Chapter 13 Trustee's Best Practices Manual[1]

by

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[1] DISCLAIMER: These materials are not an official statement of policies or procedures of the Chapter 13 Trustee's Office. They are intended to provide assistance and guidance in representing debtors in Chapter 13 cases and they are subject to ongoing revisions.
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INTRODUCTION TO CHAPTER 13 BANKRUPTCY

I. OVERVIEW AND ELIGIBILITY

A. SOURCES OF LAW

Title 11 of the United States Code (11 U.S.C. §§ 101 – 1532) is the bankruptcy statute, referred to as the "Bankruptcy Code." The Bankruptcy Code is broken into chapters. Chapters 1, 3 and 5 relate to all types of bankruptcy cases except Chapter 9. Except as otherwise noted in the Bankruptcy Code, Chapters 7, 9, 11, 12, 13 and 15 relate only to cases filed under the applicable chapter of the Code.

Certain statutes in Titles 18 and 28 of the United States Code also apply to bankruptcy cases, including 28 U.S.C. §§ 151 – 159 (bankruptcy judges and appeals); 28 U.S.C. §§ 581 – 589b (United States Trustee); 28 U.S.C. §§ 1334, 1408 – 1412 (jurisdiction and venue); 18 U.S.C. §§ 151 – 158 (bankruptcy crimes).

The national rules relating to bankruptcy are the Federal Rules of Bankruptcy Procedure (FRBP). The rules are commonly called the "Bankruptcy Rules" and are numbered 1001 – 9036. The Federal Rules of Civil Procedure and Federal Rules of Evidence are also sometimes applicable to bankruptcy cases. The Bankruptcy Court for the Western District of Washington also has a comprehensive set of local bankruptcy rules (LBR). Any bankruptcy practitioner in this District should read through the local rules, which are located at the Court's website (www.wawb.uscourts.gov).

Creditors must file additional information with their claims that will be of assistance in reviewing the claims. In Chapter 13 cases, creditors secured by an interest in a debtor's principal residence that is provided for in the plan will also have to provide notice to the Trustee, debtor's counsel and debtor (1) of any change in the payment amount (including any change that results from an interest rate or escrow account adjustment), no later than 30 days before the new payment amount is due; and (2) of fees, expenses and charges incurred after the claim was filed and that the creditor asserts are recoverable against the debtor or the residence, and that notice must be served within 180 days of the fee, expense or charge being incurred. FRBP 3002.1.

State law may also be applicable in bankruptcy proceedings. For example, certain state law causes of action might be asserted in bankruptcy lawsuits, called "adversary proceedings." In Washington State, debtors may also choose to utilize either the state or federal exemption schemes (but not both). See 11 U.S.C. § 522.

Bankruptcy appellate decisions may be rendered by the Bankruptcy Appellate Panel of the Ninth Circuit (not all Circuits have a Bankruptcy Appellate Panel), District Courts, the Ninth Circuit or the United States Supreme Court.

B. CHAPTER 13 BASICS

Chapter 13, known as adjustment of debt of individuals with regular income, involves trustee administration of a debt repayment plan by individuals pursuant to a confirmed plan. Corporations and partnerships are not eligible to be debtors under Chapter 13. Only the debtor may file a plan in a Chapter 13 case. Contents of the plan are determined by the Bankruptcy Code and local rules. See 11 U.S.C. § 1322. Local Bankruptcy Form 13-4 is the mandatory form plan. Local Bankr. R. 3015-1(a). The Court periodically revises the plan, most recently on December 1, 2014. Gen. Ord. No. 2014-2 (Bankr. W.D.Wa. Nov. 21, 2014). The plan must provide treatment to creditors that is at least the same as the creditors would receive in a Chapter 7 case.

Unlike Chapter 7, which requires the debtor to surrender his or her non-exempt assets to the trustee in return for an immediate discharge under 11 U.S.C. § 727, in Chapter 13 the debtor keeps his or her assets and proposes a repayment plan. The plan is generally three to five years in length. The discharge under 11 U.S.C. § 1328(a) is entered once the debtor has completed his or her obligations under the confirmed plan.

To be eligible for Chapter 13, an individual must:

1) Be an individual with "regular income," which means income that is sufficiently stable and regular to enable that the individual can make the proposed plan payments. 11 U.S.C. § 101(30).

2) Have noncontingent, liquidated, unsecured debt of less than $383,175 (this amount adjusts every three years); and

3) Have noncontingent, liquidated, secured debt of less than $1,149,525 (this amount adjusts every three years).

11 U.S.C. § 109.

A debtor must be eligible for Chapter 13 on the petition date itself. A debtor may not sell or surrender collateral post-petition in order to become eligible for Chapter 13. "[D]etermining Chapter 13 eligibility under § 109(e) . . . should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 982 (9th Cir. 2001). And "ordinary events occurring subsequent to the filing (e.g., paying down debt) do not affect the eligibility determination." Id. at 984. Also keep in mind that "the unsecured portion of undersecured debt is counted as unsecured for § 109(e) eligibility purposes." Id. at 983. For example, if a house is worth $100,000.00 but the debt is $200,000.00, the $100,000.00 "undersecured" portion of the debt counts toward the unsecured debt limit.

Only an individual with regular income may be a debtor under Chapter 13. 11 U.S.C. § 109(e). An individual with regular income means an individual whose income is sufficiently stable and regular to enable that individual to make payments under a chapter 13 plan. 11 U.S.C. § 101(30). Gifts or gratuitous payments from family or friends do not qualify as regular income. See In re Cregut, 69 B.R. 21, 22-23 (Bankr. D.Ariz. 1986); In re Hanlin, 211 B.R. 147, 148 (Bankr. W.D.N.Y. 1997). However, where the family member or friend commits to making the payments to allow the debtor to fund his or her plan *and there is direct evidence of that*

commitment, those payments can constitute regular income. See In re Campbell, 38 B.R. 193, 196 (Bankr. E.D.N.Y. 1984); In re Jordan, 226 B.R. 117, 119 (Bankr. D.Mont. 1998). To establish that regular income, the debtor needs to file a sworn declaration from the family member or friend committing to make the payments to the debtor so that the debtor can qualify as a debtor under Chapter 13. Without that evidence, the debtor is not eligible to be a debtor under Chapter 13 if his or her ability to fund the plan depends on gratuitous payments from family or friends.

The most significant differences between a Chapter 13 and Chapter 7 discharge are:

1) Property/debt settlement in a divorce decree that is not related to a support issue can be discharged vis-à-vis the nonfiling ex-spouse in Chapter 13;

2) The willful *and* malicious tort exception to discharge in Chapter 7 is changed in Chapter 13 to willful *or* malicious; and

3) It appears traffic tickets and fines are dischargeable in Chapter 13, but not in Chapter 7.

Reasons to file Chapter 13 include:

1) Saving a house from foreclosure by paying back pre-petition mortgage arrears over the life of the plan;

2) Paying priority tax debt over the life of the plan;

3) Avoiding loss of assets that would be sold in a Chapter 7 case by paying an equivalent amount over the life of the plan;

4) "Stripping" off junior mortgages because there is no equity above the amount of the senior mortgage(s);

5) Protecting a codebtor from creditor collection;

6) Changing loan terms (for example, a "cramdown" of a vehicle purchased more than 910 days prior to the petition date); and

7) Obtaining a discharge when not eligible for a Chapter 7 discharge.

Only married persons may file a joint bankruptcy case. 11 U.S.C. § 302(a); Fitzgerald v. Hudson (Matter of Clem), 29 B.R. 3, 4 (Bankr.D.Idaho 1982); In re Estrada, 224 B.R. 132, 135 (Bankr. S.D.Ca. 1998); In re Aldape Telford Glazier, Inc., 410 B.R. 60, 63 (Bankr. D.Idaho 2009). Unmarried persons may not file a joint bankruptcy case. Bone v. Allen (In re Allen), 186 B.R. 769, 774 (Bankr. N.D.Ga. 1995) (noting that "in order to qualify to file a joint petition under § 302 the two parties must be legally married"); In re Lucero, 408 B.R. 348, 350 (Bankr. C.D.Ca. 2009) (observing that "only . . . those couples that are legally married" may file a joint bankruptcy case).

A Chapter 13 debtor must complete a plan within sixty months. "Under Chapter 13, a debtor must complete plan payments within 36 months or, with leave of court, not later than 60 months. 11 U.S.C. § 1322(c). This time period begins running from the date at which the Chapter 13 debtor is first obligated to begin making payments to the trustee under the confirmed plan . . . as opposed to the date at which the first payment becomes due under the confirmed plan." Nicholes v. Johnny Appleseed of Washington (In re Nicholes), 184 B.R. 82, 87 (B.A.P. 9th Cir. 1995) (citations omitted).

C. AUTOMATIC STAY, CODEBTOR STAY AND *IN REM* RELIEF

Many courts have written on what actually terminates if the stay is not extended when the debtor files a second case within one year. 11 U.S.C. § 362(c)(3)(A). The confusion arises with the phrase "with respect to the debtor" in the statute. Some courts have held that the phrase is critical and conclude that the stay terminates *only* with respect to the debtor and the debtor's property, but not as to property of the estate. The Bankruptcy Appellate Panel of the Ninth Circuit held that the stay terminates in its entirety on the thirtieth day after the second case is filed *unless* the debtor files a motion to continue the stay, the court holds a hearing within the thirty day period and the court then extends the stay. Reswick v. Reswick et al. (In re Reswick), 446 B.R. 362, 372-73 (B.A.P. 9th Cir. 2011). Not all bankruptcy courts in the Ninth Circuit have agreed with the Panel. See, e.g., Rinard v. Positive Investments, Inc. (In re Rinard), 451 B.R. 12, 20 -21 (Bankr. C.D.Cal. 2011). At least one Court in the Western District of Washington agrees with the Rinard court.

Under Chapter 13, a codebtor stay comes into effect upon the filing of the petition under certain conditions. 11 U.S.C. § 1301. Generally, the codebtor stay prevents collection of a *consumer debt* against any individual who is liable on the debt with the debtor. A debt securing a debtor's principal residence qualifies as a consumer debt. Zolg v. Kelly (In re Kelly), 841 F.2d 908, 912-13 (9th Cir. 1988). Even if the automatic stay terminates or does not come into effect because of the debtor's prior cases filed within one year, the codebtor stay is not affected.

"Neither Section 1301 nor Section 362(c)(4)(A) contains any language that limits the applicability of the codebtor stay in cases where Section 362(c)(4) is applicable." King v. Wells Fargo Bank, 362 B.R. 226, 232 (Bankr. D.Md. 2007) (holding that a foreclosure sale violated the codebtor stay and was void even where the automatic stay did not go into effect under 11 U.S.C. § 362(c)(4)(A)(i)). "The co-debtor stay provided for by Section 1301 is not terminated by the statutory termination of the stay applicable to debtors pursuant to section 362(c)(3)(A)." In re Lemma, 393 B.R. 299, 306 (Bankr. E.D.N.Y. 2008) (holding that the creditor's scheduling of a foreclosure sale on a personal residence violated the codebtor stay even where the Court did not extend the automatic stay pursuant to 11 U.S.C. § 362(c)(3)).

When debtors have three cases pending in one year, the stay does not go into effect in the third case. Section 362(4)(A) provides that

> if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed . . . the stay under subsection (a) shall not go into effect upon the filing of the later case.

11 U.S.C. § 362(c)(4)(A). However, "if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors." 11 U.S.C. § 362(c)(4)(B).

