APPENDIX AA

SECTION BY SECTION ANALYSIS OF CHAPTER 13 AFTER BAPCPA

§ 1301. Stay of action against codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless--

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that--

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

No changes to text.

See new § 365(p)(3)—Codebtor stay in § 1301 is "automatically terminated" with respect to leased personal property if the lease is not assumed in the Chapter 13 plan confirmed by the court. "Automatically terminated" does not contemplate entry of an order. Does codebtor have right to notice with respect to automatic termination of codebtor stay? Any significance to absence of a provision for lessor to request an order

that stay is terminated?

See also § 362(b)—many new exceptions to automatic stay that do *not* also limit or take exception to codebtor stay in a Chapter 13 case.

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§ 1302. Trustee

(a) If the United States trustee appoints an individual under section 586(b) of title 28 to serve as standing trustee in cases under this chapter and if such individual qualifies under section 322 of this title, then such individual shall serve as trustee in the case. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as a trustee in the case.

(b) The trustee shall--

(1) perform the duties specified in sections 704(2), 704(3), 704(4), 704(5), 704(6), 704(7), and 704(9) of this title;

(2) appear and be heard at any hearing that concerns--

(A) the value of property subject to a lien;

(B) confirmation of a plan; or

(C) modification of the plan after confirmation;

(3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act;

(4) advise, other than on legal matters, and assist the debtor in performance under the plan; ~~and~~

(5) ensure that the debtor commences making timely payments under section 1326 of this title; and

(6) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).

(c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections 1106(a)(3) and 1106(a)(4) of this title.

(d) (1) In a case described in subsection (b)(6) to which subsection (b)(6) applies, the trustee shall–

(A) (i) provide written notice to the holder of the claim described in subsection (b)(6) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency;

(B) (i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1328, provide written notice to such holder and to such State child support enforcement agency of--

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that--

(I) is not discharged under paragraph (2) or (4) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2) (A) The holder of a claim described in subsection (b)(6) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making that disclosure.

New trustee noticing responsibilities with respect to a domestic support obligation (§ 101(14A)) in § 1302(b)(6) and (d).

Is the introductory phrase in § 1302(d)(1) redundant, or are there cases "described in" (b)(6) to which (b)(6) does not apply?

Trustee shall provide "written" notice to the holder of a domestic support obligation and to the support enforcement agency for the state in which the holder resides. Four notices are required—two when the debtor "is granted a discharge under § 1328" and two at some other time not specified in new § 1302(d)(1)(A). From the context, drafters probably contemplated that the first two notices would be given to the domestic support obligation holder and the state support enforcement agency early in the Chapter 13 case.

The earlier written notice to the holder of the domestic support obligation shall include notice "of such claim" and notice "of the right of such holder to use the services of the state child support enforcement agency . . . for assistance in collecting child support during and after the case under this title." Domestic support obligation is, of course, broader than just "child support." The House Report repeatedly refers to the collection of "child support" without acknowledging that many domestic support obligations will not involve child support because of the broad new definition of domestic support obligation in § 101(14A). The address and phone number of the appropriate state child support enforcement agency must be included in the first notice. Trustees will need a

nationwide list of child support enforcement agencies, including telephone numbers. The content of "notice . . . of such claim" is not clear. Should the amount scheduled by the debtor be included? What information is required about the debtor? the plan? The House Report states that the notice must "explain the claimant's right to payment under the applicable chapter of the Bankruptcy Code." (H.R. NO.109-31 at 76). There is no statement in the statute that the trustee's notice must explain the claimant's right to payment in the Chapter 13 case. Will the regular notice of commencement of the Chapter 13 case suffice as written notice "of such claim" for § 1302(d)(1)(A) purposes?

The earlier notice to the state child support enforcement agency must include the name, address and telephone number of the claim holder. Debtors will have to supply the name, address and telephone number for each holder of a domestic support obligation (for example, an ex-spouse or child). New § 112 provides that "information regarding a minor child" may (only?) be disclosed "in a non-public record that is maintained by the court and made available by the court for examination by the United States trustee, the trustee and the auditor (if any) serving under section 586(f) of title 28." What happened to the Bankruptcy Administrator? For the trustee to satisfy the new notice requirements in § 1302(d), the debtor will have to supply the name, address and telephone number of children who hold domestic support obligations in a non-public filing that the Chapter 13 trustee will then access to create the new notices. In the ECF world, the creation and maintenance of restricted access lists of this sort is not simple. There is no statutory protection for the name, address and telephone number of an ex-spouse or other (adult) holder of a domestic support obligation.

The later set of new written notices is required at the time the debtor is "granted a discharge" under § 1302(d)(1)(C). The second notices go (again) to the holder of the domestic support obligation and to the state child support enforcement agency for the state in which the holder resides. The content of the second set of notices is different and more detailed than the first set. The second set of notices must contain four kinds of information:

1. The granting of the discharge to the debtor. Including the date?

2. The last *recent* known address of the debtor. Was "recent" intended to add something here?

3. The last *recent* known name and address of the debtor's employer. It is not obvious how the trustee will know the last recent name and address of the debtor's employer in cases where there is no income deduction order under § 1325(c). Will debtors be required to supply this information at or near the time of discharge in Chapter 13 cases?

4. The name of each creditor that holds a claim that is nondischargeable under § 523(a)(2) or (4); and the name of each creditor that holds a claim that was reaffirmed by the debtor under § 524(c). Why notice only with respect to claims nondischargeable under § 523(a)(2) and (a)(4)? No notice is required

of claims that are nondischargeable under other provisions of § 1328. Reaffirmations are rare or nonexistent in Chapter 13 cases under § 524(c)—why this new notice in Chapter 13 cases? What good is "the name of each creditor" in this context? How will Chapter 13 trustees determine which creditors hold claims that are not discharged under § 523(a)(2) or (a)(4)? The trustee will not be a party to dischargeability litigation under § 523(a)(2) and (a)(4) in Chapter 13 cases.

Section 1302(d)(2) empowers the holder of a domestic support obligation to "request" the last known (recent?) address of the debtor from a creditor with a nondischargeable claim under § 523(a)(2) or (a)(4) or a reaffirmed debt under § 524(c). Will a letter or phone call do? How will creditors know the identity or legitimacy of the requester? Can the request be directed to the creditor's attorney? Is this "request" filed with the court? Why only from a creditor with a nondischargeable or reaffirmed debt? Can the domestic support obligation holder request the debtor's last known address from the trustee? from a creditor with a claim that is nondischargeable under a section other than § 523(a)(2) or (a)(4)? Is the creditor obligated to reveal the last known address of the debtor? What is the consequence if the creditor delays, refuses or just doesn't know?

Section 1302(d)(2)(B) protects a creditor that makes a disclosure of a last known (recent?) address of the debtor with a broad provision that "notwithstanding any other provision of law" the creditor "shall not be liable" for disclosing the last known address of a debtor. This protection is not extended to the trustee or to a debtor's attorney or to anyone else other than a creditor with a debt nondischargeable under § 523(a)(2) or (a)(4) or a debt that was reaffirmed under § 524(c). Would the attorney of a creditor be protected?

See also 28 U.S.C. § 589b which requires new information in final reports filed by Chapter 13 trustees.

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§ 1303. Rights and powers of debtor

Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

No changes.

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§ 1304. Debtor engaged in business

(a) A debtor that is self-employed and incurs trade credit in the production of

income from such employment is engaged in business.
(b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.
(c) A debtor engaged in business shall perform the duties of the trustee specified in section 704(8) of this title.

No changes.

Cross-reference to "704(8)" makes no sense. Probably means "704*(a)*(8)."

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§ 1305. Filing and allowance of postpetition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor--

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

No changes.

See § 502(b)(9) which was amended to provide that in a Chapter 13 case, "a claim of a governmental unit for a tax with respect to a return filed under § 1308 shall be timely if the claim is filed on or before the date that is sixty days after the date on which such return was filed as required." Does new § 502(b)(9) define "timely" for the filing of some tax claims that would be postpetition claims under § 1305(a)(1)? Section 1308 is discussed below.

§ 1306. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title--

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, ~~or~~ 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

No changes.

But see § 541(b)(5) and (b)(6)—excluding education IRA and state tuition credit accounts from property of estate, with limitations; § 541(b)(7)—excluding from property of the estate wages withheld or received as contributions to an ERISA-qualified benefit, compensation, annuity or health plan (also excluded from "disposable income"); § 541(b)(8)—excluding from property of the estate tangible personal property in the possession of a pledgee or transferee as collateral for a loan when the debtor has no obligation to repay the money or redeem the collateral and no timely redemption occurred.

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§ 1307. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including–

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;
(4) failure to commence making timely payments under section 1326 of this title;
(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
(6) material default by the debtor with respect to a term of a confirmed plan;
(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; ~~or~~
(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section ~~521.~~ 521; or
(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(d) Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

(f) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(~~f~~ g) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

New grounds for conversion or dismissal.

Cross-reference in § 1307(c) to "subsection (e)" may be a problem. Under prior law, this cross-reference prevented the involuntary conversion of a farmer from Chapter 13 to Chapter 7, 11 or 12. As it stands now, the reference to subsection (e) could be read to mandate dismissal or conversion—as opposed to the permissive "may" in § 1307(c)—upon the failure of a Chapter 13 debtor to file tax returns under § 1308 (more about this below). Former § 1307(e) is now § 1307(f). Does the elimination of the former cross-reference signal that it is now possible to involuntarily convert a farmer from Chapter 13 to another chapter? Or does § 1307(f) preclude that outcome?

There is no mention of this issue in House Report 109-31.

The cross-reference to "paragraph (1) of section 521" in § 1307(c)(9) makes no sense. Did they intend paragraph (a)(1) of § 521?

Same problem with § 1307(c)(10)—the cross-reference to "paragraph (2) of section 521" needs help.

