

**SUMMARY OF CHAPTER 13**

of the

Bankruptcy Code as Amended by  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

*December 3, 2006*

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**SECTION 1302**  
**Trustee**

Summary of Amendment

The chapter 13 trustee has been tasked with additional notice duties pursuant to 1302(b) and 1302(d). The notice requirements are the same for trustees in chapters 7, 11, and 12 cases. There are three types of notices potentially required.

**Notice Duties.** The trustee must provide a written notice both to the holder of a claim for a domestic support obligation and to the state child support enforcement agency. See 11 U.S.C. §§ 1302(d)(1)(A) & (B). The state child support enforcement agency is the agency established under sections 464 and 466 of the Social Security Act. See 42 U.S.C. §§ 664 & 666. Section 1302(d)(1)(C) requires a third, post-discharge notice to both the claim holder and the state child support enforcement agency.

Notice to Claimant. The notice to the holder of the claim required by section 1302(d)(1)(A) must:

- advise the holder that he or she is owed a domestic support obligation;
- advise the holder of the right to use the services of the state child support enforcement agency for assistance in collecting such claim; and
- include the address and telephone number of the state child support enforcement agency.

Notice to State. The notice to the State child support enforcement agency required by section 1302(d)(1)(B) must:

- advise the agency of such claim; and
- advise the agency of the name, address and telephone number of the holder of such claim.

Notice re Discharge. Once a discharge is entered, section 1302(d)(1)(C) also requires the trustee give written notice to the holder of a domestic support obligation and to the state child support agency of the following:

- the granting of the discharge;
- the last recent known address of the debtor;
- the last recent known name and address of the debtor’s employer;
- the name of each creditor that holds a claim not discharged under sections 523(a)(2) or (4); and
- the name of each creditor that holds a claim that was reaffirmed.

Pursuant to section 1302(d)(2), the holder of a claim for a domestic support obligation or the state child support enforcement agency may request the last known address of the debtor from a creditor holding a claim that was not discharged under sections 523(a)(2) or (4) or that was reaffirmed by the

debtor under section 524(c). If the creditor discloses the last known address in response to such inquiry, the creditor cannot be held liable for making the disclosure.

Deadlines. Section 1302(d) does not set any firm deadlines for giving the notices required by section 1302(d)(1)(A), (B), or (C). The wording of these subparagraphs, however, suggests that the first two notices must be given soon after the case is commenced while the third notice must be given after a discharge is granted. See the discussion of the timing issues in the summary of section 704(c). With one exception, the difficulties discussed in connection with section 704(c) are applicable in chapter 13 cases. The exception concerns section 523(a)(14A) [debts incurred to pay a tax debt owed to a governmental unit other than the United States]. Such debts are exceptions to a chapter 7 discharge but not to a chapter 13 discharge. Consequently, the fact that complaints under section 523(a)(14A) may be filed in any court with jurisdiction after entry of a discharge, will pose problems for the trustee when giving the post-discharge notice only in chapter 7 cases.

**Duties Imposed by Chapter 15.** Although section 1302 does not incorporate section 1505, section 103(k)(1) makes section 1505 applicable in all title 11 cases.

Section 1505 permits the court to authorize a trustee appointed under any chapter, or an examiner appointed under section 1104(c), to act in a foreign country on behalf of the bankruptcy estate. When authorized to so act, the trustee or examiner may act as authorized by applicable foreign law.

Cross References

New Defined Terms

**domestic support obligation**, 11 U.S.C. § 101(14A)

Bankruptcy Code

11 U.S.C. § 103(k)(1)	[makes section 1505 applicable to trustee appointed under all chapters]
11 U.S.C. § 523(a)	[nondischargeable claims]
11 U.S.C. § 704	[duties of chapter 7 trustee]
11 U.S.C. § 1106	[duties of chapter 11 trustee]
11 U.S.C. § 1202	[duties of chapter 12 trustee]
11 U.S.C. § 1505	[authority of trustee to act in a foreign country]

Applicable Nonbankruptcy Statutes

42 U.S.C. § 664	[State child support enforcement agency]
42 U.S.C. § 666	[State child support enforcement agency]

Local Rules

A requirement that the debtor provide the name and address of each domestic support claimant and State child support enforcement agency at the outset of the case would assist the trustee in complying with the notice requirement of this section. A provision for this in the form plan in the Eastern District is likely.

### Information Necessary to Apply Amended Section

The trustee will have to have available both the name and address of each claim holder as well as the name, address and phone number of each state's child support enforcement agency. The trustee must carefully monitor and store information received informally from the debtor which may not be reflected in the official court record.

### Drafting Issues and Problems

Section 1302(b), delineating the duties of a chapter 13 trustee, makes no reference to section 704(a). Instead, it continues to incorporate by reference "sections 704(2), 704(3), 704(4), 704(5), 704(6), 704(7), and 704(9)." Given the amendment of section 704, the appropriate reference should be to sections 704(a)(2) - (a)(7), and 704(a)(9).

Section 1302(d) does not state when the trustee is to give the initial notice pursuant to 1302(d). One presumes that it was intended to be given at the outset of the case as additional notices are required upon the granting of a discharge. The final notice required under 1302(d) after discharge requires that the trustee supply recent, last known address of the debtor and recent last known name and address of debtor's employer. Does this mean that if the trustee has been supplied with information that is not part of the official record, he or she is required to supply the information to the parties?

**SECTION 1307**  
**Conversion or Dismissal**

Summary of Amendment

Section 1307 has been amended in two respects.

First, section 1307(c)(11) has been added and allows a party in interest or the United States Trustee to bring a motion to dismiss or convert a case if the debtor fails to pay any domestic support obligation that first becomes payable after the date of the filing of the petition. Thus, if a debtor becomes delinquent with ongoing child or spousal support, the case may be converted or dismissed.

Second, on the motion of any party in interest, section 1307(e) requires the court to dismiss or convert a case if the debtor fails to file the tax returns required under section 1308.

Cross References

New Defined Terms

**domestic support obligation**, 11 U.S.C. § 101(14A)

Bankruptcy Code

11 U.S.C. § 521	[documents the debtor is required to file]
11 U.S.C. § 1308	[filing of prepetition tax returns]

Information Necessary to Apply Amended Section

The Internet site of the federal Office of Child Support Enforcement contains a link to the State IV-D program Internet sites for all 50 states. These links may be found at [www.acf.hhs.gov/programs/cse/extinf.htm#exta](http://www.acf.hhs.gov/programs/cse/extinf.htm#exta).

The state child support enforcement agency for California is the Department of Child Support Services. See Family Code § 17202. It, in turn, has designated local support agencies to enforce support claims. See Family Code § 17304. The agency for the county of residence of the claim holder can be found by accessing the California Department of Child Support Services at [www.childsup.cahwnet.gov](http://www.childsup.cahwnet.gov), and referencing the section entitled "Contact Local Office." Consequently, if the trustee serves the notices required by section 704(c) on the California Department of Child Support Services, those notices will not be given to the agency actually handling the collection of the child support claim.

Drafting Issues and Problems

There are substantial amendments to section 521. The references in sections 1307(c)(9) and (c)(10) were not updated to reflect these amendments. The reference to section 521(1) in section 1307(c)(9) should now be to section 521(a)(1), and the reference to section 521(2) in section 1307(c)(10) should now be to section 521(a)(2).

Prior to BAPCPA, section 1307(d) made reference to subsection (e). After BAPCPA, it continues to make that reference. However, a new subsection (e) was added to section 1307 and former subsection (e) is now subsection (f). Congress failed to update the reference in section 1307(d).

**SECTION 1308**  
**Filing Prepetition Tax Returns**

Summary of Amendment

Section 1308(a) requires a chapter 13 debtor who has failed to file tax returns due under applicable nonbankruptcy law to file all such returns if they were due for tax periods ending during the 4-year period ending on the date of the filing of the petition.

If the debtor does not file the tax returns prior to the meeting of creditors, then the trustee may continue the meeting for a reasonable period of time to allow the debtor to file the delinquent tax returns. This period of time shall not exceed 120 days from the initial meeting if the return was due before the petition date. If the return is not overdue as of the petition date, then the trustee may continue the meeting to the later of 120 days after the first date of the meeting, or the date on which the return is due, allowing for any automatic extension of time requested by the debtor in accordance with applicable non-bankruptcy law. See 11 U.S.C. § 1308(b)(1).

After notice and a hearing, the court may extend these time periods. However, the court's order must be entered before the applicable filing period under section 1308(b) has expired. To obtain an extension, the debtor must demonstrate by a preponderance of the evidence that the failure to file a return as required by section 1308 is attributable to circumstances beyond the control of the debtor. See 11 U.S.C. § 1308(c)(2).

The court may extend the filing period for an additional 30 days if the return was due prior to the filing of the petition. If the return was for a pre-petition tax period but was not required to be filed on the petition date, the deadline set in section 1308(c)(1)(B) [the longer of 120 days after the meeting or the due date under the last automatic extension of time permitted by nonbankruptcy law] may be extended to the applicable extended due date. See 11 U.S.C. § 1308(b)(2).

Finally, section 1308(c) provides that the term "return" also applies to a substitute return prepared by the taxing authority [see 26 U.S.C. § 6020] or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.

Case Authority Impacted by the Amendment

Prior to BAPCPA, the Bankruptcy Code did not require chapter 13 debtors to file delinquent tax returns. If a debtor did not file tax returns, the trustee might object to the plan on the grounds of lack of feasibility or that the plan was not proposed in good faith. See, e.g., Greatwood v. United States (In re Greatwood), 194 B.R. 637 (9<sup>th</sup> Cir. B.A.P. 1996), *affirmed*, 120 F.3d. 268 (9<sup>th</sup> Cir. 1997). Now, a chapter 13 plan cannot be confirmed unless the tax returns have been filed.

Litigation Points

What constitutes "circumstances beyond the control of the debtor?"

Cross References

Bankruptcy Code

11 U.S.C. § 1307	[dismissal or conversion of chapter 13 petitions]
11 U.S.C. § 521	[debtor's duties]

### Applicable Nonbankruptcy Statutes

26 U.S.C. § 6020(a) [returns prepared by IRS]  
IRS Reg. 1.6081-4(a) [automatic extension date for filing returns]

### Bankruptcy Rules

The Federal Rules of Bankruptcy Procedure may require amendment. Such amendment is recommended by section 716 of BAPCPA. Section 716(e) indicates that it is the “sense of Congress” that an objection to confirmation by a taxing authority be allowed post-confirmation as long as the objection is filed within 60 days of the filing of the returns by the debtor. It is also recommended that the debtor be prevented from objecting to a taxing authority’s claim until all returns required under 1308 are in fact filed. No such amendments appear in the Interim Rules. The logical rules for amendment would be Fed. R. Bankr. P. 3007 and 3015.