Based on the plain reading of Section 362(c)(4)(B), a debtor must file a motion to impose the stay within thirty days or the stay cannot go into effect. As noted by one court, under Section 362(c)(4)(B),

> there must be (1) a motion by a party in interest filed within 30 days of the bankruptcy filing, (2) notice and a hearing, and (3) a demonstration by the moving party that the new case was filed in good faith as to the creditors to be stayed.

In re Hart, No. 13-20039, 2013 WL 693013, at *1 (Bankr. D.Idaho Feb. 26, 2013). See also In re Winston, No. 07-24447, 2007 WL 2385095, at *2 (Bankr. E.D.Cal. Aug. 16, 2007) (the stay under Section 362(a) did not go into effect in the debtor's Chapter 11 case because more than thirty days had passed and no party in interest requested that the stay take effect); In re Hoilien, No. 14-01109, 2015 WL 509564, at *2 (Bankr. D.Haw. Feb. 3, 2015) (noting that a Chapter 11 "Debtor failed to make a timely motion within 30 days of filing the Third Bankruptcy Case under 11 U.S.C. § 362(c)(4)(B) for protection of the automatic stay notwithstanding her multiple bankruptcy filings").

Courts may grant *in rem* relief from the automatic stay as to real property under certain circumstances. On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -- . . .

> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either –
> (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
> (B) multiple bankruptcy filings affecting such real property.

11 U.S.C. § 362(d).

The Bankruptcy Panel of the Ninth Circuit held that only *a creditor whose claim is secured by an interest in such property* may obtain *in rem* relief from the automatic stay. Ellis v. Yu, 523 B.R. 673, 678-79 (B.A.P. 9th Cir. 2014). In the case before the Panel, a third party purchased the property from the bank that foreclosed on the debtor's real property. The debtor five chapter 13 and chapter 7 bankruptcy cases to avoid foreclosure and keep the property. The third party sought *in rem* relief to evict the debtor from the property. Because the third party was not a creditor secured on the real property, the third party could not use Section 362(d)(4) to obtain relief as to the property itself. As the BAP noted, "this is a dispute between two putative owners of the same real property, not a contest where the parties occupy a debtor-creditor relationship." Id. at 678.

According to the Bankruptcy Panel of the Ninth Circuit, 11 U.S.C. § 105(a) does not provide authority for courts to grant *in rem* relief from the automatic stay. Johnson v. TRE Holdings LLC (In re Johnson), 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006).

II. CLIENT RESPONSIBILITIES AND INFORMATION

Attorneys need information from their clients sufficient to prepare all schedules, statements, Means Test forms (Form B22C1 and Form B22C2), plan and other documents. Information required in order to properly prepare all required documents includes details of all of the clients' income, including gross income from all sources earned in the 3 years up to the filing of the petition; all monthly living expenses; all assets, including any interests in real and personal property; all debts and obligations the clients may owe; and all sales, transfers, or other dispositions of real and personal property made in the 2 years before filing, etc.

Too much information is better than not enough. Most attorneys ask their clients to complete a questionnaire from which the attorney can draft the debtors' schedules, Statement of Financial Affairs and other documents. You should ask your clients to supply the following information in order to assist you in preparing complete and accurate documents:

1) Proof of Income for the last SEVEN (7) months, including all paystubs, proof of Social Security and/or unemployment benefits and information about any other income received during this time period.
2) Bills and Collection Letters, including all bills, letters and documents from your clients' creditors, collection agencies and attorneys. Debtors need to supply their attorneys with names, addresses, account numbers and amounts owed for all creditors, collection agencies and/or attorneys, as any and all parties to whom debtors may owe obligations should be scheduled in their Chapter 13 paperwork.
3) Last 60 days' of bank statements from all bank accounts
4) Last 60 days' of checkbook entries/check registers, including any outstanding uncashed checks.
5) All coupon books, including those for home loans, home equity lines of credit, auto loans, student loans, etc.
6) All agreements for purchase or lease of cars, trucks, motorcycles and other vehicles
7) All other contracts and agreements with clients' creditors
8) All tax notices
9) Federal (and, if applicable, State) income tax returns for the last four (4) years
10) Any and all Court documents received by clients
11) All foreclosures and repossession papers received by clients
12) All papers, if any, concerning prior bankruptcy cases client and/or a spouse have filed
13) Copies of clients' credit reports (CAN BE OBTAINED ONCE A YEAR FOR FREE FROM www.annualcreditreport.com)
14) Picture ID (driver's license or passport) and Social Security Number proof (Original Social Security card, W-2 form or 1099 form)

Client (and attorney) responsibilities are generally set forth in the *Rights and Responsibilities of Chapter 13 Debtors and Their Attorney* (Local Bankruptcy Form 13-5). Attorneys need to review this document with their clients, sign it and have their clients sign it, give a copy of the document to the clients prior to the filing of the schedules and the plan, and retain the signed original document in their file.

Debtors are also required to complete a credit counseling class *pre-petition*, and obtain a certificate from the counseling agency which the attorney must file at the time the Chapter 13 petition and other documents are filed. A list of approved credit counseling agencies are available on the Court's website at www.wawb.uscourts.gov or on the US Trustee's website at www.justice.gov/ust.

Under the provisions of BAPCPA (the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005), which went into effect in October 2005, the Bankruptcy Code was revised to characterize attorneys representing debtors in bankruptcy cases as "debt relief agencies" and to characterize debtors as "assisted persons" under the Bankruptcy Code. Attorneys are required to supply debtors with written notices as mandated in section 342(b) and sections 527(a) through (c) of the Bankruptcy Code before they file bankruptcy cases for their clients.

Debtors have the duty file a statement of any change of the debtor's address. Fed. R. Bankr. P. 4002(a)(5). In addition, debtors must file notices of a change of address within fourteen days of the effective date. Local Bankr. R. 9011-1(a).

Please also keep in mind that service on the address the debtor designates constitutes effective service on the debtor. Fed. R. Bankr. P. 7004(b)(9); Local Bankr. R. 9011-1(b); Cossio v. Cate (In re Cossio), 163 B.R. 150, 155 (B.A.P. 9th Cir. 1994) (noting that "Rule 7004(b)(9) allows service on the debtor at the listed address until he files a change of address"). Both Rule 4002(5) [Rule 4002(a)(5)] and Rule 7004(b)(9) "place the burden squarely upon the debtor to apprise the clerk of the bankruptcy court of any change of address." Ruiz v. Loera (In re Ruiz), 2006 WL 6811033 (B.A.P. 9th Cir. 2006) (this case has persuasive, but not precedential, value pursuant to Fed. R. App. P. 32.1 and 9th Cir. B.A.P. R. 8013-1).

III. DRAFTING CHAPTER 13 PLANS, SCHEDULES, STATEMENTS AND MEANS TESTS

A. MEANS TEST GENERALLY

One of the most significant changes to the Bankruptcy Code with passage of BAPCPA was implementation of a formula for determining whether a debtor's case is presumed abusive in a Chapter 7 and determining how long a Chapter 13 debtor must remain in the case and pay to creditors. Effective December 1, 2014, the Chapter 13 means test was divided into two forms: *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Form B22C1) and *Chapter 13 Calculation of Your Disposable Income* (Form B22C2). All Chapter 13 debtors must complete Form B22C1, but only debtors whose income is above the state median for their household size during the relevant time period must complete Form B22C2. See 11 U.S.C. § 521(a)(1)(B)(v); 11 U.S.C. § 1325(b).

The debtor must disclose his or her average monthly income received from all sources during the six calendar months prior to filing the bankruptcy petition ("six month look back

period"). For example, if the debtor filed the case during the month of July, the six month period is January 1 – June 30. Generally, the "six month look back period" is the average monthly income from all sources that a debtor or debtors received, without regard to whether such income is taxable income (other than benefits received under the Social Security Act), during the six month period ending on the last day of the calendar month immediately preceding the date on the commencement of the case. 11 U.S.C. § 101(10A). Once certain deductions are taken, the debtor determines whether his or her income is above or below the applicable median family income.

Current monthly income is based on income derived during the six month look back period. 11 U.S.C. § 101(10A)(A). "[P]ostpetition changes in income do *not* change the debtor's 'current monthly income' as defined." In re Tengan, 2014 WL 5306620, at *2 (Bankr. D.Haw. October 15, 2014) (emphasis added).

The Bankruptcy Code requires that a Chapter 13 plan provide that all of a debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors. 11 U.S.C. § 1325(b)(1). Debtors whose income is below the state median for their household size have an applicable commitment period of 36 months. Debtors whose income is above the state median for their household size have an applicable commitment period of 60 months and that is so whether or not the debtors have positive or negative monthly disposable income on Line 45 of Form B22C2 (formerly Line 59 on Form B22C). 11 U.S.C. § 1325(b)(4); Danielson v. Flores (In re Flores), No. 11-55452, 2013 WL 4566428 (9th Cir. Aug. 29, 2013).

B. MEANS TEST SPECIFICALLY

Certain lines of Form B22C1 and Form B22C2 are worth explaining at greater length. Line 2 of Form B22C1 includes all gross income from any source, including bonuses and commissions. Generally speaking, income from a non-filing spouse must be included in column B as if it were a joint case. VA disability income is also included, but benefits received under the Social Security Act are not. 11 U.S.C. § 101(10A).

Line 11 of Form B22C1 is the total of the income and the starting point for calculation of the Section 1325(b)(4) commitment period and for determining the applicability of Section 1325(B)(3) for determining disposable income.

Line 13 of Form B22C1 is for use only by married debtors not filing jointly with his or her spouse. In determining who are dependents, see IRS publication 501 for guidance. Considerations in determining household size include time together, pooling of income, sharing expenses and functioning as a single economic unit. Applicable median family income is derived from the United States Census Bureau and published by the United States Trustee.

Line 9 of Form B22C2, taken in conjunction with Line 33 of Form B22C2, allows a debtor the greater of the Local Standard or their actual mortgage expense. If the debtor's mortgage expense is greater than the Local Standard, the entry on Line 9c will be zero and the debtor will deduct the entire monthly mortgage amount on Line 33g. If the debtor's mortgage expense is less than the standard, the debtor deducts the full mortgage expense on Line 33g and the difference between the standard and the mortgage expense on Line 9c. If the debtor is a

renter, there is no entry on Line 9b and the IRS Standard from Line 9a is entered on Line 9c. A debtor may not take deductions for property being surrendered or junior mortgages being "stripped." American Express Bank v. Smith (In re Smith), 418 B.R. 359 (B.A.P. 9th Cir. 2009); Yarnall v. Martinez (In re Martinez), 418 B.R. 347 (B.A.P. 9th Cir. 2009).

Line 13 of Form B22C2: A debtor who owns a car free and clear may not claim an "Ownership Costs" deduction for that car because that deduction is for the costs associated with a car loan or lease. Ransom v. FIA Card Services, N.A., 131 S.Ct. 716, 178 L.Ed.2d 603, ------ U.S. ——, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011). Line 13 of Form B22C2 specifically provides that "[y]ou may not claim the expense if you do not make any loan or lease payments on the vehicle."

Line 16 of Form B22C2 is the debtor's actual income tax expense, not to be confused with the amount withheld. It is computed using the debtor's income tax liability from his or her federal and state tax returns and the amount withheld for Social Security and Medicare. It is common for a debtor to overstate this line item by entering the withholding amounts and not backing out his or her tax refund amount.