If interpreted to read § 521(a)(1), the cross-reference in § 1307(c)(9) adds as grounds for conversion or dismissal that the attorney or bankruptcy petition preparer certificate described in § 521(a)(1)(B)(iii) is missing, payment advices were not filed with the petition or the monthly net income statement is missing or not itemized. Only the U.S. Trustee can raise this ground for conversion or dismissal and § 1307(c)(9) gives the debtor 15 days (or such other time as the court allows) after the petition to do the things § 521(a)(1) mandates at the petition. New § 521(i) provides for "automatic" dismissal of a Chapter 13 case on the 46th day after the petition if the information required by § 521(a)(1) has not been filed. Are § 1307(c)(9) and § 521(i) inconsistent? Which controls?

If interpreted to read § 521(a)(2), the cross-reference in § 1307(c)(10) continues the nonsensical ground for conversion or dismissal that the Chapter 13 debtor has failed to file or perform the statement of intention that is only required of debtors in Chapter 7 cases. This could be an issue in Chapter 13 cases converted from Chapter 7.

Section 1307(c)(11) is a new ground for conversion or dismissal: failure of the debtor to pay any domestic support obligation (*see* § 101(14A)) that "first becomes payable after the date of the filing of the petition." "Payable" is probably the magic word here—not to be confused with a domestic support obligation that "*accrues* before, on, or after the date of the order for relief" under § 101(14A).

The cross-reference to "subsection (e)" in § 1307(d) has issues similar to those mentioned above. Can a "family farmer" (§ 101(18)) who is not also a "farmer" (§ 101(20)) be involuntarily converted to Chapter 12?

New § 1307(e) mandates ("shall") dismissal or conversion to Chapter 7 "upon the failure of the debtor to file a tax return under § 1308." Discussed below, § 1308 contains many complicated new requirements for debtors with respect to tax returns and § 1307(e) specifies conversion or dismissal as the consequence for failure to comply with § 1308. What is the significance that this new ground was not added to the list in § 1307(c)? House Report 109-31 states that the bankruptcy court "*must* dismiss the case or convert it to one under chapter 7" on request of a party in interest if a Chapter 13 debtor fails to file a tax return "as required by section 1308." (emphasis added).

Section 521(j) provides "notwithstanding any other provision of this title," a taxing authority may request conversion or dismissal if the debtor fails to file a tax return that

"becomes due after the commencement of the case;" and upon such a request, the debtor has 90 days to file the required return (or request an extension) else the court "shall" convert or dismiss. Is § 521(j) a limitation on § 1307(e)? Section 1308 (discussed below) addresses tax returns that become due during the Chapter 13 case. So does § 521(j). Section 1307(e) allows any party in interest to move for conversion or dismissal if the debtor fails to file a return under § 1308. Section 521(j) limits that request to the taxing authority with respect to returns that become due after the petition, and gives the debtor at least 90 days to file the return after the taxing authority's motion. Are these two sections in collision?

See § 348(f) which has been substantially amended to change the effects of conversion from Chapter 13 to Chapter 7. The valuations of property and of allowed secured claims in the Chapter 13 case that applied at conversion to Chapter 7 under former law now apply only in a case converted from Chapter 13 to Chapter 11 or Chapter 12. Allowed secured claims are reduced in accordance with payments during the Chapter 13 plan only at conversion to Chapter 11 and Chapter 12—not at conversion from Chapter 13 to Chapter 7. At conversion to Chapter 7, § 348(f)(1)(C) now provides that the claim of any creditor holding security at the petition "shall continue to be secured by that security" unless the full amount of the claim "determined under applicable non-bankruptcy law" was paid before conversion. Section 348(f)(1)(C)(ii) further provides that any prebankruptcy default has the effect "given under applicable non-bankruptcy law" unless the prebankruptcy default has been "fully cured under the plan at the time of conversion." These amendments seem to undo the 1994 amendments to § 348(f) at least with respect to secured claims and conversion from Chapter 13 to Chapter 7. If the debtor is not able to convert to Chapter 11 or Chapter 12, new § 348(f)(1)(B) allows undersecured claim holders to argue at conversion to Chapter 7 that payments during the Chapter 13 case can be (re-) credited against the unsecured portion of the claim, notwithstanding the plan. It is not clear how new § 348(f) will be applied if the secured claim was provided for under § 1325(a)(5) and was a claim with respect to which § 506 shall not apply (*see* § 1325(a) discussion below). New § 348(f)(1)(C)(i) may restrict a Chapter 13 debtor's ability to sell or replace collateral during a Chapter 13 case.

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§ 1308. Filing of prepetition tax returns

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b) (1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable

period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond--

(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

(B) for any return that is not past due as of the date of the filing of the petition, the later of–

(i) the date that is 120 days after the date of that meeting; or

(ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under this subsection, if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under this subsection for--

(A) a period of not more than 30 days for returns described in paragraph (1); and

(B) a period not to extend after the applicable extended due date for a return described in paragraph (2).

(c) For purposes of this section, the term "return" includes a return prepared pursuant to subsection (a) or (b) of section 6020 of the Internal Revenue Code of 1986, or a similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.

The *day before* the *first scheduled* § 341(a) meeting of creditors is a new deadline.

"If the debtor was required to file a tax return under applicable nonbankruptcy law." What does "required" mean? Is this determined by tax laws? What if tax return is "required" by nonbankruptcy law but not yet due?

Debtor *shall* file with *appropriate tax authorities*. Mandatory. Not limited to any particular taxing authorities. Not filed with court or "provided" to trustee. *But see* § 521(e) and (f), discussed below.

All tax returns for *all taxable periods* ending during the *four-year period* ending on the petition date. Does this include the last tax year ending before the date of the petition even if the return is not yet due? Does this accelerate tax return filing deadlines for debtors in bankruptcy? House Report 109-31 states that § 1308 was added "to require a chapter 13 debtor to be current on the filing of tax returns for the four-year period preceding the filing of the case." (H.R. 109-31 at 112). "To be current" suggests only returns that are already due at the petition.

Compare § 521(e)—not later than *seven days before the date first set for the meeting of creditors* the debtor shall "provide" to the trustee (and "to any creditor that timely requests") a copy of the federal income tax return "required under applicable law" for the most recent tax year "ending immediately before the commencement of the case *and* for which a federal tax return was filed." What if debtor filed 2004 return but not 2005 return in Chapter 13 case filed in January 2006? What about returns filed between seven days and the day before the first date set for the § 341(a) meeting?

Compare § 521(f)—at the *request* (only!) of the court, the United States trustee or any party in interest, the debtor "shall file with the court" a copy of each federal income tax return required under applicable law with respect to each tax year while the case is pending and a copy of each federal income tax return that "had not been filed" as of the commencement of the case and that was subsequently filed for any tax year ending in the *three-year period* ending at the petition. Includes any amendments to returns. Does "request" require a motion? a phone call?

See § 521(j), discussed with § 1307(e), above.

New § 1308(b) permits ("may") the trustee to "hold open" the first scheduled meeting of creditors "for a reasonable period of time" to allow the debtor to file "required" returns. For a return that is past due at the petition, the hold open period is limited to 120 days after "the date of that meeting." For a return that is not past due at the filing of the petition, the hold open date is the later of 120 days "after the date of that meeting" or the date on which the return is due under the last automatic extension of time for filing that return. Can the trustee hold open a § 341 meeting that is not the "first scheduled . . . under § 341(a)?" If a Chapter 13 petition is filed in February, 2006 and the first scheduled meeting of creditors is in March, is the tax return for 2005 "required"? It is probably not past due until after April 17, 2006 but will the trustee "hold open" all meetings of creditors for cases filed in the early months of the year until after last year's tax returns are due and filed? Absent a "request" under § 521(f) would the 2005 return go anywhere except to the taxing authority? Are there any restrictions on or appeal from a trustee's exercise of discretion to hold open meetings of creditors under § 1308? What happens to the strict time limitations on the confirmation hearing in § 1324 (below) when the trustee holds open a meeting of creditors?

Section 1308(b)(2) permits the court to further extend the filing period for required tax returns but the cross-references in § 1308(b)(2)(A) and (B) to "paragraph (1)" and to "paragraph (2)" make no sense. Do we speculate that they meant "(b)(1)(A)" and "(b)(1)(B)"? Section 1308(b)(2) provides, "after notice and a hearing *and order entered before the tolling of any applicable filing period determined under this subsection*" the court can extend a filing period "established by the trustee" if the debtor demonstrates by preponderance of the evidence that the failure to file a return "required under this subsection" is attributable to circumstances beyond the control of the debtor. Will "circumstances beyond the control of the debtor" mean circumstances immediate to the bankruptcy case, or circumstances temporal to the unfiled tax returns? How will debtors know the length of a hold open period established by the trustee? Will a filing or notice

be required?

Section 1308(b)(2) permits the court to further extend a filing period for tax returns established by the trustee, but seems to require entry of an order before the filing period ends. Under new § 1307(e), conversion or dismissal is the mandatory consequence if a debtor does not get an extension order before a time period for filing a return expires. There is a trap here because the trustee will be (invisibly?) controlling an "open" meeting of creditors and the debtor must get a court order before the trustee "closes" that meeting to avoid mandatory conversion or dismissal. The time periods could be quite short because the maximum 120 day periods in § 1308(b)(1)(A) and (B) are counted from the "first scheduled" § 341 meeting. The nonsensical cross-references to "paragraph (1)" and "paragraph (2)" become critically important to the debtor who needs additional time to file required returns.

When is § 1307(e) triggered?

See also § 1325(a)(9)—confirmation is conditioned that the debtor has filed all federal, state and local tax returns "required" by § 1308.

See also § 502(b)(9)—a claim of a governmental unit for a tax "with respect to a return filed under § 1308" is timely if filed "on or before the date that is 60 days after the date on which such return was filed as required." Although not codified, BAPCPA contains a "sense of the Congress" that the Judicial Conference should propose official rules "with respect [to] an objection by a governmental unit to confirmation of a chapter 13 plan when such claim pertains to a tax return filed pursuant to section 1308." It is not clear how a rule would fit the objection of a taxing authority into the tight new schedule for confirmation of Chapter 13 plans in § 1324 (below) when a required tax return is filed just before, or after the petition. Perhaps it is contemplated that standing trustees will hold open meetings of creditors to allow for the filing of tax returns and that § 1324 will be interpreted to allow delay of the confirmation hearing when a meeting of creditors is held open under § 1308.

