN28[*] The Sixth Circuit has affirmed that "[b]ankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct." Mapother & Mapother. P.S.C. v. Cooper (In re Downs), 103 F.3d 472, 477 (6th Cir. 1996) (citing In re Rainbow Magazine, Inc., 77 F.3d 278, 283-84 (9th Cir. 1996)); In re Nicole Gas Prod. LTD., 519 B.R. 723, 736-37 (Bankr. S.D. Ohio 2014) (discussing the civil contempt power under § 105); see Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (affirming that courts have inherent contempt powers to "achieve the orderly and expeditious disposition of cases").

HN29 Section 105(a) vests bankruptcy courts with the power to prevent abuses of the bankruptcy process, including the power to sanction parties for such conduct where appropriate. Trevino, 535 B. R. at 132 (quoting In re Jacobsen, No. 07-41092, 2009 Bankr. LEXIS 3150, at *43, 2009 WL 3245418 at *13 (Bankr, E.D. Tex. Sep. 30, 2009)); In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996) ("[T]he Bankruptcy Code, both in general structure and in specific provisions, authorizes bankruptcy courts to prevent the use of the bankruptcy process to achieve illicit objectives."); In re Banner, No. 15-31761, 2016 Bankr. LEXIS 2214, at *21, [*236] 2016 WL 3251886, at *7 (Bankr. W.D.N.C. June 2, 2016) (similar). Bankruptcy courts may, within their discretion, "fashion an appropriate sanction for conduct which abuses the judicial process." Chambers, 501 U.S. at 44-45. Another bankruptcy court explained "abuse of process" in this manner:

While "abuse of process" under § 105(a) is not defined in the Bankruptcy Code, a few courts essentially define it as "maneuvers or schemes which would have the effect of undermining the integrity of the bankruptcy [**39] system." Plaintiffs offered several cases demonstrating situations where courts have relied on § 105(a) for authority to sanction conduct, or to prevent an abuse of the judicial process. In most of those cases, bankruptcy courts have found that the filing of false

documents—which disrupted the bankruptcy process and prejudiced debtors—constituted an abuse of process.

Trevino, 615 B.R. at 128; Harlow, Nos. 17-71487, 20-07028, 2022 Bankr. LEXIS 3512 at *24, 2022 WL 17586716, at *9 (same). HN30[♣] This court agrees with Trevino and Harlow and adopts this definition: an abuse of process occurs when a creditor engages in "a maneuver or scheme sufficient to undermine the integrity of the bankruptcy system" that disrupts the bankruptcy process and prejudices debtors. Harlow. Nos. 17-71487, 20-07028, 2022 Bankr. LEXIS 3512, at *24, 2022 WL 17586716, at *9. In Harlow, a bankruptcy court found that a creditor's conduct in filing allegedly false forbearance notices could constitute such an abuse of process. Id. at *24-25. The court concluded that "mortgage creditors and their agents have an obligation to ensure the filings are accurate and truthful. Indeed, the forms filed on the claims docket are certified as filed under penalty of perjury." Id. at *25.

HN31 1 In addition, while § 105 is not a "panacea for all ills confronted," bankruptcy courts may exercise § 105 authority and inherent authority when necessary to enforce provisions of the Bankruptcy [**40] Code or Rules, including to "fill the gaps left by the statutory language." Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC), 423 F.3d 166, 183-84 (2d Cir. 2005) (quoting 2 Collier ¶ 105.01[2]); see Blanco, 633 B.R. at 761 ("[B]ankruptcy courts have both inherent contempt authority and equitable authority under [§ 105]."). As the Second Circuit explained in Smart World Techs, "The equitable power conferred . . . by section 105(a) is the power to exercise equity in carrying out the provisions of the Bankruptcy Code[.]" Smart World Techs., 423 F.3d at 184 (quoting New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 91-92 (2d Cir. 2003)). Thus, this court in its discretion may exercise authority under § 105(a) to enforce the provisions of Rule 3002.1 if this court determines it to be necessary and appropriate to do so. Blanco, 633 B.R. at 761.

HN32 The bankruptcy court's sanctioning authority includes the power to impose "mild noncompensatory punitive damages," but not "serious noncompensatory punitive damages." Adell v. John Richards Homes Bldg. Co. L.L.C. (In re John Richards Homes Bldg. Co. L.L.C.), 552 F. App'x 401, 414 (6th Cir. 2013) (citing Tenn-Fla Partners v. First Union Nat'l Bank of Fla. (In re Tenn-Fla Partners), 226 F.3d 746, 751 (6th Cir. 2000))

Page 22 of 24

651 B.R. 215, *236; 2023 Bankr. LEXIS 1340, **40

(discussing Sixth Circuit jurisprudence on bankruptcy court sanctioning powers and collecting cases). Because bankruptcy courts are courts of limited jurisdiction, the general sanctioning power of bankruptcy courts does not encompass the imposition [*237] of criminal-like sanctions, absent other statutory authority. ld. at 415; but see Bavelis v. Doukas, 835 F. App'x 798, 811 (6th Cir. 2020) (distinguishing the bankruptcy court's more limited power to impose punitive sanctions for litigation misconduct from its power to do so in a "substantive state-law [**41] adversary proceeding"). Nonetheless, bankruptcy courts may award appropriate noncompensatory punitive damages when necessary or appropriate to enforce the Bankruptcy Code. Adell. 552 F. App'x at 414 (citing Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1193, 1189-97 (9th Cir. 2003)). The Sixth Circuit has declined to define the limits of this sanctioning power but noted that a \$5,000 sanction awarded in another case was not serious, while the \$2.8 million in sanctions awarded by the bankruptcy court in Adell clearly rose to the level of a serious punitive sanction. Id. at 415-16. In In re Mention, Judge Buchanan explained that civil punitive damages awarded by bankruptcy courts should seek to coerce the offending party into compliance with the Bankruptcy Code or the court's orders rather than punish the offending party in the manner of a criminal sanction. No. 15-13347, 2019 Bankr. LEXIS 3576, at *19, 2019 WL 11639530, at *7. HN33 (*) Further, *(T)he Supreme Court has made clear that monetary sanctions imposed under a court's inherent powers require a finding that the misconduct 'constituted or was tantamount to bad faith." Gravel, 6 F.4th at 528 (Bianco, J., dissenting) (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)); see Desiderio v. Parikh (In re Parikh), 508 B.R. 572, 597 (Bankr. E.D.N.Y. 2014) (similar).

This court has already determined that the Mortgagee violated Rule 3002.1 when it knowingly filed an inaccurate 3002.1(g) response under penalty of perjury and willfully acted in direct opposition to its sworn statements [**42] by attempting to collect undisclosed charges and initiating a foreclosure action on that basis. At the time of her discharge, Dewitt was deemed current on her mortgage by operation of the Rule 3002.1 process. See Figueroa, Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337, at *14, 2021 WL 5815641, at *5 ("In other words, the Debtor was deemed current because [the mortgagee] failed to notify otherwise. . . . [The mortgagee] could not pursue any alleged arrears that may have incurred during the bankruptcy case as a result of [the mortgagee's] failure

to object to the Notice of Final Cure."). The Mortgagee argues that "Debtor failed to make a showing that Respondents violated a court order or willfully violated bankruptcy laws." Doc. 148 at 18. In fact, this court did address the Mortgagee's willful violation of Rule 3002.1:

In plain terms, HSBC argues that it changed its mind about waiving the Third Advance and added the charge back onto the Debtor's account after this court entered a discharge and closed the case and despite its affirmation to this court that the debt was current at the time of discharge - an assertion equivalent to crossing fingers behind one's back. This court is hardly amused

Even though the waiver was apparently pending internal approval, HSBC swore under penalty of [**43] perjury that the account was current. Doc. 57 at 2. At no time did HSBC request an extension of time to file the 3002.1(g) response or submit an accurate showing that the amount remained outstanding. The careful review conceived by the 3002.1(f) and (g) notice and response process ought to have triggered HSBC to either file a 3002.1(c) notice of the Third Advance and an appropriate 3002.1(g) response indicating the outstanding amount or, in the alternative, to request an extension [*238] of the response deadline under Rule 9006(b) to ensure that the internal process to approve the waiver was complete. Instead, HSBC apparently filed a statement that, at best, it hoped would be true. In any case, it is clearly impermissible for a creditor to aver one set of facts to the court and then later take the opposite position, offering the excuse that it simply changed

Dewitt, 644 B.R. at 396-97 (emphasis added). In taking these actions, the Mortgagee disrupted the bankruptcy process and prejudiced Dewitt. Had the Mortgagee filed an accurate statement indicating that the Third Advance remained outstanding, Dewitt could have filed a Rule 3002.1(h) motion asking the court to determine whether the mortgage was current or otherwise resolved her outstanding obligation through the Chapter [**44] 13 process. Instead, the Mortgagee contends that it could, after the conclusion of the case and expiration of Dewitt's bankruptcy protections, change its mind and seek to collect this unnoticed amount with impunity. This course of action constitutes "a maneuver or scheme sufficient to undermine the integrity of the bankruptcy system," and a sanctionable abuse of the bankruptcy process.

Page 23 of 24

651 B.R. 215, *238; 2023 Bankr. LEXIS 1340, **44

The Mortgagee argues that its conduct, even if in violation, does not amount to bad faith but was "at worst, an operational oversight or sloppiness[.]" Doc. 148 at 14. The Mortgagee also repeats its previous explanation and states that it initially chose to process a waiver of the Third Advance and responded to the Trustee's Notice of Final Cure Payment on that basis, then later reversed the waiver, despite having previously agreed on penalty of perjury that the account was current at the time of the Response. Id. The court rejects this argument. As Dewitt notes, the Mortgagee continues, even after this court's determination that its actions were in violation of *Rule 3002.1*, "to this day to seek to foreclosure against Dewitt's residence in the state foreclosure proceedings." Doc. 149 at 10.

Finally, the Mortgagee [**45] also suggests that it is unclear whether fees that have not been noticed under Rule 3002,1(c) can be included on a Rule 3002,1(g) response and pleads this confusion as the reason for the waiver reversal. Id. Common sense, of course, dictates that a review of the account should have prompted the Mortgagee to file a Rule 3002.1(c) notice for the Third Advance and simultaneously disclose it on its Response if the Mortgagee planned to collect the Third Advance. Instead, the Mortgagee reversed the waiver after Dewitt exited bankruptcy, demonstrating a willful disregard for the Bankruptcy Rules and for its actions in filing a sworn statement attesting that the mortgage was current and that there were no postpetition obligations owed to it. After the evidentiary hearing to be scheduled, the court will determine whether punitive damages should be awarded under § 105(a) on this basis and, if so, the appropriate amount of such damages.

E. This Court Declines to Issue Recommendations to the District Court

Dewitt has requested that, in the event the bankruptcy court does not engage in the process of imposing punitive damages against the Mortgagee, that the court submit proposed findings of fact and conclusions of law to the District Court to enable [**46] it to award punitive damages. HN34[*] By statute, bankruptcy courts only submit proposed findings of fact and conclusions of law to the District Court in two situations. First, the bankruptcy court does so when addressing non-core proceedings, absent consent of all the parties. 28 U.S.C. § 157(c). Second, even if the proceeding is designated as core, absent the knowing [*239] and voluntary consent of the parties, the court may not enter

final judgment on Stern claims that otherwise can only be determined by an Article III court. Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 686, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015).

This is a core proceeding pursuant to <u>28 U.S.C. §</u> <u>157(b)(2)(B)</u>. <u>HN35</u> Additionally, without reviewing the scope of possible <u>Stern</u> claims, it is sufficient to note that <u>Stern</u> claims do not include actions covered by <u>Rule</u> <u>3002.1</u> that function as "part and parcel of the claims-allowance process in bankruptcy." <u>Waldman v. Stone</u>, <u>698 F.3d at 919</u> (citing <u>Stern v. Marshall</u>, <u>564 U.S. 462</u>, 497, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011)).

F. Discovery Disputes Cannot be Resolved Through a Summary Judgment Motion

Telegraphing their next battle in this matter, the parties have already been sparring as to whether Dewitt should be able to conduct discovery as to "other violations of Rule 3002.1 by the Respondents." Doc. 149 at 10. Dewitt argues that such discovery beyond the Mortgagee's conduct in this case "has the potential to assist the Court to assess punitive damages per [**47] Rule 3002.1(a)(2)." Dewitt asks the court to authorize discovery "for the period beginning three years prior to the date of her bankruptcy discharge to the present[,] of other cases in which HSBC, PHH, and Ocwen have been charged with violations of Rule 3002.1, been sanctioned for violations of Rule 3002.1(i)(1) and (2), and settled with or without legal proceedings for alleged violations of Rule 3002.1, and of related matters." Doc. 147 at 12. The Mortgagee argues that this request is procedurally improper and that such evidence, if any exists, would be irrelevant to any damages determination in this case. Doc. 148 at 14-15 n.5. The Mortgagee states that an affirmative discovery request is beyond the scope of the briefing order and generally cites Bankruptcy Rules 7026-7037. ld.

HN36 Rule 26 authorizes "extremely broad discovery." United States v. Leggett & Platt. 542 F.2d 655, 657 (6th Cir. 1976), cert. denied, 430 U.S. 945, 97 S. Ct. 1579, 51 L. Ed. 2d 792 (1977) (quoting C. Wright, Law of Federal Courts § 81 at 355 (2d ed. 1970)) (internal quotation marks omitted); Ledford v. State Farm and Casualty Co. (In re Sams), 123 B.R. 788, 792 (Bankr. S.D. Ohio 1991). Rule 26(b)(1), incorporated in this contested matter by Rule 7026, defines the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Indeed, information within this



User Name: Edward Bailey

Date and Time: Friday, August 9, 2024 2:33:00PM EDT

Job Number: 230831034

Document (1)

1. In re Alvarado, 2015 Bankr. LEXIS 4584

Client/Matter: MWRB seminar

A Neutral As of: August 9, 2024 6:33 PM Z

In re Alvarado

United States Bankruptcy Court for the Northern District of Ohio, Eastern Division
October 16, 2015, Decided
Case No. 10-55181, Chapter 13

Reporter

2015 Bankr. LEXIS 4584 *

In re BRIAN MICHAEL AND KRISTINA LEE ALVARADO, Debtors.

Core Terms

confirmation, disposable income, commitment period, bonuses, unsecured creditor, dividend, ambiguities, projected, percent, devote, parties, prepay, bonus, prepayments, five-year, monthly, annual

Case Summary

Overview

HOLDINGS: [1]-Above-median-income debtors who declared Chapter 13 bankruptcy were not entitled to an order deeming a 60-month "pot" plan they proposed that was confirmed in January 2011 fully performed so that they could terminate monthly payments of \$694 they were making to the trustee: [2]-Although the male debtor received several bonuses totaling \$9,542.93 after the court confirmed the debtors' plan and the debtors turned those bonuses over to the trustee for distribution to unsecured creditors, the debtors were required under 11 U.S.C.S. § 1325(b) to make payments for the full five years they proposed, and the court confirmed, as the duration of their plan.

Outcome

The court denied the debtors' motion for an order deeming their plan fully performed.

LexisNexis® Headnotes

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN1[] Plans, Plan Contents

Ambiguities in contracts are construed against the drafter. This creates an incentive for the drafter to be as clear as possible. In the context of drafting a bankruptcy plan, this rule is particularly important because the Bankruptcy Code requires confirmation only after parties, including the trustee, have an opportunity to object.

Bankruptcy Law > Reorganizations > Plans > Plan Contents
Business & Corporate
Compliance > > Reorganizations > Plans > Plans

Compliance > ... > Reorganizations > Plans > Plan Contents

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN2[2] Plans, Plan Contents

No drafting party should be allowed to "hide the ball" when drafting a bankruptcy plan or contract, whether intentionally or not.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN3[] Plans, Cramdowns

Pursuant to the United States Court of Appeals for the

Edward Bailey

Page 2 of 6

2015 Bankr. LEXIS 4584, *4584

Sixth Circuit's decision in Baud v. Carroll (In re Baud), Chapter 13 bankruptcy plans cannot be crammed down over a trustee's objection without paying all projected disposable income over the course of the commitment period. In addition, a Chapter 13 plan cannot be curtailed for a period shorter than the commitment period unless unsecured creditors receive a 100 percent dividend. Baud notes that the United States Supreme Court's decision in Ransom v. FIA Card Services, N.A. prefers interpretations of the Bankruptcy Code that serve BAPCPA's core purpose of ensuring that Chapter 13 debtors devote their full disposable income to repaying creditors. In reaching its holding in Baud that 11 U.S.C.S. § 1325(b) imposes a temporal requirement for a debtor's Chapter 13 plan payments, the Sixth Circuit observed that its holding avoids the senseless result of denying creditors payments that a debtor could easily make if additional disposable income becomes available after confirmation.

Counsel: [*1] For Cab East Llc, Creditor: Cynthia A Jeffrey, Solon OH.

For CR Evergreen II, LLC, Creditor: Linh Tran, Quantum3 Group LLC, Kirkland WA.

For Capital One, N.A., Creditor: Patti H. Bass, Tucson AZ.

For Brian Michael Alvarado, Kristina Lee Alvarado, Debtors: Robert M. Whittington, Jr., Akron OH.

For Keith Rucinski, Trustee: Joseph Anthony Ferrise, Office of the Chapter 13 Trustee, Akron OH.

Judges: ALAN M. KOSCHIK, United States Bankruptcy Judge.

Opinion by: ALAN M. KOSCHIK

Opinion

MEMORANDUM DECISION REGARDING DEBTORS'
MOTION FOR ENTRY OF AN ORDER DEEMING
PLAN TO BE FULLY PERFORMED; FOR AN ORDER
CEASING PAYROLL DEDUCTIONS; AND FOR AN
ORDER DIRECTING CHAPTER 13 TRUSTEE TO
PREPARE AND FILE SUCH FURTHER ITEMS AS
NECESSARY FOR THE DEBTORS TO BE GRANTED
A DISCHARGE

INTRODUCTION

The matter before the Court is the Debtors' Motion for the Entry of an Order Deeming Plan to Be Fully Performed [docket #85] (the "Motion"). In the Motion, the Debtors allege that (1) their Plan should be deemed complete; (2) the payroll deductions should cease; and (3) the Court should direct the Chapter 13 Trustee to prepare and file all necessary papers so that the Debtors may be granted a discharge. The Debtors' argue that the Plan only required 60 [*2] payments of \$694, which totals \$41,640. The Debtors contend that they were entitled to prepay their Plan and that they have now overpaid.

On November 3, 2014, the Chapter 13 Trustee (the "Trustee") filed his Objection to the Debtors' Motion [docket #86] (the "Objection"). The Trustee, relying on Sixth Circuit case law <u>Baud v. Carroll (In re Baud)</u>, 634 <u>F.3d 327 (6th Cir. 2011)</u>, argues that above-median debtors, such as the Debtors, are subject to a five-year commitment period pursuant to <u>Section 1325(b) of the Bankruptcy Code</u>. The Trustee also contends that the five-year commitment period is mandatory unless the Debtors pay 100 percent dividend to unsecured creditors.

Contending that this requirement is temporal in nature and is not dependent upon the amount paid into the plan, the Trustee further argues that the Debtors have not met this requirement as they have not been in bankruptcy for the requisite number of months. Therefore, the Trustee asks that the Motion be denied.

The court held a preliminary hearing on the contested matter on December 4, 2014. Prior to this hearing, the Debtors filed their Memorandum in Support of their Motion [docket #89]. At the hearing, the Court directed the parties to file supplemental briefs in support of their pleadings and joint stipulations. [*3] On December 16, 2014, the Court entered a Brief Scheduling Order [docket # 91] memorializing the deadlines for the submission of pleadings related to the contested matter.

The parties fully complied with the Brief Scheduling Order and timely filing their joint stipulations of facts and the respective supplemental briefs. Upon receipt of all of the pleadings, the Court took the matter under advisement.

JURISDICTION

This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334 and General Order No.

Page 3 of 6

2015 Bankr. LEXIS 4584, *3

2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(1) and (b)(2)(A). Venue is proper pursuant to 28 U.S.C. § 1409(a).

FACTS

On October 30, 2010, the Debtors, Brian and Kristina Alvarado (the "Debtors"), filed a petition for relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1301. et seq. Simultaneously with the petition, the Debtors filed their Chapter 13 plan [docket #2] (the "Plan"). Their proposed Plan was a "pot plan," meaning that it did not propose a specific percentage dividend to unsecured creditors. Instead, in their Plan, the Debtors agreed to pay the unsecured creditors a pro rata share of the plan payments net of administrative expenses. The [*4] Plan payments defined by the Plan were stated as follows:

The debtor(s) shall pay to the chapter 13 trustee all projected disposable income in the amount of \$694.00 each month for approximately 60 months, but not to exceed 5 years. Unless allowed unsecured claims are paid 100%, the duration of the plan shall be . . . 5 years This provision does not prohibit the debtor from prepaying the plan before the . . . 5 year period.

On January 21, 2011, the Court entered an order confirming the Plan [docket #25] (the "OCP"). The OCP provided, inter alia, that the Plan was incorporated into the OCP and to the extent there were any inconsistencies between the Plan and the OCP, the OCP would control. (OCP, decretal ¶2). It also provided that "[T]he Debtor is under a continuing obligation to ... disclose all income and assets [to the Trustee]." (Id. ¶11 at 2). In addition, the OCP also required the Debtor "to devote all future disposable income to the Plan as required by Sections 1322(a)(1) and 1325(b)(2)." (Id., Responsibility of the Debtor ¶1 at 2).

Over the course of the next four years, the Debtors made their monthly plan payments to the Trustee. In addition, each year Mr. Alvarado received annual wage bonuses. The [*5] Debtors had informed the Trustee at the initial <u>Section 341</u> meeting of creditors that Mr. Alvarado expected to receive variable annual wage bonuses of approximately \$1,200 per year. On the

Trustee's 341 examination sheet, the Debtors agreed to inform the Trustee of any and all wage bonuses received and the amount of each bonus. This was signed by the Debtors and their counsel. In fact, the Debtor husband did earn annual wage bonuses for 2011-2014 in excess of the anticipated \$1200 per year. It is unclear to the Court whether the parties reached a compromise that required the Debtors to turn over onehalf of the bonuses to the Trustee or whether the Debtors turned over a larger portion of the bonuses, or even all of them. The parties stipulated that during these four years, the Debtors turned over to the Trustee aggregate bonus proceeds ranging from \$9,542.93 to \$10.197.57.2 Inexplicably, neither party -- Debtors nor Trustee -- addressed the impact of the bonus payments at the times they were made. The Debtors sought no assurances that these payments would be applied in such a manner to prepay their Plan. The Trustee failed to clarify his position that the bonus funds were additional disposable [*6] income that would increase the pot, not curtail the Debtors' 60 monthly payments. The parties' inaction allowed this ambiguity to linger for years and has put the Court in the difficult position of imposing clarity on a situation that is now inherently

DISCUSSION

This case has presented difficult issues for the Court.

2 In the Joint Stipulations of Fact filed by the parties at docket #92, the parties state that the Debtor husband received at least \$9,542.93 in supplemental bonus income from his employer and that the Debtors have turned over that same amount to the Chapter 13 Trustee in addition to the monthly Plan payments. However, the Exhibit A attached to the Joint Stipulations of Fact, which is incorporated into the Joint Stipulations, lists all of the Plan payments and appears to include annual payments much larger than the monthly payments, from a different source (identified as "PC"), which when totaled adds up to the figure of \$10,179.57. Furthermore, the Trustee's Reply Brief at docket #94 states that the Debtor did turn over that larger amount, and refers to it as one-half of a total amount of wage bonuses of \$20,359,14 as to which the Debtor husband had the "good fortune of earning," It is unclear to the Court, and the Court makes no specific findings of fact, as to whether the Debtors paid bonus proceeds over to the Trustee in the amount of \$9,542.93, or \$10,179.57, or some other number. In addition, the Court makes no findings as to whether these payments constituted 50 percent of the bonuses earned by the Debtor husband during the pendency of the Plan, or whether it totals the entire amount of those bonuses, or some other percentage.

¹The Debtors scheduled no secured or unsecured priority claims in their Petition. Nor were any such claims registered.