### Drafting Issues and Problems

Section 1308(b)(2)(A) & (B) cross-reference the wrong paragraphs. Section 1308(b)(2)(A) refers to “returns described in paragraph (1).” It should refer to the returns referenced in section 1308(b)(1)(A) [returns that should have been filed pre-petition]. Section 1308(b)(2)(B) erroneously refers to “a return described in paragraph (2).” The reference should be to section 1308(b)(1)(B) [returns for pre-petition periods not due on the petition date].

## SECTION 1322 Contents of Plan

### Summary Of Amendment

The amendments to section 1322 affect the length of chapter 13 plans, the treatment of assigned priority claims based on a domestic support obligation, and the treatment of loans from a loan from a pension, profit-sharing, stock bonus, or other plan established under sections 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986.

**Payment of Priority Claims.** If the plan has a term of 5 years and provides for the payment of all disposable income to creditors, the plan may provide for less than full payment of a claim entitled to priority under section 507(a)(1)(B) [domestic support obligation assigned to, or owed directly to or recoverable by, a governmental unit]. See 11 U.S.C. § 1322(a)(4).

One court, In re Sanders, 341 B.R. 47 (Bankr. N.D. Ala. 2006), has concluded that the amendments to 11 U.S.C. § 507(a) reordering the priority of certain claims, do not require that a chapter 13 plan pay priority claims in the order enumerated by section 507(a). All that is required by sections 507(a) and 1322(a)(2) is that the plan provide for payment in full of priority claims (with the proviso added by section 1322(a)(4)). These sections do not mandate payment of priority claims in any particular order or before nonpriority claims are paid. See, also 11 U.S.C. § 1322(b)(4).

**Interest on Nondischargeable Claims.** If the plan provides for payment in full of all allowed claims, the plan may provide for interest on unsecured claims that are nondischargeable under section 1328(a). See 11 U.S.C. § 1322(b)(10).

**Plan Length.** The length of the plan cannot be longer than 5 years if the debtor's and the debtor's spouse's annualized current monthly income is equal to or more than the state median family income for a household of comparable size. See 11 U.S.C. § 1322(d)(1). Absent good cause, a plan may not exceed 3 years in length if the debtor's and the debtor's spouse's annualized current monthly income is equal to or less than the state median family income for a household of comparable size. See 11 U.S.C. § 1322(d)(2). If there is good cause to exceed 3 years, the plan's length may not exceed 5 years in length. See 11 U.S.C. § 1322(d)(1)(C).

**Treatment of Pension Loans.** A chapter 13 plan may not materially alter the terms of a loan described in section 362(b)(19) (loans from qualified retirement and profit-sharing plans) and any amounts required to repay such loans are excluded from disposable income under section 1325(b). See 11 U.S.C. § 1322(f). In other words, for purposes of calculating projected disposable income under section 707(b)(2) as well as section 1325(b), money necessary to repay a pension loan may be deducted from current monthly income.

However, neither the means test laid out in section 707(b)(2) nor the Statement of Current Monthly Income and Means Test Calculation for use in chapter 7 cases makes provision for the exclusion of amounts necessary to repay a pension loan from current monthly income. Official Form 22A provides only for the deduction of non-mandatory retirement contributions at Line 26.

Arguably, the deduction of amounts repaid on account of a retirement loan may be reported as an "additional expense claim" on Part VII of Official Form 22A. Alternatively, in response to a motion to dismiss a chapter 7 petition, the debtor might argue that this pension expense is a "special circumstance" under section 707(b)(2)(B) that rebuts the presumption of abuse.

Otherwise, the failure to account for this expense in the chapter 7 context could place a chapter 7 debtor in a catch-22. If no provision is made in a chapter 7 case for a pension loan repayment expense deduction from current monthly income, the debtor might have sufficient projected disposable income to pay the minimum dividend to unsecured creditors set by the means test. If that debtor then converted the petition to one under chapter 13, the pension expense would be excluded from current monthly income by virtue of section 1322(f). This exclusion might result in the debtor having no or significantly less projected disposable income to pay to unsecured creditors. If the case is reconverted to chapter 7, however, the pension expense would drop out of the means test and, once again, the debtor would flunk the means test.

In other words, if deductions and exclusions from current monthly income are not the same in chapter 7 and chapter 13, a debtor could conceivably flunk the means test while in chapter 7 yet not have the projected disposable income with which to fund a chapter 13 plan. The chapter 7 debtor has two possible avenues to deal with this catch-22.

In chapter 13 cases, Official Form 22C, the Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, permits the deduction, at Line 31, of non-mandatory retirement contributions and, at Line 55, “the monthly average” of all payments on retirement loans from a debtor’s current monthly income.

It is unclear from Form 22C, Line 55, whether this average is to be calculated over the entire applicable commitment period, the amortization period of the retirement loan, or some other period. However, any average may be inconsistent with the prohibition in section 1322(f) against materially altering the terms of a retirement loan. Two courts, In re Haley, 2006 WL 2987947, \*3 (Bankr. D.N.H. 2006) and In re Wiggs, 2006 WL 2246432, \*3 (Bankr. N.D. Ill. 2006), have considered the impact of section 1322(f) and have permitted the debtor to deduct actual monthly retirement loan payments rather than average of such payments from current monthly income. Not prorating a retirement loan over the life of the plan, may result in a debtor having disposable income later in the case that is not devoted to the plan. The court in Haley suggested that if this occurs, the trustee should move to modify the plan once the retirement loan has been paid.

#### Case Authority Impacted By Amendment

Section 1322(f) overrules those cases holding that chapter 13 debtors may not repay retirement loans in a chapter 13 without paying all claims in full. See e.g., Harshbarger v. Pees (In re Harshbarger), 66 F.3d 775, 777 (6<sup>th</sup> Cir. 1995); Tierney v. Dehart (In re Tierney), 195 F.3d 177 (3<sup>rd</sup> Cir. 1999).

Section 1322(b)(10) provides an exception to section 502(b)(2) [disallowing unmatured interest on claims] and overrules such cases as Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee), 218 B.R. 916, 925 (B.A.P. 9th Cir.1998), *affirmed*, 193 F.3d 1083 (9<sup>th</sup> Cir. 1999), Bruning v. United States, 376 U.S. 358 (1964), which held that while interest accumulated on nondischargeable claims, it could not be paid in a reorganization.

#### Litigation Points

1. Under section 1322(a)(10), is paying interest on nondischargeable debts in 100% plans always permissible, or is it still subject to an unfair discrimination objection if dischargeable unsecured claims are not receiving interest?
2. Under section 1322(d), annualized current monthly income includes then debtor’s and debtor’s spouse’s incomes. What if the debtors are separated and only one is filing?

## Cross References

### New Defined Terms

**current monthly income**, 11 U.S.C. § 101(10A)

**median family income**, 11 U.S.C. § 101(39A)

### Bankruptcy Code

11 U.S.C. § 362(b)(19) [payment of retirement loans despite automatic stay]

11 U.S.C. § 507(a)(1)(B) [assigned domestic support claims]

11 U.S.C. § 707(b)(2)(A) [means test applicable in chapter 7 cases]

11 U.S.C. § 1325(b)(2) [definition of disposable income in chapter 13 cases]

11 U.S.C. § 1328(a) [debts dischargeable in chapter 13]

### Information Necessary to Apply Amended Section

The Census Bureau publishes on its Internet site median family income by family size and state median family income by numbers of earners in a family. The most recent year for these figures is 2003. See [www.census.gov/hhes/www/income/medincsizeandstate.html](http://www.census.gov/hhes/www/income/medincsizeandstate.html).

The Consumer Price Index for All Urban Consumers is available from the Bureau of Labor Statistics and can be obtained by its Internet site. See [www.bls.gov/cpi/](http://www.bls.gov/cpi/).

**SECTION 1324**  
**Confirmation Hearings**

Summary of Amendment

**Timing of Confirmation Hearing.** The court must conduct a confirmation hearing. Section 1324(b) establishes minimum and maximum times within which the court must hold a confirmation hearing. The hearing must be no less than 20 days, but no more than 45 days, after the meeting of creditors unless the court determines that it would be in the best interest of the creditors and the estate to hold the confirmation hearing at an earlier date and no one objects to the earlier date. See In re Guidry, 2006 WL 3438599 (Bankr. S.D. Tex. 2006). Section 1324(b) does not require that a plan be confirmed with these time parameters. See In re Barajas, 2006 WL 3254483 (Bankr. E.D. Cal. 2006).

One court has noted that the time frames in section 1324(b) may result in a plan being confirmed faster than under pre-BAPCPA procedure. Partly because of this, the court refused to conclude that the failure of a creditor with a secured claim protected by the hanging paragraph following section 1325(a)(9) to object to a plan treatment violating the hanging paragraph meant that the creditor consented to that treatment. See In re Montoya, 341 B.R. 41 (Bankr. D. Utah 2006).

Fed. R. Bankr. P. 2003(a) requires the United States Trustee to call a first meeting no fewer than 20 and more than 50 days after the order for relief. Therefore, assuming a first meeting is scheduled and concluded on the earliest possible date, a confirmation hearing must be scheduled as early as the 40<sup>th</sup> day and late as 65 days after the petition is filed.

**Notice Requirements.** These deadlines must also be coordinated with the notice requirements of Fed. R. Bankr. P. 2002. Rule 2002(a) requires that all parties receive 20 days' notice of the meeting of creditors and Rule 2002(b) requires that parties be given 25 days' notice of both the deadline for filing objections to confirmation and the confirmation hearing.

Further complicating the timing issue is the fact that the debtor need not file most statements, schedules, and the plan with the petition. These documents may be filed within 15 days of the date the petition is filed. See Fed. R. Bankr. P. 1007(c) and 3015(b); Interim Rule 1007(c). A copy of the plan, or a summary of it, must be included with notice of the hearing on confirmation of the plan. See Fed. R. Bankr. P. 3015(d).

**Contents of Notice.** Therefore, in order for the case to proceed in a timely fashion toward confirmation of a plan, the notice of the commencement of the case must inform parties of the following information: 1) the date relief was ordered [the date the petition was filed]; 2) the date, time, and place of the meeting of creditors; 3) the deadline(s) for filing proofs of claim; 4) the deadline for filing and serving objections to confirmation of the plan as well as responses to those objections; and 5) the date, time, and place of the confirmation hearing. See Fed. R. Bankr. P. 9009.

Cross References

Bankruptcy Code

11 U.S.C. § 341 [meeting of creditors]

Bankruptcy Rules

Fed. R. Bankr. P. 1007(c) [deadline for files statements and schedules]

Fed. R. Bankr. P. 2003 [permits the meeting of creditors to occur as early as 20 days and as long as 50 days after the order for relief]  
Fed. R. Bankr. P. 3015(b) [deadline for filing chapter 13 plan]  
Fed. R. Bankr. P. 3015(d) [service of chapter 13 plan]  
Fed. R. Bankr. P. 9009 [permits combining of official forms and notices]

\ Interim Rules

Interim Rule 1007(c) [deadline for files statements and schedules]

Drafting Issue and Problems

Section 1324(b) ties the confirmation hearing to the meeting of creditors. Do the new time periods run from the first date set or the conclusion of the meeting? This is unclear from section 1324(b) and the Interim Rules do not address the issue.