New § 1308(c) defines "return" to include a substitute return prepared by the Secretary of the Treasury under § 6020(a) or (b) of the Internal Revenue Code. The filing of substitute returns by the Secretary ordinarily does not relieve the taxpayer of the obligation to file returns but if "return" includes a substitute return for purposes of § 1308, is there still a tax return "required" for § 1308 purposes? Section 523(a) was amended to define "return" for nondischargeability purposes to include returns filed by the Secretary under IRC § 6020(a) but *not* under § 6020(b). IRC § 6020(b) deals with returns filed by the Secretary when there has been a false, fraudulent or non-cooperative return. New § 1328(a)(2) now excepts from discharge taxes when the debtor has filed a fraudulent return under § 523(a)(1)(C) (see below). Is there any significance to the lack of parallelism in the definition of return in § 1308(c)? Why are non-cooperative returns under § 6020(b) defined as "returns" for § 1308 purposes?

How will anyone know if the debtor has complied with § 1308?

§ 1321. Filing of plan

The debtor shall file a plan.

No changes. Still the shortest section in the Bankruptcy Code.

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§ 1322. Contents of plan

(a) The plan shall--

(1) 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;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; ~~and~~

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class; and

(4) notwithstanding any other provision of this section, a plan may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(b) Subject to subsections (a) and (c) of this section, the plan may--

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section

1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; ~~and~~

(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

(11) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

(d) ~~The~~(1) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4, the plan may not provide for payments over a period that ~~is longer than three~~ is longer than 5 years.

(2) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is less than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4,

the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than ~~five~~ 5 years.

(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

(f) A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute "disposable income" under section 1325.

Section 1322(a)(4) contains an odd new mandatory plan provision: "Notwithstanding any other provision of this section" the plan "may" provide less than full payment of a priority claim for a domestic support obligation (§ 101(14A)) that is assigned to a governmental unit as described in § 507(a)(1)(B), but only if all of the debtor's "projected disposable income" will be applied to payments under the plan for a five-year period. New § 1322(a)(4) looks like a permissive ("may") exception to the full payment of priority claims requirement in § 1322(a)(2) with respect to a narrow class of domestic support obligations assigned to governmental units in five-year plans. But it was added to the mandatory ("shall") provisions of the plan in § 1322(a).

Projected disposable income is defined in § 1325(b) and it does not mean the same thing for debtors with current monthly income (CMI) greater than applicable median family income as it does for debtors with CMI less than applicable median family income (*see* below). For over median income debtors, the projected disposable income test refers to § 707(b)(2)(A) and (B) and full payment of all priority claims is netted out of the calculation. Over median income debtors in Chapter 13 cases will always have to propose five-year plans under § 1325(b)(4)(A)(ii). Section 1322(a)(4) seems to say that an over median income debtor can use full payment of priority claims to reduce the amount of projected disposable income for § 1325(b) purposes and then propose a plan that provides less than full payment of domestic support obligations assigned to the government. Does the predicate that the plan must provide that all of the debtor's disposable income over a five-year period "will be applied to make payments under the plan" mean the same thing as the requirement in the disposable income test in § 1325(b)(1)(B) that all of the debtor's projected disposable income "will be applied to make payments *to unsecured creditors* under the plan?"

New § 1322(a)(4) should be read as an exception to the unfair discrimination test for separate classifications in § 1322(b)(1).

New § 1322(b)(10) permits the Chapter 13 plan to pay interest accruing after the petition on unsecured claims that are nondischargeable under § 1328(a) "to the extent that the debtor has disposable income available to pay such interest after making

provision for full payment of all allowed claims." This amendment to § 1322(b)(10) was added by a section of BAPCPA that dealt with domestic support obligations, suggesting that the new permissive power to pay postpetition interest was targeted at nondischargeable, domestic support obligations. However, the new power is not limited to domestic support obligations and there is nothing in House Report 109-31 to suggest any limitation other than that the debt is nondischargeable. This new section does not require that the accruing postpetition interest be allowable under § 502. The new section is not worded that allowed claims must actually be paid in full before interest is paid to nondischargeable claims—only that the plan must make provision for full payment of all allowed claims. The "full payment" predicate does not include present value language—full payment does not require postpetition interest to allowed claims. The new section does not address whether the plan can pay postpetition interest to a dischargeable unsecured claim (with a cosigner, for example). Does "full payment of all allowed claims" include other treatments allowed by the Bankruptcy Code—for example, curing default and maintaining payments with respect to a long-term secured or unsecured debt? Would the payment of interest to the holder of a nondischargeable, unsecured claim under § 1322(b)(10) be unfair discrimination with respect to a dischargeable allowed unsecured claim that is paid in full but without interest?

New § 1322(d) fixes duration requirements for Chapter 13 cases with reference to the median family income statistics. Curiously, the section measures "the current monthly income of the debtor and the debtor's spouse combined"—without regard to whether the spouse is a joint debtor in the Chapter 13 case. "Current monthly income" (§ 101(10A)) measures only income received by the debtor "or in a joint case the debtor and the debtor's spouse." How will debtors do the math in § 1322(d) when a nonfiling spouse has income that would be excluded for purposes of the first half of the sentence but included by the second half? Current monthly income under § 101(10A) includes in the debtor's income amounts paid on a "regular basis" by a nonfiling spouse for the household expenses of the debtor or the debtor's dependents. Does combining the current monthly incomes of the debtor and a nonfiling spouse twice account for household expenses regularly paid by each? Is there a duration penalty here for married debtors who file alone but exceed the median income test if the nonfiling spouse's current monthly income is combined with the debtor's for purposes of § 1322(d)?

The use of current monthly income (CMI) in § 1322(d) requires averaging the monthly income received by the debtor (and the debtor's spouse, combined) from all sources during the six-month period prior to the petition with the inclusions found in § 101(10A). If the amount calculated exceeds applicable median family income, then § 1322(d) states awkwardly that the plan "may not provide for payments over a period that is longer than five years." If the CMI calculation produces a number less than the applicable median family income, then the plan may not provide for payments over a period that is longer than three years unless the court approves for cause a longer period and then the court may not approve a period that is longer than five years. Section 1325(b) (discussed below) adds an "applicable commitment period" that requires over median income debtors to propose five-year plans, again calculated using the CMI of the debtor and the debtor's spouse even when the debtor's spouse is not a joint debtor.

Under new § 1322(f), a plan "may not materially alter" the terms of a loan "described in § 362(b)(19)." Under § 1322(b)(19) there is no automatic stay with respect to the consensual withholding of income from a debtor's wages for the benefit of a pension, profitsharing or stock bonus plan for payments "solely" relating to a loan. House Report 109-31 recites that the intent of this section is "to expand the protection for tax-favored retirement plans or arrangements that may not be already protected under Bankruptcy Code section 541(c)(2) pursuant to *Patterson v. Shumate,* [504 U.S. 753 (1992),] or other state or federal law." The withholding excepted from the automatic stay by new § 362(b)(19) is withholding from a debtor's "wages" pursuant to "an agreement" for the benefit of "a pension, profitsharing, stock bonus, or other employer-sponsored plan established under Internal Revenue Code section 401, 403, 408, 408(a), 414, 457 or 501(c)" to the extent that the withheld amounts are "used solely to repay a loan . . . as authorized by section 408(b)(1) of [ERISA] or subject to Internal Revenue Code section 72(p) or with respect to a loan with certain thrift savings plans." H.R. NO. 109-31 at 78.

Under new § 1322(f) "any amounts required to repay" a pension or profitsharing loan described in § 362(b)(19) "shall not constitute 'disposable income' under section 1325." The pension plan can continue to collect its loan without violating the automatic stay, the Chapter 13 plan cannot materially alter the terms of the loan and the amount required to repay the pension loan is not disposable income for § 1325 purposes. Will § 1322(f) apply to a pension or profit sharing loan that is not subject to withholding of income from a debtor's wages?

Can debtor's counsel advise a debtor before bankruptcy to consider a pension loan without violating new § 526(a)(4)?

Section 1322(b) was not amended to cross-reference new § 1322(f). Section 1322(b)(1) imposes the unfair discrimination standard on classifications of unsecured claims in Chapter 13 cases. The absence of a cross-reference to new § 1322(f) in § 1322(b) leaves open the question whether the unfair discrimination standard applies to a favorably classified pension loan that may not be materially altered under § 1322(f).

What does "materially alter" mean in § 1322(f)?

See also § 541(b)(7) which excludes from property of the estate and from disposable income under § 1325(b)(2) *contributions* withheld by an employer from the wages of a debtor for payments to an ERISA-qualified benefit plan, deferred compensation plan, health insurance plan or tax deferred annuity. Is it significant that the amounts required to repay a pension loan do not constitute disposable income for purposes of all of § 1325 but withheld contributions are not disposable income only for purposes of § 1325(b)(2)? Compare § 1322(f) and § 541(b)(7).

The new exception to discharge in § 523(a)(18) for pension loans is *not* applicable at the completion of payments in a Chapter 13 case.

§ 1323. Modification of plan before confirmation

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

No changes.

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§ 1324. Confirmation hearing

~~After~~ (a) Except as provided in subsection (b) and after notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan.

(b) The hearing on confirmation of the plan may be held not earlier than 20 days and not later than 45 days after the date of the meeting of creditors under section 341(a), unless the court determines that it would be in the best interests of the creditors and the estate to hold such hearing at an earlier date and there is no objection to such earlier date.

Is "may be held" mandatory or permissive? The rest of the sentence suggests that it is mandatory. The rules of construction in § 102 say "may not" is prohibitive. Is "may be held not . . ." a mandatory form of the prohibitive phrase? House Report 109-31 states that § 1324 was amended "*to require* the chapter 13 confirmation to be held not earlier than 20 days following the first date set for the meeting of creditors and not later than 45 days from this date . . . ." H.R. NO. 109-31 at 90 (emphasis added). The House Report is not consistent with new § 1324(b) with respect to whether the confirmation hearing is counted from the "date of the meeting of creditors" or the "first date set for the meeting of creditors."