Page 4 of 6

2015 Bankr. LEXIS 4584, *6

This is true in large part because the parties -- the Debtors and the Trustee -- have allowed circumstances to proceed over the course of four years or more without any effort to clarify, whether by agreement or by court order, what the Debtors' Plan means in connection with the underlying circumstances. The Debtors have paid at least \$9,542.93, and as much as \$10,179.57,3 into the Plan from the Debtor husband's annual bonuses without seeking a timely, contemporaneous understanding as to whether those payments were contributions to the Plan in addition to the monthly payments of \$694, or whether they essentially prepaid the Plan. Now, after four years of plan payments, including the bonus payments, the Debtors are seeking what amounts to a declaratory judgment that their Plan is complete. The very fact that the Debtors feel obligated to seek such declaration suggests [*7] that their Plan is ambiguous. Perhaps if the Debtors' intentions were more clearly made in the Plan, the Trustee would have had an opportunity to timely object to confirmation of the Plan on the grounds that it failed to comply with Section 1325(b) thereby, avoiding the need for the Court to impose clarity at this juncture in the Debtors' case.

A. It Is Too Late To Apply Plan Confirmation Standards Under <u>Section 1325(b)</u> To Resolve This Case and This Motion Because the Plan Has Already Been Confirmed.

Strictly speaking, most of the Trustee's arguments about the temporal requirement of a Chapter 13 plan -- i.e., that a debtor cannot prepay and cut short a plan prior to the end of the applicable commitment period (unless the debtor is paying unsecured creditors 100 percent of their claims) -- is a confirmation issue. Baud v. Carroll (In re Baud), 634 F.3d 327 (6th Cir. 2011. "If the Trustee . . . objects to confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make [plan] payments." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). As the Debtors' argue, it is too late [*8] to consider whether the Plan, as written, should be confirmed. It has already been determined:

- What is or is not the Debtors' "projected disposable income."
- Whether the applicable commitment period is 3 years or 5 years.

disposable income projected at the time of confirmation, or all actual disposable income, or some other calculation, for the applicable commitment period.

• Whether prepayments may be allowed to reduce

· Whether the Debtors are required to devote all

- Whether prepayments may be allowed to reduce obligations under the Plan, and under what circumstances.
- Whether prepayments apply to a fixed monetary sum to be paid under the Plan, or whether they merely apply against a theoretical 100 percent dividend to unsecured creditors in order to permit an early termination of the Plan.

The time for objecting to the Debtors' Plan pursuant to <u>Sections 1322</u> and <u>1325</u> (or other provisions of Chapter 13) has passed. The Debtors' Plan was confirmed with a five-year commitment period. The Plan payments were defined. A confirmation order (the previously defined "OCP") was entered and remains in force. The Plan is what it is, regardless of any second-guessing about whether it should have been confirmed in the first place. See <u>United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010).</u> The confirmation issues [*9] raised by the Trustee are extremely important, both in general and in this case. To the extent they had been raised at confirmation, it is quite possible that the current disputes and potential for dashed expectations could have been avoided.

In order to resolve the Motion, however, the Court must address a more important and pressing question: What does the confirmed Plan mean?

B. Debtors' Plan, Combined With the Confirmation Order, Obligates the Debtors to Devote All Disposable Income to the Plan.

Interpretation of the Plan and the Confirmation Order.

The Plan alone is not a model of clarity on the question before the Court, namely whether the bonus payments were prepayments on the amounts due under the monthly payment schedule or whether they were additional payments required to increase the dividend to the unsecured creditors in this "pot" plan. The Plan provides that the Debtors "shall pay to the Chapter 13 Trustee all projected disposable income in the amount of \$694.00 each month for approximately 60 months." (Plan ¶1 at 1). The OCP confirms that the Debtor shall make those payments. "Furthermore, the Debtor agrees to devote all future disposable income to the Plan as required [*10] by the Bankruptcy Code Sections

³ See note 2, supra.

Page 5 of 6

2015 Bankr. LEXIS 4584, *10

1322(a)(1) and 1325(b)(2)." (OCP, Responsibilities of Debtor ¶1 at 2). The OCP is a form order that has been uniformly used by this Court for some time and should be well-known to the parties' counsel.

The OCP further provides that the "Plan is incorporated into this OCP as if fully rewritten herein, provided, however, that should there be any inconsistencies between the Plan and this OCP, this OCP shall control." (OCP ¶2 at 1). A reasonable interpretation of the Plan and the OCP together is that all disposable income, not merely the projected monthly payments and not excluding the annual bonuses, were due to be paid to the Trustee. Moreover, since the Plan was sa "pot" plan, the dividend to unsecured creditors would be expected to adjust upward without a motion to modify the plan.

The Plan also provides that (i) unless unsecured creditors are paid a 100 percent dividend, the duration of the Plan would be five years (if Debtors were above median income, as they are); and (ii) the Debtors are not prohibited from prepaying their Plan early. The juxtaposition of these two provisions create an ambiguity as to whether the prepayment is conditioned on a 100 percent dividend, or whether the right to prepay [*11] could truncate the commitment period. Taken alone, these provisions could have been, and in fact were, read differently by different parties. However, as the Trustee notes, this Plan was drafted by the Debtors' counsel and is not the form plan offered by the Trustee on his website.4 In addition, the Trustee's interpretation that the five-year commitment period could be cut short with prepayments only with a 100 percent dividend to the unsecured creditors is a plausible interpretation of the Plan's ambiguous language.

The Plan is essentially a multi-party contract governing the reorganization of the Debtors' finances and adjusting the debts owed to a range of creditors. HN1 [1] Ambiguities in contracts are construed against the drafter. Royal Ins. Co. of America v. Orient Overseas Container Line Ltd., 525 F. 3d 409, 423 (6th Cir. 2008). This creates an incentive for the drafter to be as clear as possible. In this context, it is particularly important because the Code requires confirmation only after parties, including the Trustee, have an opportunity to object.

In their Reply Memorandum [docket #98], the Debtors dismiss the Trustee's ambiguity argument stating that the ambiguities are simply "things about which the Chapter 13 Trustee disagrees." (Reply Memorandum at 2). The Court disagrees with [*12] the Debtors and agrees with the Trustee. While the Trustee could have detected and raised the issues regarding the ambiguities earlier, the fact is that the Plan's provisions are not clear, especially when considered in light of the legal standards for confirmation discussed in greater detail below.

The Debtors' Plan is full of confusing, conditional boilerplate statements that appear to cover all contingencies instead of clearly stating the terms for these Debtors in this case. This style invites uncertainty and dispute. If the Plan clearly stated that bonuses were not projected income and would not be included in the Plan even if they arose, that only the sum of \$41,640.00 was due under the Plan regardless of actual disposable income, and that amount could be prepaid by the Debtors to terminate the Plan prior to the five-year applicable commitment period even if unsecured creditors received less than a 100 percent dividend, then the Trustee would have had a clear opportunity to object. If the Trustee had failed to do so under those circumstances, then the Debtors would have had a stronger argument for their interpretation of the Plan and its enforcement here. HN2[1] No drafting party, including [*13] the Debtors here, should be allowed to "hide the ball" when drafting a plan or contract, whether intentionally or not.

Moreover, the OCP, which controls whenever inconsistencies arise with a corresponding plan, imposes clarity the Plan lacked. All disposable income of the Debtors was devoted to the Plan. The Debtors had a continuing duty to report actual income to the Trustee. These provisions required the Debtors to report additional income and devote that additional income (subject to increases in legitimate deductible expenses) to the Plan during the course of the commitment period.

2. The Sixth Circuit's Confirmation Standards Supports the Trustee's Interpretation of the Plan.

While the governing law of plan confirmation, including Baud v. Carroll (In re Baud), 634 F.3d 327 (6th Cir. 2011), does not apply directly at this juncture, because the Debtors' Plan has long been confirmed, it does provide the hypothetical grounds for the Trustee or a creditor to object to the Plan as the Debtors' interpret it. In other words, had the Plan unambiguously proposed the terms the Debtors now assert it had, the logic and

⁴The fact that the Trustee offers a plan form on his website does not suggest that that plan form is currently favored in any way by this Court. However, the origin of the form of a plan is relevant as to authorship.

Page 6 of 6

2015 Bankr. LEXIS 4584, *13

statutory interpretation suggested by Baud would have almost certainly resulted in an objection to confirmation. In this sense, Baud [*14] informs the Court how it must interpret the Plan in light of its ambiguities. Indeed, Baud's interpretation of the standard for plan confirmation under the Code -- whether in its dicta or in its holding -- is consistent with the Court's interpretation of the Plan and OCP alone, thereby reinforcing the outcome here.

HN3[*] Pursuant to Baud, Chapter 13 plans cannot be crammed down over a Trustee's objection without paying all projected disposable income over the course of the commitment period. The Debtors here did disclose to the Trustee that bonuses were common and expected, although the evidence suggests that the actual bonuses were a bit larger than expected in most of the years. In addition, Plans cannot be curtailed for a period shorter than the commitment period unless the unsecured creditors receive 100 percent dividend.

Baud notes that the Supreme Court decision in Ransom v. FIA Card Services, N.A., 562 U.S. 61, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011), preferred interpretations of the statute that serve "BAPCPA's core purpose of ensuring that the debtors devote their full disposable income to repaying creditors." Ransom. 562 U.S. at 78. In reaching its holding that Section 1325(b) imposes a temporal requirement for a debtor's Chapter 13 plan payments, Baud observed that this holding "avoids the 'senseless [*15] result [] that we do not think Congress intended' of 'deny[ing] creditors payments that the debtor could easily make' if additional disposable income were to become available after confirmation." Baud, 634 F.3d at 343 (quoting Hamilton v. Lanning, 560 U.S. 505, 520, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010)). In interpreting this Plan, in conjunction with the OCP in this case, the Court is comfortable following the interpretation of the Sixth Circuit and the Supreme Court suggesting that Chapter 13 debtors must utilize their actual disposable income that becomes available during the commitment period to repay their creditors as much as possible.5

CONCLUSION

For the reasons set forth in this Memorandum Decision, the Motion will be DENIED. The Debtors remain obligated to complete their sixty-month Plan, including devoting all their disposable income to the Plan, including all future bonuses that are earned during the commitment period, subject to adjustment for changes in their deductible expenses that may also affect their disposable income. The Debtors' payroll deductions shall resume. To the extent the Plan payments have been suspending during the pendency of the Motion, the Debtors shall be allowed additional time to complete their remaining plan payments.

separate order [*16] consistent with this Memorandum Decision will be entered contemporaneously herewith.

This document was signed electronically on October 16, 2015, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: October 16, 2015

/s/ Alan M. Koschik

ALAN M. KOSCHIK

United States Bankruptcy Judge

End of Document

⁵The issues regarding the binding effect of a plan, and the balance between confirming a plan consistent with projected disposable income pursuant to Section 1325(b), on the one hand, and maximizing the return to creditors based on the actual disposable income of the debtors during their plan commitment period, on the other, remains a complex issue fraught with potential arguments on all sides. The precedential value of this Decision is limited by the peculiar ambiguities of the Plan, the OCP, and the procedural posture in which this Motion arose.



User Name: Edward Bailey

Date and Time: Friday, August 9, 2024 2:27:00PM EDT

Job Number: 230830459

Document (1)

1. Baud v. Carroll, 634 F.3d 327 Client/Matter: MWRB seminar Search Terms: 634 F3d 327

Search Type: Natural Language

Narrowed by:

Content Type Narrowed by Cases -None-

As of: August 9, 2024 6:27 PM Z

Baud v. Carroll

United States Court of Appeals for the Sixth Circuit

August 6, 2010, Argued; February 4, 2011, Decided; February 4, 2011, Filed

File Name: 11a0033p.06

No. 09-2164

Reporter

634 F.3d 327 *; 2011 U.S. App. LEXIS 2182 **; 2011 FED App. 0033P (6th Cir.) ***; Bankr. L. Rep. (CCH) P81,930

RICHARD L. BAUD and MARLENE BAUD, Appellees, v. KRISPEN S. CARROLL, Appellant.

Subsequent History: US Supreme Court certiorari denied by Baud v. Carroll, 2012 U.S. LEXIS 318 (U.S., Jan. 9, 2012)

Prior History: [**1] Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 09-10673—Nancy G. Edmunds, District Judge.

Core Terms

disposable income, projected, commitment period, confirmation, calculation, temporal, BAPCPA, zero, monthly income, courts, expenses, pre-BAPCPA, unsecured creditor, bankruptcy court, deduct, completion, unsecured claim, make payment, multiplied, duration, above-median-income, objects, senseless, expended, holder, monetary, monthly, formula, cases, repay

Case Summary

Procedural Posture

The U.S. District Court for the Eastern District of Michigan held the applicable commitment period (ACP) was 60 months for above-median-income debtors, but the requirement did not apply because the debtors had negative projected disposable income. It reversed a bankruptcy court order sustaining a Chapter 13 trustee's objection that it should be extended to 60 months, and remanded to allow the debtors to modify their plan. The trustee appealed.

Overview

Congress had not provided that the ACP was a

multiplier for determining payments to unsecured claims, thus, the temporal approach was adopted: due to the positive projected disposable income (PDI) and objection, all PDI to be received in the ACP had to be applied for payments over a duration equal to 11 U.S.C.S. § 1325(b)'s ACP. Items such as Social Security benefits excluded under 11 U.S.C.S. § 101(10A)'s definition of current monthly income, and other expenses above-median-income debtors could deduct had to be deducted; including them would read out disposable income's revised definition. Section 1325(b)(3) clearly allowed for a mortgage payment deduction, absent some other basis, other than the disposable-income test, for disallowance. Excluding the benefits and deducting mortgage payments resulted in a negative PDI. Under § 1325(b)(4)(B), confirming a plan of less than 3 or 5 years, respectively, was permissible only if unsecured claims were paid in full over a shorter period. To ensure creditors were paid the maximum amount affordable, § 1325(b)(1)(B) required all PDI be applied to payments over a duration equal to the ACP. whether the PDI was negative, zero, or positive.

Outcome

The district court's holding that the applicable commitment period imposed a minimum plan length of 60 months for the above-median-income debtors was affirmed, but the district court's opinion that that requirement did not apply because the debtors had a negative projected disposable income was reversed. The case was remanded with instructions to remand to the bankruptcy court for the debtors to amend their plan.

LexisNexis® Headnotes

Bankruptcy Law > ... > Plan

Edward Bailey

Page 2 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN1</u>[♣] Confirmation Criteria, Nonconsensual Confirmations

Under 11 U.S.C.S. § 1325(b)(1)(B), if the Chapter 13 trustee or the holder of an allowed unsecured claim objects to the confirmation of a debtor's plan that does not provide for full payment of unsecured claims, the plan may be confirmed only if it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors under the plan. 11 U.S.C.S. § 1325(b)(1)(B). There are different applicable commitment periods depending on whether the "current monthly income" (as defined in 11 U.S.C.S. § 101(10A)) of the debtor and the debtor's spouse combined, when multiplied by 12, is above or below the median income of the relevant state.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN2(2) Confirmation Criteria, Nonconsensual Confirmations

If the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan of a debtor with positive projected disposable income who is not proposing to pay unsecured claims in full, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over a duration equal to the applicable commitment period imposed by 11 U.S.C.S. § 1325(b). The calculation of a debtor's projected disposable income: (a) must not include items that are excluded from the definition of current monthly income set forth in 11 U.S.C.S. § 101(10A); and (b) must deduct expenses that the Bankruptcy Code permits above-median-income debtors to deduct.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN3</u>[≛] Confirmation Criteria, Nonconsensual Confirmations

There is no exception to the temporal requirement set forth in <u>11 U.S.C.S. § 1325(b)</u> for debtors with zero or negative projected disposable income.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN4</u>[♣] Confirmation Criteria, Nonconsensual Confirmations

See 11 U.S.C.S. § 1325(b)(1), (2).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN5</u>[≛] Confirmation Criteria, Nonconsensual Confirmations

Determining whether a plan may be confirmed over objection requires several steps. First, in order to determine the debtor's "disposable income" according to the definition in 11 U.S.C.S. § 1325(b)(2) (which itself expressly excludes certain categories of income), one must calculate the debtor's "current monthly income" and the "amounts reasonably necessary to be expended" for, inter alia, the maintenance or support of the debtor or a dependent of the debtor.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

<u>HN6</u>[≛] Confirmation Criteria, Nonconsensual Confirmations

Under 11 U.S.C.S. § 101(10A), the term "current monthly income" means the average gross monthly income that the debtor receives, derived during a sixmonth look-back period, excluding benefits received under the Social Security Act and certain other payments. 11 U.S.C.S. § 101(10A)(B). Because current monthly income is based on the debtor's past income (in most cases, income the debtor receives that is derived during the 6-month period immediately before the

Page 3 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

necessarily reflect the debtor's actual income at the time of confirmation.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN7[Confirmation Criteria, Nonconsensual Confirmations

The appropriate method for calculating "amounts reasonably necessary to be expended" for purposes of 11 U.S.C.S. § 1325(b)(2) depends on whether the debtor's current monthly income is above or below the state median income. For debtors with current monthly income equal to or less than the applicable median family income, § 1325(b) is silent on how to calculate these amounts, suggesting that they are to be based on the debtor's reasonably necessary expenses. For debtors with current monthly income exceeding the applicable median family income, however, § 1325(b)(3) requires courts to determine the amounts reasonably necessary to be expended in accordance with the "means test," i.e., the statutory formula for determining whether a presumption of abuse arises in Chapter 7 cases. 11 U.S.C.S. § 1325(b)(3). The result of determining these expenditures in accordance with the means test is that above-median-income debtors must use several standardized expenditure figures in lieu of their own actual monthly living expenses, 11 U.S.C.S. § 707(b)(2)(A)(ii)(l).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN8[2] Confirmation Criteria, Nonconsensual Confirmations

See 11 U.S.C.S. § 1325(b)(3).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN9[Confirmation Criteria, Nonconsensual Confirmations

bankruptcy) and excludes certain payments, it will not Above-median-income Chapter 13 debtors, for purposes of 11 U.S.C.S. § 1325(b), are allowed to deduct their actual monthly expenses for the categories specified as Other Necessary Expenses issued by the IRS for the area in which the debtor resides. 11 U.S.C.S. § 707(b)(2)(A)(ii)(I). These Other Necessary Expenses include certain taxes, involuntary employment deductions, life insurance on the debtor, certain courtordered payments, certain educational expenses, childcare. unreimbursed health care telecommunications services. Official Bankr. Form 22C, 30-37. Expenditures of above-median-income debtors for other items -- including health and disability insurance, contributions to the care of certain household or family members, protection against family violence, home energy costs in excess of the allowance specified by IRS Local Standards, certain limited educational expenses, additional food and clothing expenses in excess of the applicable IRS National Standards and a certain amount of charitable contributions -- are based on debtors' own reasonably necessary needs. 11 U.S.C.S. § 707(b)(2)(A)(ii)(I)-(V); Official Bankr. Form 22C, I. 39-45.

> Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN10[Language | Confirmation Criteria, Nonconsensual Confirmations

The means test and Official Bankr. Form 22C, for purposes of 11 U.S.C.S. § 1325(b), allow certain deductions on account of ongoing payments contractually due on secured debts and priority claims without regard to whether those payments are reasonably necessary. See 11 U.S.C.S. § 707(b)(2)(A)(iii)-(iv); Official Form 22C, lines 47-49. Because standardized expense figures are used in portions of the calculation, however, the amounts reasonably necessary to be expended by abovemedian-income debtors are unlikely to reflect these debtors' actual expenses.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN11 Confirmation Criteria, Nonconsensual Confirmations

Page 4 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

After calculating the amounts reasonably necessary to be expended on, among other things, the maintenance or support of the debtor, the next step in determining whether a plan may be confirmed over objection is to subtract these amounts (as well as any additional amounts excluded from disposable income by 11 U.S.C.S. § 1325(b)(2) itself and other sections of the Bankruptcy Code) from the debtor's current monthly income in order to derive the debtor's "disposable income." 11 U.S.C.S. § 1325(b)(1)-(2). Notably, however, § 1325(b)(1) requires that all of the debtor's "projected disposable income" over the applicable commitment period be applied to make payments to unsecured creditors. The United States Supreme Court has adopted the "forward-looking" approach, under which the debtor's projected disposable income is calculated by taking into account any "known or virtually certain changes" in the debtor's disposable income at the time of confirmation.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN12</u>(♣) Confirmation Criteria, Nonconsensual Confirmations

The amount of the Chapter 13 debtor's projected disposable income depends on the "applicable commitment period," which in turn depends on whether the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is above or below the state median. 11 U.S.C.S. § 1325(b)(4) provides that, unless the plan provides for full payment of allowed unsecured claims over a shorter time frame, the applicable commitment period is three years for below-median-income debtors and not less than five years for above-median-income debtors. 11 U.S.C.S. § 1325(b)(4).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN13 (2) Confirmation Criteria, Nonconsensual Confirmations

See 11 U.S.C.S. § 1325(b)(4).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN14 & Confirmation Criteria, Nonconsensual Confirmations

A Chapter 13 plan may not provide for payments over a period that is longer than 5 years. 11 U.S.C.S. § 1322(d). Thus, although 11 U.S.C.S. § 1325(b)(4) provides that the applicable commitment period is "not less than 5 years" for above-median-income debtors, the applicable commitment period effectively is five years for such debtors.

Bankruptcy Law > ... > Judicial Review > Standards of Review > General Overview

HN15[₺] Judicial Review, Standards of Review

An appellate court reviews a bankruptcy court's order directly, giving no deference to the district court.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN16</u>[≛] Confirmation Criteria, Nonconsensual Confirmations

If the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan of a debtor with positive projected disposable income whose plan provides for a less than full recovery for unsecured claimants, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over a duration equal to the applicable commitment period set forth in 11 U.S.C.S. § 1325(b).

Governments > Legislation > Interpretation

HN17[Legislation, Interpretation

A court's analysis of the meaning of a statute begins

Page 5 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

where all such inquiries must begin: with the language of the statute itself.

Governments > Legislation > Interpretation

HN18[♣] Legislation, Interpretation

Inelegant drafting does not provide a sufficient reason to reject an otherwise correct interpretation of a statute.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN19 (Confirmation Criteria, Nonconsensual Confirmations

11 U.S.C.S. § 1322(d) establishes maximum plan lengths out of a concern for keeping debtors in Chapter 13 an unduly long time (of up to ten years). By contrast, 11 U.S.C.S. § 1325(b) establishes the minimum time (upon the filing of an objection) for the payment of projected disposable income and does so out of a concern for maximizing creditor recoveries.

Bankruptcy Law > ... > Plan Confirmation > Nonconsensual Confirmations > Cramdowns Business & Corporate Compliance > ... > Plans > Plan Confirmation > Cramdowns

<u>HN20</u>[♣] Nonconsensual Confirmations, Cramdowns

Under 11 U.S.C.S. § 1129(a)(15), if the holder of an allowed unsecured claim that is not proposed to be paid in full objects to confirmation of a Chapter 11 plan of an individual debtor, the plan can be confirmed, if at all, only if the value of the property to be distributed is not less than the projected disposable income of the debtor (as defined in 11 U.S.C.S. § 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer. 11 U.S.C.S. § 1129(a)(15). In this provision

Congress made clear that a Chapter 11 plan of any length may be confirmed as long as the value of the property to be distributed is not less than the projected disposable income of the debtor to be received over five years (or the length of the plan, whichever is longer).

Governments > Legislation > Interpretation

HN21[Legislation, Interpretation

Courts will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN22</u>[基] Confirmation Criteria, Nonconsensual Confirmations

11 U.S.C.S. § 1325(b)(1)(B) now requires that all of the debtor's projected disposable income to be received in the applicable commitment period be applied to make payments "to unsecured creditors under the plan." 11 U.S.C.S. § 1325(b)(1)(B).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN23 (2) Confirmation Criteria, Nonconsensual Confirmations

If the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan of a debtor with positive projected disposable income whose plan provides for a less than full recovery for unsecured claimants, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over a duration equal to the applicable commitment period set forth in 11 U.S.C.S. § 1325(b).

Bankruptcy Law > ... > Plan Confirmation > Confirmation

Page 6 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

Criteria > Nonconsensual Confirmations

<u>HN24</u>[≛] Confirmation Criteria, Nonconsensual Confirmations

Benefits received under the Social Security Act should not be included in the calculation of projected disposable income for purposes of 11 U.S.C.S. § 1325(b).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN25</u>(≛) Confirmation Criteria, Nonconsensual Confirmations

The discretion Lanning affords does not permit bankruptcy courts to alter the formula for calculating disposable income for purposes of 11 U.S.C.S. § 1325(b) (i.e., does not permit the court to alter the items to be included in and excluded from income).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN26</u>[♣] Confirmation Criteria, Nonconsensual Confirmations

The projected disposable income calculation employs the inclusions and exclusions from current monthly income set forth in 11 U.S.C.S. § 101(10A), but applies them not in the retrospective manner specified by that provision but rather in the forward-looking manner envisioned by 11 U.S.C.S. § 1325(b).