**SECTION 1325**  
**Confirmation of a Plan**

Summary of Amendment

I. **Secured Claims.** Many of the amendments to section 1325 affect the rights of secured creditors and the possible treatment of secured claims.

A. **Retention of Liens.** Section 1325(a)(5)(B)(i)(I) now provides that, absent an agreement to the contrary with a secured creditor or the surrender of the collateral for a secured claim, a secured claim must be permitted to retain the lien securing the claim until the earlier of the payment of the underlying debt as determined under nonbankruptcy law (i.e., not the “stripped down” claim amount), or the entry of a discharge under section 1328.

B. **Effect of Conversion.** If the chapter 13 case is dismissed or converted to chapter 7 without completion of the plan, a secured creditor may retain its lien “to the extent recognized by nonbankruptcy law.” See 11 U.S.C. § 1325(a)(5)(B)(i)(II).

C. **Periodic Payments on Account of Secured Claims.** If the secured claim is being paid through the plan in periodic payments, “such payments shall be in equal installments.” See 11 U.S.C. § 1325(a)(5)(B)(iii)(I). Also, when the claim is secured by personal property, the amount of the periodic payments “shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan. . . .” See 11 U.S.C. § 1325(a)(5)(B)(iii)(II).

1. **Periodic Payments.** Section 1325(a)(5)(B)(iii)(I) does not mandate periodic payments. It merely states that “if” periodic payments are provided for in the plan, they must be in equal monthly amounts.

a. **Types of secured claims entitled to periodic payments.** Section 1325(a)(5)(B)(iii)(I) does not differentiate among types of secured claims. Section 1325(a)(5)(B)(iii)(I) refers only to “property to be distributed pursuant to this subsection.” If this is a reference generally to subsection (a)(5) of section 1325, dealing with the treatment of all secured claims, then section 1325(b)(5)(B)(iii)(I) requires that a plan provide equal monthly amounts whenever it proposes to make periodic payments on account of any type of secured claim.

(1) However, at least one court has read this reference as being limited to subsection (a)(5)(B)(iii). That is, sections 1325(a)(5)(B)(iii)(I) and 1325(a)(5)(B)(iii)(II) are cumulative. Whenever a plan proposes periodic payments, they must be in equal amounts and adequately protect the creditor’s interest in its collateral if the claim is secured by personal property. See In re Perez, 339 B.R. 385, 398 n.13, 401 n.18 (Bankr. S.D. Tex. 2006). See, also In re Wagner, 342 B.R. 766, 771-72 (Bankr. E.D. Tenn. 2006).

(2) In In re Davis, 343 B.R. 326, 327 (Bankr. M.D. Fla. 2006), the court assumed the applicability of section

1325(a)(5)(B)(iii)(I) to a real property secured claim but concluded that the chapter 13 plan need not provide periodic payments of equal amounts. It reached this conclusion because, given the addition of section 1322(e) to the Bankruptcy Code in 1994, a debtor is no longer required by *Rake v. Wade*, 508 U.S. 464 (1993), to provide for a real property arrearage claim under section 1325(a)(5). Section 1322(b)(5) was applicable and it requires only that contract installment payments be maintained and that any pre-petition default be cured within a reasonable time. Section 1322(b)(5) trumps section 1325(a)(5). The court in *In re Lemieux*, 347 B.R. 460 (Bankr. D. Mass. 2006), declined to follow *Davis*, holding that periodic payments on a matured real estate loan must be equal monthly amounts.

b. **Necessity of periodic payments.** Nonetheless, some courts and commentators believe that periodic payments are necessary because section 1325(a)(5)(B)(iii)(I) is designed to halt the “abusive” practice of providing lump sum or balloon payments that are due long after plan confirmation rather than requiring periodic payments that begin at, or soon after, confirmation. See *DeSardi*, 340 B.R. 790, 810-11 (Bankr. S.D. Tex. 2006); Richardo Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 *Amer. Bankr. L.J.* 817, 836 (2005).

In *Wagner*, 342 B.R. at 771-72, the court refused to confirm a plan that provided no monthly payments on account of a claim for arrears on a real property secured loan and instead provided a single balloon payment in the 24th month of the plan. The court concluded that the plan “must provide for equal monthly payments ... over the life of the plan.”

c. **If periodic payments are a necessity, when must they begin?** The court in *DeSardi*, 340 B.R. at 805-06, concluded that periodic payments need not commence immediately upon confirmation. “The court understands [section 1325(a)(5)(B)(iii)(I)] to require payments to be equal once they begin, and to continue to be equal until they cease ... Exactly when these level payments begin is case specific.” However, in *Wagner*, 342 B.R. at 771-72, the court appears to have required payments each month until the secured claim is paid in full. The court held that a “plan must provide for equal monthly payments ... over the life of the plan until the lien claim is satisfied.”

2. *Requirement that Periodic Payments be Equal Monthly Amounts.* When a plan provides for periodic payments on account of a secured claim, section 1325(a)(5)(B)(iii)(I) requires those payments be in equal monthly amounts.

a. **When income has seasonal variability.** May the plan define discrete periods of time and provide for a periodic payment that is an equal monthly amount within each period but differs from period to period in order to account for seasonable variation in a debtor’s income? No case has addressed this issue. See *DeSardi*, 340 B.R. at 805, n. 4 (noting but not

addressing the issue).

b. **Ability of modified plan to vary payment amount.** Section 1329(a)(1) permits a modified plan to “increase or reduce the amount of payments on claims of a particular class,” and section 1329(a)(2) allows a modified plan to “extend or reduce the time for such payments....” However, section 1329(b)(a) requires a modified plan to satisfy the requirements of section 1325(a).

3. *Periodic Payment Must Provide Adequate Protection.* Section 1325(a)(5)(B)(iii)(II) requires that periodic payments “be [no] less than an amount sufficient to provide the holder of [a personal property secured claim] adequate protection during the period of the plan.”

a. **Harmonizing the requirement of adequate protection with the requirement that the plan payment provide adequate protection.** Are the requirements that periodic payments be both in “equal monthly amounts” and sufficient to adequately protect personal property secured claims, cumulative or independent?

In DeSardi, a creditor argued that the requirements of section 1325(a)(5)(B)(iii)(I) and section 1325(a)(5)(B)(iii)(II) are cumulative. That is, plan payments must adequately protect a creditor’s interest in its security for “the period of the plan,” and be in equal monthly amounts. As a result, the creditor was entitled to equal payments from the plan’s effective date until the claims was paid.

The court rejected this argument, holding: “The objecting creditors ask the Court to read § 1325(a)(5)(B)(iii)’s subsections to mandate that equal payments must be in the same amount as adequate protection payments. The Court finds this interpretation – forcing the reading of the two subsections as imposing identical dollar amounts – to be mathematically untenable when read in the context of the Bankruptcy Code as a whole. An adequate protection payment that occurs after the plan is confirmed cannot set the standard as to what the equal payments will be once they begin.” DeSardi, 340 B.R. at 807. The court viewed section 1326(b)(1) as prohibiting payments to creditors until all administrative expenses were paid in full. Administrative expenses would include adequate protection payments to secured creditors and the amount owed to the debtor’s attorney. As a result, the creditors in DeSardi were entitled only to adequate protection payments until all administrative claims were paid in full. Once paid, an additional equal monthly amount would be paid on account of their secured claims in order to retire them by the end of the plan, or sooner.

D. **The Hanging Paragraph.** Although not included as part of section 1325(a)(5), the portion of section 1325(a) dealing with secured claims, there is another provision in section 1325(a) that affects the treatment of secured claims. In some publications of the Bankruptcy Code, this provision is the second sentence in section 1325(a)(9) [the first sentence deals with the confirmation requirement that tax returns due under section 1308 be filed]. In other publications, this provision is included as a “hanging paragraph,” appearing at the end of section 1325(a) without an alphanumeric designation. This summary will refer to this

provision as the “hanging paragraph.”

1. *Qualifying Secured Claims.*

a. **Motor vehicles.** The hanging paragraph states that “section 506 shall not apply to a claim described in [section 1325(a)(5)] if the creditor has a purchase money security interest,” the secured debt was incurred within 910 days of the filing of the petition, and the collateral is a motor vehicle acquired for the personal use of the debtor. See In re Jackson, 338 B.R. 923 (Bankr M.D. Ga. 2006) [holding that a vehicle acquired by the debtor for the use of a nondebtor spouse remained subject to strip down].

(1) **Personal Use Requirement.** In In re Johnson, 337 B.R. 269 (Bankr. M.D.N.C. 2006), the bankruptcy court held that the hanging paragraph prevents strip down even if the claim is secured by more than just the financed vehicle. In In re Lowder, 2006 WL 1794737 (Bankr D. Kan. 2006), the court concluded that the debtor had acquired a vehicle for personal use even though she acquired it to drive to work. But, in In re Lewis, 347 B.R. 769 (Bankr. D. Kan. 2006), a car acquired for the use of the debtor’s daughter was not considered to be for the debtor’s personal use.

(2) **Purchase Money Requirement.**

(a) **Refinances.** The court in In re Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006), found that where the debtor refinanced a car four times with the creditor advancing funds each time, the loan did not qualify as a purchase money security interest. A result, its claim could be stripped down.

(b) **Trade-In Deficiencies.** In In re Vega, 344 B.R. 616 (D. Kan. 2006), the court concluded that a purchase money obligation does not include amounts for the deficiency owed on a prior vehicle.

(c) **Extended Warranties.** Two courts have come to opposite conclusions when considering whether the inclusion of an extended warranty in the financing disqualifies it for treatment as a purchase money claim. In re Murray, 346 B.R. 237 (Bankr. M.D. Ga. 2006) (considered purchase money); In re White, 2006 WL 2827321 (Bankr. E.D. La. 2006) (inclusion of insurance and warranty in vehicle financing prevented it from being considered a purchase money loan.

- b. **Other property of value.** The second sentence of section 1325(a)(9) not only bars the “strip down” of purchase money vehicle loans incurred within 910 days of the petition but it also bars the “strip down of other secured claims incurred within 1-year of the petition and secured by “any other thing of value.” Must this second category of secured claims also be purchase money claims? Yes, according to the bankruptcy court in In re Quevedo, 345 B.R. 238, 242-42 (Bankr. S.D. Cal. 2006).