Measuring from "the date of the meeting of creditors under section 341(a)" probably

means measuring from the date the meeting of creditors is actually held. Compare "the date on which the meeting of creditors is first scheduled" in new § 1308(a) discussed above. New § 1324(b) doesn't tell us whether the date of the meeting of creditors under § 341(a) means the date the meeting of creditors is concluded or the date it begins. Given the new provisions for holding open the meeting of creditors for the filing of tax returns in § 1308(b), some further interpretation of § 1324(b) will be needed. There is a "sense of Congress" in BAPCPA that the Judicial Conference of the United States should propose rules with respect to objections by a governmental unit to confirmation of a Chapter 13 plan when the government's claim pertains to a tax return filed pursuant to § 1308. *See* H.R. NO. 109-31 at 112. If a meeting of creditors is held open by the trustee for the filing of tax returns under § 1308, do we count the 45 days in new § 1324(b) from the end of the "hold open" period? Forty-five days (max) is not a lot of time for a taxing authority to process a tax return, formulate and file an objection to confirmation in a Chapter 13 case.

Under Bankruptcy Rule 2003(a), the United States trustee is required to call a meeting of creditors in Chapter 13 cases "no fewer than 20 and no more than 50 days" after the petition. Under new § 1324(b), the range of possible dates for the hearing on confirmation of a Chapter 13 plan would be no earlier than 40 days after the petition and no later than 95 days after the petition, unless the court fixes an *earlier* date under new § 1324(b).

Section 1324(b) permits the court to determine that it would be in the best interests of creditors and the estate to hold the confirmation hearing "at an earlier date," but this authority is hedged, "and there is no objection to such earlier date." Any objection to "an earlier date" seems to preclude a court determination that it would be in the best interests of creditors and the estate to have an earlier hearing on confirmation. This is unique in the Bankruptcy Code—typically, an objection triggers a hearing but not a veto.

Courts that currently confirm Chapter 13 plans immediately after the meeting of creditors when there are no objections to confirmation will have to determine that the earlier date is in the best interest of the creditors and of the estate, give notice and wait to see if there is any objection to the earlier date. Could the original notice of filing of the Chapter 13 case contain a notice that confirmation will occur earlier than 20 days after the date of the meeting of creditors absent (timely) objection? Will a court order be necessary in each case in which a hearing on confirmation is scheduled earlier than 20 days after the meeting of creditors?

Does new § 1324 prohibit the scheduling of a hearing on confirmation *later* than 45 days after the § 341(a) meeting? If a later date is permitted, what determination by the court is necessary to support a later date? Can there be a "preliminary" hearing on confirmation to satisfy § 1324(b)? Would any objection stop the setting of a later date?

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if--

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that--

(I) the holder of such claim retain the lien securing such claim until the earlier of–

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder; ~~and~~

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as

required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

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

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

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

(2) For purposes of this subsection, the term "disposable income" means current monthly income ~~which is received by the debtor and which is not~~ received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, ~~including~~ or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)~~)~~ to a qualified religious or charitable entity or organization (as ~~that term is~~ defined in section 548(d)(4)) in an amount not to exceed 15 percent of ~~the~~ gross income of the debtor for the year in which the contributions are made; and

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

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than–

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

The requirement in old § 1325(a)(3) that "the plan has been proposed in good faith" is supplemented in new § 1325(a)(7) that "the action of the debtor in filing the petition was in good faith." Of course, "good faith" is not defined in either old § 1325(a)(3) or new § 1325(a)(7). Will the new good faith filing requirement be similar to the good faith standards applied by many courts to motions to dismiss Chapter 13 petitions for "bad faith?" Will new § 1325(a)(7) preclude confirmation of a plan in a Chapter 13 case converted from Chapter 7 after a finding of bad faith (abuse?) under § 707(b)(3)(A)?

The best-interests-of-creditors test in § 1325(a)(4) was not amended by BAPCPA, but new exclusions from property of the estate will affect the § 1325(a)(4) calculation. For example, if a Chapter 7 debtor fails to file a statement of intent or fails to timely perform a statement of intent, and then converts to Chapter 13, personal property described in § 521(a)(6) may have exited the bankruptcy estate. Funds in an education IRA are excluded from the estate by new § 541(b)(5), as are tuition credit and state tuition program funds under § 541(b)(6).

Section 1325(a)(5)(B)(i) contains a new lien retention requirement. With respect to "each allowed secured claim," the plan must provide that the holder retains the lien until the earlier of "payment of the underlying debt determined under nonbankruptcy law" or "discharge under section 1328." The lien retention provision must also state that if the Chapter 13 case is dismissed or converted "without completion of the plan," the lien shall be retained "to the extent recognized by applicable nonbankruptcy law." The House Report states that § 1325(a)(5)(B)(i) is amended "to require—as a condition

of confirmation—that a chapter 13 plan provide that a secured creditor retain its lien until the earlier of when the underlying debt is paid or the debtor receives a discharge. If the case is dismissed or converted prior to completion of the plan, the secured creditor is entitled to retain its lien to the extent recognized under applicable non-bankruptcy law." H.R. NO. 109-31 at 84.

Determining the amount of "each allowed secured claim" invokes §§ 502 and 506 of bankruptcy law; determining when "payment of the underlying debt determined under nonbankruptcy law" occurs invokes the contract and state law and will produce a different amount in many circumstances. As discussed below, the new lien retention provision applies only to "each allowed secured claim provided for by the plan" and an "allowed secured claim" can only be determined by reference to § 506 of the Bankruptcy Code—a section that is rendered inapplicable to many collateralized claims by new § 1325(a). At the very least, new § 1325(a)(5)(B)(i) seems intended to overrule cases that allowed Chapter 13 debtors to confirm plans that released liens upon payment of the allowed secured claim. Is early lien release still possible when the "underlying debt determined under nonbankruptcy law" is equal to or less than the allowed secured claim determined under bankruptcy law? It is not clear how this calculation will be performed with respect to claims to which § 506 no longer applies (*see* below).

Under § 1325(a)(5)(B)(ii), the requirement remains that the value of property to be distributed under the plan on account of "such claim" must be not less than the allowed amount of "such claim" as of the effective date of the plan. This language is not changed but the reference to "such claim" becomes important because it seems to refer back to "each allowed secured claim provided for by the plan." As discussed below, there is now a class of claims that would ordinarily be "secured claims" under § 506 but with respect to which § 506 "shall not apply." If § 506 does not apply, then to what does "such claim" refer in § 1325(a)(5)(B)(ii)?

New § 1325(a)(5)(B)(ii) states that if property distributed "pursuant to this subsection" is in the form of "periodic payments," then such payments "shall be in equal monthly amounts." If "this subsection" means §1325(a)(5), then this new equal monthly payment requirement would apply to every "allowed secured claim provided for by the plan" with respect to which periodic payments are provided by the plan. "Equal monthly amounts" probably means that the amount paid each month must be the same amount. Surely, it doesn't mean that all allowed secured claim holders are to receive the same amount each month. The House Report recites that § 1325(a)(5)(B) was amended "to require that periodic payments pursuant to a chapter 13 plan with respect to a secured claim be made in equal monthly installments." H.R. NO. 109-31 at 85.

How many payments are required and on what schedule for payments to be "periodic?" Is a payment once a year from the sale of a crop "periodic?" If the underlying debt does not call for monthly payments, does this new section mandate (equal) monthly payments? What about curing default and maintaining payments under § 1322(b)(5)? Does new § 1325(a)(5)(B)(iii)(I) require that the arrearage claim be spread out over the

same number of months as the regular installments so that all payments will be equal? What do you do with a debtor whose income is not equal across the months of the year—a teacher, for example? Is it now prohibited to have larger monthly payments during months in which the debtor has more income?

New § 1325(a)(5)(B)(iii)(II) provides that payments to the holder of a claim "secured by personal property" shall be not less than an amount sufficient to provide "adequate protection" during the period of the plan. Heretofore, adequate protection was a preconfirmation concept under § 361. Not anymore. We can speculate that this new section is intended to prohibit Chapter 13 plans that provide payment to secured claim holders in an amount not sufficient to keep pace with depreciation of the underlying collateral. There is also the problem in some districts during the early months after confirmation that payments to priority claim holders—attorney fees, for example—eat into the payments otherwise provided for secured claim holders. The immediately preceding requirement of "periodic payments . . . in equal monthly amounts" could be a problem with respect to personal property that depreciates rapidly at first and then levels off—a car, for example, would require larger payments early in the plan to provide "adequate protection," not equal monthly payments. Section 361 of the Code defines adequate protection when adequate protection "is required under section 362, 363, or 364 of this title." There is no cross-reference to § 1325(a)(5)(B)(ii)(II). Is § 361 still the place to look to define adequate protection after confirmation in Chapter 13 cases? What is the "indubitable equivalent" of a creditor's "interest" in property of the Chapter 13 estate if § 506 does not apply (see below)? What standards will the courts use to determine "adequate protection" for purposes of this new section? What valuation standard and depreciation schedule will be used to adequately protect a claim secured by a waterbed? If there will be no value left in the collateral at an intermediate point during the plan, can the "equal monthly" payments stretch for the life of the plan?

Section 1325(a)(5)(C) preserves the right of the debtor to surrender the property securing "such claim." Again, "such claim" probably relates back to each "allowed secured claim provided for by the plan." Can the debtor surrender property securing a claim with respect to which § 506 does not apply? What effect would surrender have on the deficiency that would ordinarily result with respect to an undersecured claim?

Section 1325(a)(8) adds a new confirmation requirement that the debtor has paid all domestic support obligations (*see* § 101(14A)) that "first become payable after the date of the filing of the petition," required "by a judicial or administrative order, or by statute." The definition of domestic support obligation (DSO) in § 101(14A) includes support obligations that accrue before or after the petition; § 1325(a)(8) requires that the debtor be current at confirmation only with respect to amounts that "first become payable" after the petition. Does "accrue" mean the same as "become payable?" What is a DSO required "by statute" that is not contained in a judicial or administrative order? Is this a trap of some sort? How would anyone know whether the debtor has satisfied every statute with respect to DSOs? And what will be the res judicata effect of confirmation with respect to DSOs? Would confirmation be a binding determination that all DSOs that first became payable after the petition have been paid by the debtor?

Would the DSO holder have to object to confirmation if there is any doubt?