Line 23 of Form B22C2, Optional Telephones and Telephone Services, is often misunderstood. Basic telephone (land line and cellular) expenses are included in Line 8 and are not to be duplicated here. Generally, this line item should be zero and any amount that is included must be justified and documented.

Line 30 of Form B22C2, Additional food and clothing expense, should generally be zero. Any entry must be justified and documented.

Line 41 of Form B22C2, Qualified retirement deductions. Above median debtors may not exclude voluntary post-petition retirement contributions in any amount. Parks v. Drummond (In re Parks), 475 B.R. 703, 709 (B.A.P. 9th Cir. 2012). Below median debtors may make post-petition retirement contributions (which are not to be counted as disposable income) if those contributions are reasonably necessary to be expended for the maintenance and support of the debtor or a dependent of the debtor. In re Bruce, 484 B.R. 387 (Bankr. W.D.Wa. December 11, 2012). The Trustee reviews these situations on a case-by-case basis, reviewing each case for reasonableness. The Trustee reviews the amount of the contribution to determine if it is reasonable and the history of contributions. The retirement contributions should be historically documented, meaning the debtor must show a consistent history of contributions and not merely initiation of the contributions on the eve of bankruptcy.

Line 43 of Form B22C, Deduction for special circumstances, is also misunderstood. This category is for "special circumstances that justify additional expenses for which there is no reasonable alternative" and must be explained, justified and documented. In other words, this line should almost always be zero.

"Special circumstances" are circumstances such as a serious medical condition or a call or order to active duty in the Armed Forces "to the extent such special circumstances [ ] justify additional expenses or adjustments of current monthly income *for which there is no reasonable alternative*." 11 U.S.C. § 707(b)(2)(B)(i) (emphasis added). In other words, merely incurring expenses does not make them necessary and reasonable so that they can be deducted as special

circumstances on Form B22C. If that were the case, the Internal Revenue Service standards would be meaningless. Debtors could simply claim any deduction for any expense they incur. That would eviscerate Form B22C. In order to claim a deduction for special circumstances, debtors have to show that there is no reasonable alternative to the expense and that the expense is necessary and reasonable. They also have to document and explain in detail the expense. As the Ninth Circuit observed,

> Congress did not provide an exhaustive list of 'special circumstances,' but it did indicate examples of situations it would consider sufficient to rebut the presumption of abuse. As one court has noted, both examples given by Congress share 'a commonality; they both constitute situations which not only put a strain on a debtor's household budget, but they arise from circumstances normally beyond the debtor's control.'

Egebjerg v. Anderson (In re Egebjerg), 574 F.3d. 1045, 1053 (9th Cir. 2009) (citation omitted).

A debtor may not claim a $200.00 "old car" deduction on Form B22C2. Drummond v. Luedtke (In re Luedtke), 508 B.R. 408, 414 (B.A.P. 9th Cir. 2014). Because the older vehicle operating expense is not included in the IRS National or Local Standards or the commentary interpreting those standards, a debtor may not claim that expense. Id. Rather, the older vehicle operating expense is an additional expense that IRS collection employees may consider when evaluating an offer-in-compromise. Id. at 415.

As explained by one court in this District, debtors may not claim any expenses on Line 57 ("Deduction for special circumstances") unless:

1. The debtor provides supporting documentation
2. The debtor provides a detailed explanation why the additional expense is reasonable and necessary
3. The debtor attests under oath that the itemization and explanation are accurate and
4. The debtor must show that there is no reasonable alternative to the additional expense

In re Dittrich, 2011 WL 3471090 (Bankr. W.D.Wa. August 8, 2011).

Generally speaking, above median debtors may choose which secured debt to retain and claim as deductions on their means test. Drummond v. Welsh, 711 F.3d 1120 (9th Cir. 2013). However, as a practical application, this may not have as much impact as one might think. If the debtors are going to claim the deductions on the means test, the debtors will have to pay for the secured debt through their plan (with limited exceptions). Local Bankr. R. 3015-1(k). That may be prohibitive for debtors who may not be able to actually afford to keep the secured debt they wish to claim as deductions on the means test.

C. WHEN CAN DEBTORS DEVIATE FROM THEIR MEANS TEST RESULTS

Chapter 13 debtors with median family income above the state median and positive monthly disposable income on Line 45 of Form B22C2 are obligated to pay their projected disposable income (PDI) into their plan for payment to unsecured creditors. 11 U.S.C. § 1325(b). A debtor's PDI is calculated by multiplying the MDI by the debtor's sixty month applicable commitment period. This can sometimes lead to harsh results where the debtor's circumstances have worsened significantly since the six calendar months prior to filing the petition.

When calculating a debtor's projected disposable income, bankruptcy courts "may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." Hamilton v. Lanning (In re Lanning), 560 U.S. 505, 524 (2010). Thus, if for some reason a debtor's means test is clearly not representative of the debtor's known or virtually certain financial situation at confirmation, a bankruptcy court may consider those factors under certain circumstances. This applies to both income and expenditures. For example, if a debtor lost a high paying job during the six-month look back period and has a lower paying job post-petition, the debtor should be able to establish and document that change.

Debtors who assert that they cannot pay their PDI must comply with Local Bankruptcy Rule 3015-1(e) (*Deviation from Means Test*). LBR 3015-1(e) became effective on December 1, 2014. This rule is important, as it gives debtors and attorneys clear guidance on how to assert Lanning relief. Pursuant to the rule, Debtors must (1) provide the trustee with evidence of the change in circumstances; (2) include in Section IV.E.2.b. of the plan the minimum amount the debtor shall pay to allowed unsecured claims; and (3) include the following statement in Section XII of the plan: *The debtor is unable to pay all or part of the debtor's* $_________ *projected disposable income (the monthly disposable income shown on Line 45 of Official Form B 22C-2 multiplied by the sixty month applicable commitment period) as documented pursuant to Local Bankruptcy Rule 3015-1(e), and instead proposes to pay to allowed nonpriority unsecured claims at least the amount listed in Section IV.E.2.b.*

A debtor will have more difficulty establishing that his or her expenses increased post-petition such that he or she should be able to deviate from the means test results. The primary reason for that is because Congress established what expenses are reasonably necessary to be expended for the maintenance and support of the debtor or a dependent. 11 U.S.C. § 1325(b), 707(b)(2). As the Supreme Court observed in a post-Lanning case,

> Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system. In particular, Congress adopted the means test—'[t]he heart of [BAPCPA's] consumer bankruptcy reforms,' H.R.Rep. No. 109–31, pt. 1, p. 2 (2005) (hereinafter H.R. Rep.), and the home of the statutory language at issue here—to help ensure that debtors who *can* pay creditors *do* pay them. See, *e.g., ibid.* (under BAPCPA, 'debtors [will] repay creditors the maximum they can afford').
>
> In Chapter 13 proceedings, the means test provides a formula to calculate a debtor's disposable income, which the debtor must devote to reimbursing creditors under

> a court-approved plan generally lasting from three to five years. §§ 1325(b)(1)(B) and (b)(4). . . . *For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations.*

Ransom v. FIA Card Services, N.A., ––– U.S. ––––, 131 S.Ct. 716, 721-22 (2011) (case citations, quotations and footnote omitted) (emphasis added). The Supreme Court observed that its opinion did not combine "applicable" with "actual" costs:

> Although the expense amounts in the Standards apply only if the debtor incurs the relevant expense, the debtor's out-of-pocket cost may well not control the amount of the deduction. *If a debtor's actual expenses exceed the amounts listed in the tables, for example, the debtor may claim an allowance only for the specified sum, rather than for his real expenditures.*

Id. at 727 (emphasis added).

There seems to be a trend for above median debtors with positive PDI to assert that their Schedules I and J (Current Income and Expenditures), rather than their means test, should determine how much they should pay to allowed unsecured claims. However, a debtor cannot simply "opt out" of the means test because it is not representative of his or her asserted out-of-pocket expenses. In holding that excessive expenses (high transportation expenses) do not necessarily give rise to a change in circumstances, one court observed that

> [a] fair reading of Lanning indicates that the Supreme Court did not there discard the BAPCPA amendments to § 1325 nor jettison the calculation of current monthly income or disposable income under the Code that finds expression in each chapter 13 case through Form 22C. To the contrary, it was clear that Form 22C is to be followed, except in those exceptional cases where a forward-looking approach is required to take into account 'known or virtually certain' information impacting the debtor's income or expenses. The term 'projected' allowed for such an approach. But the Supreme Court clearly did not sacrifice the means test in favor of schedules I and J in every case, or validate a reversion to pre-BAPCPA practice. The contention, here, that the Court should use Form 22C only if it is, in Debtor's terms, 'reasonably connected' to schedules I and J reaches too far. *Indeed, if in order to look beyond Form 22C all that was required was a showing that a debtor's actual expenses varied from the standard expenses allowed under the means test, deviation from Form 22C would be the rule, not the exception.*

In re Thiel, 446 B.R. 434, 438-39 (Bankr. D.Idaho 2011) (citation and footnote omitted) (emphasis added).

The court summed up as follows:

> Debtors attempt to carry their burden of proving the Plan confirmable by pointing to schedules I and J and arguing that they are proposing to pay their 'truly' projected disposable income as shown thereon. That approach does not meet the requirements of the Code. The attempt to replace BAPCPA's changes with a call for a return to the 'good old days' before 2005 is not persuasive. Debtors' sole authority is Lanning, and it does not support such a rejection of the current statute in favor of the superceded version, especially in light of Ransom's recognition that Congress 'eliminat[ed] the pre-BAPCPA case-by-case adjudication of above-median income debtors' expenses' in favor of the standardized statutory formula.

Id. at 440.

A debtor cannot simply ignore the means test results and assert that his or her monthly net income on Schedules I and J should determine the plan payment. If that were the case, the means test would be essentially meaningless for an above median debtor with positive PDI. Congress instituted a formulaic approach to determining what above median debtors should pay to unsecured creditors. A debtor's monthly disposable income shown on the means test is presumed to be correct. See In re Reed, 454 B.R. 790 (Bankr. D.Or. 2011), *appeal docketed,* No. OR-11-1448 (B.A.P. 9th Cir. Aug. 17, 2011) (appealed on other grounds).

Also keep in mind that a known or virtually certain change in circumstances can cut both ways. For example, one court held that an adult daughter's post-petition contributions to debtors' household expenses could be considered in calculating debtors' projected disposable income for plan confirmation purposes. In re Coverstone, 461 B.R. 629 (Bankr. D.Idaho 2011).

If a debtor cannot pay the PDI, the debtor must demonstrate through evidence that he or she has a known or virtually certain change in circumstances that justifies deviation from the means test. The Trustee reviews these issues closely to determine if the assertions are correct. Merely having expenses greater than the standards does not mean the expenses are reasonable or allowable. A debtor asserting expenses higher than the standards on the means test must establish both that they are reasonable and that there is no alternative to paying the increased expenses.

D. SCHEDULES AND STATEMENTS OF FINANCIAL AFFAIRS

The debtor must timely file schedules and the statement of financial affairs (SoFA). The debtor signs these documents under penalty of perjury. The debtor's schedules and SoFA must be complete and accurate.

Schedules A and B list and value the debtor's real and personal property, respectively. The debtor claims exemptions in Schedule C (see also Section III.E. below). Schedule D is one of the most important schedules in Chapter 13. Schedule D lists the debtor's secured debt and that determines what non-exempt equity is available to pay unsecured creditors.