2. *Effect of the Hanging Paragraph.*

a. **Strip-down prohibited but interest accrues.** The majority of courts that have addressed the issue have concluded that an under-secured claims subject to the hanging paragraph are secured even though section 506 does not apply. As secured claims, they are entitled to receive interest. These courts interpret the language in the hanging paragraph to mean only that the the claim cannot be bifurcated. See In re Trejos, 2006 WL 2884384 (Bankr. D. Nev. 2006); Murray, 346 B.R. at 241-42; In re Brown, 346 B.R. 868, 873 (Bankr. N.D. Fla. 2006); In re Brooks, 344 B.R. 417, 421-22 (Bankr. E.D.N.C. 2006); Montoya, 341 B.R. at 44 [also holding that a creditor’s failure to raise a plan’s noncompliance with the hanging paragraph is not tacit acceptance of that treatment]; DeSardi, 340 B.R. at 811-812; In re Brown, 339 B.R. 818 (Bankr. S.D. Ga. 2006); In re Fleming, 339 B.R. 716 (Bankr. E.D. Mo. 2006); In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); Horn, 338 B.R. at 113; In re Robinson, 338 B.R. 70 (Bankr. W.D. Mo. 2006); Johnson, 337 B.R. at 272-73; In re Turner, 2006 Bankr. LEXIS 628 (Bankr. D.S.C. Mar. 31, 2006).

- (1) These courts generally refuse to find that section 506 is the sole provision that determines whether a loan is secured. Some reject the argument that the hanging paragraph converts secured claims into unsecured ones based on the conclusion that Congress intended to give creditors better (not worse) protections in chapter 13. Johnson, 337 B.R. at 272.
- (2) Some of these courts conclude that the definition of a lien in 11 U.S.C. § 101(37) as an interest in property to “secure payment of a debt” operates to allow a secured claim even when section 506(a) is not applicable. Brown, 339 B.R. at 821. Cf. Robinson, 338 B.R. at 74-75; In re Wright, 338 B.R. 917 (Bankr. M.D. Ala. 2006).
- (3) Other courts have relied on non-bankruptcy substantive law to determine whether a claim is secured. Montoya, 341 B.R. at 44; DeSardi, 340 B.R. at 812-13.
- (4) But all of these courts conclude that interest accrues on the entire claim. See Turner 2006 Bankr. LEXIS 628 (Bankr. D.S.C. Mar. 31, 2006).

b. **Claims subject to the hanging paragraph must elect between payment in full without interest or a stripped down secured claim and interest.** Because the hanging paragraph makes section 506 inapplicable to 910 claims, the court in In re Carver, 338 B.R. 521 (Bankr. S.D. Ga. 2006), reasoned that secured claims subject to the hanging paragraph cannot be treated as allowed secured claims for the purposes of section 1325(a)(5) because secured claims exist only as defined by section 506. While concluding that 910 claims cannot be treated as secured claims under a chapter 13 plan, the Carver court refused to treat the claim as an unsecured claim. Instead, the court analogized the rights of a creditor with a 910 claims to a chapter 11 secured creditor's right to make an election under section 1111(b). In chapter 11 cases, a secured creditor may elect to either be paid in full with no interest or to have its claim bifurcated. The court in Carver concluded that an undersecured 910 claim must receive the greater of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down under section 506(a).

c. **No interest.** In re Wampler, 345 B.R. 730, 735-37 (Bankr. D. Kan. 2006), the court rejected the Carver election theory and instead concluded that the hanging paragraph leaves a qualifying secured claim immune from strip down but without any right to post-petition interest. See, also In re Green, 348 B.R. 601 (Bankr. M.D. Ga. 2006).

3. *Modification of Secured Claims.* While courts agree that claims subject to the hanging paragraph cannot be stripped down, they are not interpreting the provision as barring any modification of such claims. For instance, in Robinson and in Johnson, bankruptcy courts held that a debtor was not precluded from modifying the term or the interest rate on a purchase money car loan. See, also Wright, 338 B.R. at 919; In re Bufford, 343 B.R. 827 (Bankr. N.D. Tex. 2006); Brown, 339 B.R. at 822; Fleming, 339 B.R. at 723-24; Robinson, 338 B.R. at 74-75; Johnson, 337 B.R. at 273; In re Shaw, 341 B.R. 543 (Bankr. M.D.N.C. 2006). But see In re Taranto, 344 B.R. 857 (Bankr. N.D. Ohio 2006).

4. *Waiver/Acceptance.* If a plan proposes to strip down a qualifying secured claim, does the creditor's failure to object to the plan's noncompliance with the hanging paragraph mean that the creditor has accepted the plan? The bankruptcy court in Montoya, 341 B.R. at 45-46, concluded that a creditor's failure to raise a plan's noncompliance with the hanging paragraph is not tacit acceptance of that treatment. See, also In re Montgomery, 341 B.R. 843 (Bankr. E.D. Ky. 2006).

5. *Bar to Deficiency Claims?* What's good for the goose apparently is good for the gander. A bankruptcy court has held that the hanging paragraph not only prevents a debtor from using section 506(a) to bifurcate a partially secured claim, but it also prevents the creditor from filing a claim for a deficiency when a chapter 13 plan provides for the secured claim by surrendering the collateral as permitted by 11 U.S.C. § 1325(a)(5)(C). See Ezell, 338 B.R. at 340-42. See, also Brown, 346 B.R. at 875-76; In re Sparks, 346 B.R. 767, 773-74 (Bankr. S.D. Ohio 2006); In re Payne, 347 B.R. 278 (Bankr. S.D. Ohio 2006); In re Osborn, 348 B.R. 500 (Bankr. W.D. Mo. 2006); In re Nicely, 349 B.R. 600 (Bankr. W.D. Mo. 2006); In re Evans, 349 B.R. 498 (Bankr. E.D. Mich. 2006); In re Pool, 351 B.R. 747 (Bankr. D. Or. 2006). But see In re Duke, 345 B.R. 806, 809 (Bankr. W.D. Ky. 2006); In re Particka, 2006

WL 3350198 (Bankr. E.D. Mich. 2006); In re Zehrung, 351 B.R. 675 (W.D. Wis. 2006) (permitting the secured creditor to assert an unsecured deficiency claim because the creditor retained its rights under state law to a claim for a deficiency).

II. **Good Faith.** Not only must the plan be proposed in good faith, but to obtain its confirmation the debtor must also file the petition in good faith. See 11 U.S.C. § 1325(a)(3) & (a)(7).

In Baxter v. Lewis (In re Lewis), 339 B.R. 814 (Bankr. S.D. Ga. 2006), the bankruptcy court concluded that a debtor's ineligibility for a chapter 13 discharge because of a prior chapter 7 discharge within 4 years, or a prior chapter 13 discharge within 2 years, was not determinative of the debtor's good/bad faith in proposing a plan. See 11 U.S.C. § 1328(f)(1) & (2). In other words, a debtor who is ineligible for a chapter 13 discharge is nonetheless eligible for chapter 13 relief. See, also In re Bateman, 341 B.R. 540 (Bankr. D. Md. 2006).

The mere fact that a court declines to extend the automatic stay beyond the first 30 days of a case because the court concludes that the second petition has been filed in bad faith, does not necessarily mean that the debtor will be unable to prove that the petition was filed in good faith as required by section 1325(a)(7). See In re Tomasini, 339 B.R. 773 (Bankr. D. Utah 2006). A determination of good faith under 11 U.S.C. § 362(c)(3) focuses on good faith from the perspective of creditors, while under section 1325(a)(7) the debtor's subjective motivation when filing the petition is in issue.

III. **Tax Returns.** Prior to confirmation of the plan, the debtor must file all tax returns as required by section 1308. See 11 U.S.C. § 1325(a)(9). Section 1308(a) requires a chapter 13 debtor who has failed to file tax returns under applicable nonbankruptcy law to file all such returns if they were due for tax periods ending during the 4-year period ending on the date of the filing of the petition. See, also Section 1228(a) of BAPCPA [providing that in chapter 11 and 13 cases the court shall not confirm a plan of an individual debtor unless requested tax documents have been filed with the court].

IV. **Payments on Domestic Support Obligations.** The court may not confirm a plan unless the debtor has paid all amounts falling due after the filing of the petition on a domestic support obligation. See 11 U.S.C. § 1325(a)(8).

V. **Disposable Income Test.** The "disposable income test," sometimes referred to as the "best efforts test," of section 1325(b) has been substantially revised. Under this test, the debtor is required to pay all projected disposable income for the duration of the plan to unsecured creditors. See 11 U.S.C. § 1325(b)(1)(B). The only alternative is to pay "unsecured creditors" in full. See 11 U.S.C. § 1325(b)(1)(A).

A. **Objection Necessary.** If an objection is made by the trustee or the holder of an allowed unsecured claim, a chapter 13 plan must pay unsecured creditors in full or all of the debtor's projected disposable income for the applicable commitment period of either 3 years or 5 years. See 11 U.S.C. § 1325(b)(1).

B. **Applicable Commitment Period.** The applicable commitment period is determined by comparing the debtor's and the debtor's spouse's annualized current monthly income to the median family income for a comparably sized household in the debtor's state. If that income is equal to or more than the relevant median income, the applicable commitment period is "not less than 5 years." If it is less than the relevant median income, the applicable commitment period is 3 years. See 11 U.S.C. § 1325(b)(4)(A). The applicable commitment period may be less than 3 or 5 years, whichever is applicable, only if the plan pays allowed unsecured claims in full. See 11 U.S.C. § 1325(a)(4)(B).

1. *Use of Income Other Than CMI to Calculate Applicable Commitment Period.* One court, In re Beasley, 342 B.R. 280 (Bankr. C.D. Ill. 2006), refused to look beyond a debtor's "current monthly income" for purposes of determining the applicable commitment period. In Beasley, a married debtor filed an individual petition. He had social security income that was excluded from "current monthly income" by 11 U.S.C. § 101(10A)(B). His spouse, who did not join in the petition, was a teacher. As a teacher, she was paid only during the school term. For a portion of the six-month period used to calculate current monthly income, the spouse was not working and hence had no income. As a result, the debtor's current monthly income was less than median family income for a comparable household size and the applicable commitment period was three years.

The trustee attempted to argue that the court should consider the debtor's household's actual income when setting the applicable commitment period. That is, with the debtor's social security and the spouse's prorated actual annual income, the debtor's income was above the median. Therefore, the applicable commitment period should be five years. The court rejected the trustee's argument, holding that the "plain meaning" of section 1325(b)(4) required use of the debtor's current monthly income, as reported on Official Form 22C, when determining the applicable commitment period. The court recognized that this might permit some individuals with high, albeit irregular, incomes to avoid commitment periods in excess of three years. See, also In re Farrar-Johnson, 2006 WL 2662709, \*2 (Bankr. N.D. Ill. 2006) (annual bonus not included in projected disposable income because the debtor had not received the bonus in the six months prior to the petition and was therefore excluded from CMI). The court recognized that this might permit some individuals with high, albeit irregular, incomes to avoid commitment periods in excess of three years.