New § 1325(a)(9) requires that the debtor "has filed all applicable federal, state and local tax returns as required by §1308. As detailed above, § 1308 reaches back four years, includes returns that are "required" even if not past due at the petition, and contemplates the possibility that the meeting of creditors will be held open for the debtor to file required tax returns. Can a plan be confirmed in a Chapter 13 case filed in January, 2006, when the 2005 tax return is "required" but not due until April 17, 2006?

The 800-pound gorilla is in the hanging, unnumbered and unlettered new sentence tacked on to the end of § 1325(a). The cite to this new sentence is probably just "§ 1325(a)." The new sentence begins, "For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if . . . ." "Paragraph (5)" means § 1325(a)(5) which begins "With respect to each *allowed secured claim* provided for by the plan." Of course, "allowed secured claim" is a term of art determined under § 506(a)(1): "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property." If § 506 "shall not apply" to a claim described in § 1325(a)(5), it is not a stupid question to ask how a lienholder becomes an "allowed secured claim" for purposes of § 1325(a)(5) without first applying § 506(a)(1)? Do we first apply § 506 to determine whether we have an "allowed secured claim" and then § 506 "shall not apply" to that claim if the conditions (discussed below) are present? Does § 506 not apply to all subsequent determinations with respect to that claim—for example, whether surrender under § 1325(a)(5)(C) eliminates any deficiency claim? The new adequate protection requirement in § 1325(a)(5)(B)(iii)(II) is in "paragraph (5)"—without § 506 how will adequate protection rights be determined? We do or we don't use the new valuation provisions in § 506 for § 1325(a)(5) purposes with respect to claims to which § 506 does not apply? Are wholly unsecured liens described, or not described in paragraph (5)?

Under new § 1325(a), § 506 shall not apply when the creditor has a purchase money security interest, the debt was incurred within *910 days* preceding the petition and the collateral is a *motor vehicle* (*see* 49 U.S.C. § 30102) acquired for the *personal use* of the debtor; or, if the collateral for "that debt" consists of "any other thing of value, if the debt was incurred during the one-year period preceding that filing." What about a car acquired for the debtor's spouse's use? Would a mortgage on the debtor's house incurred within a year before the bankruptcy fall in this section? Is a water bed a "thing of value?" What if the car is lost or stolen? What about a purchase of underwear at Sears on a credit card within a year of bankruptcy? Is "personal use" different than "family or household use?"

House Report 109-31 gives this description of the new hanging sentence:

> [Section 306(b) of BAPCPA] adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506

> does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days preceding the filing of the petition. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case.

H.R. NO. 109-31 at 84.

If § 506 does not apply, remember that it is §506(b) that oversecured creditors use to recover interest and attorneys fees.

When § 506 does apply to an *allowed* claim at confirmation in a Chapter 13 case, new § 506(a)(2) values personal property at replacement value at the petition without deduction for "costs of sale or marketing." Replacement value is defined as the price a "retail merchant" would charge for similar condition property if the collateral was "acquired for personal, family or household purposes."

What happens if the plan does not "provide for" an allowed secured claim? What are the rules for confirmation of such a plan? Is the old "inside/outside" the plan distinction revived and with what consequences?

Notice that the hanging sentence at the end of § 1325(a) is ambiguous with respect to whether the "personal use" requirement also applies to "any other thing of value" that secures a debt incurred during the one-year period preceding the petition.

The new hanging sentence does not require the collateral to be property of the Chapter 13 estate. This omission is magnified by the exclusion of § 506 from the calculus—§ 506 requires that the estate have an interest in collateral before a claim becomes an allowable secured claim. If § 506 does not apply, does the new hanging sentence capture debts that are secured by property that is not property of the estate or of the debtor? But then, a claim secured by property that is not property of the Chapter 13 estate would not be a claim "described in [§ 1325(a)(5)]"—is there a renvoi here?

Section 1325(b)—the so-called disposable income test—still requires an objection to confirmation from the trustee or the holder of an allowed unsecured claim. Will the holder of a claim to which § 506 does not apply under § 1325(a) have standing to object to confirmation under § 1325(b)? When would they want to?

Section 1325(b)(1)(A) still allows the debtor to satisfy a disposable income test objection by distributing to the objecting claim holder property not less than the amount of "such claim."

New § 1325(b) now requires (upon objection) that all of the debtor's "projected disposable income" to be received in the "applicable commitment period" will be applied to payments "to *unsecured* creditors" under the plan. Paying projected disposable income to only unsecured creditors overrules the practice in some jurisdictions of excluding secured debt payments from the § 1325(b) calculation.

Projected disposable income has always been a forward looking concept, requiring bankruptcy courts to "project" the debtor's income into the future. It is transformed by new § 1325(b)(2). Disposable income is based on "current monthly income"—a term of art under § 101(10A) that looks backwards to the six months before the month in which the petition was filed.

With respect to all debtors, "disposable income" starts with current monthly income (CMI) as defined in § 101(10A). For debtors with CMI less than applicable median family income, CMI received by the debtor is then reduced by amounts "reasonably necessary" to be expended for the maintenance or support of the debtor (as under current law).

For debtors with CMI greater than applicable median family income, "disposable income" also starts with current monthly income received by the debtor as defined in § 101(10A), but the amount reasonably necessary to be expended is redefined by incorporation of subparagraphs (A) and (B) of § 707(b)(2)—the mathematical test to determine whether the presumption of abuse arises in a Chapter 7 case. Section 1322(b)(2) requires that current monthly income be *reduced* by the amounts determined "in accordance" with § 707(b)(2)(A) & (B). This mathematical formula allows Chapter 13 debtors with CMI greater than applicable median family income to reduce CMI by all of the amounts listed in the right-hand column below. For example, the amount of disposable income that must be paid to unsecured creditors by an over median income Chapter 13 debtor does not include the average monthly payments on account of all amounts scheduled as contractually due to secured creditors—without regard to the treatment of secured claims under the plan. Put another way, the "reasonably necessary" test for expenses that applies to under median income debtors is replaced with a mathematical formula for over median income debtors and that formula deducts (without review for reasonableness or necessity) all contract amounts scheduled to secured creditors (among many other amounts, detailed below).

With respect to debtors with CMI greater than applicable median family income, the mathematical formula incorporated from § 707(b)(2) is unrelated to the provisions of the proposed plan and bears no predictable relationship to the amount of money that will actually be available from the debtor for payments to unsecured creditors if the plan is confirmed.

On what statutory basis will Chapter 13 trustees insist that debtors maximize payments to unsecured creditors? Will other tests for confirmation—the good faith requirement, for example—be redefined to test the debtor's effort to pay creditors?

Under § 1325(b)(2), "disposable income" means:

For All Chapter 13 Debtors

- "Current monthly income" defined in § 101(10A)
  Received by the debtor *only*
  Includes income received by the debtor's spouse only in a joint case
  "Average" monthly income from all sources
  "Without regard to whether such income is taxable income"
  "Derived during the six-month period ending on . . . the last day of the calendar month immediately preceding the [petition] if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii)" or the date on which current income is determined by the court if the debtor does not file the schedule of current income.
  Includes amounts paid by any entity "on a regular basis" for the "household expense of the debtor or the debtor's dependents (and in a joint case, the debtor's spouse if not otherwise a dependent)"
  Excludes social security benefits and war crimes benefits and payments to victims of international terrorism

- Exclude child support payments, foster care payments or disability payments for a dependent child to the extent "reasonably necessary to be expended for such child"

- Exclude "amounts required to repay" a pension loan described in § 362(b)(19)—*see* § 1322(f)

- Exclude wages withheld or received by an employer as contributions to an employee benefit plan, a deferred compensation plan, a tax deferred annuity or a health insurance plan—*see* § 541(b)(7)

If Current Monthly Income < Applicable Median Family Income

* Less "amounts reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor"
* Less amounts reasonably necessary to be expended for a domestic support obligation that first becomes payable after the petition
* Less charitable contributions not to exceed 15% of gross income

If Current Monthly Income > Applicable Median Family Income

* Less "amounts reasonably necessary to be expended—" shall be determined in accordance with new § 707(b)(2)(A) & (B)
* Reduced by National Standards
* Reduced by Local Standards

If Current Monthly Income < Applicable Median Family Income

* Less expenditures necessary for the continuation, preservation and operation of a business if the debtor is engaged in business

If Current Monthly Income > Applicable Median Family Income

* Reduced by actual expenditures in categories found in Other Necessary Expenses

* Reduced by health insurance, disability and medical savings account, including for spouse even if not joint case

* Reduced by family violence expenses

* Reduced by additional 5% food and clothing allowance if demonstrated

* Reduced by actual expenses for elderly, chronically ill, disabled household member

* Reduced by administrative expenses of a Chapter 13 case up to 10%

* Reduced by actual expenses of up to $1,500 per year per child to attend school

* Reduced by an extra allowance for home energy costs if documented

* Reduced by average monthly payments on account of secured debts based on the total of all amounts "scheduled as contractually due to secured creditors"

* Reduced by "additional payments to secured creditors necessary for the debtor . . . to maintain possession of the debtor's primary residence, motor vehicle or other property necessary for the support of the debtor and the debtor's dependents"

* Reduced by all priority claims, including priority child support and alimony claims

If Current Monthly Income < Applicable Median Family Income

If Current Monthly Income > Applicable Median Family Income

* Reduced by "additional expenses or adjustments of current monthly income" caused by special circumstances

What happened to the deduction for charitable contributions to determine disposable income for a debtor with CMI greater than applicable median family income?

Business expense deductions for an over median income debtor are buried in a category in the IRS's "Other Necessary Expenses"

"Applicable commitment period" for purposes of the projected disposable income test is defined by new § 1325(b)(4) as three years or "not less than five years" depending on whether the current monthly income "of the debtor and the debtor's spouse combined" is less than or greater than applicable median family income. It is not obvious why the income of a nonfiling spouse is included for purposes of calculating the applicable commitment period but is excluded for purposes of determining disposable income itself. Current monthly income under § 101(10A) does not include a nonfiling spouse's income but § 1325(b)(4) requires combination of the CMI of the debtor and the debtor's spouse to determine whether the debtor has over or under median income for purposes of the applicable commitment period. The statute does not reveal how CMI of a debtor and a debtor's nonfiling spouse is combined. Some married debtors not filing jointly with CMI less than applicable median family income are likely to end up with five year commitment periods.