The value of the property, secured debts and exemptions are important for many reasons, including that they determine what must be paid to unsecured creditors under the liquidation analysis test of 11 U.S.C. § 1325(a)(4). That test provides that unsecured creditors must receive as much in the Chapter 13 case as they would have received in the Chapter 7 case. The difference is that, rather than surrendering the asset(s) to the trustee in the Chapter 7 case for liquidation, the Chapter 13 debtor may pay the value of the non-exempt assets over the life of the Chapter 13 plan.

The values in these schedules (and plan) are also important because the value of the real property will determine whether a Chapter 13 debtor may "strip off" a junior deed of trust lien. In the Ninth Circuit (and multiple other Circuits), a debtor may remove ("strip") a junior deed of trust lien if there is no equity to which the lien attaches. Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002). For example, if a house is worth $100,000.00 and the senior deed of trust amount is $100,001.00, there is no equity for a junior deed of trust lien to attach to (i.e, the junior lien is "wholly unsecured"). This is different than removing a judgment lien that interferes with the debtor's claimed homestead exemption. With a junior deed of trust lien "strip," the homestead exemption does not come into play.

When the debtor intends to retain the property and avoid the junior mortgage lien as wholly unsecured, the proper valuation is the fair market value and the debtor may not deduct hypothetical selling costs when determining that value. Taffi v. United States, 96 F.3d 1190, 1192 (9th Cir. 1996); United States Farmers Home Administration v. Case (In re Case), 115 B.R. 666, 669 (B.A.P. 9th Cir. 1990); In re Serda, 395 B.R. 450, 453, 456 (Bankr. E.D.Cal. 2008); Lee v. Wells Fargo Bank, Adv. Proc. No. 14-01396-KAO, No. 14-15632 (Bankr. W.D.Wa. Dec. 10, 2014) (oral ruling).

The petition date rather than the plan confirmation date is the point of valuation of the property itself and the senior mortgage liens. Benafel v. One West Bank (In re Benafel), 461 B.R. 581, 589 (B.A.P. 9th Cir. 2011); In re Gutierrez, 503 B.R. 458, 466 (Bankr. C.D.Cal. 2013) (tentatively ruling that courts should use the petition date as the date for valuation and determining the dollar amount of senior liens when debtors seek to avoid junior mortgage liens as wholly unsecured); In re Dean, 319 B.R. 474, 477 – 78 (Bankr. E.D.Va. 2004) (concluding that "the petition date is the appropriate date to value debtors' principal residence because debtors have used the property as their principal residence throughout the bankruptcy case from the date of their petition to the present"); Giebel v. Styron (In re Giebel), No. 13-18835, 2014 WL 4346611, at *7 (Bankr. W.D.Wa. Aug. 29, 2014) (holding that "[t]he petition is the appropriate date for both valuing the mortgage property and for determining the amount of the senior mortgage debt"). But see In re Crain, 243 B.R. 75, 85 (Bankr. C.D.Cal. 1999) (holding that "the appropriate date of valuation for the [property] is the 'effective date of the plan' or ten [now fourteen] days after entry of the order confirming the plan, provided no timely appeal has been made").

Schedule E lists a debtor's priority debt. Priority debts are listed in 11 U.S.C. § 507 and include, among other debts, certain domestic support obligations, administrative expenses and taxes. Unless the priority creditor agrees to different treatment, a debtor's plan must fully pay all

priority claims under Section 507. 11 U.S.C. § 1322(a)(2).

Schedule F lists all nonpriority unsecured creditors. It is important to check if the unsecured claims, including priority claims and undersecured claims, exceed the unsecured debt limit of Chapter 13. If so, the debtor is not eligible for Chapter 13 and must instead file under another chapter (e.g., Chapter 11).

Schedules I and J list the debtor's income and expenses, respectively.

The accuracy of a debtor's schedules is important. Debtors who do not present accurate schedules open themselves up to problems in the bankruptcy case itself (e.g., possible dismissal of their case) and even after conclusion of the bankruptcy case. See, e.g., Harris v. Fortin, 2014 WL 4411006 (Wash.App. Sept. 8, 2014) (debtors were judicially estopped from collecting on a promissory note post-discharge because the debtors misrepresented in their bankruptcy schedules that their interest in the promissory had no value and was uncollectable).

E. EXEMPTIONS

In Washington State, the debtor may claim exemptions under *either* the state *or* federal statutory exemption schemes, but not both. See 11 U.S.C. § 522(b).

Washington State's homestead exemption statute does not apply to property located in other states. In re Wieber, No. 90331-0, 2015 WL 1510453, at *7 (Wash. April 2, 2015). "While . . . the homestead exemption law is entitled to a liberal construction, the structure of the homestead exemption law indicates a legislative intent to limit application to homestead protection in Washington." Id. at *6.

F. DRAFTING THE PLAN

All chapter 13 plans (original and amended) must be filed using ***the current version*** of Local Bankruptcy Form 13-4 (Form Plan). See Local Bankr. Rule 3015-1(a). The Court most recently revised LBF 13-6 effective December 1, 2014. The Form Plan is located on the Bankruptcy Court's website. Debtors may *not* create their own plan form. In addition, all appropriate blanks on the Form Plan must be completed and any case-specific provisions must be included in Section XII. Any revision to the Form Plan not set forth in Section XII shall not be effective and both the debtors and counsel certify that the form used does not alter the Form Plan except as provided in Section XII. Local Bankr. Form 13-4, Section XI.

Common mistakes to avoid in completing and filing the Form Plan include:

1) Failure to indicate whether the debtor is an above or below median debtor in Section I.B.;
2) Failure to list the plan payment frequency in Section II;
3) Failure to list domestic support obligations in Sections IV.B. and/or Section VII;
4) Failure to complete Section IV.E.2. of the plan, which states the distribution to nonpriority unsecured creditors;
5) Failure to list the liquidation value of the bankruptcy estate in Section IX;

6) Failure to include the federal judgment interest rate when the liquidation value of the estate exceeds unsecured claims (i.e., the estate is solvent);
7) Failure to sign the plan;
8) Failure to serve the plan on creditors if the plan is not filed with the petition. Local Bankr. R. 3015-1(c)(2);
9) Failure to use the Court's mandated form plan; and
10) Failure to provide that the Trustee makes payments on vehicles (other than leases) and delinquent mortgages (both the pre-petition arrearages and the post-petition payments). Local Bankr. R. 3015-1(k).

Failure to complete these and other sections of the plan delays confirmation of the plan. Prior to filing, debtors' counsel should carefully review the plan to make sure all appropriate sections are completed and the above issues addressed. All parties have a strong incentive to obtain confirmation of the plan as soon as possible.

Overall plan payments must be enough to pay the scheduled installments each month, plus allow the Chapter 13 Trustee to take his administrative fee (mandated by the Bankruptcy Code) on all disbursements made through the plan. The Trustee's fee is subject to change, but averaged around 5.0% on funds disbursed over the last three years.

If debtors are behind on their mortgage payments and are proposing a "homesaver" plan, where they will cure mortgage arrears over a period not to exceed 60 months, they must make their ongoing mortgage payments through the plan, and also provide for payments sufficient to cure the arrears within five years. If the debtors are behind in real property taxes and/or condominium dues, they can likewise provide for cures of these arrears in their plan, but they not only must set up a real estate tax holding account (to be funded at 1/12 of the debtors' yearly taxes, with the Trustee to hold those funds until the post-petition taxes come due and then use the funds to pay the ongoing taxes due) to pay ongoing condo dues through the plan, but they must also provide for a cure of the property tax and/or condo dues arrears, with 12% statutory interest to be paid on the delinquency over the life of a plan. (SEE SECTION VII.C. BELOW FOR ADDITIONAL INFORMATION).

Even if the debtors' means test shows that they are not required to pay any funds to their unsecured creditors, their plan must still provide that unsecured creditors will be paid at least as much as said creditors would receive if their case was liquidated under Chapter 7 of the Bankruptcy Code. This "liquidation value" of the debtors' estate must be paid to allowed unsecured claims over the life of the Chapter 13 plan. (SEE SECTION VII.D. BELOW FOR ADDITIONAL INFORMATION).

Make sure you advise your clients that their first plan payment is due within 30 days of the filing of the Chapter 13 petition. If your client is employed, a wage deduction is generally issued by the Trustee to your client's employer requesting that the employer deduct the plan payments from each paycheck and forward them to the Trustee at his lockbox address in Memphis, Tennessee. If the wage deductions do not begin within the first 30 days, your clients will be responsible for making direct payments to the Trustee until the wage deduction takes effect. If your clients are self-employed or receive Social Security/disability or unemployment

benefits, they will have to remit their plan payments directly to the Trustee's lockbox address each month, and must make the payments by way of cashier's checks or money orders; personal checks and cash cannot be accepted.

More details regarding plan confirmation issues are in section VII below.

IV. FILING DOCUMENTS / PAYING COURT FILING FEE

Documents must be filed electronically, using the Court's ECF system. For attorneys new to ECF, you should contact the Clerk's office through the Court's website. Registration forms and other tools and information are available there.

The court filing fee can be paid at the time of filing (usually as a charge on the attorney's credit card when the case is filed) or the debtor can pay the $310.00 court filing fee in installments through the Chapter 13 plan. At a minimum, the debtor must pay $100.00 of the filing fee. The debtor must generally pay the full filing fee within 120 days of the date of the filing of the petition. MAKE SURE YOU FILE AN APPLICATION AND ORDER TO PAY THE COURT FILING FEE IN INSTALLMENTS IF THAT IS WHAT YOUR CLIENT INTENDS TO DO. If the filing fee is to be paid through the plan, the Trustee will pay it to the Court prior to plan confirmation from plan payments received.

If at all possible, you should file your clients' Chapter 13 plan and other schedules, statements and forms at the same time you file the Chapter 13 petition, credit counseling certificates and creditor matrix. However, if you only initially file the petition and other minimum filing requirements, you must file the balance of schedules, statements, forms and Chapter 13 plan within 14 days of the date the petition was filed. If the documents are not timely filed, the debtors' case will generally be dismissed upon motion by the U.S. Trustee.

If the debtor does not file the plan with the petition, the debtor must serve copies of the plan on creditors at least fourteen days prior to the originally scheduled meeting of creditors. Local Bankr. R. 3015-1(c)(2). This is a very common mistake. Failure to comply with this requirement will result in delay of confirmation.

V. ATTORNEY FEES

Effective December 1, 2014, all applications for compensation must conform to Local Bankruptcy Form 13-9 and all orders must conform to Local Bankruptcy Form 13-10. Local Bankr. R. 2016-1(e)(3). Please review the rule carefully to avoid delaying approval and / or payment of your fees.

The Bankruptcy Court must approve all attorney fees whether or not the fees are to be paid through the Chapter 13 plan.

The presumptive ("no look") fee is $3,500.00. Local Bankr. R. 3015-1(e)(1). If you subsequently request compensation above the presumptive fee, you must comply with Local Bankruptcy Rule 2016-1(e)(3) and file an itemized record for all services provided for

representation of the debtor *in any capacity whatsoever in connection with the case*. In other words, if you take the $3,500.00 presumptive fee and later ask for fees in addition to $3,500.00, you must go back in time and produce itemized records justifying the first $3,500.00.

Most debtors' attorneys get the bulk of their attorney fees paid through the Chapter 13 plans, but attorneys can accept fees from debtors prior to filing. In general, no attorney fees will be paid through the Chapter 13 plans until the debtors' cases have been confirmed.