2. *Duration or Formula?* When the trustee or an unsecured creditor objects, does section 1325(b) set a plan duration of three to five years? Or, does section 1325(b) merely set out a formula for determining a minimum amount that must be paid to unsecured creditors? See Alane A. Becket and Thomas A. Lee III, Applicable Commitment Period: Time or Money?, March 2006, American Bankruptcy Institute Journal. The legislative history found at H.R. Rep., No. 109-31(I), § 318, April 8, 2005, describes section 1325(b) as mandating a five-year "duration."

a. In In re Schanuth, 342 B.R. 601 (Bankr. W.D. Mo. 2006), the court concluded that the applicable commitment period was, as the name suggests, a period of time. See, also In re McGuire, 342 B.R. 608 (Bankr. W.D. Mo. 2006); In re Dew, 344 B.R. 655, 661 (Bankr. N.D. Ala. 2006); Brian D. Lynch, *Chapter 13 Plan Modifications: The Next BAPCPA Battleground*, October 2006, American Bankruptcy Institute Journal.

b. In In re Alexander, 344 B.R. 742, 750-51 (Bankr. E.D.N.C. 2006) the court agreed that the applicable commitment period is a temporal requirement. However, the plan must satisfy that temporal requirement only if the debtor has projected disposable income. If the debtor has none, the plan may end as soon as priority and secured claims are paid in full. The concept of an applicable commitment period is not applicable in the absence of projected disposable income that must be paid to unsecured

creditors.

c. The court in In re Fuger, 347 B.R. 94 (Bankr. D, Utah 2006), disagreed with the Schanuth court, concluding that section 1325(b) does not impose just a temporal requirement. “[T]his Court respectfully disagrees with the conclusion reached in these opinions to the extent they would bind debts to a specific period of time. The Court believes that the manifest intent of Congress underlying § 1325(b)(1)(B) is as it was before BAPCPA – to require debtors to commit to a specific return to unsecured creditors. That amount is determined by projecting the debtor’s disposable income over the length of the ‘applicable commitment period.’ In that sense, the term ‘applicable commitment period’ is both temporal and monetary in nature.”

C. Current Monthly Income. For purposes of section 1325(b), disposable income begins with “current monthly income.” See 11 U.S.C. § 1325(b)(2). Current monthly income is an average of the debtor’s and the debtor’s spouse’s income, excluding Social Security benefits, for the six months prior to the filing of the petition. This income includes any amount regularly paid by someone other than the debtor (or the debtor’s spouse in a joint case) for the household expenses of the debtor, the debtor’s dependents, and (in a joint case) the debtor’s spouse. See 11 U.S.C. §§ 101(10A), 707(b)(7). For example, CMI includes distributions from a 401(k) retirement plan made during the 6-month period prior to the petition. See In re Sanchez, 2006 WL 2038616 (Bankr. W.D. Mo. 2006).

1. *Chapter 13 Exclusions from CMI*. Section 1325(b)(2) then directs that child support payments, foster care income, or disability payments for a dependent child, to the extent reasonably necessary for the child, be deducted from the debtor’s current monthly income. From the remainder, the debtor’s personal living and business expenses are deducted in order to arrive at the debtor’s projected disposable income. How these expenses are calculated depends on whether or not the debtor’s annualized current monthly income is greater than the state’s median family income.

2. *Inadequacy of CMI as Basis for Projection of Disposable Income*. Some have suggested that the amendments to section 1325(b) will result in debtors having less, and frequently no, projected disposable income. See Henry E. Hildebrand, *Unintended Consequences: BAPCPA and the New Disposable Income Test*, March 2006, American Bankruptcy Institute Journal. This may be the result of projecting future income from a debtor’s “current monthly income” rather than actual income on the petition date, or the result of deducting, for debtors with CMI over the median, expenses based on the IRS National and Local Standards rather than a debtor’s actual living expenses.

One court, In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006), has concluded that “the term ‘projected disposable income’ must be based upon the debtor’s anticipated income during the term of the plan, not merely an average of her prepetition income.” The court reached this result because “a strict application of section 101(10A)’s definition of current monthly income can have serious consequence in some cases.” In those cases where a debtor could anticipate “a significant enhancement of future income,” creditors would be denied the benefit of the debtor’s higher post-petition income because the plan would be based on the debtor’s lower pre-petition income. “On the other hand, a debtor who finds herself in the unfortunate circumstance of having a lower income after filing her petition

might find that she is unable to confirm a plan because she cannot devote to the plan a ‘projected disposable income’ predicated on her prepetition income.”

a. **“Projected disposable income” is not necessarily “disposable income.”** The analysis in Hardacre seems strained given that section 1325(b)(2) provides that “the term ‘disposable income’ means current monthly income received by the debtor....” As noted by Kevin R. Anderson in *Disposable Income vs. Projected Disposable Income: Identical Twins or Distant Relatives?*, Vol. 18, No. 4, NACTT Quarterly, after BAPCPA, an unsecured creditor may compel a individual chapter 11 debtor to pay all “projected disposable income ... (as defined in § 1325(b)(2))” for a 5-year period. See 11 U.S.C. § 1129(a)(15)(B). Section 1129(a)(15)(B) defines the phrase “projected disposable income” by reference to section 1325(b)(2), which in turn ties the definition of “disposable income” to CMI.

Nonetheless, two other courts quickly adopted the Hardacre court’s interpretation of section 1325(b). See In re Jass, 340 B.R. 411 (Bankr. D. Utah 2006); In re Kibbe, 342 B.R. 411 (Bankr. D.N.H. 2006). These three courts conclude that the phrase “projected disposable income” is distinct from the phrase “disposable income.” According to these courts, “projected disposable income” is not based solely on the debtor’s average income for the six months prior to bankruptcy, that is, upon the debtor’s “current monthly income.” Rather, “projected disposable income” is based on the debtor’s anticipated income during the term of the plan. This can be inferred from the use of the “projected,” from section 1325(b)(1)(B)’s reference to disposable income *to be received in the applicable commitment period*, and from the reference in section 1325(b)(1) to income “as of the effective date of the plan.”

These three courts differ, however, in the emphasis given to the debtor’s “current monthly income” in the disposable income analysis.

(1) According to the court in Hardacre, the definition of “disposable income” in section 1325(b)(2) merely informs the bankruptcy court what types of income may be included in its projection of a chapter 13 debtor’s future disposable income. See, also In re Fuller, 346 B.R. 472, 485 (Bankr. S.D. Ill. 2006); In re Risher, 344 B.R. 833, 836-37 (Bankr. W.D. Ky. 2006).

(2) In Jass, the bottom line on Official Form 22C (which begins with the debtor’s “current monthly income” then deducts expenses) is presumptively the debtor’s projected disposable income. In order to rebut this presumption, “special circumstances” must be proven and those special circumstances must substantially affect the debtor’s income and/or expenses. Cf. 11 U.S.C. § 707(b)(2)(B). See, also In re Foster, 2006 WL 2621080 (Bankr. N.D. Ind. 2006).

(3) In Kibbe, however, the court concluded that “‘projected disposable income,’ as used in section 1325(b)(1)(B), is based on a debtor’s current income and expenses as reflected on Schedules I and J.” Current monthly income and the calculations in Official

Form 22C apparently have no role in determining disposable income. See, also In re Demonica, 345 B.R. 895, 900 (Bankr. N.D. Ill. 2006).

b. The court in Alexander, 344 B.R. at 748-49, disagreed with the foregoing cases, concluding that after BAPCPA disposable income “is based upon historical data – current monthly income derived from the six-month period preceding the bankruptcy filing ... The court finds that, in order to arrive at ‘projected disposable income,’ one simply takes the calculation mandated by § 1325(b)(2) and does the math.” As a result, a plan’s “feasibility is no longer dictated by the disposable income calculation.” This is because under BAPCPA, a chapter 13 debtor may have income that is not “counted in the definition of current monthly income” and/or may be permitted to deduct expenses from CMI that are higher than the debtor’s actual expenses. See, also In re Rotunda, 349 B.R. 324 (Bankr. N.D.N.Y. 2006); In Guzman, 345 B.R. 640 (Bankr. E.D. Wis. 2006), In re Tranmer, 2006 WL 3366458 (Bankr. D. Mont. 2006).

3. *Adjustments to Income Permitted by § 707(b)(2)(B)*. If a chapter 13 debtor’s “current monthly income” is higher than the debtor’s actual income on the date the petition is filed, may the debtor ask that his or her current monthly income be adjusted downward? In a chapter 7 case, a debtor who flunks the means test is permitted to rebut the presumption of abuse by showing, among other things, that special circumstances warrant an adjustment to income. See 11 U.S.C. § 707(b)(2)(B). In chapter 13, section 1325(b)(3) directs the court to consider section 707(b)(2)(B), at least when the debtor is over the median income. However, subsections 707(b)(2)(A) and (B) are incorporated into the analysis by section 1325(b)(3). Section 1325(b)(3), however, discusses the expenses, not the income, that must be used in the disposable income analysis.

4. *Good Faith Objection as an Alternative?* When a debtor demonstrates compliance with section 1325(b), at least as that requirement is interpreted courts such as Alexander, but nonetheless has actual income not being contributed to the plan, may the trustee or an unsecured creditor argue that the plan has not been proposed in good faith as required by 11 U.S.C. § 1325(b)(3)?

a. **No.** In In re Barr, 341 B.R. 181 (Bank. M.D.N.C. 2006), the court declined to sustain a good faith objection to the confirmation on the ground that the debtor had “excess” income not being contributed to the plan. The court concluded that only excess income that is “projected disposable income” within the meaning of section 1325(b) must be paid to unsecured creditors. Cf. Sunahara v. Burchard (In re Sunahara), 326 B.R. 768 (B.A.P. 9th Cir. 2005). See, also Alexander, 344 B.R. at 751; Farrar-Johnson, 2006 WL 2662709, \*6. “Instead of simply looking at the debtor’s actual income and expenses, these [2005] amendments in many cases attempt to create a bright line test to determine whether a debtor’s plan is committing all disposable income. By creating a bright line test, Congress even more clearly indicated that it intended that section 1325(b), rather than the good faith test, to be the measure of whether the debtor was committing sufficient income to the plan.” 8 Collier On Bankruptcy ¶ 1325.08[1] (15th

ed. rev. 2005).

- b. **Maybe.** In *In re Edmunds*, 350 B.R. 636 (Bankr. D.S.C. 2006), the court declined to conclude that the strict and mechanical application of the disposable income test necessarily ended the inquiry into whether the debtor has devoted sufficient income to the plan. A plan must be proposed in good faith and determining whether a plan is proposed in good faith is based upon the totality of the circumstances. Cases like *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir.1982) and *In re Warren*, 89 B.R. 87 (B.A.P. 9<sup>th</sup> Cir. 1988), direct bankruptcy courts to consider a nonexclusive list of factors to determine whether a plan has been proposed in good faith. Included in this list is a debtor's current financial situation, length of the plan, surplus income not devoted to the plan, and the dividend promised to unsecured creditors. See, also *In re LaSota*, 351 B.R. 56 (Bankr. W.D.N.Y. 2006); *In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006).

D. **Deduction of Expenses.** Once the debtor's current monthly income is calculated, the debtor's reasonable and necessary monthly living expenses and, if the debtor is self-employed, business expenses must be deducted from current monthly income.