Bankruptcy Law > Conversion &
Dismissal > Liquidations
Business & Corporate
Compliance > Bankruptcy > Conversion &
Dismissal > Liquidations

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN27 Conversion & Dismissal, Liquidations

11 U.S.C.S. § 1325(b) permits above-median income debtors to deduct ongoing mortgage payments in accordance with the formula set forth in 11 U.S.C.S. § 707(b)(2)(A)(iii). Section 1325(b)(3) states that, for such debtors, amounts reasonably necessary to be expended in § 1325(b)(2) shall be determined in accordance with § 707(b)(2)(A), (B). 11 U.S.C.S. § 1325(b)(3). Thus, above-median-income debtors may deduct ongoing monthly payments on secured debt in accordance with the formula set forth in § 707(b)(2)(A)(iii) for property that debtors intend as of the date of confirmation to retain, regardless of whether the payments are subjectively reasonably necessary to be expended for the maintenance or support of the debtors or the debtors' dependents.

Bankruptcy Law > Conversion &
Dismissal > Liquidations
Business & Corporate
Compliance > Bankruptcy > Conversion &
Dismissal > Liquidations

HN28[Liquidations Dismissal, Liquidations

See 11 U.S.C.S. § 707(b)(2)(A)(iii).

Bankruptcy Law > Conversion & Dismissal > Liquidations Business & Corporate Compliance > Bankruptcy > Conversion & Dismissal > Liquidations

Governments > Legislation > Interpretation

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN29[Conversion & Dismissal, Liquidations

11 U.S.C.S. § 1325(b)(3) provides a clear indication that Congress intended a departure from pre-Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 practice with respect to above-median-income debtors and the deduction of mortgage payments. Thus, above-median-income debtors should be permitted to deduct their mortgage payment in accordance with the formula set forth in 11 U.S.C.S. § 707(b)(2)(A)(iii), unless there is some other basis other than the disposable-income test for disallowing the deduction.

Page 7 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

Confirmations

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN30</u>[≛] Confirmation Criteria, Nonconsensual Confirmations

If a debtor's income is below the median for his or her State, "amounts reasonably necessary" include the full amount needed for "maintenance or support," 11 U.S.C.S. § 1325(b)(2)(A)(i), but if the debtor's income exceeds the state median, only certain specified expenses are included, 11 U.S.C.S. §§ 707(b)(2), 1325(b)(3)(A).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN31</u>[♣] Confirmation Criteria, Nonconsensual Confirmations

It is appropriate under 11 U.S.C.S. § 1325(b) to calculate a debtor's projected disposable income using the inclusions and exclusions from disposable income set forth in the Bankruptcy Code and the deductions permitted by the Code, supplemented as of the date of confirmation and adjusted to take into account changes during the applicable commitment period that are known or virtually certain at the time of confirmation.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN32</u>[±] Confirmation Criteria, Nonconsensual Confirmations

The applicable commitment period for purposes of <u>11</u> <u>U.S.C.S. § 1325(b)</u> applies to debtors with zero or negative projected disposable income.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

HN33[| Confirmation Criteria, Nonconsensual

Under 11 U.S.C.S. § 1325(b), a plan that does not propose to pay the holders of unsecured claims in full may not be confirmed over objection unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors under the plan. 11 U.S.C.S. § 1325(b)(1)(B). Under the express language of § 1325(b)(4), the applicable commitment period does not depend on the amount of the debtor's projected disposable income. To the contrary, the applicable commitment period depends on the current monthly income of the debtor and the debtor's spouse combined. 11 U.S.C.S. § 1325(b)(4). Section 1325(b)(4) expressly states that the applicable commitment period shall be three years, unless the debtor's current monthly income is above the applicable state median, in which case it shall be not less than five years. 11 U.S.C.S. § 1325(b)(4)(A).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

<u>HN34</u>(≛) Confirmation Criteria, Nonconsensual Confirmations

Confirmation of a plan of less than three or five years in length, respectively, is permissible only if the plan provides for payment in full of all allowed unsecured claims over a shorter period. 11 U.S.C.S. § 1325(b)(4)(B). Accordingly, the express statutory language strongly suggests that, upon the filing of an objection to confirmation of a plan that does not propose to pay unsecured claims in full, in order for the plan to be confirmed under § 1325(b)(1)(B), it must provide that all of the debtor's projected disposable income will be applied to make payments over a duration equal to the applicable commitment period and that this is the case whether the debtor has negative, zero, or positive projected disposable income.

Bankruptcy Law > ... > Plan
Confirmation > Confirmation
Criteria > Nonconsensual Confirmations

<u>HN35</u>[♣] Confirmation Criteria, Nonconsensual Confirmations

Page 8 of 29

634 F.3d 327, *327; 2011 U.S. App. LEXIS 2182, **1; 2011 FED App. 0033P (6th Cir.), ***Cir.)

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, a debtor with zero or negative projected disposable income may propose a confirmable plan by making available income that falls outside of the definition of disposable income, such as benefits under the Social Security Act, to make payments under the plan to administrative, priority and secured creditors and to make any payments to unsecured creditors required to satisfy other confirmation requirements. Other confirmation requirements would include the best-interests test set forth in 11 U.S.C.S. § 1325(a)(4), which provides that, in order for a Chapter 13 plan to be confirmable, the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 on such date.

Governments > Legislation > Interpretation

HN36[Legislation, Interpretation

It is appropriate to consult legislative history where a textual analysis fails to produce a conclusive result, or where it leads to ambiguous or arguably unreasonable results, in which case a court may look to legislative history to interpret a statute.

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Nonconsensual Confirmations

Governments > Legislation > Interpretation

HN37(Confirmation Criteria, Nonconsensual Confirmations

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requires certain debtors to make payments over a period that is not less than fives years -- a clearly temporal requirement -- and the determination of which debtors must do so is based solely on the current monthly income of the debtor and the debtor's spouse combined, not on whether the debtor has positive projected disposable income.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

HN38 2 Plans, Plan Modification

See 11 U.S.C.S. § 1329(a)

Governments > Legislation > Interpretation

HN39[Legislation, Interpretation

Where each competing interpretation of a Bankruptcy Code provision amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is consistent with the plain language of the statute, courts must apply the interpretation that has the best chance of fulfilling BAPCPA's purpose of maximizing creditor recoveries.

Counsel: ARGUED: Krispen S. Carroll, OFFICE OF THE CHAPTER 13 TRUSTEE, Detroit, Michigan, for Appellant.

Melissa A. Caouette, Livonia, Michigan, for Appellees.

ON BRIEF: Krispen S. Carroll, Maria Gotsis, OFFICE OF THE CHAPTER 13 TRUSTEE, Detroit, Michigan, for Appellant.

Melissa A. Caouette, Charles J. Schneider, Livonia, Michigan, for Appellees.

Judges: Before: COLE and CLAY, Circuit Judges; KATZ, District Judge.*

Opinion by: COLE

Opinion

[*330] COLE, Circuit Judge. As numerous courts and commentators have noted, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") has created many difficult problems of statutory interpretation, none more vexing than those [***2] arising from application of the "projected disposable income test" imposed by 11 U.S.C. § 1325(b)(1). HN1[*] Under § 1325(b)(1)(B) of the Bankruptcy Code (the "Code"), if the Chapter 13 trustee or the holder of an allowed unsecured claim objects to the confirmation of a debtor's plan that does not provide [**2] for full payment of unsecured claims, the plan may

^{*}The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Page 9 of 29

634 F.3d 327, *330; 2011 U.S. App. LEXIS 2182, **2; 2011 FED App. 0033P (6th Cir.), ***2

be confirmed only if it "provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). In addition to replacing the phrase "three-year period" formerly used in § 1325(b)(1)(B) with the term "applicable commitment period" and inserting in that subsection the phrase "to unsecured creditors" before "under the plan," BAPCPA substantially redefined the term "disposable income" and established different applicable commitment periods depending on whether the "current monthly income" (as defined in § 101(10A)) of the debtor and the debtor's spouse combined, when multiplied by 12, is above or below the median income of the relevant state. Three interpretative issues raised by these changes are presented in this appeal. First, if the trustee or the holder of an unsecured claim objects to the confirmation of a Chapter 13 plan of a debtor with positive projected disposable income who is not proposing to pay unsecured claims in full, does § 1325(b) require the plan to have [**3] a duration equal to the applicable commitment period in order to be confirmed? Second, how does the amended definition of disposable income set forth in § 1325(b)(2) affect the calculation of a debtor's "projected disposable income"? Third, if the calculation demonstrates that the debtor has zero or negative projected disposable income, does any temporal requirement imposed by § 1325(b) apply?

Krispen Carroll, Chapter 13 Trustee for the Eastern District of Michigan (the "Appellant"), contends that § 1325(b) imposes a minimum plan length and that there is no exception for debtors who have zero or negative projected disposable income. Even if there were such an exception, debtors Richard and Marlene Baud (the "Appellees") would not qualify for it, the Appellant argues, contending that they do in fact have positive projected disposable income. The Appellees counter that § 1325(b) establishes a minimum amount that must be paid to unsecured creditors, not a minimum duration [***3] of the plan and that, even if § 1325(b) does mandate a minimum plan length, there is an exception for debtors, like them, with negative projected disposable income.

Whether § 1325(b) as amended by BAPCPA requires a Chapter [**4] 13 plan that has drawn an objection and that provides for a less than full recovery for unsecured claimants to have a duration equal to the applicable commitment period if the debtor has positive projected disposable income, whether the amended definition of disposable income signifies that courts must no longer

include in the calculation of projected disposable income certain categories of income they typically included prior to BAPCPA and must permit above-median-income debtors to deduct certain expenses they might not have been able to deduct before BAPCPA, and whether any temporal requirement set forth in § 1325(b) applies to debtors with zero or negative projected [*331] disposable income, are questions that have deeply divided the courts.

Our holding today is three-fold. First, we hold that, HN2[1 if the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan of a debtor with positive projected disposable income who is not proposing to pay unsecured claims in full, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over [**5] a duration equal to the applicable commitment period imposed by § 1325(b). Further, we hold that the calculation of a debtor's projected disposable income: (a) must not include items-such as benefits received under the Social Security Act-that are excluded from the definition of currently monthly income set forth in § 101(10A); and (b) must deduct expenses that the Code, as amended by BAPCPA, permits above-median-income debtors to deduct. Finally, we hold that HN3[*] there is no exception to the temporal requirement set forth in § 1325(b) for debtors with zero or negative projected disposable income. Accordingly, we AFFIRM in part and REVERSE in part the district court's opinion and order, and REMAND the case to the district court with instructions to remand to the bankruptcy court for further proceedings consistent with this opinion.

[***4] I. BACKGROUND

A. The Statutory Framework

Prior to BAPCPA's passage, the Code required that, if the Chapter 13 trustee or the holder of an allowed unsecured claim objected to confirmation, then the debtor's plan could be confirmed only if it (1) called for full payment of the unsecured claim(s) or (2) provided that "all of the debtor's projected disposable income [**6] to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." 11 U.S.C. § 1325(b)(1) (2000). The Code defined "disposable income" loosely as "income which is

Page 10 of 29

634 F.3d 327, *331; 2011 U.S. App. LEXIS 2182, **6; 2011 FED App. 0033P (6th Cir.), ***4

received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions . . . and . . . if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business." 11 U.S.C. § 1325(b)(2) (2000). Bankruptcy courts determined a debtor's income and reasonably necessary expenses based on the debtor's actual financial circumstances, using "the best information available at the time of confirmation," 6 Keith M. Lundin, Chapter 13 Bankruptcy § 494.1 (3d ed. 2000 & Supp. 2006), making adjustments to "account [for] foreseeable changes in a debtor's income or expenses." Hamilton v. Lanning, 130 S. Ct. 2464, 2469, 177 L. Ed. 2d 23 (2010) (describing pre-BAPCPA practice).

BAPCPA extensively amended $\underline{\S}$ 1325(b) by substituting the term "applicable commitment period" for "three-year [**7] period" in $\underline{\S}$ 1325(b)(1), redefining "disposable income" in $\underline{\S}$ 1325(b)(2), and adding $\underline{\S}$ 1325(b)(3) and (b)(4). Subsections (b)(1) and (b)(2) now read as follows:

HN4 (*) (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

[***5] (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment [*332] period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent [**8] of the debtor, or

for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions . . . in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(1)—(2) (Supp. 2010) (emphasis added). Consequently, HN5[1] determining whether a plan may be confirmed over objection now requires several steps. First, in order to determine the debtor's "disposable income" according to the revised definition in § 1325(b)(2) (which itself expressly excludes certain categories of income), one must calculate the debtor's "current monthly income" and the "amounts reasonably necessary to be expended" for, inter alia, the maintenance or support of the debtor or a dependent of the debtor.

HN6[*] Under 11 U.S.C. § 101(10A), the term "current monthly income" means the average gross monthly income that the debtor receives, derived during a sixmonth look-back period, excluding "benefits received under the Social Security Act" [**9] and certain other payments not relevant here. See 11 U.S.C. § 101(10A)(B). Because current monthly income is based on the debtor's past income (in most cases, income the debtor [***6] receives that is derived during the 6-month period immediately before the bankruptcy 1 and excludes certain payments, it will not necessarily reflect the debtor's actual income at the time of confirmation. See 6 Lundin, supra, § 468.1 (describing the calculation of current monthly income).

¹ See 11 U.S.C. § 101(10A)(A)(i). Sections 101(10A)(A)(ii) and 521(i)(3) of the Code also offer a Chapter 13 debtor the option of seeking leave to delay the filing of "Schedule I — Current Income of Individual Debtor(s)" ("Schedule I") and requesting that the bankruptcy court select a six-month period that is more representative of the debtor's future monthly income in calculating current monthly income. See In re Dunford, 408 B.R. 489, 497 (Bankr. N.D. III. 2009) (granting Chapter 13 debtor an extension of the time to file Schedule I and resetting the six-month period for calculation of current monthly income). Such a request must be made within 45 days after the filing of the petition. See 11 U.S.C. § 521(i)(3).

Page 11 of 29

634 F.3d 327, *332; 2011 U.S. App. LEXIS 2182, **9; 2011 FED App. 0033P (6th Cir.), ***6

HN7[*] The appropriate [**10] method for calculating "amounts reasonably necessary to be expended" depends on whether the debtor's current monthly income is above or below the state median income. For debtors with current monthly income equal to or less than the applicable median family income, § 1325(b) is silent on how to calculate these amounts, suggesting that they are to be based (as before BAPCPA) on the debtor's reasonably necessary expenses. See Schultz v. United States, 529 F.3d 343, 348 (6th Cir. 2008) (noting that expenditures for below-median-income [*333] debtors are to be calculated as they were pre-BAPCPA); 6 Lundin, supra, § 466.1 ("Chapter 13 debtors with [current monthly income] less than applicable median family income remain subject to the familiar reasonable and necessary test for the deductibility of expenses in § 1325(b)(2)(A) and (B)."). For debtors with current monthly income exceeding the applicable median family income, however, § 1325(b)(3) requires courts to determine the amounts reasonably necessary to be expended in accordance with the "means test," i.e., the statutory formula for determining whether a presumption of abuse arises in Chapter 7 cases. See 11 U.S.C. § 1325(b)(3) (Supp. 2010) [**11] (requiring that HN8[*] "[a]mounts reasonably necessary to be expended under paragraph (2) . . . be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than [the applicable state median]"); Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 721-22, 178 L. Ed. 2d 603 (2011) ("For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants [***7] the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations."); Lanning, 130 S. Ct. at 2470 n.2 ("The formula for above-medianincome debtors is known as the 'means test' and is reflected in a schedule (Form 22C) that a Chapter 13 debtor must file."). The result of determining these expenditures in accordance with the means test is that above-median-income debtors must use several standardized expenditure figures in lieu of their own actual monthly living expenses, see 11 U.S.C. § 707(b)(2)(A)(ii)(l), 2 a fact recognized by the Advisory

Committee on Bankruptcy Rules when it promulgated [**12] Official Form 22C. See Official Form 22C, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, lines 24-29 (Dec. 2010). The standardized figures are derived from the IRS National Standards (for allowable living expenses and out-of-pocket health care) and IRS Local Standards (for housing, utilities and transportation expenses). See Means Testing: Census Bureau, IRS Data and Administrative Expenses Multipliers,

http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm (last visited Jan. 31, 2011) (listing amounts for Local and National Standards). HN9[*] Above-medianincome debtors also are allowed to deduct their "actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides[.]" See 11 U.S.C. § 707(b)(2)(A)(ii)(I); Ransom, 131 S. Ct. at 727 ("For the Other Necessary Expense categories . . . the debtor may deduct his actual expenses, no matter how high they are."). These Other Necessary Expenses include certain taxes, involuntary employment deductions, life insurance on the debtor, certain courtordered payments, certain educational expenses, childcare, [**13] unreimbursed health care and telecommunications services. See Official Form 22C, lines 30-37. Expenditures of above-median-income debtors for other items-including health and disability insurance, contributions to the care of certain household or [*334] family members, protection against family violence, home energy costs in excess of the allowance [***8] specified by IRS Local Standards, certain limited educational expenses, additional food and clothing expenses in excess of the applicable IRS National Standards and a certain amount of charitable contributions-are based on debtors' own reasonably necessary needs. See 11 U.S.C. § 707(b)(2)(A)(ii)(I)-(V); Official Form 22C, lines 39-45. HN10 The means test and the Official Form allow certain deductions on account of ongoing payments contractually due on secured debts and priority claims without regard to whether those payments are reasonably necessary. See 11 U.S.C. § 707(b)(2)(A)(iii)-(iv); Official Form 22C, lines 47-49. Because standardized expense figures are used in portions of the calculation, however, the amounts reasonably necessary to be expended by abovemedian-income debtors are unlikely to reflect these

expenses exceed the amounts listed in the tables, for example, the debtor may claim an allowance only for the specified sum, rather than for his real expenditures.").

² See <u>Ransom</u>, 131 S. Ct. at 727 ("Although the expense amounts in the Standards apply only if the debtor incurs the relevant expense, the debtor's out-of-pocket cost may well not control the amount of the deduction. If a debtor's actual

Page 12 of 29

634 F.3d 327, *334; 2011 U.S. App. LEXIS 2182, **13; 2011 FED App. 0033P (6th Cir.), ***8

debtors' actual expenses. *Cf.* 6 Lundin, *supra*, [**14] § 500.1 ("The amount of disposable income determined by the formula in § 1325(b)(1) will bear no certain relationship to the debtor's actual financial ability to make payments . . . because the deductions from [current monthly income] to determine disposable income are artificial and not based on the debtor's actual financial circumstances"). ³

HN11[1] After calculating the amounts reasonably necessary to be expended on, among other things, the maintenance or support of the debtor, the next step in determining whether a plan may be confirmed over objection is to subtract these amounts (as well as any additional amounts excluded from disposable income by § 1325(b)(2) itself and other sections of the Code 4 from the debtor's current monthly income in order to derive the debtor's "disposable income." See 11 U.S.C. § 1325(b)(1)-(2). Notably, however, § 1325(b)(1) requires that all of the debtor's "projected disposable income" over the applicable commitment period be applied to make payments to unsecured creditors. Determining what the term "projected" adds to § 1325(b)(2)'s definition of disposable [***9] income led to a split among the courts. See 6 Lundin, supra, § 467.1 (discussing the different approaches to calculating projected disposable income). The Supreme Court has weighed in on this question. In Lanning, the Supreme Court rejected the "mechanical" approach to calculating projected disposable income, under which the debtor's average monthly disposable income figure was simply multiplied by [**16] the number of months of the applicable commitment period. Lanning, 130 S. Ct. at 2473-77. Instead, the Supreme Court adopted the "forward-looking" approach, under which the debtor's projected disposable income is calculated by taking into account any "known or virtually certain changes" in the

debtor's disposable income at the time of confirmation. Id. at 2478. As discussed in more detail below, in our decision in <u>Darrohn v. Hildebrand (In re Darrohn), 615 F.3d 470 (6th Cir. 2010)</u>, we applied the [*335] holding in <u>Lanning</u> to an expense—the debtors' monthly mortgage payment—that the above-median-income debtors would have been able to deduct except for the "known or virtually certain" change in the debtors' circumstances occasioned by their decision to surrender the property to the mortgagee. See <u>Darrohn, 615 F.3d at 477</u>.

HN12 The amount of the debtor's projected disposable income also depends on the "applicable commitment period," which [**17] in turn depends on whether the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is above or below the state median. Section 1325(b)(4) provides that, unless the plan provides for full payment of allowed unsecured claims over a shorter time frame, the applicable commitment period is three years for below-median-income debtors and not less than five years for above-median-income debtors: 5

HN13 (4) For purposes of this subsection, the "applicable commitment period"—

[***10] (A) subject to paragraph (B), shall be-

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

[the applicable median income]

³ In addition to Form 22C, Chapter 13 debtors are required to disclose their current and anticipated future income and actual expenses, as set out in Schedule I and "Schedule J — Current Expenditures of Individual Debtor(s)" ("Schedule J"). Schedules I and J normally will better capture debtors' current financial circumstances as of the date of filing or, if amended, as of confirmation. The schedules, however, often times will not reflect debtors' [**15] disposable income as defined under BAPCPA.

⁴ See 11 U.S.C. § 1322(f) (excluding from disposable income amounts required to repay certain retirement loans) and § 541(b)(7) (excluding from disposable income amounts withheld or received by an employer for payment as contributions to certain plans and annuities).

⁵ HN14 A Chapter 13 plan may not provide for payments over a period that is longer than 5 years. See 11 U.S.C. § 1322(d). Thus, although § 1325(b)(4) provides that the applicable commitment period is "not less than 5 years" for above-median-income [**18] debtors, the applicable commitment period effectively is five years for such debtors, and we will refer to the applicable commitment period for above-median-income debtors as five years. See In re Johnson, 400 B.R. 639, 644 & n.5 (Bankr. N.D. III. 2009) ("The statute actually provides that the applicable commitment period for above-median income debtors is 'not less than five years.' However, an applicable commitment period of more than five years is not possible under § 1322(d), which states that a plan may not provide for payments over a period longer than five years."), aff'd, 382 Fed, App'x 503 (7th Cir. June 21, 2010) (unpublished).

Page 13 of 29

634 F.3d 327, *335; 2011 U.S. App. LEXIS 2182, **18; 2011 FED App. 0033P (6th Cir.), ***10

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

11 U.S.C. § 1325(b)(4) (Supp. 2010).

B. Procedural Background

On September 26, 2008 (the "Petition Date"), the Appellees filed for Chapter 13 protection with the United States Bankruptcy Court for the Eastern District of Michigan. See Baud v. Carroll, 415 B.R. 291, 293 (E.D. Mich. 2009). The Appellees' Form 22C, which they filed on October 13, 2008, listed current monthly income of \$7,086.72 (which was above the state median for a family of two), see id., and monthly disposable income of negative \$1,203.55. See id. at 303. As required, the Appellees also filed Schedule I, listing gross [**19] monthly income of \$9,115.63 (including Social Security benefits for one of the Appellees and income from employment for the other), and Schedule J, listing actual monthly expenses of \$4,946.41. Id. at 293. Subtracting payroll deductions and Schedule J expenses from gross monthly income in Schedule I, the Appellees' monthly net income was \$402,32, as compared to disposable income of negative \$1,203.55 on their Form 22C. See id.

On October 13, 2008, the Appellees submitted a Chapter 13 plan that provided for monthly payments to general unsecured creditors totaling \$30,321.65 over a 36-month period, which would result in less than full payment on those unsecured claims. Id. at 293-94. The Appellant objected to confirmation of the proposed [*336] plan, arguing that it should be extended to 60 months to conform to the applicable commitment period for above-median-income debtors. Id. at 294. The bankruptcy court, following briefing and [***11] a hearing, sustained the Appellant's objection. The Appellees then filed an amended plan providing for monthly payments to general unsecured creditors totaling \$58,603.97 over a period of 60 months. The bankruptcy court issued an order confirming the amended plan [**20] over the Appellees' objection. Id. 6

The Appellees then filed an appeal with the United States District Court for the Eastern District of Michigan, arguing that the bankruptcy court erred in determining that the applicable commitment period under § 1325(b) imposes a temporal rather than a monetary requirement that applies to Chapter 13 debtors with zero or negative projected disposable income. Id. at 295. The Appellant countered that § 1325(b) requires a minimum plan length of 60 months for the Appellees who, their assertions to the contrary notwithstanding, had positive projected disposable income, as indicated by their Schedule I and Schedule J, on the date of the confirmation of their plan. Id. Adopting the forwardlooking approach to calculating projected disposable [**21] income that the Supreme Court has since endorsed in Lanning, the district court held that the applicable commitment period imposes a minimum plan length of 60 months for above-median-income debtors. but that this requirement does not apply when debtors, like the Appellees, have negative projected disposable income. Id. at 297-303. Accordingly, the district court reversed the bankruptcy court's order and remanded the case to allow the Appellees to modify their amended Chapter 13 plan. Id. at 303.