VI. MEETING OF CREDITORS

Generally within 20 to 40 days after the filing of the petition, a 11 U.S.C. § 341 meeting of creditors will occur. The Chapter 13 Trustee or his representative will conduct the meeting. At the meeting, the Trustee will question the debtor about the schedules, review income and expenses and, if necessary, ask for amendments and additional information. Following the meeting, the Trustee will send debtors and their attorney the list of information and/or amendments that are needed before the Trustee can recommend confirmation of the debtors' plan. Debtors are required to cooperate with the Trustee as necessary to enable him to perform his duties under the Bankruptcy Code. 11 U.S.C. § 521(a)(3). Not surprisingly, the sooner debtors provide the requested information and make the necessary amendments (if any), the sooner the debtors' plan can be confirmed.

Creditors are permitted to attend and ask questions at the meeting. Given the number of meetings of creditors held on any particular calendar, the time permitted to a creditor to ask questions is generally limited. If a creditor wants to question a debtor further or obtain documents, the creditor may request the Court to set an examination of the debtor pursuant to Federal Rule of Bankruptcy Procedure 2004.

At the meeting of creditors, a debtor must produce proof of his or her identification (ID) and social security number. Acceptable forms of ID include:

1) Driver's license;
2) Government ID;
3) State picture ID;
4) Student ID;
5) U.S. passport;
6) Military ID;
7) Resident alien card; and
8) Consulate card.

Acceptable forms of proof of social security number include:

1) Social security card;
2) Medical insurance card;
3) Pay stub;
4) W-2 form;
5) IRS form 1099; and
6) Social Security Administration report.

Local Bankr. R. 2003-1(a).

A debtor is required to provide copies of sixty days payment advices or other evidence of payment, a copy of the debtor's most recently filed federal income tax return, and a completed Chapter 13 Trustee Information Sheet (Local Bankruptcy Form 13-2, amended) AT LEAST SEVEN DAYS PRIOR TO THE MEETING OF CREDITORS. 11 U.S.C. § 521; Interim Fed. R. Bankr. P. 4002(b); Local R. Bankr. P. 4002-1; Local R. Bankr. P. 3015-1(e). All of these documents must be submitted to the Trustee at least seven days prior to the meeting of creditors so that the Trustee and his staff have time to review the information and prepare for the meeting. **To submit these documents, follow these steps:**

1) Log in to the Trustee's website at www.13documents.com
2) Proceed to Document Filing
3) Select "K. Michael Fitzgerald" as the trustee
4) Type the case number in the field (do not include the hyphen)
5) Select the type of document from the drop down menu and attach the document
6) Click "Upload File"

Please use this system to submit 341 documents rather than sending the documents to an email address at the Trustee's office, as using this system is much more efficient and is more likely to result in prompt processing of the documents. This system also protects the debtor's personally identifying information.

The Trustee will not conduct the meeting of creditors until this information is provided. Failure to provide this information at least seven days prior to the meeting will result in continuation of the meeting to a future date and often a motion to dismiss. Moreover, if the debtor fails to provide the most recent income tax return seven days prior to the original meeting of creditors, "the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." 11 U.S.C. § 521(e)(2). The most common reason that meetings of creditors are continued is due to failure to timely provide this information to the Trustee, resulting in loss of time and additional work for the debtors, debtors' counsel, and the Trustee and his staff.

If the debtor needs to continue the meeting of creditors or appear by alternative means, you must consult the United States Trustee's guidelines and procedures. LBR 2003-1. The guidelines may be found at www.justice.gov/ust/r18/seattle/genearl_info.htm. Circumstances that do not justify rescheduling a meeting of creditors include the work schedule of the debtor or debtor's attorney (including scheduling conflicts); business or personal travel by the debtor or debtor's attorney; a routine medical appointment; the failure of debtor or debtor's attorney to properly calendar the meeting; and failure to receive the meeting notice.

VII. PLAN CONFIRMATION ISSUES

A. OVERVIEW AND TRUSTEE OFFICE CONTACTS

As mentioned above, debtors and their counsel should carefully review the plan before it is filed. After the meeting of creditors, the Trustee will send debtors and their counsel a letter requesting information and/or modifications to the plan, Statement of Financial Affairs, and schedules. The most common requests include:

1) Provide information relating to valuation of assets listed in Schedules A (real property) and B (personal property);
2) Amend Schedule C to correct exemptions claimed. The Trustee will object to the debtors' exemptions if they are inaccurate or incorrect;
3) Amend or provide information supporting the deductions taken in Form B22C;
4) Amend the plan to provide for secured creditors, correct liquidation value, plan payment frequency, property tax holding accounts, etc.

The Trustee's staff includes paralegals that assist the Trustee and his Staff Attorneys in preparing plans for confirmation. These paralegals are good contacts and great sources of information. Current paralegal assignments are:

Cases	**Paralegal**	**Email**	**Telephone Extension**
Judge Alston Port Orchard	Dave Diack	ddiack@seattlech13.com	145
Judge Alston Seattle	Linda Horan	lhoran@seattlech13.com	144
Judge Dore Seattle	Janine Reger	jreger@seattlech13.com	146
Judge Barreca Marysville	Karen Mather	kmather@seattlech13.com	142

These assignments change periodically, but current assignments can always be found on the Trustee's website.

B. MOTOR VEHICLES

Collateral issues are central in Chapter 13 cases. A debtor cannot "cram down" the value of a motor vehicle if the debtor purchased the motor vehicle within 910 days of the petition date and the creditor has a purchase money security interest in the motor vehicle or if the debtor incurred credit and used it to purchase other personal property within one year of the petition date. 11 U.S.C. § 1325(a). A debtor may, however, cram down the interest rate on a 910 vehicle. In re Craig, 2014 WL 5325873, at *2 (Bankr. D.Haw. October 20, 2014) ("Based on the plain text of section 506 and the hanging paragraph [of 11 U.S.C. § 1325(a)], there is no basis to conclude that Congress intended to eliminate a debtor's option to lower the interest rate on 910-day car loan[s]."). For non-910 motor vehicles, a debtor may cram down both the value of the vehicle and the interest rate. The Form Plan includes specific Sections for 910 collateral and non-910 collateral.

11 U.S.C. § 506(a)(2) sets the cramdown value of a vehicle as its replacement value without deduction for costs of sale or marketing. And "[w]ith respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail

merchant would charge for property of that kind considering the age and condition of the property at the time the value is determined." Section 506(a)(2) does not explain the meaning of "costs of sale" or "marketing." The value stated in the creditor's proof of claim controls unless otherwise ordered following timely objection to claim. Local Bankr. Form 13-4, Section IV.C. This means that a debtor will need to object to the creditor's valuation in the proof of claim if it is higher than that listed in the plan. This issue will often delay confirmation, so it is in a debtor's best interest to file the objection as soon as possible.

The appropriate interest rate is a "formula approach" providing for a base rate with "risk factors." As explained by the Supreme Court,

> the approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of the of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment.

Till v. SCS Credit Corp., 541 U.S. 465, 479-80 (2004).

It is very rare for debtors and creditors to litigate over motor vehicle valuations and interest rates. Litigating these issues does not generally make economic sense, resulting in settlement of these amounts by the parties. Once the parties agree on the appropriate valuation and interest rate, the debtor will need to amend the plan to encompass the terms of the agreement.

A debtor may also sometimes change the monthly payment amount to the creditor. In the Western District of Washington, motor vehicles must be paid through a debtor's Chapter 13 plan by the Trustee. The one exception is motor vehicle leases, which cannot be paid through the Chapter 13 plan due to the uncertainties that arise at the end of the lease term.

Non-910 motor vehicles must be paid in full during the life of the plan, while 910 motor vehicle claims can survive beyond the plan. Keep in mind, however, that it is advisable to pay 910 motor vehicle claims in full during the plan if any changes are made to the contract terms (e.g., interest rate and monthly payment amount).

All secured creditor payments are to be disbursed by the Chapter 13 Trustee with certain exceptions: mortgages that are current on the petition date, leases of personal and real property, and domestic support obligations made by an assignment from a debtor's wages. Local Bankr. R. 3015-1(j). The Trustee makes payments to motor vehicle creditors (except for leases), even if

the debtor is current on the payments as of the petition date. A debtor's plan "shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1). The Trustee's duties include monitoring a debtor's performance under the plan. 11 U.S.C. §§ 1302(b)(1), 1307(c). Payment of claims by the Trustee is necessary for many reasons, including administrative efficiency, monitoring of payments, fairness and treatment of creditors, reduction of plan failure and provision of an independent accounting in the event of a dispute between the debtor and a creditor. See In re Genereux, 137 B.R. 411 (Bankr. W.D. Wa. 1992) (enumerating various factors).

C. MORTGAGES

The rights of a holder of a secured claim secured only by a security interest in real property that is the debtor's principal residence cannot be modified. 11 U.S.C. § 1322(b)(2). Thus, the debtor cannot change the monthly payment and cannot lower the interest rate on the debtor's home mortgage. In addition, the debtor must make all the post-petition mortgage payments because a default cannot be created. "[A] plan that proposes withholding of monthly installments due on the obligation for any period of time modifies the rights of the expected creditors in violation of 11 U.S.C. § 1322(b)(2)." In re Gavia, 24 B.R. 573 (B.A.P. 9th Cir. 1982); In re Proudfoot, 144 B.R. 876, 878 (B.A.P. 9th Cir. 1992). However, Courts in this District generally approve plans that 1) grant the mortgage creditor relief from the stay immediately; 2) specify a date, not significantly beyond the date the creditor could otherwise conduct a foreclosure sale, by which the debtor must sell the property, or there is an equity cushion or other adequate protection sufficient to protect the creditor beyond that date; 3) provide that the debtor will enter into a stipulated order for relief from stay at the creditor's request; and 4) include a provision that in any conflict between the plan and a stipulated order for relief from stay, the stipulation controls. In re Dunn, 399 B.R. 909, 910 (Bankr. W.D.Wa. 2009).

There is also the question of what point in time it is determined when the debtor is using real property as her personal residence so that a mortgage creditor is protected (or not protected) by the residential mortgage anti-modification protection of Section 1322(b)(2). Some courts have determined that the loan transaction date is the point of determination. In re Hildebran, 54 B.R. 585, 586 (Bankr. D.Or. 1985) (noting that the legislative intent behind Section 1322(b)(2) was to provide stability in the long term residential housing market and holding that a debtor's principal residence for purposes of Section 1322(b)(2) is determined at the time the security interest was created); Parker v. Fed. Home Loan Mortg. Corp., 179 B.R. 492, 494 (Bankr. E.D.La. 1995); In re Smart, 214 B.R. 63, 67 (Bankr. D.Conn. 1997); In re Baker, 398 B.R. 198, 203 (Bankr. N.D.Ohio 2008). However, the Bankruptcy Appellate Panel of the Ninth Circuit held that the petition date is the point in time in determining the anti-modification provision of Section 1322(b)(2). Benafel v. One West Bank (In re Benafel), 461 B.R. 581, 591 (B.A.P. 9th Cir. 2011).

In a decision interpreting 11 U.S.C. § 1123(b)(5), which is identical to 11 U.S.C. § 1322(b)(5), the Bankruptcy Appellate Panel listed three distinct requirements for applicability of the anti-modification provision:

1) The security interest must be in real property;

2) The real property must be the only security for the debt; and
3) The real property must be the debtor's principal residence.