1. *Debtors Over the Median Income.* If the debtor's [but not a nonfiling spouse's] annualized current monthly income is greater than the median family income for a comparably sized household, the amount reasonably necessary for the debtor's and debtor's dependent's maintenance, and for operation of the debtor's business, must be calculated by using the means test formula. See 11 U.S.C. §§ 707(b)(2)(A) & (B) & 1325(b)(3). See the discussion of the means test in the summary of section 707.

a. **The means test.** In brief, the means test requires the calculation of certain actual and presumed monthly expenses and deduction from the debtor's current monthly income. See 11 U.S.C. §§ 707(a)(1) & (b)(2)(A)(ii) - (iv). The presumed expenses are based on the collection financial standards developed by the IRS to guide its revenue agents when evaluating a taxpayer's ability to pay delinquent taxes. These standards fall into three categories: the National Standards (basic living expenses); the Local Transportation and Housing Expenses; and Other Necessary Expenses.

(1) Section 707(b)(2)(A)(ii)(I) provides that "the monthly expenses of the debtor shall not include payments for debts." When this language is considered along with section 707(b)(2)(A)(iii) [permitting a debtor to deduct actual payments on secured debt], the debtor's actual secured debt payments are permitted even if in excess of what is permitted by the Local Transportation and Housing Standards. These amounts are subtracted from the amounts permitted by the Local Standards and are separately deducted from current monthly income.

(2) If the debtor owns a vehicle that is not encumbered by a debt, may the debtor deduct the ownership expense permitted by the

Local Transportation Standards? The courts in McGuire, 342 B.R. at 612-14, and Hardacre, 340 B.R. at 728, did not permit the deduction. See, also In re Carlin, 348 B.R. 795 (Bankr. D. Or. 2006).

However, in In re Fowler, 349 B.R. 414, 417-18 (Bankr. D. Del. 2006), the court concluded that the debtor may deduct the Local Transportation Standard ownership expense even though the car was unencumbered. See, also In re Farrar-Johnson, 2006 WL 2662709, \*4-5; Demonica, 345 B.R. at 900-05.

(3) These courts diverge in their interpretation of the requirement in § 707(b)(2)(A)(ii)(I) that a “debtor’s monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the National Standards and the Local Standards...” In McGuire and Hardacre, the courts interpreted the Local Transportation Standard ownership expense to be “applicable” only if the debtor was financing the purchase of a car. In Fowler, the court determined that the ownership expense was applicable if the debtor owned a car, whether or not it was encumbered by a debt.

(4) May an above median income debtor deduct expenses related to property that the plan proposes to surrender? See 11 U.S.C. §§ 707(b)(2)(A)(iii), 1325(b)(3). No, according to the court in In re Renicker, 342 B.R. 304, 308-09 (Bankr. W.D. Mo. 2006). “[T]he plain language of § 1325(b)(2) unambiguously indicates that prospective – not historical – expenses are to be used to calculate disposable income.” See, also In re McPherson, 350 B.R. 38 (Bankr. W.D. Va. 2006) (not permitting a debtor to deduct housing expense based future mortgage expenses when the house is surrendered).

2. *Debtors at or Below the Median Income.* If the debtor’s annualized current monthly income is equal to or less than this benchmark, the debtor is permitted to deduct amounts reasonably necessary for maintenance and support of the debtor and the debtor’s dependents, charitable contributions not to exceed 15% of yearly gross income, and expenditures necessary for the continuation, preservation, and operation of the debtor’s business from current monthly income. See 11 U.S.C. § 1325(b)(2)(A) & (B). Because the means test is not applicable, presumably pre-BAPCPA case law will guide courts as to what is reasonable and necessary.

a. **Deduction of priority and secured claims to be paid through plan by debtors under the median income.** Prior to BAPCPA, a chapter 13 debtor made no deduction from anticipated future income for amounts to be paid on account of secured and priority claims through the chapter 13 plan. This was unnecessary because disposable income was not paid to any particular creditor or class of creditors. It was merely contributed to the plan. Under BAPCPA, projected disposable income is payable “to unsecured creditors.” Consequentially, if the debtor does not deduct dividends to be paid on account of secured and priority claims, in addition to reasonable and necessary living expenses, the debtor may have nothing remaining with which to pay secured and priority claims. See Hon. Leif M.

Clark, *Memo to Congress: Fix Needed on New “Best Interest” Test in § 1325(b)*, February 2006, American Bankruptcy Institute Journal.

In In re Quarterman, 342 B.R. 647 (Bankr. M.D. Fla. 2006), apparently in recognition of this problem, the court permitted a debtor to add the monthly amount to be paid on account of secured claims under the proposed plan to the debtor’s reasonable and necessary living expenses, and then deduct both amounts from current monthly income in order to project the debtor’s disposable income. See, also Alexander, 344 B.R. 746 n. 2 (noting but not reaching the issue).

b. **Deduction of priority and secured claims to be paid through plan by debtors over the median income.** Contrast the situation of a debtor under the median income to a chapter 13 debtor with a current monthly income over the applicable median income. See 11 U.S.C. § 1325(b)(3). That debtor’s projected disposable income is calculated by deducting expenses permitted under the means test based formula. This formula allows 1/60th of secured and priority claims to be deducted from current monthly income. Hence, if an unsecured creditor or the trustee objected under section 1325(b), paying all projected disposable income to unsecured creditors would still leave the debtor with sufficient income [assuming that projected disposable income equaled the debtor’s monthly net income] to pay secured and priority claims.

E. Official Form. Official Form 22C, Statement of Current Monthly Income and Disposable Income Calculation, is a variation of a similar form used by chapter 7 debtors, Official Form 22A, in connection with the means test. It implements the disposable income test of section 1325(b). Parts I and II of the form must be completed by all chapter 13 debtors. If the debtor’s annualized current income equals or is less than median family income, the remainder of the form is not applicable and the debtor’s disposable income is calculated without reference to the means test. If the debtor’s annualized current income exceeds the benchmark, the remainder of the form must be completed and the amount of disposable income reported on Line 48 determines the disposable income that must be paid to unsecured creditors.

F. Paid to Unsecured Creditors. However disposable income is calculated, whether with or without use of the means test, section 1325(b)(1)(B) requires that all projected disposable income to be received by the debtor during the applicable commitment period “be applied to make payments to unsecured creditors under the plan.”

1. *Are Holders of Priority Claims “Unsecured Creditors?”* For chapter 13 debtors over the median income, the means test is used to calculate projected disposable income. All disposable income must be paid to “unsecured creditors” if an objection is raised. Does this include holders of priority unsecured claims? Note that section 1325(b)(3), by incorporating section 707(b)(2)(A), deducts 1/60th of priority claims from current monthly income. Thus, if holders of priority unsecured claims receive a share of the debtor’s projected disposable income, their claims will have been provided for twice – once from current monthly income and once from projected disposable income.

The court in In re Wilbur, 344 B.R. 650, 654 (Bankr. D. Utah 2006), concluded that the reference to “unsecured creditors in section 1325(b)(1)(B) was to nonpriority

unsecured creditors only. The court reasoned: “[T]he terms of § 707(a)(2) and Form B22C require the debtor to account for chapter 13 payments to be made to priority unsecured creditors before reaching the debtor’s presumptive ‘projected disposable income.’ Section 1325(b)(1)(B) then requires the debtor to return the ‘projected disposable income’ to ‘unsecured creditors.’ If the Court interpreted ‘unsecured creditors’ to include priority unsecured creditors, the debtor would, in effect, be double-counting. Allowing the debtor to double-count in this fashion would undermine the purpose and efficacy of § 707(b)(2) and Form B22C. This would be an absurd result.” See, also Alexander, 344 B.R. at 753 n. 7.

2. *Is the Debtor’s Attorney an “Unsecured Creditor?”* Whether a chapter 13 debtor is over or under the median income, nothing in section 1325(b)(3) permits the debtor to deduct estimated attorney’s fees from income in order to arrive at projected disposable income. Is the debtor’s attorney an “unsecured creditor” and among those who are entitled to share the debtor’s projected disposable income? Keep in mind that “creditor” is defined at 11 U.S.C. § 101(10)(A) as an “entity that has a claim against the debtor that arose at the time of or before the order for relief.” This would appear to exclude the debtor’s attorney (at least to the extent the attorney is seeking compensation for post-petition services) from the “unsecured creditors” entitled to share in a debtor’s projected disposable income.

#### Litigation Points

1. Payment of Secured Creditors. If a secured creditor objects, is it entitled to equal monthly payments for the length of the plan? Section 1325(a)(5)(B)(iii) provides: “if - (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts. . . .” This implies it may be possible to pay a creditor in some form other than periodic payments. “Periodic” suggests payments that occur or recur at regular intervals. If a creditor received only one payment, it would not be receiving payments. This section does not describe when payments must begin, so the periodic payments may not start until sufficient funds have accumulated to pay monthly payments from that point on.

2. Because the ability to value collateral is significantly limited when the property is a vehicle acquired for the personal use of the debtor, significant litigation may occur over whether a vehicle is obtained for business use or for the personal use of another.

3. As the requirements of periodic monthly payments and the cramdown limitations may be avoided if the secured creditor accepts the plan, litigation may occur over whether failure to object is equal to acceptance of the plan. Cf. Andrews v. Loheit, 49 F.3d 1404, 1409 (9<sup>th</sup> Cir 1995). Notice to the secured creditor may be central to the issue. See In re Enewally, 368 F.3d 1165, 1173 (B.A.P. 9<sup>th</sup> Cir. 2004).

4. Chapters 7 and 13 both use current monthly income as a starting point. Chapter 13, however, excludes from it most benefits paid to a child to the extent reasonably necessary to be expended for the child, as well as necessary business expenditures. Because of this, a debtor may flunk the means test in chapter 7, convert to chapter 13, then not be required to pay any amount to unsecured creditors.

5. Secured creditors must retain their liens until the underlying debt is paid in full or the debtor receives a discharge. May a debtor ask the court to substitute collateral?

## Cross References

### New Defined Terms

**applicable commitment period**, 11 U.S.C. §1325(b)(4)  
**current monthly income**, 11U.S.C. §101(10A)  
**domestic support obligation**, 11 U.S.C. §101(14A)  
**median family income**, 11 U.S.C. §101(39A)

### Bankruptcy Code

11 U.S.C. § 707(b)(2)(A) [chapter 7 means test]  
11 U.S.C. § 707(b)(2)(B) [special circumstances exception to means test]

### Interim Rules

Interim Rule 1007(b)(6) [requires the filing of a statement of current monthly income on the Official Form 22C]

### Official Forms

Official Form 22A [Statement of Current Monthly Income and Means Test Calculation]  
Official Form 22C [Statement of Current Monthly Income and Disposable Income Calculation]

## Information Necessary to Apply Amended Section

<http://www.census.gov/hhes/www/income/medincsizeandstate.html>- for State median income.

<Http://www.bls.gov/cpi/> - for Consumer Price Index for all urban consumers.

<http://www.irs.gov/businesses/small/article/0,,id=104627,00.html> - IRS national standards.