The Appellant now challenges the district court's decision

II. ANALYSIS

The issues presented by this appeal are questions of law that we decide de novo. See Nuvell Credit Corp. v. Westfall (In re Westfall), 599 F.3d 498, 501 (6th Cir. 2010). HN15 We review the bankruptcy court's order directly, giving no deference to the district court. Id. at 500.

[***12] A. <u>Section 1325(b)</u> Imposes a Temporal Requirement for Debtors with Positive Projected Disposable Income.

The question of whether § 1325(b) sets forth a temporal requirement or a monetary requirement has split the courts into several interpretive camps. The United States Court of Appeals for the Eleventh Circuit and a majority of other courts have held that, [**22] if the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan that provides for a less than full recovery for unsecured

Troutman Enters., Inc.), 286 F.3d 359, 364 (6th Cir. 2002)).

⁶ Following the Eighth Circuit's decision in Zahn v. Fink (In re Zahn), 526 F.3d 1140 (8th Cir. 2008), the district court concluded that debtors have standing to appeal a bankruptcy court's confirmation of their own amended plan when they have been "directly and adversely affected pecuniarily by the order." 415 B.R. at 296 (quoting Harker v. Troutman (In re

Page 14 of 29

634 F.3d 327, *336; 2011 U.S. App. LEXIS 2182, **22; 2011 FED App. 0033P (6th Cir.), ***12

claimants, the plan cannot be confirmed unless its length is equal to the applicable commitment period; according to these courts, this temporal requirement applies whether the debtor has positive, zero or negative projected disposable income. See, e.g., Whaley v. Tennyson (In re Tennyson), 611 F.3d 873, 877-78 (11th Cir. 2010); In re King, No. 10-18139, 2010 Bankr. LEXIS 3935, 2010 WL 4363173, at *2 (Bankr. D. Colo. Oct. 27, 2010); Baxter v. Turner (In re Turner), 425 B.R. 918, 920-21 (Bankr. S.D. Ga. 2010); In re Moose, 419 B.R. 632, 635-36 (Bankr. [*337] E.D. Va. 2009); In re Meadows, 410 B.R. 242, 245-47 (Bankr. N.D. Tex. 2009); In re Brown, 396 B.R. 551, 554-55 (Bankr. D. Colo. 2008); In re Lanning, Nos. 06-41037, 06-41260, 2007 Bankr. LEXIS 1639, 2007 WL 1451999, at *7-8 (Bankr. D. Kan. May 15, 2007), affd, 380 B.R. 17 (B.A.P. 10th Cir. 2007), aff'd, 545 F.3d 1269 (10th Cir. 2008), affd, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010); In re Kidd, 374 B.R. 277, 280 (Bankr. D. Kan. 2007); In re Nance, 371 B.R. 358, 369-70 (Bankr. S.D. III. 2007); In re Beckerle, 367 B.R. 718, 719-21 (Bankr. D. Kan. 2007); [**23] In re Pohl. No. 06-41236, 2007 Bankr. LEXIS 1638, 2007 WL 1452019, at *3 (Bankr. D. Kan. May 15, 2007); In re Strickland, No. 06-81060C-13D, 2007 Bankr. LEXIS 508, 2007 WL 499623, at *1-*2 (Bankr. M.D.N.C. Feb. 13, 2007); In re Casey, 356 B.R. 519, 527-28 (Bankr. E.D. Wash. 2006); In re Davis, 348 B.R. 449, 456-58 (Bankr. E.D. Mich. 2006). The United States Court of Appeals for the Eighth Circuit and other courts have held that, if the trustee or the holder of an allowed unsecured claim objects to the confirmation of a Chapter 13 plan of a debtor with positive projected disposable income whose plan provides for a less than full recovery for unsecured claimants, the plan cannot be confirmed unless its length is equal to the applicable commitment period; these courts, however, have declined to decide whether this temporal requirement applies when the debtor has zero or negative projected disposable income. See Coop v. Frederickson (In re Frederickson), 545 F.3d 652, 660 & n.6 (8th Cir. 2008) [***13], cert. denied, 129 S. Ct. 1630, 173 L. Ed. 2d 997 (2009); In re Wirth, 431 B.R. 209, 213 (Bankr. W.D. Wis. 2010); In re Slusher, 359 B.R. 290, 300 n.17 (Bankr. D. Nev. 2007). The United States Court of Appeals for the Ninth Circuit as well as other courts have [**24] held that § 1325(b), although not establishing a minimum plan duration, does require a debtor with positive projected disposable income facing a plan objection and whose plan provides for a less than full recovery for unsecured claimants to pay unsecured creditors for the duration of the applicable commitment period, but that this temporal requirement does not apply if the debtor has zero or negative projected

disposable income. See, e.g., Maney v. Kagenveama (In re Kagenveama), 541 F.3d 868, 875-77 (9th Cir. 2008); Musselman v. eCast Settlement Corp., 394 B.R. 801, 814 (E.D.N.C. 2008); In re Green, 378 B.R. 30, 38 (Bankr. N.D.N.Y. 2007); In re Lawson, 361 B.R. 215, 220 (Bankr. D. Utah 2007); In re Alexander, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006). Finally, a significant minority of lower courts have followed the "monetary" approach, holding that § 1325(b) does not require the debtor to propose a plan that lasts for the entire length of the applicable commitment period; rather, as long as the plan provides for the payment of the monetary amount of disposable income projected to be received over that period, the court may confirm a plan that lasts for a shorter time. 7 See, e.g., In re Burrell, No. 08-71716, 2009 Bankr. LEXIS 1570, 2009 WL 1851104, at *3-*5 (Bankr. C.D. III. June 29, 2009); [**25] Dehart v. Lopatka (In re Lopatka), 400 B.R. 433, 436-40 (Bankr. M.D. Pa. 2009); In re Williams, 394 B.R. 550, 566-570 (Bankr. D. Colo. 2008); In re McGillis, 370 B.R. 720, 734-39 (Bankr. W.D. Mich. 2007); In re Mathis, 367 B.R. 629, 632-36 (Bankr. N.D. III. 2007); In re Swan, 368 B.R. 12, 24-27 (Bankr. N.D. Cal. 2007); In re Brady, 361 B.R. 765, 776-77 (Bankr. D.N.J. 2007) [*338]; In re Fuger, 347 B.R. 94, 97-101 (Bankr. D. Utah 2006).

This question also has divided the commentators. Although it does not address the issue directly, Collier's authoritative bankruptcy treatise appears to assume a [***14] temporal requirement. See 8 Collier on Bankruptcy ¶ 1325.08[4][d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). By contrast, in the leading treatise on Chapter 13, Judge Lundin supports the [**26] monetary approach. See 6 Lundin, supra, § 500.1 ("The applicable commitment period does not require that the debtor actually make payments for any particular period of time. Rather, it is the multiplier in a formula that determines the amount of disposable income that must be paid to unsecured creditors.").

Although tenable arguments support each approach, today we join the Eighth, Ninth and Eleventh Circuits in holding that, <u>HN16</u> if the trustee or the holder of an allowed unsecured claim objects to confirmation of a

⁷This approach also is known as the "multiplier" or "multiplicand" approach. It should not be confused with the mechanical approach to the calculation of projected disposable income, which the Supreme Court rejected in Lanning in favor of the forward-looking approach, allowing consideration of "known or virtually certain changes" to debtors' projected disposable income. See <u>Lanning</u>, 130 S. Ct. at 2478.

Page 15 of 29

634 F.3d 327, *338; 2011 U.S. App. LEXIS 2182, **26; 2011 FED App. 0033P (6th Cir.), ***14

Chapter 13 plan of a debtor with positive projected disposable income whose plan provides for a less than full recovery for unsecured claimants, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over a duration equal to the applicable commitment period set forth in § 1325(b). 8 HN17[1] Our analysis of the meaning of § 1325(b) begins "where all such inquiries must begin: with the language of the statute itself." Palmer v. United States (In re Palmer). 219 F.3d 580, 583 (6th Cir. 2000) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)). [**27] In this regard, certain courts adopting the temporal approach have relied, at least in part, on the temporal connotation of the term "applicable commitment period." As the Eleventh Circuit recently stated:

[W]e first look at the term "applicable commitment period" and note that "applicable" "commitment" are modifiers of the noun, the core substance of the term, "period." The plain meaning of "period" denotes a period of time or duration. "Applicable commitment period" at its simplest is a term that relates to a certain duration, and based on its presence in § 1325, it is a duration relevant to Chapter 13 bankruptcy. The modifier "commitment" then reveals that "applicable commitment period" is a duration to which the debtor is obligated to serve [if the debtor chooses to remain in Chapter 13]. Finally the meaning of "applicable" reflects the fact that there are alternate "commitment periods" depending on the debtor's classification as an above median income debtor or a below median income debtor.

[***15] Tennyson, 611 F.3d at 877 (citations omitted). Certain bankruptcy courts have followed this line of reasoning as well. See Turner, 425 B.R. at 920-21; Brown, 396 B.R. at 554-55; In re Schanuth, 342 B.R. 601, 607-08 (Bankr. W.D. Mo. 2006); [**28] Lenning, 2007 Bankr. LEXIS 1639, 2007 WL 1451999, at *7-8. The Ninth Circuit has found this rationale persuasive to the extent that the debtor has positive projected disposable income. See Kagenveama, 541 F.3d at 876 ("The plain meaning of the word 'period' indicates a

period of time.").

Although persuasive, the evident temporal connotation of the term "applicable commitment period" is not dispositive in and of itself. Indeed, adherents of the [*339] monetary approach generally concede that applicable commitment period has a temporal connotation, but conclude that the time period it establishes is simply one part of § 1325(b)(1)(B)'s calculation of the amount of the debtor's projected disposable income that must be devoted to unsecured creditors in order for a plan to be confirmed. Thus, proponents of the monetary approach contend that, although § 1325(b)(1)(B) requires that all of the debtor's projected disposable income to be received over the course of the applicable commitment period be paid to unsecured creditors, the section does [**29] not mandate that these payments be made over any particular period of time or that the plan last for any particular duration. See, e.g., Mathis, 367 B.R. at 633 ("[Section 1325(b)(1)(B)] does not say that 36 or 60 plan payments must be made, or that the plan must remain open for any particular duration of time. If Congress wanted to require a debtor to make 36 or 60 plan payments over three or [five] years, it would have said so."); 6 Lundin, supra, § 493.1 ("The disposable income test, as modified by BAPCPA, does not require that the plan last any particular period of time."). Reading § 1325(b)(1) in isolation, we might find the monetary approach to be the more plausible interpretation of the statute. As explained below, however, we conclude that the reasoning employed in Lanning-in which the Supreme Court relied both on the lack of explicit multiplier language in § 1325(b)(1) and on pre-BAPCPA practice-compels us to adopt the temporal approach. We also find that the reasoning employed in Ransomin which the Supreme Court relied on BAPCPA's purpose of ensuring that debtors "repay creditors the maximum they can afford," Ransom, 131 S. Ct. at 725 (internal quotation marks omitted)-leads [**30] to the same conclusion.

[***16] 1. The Lack of Explicit Multiplier Language or Other Indication that Congress Intended Simple Multiplication

In Lanning, the Supreme Court rejected the mechanical approach to calculating projected disposable income and, in so doing, stated that "we need look no further than the Bankruptcy Code to see that when Congress wishes to mandate simple multiplication, it does so unambiguously—most commonly by using the term

⁸ In Section II.C. we explain why we part with Kagenveama and agree with Tennyson in holding that this requirement applies to debtors with zero or negative projected disposable income.

Page 16 of 29

634 F.3d 327, *339; 2011 U.S. App. LEXIS 2182, **30; 2011 FED App. 0033P (6th Cir.), ***16

'multiplied." Lanning, 130 S. Ct. at 2472. Similarly, one strong indicator that § 1325(b) should be interpreted as establishing a temporal requirement is that, if Congress had intended the applicable commitment period simply to act as a multiplier in a calculation determining the amount of money that must be paid to unsecured creditors, it would have said so explicitly. For example, § 1325(b) itself establishes a debtor's applicable commitment period based on the current monthly income of the debtor and the debtor's spouse combined "when multiplied by 12[.]" 11 U.S.C. § 1325(b)(4). Other Code provisions illustrating that Congress has been explicit when requiring simple multiplication include § 707(b)(2) (presuming abuse if current monthly income "multiplied [**31] by 60" and reduced by permitted expenses is not less than a certain amount) and § 1322(d)(1) & (2) (establishing maximum plan lengths based on the current monthly income of the debtor and the debtor's spouse combined "multiplied by 12"). It could be argued that, had Congress intended to impose maximum plan lengths as well as a minimum time for the payments of projected disposable income in response to an objection, addressing the two requirements in separate statutory sections—§§ 1322(d) and 1325(b)—was an inelegant way to accomplish this goal. HN18[*] Inelegant drafting, however, does not provide [*340] a sufficient reason to reject an otherwise correct interpretation of the Code. See Lamie v. United States Tr., 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (accepting an interpretation of a Code provision even though "[t]he statute is awkward"). Moreover, neither § 1322(d) nor § 1325(b) is superfluous under the temporal approach. See, e.g., Tennyson, 611 F.3d at 878; Kagenveama, 541 F.3d at 879 (Bea, J., concurring in part and dissenting in part) (concluding that the "applicable commitment period is congruous, rather than superfluous, to § 1322(d)"). The provisions are not superfluous because they address different [**32] concerns. HN19[*] Section 1322(d) [***17] establishes maximum plan lengths out of a concern for keeping debtors in Chapter 13 an unduly long time (of up to ten years). 9 By contrast, § 1325(b) establishes the minimum time (upon the filing of an

objection) for the payment of projected disposable income and does so, as discussed further below, out of a concern for maximizing creditor recoveries.

Contrasting § 1325(b) with § 1129(a)(15) is also informative. HN20[] Under § 1129(a)(15), if the holder of an allowed unsecured claim that is not proposed to be paid in full objects to confirmation of a Chapter 11 plan of an individual debtor, the plan can be confirmed, if at all, only if the value of the property to be distributed is not "less than the [**33] projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments. whichever is longer." 11 U.S.C. § 1129(a)(15). In this provision Congress made clear that a Chapter 11 plan of any length may be confirmed as long as the value of the property to be distributed is not less than the projected disposable income of the debtor to be received over five years (or the length of the plan, whichever is longer). See Randolph J. Haines, Chapter 11 May Resolve Some Chapter 13 Issues, 2007 No. 8 Norton Bankr. L. Adviser 1, 1 (Aug. 2007) ("[Chapter 11] provides that if creditors are not paid in full and someone objects, then the plan must distribute at least the amount of the annualized disposable income to be received in five years or during the term of the plan, whichever is longer. This process yields a dollar amount, and nothing else. . . All of § 1129(a)(15) is only about the value of the property to be distributed under the plan, and this is entirely consistent with pre-BAPCPA Chapter 11 practice, which never imposed [**34] a minimum plan duration."). Judge Haines suggests that this supports a monetary approach to § 1325(b), questioning why Congress would "make Chapter 13 more difficult than Chapter 11, by imposing a minimum plan term that is longer than would [***18] be required of the same debtor in a Chapter 11[.]" Id. But contrasting the statutory language of §§ 1325(b) and 1129(a)(15) seems to support, rather than undercut, the temporal approach. For if Congress had desired the same result in Chapter 13 as it did in Chapter 11, it presumably would have used the same construction in § 1325(b) that it used in § 1129(a)(15). All in all, we conclude that the lack of explicit multiplier language in § 1325(b)-or some other clear indication that mere multiplication [*341] was intended, as in 1129(a)(15)—strongly supports the temporal approach.

2. Pre-BAPCPA Practice

In Lanning, the Supreme Court also looked to pre-

⁹ See In re Mandarino, 312 B.R. 214, 216 n.3 (Bankr. E.D.N.Y. 2002) ("The rationale underlying section 1322(d), expressed in the House Judiciary Committee Report and discussed in 8 Collier on Bankruptcy, ¶ 1322.17[1], 15th Edition Revised (Matthew Bender 2002) is: 'Extensions on plans... and newly incurred debts put some debtors under court supervised repayment plans for seven to ten years. This has become the closest thing there is to involuntary servitude...").

Page 17 of 29

634 F.3d 327, *341; 2011 U.S. App. LEXIS 2182, **34; 2011 FED App. 0033P (6th Cir.), ***18

BAPCPA practice, concluding that such practice "is because they were rendered prior to the enactment of telling because we HN21[*] 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Lanning, 130 S. Ct. at 2473 (quoting Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Electric Co., 549 U.S. 443, 454, 127 S. Ct. 1199, 167 L. Ed. 2d 178 (2007)). [**35] Likewise, pre-BAPCPA practice in the context of plan confirmation counsels in favor of the temporal approach.

To understand why this is so, a brief history is in order. There was a time when the Code imposed no disposable-income requirement on a debtor facing an objection to plan confirmation. At that time, bankruptcy courts would, despite an objection, sometimes confirm plans of less than three years. See In re Markman, 5 B.R. 196 (Bankr. E.D.N.Y. 1980). Cf. In re Ali, 33 B.R. 890, 895-97 (Bankr. D. Kan. 1983) (holding, in the context of examining the good-faith requirement under § 1325(a)(3), that a Chapter 13 plan proposing to pay zero percent to unsecured creditors over 25 months would be confirmed only if it were extended to 36 months). In Markman, after the debtor proposed an 18month Chapter 13 plan that would not have resulted in full payment of creditors, the Chapter 13 trustee objected to confirmation, contending that the Code required the debtor to commit to make payments over a three-year period. The bankruptcy court confirmed the plan over the trustee's objection, concluding that "[c]reditors are not prejudiced when, as in the present case, they are paid more under the [**36] Chapter 13 plan than they would receive under a Chapter 7 liquidation." Markman, 5 B.R. at 198 n.3. This, however, was before the Bankruptcy Amendments and Federal [***19] Judgeship Act of 1984 ("BAFJA") became effective. With BAFJA, Congress introduced the disposable-income requirement to the Code. Courts presented with a disposable-income objection to confirmation after the enactment of BAFJA distinguished Markman and declined to confirm plans of less than three years. See In re Turpen, 218 B.R. 908, 916 (Bankr. N.D. lowa 1998) ("Debtors provide [Markman] as support for their proposal to make payments of a fixed amount over less than three years. Markman does not aid debtors because it was decided before the disposable income requirement was added to Chapter 13 in 1984."); In re Schwarz, 85 B.R. 829, 830-31 (Bankr. S.D. lowa 1988) (stating in a Chapter 12 case that "[t]he language in section 1225(b) closely parallels the language in section 1325(b)" and concluding that "the cases upon which the debtors rely [including Markman] no longer are apposite to the issue at hand

disposable income provision of section the 1325(b)."). See also In re Greer, 60 B.R. 547, 555 (Bankr. C.D. Cal. 1986) [**37] ("If the proposed plan is less than 36 months, it must be extended to 36 months upon objection of a creditor or the Chapter 13 Trustee."); In re Wobig, 73 B.R. 292, 296 (Bankr. D. Neb. 1987) ("[T]he [Chapter 12] plan must be changed to provide that the plan will remain open for three years.

Several courts adopting the temporal approach have pointed out that pre-BAPCPA practice is consistent with that approach. See Fridley v. Forsythe (In re Fridley), 380 B.R. 538, 544 (B.A.P. 9th Cir. 2007) ("Before BAPCPA, the § 1325(b)(1) 'three-year period' operated as a temporal requirement. After BAPCPA, the § 1325(b)(1) 'applicable commitment period' continues to operate as a temporal requirement. [*342] Nothing in the statutory structure suggests that Congress meant to alter this aspect of the statute.") (citations omitted); King, 2010 Bankr. LEXIS 3935, 2010 WL 4363173, at *3 ("The Court also looks to past bankruptcy practice. Before [BAPCPA] . . . [c]ourts construed [§ 1325(b)(1)(B)] as a temporal minimum, at least at the time of confirmation, when an objection was filed." citations and internal quotation marks omitted)); In re King, 439 B.R. 129, 135 (Bankr. S.D. III. 2010); Schanuth, 342 B.R. at 608 ("Under [**38] pre-BAPCPA practice, in the face of an objection to confirmation by an unsecured creditor or the trustee, § 1325(b)(1) required a debtor to devote all of the debtor's disposable income [***20] to the plan for a minimum of three years. . . BAPCPA's revision of § 1325, albeit significant, has not changed this tenet of pre-BAPCPA practice."). By contrast, as courts adopting the temporal approach also have noted, the monetary approach is inconsistent with post-BAFJA, pre-BAPCPA practice. See Pohl, 2007 Bankr. LEXIS 1638, 2007 WL 1452019. at *3 (holding that the monetary approach "is a significant departure from the pre-BAPCPA practice requiring a minimum period of payments that is simply not justified by the language or structure of the statute, or by the admittedly scant legislative history" 10); Strickland, 2007 Bankr, LEXIS 508, 2007 WL 499623, at

^{10 &}quot;[S]cant legislative history" is a reference to H.R. Rep. 109-31(I), p. 79, 2005 U.S.C.C.A.N. 88, 146. In adopting the temporal approach, some courts have relied in part on this House Report, which has a section heading entitled "Chapter 13 Plans to Have 5-Year Duration in Certain Cases." See, e.g., Tennyson, 611 F.3d at 879.

Page 18 of 29

634 F.3d 327, *342; 2011 U.S. App. LEXIS 2182, **38; 2011 FED App. 0033P (6th Cir.), ***20

*2; Lanning, 2007 Bankr. LEXIS 1639, 2007 WL 1451999, at *8; Davis, 348 B.R. at 457. See also 3 Lundin, supra, § 199.1 ("A plan shorter than 36 months will likely face an objection to confirmation unless the plan proposes to pay all claim holders in full." (citing pre-BAPCPA version of § 1325(b)(1)(A))). Post-BAPCPA decisions adopting the monetary approach in which the courts point to pre-BAPCPA practice in support [**39] of their position rely on cases decided in the context of plan modification or early-payoff, not confirmation. See Fuger, 347 B.R. at 97-101; Swan, 368 B.R. at 25. By contrast, as discussed above, pre-BAPCPA decisions addressing plan confirmation support the temporal approach.

Before leaving the issue of pre-BAPCPA practice, it bears noting that, prior to BAPCPA, § 1325(b)(1)(B) required that all of the debtor's projected disposable income to be received in the specified three-year period be applied to make payments "under the plan." HN22[1] Section 1325(b)(1)(B) now requires that all of the debtor's projected disposable income to be received in the applicable commitment period be applied to make payments "to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). The addition of the phrase "to unsecured creditors" may raise certain issues that [**40] we need not reach today. See, e.g., In re Johnson, 408 B.R. 811, 817 (Bankr. W.D. Mo. 2009) (denying confirmation of a Chapter 13 plan that provided for projected disposable income to be paid to priority unsecured creditors, which the court held were not "unsecured creditors" within the meaning of § 1325(b)). Whatever its effect, however, [***21] we do not believe that the addition of the phrase "to unsecured creditors" evinces a clear indication that Congress intended bankruptcy courts to depart from their pre-BAPCPA practice of declining to confirm plans of less than the required length if there was an objection to confirmation.

3. BAPCPA's Purpose

The facts of *Ransom* presented the issue of whether a debtor who owns a vehicle but does not have any ongoing loan or [*343] lease payments to make on the vehicle may take an ownership deduction for that vehicle when calculating projected disposable income. In holding that such a debtor may not take the deduction, the Supreme Court stated that "the text, context, and *purpose* of the statutory provision at issue" precludes the debtor from taking the deduction. *Ransom*, 131 S. Ct. at 721 (emphasis added). Regarding the purpose of the statutory provision, the [**41] Supreme Court stated:

Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system. In particular, Congress adopted the means test . . . to help ensure that debtors who can pay creditors do pay them.

....

. . . [C]onsideration of BAPCPA's purpose strengthens our reading of the [statute]. Congress designed the means test to measure debtors' disposable income and, in that way, to ensure that [they] repay creditors the maximum they can afford. This purpose is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor's ability to afford repayment. Cf. [Lanning, 130 S. Ct. at 2475-2476] (rejecting an interpretation of the Bankruptcy Code that "would produce [the] senseless resul[t]" of "deny[ing] creditors payments that the debtor could easily make").