It is possible (likely?) that the disposable income calculation in § 1325(b)(2) will produce zero dollars as the amount available for distribution to unsecured creditors for (many?) debtors with CMI greater than applicable median family income and yet the applicable commitment period calculation will be five years? What are the debtor's obligations in a five-year plan that does not have a minimum payment requirement for unsecured creditors? What are the trustee's obligations with respect to confirmation of such a plan? When is the plan completed?

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§ 1326. Payments

(a)(1) Unless the court orders otherwise, the debtor shall commence making ~~the~~ payments ~~proposed by a plan within 30 days after the plan is filed~~ not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount--.

(A) proposed by the plan to the trustee;

(B) scheduled in a lease of personal property directly to the lessor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the

trustee with evidence of such payment, including the amount and date of payment; and

(C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment.

(2) A payment made under ~~this subsection~~ paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation ~~of a plan~~. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such ~~payment~~ payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b) ~~of this title~~.

(3) Subject to section 363, the court may, upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan.

(4) Not later than 60 days after the date of filing of a case under this chapter, a debtor retaining possession of personal property subject to a lease or securing a claim attributable in whole or in part to the purchase price of such property shall provide the lessor or secured creditor reasonable evidence of the maintenance of any required insurance coverage with respect to the use or ownership of such property and continue to do so for so long as the debtor retains possession of such property.

(b) Before or at the time of each payment to creditors under the plan, there shall be paid--

(1) any unpaid claim of the kind specified in section 507(a)(2) of this title; and

(2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title ~~28.~~ 28; and

(3) if a chapter 7 trustee has been allowed compensation due to the conversion or dismissal of the debtor's prior case pursuant to section 707(b), and some portion of that compensation remains unpaid in a case converted to this chapter or in the case dismissed under section 707(b) and refiled under this chapter, the amount of any such unpaid compensation, which shall be paid monthly--

(A) by prorating such amount over the remaining duration of the plan; and

(B) by monthly payments not to exceed the greater of--

(i) $25; or

(ii) the amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent, and the result divided by the number of months in the plan.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

(d) Notwithstanding any other provision of this title--

(1) compensation referred to in subsection (b)(3) is payable and may be collected by the trustee under that paragraph, even if such amount has been discharged in a prior

case under this title; and
(2) such compensation is payable in a case under this chapter only to the extent permitted by subsection (b)(3).

New § 1326 requires the debtor to make payments before confirmation to certain creditors (details below). Direct payments by debtors before confirmation is a really bad idea. Direct payments interfere with the commencement of payments to the trustee to fund the plan and complicate getting an income deduction order in the correct amount through the debtor's employer. Direct payments are difficult or impossible to account for and direct payments mess up the claims allowance process. That new § 1326(a)(1) permits the bankruptcy court to "order otherwise" is an opportunity for enlightened trustees and debtors' attorneys to intercept this foolish direct payment process with a first day order that makes the payments through the trustee rather than directly by the debtor. Redirecting the payments through the Chapter 13 trustee will allow the trustee to keep track of what creditors are paid and how much, will allow the trustee to adjust the allowance of claims to reflect payments made before confirmation and will start the debtor off in the right direction by fixing the amount to be paid to the trustee. An income deduction order can be issued soon after the commencement of the case to begin deductions and remittance to the trustee in the correct amount. The first day order can authorize the trustee to make preconfirmation distributions in the amounts required by new § 1326(a)(1).

New § 1326(a)(1) nonsensically requires the debtor to commence making payments not later than 30 days "after the date of the filing of the plan or the order for relief, whichever is earlier." Chapter 13 debtors do not routinely file the plan before filing the petition. Section 1326(a)(1) will require the debtor to commence making payments not later than 30 days after the petition.

How will new § 1326(a)(1) be applied at conversion from Chapter 7 to Chapter 13? There is no exception in § 348(b) for § 1326(a)(1). Will the commencement of payments relate back to the original (preconversion) petition date?

Section 1326(a)(1) requires the debtor to commence making three kinds of payments:

1. To the trustee, the payments proposed by the plan. The new section is not clear what happens if a plan has not yet been filed.

2. "Directly to the lessor," the "portion of the obligation that becomes due after the order for relief" that is "scheduled in a lease of personal property." This new direct payment requirement is not conditioned that the debtor is using the property, has possession of the property or intends to assume the lease. It is not specific to any particular kind of personal property—presumably, it would include cars, appliances, rent-to-rent contracts, etc. Section 1326(a)(1)(B) instructs the debtor to reduce the payments to the trustee proposed by the plan by the amount paid directly to the lessor of personal

property. The debtor is also instructed to provide the trustee with "evidence" of the amount and date of payment directly to the lessor.

3. Directly to a creditor, payments that provide "adequate protection" to the holder of an "allowed claim" secured by "personal property," to the extent the claim is "attributable to the purchase of such property by the debtor," for the portion of the obligation that becomes due after the order for relief. The debtor is instructed to reduce payments to the trustee under the plan by the amount paid directly to the creditor and to provide the trustee with evidence of the amount and date of payment. There is no requirement that the debtor is using the property or intends to keep it through the plan. This new direct payment of adequate protection requirement applies only to purchase money claims and the adequate protection required is only with respect to the "portion" of the debt that becomes due after the order for relief. This is odd. Adequate protection typically relates to the value of collateral and depreciation that results from the debtor's use before confirmation under § 361. New § 1326(a)(1)(C) requires adequate protection of only the "portion of the obligation" that becomes due after the order for relief. How do you calculate adequate protection of an installment payment? Notice also that only a creditor holding an "allowed claim" is entitled to adequate protection before confirmation. Section 1326(a)(1)(C) requires the commencement of adequate protection payments not later than 30 days after the petition. Only creditors that immediately file proofs of claim will be entitled to payments directly from the debtor. How will this new adequate protection requirement be calculated for lienholders to which § 506 shall not apply under § 1325(a)? Section 1326(a)(1)(C) does not require that the personal property securing the allowed claim be property of the estate.

The new direct payment obligations in § 1326(a)(1)(B) & (C) are likely to produce a flood of "evidence" into the trustee's office in unconfirmed Chapter 13 cases. This has accounting nightmare written all over it and a fair portion of the accounting work will be in cases that are converted or dismissed before confirmation. All the more reason to consider a first day order re-routing these "direct" payments through the trustee.

Section 1326(a)(2) contains a new provision that you just have to read: "If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b)." Paragraph [1326(a)](3) provides: "subject to section 363, the court may, upon notice and a hearing, modify, increase, or reduce the payments required under this subsection pending confirmation of a plan." Read literally, "payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3)" would apply only if, after notice and a hearing, the bankruptcy court modified, increased or reduced payments required under "this subsection." If there's been no such hearing, there would be no payments paid, due or owing pursuant to paragraph (3). We can speculate that the sentences quoted above were intended to capture for lessors and allowed secured claim holders unpaid direct payments described in § 1326(a)(1)(B) &

(C) when the trustee holds money at conversion or dismissal in an unconfirmed Chapter 13 case. The House Report unhelpfully provides "[i]f the plan is not confirmed, the trustee must return to the debtor payments not yet due and owing to creditors." H.R. NO. 109-31 at 85. What does "due and owing" means in this preconfirmation context? Unpaid preconfirmation payments to lessors and to secured claim holders on account of "adequate protection" will rarely qualify as an administrative expense under § 503(b).

If the debtor does not intend to assume a lease of personal property but there are scheduled payments that become due after the petition, the debtor may need to reject the lease or move for relief from the direct payment requirement in § 1326(a)(1)(B).

Given the confusing wording of § 1326(a)(1)(C), if the debtor and a creditor with an allowed purchase money claim secured by personal property can't agree on the necessary direct payment to provide adequate protection for the "portion" that becomes due after the petition and before confirmation, the lienholder should move for a hearing to determine the required payment. Given that the hearing on confirmation must be not less than 20 days or more than 45 days after the date of the § 341 meeting of creditors under new § 1324(b), most Chapter 13 cases will reach confirmation about the same time as any hearing under § 1326(a)(3).

Section 1326(a)(4) contains a new requirement with respect to insurance coverage: Not later than 60 days after the petition, a debtor "retaining possession of personal property subject to a lease or securing a claim attributable in whole or in part to the purchase price of such property" shall provide the lessor or secured creditor "reasonable evidence of the maintenance of any required insurance coverage." The debtor is required to "continue to do so" for so long as the debtor "retains possession" of the property. Proof of insurance is provided to the lessor or secured creditor, not to the court or the trustee. This proof of insurance requirement applies to leases of personal property and claims attributable "in whole or in part" to the purchase price of the property—without regard to whether the lessor or creditor has filed a proof of claim. The adequate protection requirement for direct payments before confirmation under § 1326(a)(1)(C) applies only to allowed claims; the proof of insurance requirement applies to property that the debtor retains possession of without regard to whether the secured party has filed an allowable claim. "Required insurance coverage" will be a matter of contract and could be a problem for debtors who are cash short at the beginning of a Chapter 13 case and have not been insuring collateral subject to a lease or lien. For example, many rent-to-rent contracts require the debtor to maintain insurance but rent-to-rent companies rarely police the obligation. Debtors' counsel may have to advise Chapter 13 debtors to get insurance required by an unexpired lease or executory contract even when there has been no habit of doing so prepetition.

New § 1326(a)(4) does not state a consequence if the debtor fails to provide reasonable evidence of the required insurance. Inclusion of the phrase "use or ownership" of such property in § 1326(a)(4) implies that the insurance requirement applies even if the debtor simply retains possession but is not using the property that is subject to a lease or secures a purchase money claim. The requirement to provide reasonable evidence of insurance

seems to continue after confirmation. "Reasonable evidence" is anybody's guess.