<http://www.irs.gov/businesses/small/article/0,,id=104701,00.html> - IRS local standards for housing and utilities for California.

<http://www.irs.gov/businesses/small/article/0,,id=104623,00.html> - IRS local standards for transportation expenses.

<http://www.irs.gov/businesses/small/article/0,,id=104598,00.html> - IRS necessary expenses.

## Drafting Issues and Problems

The second sentence of section of 1325(a)(9) should be moved to section 1325(a)(5) for clarity's sake.

**SECTION 1326**  
**Payments**

Summary of Amendment

I. **Commencement of Plan Payments.** Under section 1326(a)(1), unless the court orders otherwise, a chapter 13 debtor's plan payments must commence not later than 30 days after filing of the plan or the order for relief, whichever is earlier. Because no chapter 13 debtor will be able to file a plan before the order for relief, plan payments must always commence 30 days after the order for relief.

II. **Plan Payment Components.** Prior to confirmation of a plan, the plan payment will have three components.

A. The Plan Payment. First, the debtor must pay to the trustee the payment proposed in the plan. See 11 U.S.C. § 1326(a)(1)(A).

B. Personal Property Lease Payments. Second, all scheduled payments for the lease of personal property falling due after the order for relief must be paid "directly to the lessor." These payments may be deducted from the plan payment otherwise due to the trustee provided the debtor provides the trustee with evidence that the lease payments have been paid to the lessor. See 11 U.S.C. § 1326(a)(1)(B).

C. Adequate Protection Payments. Third, adequate protection payments must be paid "directly" to a creditor holding an allowed purchase money claim secured by personal property. These payments may be deducted from the plan payment otherwise due to the trustee provided the debtor provides the trustee with evidence that the adequate protection have been paid to the secured creditor. See 11 U.S.C. § 1326(a)(1)(C).

III. **Who Transmits the Payments?**

A. Preconfirmation Payments. Subsections 1326(a)(1)(B) and (C) require the debtor to make preconfirmation payments directly to certain lessors and secured creditors. However, section 1326(a)(1) permits the court "to order otherwise." This language permits the court to order that the trustee, rather than the debtor, make the preconfirmation payments to lessors and secured creditors required by sections 1326(a)(1)(B) & (C).

B. Post-Confirmation Payments. The issue of whether the debtor or the trustee must or should make payments to creditors is one that predates BAPCPA.

1. The court in In re Perez, 339 B.R. at 414, held that pursuant to a local rule, debtors must make post-confirmation mortgage installments through the trustee absent a showing of good cause. To show good cause required the debtor to sift through 21 factors relevant to the issue of who should make the ongoing mortgage installment. The court concluded: "Over the past quarter century ... a pattern has developed in Chapter 13 cases in which debtors in this district have been allowed to make their mortgage and vehicle payments directly to their home and vehicle lenders while also making their plan payments to the trustee. The consequences of this practice have led to an abuse of the system whereby those debtors with

insufficient cash flow play the trustee, the mortgage lender, and the vehicle lender against one another by making some payments to each of them in one month and no payments to some of them in another month. The system is broken and needs to be fixed ... [B]ankruptcy courts across the country have increasingly required payment of mortgage notes through the Chapter 13 trustee to remedy the problem.”

2. The court in In re Clay, 339 B.R. 784 (Bankr. D. Utah 2006), reached the opposite result, holding that debtor could make direct payments on secured claims modified by the plan upon a showing of “compelling reasons.” The debtor could make direct payments on any secured claim subject to the following conditions: (1) the claim is in no way modified by the plan (e.g., the debtor will pay the claim pursuant to the original contract terms); (2) the claim is not subject to the automatic stay; (3) the trustee does not have a responsibility to monitor such payments; (4) the claim will not be discharged upon completion of the plan; and (5) the debtor provides the creditor with adequate notice in the plan of these conditions. See also In re Vigil, 344 B.R. 624 (Bankr. D.N.M. 2006).
3. The court rejected the trustee’s argument in In re Lopez, 350 B.R. 868 (Bankr. C.D. Cal. 2006), that after BAPCPA, a trustee was required to make all payments, including ongoing mortgage payments, to creditors. The court concluded that pre-BAPCPA law permitted the debtor to designate himself as the disbursing agent for plan payments and nothing in BAPCPA requires a different result. The issue is addressed to the court’s discretion.

#### IV. **Preconfirmation Adequate Protection Payments.**

A. Calculating Adequate Protection. Are payments calculated based on the value of the collateral for the claim, or are they calculated based on the amount of the creditor’s claim?

1. *Prior to BAPCPA.* The Supreme Court determined in United Sav. Ass’n. Of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988), that a secured creditor’ interest in its collateral had to protected from diminution in the value during the period prior to confirmation of a plan. A secured creditor, however, was not entitled to adequate protection payments to offset the erosion of its equity cushion because of the accrual of interest. Adequate protection payments offset the decline in value of collateral rather than perpetuating the ratio of collateral to debt.

2. *After BAPCPA.* The use of the term “adequate protection” in section 1326(a)(1)(C) may have been meant to carry the meaning given it by such cases as Timbers. However, section 1326(a)(1)(C) specifies that payment must provide adequate protection “for that portion of the obligation that becomes due after the order for relief...” This seems to focus on the obligation rather than the security for the obligation.

a. **Based on collateral value.** In the context of section 1326(a)(1)(C) as well as section 1325(a)(5)(B)(iii)(I), the court in In re DeSardi, 340 B.R. 790, 804 (Bankr. S.D. Tex. 2006), concluded that adequate protection after BAPCPA continues to be based on the value of

the collateral rather than the amount of the claim. In the context of section 1326(a)(1)(C), the court in In re Beaver, 337 B.R. 281, 285 (Bankr. E.D.N.C. 2006), came to the same conclusion.

b. **910 claims.** The hanging paragraph following section 1325(a)(9) arguably prevents certain defined undersecured claims from being stripped down pursuant to section 506(a). For purposes of calculating adequate protection, does the court look to the value of the collateral or to the amount of the claim. In DeSardi, the bankruptcy court concluded that the holder of a claim subject to the hanging paragraph was entitled to adequate protection based only on the value of the vehicle. DeSardi, 340 B.R. at 804.

B. Claims Eligible to Receive Adequate Protection. As noted above, section 1325(a)(1)(C) requires adequate protection payments only on account of a claim secured by personal property that serves as collateral for a purchase money debt. This section makes no reference to claims secured by real property. See Perez, 339 B.R. at 398 n.13, 401 n.18. Further, the creditor must hold an “allowed claim.” A claim is allowed only by the filing of a proof of claim. See 11 U.S.C. §§ 501, 502(a). See Beaver, 337 B.R. at 285 n. 3.

C. Application of Preconfirmation Adequate Protection Payments. Do pre-confirmation adequate protection payments made under section 1326(a)(1)(C) reduce the principal amount of a secured claim, or are they applied first to accrued post-petition interest, then to principal?

1. *Crediting Adequate Protection Payment Against Principal.* If adequate protection payments are designed to protect a secured creditor from a decline in the value of its collateral, adequate protection payments should be credited only against principal at least when the claim is undersecured. See DeSardi, 340 B.R. at 803; In re Brown, 348 B.R. 583, 592-94 (Bankr. N.D. Ga. 2006).

2. *Administrative Issues Caused by Direct Payment.* A proof of claim generally makes a demand as of the petition date. Therefore, if adequate protection payments are made prior to plan confirmation, those payments will not be reflected in the proof of claim. This problem may suggest that the court should order, as permitted by section 1326(a)(1), that the trustee make all adequate protection payments. See Brown, 348 B.R. at 591.

D. Are Adequate Protection Payments Mandatory?

1. *Court’s Discretion.* The preamble to section 1326(a)(1), “unless the court orders otherwise,” appears to provide the court with the discretion to dispense with adequate protection payments under section 1326(a)(1)(C).

2. *Debtor’s Election.* In Beaver, 337 B.R. at 284-85, the court concluded that adequate protection payments are required only if the debtor elects to provide adequate protection by making such payments. “The court’s understanding of § 1326(a)(1)(C) ... is that a chapter 13 debtor is required to begin making adequate protection payments 30 days after the order for relief [footnote omitted] if direct payment is the form of adequate protection that the chapter 13 debtor has chosen to provide to a creditor with a claim secured by personal property attributable to the purchase of the collateral. If the debtor has chosen another method of providing adequate protection, no pre-confirmation direct payments are needed ... Adequate

protection can take many forms and may even be the status quo where the value of the creditor's collateral is sufficient to provide an 'equity cushion.' ... Had Congress intended to change this well established practice of affording debtors a wide range of adequate protection options, it would have done so more clearly. The legislative history merely paraphrases the statute and does not suggest that Congress intended to limit a debtor's adequate protection options." See, also Brown, 348 B.R. at 590-91.

E. Modification of Adequate Protection. Pending plan confirmation, and upon notice and a hearing, the court may order modifications of the payments required by sections 1326(a)(1)(B) & (C) to lessors and secured creditors. See 11 U.S.C. § 1326(a)(3).

V. **Distribution of Plan Payments**. Under section 1326(a)(2), payments made to the trustee shall be retained by the trustee until plan confirmation or denial of confirmation. Once the plan is confirmed, the trustee must distribute payments in accordance with the plan terms as soon as practicable. If the plan is not confirmed, the trustee must return to the debtor any payments not previously paid, or not yet due, to creditors. However, the trustee may deduct allowed administrative expenses from the debtor's refund.

VI. **Proof of Insurance**. The debtor is required by section 1326(a)(4) to provide proof of insurance covering personal property subject to a lease or that is security for a purchase money debt within 60 days of the filing of the petition. The debtor must present reasonable evidence of the maintenance of any required insurance as long as the debtor retains possession of personal property.

VII. **Fees of Former Chapter 7 Trustee**. Sections 1326(b)(3) & (d) provide for payment of a chapter 7 trustee's fees when the case was commenced under chapter 7 then converted to chapter 13 or dismissed under section 707(b). Any unpaid portion of such fees are to be paid in the subsequent chapter 13 case even if they had been discharged in a prior case. Payment of these fees, however, is subject to a cap that varies depending upon the amount of other unsecured claims in the case. The cap is the greater of \$25.00 or the amount payable to unsecured non-priority creditors as provided by the plan multiplied by 5% and divided by the number of months in the plan.

#### Cross References

##### Bankruptcy Code

11 U.S.C. § 363	[use sale or lease of property]
11 U.S.C. § 503(b)	[administrative expenses]
11 U.S.C. § 507(a)	[priority claims]
11 U.S.C. § 707(b)	[dismissal of chapter 7 petition for abuse]

##### Applicable Nonbankruptcy Statutes

28 U.S.C. § 586	[appointment of trustees]
28 U.S.C. § 1930	[bankruptcy fees]

#### Drafting Issue and Problems

Under section 1326(a)(1), the debtor's payments must commence not later than 30 days after filing of the plan or the order for relief, whichever is earlier. Because no chapter 13 debtor will be able to file a plan before the order for relief, and because it is not possible to file an involuntary chapter 13 petition, plan payments will always first fall due 30 days after the order for relief.