. . . Ransom's interpretation would run counter to the statute's overall purpose of ensuring that debtors repay creditors to the extent they can[.]

. . . .

Ransom . . . contends that his view of the means test is necessary to avoid senseless results not intended by Congress. At the outset, we note that the policy concerns Ransom emphasizes pale beside one his reading creates: [**42] His interpretation, as we have explained, would frustrate [***22] BAPCPA's core purpose of ensuring that debtors devote their full disposable income to repaying creditors.

<u>[d. at 721, 725, 727, 729</u> (citations and internal quotation marks omitted).

In Ransom, therefore, the Supreme Court chose the interpretation of the statutory provision at issue that was at least as "consistent with the statutory text," id. 178 L. Ed. 2d at 612, as the competing interpretation, but that also would serve "BAPCPA's core purpose of ensuring that debtors devote their full disposable income to repaying creditors." Id. 178 L. Ed. 2d at 616. Likewise, in adopting the temporal approach here, we are choosing the interpretation of the statutory provision at issue that is at least as consistent with the statutory text as the competing interpretation; as explained above, we also are choosing the interpretation that is consistent with pre-BAPCPA practice—from which we see no clear indication that Congress intended bankruptcy courts to

Page 19 of 29

634 F.3d 327, *343; 2011 U.S. App. LEXIS 2182, **42; 2011 FED App. 0033P (6th Cir.), ***22

depart. As explained further below in connection with our determination that the applicable commitment period applies to debtors with zero or negative projected disposable income, we also believe that our interpretation [**43] better serves BAPCPA's core purpose, recognized by the Supreme Court in Ransom, of ensuring that debtors devote their full disposable income to repaying creditors. And applying the applicable commitment period as a temporal requirement avoids the "senseless result[] that we do not think Congress intended" of "deny[ing] creditors payments that the debtor could easily make" if additional disposable income were to become available after confirmation. Lanning, 130 S. Ct. at 2475-76. Moreover, our holding in no way implicates the Supreme Court's statement in Lanning that it was rejecting an interpretation of the Code that in certain instances would "deny [*344] the protection of Chapter 13 to debtors who meet the chapter's main eligibility requirements." Id. at 2476. At most, courts that reject the temporal approach contend that it would delay Chapter 13 debtors receipt of the discharge in certain instances. See, e.g., Swan, 368 B.R. at 24 ("[T]he absurdity [of the temporal approach] is having a debtor remain in chapter 13 awaiting discharge where, after a certain point, he has fulfilled all of the Code requirements and his plan payment is reduced to zero."). No court or commentator of which we [**44] are aware, however, has argued that the temporal [***23] approach would ultimately deny any debtor a discharge or any other protection afforded by Chapter 13.

The arguments set forth above provide compelling support for the temporal approach. In sum, therefore, we hold that, HN23[1] if the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan of a debtor with positive projected disposable income whose plan provides for a less than full recovery for unsecured claimants, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over a duration equal to the applicable commitment period set forth in § 1325(b). This holding is consistent with the better reading of the text of § 1325(b), with pre-BAPCA practice and with the core purpose of BAPCPA. Our holding also is consistent with the decisions of each of the federal appellate courts to have considered this issue. See Tennyson, 611 F.3d at 877-78; Frederickson, 545 F.3d at 660; Kagenveama, 541 F.3d at 875-77.

B. The Appellees' Projected Disposable Income as of the Date of Confirmation.

Whether [**45] the Appellees had zero, negative or positive projected disposable income as of the date of confirmation of their Chapter 13 plan turns on our answer to two questions: (1) whether benefits received under the Social Security Act can be included in the calculation of projected disposable income and (2) whether above-median-income debtors can be precluded from deducting their full mortgage payment as part of the calculation. According to the Appellant, the Appellees' Form 22C, which lists a disposable income figure of negative \$1,203.55, underestimates the actual income available to fund the Appellees' plan in three ways. The Appellant points out that Form 22C (1) does not include the Appellees' Social Security benefits (\$1,758 per month); (2) sallows for standardized deductions for living expenses, healthcare, and transportation, even if the Appellees did not incur these costs; and (3) permits the Appellees to deduct their entire monthly mortgage payment of \$1,699.93, even though this exceeds the IRS Local Standard of \$791. The Appellant also argues that Form 22C does not reflect that the Appellees earned almost \$300 more in monthly wages on the [***24] Petition Date than in the six months before [**46] the month of the Petition Date, nor that they would complete their monthly 401(k) loan repayments of approximately \$480 seven months after confirmation. Relying on the Supreme Court's decision in Lanning and our decision in Darrohn, the Appellant concludes that all of this additional income should be included in the calculation of projected disposable income. The parties, however, agree that the determination of whether the Appellees had zero, negative or positive projected disposable income as of the confirmation date turns primarily on the issue of whether benefits received under the Social Security Act can be included in the calculation. Given the numbers, it also matters whether [*345] the Appellees are permitted to deduct their entire monthly mortgage payment. We will consider the question presented by the benefits under the Social Security Act first and then turn to the Appellees' mortgage payment.

We conclude that <u>HN24</u>[**] benefits received under the Social Security Act—such as the benefits the Appellees receive—should not be included in the calculation of projected disposable income. ¹¹ As previously noted, in

¹¹The benefits the Appellees are receiving are not on account of unemployment compensation. Thus, we do not decide the

Page 20 of 29

634 F.3d 327, *345; 2011 U.S. App. LEXIS 2182, **46; 2011 FED App. 0033P (6th Cir.), ***24

Lanning the Supreme Court rejected the mechanical approach to calculating projected [**47] disposable income, under which the debtor's monthly disposable income figure simply is multiplied by the number of months comprising the applicable commitment period. See Lanning, 130 S. Ct. at 2473-77. Noting that in most cases "nothing more is required" in calculating projected disposable income than projecting the disposable income figure from Form 22C over the term of the plan, the Supreme Court held that "in unusual cases . . . a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses." Id. at 2475. Thus, the Supreme Court held that the bankruptcy court could take into account the fact that the disposable-income figure on Lanning's Form 22C was inflated greatly by a one-time buyout from her former employer. Id. at 2470. In Darrohn, we considered Lanning's application to a situation in which changes [***25] in the debtors' financial circumstances led to Form 22C's understating their income and overstating their expenditures. During the six months prior to filing, David Darrohn had been unemployed for ninety days, but subsequently secured another job, leading to a historical income-figure on Form 22C that was [**48] substantially lower than the income figure on the Schedule I; in addition, the Form 22C expenditure figure included mortgage payments on properties, notwithstanding the Darrohns' undisputed intent to surrender both properties in their Chapter 13 plan. See Darrohn, 615 F.3d at 476. We held that these changes fell squarely within Lanning's holding. Because the changes to the debtors' income and mortgage payment were both "known or virtually certain" at the time of confirmation, the bankruptcy court had the authority to take them into account when calculating the debtors' projected disposable income. Id. at 477. Neither Lanning nor Darrohn, however, supports the view that a court may disregard the Code's definition of disposable income (which incorporates the income exclusions of § 101(10A)) simply because there is a disparity between the amount calculated using that definition and the debtor's actual available income as set forth on Schedule I. In other words, HN25[1] the discretion Lanning affords does not permit bankruptcy courts to alter BAPCPA's formula for calculating disposable income (i.e., does not permit the court to

alter the items to be included in and excluded from income). Permitting [**49] the bankruptcy court-as the Appellant would have us do-to include Social Security benefits in the calculation of the Appellees' projected disposable income essentially would read out of the Code BAPCPA's revisions to the definition of disposable income. Courts so held prior [*346] to the Supreme Court's decision in Lanning. See Kibbe v. Sumski (In re Kibbe), 361 B.R. 302, 311-12 (B.A.P. 1st Cir. 2007) ("[I]n its adherence to Schedule I, the bankruptcy court abandoned the new definition for 'disposable income.' But Congress apparently intended to exclude certain categories of income when it defined 'disposable income' generally and then in the chapter 13 context. Not to be included in the income determination under chapter 13 are . . . benefits received under the Social Security Act "); In re Bartelini, 434 B.R. 285, 295-96 (Bankr. N.D.N.Y. 2010) (same); Lanning, 2007 Bankr. LEXIS 1639, 2007 WL 1451999, at *5 n.21 (same); In re Barfknecht, 378 B.R. 154, 161-62 (Bankr. W.D. Tex. 2007) (same); In re McCarty, 376 B.R. 819, 825 (Bankr. N.D. Ohio 2007) [***26] (same); In re Upton, 363 B.R. 528, 534-35 (Bankr. S.D. Ohio 2007) (same); Schanuth, 342 B.R. at 605 (same); see also Baud, 415 B.R. at 302 ("In this case, the difference [**50] between Schedules I and J and the Form 22C calculation could be attributable to the fact that current monthly income under the new definition excludes Debtors' social security income[.]"). 12 And nothing in Lanning suggests that bankruptcy courts may ignore the statutory definition of disposable income in this manner. See 8 Collier on Bankruptcy ¶ 1325.08[4][a] ("There is no suggestion [in Lanning] that a bankruptcy court may rely on the term 'projected' to otherwise deviate from the formula-for example, by including income that the formula excludes, such as Social Security benefits, or altering expense allowances permitted by the formula."). Thus, post-Lanning, courts have continued to exclude from the calculation of projected disposable income the items excluded by § 101(10A). See In re Johnson, 382 Fed. App'x 503, 506 (7th Cir. June 21, 2010) (unpublished) (affirming, post-Lanning, the bankruptcy court's "harmonizing' approach" to HN26[1] the projected disposable income calculation, which "employ(s) the inclusions and exclusions from 'current

question—which also has split the courts—of whether unemployment-compensation benefits are "benefits received under the Social Security Act" within the meaning of § 101(10A)(B). See Washington v. Reding (In re Washington), 438 B.R. 348, 350 (M.D. Ala. 2010) (collecting cases on both sides of the issue).

¹² Contra In re Timothy, No. 08-28332, 2009 Bankr. LEXIS 1198, 2009 WL 1349741, at *6 (Bankr. D. Utah May 12, 2009) [**52] (holding that Social Security benefits can be included in the calculation of projected disposable income), affd, Nos. UT-10-003, 08-28332, 442 B.R. 28, 2010 WL 5383897, at *6 (B.A.P. 10th Cir. 2010).

Page 21 of 29

634 F.3d 327, *346; 2011 U.S. App. LEXIS 2182, **52; 2011 FED App. 0033P (6th Cir.), ***26

appl[ies] them not in the retrospective manner specified by that provision but rather in the forward-looking [**51] manner envisioned by section 1325(b)"); In re . 2010 Bankr. LEXIS 4095 Welsh, 440 B.R. (Bankr. D. Mont. 2010) ("Current monthly income defined under BAPCPA, § 101(10A)(B), excludes benefits received under the Social Security Act; Section 101(10A)(B) is a clear indication that Congress intended a departure from pre-BAPCPA practice and [to] exclude SSI income from the disposable income calculation."). But see In re Cranmer, 433 B.R. 391, 399 (Bankr. D. Utah 2010) (holding that a case where the debtor has Social Security benefits is the "unusual case the Supreme Court meant in [Lanning] where there are other known sources of income that should be included in the calculation of [projected disposable income]"). 13

[***27] [*347] Prior to BAPCPA, courts typically included Social Security benefits in the calculation of disposable income. See Hagel v. Drummond (In re Hagel), 184 B.R. 793, 796 (B.A.P. 9th Cir. 1995); In re Cornelius, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995); In re Schnabel, 153 B.R. 809, 817 (Bankr. N.D. III. 1993). See also Bartelini, 434 B.R. at 296 (stating that, prior to BAPCPA, courts "consistently included social security income in the calculation of projected disposable income." (internal quotation marks omitted)). This appears to be indicative of a pre-BAPCPA practice to include benefits received under the Social Security Act

13 Courts are split on the issue of whether a bankruptcy court may consider an above-median-income debtor's decision to not commit available Social Security benefits to unsecured creditors in the good-faith analysis under 11 U.S.C. § 1325(a)(3). Cf. Fink v. Thompson (In re Thompson), 439 B.R. 140, 142-43 (B.A.P. 8th Cir. 2010) (holding that debtors' exclusion of Social Security benefits as source of payment under Chapter 13 plan could not be considered in good-faith analysis), and Barfknecht, 378 B.R. at 164 ("[W]hether plan payment must include income derived from Social Security benefits is already specifically addressed elsewhere in the Bankruptcy Code. The trustee's proposed reading of the good faith standard would swallow up these other explicit statutory treatments, effectively rendering them nullities."), with Bartelini, 434 B.R. at 297 (holding that a debtor's decision to not commit Social Security benefits to pay unsecured creditors may be "considered as one of many factors under a [**53] totality of the circumstances inquiry to determine good faith"), and Upton, 363 B.R. at 536 (same). Because the Appellees have chosen to devote Social Security benefits to unsecured creditors, this good-faith issue is not before us

monthly income' set forth in section 101(10A), but in the calculation of projected disposable income. If so, we see a "clear indication that Congress intended . . . a departure" from any such pre-BAPCPA practice, Lanning, 130 S. Ct. at 2473, in the combined effect of BAPCPA's (1) defining current monthly income to expressly exclude benefits received under the Social Security Act [**54] and (2) amending the definition of disposable income to incorporate the definition of current monthly income. And this clear indication by Congress that Social Security benefits are to be treated differently post-BAPCPA must override BAPCPA's purpose of ensuring that debtors "repay creditors the maximum they can afford," Ransom, 131 S. Ct. at 725 (internal quotation marks omitted), because any application of that purpose must be "consistent with the statutory text[.]" Id.

> Were we to follow the approach espoused by the Appellant, bankruptcy courts-contrary to what the Supreme Court contemplated in Lanning and contrary to the express statutory language-would be permitted to depart from the definition of disposable income set forth in § 1325(b)(2) in virtually every case, given the improbability of a debtor's actual financial circumstances matching perfectly the disposable-income calculation set out by BAPCPA. See 6 Lundin, supra, § 500.1 (noting that "[t]he amount of disposable income determined by the formula in § 1325(b)(1) will bear no certain relationship to the debtor's actual financial ability to [***28] make payments"); cf. Frederickson, 545 F.3d at 658 ("In enacting BAPCPA, Congress [**55] reduced the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses. . . . Congress wanted to eliminate what it perceived as widespread abuse of the system by curtailing the bankruptcy courts' discretion Accordingly, Congress rigidly defined 'disposable income' ").

> Turning to the Appellees' mortgage payments, we conclude that HN27[] § 1325(b) permits the Appellees to deduct their ongoing mortgage payments in accordance with the formula set forth in 707(b)(2)(A)(iii). We note that there is a split of authority on the issue of what the phrase "amounts reasonably necessary to be expended" as set forth in § 1325(b)(2) means in the context of secured-debt payments by above-median income debtors. Section 1325(b)(3) states that, for such debtors, "amounts reasonably necessary to be expended" in § 1325(b)(2) "shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)[.]" 11 U.S.C. § 1325(b)(3). Thus, a majority of [*348] courts have held that above-

Page 22 of 29

634 F.3d 327, *348; 2011 U.S. App. LEXIS 2182, **55; 2011 FED App. 0033P (6th Cir.), ***28

median-income debtors may deduct ongoing monthly payments on secured debt in accordance with the formula set forth in § 707(b)(2)(A)(iii) for property [**56] that debtors intend as of the date of confirmation to retain, regardless of whether the payments are subjectively reasonably necessary to be expended for the maintenance or support of the debtors or the debtors' dependents. See Musselman, 394 B.R. at 818-19; In re Davis, No. 08-13693-SSM, 2008 Bankr. LEXIS 4006, 2008 WL 5786921, at *4 & n.5 (Bankr. E.D. Va. Nov. 18, 2008); In re Hays, No. 07-41285, 2008 Bankr. LEXIS 1321, 2008 WL 1924233, at *3-6 (Bankr. D. Kan. Apr. 29, 2008); In re Moore, No. 07-11528C-13G, 2008 Bankr. LEXIS 1053, 2008 WL 895668, at *3-4 (Bankr. M.D.N.C. Apr. 2, 2008); In re Van Bodegom Smith, 383 B.R. 441, 445-49 (Bankr. E.D. Wis. 2008); In re Austin, 372 B.R. 668, 681 (Bankr. D. Vt. 2007); In re Edmondson, 371 B.R. 482, 485-86 (Bankr. D. N.M. 2007); In re Carlton, 362 B.R. 402, 411 (Bankr. C.D. III.2007); In re Martin, 373 B.R. 731, 733-34 (Bankr. D. Utah 2007). 14 Other courts [***29] have held that bankruptcy courts have the authority after BAPCPA to continue to engage in a subjective analysis of what is reasonably necessary, even for above-median-income debtors. Some courts find this authority to be implicit in Lanning. See In re Collier, No. 09-33187, 2010 Bankr. LEXIS 2089, 2010 WL 2643542, at *3 (Bankr. M.D. Ala. June 29, 2010) ("[A] per se rule in which all [**57] payments to secured creditors are reasonable necessary deductions under Section 707(b) is not in keeLanning. See In re Collier, No. 09-33187, 2010 Bankr. LEXIS 2089, 2010 WL 2643542, at *3 (Bankr. M.D. Ala. June 29, 2010) ("[A] per se rule in which all [**58] payments to secured creditors are reasonable necessary deductions under Section 707(b) is not in keeping with the holding in Lanning."). Other courts find the authority in § 707(b)(2)(A)(iii). 15 See In re Owsley,

384 B.R. 739, 748 (Bankr. N.D. Tex. 2008) ping with the holding in Lanning."). Other courts find the authority in § 707(b)(2)(A)(iii). ¹⁵ See In re Owsley, 384 B.R. 739, 748 (Bankr. N.D. Tex. 2008) ("[T]he court concludes that the limiting language in subclause (II) also applies to subclause (I).").

Prior to BAPCPA, bankruptcy courts had the discretion to determine whether debtors' mortgage expenses were reasonably necessary and were permitted to exercise this discretion for all debtors, regardless of their income. We conclude that $\underline{HN29}$ $\underbrace{ 1325(b)(3)}$ provides a clear indication that Congress intended a departure from such pre-BAPCPA practice with respect to above-median-income debtors. Thus, the Appellees should be permitted to deduct their mortgage payment in accordance with the formula set forth in $\underline{\S}$ $\underline{707(b)(2)(A)(iii)}$, unless there is some other basis other than the disposable-income test for disallowing the deduction. ¹⁶ [*349] Concluding otherwise would limit

of-

 (i) the total of all amounts scheduled as contractually due to secured creditors in each month [**59] of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

11 U.S.C. § 707(b)(2)(A)(iii) (emphasis added).

16 There is a split of authority on the issue-which we do not reach-of whether a bankruptcy court may consider an abovemedian-income debtor's decision to continue making payments on secured debt in the good-faith analysis under 11 U.S.C. § 1325(a)(3), Cf. Davis, 2008 Bankr. LEXIS 4006, 2008 WL 5786921, at *4 (holding that above-median-income debtors' decision to continue making monthly mortgage payment of \$5,768 was evidence of bad faith and denying confirmation in part on that basis), with Van Bodegom Smith, 383 B.R. at 456 (stating in the context of a mortgage payment that "the question of whether the debtors committed all of their projected disposable income into the plan is a matter solely for review under § 1325(b), and is not pertinent to engaging in a review of good faith under § 1325(a)(3)."), and Austin, 372 B.R. at 683 (holding in the context of [**61] an objection to the above-median-income debtors' decision to continue making a payment on secured debt that "post-BAPCPA, [t]he disposable income a debtor decides to commit to his plan is not the

¹⁴ Some of these courts distinguish between ongoing payments on secured debt and payments to cure arrearages on secured debt, concluding that ongoing payments may be deducted without regard to whether or not they are subjectively reasonably necessary for the maintenance or support of the debtor or the debtor's dependents, while cure payments are deductible only if they are so necessary. We need not reach this issue here because, according to the Appellees' confirmed Chapter 13 plan, their secured mortgage payment is an ongoing payment only; the Appellees list no amount for payment of an arrearage.

¹⁵ This subsection provides as follows:

HN28 [1] (iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum

Page 23 of 29

634 F.3d 327, *349; 2011 U.S. App. LEXIS 2182, **61; 2011 FED App. 0033P (6th Cir.), ***29

above-median-income [***30] debtors to deducting the categories of expenses set forth in \S 707(b)(2)(A) [**60] & (B)—a result that is required but that is different than that for below-median income-debtors ¹⁷—but at the same time would not allow them to take full advantage of the amounts that those subsections would permit them to deduct. We see nothing in \S 1325(b)(2) as construed in Lanning—nor anything in \S 707(b)(2)(A)(iii)—that would support such a result.

In sum, HN31[4] it is appropriate to calculate a debtor's projected disposable income using the inclusions and exclusions from disposable income set forth in the Code and the deductions permitted by the Code, supplemented as of the date of confirmation and adjusted to take into account changes during the applicable commitment period that are known or virtually certain at the time of confirmation. Cf. Johnson, 400 B.R. at 651 ("[I]n order to report disposable income projected to be received during the applicable commitment period, a debtor must supplement [**62] Official Form 22C with a statement of any changes in the 'current monthly income' as reported in the form, and any changes in the expenses allowed, anticipated to take place during the applicable commitment period."). 18

measure of his good faith in proposing the plan") internal quotation marks omitted)).

17 See Lanning, 130 S. Ct. at 2470 (HN30(↑) "If a debtor's income is below the median for his or her State, 'amounts reasonably necessary' include the full amount needed for 'maintenance or support,' see § 1325(b)(2)(A)(i), but if the debtor's income exceeds the state median, only certain specified expenses are included, see §§ 707(b)(2), 1325(b)(3)(A)." (footnote omitted)).

18 The Appellant makes three additional arguments in support of her position that the Appellees had positive projected disposable income as of the date of confirmation. First, she contends that the Appellees' projected repayment of a retirement loan during the term of the plan must be taken into account in the calculation of their projected disposable income. The issue of whether disposable income includes amounts that become available as a result of a debtor repaying a retirement-plan loan is on appeal from the Bankruptcy Appellate Panel for the Sixth Circuit. See Burden v. Seafort (In re Seafort), 437 B.R. 204 (B.A.P. 6th Cir. 2010), appeal docketed, No. 10-6248 (6th Cir. Dec. 1, 2010). Second, the Appellant argues that the Appellees may not deduct certain standardized deductions allowed by § 1325(b)(3) and § 707(b)(2)(A) and (B) if they did not actually incur the expenses. We need not address either of these issues because the exclusion of Social Security benefits [**63] from [***31] [*350] C. The Temporal Requirement of the Applicable Commitment Period Applies to Debtors with Zero or Negative Projected Disposable Income as of the Date of Confirmation.

This brings us to the issue of whether there is an exception to the temporal requirement set forth in § 1325(b) for debtors with zero or negative projected disposable income. The Eleventh Circuit and certain bankruptcy courts have held that HN32[1] the applicable commitment period applies to debtors with zero or negative projected disposable [**64] income. See, e.g., Tennyson, 611 F.3d at 876-77; Moose, 419 B.R. at 635; Meadows, 410 B.R. at 245-46; Brown, 396 B.R. at 554-55; Nance, 371 B.R. at 371-72; Casey, 356 B.R. at 527-28. See also Kagenveama, 541 F.3d at 879 (Bea, J., concurring in part and dissenting in part) (concluding that the applicable commitment period applies whether or not the debtor has positive projected disposable income). By contrast, the Ninth Circuit and several other courts, including the district court below, have held that the applicable commitment period does not apply to debtors with zero or negative projected disposable income. See, e.g., Kagenveama, 541 F.3d at 875-77; Baud, 415 B.R. at 293; Musselman, 394 B.R. at 813-14; Green, 378 B.R. at 38; Lawson, 361 B.R. at 220; Alexander, 344 B.R. at 751. See also In re Davis, 392 B.R. 132, 146 (Bankr. E.D. Pa. 2008) (assuming for the sake of argument that the applicable commitment period imposes a temporal requirement and holding that, if so, it does not apply to debtors with zero or negative projected disposable income). In holding that there is no exception to the applicable-commitmentperiod requirement for debtors with zero or negative projected disposable [**65] income, the Eleventh Circuit applied a plain-meaning analysis, pointing out that § 1325(b)(4) "does not state that the 'applicable commitment period' exists solely for the § 1325(b)(1)(B) calculation and it certainly does not state that the 'applicable commitment period' becomes

disposable income and the deduction of the mortgage payment together mean that the Appellees had negative projected disposable income as of the confirmation date. The Appellant also contends that the Appellees must include in the calculation of projected disposable income any income from employment that is known or virtually certain as of the date of confirmation even if they did not have that income during the six-month period reflected on Form 22C. Under <u>Lanning</u> and <u>Darrohn</u>, such income must be included in the calculation of projected disposable income so long as the income does not fall within the categories of income excluded from disposable income by the Code. See <u>Darrohn</u>, 615 F.3d at 476.

