

Syllabus: Chapters 13 & 11 Post-BAPCPA

Law 977 Spring 2014

(These are the topics more fully explained in the course.)

1301. Co-debtor stay. (Unchanged)

- (a) If the plan proposes to pay a co-signed debt in full, the co-debtor is included in the automatic stay provided the debt is a consumer debt.
- (b) A creditor can present a check made and delivered prepetition for cashing postpetition. This is not a stay violation. (Advise clients with payday loans or other post-dated check situations to go to the bank and enter a stop-payment order.)
- (c) Stay relief available to a creditor in a co-signed obligation only if
  - (1) the co-debtor actually received the consideration;
  - (2) the plan does not propose payment in full; or
  - (3) creditor would somehow suffer irreparable harm if the stay were continued.

1302. Trustee. (Enhanced duties re DSO's)

Describes duties of the trustee... appear and be heard on confirmation matters, etc. Advises and assist the debtor in performing a confirmed plan, short of giving legal advice. Receive and disburse debtor's payments under the terms of the confirmed plan. If the debtor is engaged in business, the trustee shall supervise the financial aspects of the business. Mainly, this means requiring monthly operating statements from the debtor disclosing gross receipts and itemizing disbursements.

1303. Rights and powers of debtor. (Unchanged)

A Ch 13 debtor has, exclusive of the trustee, certain rights and powers of a trustee, namely,

-use, sell, lease property of the estate in the ordinary course of business or, if otherwise, after notice and a hearing;

-sell property free and clear of liens (w/liens to attach to proceeds, of course) under certain conditions.

1304. Debtor engaged in business. (Unchanged)

Authorizes debtor to continue operating the business under a routinely-issued court operating order.

1305. Filing and allowances of postpetition claims. (Unchanged)

POC's may be filed by tax authorities for taxes that fell due postpetition.

POC's may be filed by other postpetition creditors if for a consumer debt that arises after the date of filing, and is for property or services necessary for the performance of the plan. But such a claim by a non-tax creditor shall be disallowed if the creditor knew or should have known that prior approval by the trustee was practical and was not first obtained.

1306. Property of the estate (POTE). (Unchanged)

In any bankruptcy, Section 541 applies. It states that upon the filing of a case, all the debtor's legal and equitable interests go to an estate created by the filing. In addition, Section 1306 adds to the estate the same types of property acquired postpetition as well. Post-petition earnings of the debtor are property of the estate under Sec 1306. Unless otherwise provided in a confirmed plan or an order confirming

a plan, the debtor remains in possession of all property of the estate.

Note: There is some confusing and inconsistent caselaw on this subject. POTE but vested back in the debtor by operation of confirmation order? What is 'income' and what is 'property'? Discuss attached notes re caselaw.

1307. Conversion or dismissal. (Some enhanced liability for debtors for failure to file prepetition tax returns or to stay current in postpetition DSO's)

- (a) OK to convert to Ch 7 at any time...no ct approval needed. [But the SCOTUS read a good faith requirement into the statute in the *Marama* case.]
- (b) Debtor can have his Ch 13 case dismissed at any time. *Marama* also applies.
- (c) For cause shown, upon request of the UST or any party in interest, the court may convert to Ch 7 or dismiss, whichever is in the best interests of the creditors and the estate. Several examples of good cause are enumerated, such as unreasonable delay in obtaining confirmation of a plan, failure to file a plan, material default by the debtor with respect to a term of a confirmed plan, failure to make payments to the trustee as called for in the proposed or confirmed plan, etc.,
- (d) Subject to minor restrictions, the court may convert the case to Ch's 11 or 12 upon motion and hearing by debtor, the UST, or a party in interest.

1308. Filing of prepetition tax returns. (New with BAPCPA)

- (a) All required prepetition tax returns for past 4 years must be filed NLT one day prior to the 341(a).

(b) Trustee can hold 341(a) open for reasonable time if these returns still aren't filed.

(c) ((Definition of tax return....))

1321. Filing of a plan.

The debtor must file a plan. Unlike Ch 11, no one else may do so.

1322. Contents of plan.

(a) The plan shall...

(1) provide for sufficient funds to the trustee as are necessary for the plan;

(2) pay all priority class claims (Sec 507) unless the holder of the claim agrees to a different treatment;

[new with BAPCPA:] -except for *assigned* DSO arrears. These can be partly paid, remaining non-dischargeable, if all PDI goes to the plan for a 5 year term.

(3) provide equal treatment to all members of a class, if the plan divides claims into classes;

(b) - no unfair discrimination among members of an unsecured class except for co-debtors under Sec 1301.

- modify the rights of secured claims except those holding a lien on real property used as debtor's primary residence;

- provide for the curing or waiving of defaults;

- provide for curing of defaults on secured claim w/ concurrent payments on the loan if the last payment is due after the date of final payment to the

trustee. (I.e, cure mortgage defaults)

- provide for assumption, rejection, or assignment of an executory contract or unexpired lease

- provide for vesting of property of the estate back in the debtor (this will be upon confirmation unless the plan provides otherwise). (Note: vesting upon confirmation of the plan will protect against any garnishment by a postpetition creditor.)

- [new] Interest on nonl-dischargeable unsecured claims can be paid but only if funds are available after paying all allowed claims.

- Include any other appropriate provision not inconsistent with Ch 13 law

(c) Any default on debtor's principal residence may be cured up to the date of a foreclosure sale.