**SECTION 1328**  
**Discharge**

Effective Date

Section 1328(h) applies in cases filed on or after the date of enactment, April 2005. All other amendments are effective in cases filed on and after October 17, 2005.

Summary of Amendment

A discharge will not issue in a chapter 13 case until the debtor has completed all payments under the plan and, if the debtor is required to pay a domestic support obligation, after the debtor has certified that all amounts payable on account of that obligation, both pre-petition, to the extent the plan required payment, and post-petition, have been paid. See 11 U.S.C. § 1328(a).

Section 1328(a)(2) adds to the list of debts that are not dischargeable in chapter 13 case tax debts of the types described in sections 507(a)(8)(C) and 523(a)(1)(B) & (1)(C), as well as debts made nondischargeable by section 523(a)(2) [fraud], (3) [debts not scheduled in time to permit timely proof of claim or dischargeability complaint] & (4) [fraud or defalcation while acting in a fiduciary capacity, embezzlement, larceny]. These exceptions are in addition to those debts that were already excepted from discharge prior to BAPCPA [long term debt, spousal and child support, education loans, debts arising from operation of vehicles while intoxicated, restitution, criminal fines].

The application of section 523(a)(3) to chapter 13 cases is a significant change. It means that if a creditor is omitted from the schedules or not accurately listed in them and as a result the creditor is not advised of the chapter 13 petition in time to file a proof of claim or a complaint objecting to the discharge of a debt, the creditor's claim will not be discharged even if the debtor fully performs the plan. Further, complaints under section 523(a)(3) need not be filed within 60 days of the first meeting. See 11 U.S.C. § 523(c).

Section 1328 (a)(4) is new. It makes debts for restitution or damages awarded against the debtor as a result of willful or malicious injury causing personal injury or death nondischargeable in a chapter 13 case. This exception is reminiscent of section 523(a)(6) but the sweep of section 1328(a)(4) is less extensive than section 523(a)(6). It reaches only injuries to persons, not property. On the other hand, unlike section 523(a)(6), section 1328(a)(4) does not require both willful and malicious conduct causing a personal injury. It requires either willful or malicious misconduct.

There is another difference. Section 523(c) requires that the bankruptcy court determine whether a debt is nondischargeable under section 523(a)(6), and Fed. R. Bankr. P. 4007(c) requires that a complaint under section 523(c) be filed within 60 days of the first meeting. Because section 1328(a)(4) does not incorporate section 523(a)(6), and by implication does not incorporate section 523(c), a complaint under section 1328(a)(4) can come anytime during the case, or possibly after a chapter 13 case has been concluded, and it can be adjudicated by any nonbankruptcy court with jurisdiction. Given 28 U.S.C. § 157(b)(5), requiring the district court try all personal injury tort and wrongful death claims, the likelihood that the bankruptcy court will adjudicate exceptions to discharge under section 1328(a)(4) is remote.

Interim Rule 4007(c) reflects the fact that the deadline formerly only applicable in chapter 7 cases for bringing complaints under section 523(c) is now applicable to chapter 13 cases insofar as claims under sections 523(a)(2) or (a)(4) can be stated. The deadline for filing such complaints is 60 days after the first date set for the meeting of creditors.

Although the chapter 13 discharge is now more restrictive, it remains broader than a chapter 7 discharge in some respects. For instance:

- a chapter 7 debtor may not discharge a nonsupport obligation incurred in the course of a divorce or separation [section 523(a)(15)] while a chapter 13 debtor may do so;
- a chapter 7 discharge, unlike a chapter 13 discharge, does not cover debts incurred to pay taxes or to pay fines or penalties imposed for violations of federal election laws [sections 523(a)(14), (a)(14A), (a)(14B)];
- while section 1328(a)(4) is, to a degree, similar to section 523(a)(6) [see discussion above], it does not include damages for willful and malicious injury to property interests; and
- a debt owed to a pension, profit-sharing, stock bonus plan is nondischargeable in chapter 7 [section 523(a)(18)] but may be discharged in chapter 13.

Section 523(c) requires that the bankruptcy court adjudicate all dischargeability complaints under section 523(a)(2), (a)(4), and (a)(6). A debt of the type described in section 523(a)(6) [willful and malicious injury to the person or property of another], however, is not an exception to a chapter 13 discharge. Only if a chapter 13 debtor is unable to complete his or her plan and seeks a hardship discharge under section 1328(b), is a debt made nondischargeable by section 523(a)(6) in the chapter 13 context. See 11 U.S.C. § 1328(c).

This difference between the usual chapter 13 discharge and the hardship discharge necessitates the amendment of Fed. R. Bankr. P. 4007(d). Whenever a debtor sought a hardship discharge under the former Bankruptcy Code, Rule 4007(d) required the court to fix a deadline for filing any complaint under section 523(c), whether pursuant to sections 523(a)(2), (a)(4), or (a)(6). However, under BAPCPA, creditors must decide whether or not to file complaints under section 523(a)(2) & (a)(4) by the 60<sup>th</sup> day after the date first set for the meeting of creditors. Because debts described in 523(a)(6) are not excepted from the new chapter 13 discharge, creditors cannot file such complaints. This changes, however, if a chapter 13 debtor seeks a hardship discharge. Therefore, Rule 4007(d) must be amended to limit creditors to filing complaints under section 523(a)(6) rather than all complaints under section 523(c). This is what is done in Interim Rule 4007(d).

Section 1328(f) does not permit a chapter 13 debtor to receive a chapter 13 discharge if the debtor has received a discharge in a case filed under chapter 7, 11, or 12 in the 4-year period preceding the order for relief. Also, if the debtor has received a discharge in a chapter 13 case filed during the 2-year period preceding the order for relief, the debtor may not receive a second chapter 13 discharge. However, a debtor who is ineligible for a chapter 13 discharge is nonetheless eligible for chapter 13 relief. See Lewis, 339 B.R. at 817. See, also In re McGhee, 342 B.R. 256 (Bankr. W.D. Ky. 2006); Bateman, 341 B.R. at 542; In re West, 2006 WL 2872275 (Bankr. E.D. Ark. 2006); In re Sours, 350 B.R. 261 (Bankr. E.D. Va. 2006).

A chapter 13 debtor must complete the instructional course on personal financial management described in section 111 as a condition to receiving a chapter 13 discharge. See 11 U.S.C. § 1328(g). Once the course is taken, Interim Rule 1007(b) requires the debtor to file a statement regarding the completion of a course on personal financial management. See Interim Rule 1007(b)(7). This statement is due no later than the last plan payment by the debtor or by the filing of a motion for entry of a hardship discharge pursuant to section 1328(b). See Interim Rule 1007(c). The statement is Official Form 23, Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management.

The court may not grant a debtor a chapter 13 discharge if section 522(q)(1) is applicable to the debtor and there is a “pending proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).” See 11 U.S.C. § 1328(h). This is very similar to new section 727(a)(12) applicable in chapter 7 cases. For the limitations of this ground for delaying or denying a discharge refer to the Summary of section 727. Interim Rule 4003(b)(2) makes clear that objecting to homesteaded property [or a burial plot] pursuant to section 522(q) is not subject to the usual deadline for objecting to exemptions, 30 days after the conclusion of the meeting of creditors. See Fed. R. Bankr. P. 4003(b). Such an objection may be raised anytime prior to the closing of the case.

### Litigation Points

1. Section 1328(a) requires a certification by the debtor as to the status of support payments. The recipient would have to file an objection to confirmation if this was not true. This indicates that there must be a discharge hearing or some notice and opportunity for these claimants to object to a discharge.

2. While the entry of a chapter 13 discharge may not be available to a debtor, section 1328 does not bar a debtor who is ineligible for a discharge from filing a chapter 13 petition. Is chapter 20 alive and well?

### Cross References

#### Bankruptcy Code

11 U.S.C. § 109(e) & (h)	[eligibility for chapter 13 relief and credit counseling]
11 U.S.C. § 111	[nonprofit budget and credit counseling agency and instructional course on personal financial management]
11 U.S.C. § 507	[priority claims]
11 U.S.C. § 522	[exemptions]
11 U.S.C. § 523(a)	[exceptions to chapter 7 discharge]
11 U.S.C. § 523(c)	[exceptions to chapter 7 discharge that must be adjudicated by the bankruptcy court]
11 U.S.C. § 727	[objections to chapter 7 discharge]

#### Bankruptcy Rules

Fed. R. Bankr. P. 4003(b)	[deadline for making objections to exemptions]
Fed. R. Bankr. P. 4007(c)	[deadline for filing § 523(c) complaints]
Fed. R. Bankr. P. 4007(d)	[deadline for filing § 523(c) when chapter 13 debtor seeks a hardship discharge]

#### Interim Rules

Interim Rule 1007(b)(7)	[requires the filing of a statement regarding the completion of a course on personal financial management]
Interim Rule 1007(c)	[deadline for filing statement regarding completion of course on personal financial management]
Interim Rule 4003(b)(1)	[former Fed. R. Bankr. P. 4003(b)]
Interim Rule 4003(b)(2)	[objection to homestead exemption under § 522(q) may be raised any time before the closing of a case]

Interim Rule 4007(c) [in the chapter 13 context, deadline for filing complaints under §§ 523(a)(2) & (a)(4)]  
Interim Rule 4007(d) [deadline for filing § 523(a)(6) complaints when chapter 13 debtor seeks a hardship discharge]

Official Forms

Form 23 [Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management]

**SECTION 1329**  
**Modification of Plan After Confirmation**

Summary of Amendment

Section 1329(a) is amended to permit post-confirmation modification of a plan in order to reduce payments to permit the debtor to purchase health insurance for himself or herself or a dependent. The debtor is required to document the cost of that insurance and to demonstrate:

- that the expense is reasonable and necessary.
- if the new insurance replaces a prior policy, the cost for the new policy must not be materially higher than the cost for the prior policy.
- if the debtor did not previously have coverage, the cost of the policy must not be materially higher than the cost likely to be incurred by someone in the same locale with similar income, expenses, age, health status, and number of dependents.
- the amount claimed for health insurance was not already deducted under section 1325(b) when determining projected disposable income.
- if requested by a party in interest, the debtor must file proof that a health insurance policy was purchased.

There is also a technical amendment to section 1329(c), substituting “the applicable commitment period under section 1325(b)(1)(B)” for “three years.”

Litigation Points

1. The court must consider a number of factors if the debtor is modifying the plan in order to purchase health insurance. Each factor may be source of a potential dispute. For example, who is a dependent? Does dependent include adult children? What is reasonable and necessary? What is materially larger?

2. How do you determine what it would cost a similar person? The employer of the party or availability of insurance through an employer is not listed as a factor. May a debtor purchase health insurance on the open market that costs more than insurance that is available through his or her employment?

Cross References

Bankruptcy Code

11 U.S.C. § 1325(b)      [projected disposable income]