Wages v. J.P. Morgan Chase Bank, 2014 WL 1133924, at *3, No. 12-1397-JuKiKu (B.A.P. 9th Cir. March 7, 2014). The Panel specifically addressed the third requirement, holding that the anti-modification exception applies to any property that is used as the debtor's principal residence, even if that property is not used exclusively as the debtor's principal residence. Id. at *5. The debtors used part of their residence for a home office to run their business and they also parked trucks and trailers that they used in the business on the property. The debtors contended that there was an exception to the anti-modification provision when the property is used not only as the debtors' residence, but also for a commercial use. As noted, the Court rejected the debtors' argument.

In addition, the undersecured mortgage holder secured cannot be crammed down to the property value. Nobelman v. American Savings Bank, 508 U.S. 324 (1993). However, if a mortgage is completely unsecured, that mortgage creditor's lien can be "stripped." Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002). This issue turns on the valuation of the property and usually involves dueling appraisers opining on property value at an evidentiary hearing before the Bankruptcy Court. If there is even one dollar of equity in the property to which the junior mortgage can attach, the lien cannot be stripped.

"Chapter 20" (a chapter 7 case followed by a chapter 13 case) debtors may avoid wholly unsecured mortgage liens even where they may not receive a discharge. Boukatch v. Midfirst Bank et al. (In re Boukatch), No. 14-1483, 2015 WL 4127158, at *7 (B.A.P. 9th Cir. July 9, 2015) (the Panel reviewed the three approaches to this issue). Stated more specifically, a debtor who has been discharged of personal liability for a home mortgage debt by receiving a chapter 7 discharge may avoid the lien of a wholly unsecured mortgage holder even though the debtor is not eligible for a discharge. Id. at *2.

When mortgages are in default on the petition date, the plan must provide for payment of both the pre-petition arrearage claim and the post-petition payment through the debtor's plan (i.e, by the Chapter 13 Trustee). Local Bankr. R. 3015-1(k). This practice is necessary for the effective administration and execution of chapter 13 plans. The Trustee is able to monitor the debtor's mortgage payments and, importantly, provide an independent accounting in the event a dispute arises between the debtor and the mortgage creditor.

If a debtor intends to "cram down" the value of non-residential property to its current value, the debtor must pay the crammed down secured claim amount over the plan term (i.e., the debtor may not propose to pay the crammed down value over a period longer than five years). Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1172 (9th Cir. 2004). In addition, "the plain language of 11 USC § 1325(a)(5)(B)(iii)(I) requires repayment plans to secured creditors to provide equal periodic payments, which necessarily excludes balloon payments." In re Bollinger, 2011 WL 3882275, at *4 (Bankr. D.Or. Sept. 2, 2011). See also In re Nguyen, 2012 WL 1110022, at *2 (Bankr. D.Or. April 2, 2012) (reluctantly agreeing to follow Bollinger because "I am bound by the published opinion of another judge of this court"); In re Schultz, 363 B.R. 902, 906 (Bankr. E.D.Wa. Wis. 2007) (holding that Section 1325(a)(5)(B)(iii) requires periodic payments to be equal even when the default is cured and only current payments

and the arrearage are being paid pursuant to the plan under Section 1322(b)(5) and when a long-term or matured debt are paid in full under the plan). But see In re Davis, 343 B.R. 326, 328 (Bankr. M.D.Fla. 2006) (holding that equal monthly payments are not required under Section 1325(a)(5)(B)(iii) when the claim at issue is one in which arrears on long term debt are being cured). These cases should be kept in mind when considering whether to "cram down" non-residential real property values.

Moreover, if the non-residential property has negative cash flow, a debtor whose income is below the state median (pursuant to the means test) generally has to surrender the property. But see Drummond v. Welsh, 711 F.3d 1120 (9th Cir. 2013) (above median debtors generally may choose which secured debt to retain and claim as deductions on their means test). For example, if the below median debtor receives $1,000.00 monthly rent and the monthly "cram down" payment over the plan is $1,500.00, retention of that property is not reasonable because that generally impacts unsecured creditors.

It is not uncommon for a judgment lien to attach to the debtor's residence prior to the petition date. 11 U.S.C. § 522(f)(1) provides a mechanism for the debtor to avoid any judgment lien that "impairs" the debtor's homestead exemption. The debtor files a motion or adversary proceeding and, if the debtor is successful, the judgment lien will be "avoided" in the bankruptcy. If a judgment lien is not avoided, the creditor must be provided for in the debtor's plan.

Debtors and their counsel should carefully review mortgage creditors' proofs of claim to make sure that the mortgage creditor has not overstated the pre-petition arrearage amount or post-petition payment amount. If the debtor believes the claim is inaccurate, the debtor will need to object to the proof of claim. Pre-petition arrearage items in the proof of claim to pay particular attention to include escrow deficiency or shortage items and items labeled "corporate advance" or the like.

The December 1, 2011 FRBP revisions provide that creditors must provide more information when filing proofs of claims. FRBP 3001 and 3002. There is also a rule relating specifically to claims secured by debtor's principal residence. FRBP 3002.1.

MORTGAGE MODIFICATIONS: A debtor may make a written request to the Trustee for authority to enter a temporary or trial modification of a mortgage. Local Bankr. R. 4001-2. The debtor's request must include a copy of the trial mortgage modification. If the debtor was delinquent on the mortgage at the petition date, the Trustee must make the trial mortgage modification payments (i.e., the debtor may not make the payments directly to the mortgage lender). See also Local Bankr. R. 3015-1(k). The debtor has to make the plan payment in amount sufficient (including the Trustee's fee) so that the Trustee can timely make the trial mortgage modification payments. The Court must approve any final mortgage modification.

To request approval for the trial mortgage modification, upload the trial mortgage modification documents through the Trustee's website:

1) Log in to the Trustee's website at www.13documents.com
2) Proceed to Document Filing

3) Select "K. Michael Fitzgerald" as the trustee
4) Type the case number in the field (do not include the hyphen)
5) Choose "Trial Mortgage Modifications"
6) Click "Upload File"

The Trustee considers submission of the trial mortgage modification as a request for approval of the modification. You do not need to submit a separate request. Assuming the submission is made by 2:00 pm, the Trustee will make every effort to respond the same day. If you have not received an answer (likely by electronic message) by end of the next business day or if you need expedited approval, please contact the Trustee's office for status. Again, please keep in mind that the Trustee will make payments on delinquent mortgages and you should advise the debtors of this.

D. LIQUIDATION VALUE

Unsecured creditors must receive as much in a Chapter 13 case as they would have received in a Chapter 7 case filed at the same time. 11 U.S.C. § 1325(a)(4). The liquidation value is generally arrived at by taking the collateral value and reducing that amount by the available exemption and costs of sale. The liquidation value, even if it is zero, must be listed in Section IX of the Form Plan. If the liquidation value exceeds the amount of the unsecured debt, Section IX must also include interest for the unsecured creditors. The interest rate used is the federal judgment rate of interest, which can be found on the Trustee's website (www.seattlech13.com).

E. PREFERENCES

The Trustee has the authority to pursue preference actions against creditors. A preference is any transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made within 90 days before the petition date or within one year of the petition date if the creditor was an insider; and (5) that enables the creditor to receive more than the creditor would have received if the case was a Chapter 7, the transfer had not been made, and the creditor received the payment to the extent provided by the Bankruptcy Code. 11 U.S.C. § 547(b). An "insider" includes, but is not limited to, a debtor's relative, general partner, partnership, and corporation. 11 U.S.C. § 101(31).

A debtor must fully and accurately disclose these payments in paragraph 3 of the Statement of Financial Affairs. The debtor must list the name, address and relationship of the creditor, the dates of the payments, the amounts paid and the balance remaining.

In some cases, the Trustee will agree to not pursue a preference against an insider in exchange for *all* of the following:

1) A tolling agreement signed by *both* the creditor and debtor that tolls the statute of limitations to a period six months after a conversion of the case to a Chapter 7 case. This is necessary because the statute of limitations to pursue a preference is generally two years from the petition date. 11 U.S.C. § 546(a).

2) The value of the preference included in Section IX of the plan (this amount would

be *in addition to* any other liquidation value).

F. DIFFERENT NOTICE PERIOD FOR PRE- AND POST-CONFIRMATION AMENDED PLANS

Service of a motion to approve a pre-confirmation amended plan requires thirty-one days notice from the date of service to the hearing date. Fed. R. Bankr. P. 2002(b) (twenty-eight days); Fed. R. Bankr. P. 9006(f) (three days for mailing).

Local Bankruptcy Rule 9013-1(d)(2)(F) provides that "[a]ll other motions and/or notice thereof shall be filed and served upon the appropriate parties at least 21 days preceding the date fixed for hearing *unless a longer period of notice is ordered by the court or prescribed by the Federal Rules of Bankruptcy Procedure or these Local Bankruptcy Rules*" (emphasis added). Because Rule 2002(b) requires a twenty-eight day notice period, Rule 2002(b) controls over Local Bankruptcy Rule 9013-1(d)(2)(F).

Service of a motion to approve a post-confirmation amended plan requires twenty-four days notice from the date of service to the hearing date. 11 U.S.C. § 1329; Local Bankr. R. 9013-1(d)(2)(F) (twenty-one days); Fed. R. Bankr. P. 9006(f) (three days for mailing).

VIII. ROLE OF THE CHAPTER 13 TRUSTEE

The Chapter 13 Trustee is often considered the guardian for unsecured creditors. The Trustee and his staff will conduct the necessary analysis of the plan to determine if it is objectionable and whether it complies with the Bankruptcy Code. Once the plan is confirmed, the Trustee will administer the plan by accepting the required payments and disbursing payments to creditors pursuant to the plan. The Trustee may object to the debtor's plan and/or move to dismiss or convert the debtor's case for various reasons, including the debtor's failure to make payments, failure to present a feasible plan, failure to provide requested documents, failure to file tax returns, and failure to comply with the debtor's obligations under the Bankruptcy Code and rules.

However, the Trustee's duties extend beyond being the "guardian" for unsecured creditors. The Trustee has the duty to appear and be heard at any hearing (confirmation hearings, most particularly) that concerns the value of property subject to a lien, confirmation of a plan or modification of a plan after confirmation. 11 U.S.C. § 1302(b)(2). The Trustee has standing to object to a plan that fails to comply with any provision of the U.S. Bankruptcy Code, including those provisions that affect secured creditors. Andrews v. Loheit (In re Andrews), 49 F.3d 1404, 1408 (9th Cir. 1995); In re Rosa, 495 B.R. 522, 523-24 (Bankr. D.Haw. 2013).

Pursuant to the form Order Confirming Plan, a debtor shall not incur debt without the Court's permission; a debtor shall inform the Trustee of any change in circumstances, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require; all disposable income received by a debtor on the date the first payment is due under the plan shall be applied as payments under the plan, unless the Court orders otherwise; and the Trustee shall charge such percentage fee as may

periodically be fixed by the United States Department of Justice pursuant to 28 U.S.C. § 586(e).

The Chapter 13 Trustee may, at any time after confirmation of a plan but before completion of the plan, move to modify the debtor's plan to increase or reduce the amount of payments on claims; extend or reduce the time for plan payments; alter the amount of the distribution to a creditor under certain circumstances. 11 U.S.C. § 1329(a).

IX. ABUSIVE BEHAVIOR

Courts may dismiss cases for bad faith. Bad faith as cause for dismissal involves a totality of the circumstances test. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999). A court should consider whether the debtor misrepresented facts in the petition or plan, unfairly manipulated the Bankruptcy Code or otherwise filed the petition or plan in an inequitable manner; the debtor's history of filings and dismissals; whether the debtor intended to defeat state court litigation; and whether egregious behavior is present. Id.