Now that the Code gives Chapter 13 debtors up to 60 days after the petition in which to prove insurance coverage, inconsistent local rules and cultures that require proof of insurance earlier than 60 days after the petition in a Chapter 13 case may not be enforceable. This is especially likely to impact the many local rules and practices with respect to proof of insurance for cars in Chapter 13 cases.

New § 1326(b)(3) allows a Chapter 7 trustee to recover compensation in a Chapter 13 case when the Chapter 7 trustee was allowed compensation "*due to* the conversion or dismissal of the debtor's prior case pursuant to section 707(b)." This is very strange. "Compensation" of a Chapter 7 trustee is a term of art referring to an award under § 326. "Compensation" of a Chapter 7 trustee is based on a percentage of moneys "disbursed or turned over" during the Chapter 7 case. There is no amendment of § 326 to suggest that Chapter 7 trustees get compensation in dismissed or converted cases in which there was no disbursement or turn over of moneys. Under what circumstances will a Chapter 7 trustee be awarded "compensation" in a Chapter 7 case that is dismissed or converted under § 707(b)? What is compensation of a Chapter 7 trustee that is "*due to* the conversion or dismissal of the debtor's prior case pursuant to section 707(b)?"

The House Report gives this account of new § 1326(b)(3):

> [I]f a chapter 7 trustee has been allowed compensation as a result of the conversion or dismissal of the debtor's prior case pursuant to section 707(b) and some portion of that compensation remains unpaid, the amount of any such unpaid compensation must be repaid in the debtor's subsequent chapter 13 case.

H.R. NO. 109-31 at 151.

The amount of compensation recoverable under § 1326(b)(3) is pro rated over "the remaining duration of the plan" and is limited to monthly payments not exceeding the greater of $25 or 5% of the amount payable to unsecured, nonpriority creditors under the plan. The $25 maximum payment in § 1326(b)(3)(B)(i) means that the Chapter 7 trustee cannot recover more than $1,500 in a 60-month Chapter 13 plan except in the (unlikely) event that unsecured creditors are to receive more than $30,000 through the plan. This proration limitation is likely to interfere with the stated intention that unpaid Chapter 7 compensation "must" be repaid in a subsequent Chapter 13 case.

Notice that § 1326(b)(3) applies when a Chapter 7 case is dismissed under § 707(b) and the debtor then refiles (converts?) under Chapter 13. There is no temporal limitation on the refiling—presumably compensation allowed in any prior Chapter 7 case dismissed or converted under § 707(b) would be recoverable in any subsequent Chapter 13 case.

New § 1326(d) supplements the collection of compensation in new § 1326(b)(3) by providing that compensation referred to in (b)(3) "is payable and may be collected by the

trustee . . . even if such amount has been discharged in a prior case." This gets curiouser and curiouser. New § 1326(d) doesn't create an "exception" to discharge of the sort found in § 523 of the Code but it authorizes collection of a discharged debt. This is a new concept.

You just have to ask yourself how the compensation referred to in § 1326(b)(3) could have been "discharged in a prior case under this title" for purposes of § 1326(d). The compensation described in subsection (b)(3) arises *due to* the conversion or dismissal of a prior Chapter 7 case under § 707(b). It seems unlikely that a Chapter 7 case would be dismissed for abuse under § 707(b) after discharge. Does § 1326(d) contemplate an intermediate Chapter 7 or Chapter 13 case in which the debtor received a discharge without paying compensation awarded to the Chapter 7 trustee in a prior Chapter 7 case? Chapter 13 trustees have to be wondering how they will program their computers to pay the compensation claim contemplated by § 1326(b)(3).

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§ 1327. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

No changes to text.

Section 1327 is likely to become the biggest stick left for debtors after BAPCPA. The binding effect of confirmation remains a back stop for the debtor to use. As always, confirmation will bind creditors without regard to whether creditors accept or reject the plan. Property still vests in the debtor free and clear of any claim or interest provided for by the plan. Snooze, you lose.

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§ 1328. Discharge

(a) ~~As~~ Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for

by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) ~~of this title~~;

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a) ~~[or 523(a)(9)] of this title; or~~;

(3) for restitution, or a criminal fine, included in a sentence on the debtor''s conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

(b) ~~At~~ Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if--

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge--

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

(g)(1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

(2) Paragraph (1) shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional

courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional course by reason of the requirements of paragraph (1).

(3) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in paragraph (2) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.

(h) The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that--

(1) section 522(q)(1) may be applicable to the debtor; and

(2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

There's not much left of the Chapter 13 "super discharge."

There is a new certificate requirement for discharge in § 1328(a). If the debtor is required to pay a domestic support obligation (DSO) (§ 101(14A)), the debtor must certify that "all amounts payable . . . that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan)" have been paid. Debtor's counsel will have to find the debtor and get the new certificate at about the time of completion of payments to other creditors under the plan. This certificate requirement is another good reason to pay ongoing support obligations through the Chapter 13 trustee. Notice that the certificate must address DSOs required by "statute" in addition to DSOs required by judicial or administrative order. The DSOs defined by § 101(14A) do not include obligations arising by statute that are not included in a judicial or administrative order. This certificate is thus broader than the DSOs otherwise defined by the Code. The certificate must include that the debtor has paid all DSOs that were due before the petition to the extent provided for by the plan. Because § 101(14A) defines DSOs to include obligations accruing "before, on, or after" the petition and § 507(a)(1) makes all DSOs first priority entitled to payment in full (absent consent otherwise) under § 1322(a)(2), the certification requirement conditions discharge that the debtor has paid all domestic support obligations that became due before or after the petition, unless the holder consented to less than full payment at confirmation.

Section 1328(a) does not specify to whom this certification is made. Presumably, it will be filed with the court.

There are seven new exceptions to discharge in § 1328(a) at the completion of payments under a Chapter 13 plan:

1. Section 507(a)(8)(C). A tax required to be collected or withheld "for which the debtor is liable in whatever capacity."

2. Section 523(a)(1)(B). A tax or customs duty with respect to which a return was not filed or was filed late and within two years before the petition.

3. Section 523(a)(1)(C). A tax or customs duty with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat taxes.

4. Section 523(a)(2). This is the false pretenses, false representation or actual fraud exception to discharge most often used by credit card companies. This exception includes the false financial statement provisions of § 523(a)(2)(B). It also contains the presumption of nondischargeability for "*consumer* debts owed to a single *creditor* and *aggregating* more than *$500* for *luxury goods* or services incurred by an individual debtor . . . within *90 days*" before the petition; and the presumption of nondischargeability for "*cash advances aggregating* more than *$750* . . . within *70 days*" before the petition. The luxury goods and cash advances presumptions were lengthened temporally and reduced in amount by BAPCPA. "Luxury goods or services" has been redefined to exclude goods or services "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor." It can be anticipated that credit card lenders will use this new exception to discharge as leverage in Chapter 13 cases. The cost of litigating a § 523(a)(2) exception to discharge can be a big deal for a Chapter 13 debtor. Increased pressure to separately classify or to reaffirm credit card debts in Chapter 13 cases is likely.

5. Section 523(a)(3). This is the exception to discharge for debts that are neither listed nor scheduled in time to permit the timely filing of a proof of claim or, if the debt is of a kind specified in § 523(a)(2), (a)(4) or (a)(6), in time for the timely filing of a proof of claim and timely request for a determination of dischargeability—unless the creditor had notice or actual knowledge of the case in time for such timely filing and request. For the creditor with an otherwise dischargeable claim, the incorporation of § 523(a)(3) means that the unlisted creditor that is without actual notice or knowledge of the Chapter 13 case is awarded a nondischargeable debt at the completion of payments to other creditors. To what extent is an unlisted but otherwise dischargeable debt nondischargeable in a Chapter 13 case if the confirmed plan provides for 10% (or 0%) payment of claims in that class? Timely filing of a proof of claim is 90 days after the first date set for the meeting of creditors (180 days for governmental units) under Bankruptcy Rule 3002. The incorporation of § 523(a)(3) creates an incentive for debtors in Chapter 13 cases to quickly amend schedules to add unlisted creditors with enough time before the claims bar date to allow the timely filing of a proof of claim. The § 523(a)(3) case law developed in Chapter 7 asset cases is not consistent with respect to how many days before the bar date is enough time for § 523(a)(3) purposes. The wholesale incorporation of § 523(a)(3) into Chapter 13 cases is a problem with respect to debts that would be nondischargeable in a Chapter 7 case under § 523(a)(6)—the willful and malicious misconduct

exception to discharge. Section 523(a)(6) was *not* incorporated into the exceptions to discharge in a Chapter 13 case (a modified version of § 523(a)(6) was added as § 1328(a)(4) (discussed below)). Because § 523(a)(6) is one of the cross-referenced subsections in § 523(a)(3), it is now arguable that an unscheduled creditor holding a claim that would be nondischargeable in a Chapter 7 case under § 523(a)(6) has a nondischargeable claim in a Chapter 13 case if the claim holder does not have actual notice or knowledge of the case in time to timely file a proof of claim and timely request a determination of dischargeability—notwithstanding that a scheduled § 523(a)(6) debt is not an exception to discharge at the completion of payments under a Chapter 13 plan. "Timely" is problematic here—when is a request for determination of dischargeability timely in a Chapter 13 case when the debt is nondischargeable under § 523(a)(6) only in a *Chapter 7* case? Does the § 523(a)(3) incorporation render nondischargeable an unscheduled § 523(a)(6) claim because the failure to schedule disables the creditor to timely file a proof of claim even though there is no deadline for determining the dischargeability of a § 523(a)(6) debt in a Chapter 13 case? Section 523(a)(2) and (a)(4) debts now are nondischargeable in Chapter 13 cases and the failure to schedule such a debt in time for the timely filing of a proof claim and the timely filing of a request for a determination of dischargeability will render the debt nondischargeable. Because most Chapter 7 cases are no asset cases in which creditors are instructed not to file proofs of claim, § 523(a)(3) is not often in play. The same will not be true in Chapter 13 cases because most plans provide some dividend to creditors and the filing of claims serves purposes other than just distributions in Chapter 13 cases.

6. Section 523(a)(4). This is the exception to discharge for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny—another of the so-called "fraud" exceptions to discharge now applies in Chapter 13 cases.