Page 24 of 29

634 F.3d 327, *350; 2011 U.S. App. LEXIS 2182, **65; 2011 FED App. 0033P (6th Cir.), ***31

inconsequential if disposable income is negative." Tennyson, 611 F.3d at 877. The Eleventh Circuit also noted that the applicable commitment period "shall be" three years or five years and that the length of the period to be applied to a particular debtor is based solely on "the current monthly income of the debtor and the debtor's spouse combined," 11 U.S.C. § 1325(b)(4), not on the debtor's having positive projected disposable income. See Tennyson, 611 F.3d at 877. By contrast, the Ninth Circuit-also applying a plain-meaning analysis-held that [***32] there is an exception to the applicable-commitment-period requirement for debtors with zero or negative projected disposable income. In so doing, the Ninth Circuit agreed that the applicable commitment period imposes a period of time over which projected disposable income is to be paid, but concluded that, if the debtor's projected disposable income is zero or negative, [**66] the applicable commitment period is "irrelevant." Kagenveama, 541 F.3d at 877.

In addressing this difficult issue, we begin once again with the language of the statute itself. HN33[*] Under § 1325(b), a plan that does not propose to pay the holders of unsecured claims in full may not be confirmed over objection unless it "provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). Under the express language of § 1325(b)(4), the applicable commitment period does not depend on the amount of the debtor's projected disposable income. To the contrary, the applicable commitment period depends on the current monthly income of the debtor and [*351] the debtor's spouse combined. See 11 U.S.C. § 1325(b)(4); Tennyson, 611 F.3d at 877; Nance, 371 B.R. at 371 ("The definition of 'applicable commitment period' . . . is linked exclusively to the amount of a debtor's current monthly income."). Section 1325(b)(4) expressly states that the applicable commitment period shall be three years, unless the debtor's current monthly income is above the [**67] applicable state median, in which case it shall be not less than five years. See 11 U.S.C. § 1325(b)(4)(A). HN34[♣] Confirmation of a plan of less than three or five years in length, respectively, is permissible "only if the plan provides for payment in full of all allowed unsecured claims over a shorter period." 11 U.S.C. § 1325(b)(4)(B). Accordingly, the express statutory language strongly suggests that, upon the filing of an objection to confirmation of a plan that does not propose to pay unsecured claims in full, in order for the plan to be confirmed under § 1325(b)(1)(B), it must

provide that all of the debtor's projected disposable income will be applied to make payments over a duration equal to the applicable commitment period and that this is the case whether the debtor has negative, zero or positive projected disposable income. See Tennyson, 611 F.3d at 877-78 ("[Section 1325(b)(4)] certainly does not state that the 'applicable [***33] commitment period' becomes inconsequential if disposable income is negative." (citing Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2575, 174 L. Ed. 2d 382 (2009) ("[W]e will not attribute words to Congress that it has not written.")). Accordingly, we conclude that the better [**68] reading of § 1325(b) is that the temporal requirement of the applicable commitment period applies to debtors facing a confirmation objection even if they have zero or negative projected disposable income.

This, however, does not end our inquiry. Although we find the interpretation of § 1325(b) that applies the applicable commitment period to debtors with zero or negative projected disposable income to be more persuasive than the competing interpretation, we also recognize that the plain-language arguments supporting each approach are nearly in equipoise, and that the circuit-level decisions on the issue are entirely so. For assistance in interpreting the statute, therefore, we turn once again to the guideposts provided by the Supreme Court in Lanning and Ransom.

In rejecting the mechanical approach to calculating projected disposable income, the Supreme Court in Lanning relied primarily on the lack of explicit multiplier language in § 1325(b) and on the state of pre-BAPCPA practice. See Lanning, 130 S. Ct. at 2478 ("Consistent with the text of § 1325 and pre-BAPCPA practice, we hold that when a bankruptcy court calculates a debtor's projected disposable income, the court may account [**69] for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."). But these guideposts do not aid us here. Although, as discussed earlier, the lack of explicit multiplier language in § 1325(b)(1)(B) leads us to an interpretation of § 1325(b) under which a Chapter 13 plan that does not provide for full payment of creditors and that is subject to an objection must provide that all of the debtor's projected disposable income will be applied to make payments for the duration of the applicable commitment period, the lack of explicit multiplier language does not answer the question of what the plan must provide if the debtor has no positive projected disposable income with which to make payments. And pre-BAPCPA practice sheds no light

Page 25 of 29

634 F.3d 327, *351; 2011 U.S. App. LEXIS 2182, **69; 2011 FED App. 0033P (6th Cir.), ***33

here because "[t]o veterans of Chapter 13 practice, it runs afoul of basic principles to suggest that a debtor with no disposable income can nonetheless propose [***34] a confirmable [*352] plan[.] [y]et BAPCPA permits precisely that." Alexander, 344 B.R. at 750. 19 Thus, we turn next to the third guidepost set forth in Lanning. In rejecting the mechanical approach to calculating disposable income, the Supreme Court—in addition [**70] to primarily relying on the lack of explicit multiplier language in § 1325(b) and on the state of pre-BAPCPA practice—also noted that its holding would avoid "senseless results":

In cases in which a debtor's disposable income during the 6-month look-back period is either substantially lower or higher than the debtor's disposable income during the plan period, the mechanical approach would produce senseless results that we do not think Congress intended. In cases in which the debtor's disposable income is higher during the plan period, the mechanical approach would deny creditors payments that the debtor could easily make. And where, as in the present case, the debtor's disposable income during the plan period is substantially lower, the mechanical approach would deny the protection of Chapter 13 to debtors who meet the chapter's main eligibility requirements.

Lanning, 130 S. Ct. at 2475-76. As we previously discussed, in response to an argument made by the debtor in Ransom that the Ninth Circuit decision from which he was appealing would lead to senseless results, the Supreme Court made clear that any analysis predicated on purported senseless results must be cabined by still another [**71] guidepost—BAPCPA's

19 HN35 [] Under BAPCPA, a debtor with zero or negative projected disposable income may propose a confirmable plan by making available income that falls outside of the definition of disposable income-such as the Appellees' benefits under the Social Security Act-to make payments under the plan to administrative, priority and secured creditors and to make any payments to unsecured creditors [**72] required to satisfy other confirmation requirements. Other confirmation requirements would include the best-interests test set forth in § 1325(a)(4). See 11 U.S.C. § 1325(a)(4) (providing that, in order for a Chapter 13 plan to be confirmable, "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date").

purpose of ensuring that debtors repay creditors using their full disposable income. See Ransom, 131 S. Ct. at 729 ("Ransom finally contends that his view of the means test is necessary to avoid senseless results not intended by Congress. At the outset, we note that the policy concerns Ransom emphasizes pale beside one his reading creates: His interpretation, as we have explained, would frustrate BAPCPA's core purpose of ensuring that debtors devote their full disposable income to repaying [***35] creditors.). 20 The Supreme Court's approach [*353] in Ransom is consistent with Lanning, in which the Supreme Court noted that its holding would avoid the "senseless result[] that we do not think Congress intended" of "deny[ing] creditors payments that the debtor could easily make." Lanning. 130 S. Ct. at 2475-76.

Courts that have applied the applicable commitment period to debtors with zero or negative projected disposable income have concluded without extended analysis that this approach would best serve BAPCPA's goal of ensuring that debtors repay creditors the maximum amount they can afford. See, e.g., <u>Tennyson</u>. 611 F.3d at 879 ("[A]llowing Tennyson to confirm a plan for less than five years would deprive the unsecured [**74] creditors of their full opportunity to recover on their claims from Tennyson by way of post confirmation plan modifications."); <u>Moose</u>, 419 B.R. at 635

20 In reaching this conclusion, the Supreme Court consulted the legislative history to BAPCPA. See id. We believe that HN36[1] it also is appropriate to consult legislative history in this case because where, as here, a "textual analysis fails to produce a conclusive result, or where it leads to ambiguous or [arguably] unreasonable results, a court may look to legislative history to interpret a statute." Limited, Inc. v. C.I.R., 286 F.3d 324, 332 (6th Cir. 2002). A portion of the legislative history that was not relevant in Ransom but that is relevant here supports the view that there is no exception to the applicable commitment period for debtors with zero or negative [**73] projected disposable income. See H.R. Rep. 109-31(I), p. 79, 2005 U.S.C.C.A.N. 88, 146 ("Paragraph (1) of section 318 of the Act amends Bankruptcy Code sections 1322(d) and 1325(b) to specify that a chapter 13 plan may not provide for payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds."). As this legislative history suggests, HN37[*] BAPCPA requires certain debtors to make payments over a "period that is not less than fives years"-a clearly temporal requirement-and the determination of which debtors must do so is based solely on "the current monthly income of the debtor and the debtor's spouse combined," not on whether the debtor has positive projected disposable income.

Page 26 of 29

634 F.3d 327, *353; 2011 U.S. App. LEXIS 2182, **73; 2011 FED App. 0033P (6th Cir.), ***35

("[A]llowing above-median income debtors to exit chapter 13 in less than five years deprives the trustee and creditors of the right to seek an increase in plan payments if the debtors' financial situation were to improve dramatically during that period."). We agree with the conclusion those courts have reached, but find that adequately explaining it requires a more extended analysis, including a brief discussion of postconfirmation modification of Chapter 13 plans. Section 1329(a) provides that HN38[7] "[a]t 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[.]" 11 U.S.C. § 1329(a) (emphasis added). 21 A few courts have held that the [***36] phrase "completion of payments" has a temporal connotation and that payments are not completed until the time period in which the payments are to be made has passed. See Fridley, 380 B.R. at 546 ("[T]he statutory concept of 'completion' of payments includes [**75] the completion of the requisite period of time."); Buck, 443 B.R. 463, 2010 Bankr. LEXIS 4736, 2010 WL 5463063, at *6 ("Even where, as in the case of these Debtors, no funds are available on a monthly basis for payment to the Trustee, Debtors could propose a modified plan with monthly payments of zero dollars to the Trustee. If neither the Trustee nor a creditor propose a further modification to the Plan during the remaining portion of the [applicable commitment period]. Debtors will have completed their payments under the Plan and will be eligible for a Chapter 13 discharge at the conclusion of their original [applicable commitment period], assuming all other requirements for discharge set out in § 1328 have been met."); In re McKinney, 191 B.R. 866, 869 (Bankr. D. Or. 1996) (holding that completion of payments under a

21 Presumably designed in part to assist creditors and the Chapter 13 trustee in deciding whether to bring motions to modify, § 521(f)(4)(B), which was added by BAPCPA, requires Chapter 13 debtors (at the request of the Court, [**77] the United States Trustee or any party in interest) to provide annual statements (after the case is confirmed and until it is closed) of their income and expenditures. See 11 U.S.C. § 521(f)(4); Fridley, 380 B.R. at 544 ("The obvious purpose of this self-reporting obligation is to provide information needed by a trustee or holder of an allowed unsecured claim in order to decide whether to propose hostile § 1329 plan modifications."); Nance, 371 B.R. at 371 ("The purpose of [§ 521(f)], ostensibly, is to allow interested parties to monitor a debtor's financial situation during the pendency of the bankruptcy case and to seek modification of the plan pursuant to § 1329 if changes in that situation occur.").

plan occurs only [*354] when the debtor has fulfilled the temporal requirement of § 1325(b)(1)). See also 3 Lundin, supra, § 253.1 ("Completion of payments under a Chapter 13 plan could be measured in terms of the passage of time-for example, if the confirmed plan required the debtor to make payments for 36 months, when 36 months pass, the debtor has completed the payments required by the plan."). Other courts, [**76] however, have held that the completion of payments under the plan does not require the passage of the period of time contemplated in the plan or that the debtor make the number of payments contemplated by the plan; rather, completion generally is held to have occurred once the debtor has tendered the monetary amount required by the plan to the Chapter 13 trustee or, at the latest, once creditors receive, either directly from the debtor or through the trustee, the recovery on their claims called for by the plan. See In re Jacobs, 263 B.R. 39, 44 (Bankr. N.D.N.Y. 2001) ("[T]hose courts addressing the completion of payments issue have generally . . . held that a plan is complete when the debtor makes all the payments to the trustee." (internal quotation [***37] marks omitted)); 3 Lundin, supra, § 253.1 & n.28 (collecting cases holding that payments under the plan are completed once the debtor has tendered the amount required to pay creditors as provided for in the plan).

The question of whether applying the applicable commitment period to debtors with zero or negative projected disposable income would produce senseless results ultimately turns on an issue-the meaning of "completion of payments" as used in § 1329(a)—that is not before us. That is, whether applying the applicable commitment period to debtors with zero or negative projected disposable income would result in potentially greater recoveries for creditors or instead would only lead down the [**78] path to potentially absurd results for debtors without any benefit to creditors turns on which interpretation of "completion of payments" this Court or, ultimately, the Supreme Court, were to adopt if presented with the issue. As explained below, if this Court or the Supreme Court were ever to hold that completion has a temporal connotation, then an interpretation of § 1325(b) that applies the applicable commitment period to debtors with zero or negative projected disposable income could result in greater recoveries for creditors and would not necessarily lead to absurd or senseless results; conversely, if this Court or the Supreme Court were ever to hold that completion does not have a temporal connotation, then an interpretation of § 1325(b) that applies the applicable commitment period to debtors with zero or negative

Page 27 of 29

634 F.3d 327, *354; 2011 U.S. App. LEXIS 2182, **78; 2011 FED App. 0033P (6th Cir.), ***37

projected disposable income would not result in greater recoveries for creditors and could lead to absurd or senseless results.

To see why this is so, assume that a Chapter 13 trustee or an unsecured claimant objects to the confirmation of a hypothetical debtor's plan, but that the bankruptcy court declines to apply the applicable commitment period on the basis that [**79] the debtor has zero or negative projected disposable income. The debtor proposes, and the court confirms, a plan providing for payments to be made in less than what would have been the applicable commitment period had it been applied. The debtor has sources of income that do not constitute projected disposable income. It also turns out that the debtor needs less than the time period that would have been the applicable commitment period had it been applied to make payments to administrative, priority and secured claimants and [***38] to make any payments the debtor must make to unsecured creditors in order to comply with confirmation requirements such as the [*355] best-interests test. Assume that the debtor needs nine months and proposes a plan of that length. Because the applicable commitment period was not applied at confirmation, completion of payments under the plan within the meaning of § 1329(a) will have occurred as soon as the nine-month period passes and the last payment under the plan is made. And, because a party in interest may request a plan modification only before the completion of payments under the plan, the trustee and unsecured creditors would have no opportunity to seek a modification [**80] of the plan. Creditors effectively would be barred from maximizing their recoveries by obtaining a distribution on their claims from disposable income that may become available after the completion of payments but before the end of what would have been the applicable commitment period if it had been applied.

On the other hand, if the bankruptcy court had applied the applicable commitment period at the time of confirmation and the view that completion of payments is temporal were followed, then completion of payments under the plan would have occurred only after the applicable commitment period had passed; by applying the applicable commitment period to debtors with zero or negative projected disposable income, creditors would have a longer period of time in which to realize a greater recovery on their claims. Again, however, if completion were interpreted as not having a temporal connotation, any opportunity to augment creditor recoveries with additional disposable income that becomes available post-confirmation would be illusory in

cases where payments required under the plan already have been made. In sum, whether applying the applicable commitment period to debtors with zero or negative [**81] projected disposable income would result in potentially greater recoveries for creditors depends ultimately on the meaning of the phrase "completion of payments" contained in § 1329(a).

Whether applying the applicable commitment period to debtors with zero or negative projected disposable income could lead to senseless or absurd results also turns [***39] in large part on the meaning of the same phrase. 22 The concern has been expressed that applying the applicable commitment period to such debtors would be senseless because it would essentially trap them in bankruptcy even after unsecured creditors would no longer have an opportunity to recover any disposable income that would happen to become available. Under the majority view of the meaning of the phrase "completion of payments," any opportunity to capture additional disposable income by attempting to modify the plan would be impossible where payments under the plan already have been made. And requiring debtors who already have completed payments to remain in Chapter 13 [*356] beyond the time that it takes them to cure arrearages (see § 1322(b)(5)) and pay secured, priority and administrative claims arguably serves no purpose if they have no positive [**82] disposable income available to pay unsecured creditors. It also would not benefit creditors if those creditors lack the means to recover any disposable income that becomes available because payments under the plan already have been completed. On the other hand, under the temporal view of the

22 Some courts have pointed out that applying the applicable commitment period to debtors with [*357] zero or negative projected disposable income will result in a portion of such debtors remaining in their Chapter 13 plans for several years even when they have no income-and never will-to pay unsecured creditors. See Meadows, 410 B.R. at 246 (while adopting the temporal approach, noting that "[o]ne criticism of requiring an 'applicable commitment period' in cases where there is no projected disposable income is that it can require sixty-month plans in cases where there is little, if any, prospect of future increases in projected disposable income."). So long as the [**83] possibility remains that changes could occur in the debtor's circumstances and that such changes could result in disposable income becoming available before the end of the applicable commitment period-and it would be rare cases in which there would be no such possibility-keeping the debtor in Chapter 13 could conceivably result in some benefit to creditors, a result that is not senseless.

Page 28 of 29

634 F.3d 327, *357; 2011 U.S. App. LEXIS 2182, **83; 2011 FED App. 0033P (6th Cir.), ***39

phrase "completion of payments" adopted by some courts, payments would not be considered completed until the end of the applicable commitment period and the trustee and creditors could request a modification to recover future disposable income.

The meaning of "completion of payments" under § 1329(a) is an interesting question that is not before us and therefore must await another day. We cannot predict how this Court would resolve the issue if it came before us. We are certain, however, that there is nothing we can glean from the legislative history to BAPCPA that would suggest that Congress was focused on this issue or on the potential problems posed by "trapping" debtors in Chapter 13 for the full applicable commitment period. To the [***40] contrary, as the Supreme Court recognized in both Ransom and Lanning, the legislative history makes clear that the focus of Congress in enacting BAPCPA was on maximizing the amount of disposable income that debtors would pay to creditors. And there are numerous circumstances in which disposable income might [**84] become available to the Appellees and to other debtors after confirmation, even those who have zero or negative projected disposable income as of confirmation. Just by way of example: income that is properly included in the calculation of disposable income could increase after confirmation; taxes might decrease, as might other items included as "Other Necessary Expenses;" and secured debt payments (especially on vehicles) and payments on account of qualified retirement deductions may come to an end during the plan, as will be the case for the Appellees. See Kagenveama, 541 F.3d at 880 (Bea, J., concurring in part and dissenting in part) ("There are many imaginable instances where a debtor's financial situation will dramatically improve after plan confirmation-either through good fortune or clever planning.").

We believe it is now clear that, <u>HN39</u> where each competing interpretation of a Code provision amended by BAPCPA is consistent with the plain language of the statute, we must, as the Supreme Court did in <u>Lanning</u> and <u>Ransom</u>, apply the interpretation that has the best chance of fulfilling BAPCPA's purpose of maximizing creditor recoveries. Here, that interpretation is the one under which [**85] the applicable commitment period applies to all debtors facing a plan objection, even those who have zero or negative projected disposable income. Although this interpretation may not benefit creditors in all cases to a greater extent than the competing interpretation, although it may in certain circumstances lead to unfortunate situations in which some debtors will

remain in Chapter 13 for no good reason, and although our interpretation could be undermined by a subsequent controlling interpretation of § 1329(a), this does not appear to us to be a situation where our interpretation of the statute "would lead to patently absurd consequences, that Congress could not possibly have intended[.]" Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (Kennedy, J., concurring) (citation and internal quotation marks omitted). On balance, we conclude that applying the applicable commitment period to debtors with zero or negative projected disposable income would [***41] best serve BAPCPA's goal of ensuring that debtors repay creditors the maximum amount they can afford.

In sum, we adopt the interpretation of § 1325(b) that is not only more consistent with the language of the statute than [**86] the competing interpretation, but that also is consistent with the legislative history and the overriding purpose of BAPCPA as recognized in Lanning and Ransom.

III. CONCLUSION

To summarize, we hold: (1) if the trustee or the holder of an allowed unsecured claim objects to confirmation of a Chapter 13 plan of a debtor with positive projected disposable income, the plan cannot be confirmed unless it provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments over a duration equal to the applicable commitment period set forth in § 1325(b); (2) the calculation of a debtor's projected disposable income (a) must exclude income-such as benefits received under the Social Security Act-that are excluded from the definition of currently monthly income set forth in § 101(10A) and (b) must deduct "amounts reasonably necessary to be expended" as defined in § 1325(b)(3) which, for an above-medianincome debtor, means that the debtor's average monthly payments on account of secured debts calculated pursuant to § 707(b)(2)(A)(iii) must be subtracted if the debtor intends as of the date of confirmation to continue making [**87] those payments; and (3) there is no exception to the temporal requirement set forth in § 1325(b)(1) for debtors with zero or negative projected disposable income. For the reasons stated above, we AFFIRM in part and REVERSE in part the district court's opinion and order, and REMAND the case to the district court with instructions to remand to the bankruptcy court for further proceedings consistent with this opinion.

Page 29 of 29

634 F.3d 327, *357; 2011 U.S. App. LEXIS 2182, **87; 2011 FED App. 0033P (6th Cir.), ***41

End of Document



User Name: Edward Bailey

Date and Time: Friday, August 9, 2024 2:28:00PM EDT

Job Number: 230830572

Document (1)

1. Barbosa v. Soloman, 235 F.3d 31

Client/Matter: MWRB seminar Search Terms: 235 F3d 31 Search Type: Natural Language

Narrowed by:

Content Type Narrowed by Cases -None-

As of: August 9, 2024 6:28 PM Z

Barbosa v. Soloman

United States Court of Appeals for the First Circuit

December 21, 2000, Decided

No. 00-1221

Reporter

235 F.3d 31 *; 2000 U.S. App. LEXIS 33448 **; Bankr, L. Rep. (CCH) P78,338; 45 Collier Bankr, Cas. 2d (MB) 596

MARCELINO BARBOSA; MARIANA BARBOSA, Appellants, v. DOREEN SOLOMAN; MELLON MORTGAGE COMPANY, Appellees.

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Robert E. Keeton, U.S. District Judge.

Disposition: Affirmed.

Core Terms

confirmation, modification, bankruptcy court, unsecured creditor, proceeds, property of the estate, vesting, unanticipated, modify, circumstances, doctrine of res judicata, district court, financial circumstances, secured claim, cases, post-confirmation, substantial change, bankruptcy judge, unsecured claim, free and clear, appreciation, provisions, dividend, courts

Case Summary

Procedural Posture

Appellants, the debtors, filed an appeal from a ruling entered in the United States District Court for the District of Massachusetts, which affirmed the bankruptcy court's decision that appellants were required to amend their plan as requested by appellees, the Chapter 13 trustee and the unsecured creditors, to provide for full compensation to those creditors.

Overview

After the confirmation of a bankruptcy plan under Chapter 13, but before the case was closed or converted to Chapter 7, appellants (the debtors), sold property of the estate which vested in them free and clear of any claim or interest of any creditor pursuant to the provisions of 11 U.S.C.S. § 1327. Appellants'

unsecured creditors and the Chapter 13 Trustee (appellees) moved to compel appellants to amend their bankruptcy plan in order to distribute the proceeds from the sale to the unsecured creditor appellees. The district court affirmed the bankruptcy court's holding that appellants were required to amend their plan as requested by appellee trustee to provide for full compensation to the unsecured creditor appellees. The appellate court affirmed the lower court's decision. Appellees were not precluded by res judicata from seeking an amendment to the confirmation plan. The bankruptcy court did not abuse its discretion in granting the amendment.

Outcome

The lower court's order was affirmed. Appellees were not precluded by res judicata from seeking an amendment to the confirmation plan, and it was not an abuse of discretion to grant an amendment after appellants' bankruptcy plan was confirmed, but before the case was closed or converted.

LexisNexis® Headnotes

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN1[1] Plan Confirmation, Effects of Confirmation

See 11 U.S.C.S. § 1327.