Once a court has determined that cause for dismissal exists, the court must determine what remedial action to take. Ellsworth v. Lifescape Medical Associates et al. (In re Ellsworth), 455 B.R. 904, 922 (B.A.P. 9th Cir. 2011). The court may dismiss a case with prejudice (precluding the debtor from ever again seeking to discharge debts which would have been discharged by their plan) or impose some lesser remedy such as barring a debtor from re-filing for bankruptcy relief for 180 days or longer. Id.

Bankruptcy courts have the authority under 11 U.S.C. §§ 105(a), 349(a) to sanction bad faith serial filers by prohibiting further bankruptcy filings for longer periods of time than the 180 days specified by 11 U.S.C. § 109(g). Casse v. Key Bank, N.A. (In re Casse), 198 F.3d 327, 337 – 40 (2d Cir. 1999). As Judge Lundin and Judge Brown observed,

> On compelling facts, many reported decisions condition dismissal that the debtor is ineligible to file another bankruptcy petition for months or years or forever: these cases typically involve serially filing debtors with insufficient disposable income to fund a plan, who fail to appear at meetings of creditors or to commence making payments and who seem to have filed Chapter 13 solely to buy time.

Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th EDITION, § 339.1, at ¶ 12, Sec. Rev. July 22, 2004 (citations omitted).

X. POST-CONFIRMATION ISSUES

A. LIEN AVOIDANCES UNDER 11 U.S.C. §522(f)

B. OBJECTIONS TO CLAIMS

Objections to claims in chapter 13 cases must be filed and served no later than 270 days from the petition date, unless good cause is shown. LBR 3007-1(b). Objections to claims shall

be filed and served at least 30 days preceding the date fixed for hearing. LBR 9013-1(d)(2)(C). See also FRBP 3007.

The Trustee distributes funds pursuant to the plan. Therefore, disputed claims and untimely claims may receive disbursements until a written objection is filed. Whether a claim is filed timely or late, it is allowed unless a party in interest objects. 11 U.S.C. § 502(a); In re Smith, No. 09-43823, 2010 WL 5018379, at * 2 -3 (Bankr. W.D. Wa. Dec. 3, 2010). In addition, in the absence of an objection, even an untimely proof of claim is entitled to payment through the plan in the same manner as other claims of its class. Smith, 2010 WL 5018379, at *3.

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A properly executed and filed proof of claim constitutes prima facie evidence of the validity and amount of the claim. Am. Express Travel Related Serv. Co. v. Heath (In re Heath), 331 B.R 424, 432 (B.A.P. 9th Cir. 2005); Fed. R. Bankr. P. 3001(f).

Objections to claims must be in writing and filed. Fed. R. Bankr. P. 3007(a). A copy of the objection with notice of the hearing shall be mailed or otherwise delivered to the claimant, the debtor and the trustee at least *thirty days* prior to the hearing. Fed. R. Bankr. P. 3007(a); Local Bankr. R. 9013-1(d)(2)(C). When service is by mail, three days are added to the notice period for mailing. Fed. R. Bankr. P. 9006(f).

The filing of an objection to claim creates a dispute which is a contested matter within the meaning of Federal Rule of Bankruptcy Procedure 9014. Lundell v. Anchor Const. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000); In re 701 Mariposa Project, LLC, 514 B.R. 10, 16 (B.A.P. 9th Cir. 2014) (noting that "[c]laims objections undoubtedly are contested matters subject to the requirements of Rule 9014").

Contested matters must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004. Fed. R. Bankr. P. 9014(b). The Internal Revenue Service cannot be sued and the proper party in actions involving federal taxes is the United States. Blackmar V. Guerre, 342 U.S. 512, 514 (1952); United States v. Levoy (In re Levoy), 182 B.R. 827, 832 (B.A.P. 9th Cir. 1995). Under Rule 7004, service on the United States must be made by mailing a copy of the summons and complaint to the civil process clerk at the Office of the United States Attorney for the District in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States in Washington, D.C. Fed. R. Bankr. P. 7004(b)(4); In re Morrell, 69 B.R. 147, 149 (Bankr. N.D.Cal. 1986).

The Bankruptcy Appellate Panel has held that Rule 7004 applies to objections to claims and, therefore, objections to claims of the United States must be served according to Rule 7004(b)(4). In re Levoy, 182 at 834; see also Fortune & Faal v. Zumrun (In re Zumbrun, 88 B.R.

250, 252 (B.A.P. 9th Cir. 1998) (the same due process requirements apply to both Rule 7004 and Rule 9014). However, in a rather labored, split (two-to-one) and vacated (as moot) opinion, the Panel indicated that Rule 9014(a) applies only to contested matters "not otherwise governed by these rules" and that a claim objection is otherwise governed. Jorgenson v. State Line Hotel, Inc. (In re State Line Hotel, Inc.), 323 B.R. 703, 711-12 (B.A.P. 9th Cir. 2005), vacated as moot, 242 Fed.Appx. 460, 462 (9th Cir. 2007). The State Line Hotel Panel concluded that "we do not think Rule 9014 nevertheless required the Objection [to claim] to be served in accordance with Rule 7004." Id. at 712. In a subsequent decision, the Panel noted that it had offered conflicting views about whether Rule 3007(a)'s requirements to mail and deliver are in addition to or in lieu of Rule 7004's service requirements. 701 Mariposa Project, 514 B.R. at 16. One would probably be very unwise to rely on the Panel's vacated State Line Hotel opinion, even assuming it has any precedential value at all.

As explained by Judge Alley in the District of Oregon,

> Rule 9014(a) provides that "[i]n a contested matter not otherwise governed by these rules, relief shall be requested by motion. . .." Rule 9014(b) specifies how service of that motion shall be made: pursuant to Rule 7004. The *Anderson* [330 B.R. 180 (Bankr. S.D.Tex. 2005)]and State Line opinions hold that an objection to claim is not commenced with a "motion," and is "otherwise governed by" Rule 3007, making service under Rule 7004 unnecessary. In essence, that even though an objection to claim may be a contested matter, Rule 9014(a) defers to Rule 3007 regarding notice of an objection to claim.
>
> This Court disagrees with the reasoning in the *Anderson* and vacated State Line Hotel opinions. The better reasoning is found in In re Levoy, 182 B.R. 827 (9th Cir. BAP 1995), a Bankruptcy Appellate Panel opinion decided before State Line Hotel, which this Court finds to be the controlling opinion in this Circuit.
>
> > Fed. R. Bankr. P. 3007does not provide the manner for service of the objection to a proof of claim. However, the rule's Advisory Committee Note states: "The contested matter initiated by an objection to a claim is governed by rule 9014...." Fed. R. Bankr. P. 9014, which pertains to contested matters, in turn, makes applicable the service provisions of Fed. R. Bankr. P. 7004.
>
> Id. at 834. In essence, Rule 9014(b)provides the manner in which *service* of the objection to claim should be made, while Rule 3007(a)supplements that provision by providing more specific information about who should receive *notice* of the hearing and when. Rule 3007 is not a substitute for service of the objection to claim. The fact that a claim objection is initiated by an objection rather than a motion does not remove the matter from the service requirements of Rule 9014(b).

Monk v. LSI Title Company of Oregon et al. (In re Monk), 2013 WL 4051864, at *3 (Bankr. D.Or. August 9, 2013).

Even more significantly, the Ninth Circuit determined that the filing of an objection to claim creates a dispute which is a contested matter within the meaning of Federal Rule of Bankruptcy Procedure 9014. Lundell, 223 at 1039. The State Line Hotel Panel stated that "Rule 9014 defers to Rule 3007 on the subject of claims objections: it calls for an objection, not a motion, and authorizes notice, rather than requiring service." State Line Hotel, 323 B.R. at 713. Undercutting the reasoning of State Line Hotel, the Ninth Circuit stated that an objection to claim "must be resolved after notice and opportunity for hearing upon a motion for relief."

Lundell, 223 F.3d at 1039. Moreover, Rule 9014 specifically references Rule 7004. A debtor who does not serve an objection to a claim of the Internal Revenue Service on the United States pursuant to Rule 7004(b)(4) does not have effective service of the objection.

And there's always one more reason: Why risk defective service? Just serve the objection to claim correctly and then you do not have to worry about it.

C. MOTIONS FOR SALE OF PROPERTY AND TO INCUR DEBT, AND PURCHASING VEHICLES POST-CONFIRMATION

Motions for sale of real property and motions to incur debt should be noted for hearing. Debtors cannot incur debt without the Court's approval.

Debtors no longer have to obtain court approval to incur post-confirmation debt to finance a motor vehicle. LBR 3015-2. A debtor may make a written request to the Trustee and the Trustee will either approve or deny that request. If the Trustee denies the request and the debtor still wants to purchase the vehicle, the debtor may move for approval (with proper service and notice) of the purchase. The forms to purchase the vehicle are located on the Trustee's website. The Trustee does not approve vehicle purchases that exceed $15,000.00 and 20% interest (these are the *maximum* amounts, but the approved amount and interest rate may be less). The Trustee bases his decision on financial information the debtors provide.

D. POST-CONFIRMATION PLAN AMENDMENTS

If debtors need to amend their plan post-confirmation, they need to file an amended plan and a motion requesting approval of the amended plan, together with a declaration explaining the need for the modification. LBR 3015-1(i). The debtors also have to provide the Trustee payment advices or other evidence of proof of payment received within the last thirty days. The order approving the amended plan must substantially comply with Local Bankruptcy Form 13-6.

A post-confirmation amended plan must be proposed in good faith. 11 U.S.C. §§ 1329(b)(1); 1325(a)(3). As part of the good faith analysis, the Court may consider whether the proposed modification correlates to the debtors' change in circumstances. Mattson v. Howe, 468 B.R. 361, 371 (B.A.P. 9th Cir. 2012).

E. VOLUNTARY DISMISSAL

A debtor does not have an absolute right to voluntarily dismiss his or her chapter 13 case. Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 774 (9th Cir. 2008). The Court has the authority to deny dismissal on grounds of bad faith conduct or to prevent an abuse of process. Id. As the Supreme Court noted, bankruptcy courts have broad authority to take any action that is necessary or appropriate to prevent an abuse of process described in 11 U.S.C. § 105(a). Marrama v. Citizens Bank of Mass., 549 U.S. 365, 375 (2007).

Under the Local Rules, voluntary motions to dismiss are somewhat of an anomaly because of the different notice period. Local Bankr. R. 9013-1(d)(2)(G). The debtor must file

and serve a motion and notice on the Trustee, United States Trustee, claimants and parties requesting special notice. The notice must provide that an *ex parte* order will be submitted to the Court after seven days of filing the motion provided no objections have been filed. The notice must also provide a hearing date for the motion if an objection is filed. The hearing date should be set in the normal course. See Local Bankr. R. 9013-1(d)(2)(F). The debtor must include a proposed form of order. Local Bankr. R. 9013-1(d)(1)(D).

XI. DEBTOR FINANCIAL EDUCATION

Debtors are also required to complete a post-filing financial education class before they receive a discharge. Attorneys may want to recommend that their clients complete this requirement shortly after their Chapter 13 case is filed, so that they do not neglect to do so and lose their right to discharge at the end of their case because they failed to complete this required step. The list of approved financial management course providers is available on the Court's website and U.S. Trustee's website. Each debtor must obtain a certificate upon completion of the financial management/education course, and provide it to their attorney to be filed with the Court. A free post-filing financial management course is also available through the Chapter 13 Trustee's office in Seattle, for those debtors with cases assigned to the Seattle Chapter 13 Trustee.