(d) Explain provisions for Means Testing (new with BAPCPA).

3 years is the limit for a plan unless the court for cause approves a long period but it may not approve a period longer than five years (sub-median). Above-median filers go five years.

(e) ((Amount of defaults will be determined according to non-bankruptcy law.))

(f) A plan can now repay retirement loans, such as those against a debtor's 401(k) plan, and such funds are not PDI. (New with BAPCPA)

1323. Modification of plan before confirmation. (Usually referred to as an amended plan rather than a modified one. We use 'modified' with reference to changes in a confirmed plan.) (Unchanged)

The debtor may replace an original plan with an amended one any time before confirmation.

1324. Confirmation hearing.

After notice and a hearing, the court shall hold a hearing on confirmation of a proposed plan. Any party in interest may object.

-New: Conf hearing must be held between 20 and 45 days after the 341(a) unless court allows an earlier date and there are no objections to such earlier date.

1325. Confirmation of a plan.

(a) Subject to certain restrictions spelled out later in this Section, the court shall confirm the plan if...

- the plan complies with Ch 13 statutes

- plan proposed in good faith

- unsecured creditors are to receive at least as much as they would have received if the case were a Ch 7. Sometimes called the 'Best interest of creditors' or the 'liquidation' test. OK to include payments to priority claims (e.g., taxes) but not administrative ones (e.g., attorney fees).

- as to holders of secured claims, the debtor either pays the creditor the equivalent value of the collateral or the amount of the debt, whichever is less, and provides that the secured creditor retain his lien until paid; or surrenders the collateral to the creditor.

(b) If the trustee or the holder of an unsecured claim objects to confirmation, the court may not confirm unless...

- the plan passes the 'best interests of creditors' test
  - the plan provides that all the debtor's PDI for the next three years is paid in to the plan
  - PDI means that income which is left after deduction from net income (Schedule I) of allowed costs of living (Schedule J) and business expenses (Supplement to Schedule J), if debtor is engaged in business.
- (c) After confirmation, the court may enter an order requiring debtor's employer to deduct the plan payments from debtor's compensation and pay it directly to the trustee. (Locally, this is done by the trustee sometimes if the debtor ever gets as much as two payments behind. It is a good idea to recommend this be done voluntarily because bcy clients are almost by definition not the best at handling their money and automatic deduction helps assure the success of the case.)

1326. Payments.

- (a) -Payments to the trustee begin w/in 30 days of the DOF unless the court orders otherwise. (All my plans state that the first payment is due on the 20th of the month after the month in which the case was filed; subsequent payments are due on the 20th of each month. When the plan is confirmed, that payment schedule becomes part of the confirmed plan and therefore is 'by court order.')

- The trustee retains funds received in his trust account. Upon confirmation, he begins disbursements pursuant to the terms of the plan. If the case is dismissed or converted, he returns the funds to the debtor.

(b) The trustee is entitled to fees and costs provided in 28 USC 586: 5% of funds handled for costs and another 5% for fees, total 10%. This applies not merely to all funds actually handled but to all disbursements contemplated by the plan. Thus if debtor sells a vehicle and that vehicle was being paid for through the plan, as on a cramdown, for example, the trustee would be entitled to 10% of the proceeds.

1327. Effect of Confirmation.

- (a) The provisions of a confirmed plan bind the debtor and all creditors.
- (b) Except as provided otherwise in the plan or the order confirming, the confirmation of a plan vests the property of the estate back in the debtor
- (c) Except as otherwise provided in the plan or the order confirming the plan, when the property of the estate reverts in the debtor, it does so free and clear of any claim or interest of any creditor except as otherwise provided  
In the plan.

1328. Discharge.

(a) Upon completion of the plan, the court shall grant a discharge except as to any debt for long-term payments such as a mortgage, support, student loans, claims for damages stemming from a vehicle accident involving drugs or alcohol, or for restitution or fine levied in a criminal case.

(b) ((Hardship discharge.))

After confirmation and upon notice and a hearing before completion of the plan, the court may grant a discharge if three conditions are met:

-The failure to complete the plan stems from circumstances for which the debtor may not fairly be held accountable,

- The best interests of creditors test has been met, and
- Modification is not practicable.

(c) A hardship discharge, however, is merely a Ch 7 discharge in disguise. It does not carry the 'super discharge' advantages of the regular Ch 13 discharge.

(d) The hardship discharge also does not release the debtor from any allowed claim for a postpetition consumer debt under Section 1305 if prior approval by the trustee was practicable but was not obtained.

(e) A hardship discharge is voidable by the court upon motion of a party in interest for one year if the discharge was obtained through fraud and the requesting party did not know of such fraud until after the discharge had been granted.

1329. Modification of plan after confirmation.

(a) The plan may be modified post-confirmation at the request of the debtor, the trustee, or an unsecured creditor to...

- increase or decrease payments to a class of claims,
- extend or reduce the time for such payments, or
- change the distribution to a creditor to take account of any payment on

the claim other than through the plan

(b) Any modification must still comply with Ch 13 law.

1330. Revocation of an order of confirmation.

(a) If the order was obtained through fraud, the court can revoke it within 180 days (6 months) of entry. This would be upon the motion of any party in interest and upon notice and a hearing.

(b) If a confirmation order is revoked, the court will proceed with either dismissal or conversion to CH 7 unless the debtor can convince the court to permit a modification.