7. Section 1328(a)(4). This is a new exception to discharge for "restitution, or damages, awarded in a civil action . . . as a result of willful *or* malicious injury . . . that caused personal injury . . . or death." This is a modified version of § 523(a)(6). Incongruously, "or" has been substituted for "and" in § 523(a)(6)—arguable making the discharge in Chapter 13 cases more restrictive with respect to personal injury claims than in Chapter 7 cases. It is limited to personal injury or death and does not include injury to property. It seems to be worded in the past tense—"awarded"—to require a prepetition award of restitution or damages for willful or malicious injury. There is some overlap between new § 1328(a)(4) and § 523(a)(6) which could become important for purposes of the incorporation of § 523(a)(3) discussed above when the debtor fails to schedule a claim that resulted from willful or malicious injury.

The addition of two of the three fraud exceptions—§ 523(a)(2) and (a)(4)—and the

addition of a modified version of § 523(a)(6) in § 1328(a)(4) will raise the relevance of Chapter 7 dischargeability cases to Chapter 13 practice. It can be expected that bankruptcy courts will look to Chapter 7 cases interpreting § 523(a)(2) and (a)(4) and to a lesser extent (a)(6) in Chapter 13 cases for guidance applying the new exceptions to dischargeability.

The pre-BAPCPA exception to dischargeability for debts of the kind specified in § 523(a)(5) is changed because of the new definition of domestic support obligation in § 101(14A).

Section 1328(f) changes the limits on consecutive discharges. Ambiguously, § 1328(f) states that the court "shall not grant a discharge" if the debtor "received a discharge . . . in a case filed under chapter 7, 11 or 12 . . . during the 4-year period preceding the date of the order for relief . . . or in a case filed under chapter 13 . . . during the 2-year period preceding the date of such order." Do we count from filing to filing, filing to discharge or discharge to discharge? The four-year period seems to be counted backwards from the date of the order for relief under Chapter 13 to a case "filed" under Chapter 7, 11 or 12. By this interpretation, the date of discharge in the prior Chapter 7 case is not relevant—the four-year period is counted from filing of the Chapter 7 to filing of the Chapter 13 case. If "such order" at the end of § 1328(f)(2) means the order for relief in the Chapter 13 case, then the two-year period also would be counted from the filing of the prior Chapter 13 case to the filing of the current Chapter 13 case. If "such order" in § 1328(f)(2) refers to "received a discharge," then it is arguable that the two-year period between Chapter 13 cases is counted from the entry of discharge in the prior Chapter 13 case. Does someone have to file a complaint to trigger new § 1328(f)?

The House Report explains the new limitation on successive discharges this way:

> It also amends section 1328 to prohibit the issuance of a discharge in a subsequent chapter 13 case if the debtor received a discharge in a prior chapter 7, 11 or 12 case within four years preceding the filing of the subsequent chapter 13 case. In addition, it prohibits the issuance of a discharge in a subsequent chapter 13 case if the debtor received a discharge in a chapter 13 case filed during the two-year period preceding the date of the filing of the subsequent chapter 13 case.

H.R. NO. 109-31 at 87.

Nothing in new § 1328(f) prevents the filing of a Chapter 13 case after discharge in a prior Chapter 7 or Chapter 13 case if the debtor does not seek a discharge in the subsequent Chapter 13 case. In other words, § 1328(f) is a limitation on the granting of a discharge, not a limitation on the eligibility of the debtor in a Chapter 13 case.

Section 1328(g)(1) prohibits the bankruptcy court from granting a discharge to a debtor who has not completed an instructional course on personal financial management as described in § 111. There is an exception for debtors described in § 109(h)(4)—debtors

who are incapacitated, disabled or combat military. In a Chapter 7 case, § 727(a)(11) contains a similar exception to discharge but in Chapter 7 cases that new exception probably requires the filing of a complaint objecting to discharge. In a Chapter 13 case, the court "shall not" grant a discharge unless the debtor has completed the financial management course—perhaps without regard to the filing of a complaint. Section 1328(g) is not clear how the bankruptcy court will know whether a debtor has completed a personal financial management course. There is no certificate or other filing requirement as there is, for example, with respect to domestic support obligations in § 1328(a) or the new "briefing" requirement in § 521(b). Section 111 describes the non-profit budget and credit counseling agencies and the providers of instructional courses, but there is no report to the court that a debtor has completed such a course.

The instructional course requirement for discharge in § 1328(g)(1) should not be confused with the "briefing" required by § 109(h) as an eligibility requirement for all debtors in Chapter 13 cases.

Section 1328(h) imposes a bizarre new hearing requirement masquerading as an exception to discharge: The court "may not" grant a Chapter 13 discharge unless "after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge" the court finds that there is "no reasonable cause to believe" that § 522(q)(1) "may be applicable to the debtor *and* . . . there is *pending* any proceeding in which the debtor may be found guilty of a felony . . . or liable for a debt" of the kind described in § 522(q)(1)(A) or (B).

New § 1328(h) was added by a section of BAPCPA titled "Delay of Discharge During Pendency of Certain Proceedings." The House Report states the intent of this section is "to require the court to withhold the entry of a debtor's discharge order if the court, after notice and a hearing, finds that there is reasonable cause to believe that there is a pending proceeding in which the debtor may be found guilty of a felony of the kind described in Bankruptcy Code section 522(q)(1) or liable for a debt of the kind described in Bankruptcy Code section 522(q)(2)." H.R. NO. 109-31 at 94.

The mandated timing of this new hearing is ridiculous. The date of entry of discharge in Chapter 13 cases is not a date certain from which 10 days can be counted. The limitation on exemptions described in § 522(q)(1) would have to have been litigated long before the debtor becomes entitled to a discharge in a Chapter 13 case. The requirement that there must be a proceeding *pending* in which the debtor may be found guilty of the felonies described in § 522(q)(1) or liable for a debt described in § 522(q)(1)(B) seems to contemplate that the criminal action or civil action was filed during the Chapter 13 case or has been pending for years while the debtor made payments under the plan. Section 522(q)(1)(B) refers to debts arising from "reckless misconduct" that caused serious physical injury or death in the preceding five years. Does this cross-reference mean that a discharge cannot be entered in a Chapter 13 case if the debtor is a defendant in a negligence action that could trigger the exemption ceiling in § 522(q)(1) without regard to whether the debtor claims such an exemption? The "reasonable cause to believe" standard in § 522(h) sets a much lower bar to discharge than applies to other exceptions

to discharge. Does § 1328(h) bar the entry of discharge or just delay the entry of discharge? If the debtor does not have exempt property that exceeds $125,000, does § 1328(h) still bar discharge?

Who is the protagonist at the § 1328(h) hearing? Does somebody file a motion or complaint? What are the burdens of proof? What is the consequence if the hearing is held more than 10 days before entry of the discharge order? Given that § 522(q)(1) only applies to debtors electing exemptions under state or local law, the new prohibition on granting a discharge in § 1328(h) is inapplicable to debtors claiming federal exemptions. Does a debtor "elect" state exemptions in a state that prohibits use of the federal exemptions? The $125,000 cap on exemptions in § 522(q)(1) applies when the debtor owes debts for violating securities laws, intentional torts and any criminal act or willful or reckless misconduct that cause serious physical injury or death in the preceding five years. But new § 1328(h) seems to say that if the debtor's guilt or responsibility under § 522(q)(1) has already been determined and there is no longer any "pending" proceeding, then the prohibition on discharge does not apply. Does this make any sense?

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§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; ~~or~~

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that--

(A) such expenses are reasonable and necessary;

(B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title; and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after ~~three years~~ the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

Section 1329(a) is amended to add a fourth ground for modification after confirmation: to reduce the amount paid under the plan by the "actual amount" expended by the debtor to purchase health insurance for the debtor or for a dependent of the debtor if the debtor documents the cost of the insurance, demonstrates that the expenses are reasonable and necessary and shows that the amount to be expended for health insurance is not materially larger than the cost the debtor previously paid for health insurance. If the debtor did not have health insurance, then the amount to be expended must not be materially larger than the "reasonable cost" of health insurance for a debtor who has "similar income, expenses, age and health status . . . in the same geographic location with the same number of dependents." The amount to be expended for health insurance must not otherwise be allowed for purposes of determining disposable income under § 1325(b). Upon the request of any party, the debtor must file proof that the health insurance policy was purchased.

Curiously, the House Report describes the new ground for modification of a confirmed Chapter 13 plan in § 1329(a)(4) in these mandatory terms:

> The act amends Bankruptcy Code section 1329(a) *to require the amounts paid under a confirmed chapter 13 plan* to be reduced by the actual amount expended by the debtor to purchase health insurance for the debtor and the debtor's dependents (if those dependents to not otherwise have such insurance) if the debtor documents the cost of such insurance and demonstrates such expense as reasonable and necessary and the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b).

H.R. NO. 109-31 at 69. The House Report makes no mention that this is a "modification" of a confirmed plan or that there is any discretion to this reduction of the amounts paid under a confirmed plan except as stated in new § 1329(a) itself.

This new ground for modification after confirmation in some respects mirrors the deduction for health insurance premiums allowed by § 707(b)(2)(A)(ii)(I). Chapter 13 debtors with current monthly income less than applicable median family income might argue at confirmation that health insurance is a reasonable and necessary expense based on new § 1329(a)(4) notwithstanding that § 707(b)(2) does not apply to an under median

income debtor.

The new definition of current monthly income in § 101(10A) will affect modifications after confirmation because the income-based tests in § 1325(b) will always look back to the six months before the petition. Postpetition changes in income will not be reflected in any disposable income test analysis that might be appropriate at modification after confirmation.

Amended § 1329(c) could be read to impose the original commitment period without consideration of postpetition changes in the debtor's (or spouse's) income. Under § 1325(b)(1)(B), the commitment period would be based on current monthly income which measures the six months before the petition under § 101(10A) and does not change during the Chapter 13 case.

§ 1330. Revocation of an order of confirmation

(a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.
(b) If the court revokes an order of confirmation under subsection (a) of this section, the court shall dispose of the case under section 1307 of this title, unless, within the time fixed by the court, the debtor proposes and the court confirms a modification of the plan under section 1329 of this title.

No changes to text.