XII. COMPLETION OF PLAN AND DISCHARGE

Upon completion of the plan as confirmed and payment of all required sums, and upon completion of post-filing financial education and the filing of the appropriate certificates, the debtors who are otherwise eligible for discharge should be entitled to receive a discharge in their Chapter 13 case. The Trustee will advise the Clerk that the debtors' case is ready for discharge, and the Clerk will issue a discharge order signed by the assigned Judge. The Chapter 13 Trustee will file a final account and report indicating all payments made into the case and all disbursements made to creditors.

XIII. GETTING PLANS CONFIRMED: SUGGESTED BEST PRACTICES

1. Initially, determine if your client is eligible for Chapter 13. Refer to 11 USC §109(e) which sets the jurisdictional limits for noncontingent, liquidated, unsecured and secured debt. Effective April 1, 2010, the limits are increased to $360,475 for unsecured debt and $1,081,400 for secured debt. These amounts are adjusted every three years.

If the total of the unsecured debts listed on Schedule F, plus the undersecured component of the secured debts listed on Schedule D, exceeds the jurisdictional limit imposed by 11 USC §109(e), or if the total of the secured debts listed on Schedule D exceeds the §109(e) limit, then your client is probably not eligible for Chapter 13, and you should anticipate an objection from the Trustee.

Eligibility for Chapter 13 should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith; see In re Scovis, 249

F.3d 975 (9th Cir 2001).

The overwhelming majority of courts, including every circuit that has considered the question, have concluded that the undersecured portion of a secured creditor's claim should be counted as unsecured debt for §109(e) purposes; see In re Soderlund, 236 B.R. 271 (B.A.P. 9th Cir 1999).

Debts which are "disputed" are included in the §109(e) jurisdictional calculation; see In re Nicholes, 184 B.R. 82 (B.A.P. 9th Cir 1995).

A debt is "liquidated" if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been fully decided; whether a debt is subject to "ready determination" depends on whether the amount is easily calculable or whether an extensive hearing is needed to determine the amount of the debt; see In re Ho, 274 B.R. 867 (B.A.P. 9th Cir 2002).

A debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy; see In re Mazzeo, 131 F.3d 295 (2nd Cir 1997), citing In re Nicholes.

2. Pay close attention to Exhibit C to that General Order, Local Bankruptcy Form 13-5; it sets forth the newly adopted Rights and Responsibilities of Chapter 13 Debtors and Their Attorney. In this regard, read Local Bankruptcy Rule 2016-1(h), Local Bankruptcy Rule 4002-1, Local Bankruptcy Rule 4002(b), and Local Bankruptcy Rule 3015-1(e). They explain the statutory duties of Chapter 13 debtors. A complete copy of the amended local rules may be obtained by accessing the Court's website at www.wawb.uscourts.gov.

3. The presumptive attorney fee in Chapter 13 cases is $3,500. Read Local Bankruptcy Rule 2016-1(e)(2) regarding original fees in excess of that amount, as well as Local Bankruptcy Rules 2016-1(a) and (f), concerning the form of Chapter 13 fee applications. Read Local Bankruptcy Rule 2016-1(g), concerning *Ex Parte* fee applications, and Local Bankruptcy Rule 2016-1(i), concerning the pre-confirmation estimate required by the new form plan.

4. Note that the procedure for voluntarily dismissing a debtor's Chapter 13 case has been changed. New Local Bankruptcy Rule 9013-1(d)(2)(G) requires the debtor to file a motion to dismiss and serve notice on all parties who have filed claims, the Chapter 13 Trustee, the UST and parties requesting special notice. The notice must provide that an *ex parte* order of dismissal will be submitted 7 days after the motion was filed provided no objections are filed. The notice must also provide a hearing date for the dismissal motion if an objection is timely filed.

5. A feasible plan simply cannot be composed without reference to the debtor's documented income. In other words, you cannot construct a confirmable plan without first insisting that your client provide you with copies of his or her pay stubs, or other documented sources of income, for the most recent 60 days. Preparing a plan based on what the client tells you he or she is earning, without first verifying that against documented proof of income is a recipe for amended plans and a great deal of frustration for everyone involved.

7. Make sure the attorney's fees request in Section IV(A) matches the amount set forth in your Rule 2016 Fee Disclosure Form.

8. Make sure you complete Section IV(E)(2) of the form plan, and that if the plan is not proposing a 100% dividend, that it proposes to pay the projected disposable income, (PDI), reflected on the debtor's means test form.

If the debtor is above median income with positive monthly disposable income, (MDI), on Line 45 of Form B22C2, then the projected disposable income, (PDI), he is required to pay to allowed non-priority unsecured claims is the number on Line 45 multiplied by the mandated applicable commitment period of 60 months. That is the number that must appear in Section IV(E)(2)(b).

9. Do not propose plan payments that are not whole numbers. Instead round up or down, but don't propose a payment like $599.89, round it up to $600.

10. Note that the first sentence in Section IV provides that creditors must apply plan payments according to the manner in which they were disbursed. Consequently there is no need to include a special provision in Section XII saying the same thing.

11. Note that Section IV(C) provides that only the secured claims listed in the plan will be paid; a creditor filing a secured claim that isn't provided for in the plan will not be paid. Therefore, it is up to the debtor to either object to the filed secured claim, or wait until after plan completion and discharge to deal with any problems presented by the unpaid secured claim.

12. Note that Section IV(C) also provides that if plan payments are sufficient, the Trustee may adjust distribution on claims for post petition ongoing mortgages, homeowners dues and real estate taxes upon receipt of appropriate notification of those changes. Consequently, you do not need to include a special provision in Section XII saying the same thing.

13. Make sure to complete Section IX and provide your estimate of the estate's liquidation value. ***Remember, the liquidation value is different from the projected disposable income figure, (PDI), if any, reflected in the debtor's means test.*** Also remember that if the means test shows no positive projected disposable income, but the debtor nevertheless has non-exempt equity in either real or personal property, then the plan must propose to pay allowed unsecured claims the same amount of money, reduced by the fees of a hypothetical Chapter 7 Trustee. If it doesn't, then the plan can't be confirmed and the Trustee will likely object.

14. Read Section X; it contains several standard provisions which the Judges in this district have traditionally approved. There should be no need to include multiple special provisions in Section XII unless there is a readily apparent and valid reason to do so.

15. Any provisions in Section XII of the plan must be clearly related to the specific facts of the case. If it is not readily apparent from the plan and schedules why those special provisions are necessary, they will quite likely draw an objection from the Trustee.

The local rules committee spent a great deal of time re-drafting this district's form plan and our new Local Form 13-4 represents the collaborative efforts of the debtor and creditor bar, the Chapter 13 Trustee's office and the Judges. With almost 300 new cases being filed each month, a form plan is essential to achieving our common goal of quickly confirming your client's plans and disbursing funds to their creditors. In that regard, please take note of Judge Williams' unpublished decision from the Eastern District of Washington, in the case of In re Grantham, No. 03-00165-W13 (Bankr. E.D. Wa. May 21, 2003). There, Judge Williams wrote, "… one of the principal reasons for the adoption of a form plan is that a standard form in use throughout the District assists all interested parties. … A standard form allows relevant information to be located quickly and efficiently and allows an interested party to focus on the portion of the plan of most interest to that party. The use of a standard form results in predictability and uniformity. … Allowing debtor's counsel to develop their (sic) own plan language is contrary to the purpose of the prescribed plan form. It creates inefficiency and uncertainty. It requires any creditor to carefully review the additional page and a half of language added to determine if anything in that language effects (sic) that creditor's rights.

The prescribed form plan does have an optional section where a debtor may add special provisions. *The purpose of that option is not to circumvent the prescribed form, but a recognition that there can be unique circumstances in a specific case which require some treatment different than the prescribed form. 'Special provisions' are just that—special. They may arise in a specific case based on unusual facts. They should not appear as standard deviations from the prescribed standard form plan."*
(Emphasis added).

Also, in the same vein, be sure to read the recent United States Supreme Court decision in United States Aid Funds, Inc. v. Espinosa, --- U.S. ---, 130 S. Ct. 1367, 176 L.Ed.2d 158 (2010). That case dealt with a Chapter 13 Plan that provided for the discharge of any unpaid interest on an otherwise nondischargeable student loan, and which was confirmed without objection from the student loan creditor. Although the Court upheld the order confirming the plan, it nevertheless held that " … §1325(a) instructs a bankruptcy court to confirm a plan only if the court finds, *inter alia*, that the plan complies with the 'applicable provisions' of the Code." The Court goes on to rule that "the Code makes plain that bankruptcy courts have the authority – indeed, the obligation –to direct a debtor to conform his plan to the requirements of §§1328(a)(2) and 523(a)(8)." In other words, Justice Thomas, who authored the unanimous decision, observed that Bankruptcy Judges have an independent obligation to refuse confirmation of plans that do not comply with Code requirements.

The Court concludes the opinion by stating, ***"debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See Fed. Rule Bkrtcy. Proc.9011. The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required."***
(Emphasis added).

16. Review the plan with your client before you file it. Add up the monthly payments proposed to creditors and multiply that total by 10% to account for the Trustee's administrative fee. By statute, the Chapter 13 Trustee's fee cannot exceed 10% of funds disbursed. If that calculation

produces a number greater than the proposed plan payment, then the plan is underfunded and unfeasible.

17. Remember that a plan projecting a term in excess of 60 months cannot be confirmed. See 11 USC §1322(d)(1), and (d)(2). Therefore, you must pay close attention to the delinquency cure payments proposed by the plan. If the original plan is not immediately confirmed and several months pass, then any amended plan must account for that passed time and cannot propose a 60 month cure. In other words, an amended plan filed 10 months after the first plan payment is due under 11 USC §1326(a)(1), must propose a delinquency cure term of 50, not 60 months. And, the amount to be cured then becomes the total of the pre-petition delinquency claim plus the total of the post petition payments which have not been made.

Clearly, every month that passes without plan confirmation necessarily increases the monthly payment required for feasibility. Many times, the failure to immediately commence post petition mortgage payments proves fatal to the debtor's chances to confirm a plan.

18. Once you have filed your client's plan, be sure to upload your documents through the Trustee's website (see Section VI above for instructions). If the required documents are not received in the Trustee's office 7 days before the originally scheduled 341 meeting date, the Trustee will file a motion to dismiss the debtor's case. If the documents are provided after the Trustee's motion is filed, then the debtor will have to move to continue the scheduled 341 meeting to a date and time approved by the Trustee's office.

Please also see ***Section VI*** of these materials for a more detailed discussion of these requirements.

It is critical that the Trustee receive the Chapter 13 Information Sheet by the deadline set forth in Local Bankruptcy Rule 3015-1(e). That document is important in multiple respects, one of which is that it identifies whether or not the debtor has a history of receiving income tax refunds. Typically, the Trustee will insist that tax refunds in excess of $1,500 be committed to the debtor's plan and will object to confirmation if the plan fails to so provide.

19. Use the Trustee's website, www.seattlech13.com as a resource. It contains links to the websites for the Court, the United States Trustee, County Treasurers Offices, the NACTT, the Chapter 13 Network, and other helpful sites. It will help you identify the paralegal and claims department staff member working on your case. You can review and down load 341 hearing and Chapter 13 motion calendars and run reports showing your unconfirmed cases and the things that need to be done to get those plans confirmed.