Bankruptcy Law > Claims > Allowance of Claims Business & Corporate

Edward Bailey

Page 2 of 14

235 F.3d 31, *31; 2000 U.S. App. LEXIS 33448, **1

Compliance > Bankruptcy > Claims > Allowance of Claims

Civil Procedure > ... > Pleadings > Time Limitations > Extension of Time

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

HN2[] Claims, Allowance of Claims

11 U.S.C.S. § 1329(a) of the Bankruptcy Code provides for the modification of a confirmed Chapter 13 plan upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, for the following limited modifications: (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; or (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.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN3[| Plans, Plan Modification

11 U.S.C.S. § 1329(b) of the Bankruptcy Code provides that a proposed plan modification must meet the requirements of §§ 1322(a), 1322(b), 1323(c) and 1325(a) of the Code.

Bankruptcy Law > Claims > Allowance of Claims Business & Corporate Compliance > Bankruptcy > Claims > Allowance of Claims

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > ... > Plan

Confirmation > Confirmation Criteria > Consensual Confirmations

HN4 2 Claims, Allowance of Claims

11 U.S.C.S. § 1325(a) provides that a bankruptcy plan may only be confirmed if it has been proposed in good faith and not by any means forbidden by law. 11 U.S.C.S. § 1325(a)(3). While the value, as of the effective date of the plan, of property to be distributed under it on account of each allowed unsecured claim must be not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of the Bankruptcy Code on such date. 11 U.S.C.S. § 1325(a)(4).

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN5[Standards of Review, Clear Error Review

Where a case presents primarily questions of law, the appellate court's review of the bankruptcy and district court's decisions is de novo. However, any findings of fact by the lower courts are reviewed on a clearly erroneous standard.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN6[♣] Plan Confirmation, Effects of Confirmation

11 U.S.C.S. § 1327(b) of the Bankruptcy Code states that the confirmation of a plan vests all property of the estate in the debtor. In addition, 11 U.S.C.S. § 1327(c) adds that such vesting is free and clear of any claim or

Page 3 of 14

235 F.3d 31, *31; 2000 U.S. App. LEXIS 33448, **1

interest of any creditor provided for by the plan.

Business & Corporate
Compliance > Bankruptcy > Estate
Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of
Estate

Bankruptcy Law > Individuals With Regular Income > Estate Property

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN7 La Estate Property, Contents of Estate

11 U.S.C.S. § 541(a)(6) establishes that the concept "property of the estate" includes proceeds of or from property of the estate.

Business & Corporate
Compliance > Bankruptcy > Estate
Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of
Estate

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN8[] Estate Property, Contents of Estate

11 U.S.C.S. § 1306(a) of the Bankruptcy Code defines the concept "property of the estate" within a Chapter 13 bankruptcy. Property of the estate includes, in addition to the property specified in 11 U.S.C.S. § 541: (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

Business & Corporate

Compliance > Bankruptcy > Estate

Property > Contents of Estate

Bankruptcy Law > Estate Property > Contents of

Estate

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN9[] Estate Property, Contents of Estate

While 11 U.S.C.S. § 1306(a) does extend the application of 11 U.S.C.S. § 541 to cases filed under Chapter 13, it does so within a specific context. In particular, the status of the property of the estate after the confirmation of a Chapter 13 plan is a controversial issue in itself.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Estate Property

Bankruptcy Law > Individuals With Regular Income > Treatment of Postpetition Claims

HN10[2 Plan Confirmation, Effects of Confirmation

By stating that the bankruptcy estate continues to be replenished by post-petition property until the case is closed, dismissed, or converted under chapter 7, 11 or 12 of the Bankruptcy Code, 11 U.S.C.S. § 1306(a) is actually providing for the continued existence of the bankruptcy estate until the earliest of any of the abovementioned events occur. The meaning of the "vesting" language of 11 U.S.C.S. § 1327(b) within this context has been explored far and wide throughout the nation.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Estate Property

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN11[| Plan Confirmation, Effects of Confirmation

A line of cases holds that by virtue of 11 U.S.C.S. §§
1327(b)-(c), property of the estate at the time of
confirmation vests in the debtors free of any claims from
the creditors. The estate does not cease to exist
however, and it continues to be funded by the debtors'

Page 4 of 14

235 F.3d 31, *31; 2000 U.S. App. LEXIS 33448, **1

regular income and post-petition assets as specified in 11 U.S.C.S. § 1306(a).

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Individuals With Regular Income > Estate Property

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN12 | Plan Confirmation, Effects of Confirmation

The rule that property of an estate at the time of confirmation vests in the debtors free of any claims from the creditors, cannot be applied in an inflexible manner, for in spite of the "vesting" provided by 11 U.S.C.S. § 1327 of the Bankruptcy Code, until all payments due under the plan are made, both the trustee and the unsecured creditors have an interest in the preservation of the debtor's financial situation, and in the extension of the ability-to-pay standard to future situations under the plan.

Bankruptcy Law > Claims > Allowance of Claims Business & Corporate Compliance > Bankruptcy > Claims > Allowance of Claims

Civil Procedure > ... > Pleadings > Time Limitations > Extension of Time

Estate, Gift & Trust Law > Trusts > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

HN13[Claims, Allowance of Claims

11 U.S.C.S. § 1329 of the Bankruptcy Code provides that a confirmed plan may be modified at the request of the debtor, the trustee, or the holder of an allowed unsecured claim in order to increase or reduce the

amount of payments on claims of a particular class provided for by the plan; or to extend or reduce the time for such payments. 11 U.S.C.S. § 1329(a)(1),(2). Any such post-confirmation modifications shall comply with §§ 1322(a)-(b), 1323(c), 1325(a) of the Bankruptcy Code. 11 U.S.C.S. § 1329(b)(1).

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN14[] Plans, Plan Contents

11 U.S.C.S. § 1322(a) of the Bankruptcy Code establishes the requirements that must be met by a bankruptcy repayment plan in order to be approved by the court. 11 U.S.C.S. § 1322(b) on the other hand, enumerates all permissible provisions which can be included in a bankruptcy repayment plan. 11 U.S.C.S. § 1322(a)-(b).

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN15[] Plans, Plan Modification

See 11 U.S.C.S. § 1323(c).

Bankruptcy Law > Claims > Allowance of Claims Business & Corporate Compliance > Bankruptcy > Claims > Allowance of Claims

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Consensual Confirmations

HN16[] Claims, Allowance of Claims

11 U.S.C.S. § 1325(a) of the Bankruptcy Code provides, in part, that the courts shall confirm a plan if:

Page 5 of 14

235 F.3d 31, *31; 2000 U.S. App. LEXIS 33448, **1

(1) it complies with all applicable provisions of the Bankruptcy Code; (2) it has been proposed in good faith and not by any means forbidden by law; (3) the value of property to be distributed under the plan on account of all allowed unsecured claims is not less than what would be paid under a chapter 7 liquidation; and (4) the debtor is able to comply with the plan. 11 U.S.C.S. § 1325(a)(1), (3)-(4), (6).

Bankruptcy Law > ... > Plan Confirmation > Confirmation Criteria > Consensual Confirmations

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN17 Confirmation Criteria, Consensual Confirmations

11 U.S.C.S. § 1329 does not in itself establish a criterion for granting a modification, other than the plan as modified must comply with all applicable provisions of the Bankruptcy Code. 11 U.S.C.S. § 1329(b), incorporating by reference 11 U.S.C.S. § 1325(a). This means that the plan as modified must be proposed in good-faith. 11 U.S.C.S. § 1325(a)(3). Also, it must comply with the best-interests-of-the-creditors test and the ability-to-pay standard. 11 U.S.C.S. § 1325(a)(4-6). However, the Bankruptcy Code says nothing about the applicability of the doctrine of res judicata or the threshold requirement of unanticipated and substantial change in the debtor's financial circumstances. These are doctrines of judicial origin.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Bankruptcy Law > Individuals With Regular

Income > Plans > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN18[] Plans, Plan Modification

Some of the stated grounds for the application of the doctrine of res judicata within the context of a modification sought pursuant to 11 U.S.C.S. § 1329 are: (1) the "awkward" application of § 1329; (2) the apparent inconsistency of §§ 1321, 1329 of the Bankruptcy Code; while the first provides that only the debtor shall file a plan, the second provides standing to the trustee and the unsecured creditors to seek to modify it after confirmation; (3) the little, if any, guidance as to the standard to be applied by a bankruptcy court in determining whether a request for a post-confirmation modification of a Chapter 13 plan should be granted; (4) the legislative history of § 1329; (5) the case law; and (5) the finality accorded to the confirmed plan. Of all these factors, the need to accord a degree of finality to the confirmation order is one of the most weighty for some courts.

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN19[2] Individuals With Regular Income, Plans

An order confirming a Chapter 13 plan is res judicata as to all justifiable issues which were or could have been decided at the confirmation hearing.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN20[] Plans, Plan Modification

Many courts rule that 11 U.S.C.S. § 1329(a) allows the parties an absolute right to request a modification of a

Page 6 of 14

235 F.3d 31, *31; 2000 U.S. App. LEXIS 33448, **1

plan's confirmation. This approach is based on the clear language of the statute.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN21 2 Plans, Plan Modification

Although a party has an absolute right to request modification between confirmation and completion of the plan, modification under 11.0.s.c.s. § 1329 is not without limits.

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN22[] Plans, Plan Modification

11 U.S.C.S. § 1329 does provide a criterion for granting a modification. First, modifications are only allowed in the three limited circumstances provided by the statute. Second, as provided by § 1329(b)(1) of the Bankruptcy Code, a modified plan is only available if §§ 1322(a), 1322(b), 1325(a), 1329(c) of the Bankruptcy Code are met. Third, a modification may only be proposed in good faith. Fourth, all proposed modifications need not be approved and in practice not all modifications are approved. Moreover, the statutory framework is clear in allowing post-confirmation modifications, a feature that is incongruent with the application of the doctrine of residulcata.

Bankruptcy Law > Reorganizations > Plans > Plan Modification Business & Corporate Compliance > ... > Reorganizations > Plans > Plan Modification Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN23[Plans, Plan Modification

The common-law principle of res judicata does not apply when a statutory purpose to the contrary is evident. The statutory framework of the Bankruptcy Code plainly assumes the possibility of modifications of bankruptcy plans after they are confirmed.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Modification

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

HN24[Standards of Review, Abuse of Discretion

Because modification under 11 U.S.C.S. § 1329 is discretionary, the appellate court's review is limited to a determination of whether the district court abused its discretion in modifying the plan.

Counsel: Anthony L. Gray, with whom Joseph F. Ryan, and Brown, Rudnick, Freed & Gesmer, P.C. were on brief for appellants.

Lynne F. Riley, with whom Doreen B. Soloman, Office of the Chapter 13 Trustee, was on brief for Doreen B. Soloman.

Richard S. Hackel, with whom Samuel D. Shiro was on brief, for appellee Mellon Mortgage Company.

Judges: Before Torruella, Chief Judge, Selya, Circuit Judge, and Casellas, * District Judge.

Opinion by: CASELLAS

Opinion

of the District of Puerto Rico, sitting by designation.

Page 7 of 14

235 F.3d 31, *31; 2000 U.S. App. LEXIS 33448, **1

[*32] CASELLAS, District Judge. The controversy in this appeal arises out of the not-so-infrequent scenario where, after the confirmation of a bankruptcy plan under Chapter 13, but before the case is closed or converted to Chapter 7, the debtors sell property of the estate which "vested" in them "free and clear of any claim or interest of any creditor" pursuant to the provisions of 11 U.S.C. § 1327. 1 [**3] The distribution of the proceeds from the sale of such property is usually controversial; especially when, [**2] as here, the property sold has considerably appreciated in value and as a consequence, the debtors received substantial profits which [*33] they intend to keep to themselves. 2 On the other hand, the debtors' unsecured creditors and the Chapter 13 Trustee moved to compel the debtors to amend their bankruptcy plan in order to distribute the proceeds from the sale to the unsecured creditors.

I. BACKGROUND

The property sold in this particular case consists of a two-family building retained by the debtors for investment purposes ("the Property"), which was subject to a lien in the amount of \$ 114,000 held by Mellon Mortgage Company ("Mellon"). On May 5, 1997, Mellon entered into a stipulation with the Debtors, Marcelino and Mariana Barbosa ("the Debtors"), whereby they agreed that the market value of the Property was \$ 64,000 ("the Stipulation"). Therefore, Mellon's secured claim was "stripped down" by \$ 50,000, from \$ 114,000

to \$ 64,000. The Stipulation also provided for payment in full of the stripped-down secured claim plus interest. The balance, now unsecured, would be repaid "at a rate of not less than 10%." As a guarantee, Mellon "retained its lien in full until successful completion of the repayment plan."

On July 17, 1998, the Debtors filed their repayment plan, in consonance with [**4] the terms of the Stipulation. It was confirmed by the bankruptcy court on September 23, 1998. The Plan provided, among other things, the following: (1) full payment of Mellon's stipulated secured claim plus interest at a 9% annual interest rate; (2) prepayment of Mellon's stipulated secured claim at any time, without premium or penalty; (3) payment of a dividend to unsecured creditors equal to 10% of the amount of their claims; and (4) reduction of the monthly plan payment, in the event that Mellon's secured claim was prepaid.

The bankruptcy court's Confirmation Order approved the Debtors' Plan and summarized the disbursements to be made under it. In addition, it acknowledged the modification of Mellon's secured claim as explained above. Regarding the unsecured claims, it stated that they "shall be paid [at] a dividend of not less than 10%." Finally, in compliance with 11 U.S.C. § 1327, the Confirmation Order provided that: "The provisions of the confirmed Plan bind the debtors and all creditors; the confirmation of the Plan vests all property of the estate in the debtors; and all property vesting in the debtors is free and clear of any claim or interest [**5] of any creditor, except as provided in the Plan or this order." (Emphasis added).

After the entry of the Confirmation Order, the Debtors sought leave from the bankruptcy court to sell the Property free of liens or encumbrances pursuant to 11 U.S.C. §§ 1303 and 363. Leave was obtained and accordingly, the property was sold for \$ 137,500 to a good faith purchaser. The bankruptcy court's order approving the sale (the "Sale Order") provided for payment in full of Mellon's secured claim pursuant to the Plan and the Confirmation Order; while the balance of the proceeds were to be held in escrow by the Debtors' counsel "until the earlier of (a) an agreement by and between the Debtors and ... the Chapter 13 Trustee ... regarding disbursement of such proceeds, and (b) disposition by the Court, by a final order, adjudicating a motion filed by the Chapter 13 Trustee seeking an amendment to the Plan...."

The Debtors and the Chapter 13 Trustee were unable to

^{1 11} U.S.C. § 1327 provides, in relevant HN1[*] part:

⁽a) 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.

⁽b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

⁽c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan. (Emphasis added).

² After payment in full of all secured bankruptcy claims, plus interest, and all closing costs, taxes, insurance premiums and other amounts, there remains \$ 50,668.35 in excess proceeds.

Page 8 of 14

235 F.3d 31, *33; 2000 U.S. App. LEXIS 33448, **5

reach an agreement for the distribution of the proceeds. Therefore, the Trustee moved to compel the Debtors to modify their Plan in order to pay the excess of the proceeds to the Debtors' unsecured creditors. ³ [**6] The end result under the Trustee's proposed plan [*34] would be that the dividend paid to unsecured creditors would increase from 10% to 100%.

The Debtors opposed the Trustee's motion. On July 30, 1999, after a hearing, the bankruptcy court entered a Modification Order granting the Trustee's motion and holding that the Debtors were compelled to amend their Plan in order to distribute the proceeds to the unsecured creditors. In re Barbosa, 236 B.R. 540 (Bankr.D.Mass. 1999). The court reasoned that since the Debtors' bankruptcy plan did not provide for prepayment of the unsecured claims, the Debtors, through their Sale Motion, were "implicitly seeking to modify their plan to reduce the time for satisfying the claims of unsecured creditors." Id. at 545. 4 [**8] Accordingly, the court rejected Debtors' implied amendments to reduce the time of payment to the unsecured creditors and satisfy their claims by paying the 10% dividend, [**7] without any regard to the change in circumstances. Id. at 548-49, 556. In addition, the bankruptcy court found that the Debtors' intention to keep the proceeds of the sale, while paying the 10% dividend provided by the Plan to the unsecured creditors, failed to meet both the good faith requirement and the best-interests-of-the-creditors test of 11 U.S.C. §§ 1329 5 and 1325(a) 6 in order to

modify a confirmed plan, given the substantial and unanticipated change in the Debtors' financial circumstances. *In re Barbosa, 236 B.R. at 552-56.*

[**9] Further, the bankruptcy court noted that although pursuant to 11 U.S.C. § 1327(b), the Property sold vested in the Debtors free and clear of any claim from the creditors (accord In re Rangel, 233 B.R. 191 (Bankr.D.Mass. 1999)), the result in this case by allocating the appreciation of property, which the court characterized as windfall profits, to the Debtors rather than to the unsecured creditors "is antithetical to the results that would be achieved in the absence of a confirmed plan that vested the Property in the Debtors." In re Barbosa, 236 B.R. at 551. The court continued:

Moreover, there is something unsavory about Chapter 13 Debtors 'stripping down' a mortgage under § 506(a) and (d) and receiving the 'super' discharge provided by § 1328(a) while walking away with substantial cash proceeds due to the appreciation in value of their Property, without amending their plan to satisfy the claims of their unsecured creditors... Putting aside the various [*35] inconsistent Code sections, the problems created by the vesting language in § 1327(b) and the order of confirmation used in this case, and hairsplitting arguments [**10] about constitutes property of the estate in Chapter 13, the spectacle of the Debtors profiting while in bankruptcy is disconcerting and may be indicative of a bad faith manipulation of the Code.

Id. at 551-52. Accordingly, the bankruptcy court held that the Debtors were required to amend their plan as

- 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; or
- (3) after 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.

11 U.S.C. § 1329(a).

HN3[*] Section 1329(b) of the Code provides in turn, that a proposed plan modification must meet the requirements of sections 1322(a), 1322(b), 1323(c) and 1325(a) of the Code.

6 HN4 [**] Section 1325(a) provides in the pertinent part that a bankruptcy plan may only be confirmed if "[it] has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). While "the value, as of the effective date of the plan, of property to be distributed under [it] on account of each allowed unsecured claim" must be "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of [the Code] on such date." 11 U.S.C. § 1325(a)(4).

³ Mellon joined the Trustee's efforts by filing a separate motion.

⁴ The court also ruled that pursuant to <u>11 U.S.C. § 1329</u>, the Trustee had standing to seek modification of the plan, and that "even if this Court were to conclude that the Chapter 13 Trustee must show a substantial change in circumstances, the Court observes that the Chapter 13 Trustee could satisfy that standard [given that] although the Debtors contemplated the sale of their Property in their Chapter 13 plan, the sales price was more than double the stipulated value of Mellon's secured claim." *In re Barbosa*, <u>236 B.R. at 547 n. 8</u>.

⁵ HN2[**] Section 1329(a) of the Bankruptcy Code provides for the modification of a confirmed Chapter 13 plan upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, for the following limited modifications:

Page 9 of 14

235 F.3d 31, *35; 2000 U.S. App. LEXIS 33448, **10

requested by the Trustee to provide for full compensation to the unsecured creditors. *Id. at 556*.

On appeal, the district court affirmed the bankruptcy court's decision and order. Barbosa v. Solomon, 243 B.R. 562 (D. Mass. 2000). However, it used a different rationale. It found that the central issue was the meaning of the phrase "property of the estate" as used in the various sections of the Bankruptcy Code. Id. at 565. It then noted that a reading of the bankruptcy court's memorandum opinion might give the impression that the Trustee "admits that ... [proceeds of the foreclosure sale are] no longer property of the estate...." ld. However, in the district court's opinion, "if that is what the bankruptcy court's Memorandum means, it is an error of law." Id. Rather, the district court's interpretation [**11] of the concept "property of the estate" as used by section 1327 of the Code, vested title to the realty in the Debtors at confirmation, but not the proceeds of the sale. Id. at 567-68. The district court concurred with the bankruptcy court in all other aspects and therefore, it affirmed the judgment below.

The Debtors appealed from that decision and raise various issues. In particular, they contend that the district court erred in ruling that the proceeds were part of the bankruptcy estate, based on 11 U.S.C. §§ 1327 and 541(a)(6). They rely on the vesting language of section 1327 of the Code and the Confirmation Order for the proposition that Mellon forfeited any claim to the excess proceeds from the property when it entered into the Stipulation, and that such forfeiture became effective when the Confirmation Order was entered.

Second, Debtors argue that the bankruptcy and district courts erred by improperly applying 11 U.S.C. § 1329 by finding that they had implicitly sought a modification of the Plan through the motion for confirmation of sale.

II. ANALYSIS OF APPLICABLE LAW

Since this <u>HN5</u> case presents primarily [**12] questions of law, this Court's review of the bankruptcy and district court's decisions is *de novo*. <u>In re Savage Industries</u>, <u>Inc.</u>, <u>43 F.3d 714, 719 n. 8 (1st Cir. 1994)</u>; <u>In re DN Associates</u>, <u>3 F.3d 512, 515 (1st Cir. 1993)</u>. However, any findings of fact by the lower courts are reviewed on a clearly erroneous standard. <u>In re Savage Indus.</u>, <u>43 F.3d at 720</u>.

A. The Confirmed Plan in a Chapter 13 Bankruptcy Case.

HN6[*] Section 1327(b) of the Bankruptcy Code states that "the confirmation of a plan vests all property of the estate in the debtor." 11 U.S.C. § 1327(b). In addition, section 1327(c) adds that such vesting "is free and clear of any claim or interest of any creditor provided for by the plan." Id. The language used by the bankruptcy court in its Confirmation Order was in consonance with these Code provisions.

Property of the estate includes, in addition to the property specified in <u>section 541</u> of this title:

- (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and
- (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

extend the application of section 541 to cases [**14] filed under Chapter 13, it does so within a specific context. In particular, the status of the property of the estate after the confirmation of a Chapter 13 plan is a controversial issue in itself. See Russell G. Donaldson, Continued Existence of Bankruptcy Code Chapter 13 Estate After Confirmation of the Chapter 13 Plan, 126 ALR Fed. 665 (1995)(Supp. 1999); David B. Wheeler, Whose Property Is It Anyway? 18-NOV Am. Bankr. Inst. J. 14 (1999)(brief review and analysis of the four different approaches currently used by the bankruptcy courts to harmonize §§ 1327 and 1306 of the Bankruptcy Code); Thomas E. Ray, Post-Petition

Page 10 of 14

235 F.3d 31, *36; 2000 U.S. App. LEXIS 33448, **14

Claims and the Automatic Stay in Chapter 13, 19-FEB Am. Bankr. Inst. J. 12 (2000)(reference to the same variety of interpretations given by the bankruptcy courts to §§ 1327 and 1306 of the Code); Vickie L. Vaska, Commentary: Property of the Estate After Confirmation of a Chapter 13 Repayment Plan: Balancing Competing Interests, 65 Wash. L. Rev. 677 (July 1990); see also In re Reynard, 250 B.R. 241, 246-47 (Bankr.E.D.Va. 2000); In re Holden, 236 B.R. 156, 160-63 (Bankr.D.Vt. 1999); In re Rangel, 233 B.R. at 198. [**15]

HN10 By stating that the bankruptcy estate continues to be replenished by post-petition property until the case is closed, dismissed, or converted under chapter 7, 11 or 12 of the <u>Bankruptcy Code, section 1306(a)</u> is actually providing for the continued existence of the bankruptcy estate until the earliest of any of the above-mentioned events occur. The meaning of the "vesting" language of <u>section 1327(b)</u> within this context has been explored far and wide throughout the nation. In fact, the bankruptcy court noted that <u>sections 1306(a)</u> and <u>1327(b)</u> of the Code "are difficult to reconcile" in this regard. <u>In re Barbosa, 236 B.R. at 545</u>, <u>quoting In re Rangel, 233 B.R. at 193</u>.

Some courts have interpreted section 1306(a) as actually providing for the continuation of the bankruptcy estate until the earliest of any of the above-mentioned events. See Security Bank of Marshall Town v. Neiman, 1 F.3d 687 (8th Cir. 1993), Still others have held that the confirmation order terminates the estate altogether, revesting all property of the estate in the debtor. In re Oliver, 193 B.R. 992 (Bankr.N.D.Ga. 1996); In re Petruccelli, 113 B.R. 5 (Bankr.S.D.Cal. 1990). [**16] A called "the-middle-of-the-road approach. approach", stands for the proposition that the estate continues to exist only with regard to property used to fund the plan. In re Leavell, 190 B.R. 536 (Bankr.E.D.Va. 1995); In re Ziegler, 136 B.R. 497 (Bankr.N.D.III. 1992). All of these positions have been criticized; the first two for overly emphasizing either section 1306 or 1327, rendering the opposing section meaningless, Wheeler, supra at 14, while the third approach is criticized for involving a subjective analysis not contemplated, or provided for, by the Code. Id.; see also Donaldson, supra, 126 ALR Fed. 665 §§ 2-5.

HN11[1] However, a fourth line of cases has held that by virtue of sections 1327(b)-(c), property of the estate at the time of confirmation [*37] vests in the debtors free of any claims from the creditors. The estate does not cease to exist however, and it continues to be funded by the Debtors' regular income and post-petition

assets as specified in <u>section 1306(a)</u>. <u>In re Reynard</u>, <u>250 B.R. at 247</u>; <u>In re Trumbas</u>, <u>245 B.R. 764</u>, <u>766</u> (<u>Bankr.D.Mass. 2000</u>); <u>In re Holden</u>, <u>236 B.R. at 162-63</u>; [**17] <u>In re Rangel</u>, <u>233 B.R. at 198</u>.

Many commentators consider this approach to be the best, since it gives meaning to both sections 1306 and 1327, without the subjective analysis required by the middle-of-the-road approach. E.g. Wheeler, supra. It was also the approach followed by the bankruptcy court in this case. Because we think that this approach has a logical consistency that harmonizes two apparent inconsistent sections, we hereby adopt it. However, we note that HN12[*] this rule cannot be applied in an inflexible manner, for in spite of the "vesting" provided by section 1327 of the Code, until all payments due under the plan are made, both the trustee and the unsecured creditors have an interest in the preservation of the debtor's financial situation, and in the extension of the ability-to-pay standard to future situations under the plan. In this particular case, "receiving proceeds has also altered the debtor's financial circumstances", which brings into play § 1329 of the Code. In re Suratt, 1996 U.S. Dist. LEXIS 22610, 1996 WL 914095, *1 (D.Or.

[**18] B. Modification of a Confirmed Chapter 13 Plan.

HN13 Section 1329 of the Code provides that a confirmed plan may be modified at the request of the debtor, the trustee, or the holder of an allowed

⁷ In In re Suratt, 1996 U.S. Dist. LEXIS 22610, 1996 WL 914095 at *1, the bankruptcy court rejected debtor's argument that by "vesting" the property on him upon confirmation, § 1327 operated to exclude the trustee and the unsecured creditors from partaking in the post-confirmation sale proceeds of former estate property. The court noted that:

The logical extension of the debtor's argument is ... that there must be a provision in all Chapter 13 plans requiring post-confirmation sale proceeds from property originally part of the estate to be paid to creditors, in order to preclude the debtor from receiving those funds. There is no such requirement in the Bankruptcy Code, nor has any court imposed such a requirement. 11 U.S.C. § 1329(a) is intended, in part, to provide the protection the debtor claims is missing. Its purpose is to protect creditors' rights to a debtor's increased income, including from proceeds from the sale of property that has appreciated in value, post-confirmation.

Id. at *3.

Page 11 of 14

235 F.3d 31, *37; 2000 U.S. App. LEXIS 33448, **18

unsecured claim in order to "increase or reduce the amount of payments on claims of a particular class provided for by the plan; [or to] extend or reduce the time for such payments..." 11 U.S.C. § 1329(a)(1,2). Any such post-confirmation modifications shall comply with sections 1322(a)-(b) 8, 1323(c) 9 [**19], and 1325(a) 10 of the Bankruptcy Code. 11 U.S.C. § 1329(b)(1).

The Debtors argue that both the bankruptcy court and the district court erred in [*38] applying section 1329 of the Code to allow a modification of the confirmed plan at the request of the Trustee and Mellon without their showing a substantial and unanticipated change in the Debtors' financial circumstances from the time of confirmation. They argue that the Property's sale was contemplated by the parties at the time of entering into the Stipulation and by the Court when it confirmed the Plan. Therefore, they aver that the modification requested by the Trustee and Mellon precluded [**20] by res judicata. For that purpose, they allege that the sale was not an unanticipated event, and that the appreciation in value of the property was foreseeable. They do not dispute however, nor can they given the facts, that the change in the Debtors' financial circumstances is substantial.

From the start, we note that Debtors' arguments are not

grounded on the specific provisions of the Code; since HN17[1] section 1329 does not in itself establish a criterion for granting a modification, other than the plan as modified must comply with all applicable provisions of the Code. 11 U.S.C. § 1329(b), incorporating by reference 11 U.S.C. § 1325(a). This means that the Plan as modified must be proposed in good-faith. 11 U.S.C. § 1325(a)(3). Also, it must comply with the "bestinterests-of-the-creditors" test and the "ability-to-pay" standard. 11 U.S.C. § 1325(a)(4-6). However, the Code says nothing about the applicability of the doctrine of res judicata or the threshold requirement of unanticipated and substantial change in the debtor's financial circumstances. These are doctrines of judicial [**21] origin. See, e.g., In re Witkowski, 16 F.3d 739, 746 (7th Cir. 1994)("The clear and unambiguous language of § 1329 negates any threshold change in circumstances requirement and clearly demonstrates that the doctrine of res judicata does not apply."); In re Than, 215 B.R. 430, 435 (B.A.P.9th Cir 1997)("The unanticipated, substantial change test is judicial gloss to § 1329, ... and the standard was seriously questioned by the Seventh Circuit's 1994 Witkowski opinion."); In re Powers, 202 B.R. 618, 622 (B.A.P.9th Cir. 1996)("We decline to hold that the change must be substantial and unanticipated as suggested by various cases in this circuit. The plain language of § 1329 simply does not support a change in circumstances as a prerequisite to modification."); In re Euler, 251 B.R. 740, 744 (Bankr.M.D.Fla. 2000)(recognizing that section 1329 "is silent as to whether the court should impose any conditions on a modification ... other than those provided by § 1329(b)."); In re Fitak, 92 B.R. 243, 249 (Bankr.S.D.Ohio 1988), affd 121 B.R. 224 (S.D.Ohio 1990)("While [**22] the legislative history indicates that a post-confirmation modification should be ordered pursuant to § 1329(a) upon a showing of changed circumstances which affect a debtor's ability to pay, the case law suggests that the doctrine of res judicata limits the scope of appropriate post-confirmation modifications.").

HN18 Some of the stated grounds for the application of the doctrine of res judicata within the context of a modification sought pursuant to § 1329, are: (1) the "awkward" application of section 1329, In re Euler, 251 B.R. at 744, guoting In re Perkins, 111 B.R. 671 at 673 ("Unfortunately... section 1329 is 'somewhat awkward in concept and application."); (2) the apparent inconsistency of sections 1321 and 1329 of the Code; while the first provides that only the debtor shall file a plan, the second provides standing to the trustee and the unsecured creditors to seek to modify it after

⁸ <u>HN14</u> Section 1322(a) of the Code establishes the requirements that must be met by a bankruptcy repayment plan in order to be approved by the court. Section 1322(b) on the other hand, enumerates all permissible provisions which can be included in a bankruptcy repayment plan. 11 U.S.C. § 1322(a)-(b).

⁹ <u>Section 1323(c)</u> provides <u>HN15[1]</u> that: "Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection." 11 U.S.C. § 1323(c).

[&]quot;" HN16 Section 1325(a) of the Code provides, in the pertinent part, that the courts "shall confirm a plan if" (1) it complies with all applicable provisions of the Code; (2) it "has been proposed in good faith and not by any means forbidden by law"; (3) the value of property to be distributed under the plan on account of all allowed unsecured claims is not less than what would be paid under a chapter 7 liquidation; and (4) the debtor is able to comply with the plan. 11 U.S.C. § 1325(a)(1), (3)-(4), (6).

Page 12 of 14

235 F.3d 31, *38; 2000 U.S. App. LEXIS 33448, **22

confirmation, id. 251 B.R. at 745-46; (3) the "little, if any, guidance as to the standard to be applied by a bankruptcy court in determining whether a request for a post-confirmation modification of a Chapter 13 plan should be granted," In re Fitak, 92 B.R. at 248; [**23] (4) the legislative history of § 1329, In re Euler, 251 B.R. at 746; (5) the case law, e.g. In re Fitak, 92 B.R. at 249, citing In re Moseley, 74 B.R. 791, 799-800 [*39] (Bankr.C.D.Cal, 1987) 11 [**24], Anaheim Savings & Loan Ass'n v. Evans (In re Evans), 30 B.R. 530, 531 (B.A.P.9th Cir. 1983) 12; and (5) the finality accorded to the confirmed plan, In re Euler, 251 B.R. at 746. Of all these factors, the need to accord a degree of finality to the confirmation order is one of the most weighty for some courts. See, e.g., Witkowski, 16 F.3d at 745, and cases cited therein.

However, while the doctrine of res judicata has been applied by some courts in this context, e.g. In re Arnold, 869 F.2d 240, 243 (4th Cir. 1989)("The doctrine of res judicata bars an increase in the amount of monthly payments only where there have been no unanticipated, substantial changes in the debtor's financial situation."); In re Suratt, 1996 U.S. Dist. LEXIS 22610, 1996 WL 914095 at *2 (D.Or. 1996)("The doctrine of res judicata limits post confirmation modifications to cases in which the change in a debtor's ability to pay was unanticipated at the time of confirmation."); In re Solis, 172 B.R. 530, 532 (Bankr.S.D.N.Y. 1994) quoting 5 L.King, Collier on Bankruptcy P 1329.01 (15th ed. 1994) ("A trustee's application [**25] 'should be limited to situations in which there has been a substantial change in the debtor's income or expenses that was not anticipated at the time of the confirmation hearing."); In re Fitak, 92 B.R. at 250 ("The doctrine of res judicata operates as a

limitation on the ability of parties to obtain a post-confirmation modification under $\underline{\S \ 1329(a)}$ based upon unanticipated changed circumstances."), it is by no means the uniformly accepted norm.

HN20[1] Many other courts have ruled that section 1329(a) allows the parties an absolute right to request a modification (although a modification will not necessarily be granted). Witkowski, 16 F.3d at 745; In re Powers, 202 B.R. at 622 ("HN21[*] Although a party has an absolute right to request modification between confirmation and completion of the plan, modification under § 1329 is not without limits."); In re Than, 215 B.R. at 436 (same); In re Trumbas, 245 B.R. at 767 (following In re Barbosa, 236 B.R. at 548, and Witkowski, supra); In re Meeks, 237 B.R. 856, 859-60 (M.D.Fla. 1999)("The Debtors demonstrate [**26] a substantial, unanticipated change in circumstances in order to modify their confirmed chapter 13 plan. However, neither can Chapter 13 debtors simply modify their plans willy nilly."); In re Laye, 1994 Bankr. LEXIS 2353, 1994 WL 905759, *2 (Bankr.N.D.III. 1994)(following Witkowski, supra). This approach is based on the clear language of the statute. In re Witkowski, 16 F.3d at 746; In re Powers, 202 B.R. at 622 ("We decline to hold that the change [under § 1329] must be substantial and unanticipated as suggested by various cases in [the Ninth Circuit]. The plain language of § 1329 simply does not support a change in circumstances as a prerequisite to modification.") Also, it acknowledges that HN22[*] section 1329 does provide a criterion for granting a modification. In re Witkowski, 16 F.3d at 745-46. First, "modifications are only allowed in [the] three limited circumstances" provided by the statute. Id. at 745. Second, as provided by § 1329(b)(1) of the Code, "a modified plan is only available if §§ 1322(a), 1322(b), 1325(a) and 1329(c) of the bankruptcy code are met." ld. Third, a modification [*40] may only [**27] be proposed in good faith. Id. at 746. 13 Fourth, "all proposed modifications need not be approved and in practice not all modifications are approved." Id. Moreover, the statutory framework is clear in allowing post-confirmation modifications, a feature that is incongruent with the application of the doctrine of res judicata. Id. at 745. 14

¹¹ In re Moseley, supra, makes a distinction between motions to modify a confirmed plan filed by the debtor, and motions to modify filed by the trustee or the unsecured creditors. The debtor may file motions to modify liberally, "on a proper showing of changed circumstances"; 74 B.R. at 799; while "a creditor may move to modify a plan adversely to a debtor after confirmation only upon a showing of a post-confirmation default by the debtor, or that the circumstances have changed since confirmation." Id. As to everything else, the confirmed plan is res judicata. Id.

¹² Anaheim Savings & Loan Ass'n v. Evans, supra, states while discussing the effect of a confirmation pursuant to section 1327, that: "HN19 1 An order confirming a Chapter 13 plan is res judicata as to all justifiable issues which were or could have been decided at the confirmation hearing." 30 B.R. at 531.

¹³ Specifically, "lack of good faith can be shown by manipulation of code provisions." In re Witkowski, 16 F.3d at 746.

¹⁴ The Witkwoski court stated: HN23[7] "The common-law

Page 13 of 14

235 F.3d 31, *40; 2000 U.S. App. LEXIS 33448, **27

The legislative history of section 1329(a) is not [**30] There was an indication at the Congressional applied. Section 1329(a) was amended in 1984 to provide standing to the trustee and the holders of unsecured claims to move to amend the confirmed bankruptcy repayment plan. Consumer Credit Amendments, Section 319, Title III of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), Publ. L. No. 98-353; 8 Collier on Bankruptcy P 1329.03 (Lawrence P. King, chief ed., 15th ed. 2000). Prior to the amendment, only the debtor was authorized to request a modification of the plan. Id.; see also William L. Norton Jr., Bankruptcy Law and Practice 2d, Bankruptcy Code 1270, eds.' comm. (1998-1999). However, Congress saw fit to allow the trustee and holders of unsecured claims to seek an amendment to the confirmed plan in order to carry the ability-to-pay standard forward in time, allowing upward or downward adjustment of plan payments in response to changes in the debtor's financial circumstances which affect his/her ability to make payments. See Oversight Hearings on Personal Bankruptcy Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, [**29] House of Representatives, 97th Cong., 1st and 2nd Sess. 22-23 (1981-1982). 15

principle of res judicata ... does not apply when a statutory purpose to the contrary is evident." In re Witkowski, 16 F.3d at 744 (internal quotations omitted). It then noted that "the statutory framework of the Bankruptcy Code plainly assumes the possibility of modifications of bankruptcy plans after they are confirmed." Id. at 745.

15 See Statement of Professor Vern Countryman:

Since plans are confirmed on the basis of projections of future income of the debtor, any subsequent change in the debtor's income, either an increase or a reduction, during the term of the plan will result in an excessive or an inadequate commitment of his disposable income under the plan. Because we believe that, in exchange for the advantages of Chapter 13 over Chapter 7, the debtor should commit his disposable income for the term of the plan, we propose a new section 1329(d) to deal with that problem. While this provision will permit the debtor to seek a modification of the plan in the event of a reduction in income, it will also permit an unsecured creditor, in the event of an improvement in the debtor's income position at any time during the period of the plan, to seek a modification so that the full amount of the debtor's disposable income remains committed to payments under the plan. This proposal ... seems to us to be a reasonable guid pro guo for the benefits conferred on the debtor under Chapter 13 which would not be available to

conclusive on this [**28] issue either, and if anything, it Oversight Hearings on Personal Bankruptcy that the supports the inference that res judicata should not be standing conferred to the trustee and the unsecured creditors would serve to accommodate any changes in the financial circumstances of the debtor (either adversely or favorably), which substantially affect his ability to make future payments under the plan. Oversight Hearings, supra, at 215-216, 221-222 (1981-1982) (statement of the Hon. Conrad [*41] K. Cyr. Bankruptcy Judge for the District of Maine, speaking on behalf of the National Bankruptcy Conference and the National Conference of Bankruptcy Judges); Arnold & Porter, BANKR84, Hearings(21). However, the reference to a substantial change was never accompanied by the requirement that the change be unanticipated. 16 Moreover, the legislative history indicates that the application of the doctrine of res judicata was never discussed, considered, or contemplated by Congress. Oversight Hearings, supra.

> [**31] Faced with this legislative intention, and the plain language of the statute, we are compelled to concur with the district court and the bankruptcy court that the Witkowski approach is the more sensible one. In re Barbosa, 236 B.R. at 547. However, the

him in a Chapter 7 case.

Oversight Hearings on Personal Bankruptcy Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st and 2nd Sess, 22-23 (1981-1982)(statement of Mr. Vern Countryman, Harvard Law School Professor and Vice-Chairman of the National Bankruptcy Conference); Arnold & Porter, BANKR84, Hearings(21).

Although the proposed subsection 1329(d) was not finally enacted by Congress, the essential purpose behind it, to permit the unsecured creditors (and the trustee) to request an amendment to the confirmed bankruptcy plan if there was a change in the debtor's income, did become law.

16 In fact, the original proposed amendment read:

On request of the debtor or of a creditor holding an allowed unsecured claim and after notice and a hearing, the plan shall be modified under subsection (a) of this section to any extent that any change in the debtor's total projected disposable income, as defined in section 1320 of this title, substantially affects whether the plan, before modification, complies with the conditions specified in sections 1325(a)(6) and 1325(c) of this title.

Proposed Section 1329(d); Oversight Hearings, supra, at 31. The reference to a "substantial change" was later deleted from the section and did not become law.

Page 14 of 14

235 F.3d 31, *41; 2000 U.S. App. LEXIS 33448, **31

bankruptcy judge was careful to note that "motions to Costs are awarded to the appellees. modify cannot be used to circumvent the appeals process for those creditors who have failed to object confirmation of a Chapter 13 plan or whose objections to confirmation have been overruled." Id. Moreover, the bankruptcy judge noted that " §§ 1327 and 1330 accord significant finality to confirmation orders in Chapter 13 cases." Id. Accordingly, the court concluded that "while Witkowski may be a correct statement of the law, as a practical matter, parties requesting modifications of Chapter 13 plans must advance a legitimate reason for doing so, and they must strictly conform to the three limited circumstances set forth in § 1329." Id. at 548.

Upon a close analysis, the bankruptcy court's conclusions of law do accord significant finality to confirmed plans without requiring specific threshold tests not contemplated by the statute. [**32] Therefore, we adopt the Witkowski approach as modified by the bankruptcy court and refrain from adopting the substantial and unanticipated test for seeking a modification pursuant to § 1329. Accordingly, we find that the Trustee and Mellon were not precluded by res judicata from seeking an amendment to the plan. In addition, given the factual circumstances of this case -where the Debtors realized through the sale an appreciation in value of almost 215% of the stipulated value of the property at confirmation -- we find that the bankruptcy court did not abuse its discretion in granting the amendment. Witkowski, 16 F.3d at 746 HN24[1] ("Because modification under § 1329 is discretionary, our review is limited to a determination of whether the district court abused its discretion in modifying the plan.").

Finally, as the bankruptcy judge said, it is antithetical to the bankruptcy system to allow a debtor to "strip down" a mortgage, underpay the unsecured creditors, and obtain a super discharge under section 1328(a) of the Code, while selling the property mortgaged for a price of two times its estimated value for purposes of the "strip down", and keeping to himself [**33] the excess of the proceeds. In re Barbosa, 236 B.R. at 552. In fact, to allow the Debtors to keep the proceeds of the sale in such circumstances effectively defeats Congress' intention to extend the application of the "ability-to-pay" standard forward throughout the duration of the plan. Oversight Hearings, supra.

III. CONCLUSION

On these grounds, the district court's order upholding the bankruptcy court's [*42] judgment is Affirmed.

End of Document

Faculty

Edward A. Bailey is a Standing Chapter 13 Bankruptcy Trustee in Columbus, Ohio. He was appointed by the U.S. Trustee for Region 9, and officially took charge of his office on Oct. 1, 2020. Previously, Mr. Bailey was a creditors' rights attorney for 21 years, representing creditors throughout Ohio and Kentucky. Before entering the creditor world, he was at a general practice firm, where he handled various types of cases including debtor bankruptcy, as well as criminal, domestic and personal-injury matters. Mr. Bailey has been a frequent speaker on bankruptcy law, including at events such as the NACTT National meeting, the Midwest Regional Bankruptcy Seminar, the Consumer Education Coalition seminars and others, including targeted training and seminars for creditors and clients to educate them on how to handle issues arising out of bankruptcy cases. He has also written articles for many industry journals and publications. Mr. Bailey received his undergraduate degree from Hiram College and his J.D. from Capital University Law School.

Edward J. Boll, III is Of Counsel with Dinsmore & Shohl LLP in Cincinnati. He is a creditors' rights attorney and a trusted advisor to the default servicing industry. Mr. Boll has experience representing secured and unsecured creditors in chapters 7, 11, 12 and 13, and he frequently speaks and advocates for clients at national and local court and industry conferences, including those sponsored by the Mortgage Bankers Association and ABI, for which he serves on the advisory board of its Midwest Regional Bankruptcy Seminar. He also offers on-site client training to provide strategic and practical advice to better help clients evaluate risk, offer compliance solutions, and make systemic changes to operations. Mr. Boll is a member of the Ohio State Bar Association and the Cincinnati Bar Association's Bankruptcy Committee, as well as the Southern District of Ohio Bankruptcy Court's Local Rules Committee. He received his B.A. from the University of Cincinnati in 1997 and completed an International & Comparative Business Law Study Abroad in London in 1998 with the University of Notre Dame School of Law, and he received his J.D. from the University of Dayton School of Law in 2000, where he was a member of the University of Dayton National Bankruptcy Moot Court Team.

Stuart P. Brown is the owner of Stuart P. Brown, PLLC in Covington, Ky., where he focuses on the practice of consumer bankruptcy and general representation of small businesses. Prior to establishing his current office, he was an attorney with O'Hara, Ruberg, Taylor, Sloan & Sergent in Crestview Hills, Ky. Mr. Brown is a member of the Kentucky Bar Association, Northern Kentucky Bar Association and ABI. He has been a regular speaker on the topics of bankruptcy jurisdiction, representation of owners of small businesses in bankruptcy, and the interplay between auctions and bankruptcy sales. Mr. Brown received his B.A. in 1992 from the University of Kentucky and his J.D. in 1997 from Northern Kentucky University.

Hon. Beth A. Buchanan is a U.S. Bankruptcy Judge for the Southern District of Ohio in Cincinnati, appointed on May 10, 2011. Prior to her appointment, she was a member of Frost Brown Todd LLC in its Bankruptcy and Restructuring Practice Group, where she practiced exclusively in the areas of bankruptcy and insolvency law, representing debtors, creditors' committees, secured lenders and unsecured creditors in numerous complex chapter 7, 11 and 15 bankruptcy proceedings. Before attending law school, Judge Buchanan worked in banking for more than eight years with two major

financial institutions. She is a member of ABI, the Cincinnati Bar Association, the Federal Bar Association's Cincinnati/Northern Kentucky Chapter, the National Conference of Bankruptcy Judges and the Thomas F. Waldron American Bankruptcy Law Forum, and she is the chairperson of the Local Bankruptcy Rules Standing Committee for the Southern District of Ohio. She also served on the Sixth Circuit Bankruptcy Appellate Panel from 2018-20. Judge Buchanan received her B.S.B.A. in 1986 from The Ohio State University and her J.D. *summa cum laude* in 1997 from the University of Dayton School of Law.

John G. Jansing is the chapter 13 trustee for Southern District of Ohio's Western Division in Dayton. He was appointed in July 2019 and started as trustee on Oct. 1, 2019. Mr. Jansing's office administers about 2,026 cases currently. Prior to his appointment as 13 trustee, he served as a chapter 7 trustee for about 10 years and represented mostly creditors in all chapters of bankruptcy for about 25 years. Prior to his bankruptcy practice, Mr. Jansing clerked for the Ohio Court of Appeals and managed a title company and handled commercial real estate matters. He is a member of the American Bar Association, the Ohio Bar Association, the Dayton Bar Association and the American Bankruptcy Law Forum. Mr. Jansing received his B.A. *cum laude* in history from the University of Cincinnati in 1985 and his J.D. from the University of Dayton School of Law in 1988.

Paul J. "P.J." Minnillo is a founding shareholder in the law firm of Minnillo Law Group Co., LPA in Cincinnati, where his practice is concentrated in representing individuals and small businesses in chapter 7, 11 and 13 bankruptcy proceedings. He is admitted to the Ohio Bar and the Federal Bar for the Southern District of Ohio. Mr. Minnillo is a member of the Cincinnati Bar Association, the Clermont County Bar Association, ABI and the National Association of Consumer Bankruptcy Attorneys. He received his B.A. *cum laude* in French in 1992 from the University of Cincinnati and his J.D. with honors from Cleveland State University Cleveland-Marshall College of Law in 1995.