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Chapter 13 Practice and Procedure in Montana

Robert G. Drummond

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I. INTRODUCTION

Financial reorganization under Chapter 13 of the Bankruptcy Code (Code) offers individual debtors unique benefits not available under other chapters of the Code.¹ Chapter 13 gives individual

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debtors the ability to apply a portion of their future earnings to the payment of their debts over an extended period of time. Debtors under Chapter 13 are subject to court supervision and protected from creditors by the automatic stay during the pendency of the bankruptcy. The policy underlying Chapter 13 encourages debtors to pay their debts instead of merely seeking a discharge under Chapter 7 of the Code. This policy benefits both creditors and debtors through a confirmation process that balances these interests. This Article explores the benefits of Chapter 13 to debtors and creditors and is intended to serve as a primer for attorneys representing debtors and creditors. In addition, this Article explores the law and procedures applied to Chapter 13 bankruptcy by examining the statutes and rules of bankruptcy procedure, and their interpretation by the Bankruptcy Court for the Jurisdiction of Montana ("bankruptcy court").

II. BENEFITS OF CHAPTER 13

Chapter 13 offers numerous benefits for individual debtors that are not offered under other sections of the Code. Those benefits include lien stripping of secured debts, protection of non-exempt assets, "super discharge," a codebtor stay of collection actions, an absolute right to dismiss or convert, and a streamlined reorganization procedure. Likewise, creditors are benefitted be-


5. See infra part II.A.
6. See infra part II.B.
7. See infra part II.C.
8. See infra part II.D.
9. See infra part II.E.
10. See infra part II.G.
cause they must be paid at least as much as they would receive if
the bankruptcy estate were liquidated under Chapter 7. Both
creditors and debtors have much more flexibility under Chapter 13
than under Chapter 7.

A. Restructuring Consumer Debts and Lien Stripping

Chapter 13 offers an alternative to reaffirmation or lump-sum
redemption of non-exempt assets.\(^\text{11}\) Paying the allowed value of a
secured claim in a Chapter 13 plan is distinguished from redemp-
tion under Chapter 7 where a debtor must pay, in one cash lump
sum, the value of collateral.\(^\text{12}\) Reaffirmation under Chapter 7 is dis-
cretionary with the creditor. In contrast, Chapter 13 gives the
debtor an opportunity to make payments to the secured creditors
for the value of the allowed claim over the term of the plan.\(^\text{13}\)

Debtors often use the lien stripping provisions of 11 U.S.C.
§ 1322(b)(2) to restructure the terms of debts secured by personal
property. A Chapter 13 debtor may value a vehicle according to its
wholesale value rather than its going concern or cost value.\(^\text{14}\) This
secured claim may be paid over the term of the plan. The debtor
therefore has a powerful tool for dealing with creditors’ claims not
available under other chapters. This “stripdown” of the lien may
allow the debtor to retain a vehicle or other property in a fashion
which is more affordable than reaffirmation or redemption.

B. Protection of Non-exempt Assets

Another benefit under Chapter 13 is the protection of the
debtors’ non-exempt assets. The Chapter 7 bankruptcy trustee has
a duty to collect and reduce property of the estate to money for
distribution to creditors.\(^\text{15}\) The Chapter 13 trustee does not have a
liquidation function.\(^\text{16}\) Retention of non-exempt property is espe-
cially important in the case of ongoing sole proprietorships or of
individuals engaged in business who must rely on business assets
to generate regular income. In view of the liberal exemption stat-
utes in Montana, particularly the generosity of the statutes dealing

the value of their claim through the plan, consent to the treatment of their claim, or receive
their collateral).
\(^\text{13}\) 11 U.S.C. § 1325(a)(5).
\(^\text{14}\) In re Mitchell, 954 F.2d 557, 559-61 (9th Cir. 1992), cert. denied, 113 S. Ct. 303;
with retirement accounts, homesteads, and personal property, many consumer debtors find that most assets are exempt. However, debtors who place a high value on keeping non-exempt assets or who have assets which are necessary for an on-going business or financial reorganization should consider Chapter 13 relief.

Chapter 13 specifically authorizes the debtor who is engaged in business to continue the operations of the business subject to certain restrictions imposed under section 364 of the Code. Allowing the debtor to engage in business protects his ability to generate income by continued operation of the business.

C. Chapter 13 Discharge

Debtors may be able to discharge certain debts under Chapter 13 which would be nondischargeable under other sections of the Bankruptcy Code. If the debtor has substantial obligations which are nondischargeable under other chapters of the Code, such as debts based on taxes, willful or malicious injury to property, or fines, Chapter 13 offers an opportunity to eliminate, reduce, or pay such debts over an extended period of time. In contrast, Chapter 7 liquidation would not protect the debtor from enforcement of these nondischargeable obligations after the case is closed or relief from the automatic stay is granted. In addition, Chapter 13 may be available to individuals who may not be eligible for a Chapter 7 discharge. For example, a person who received a discharge in a Chapter 7 liquidation case within the previous six years may not obtain another discharge in a subsequent Chapter 7 case, but may seek relief and receive a discharge under Chapter 13.

D. Codebtor Stay

Section 1301 of Title 11 of the United States Code provides a stay of collection actions for codebtors in certain instances. The

20. 11 U.S.C. § 1304(b) (1988) (the debtor may continue to use property in the ordinary course of business; property may not be sold unless the court authorizes such action).
22. See, e.g., In re Polk, 12 Mont. B.R. 74, 84-85 (Bankr. D. Mont. 1993) (holding government fines are not excepted from discharge under Chapter 13).
24. Section 1301(a) of the Code provides:
[A]fter 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
stay protects a codebtor who is obligated on a consumer debt which was not incurred in the ordinary course of business.\textsuperscript{25} Therefore, the debtor should consider whether a codebtor exists on any obligations which are owed to creditors. Chapter 13 gives the debtor an opportunity to pay jointly owed debts over time without fear that the creditor will look to the codebtor for collection of its debt.

The protection granted by the codebtor stay is limited, however, because relief from the stay may be granted to allow the creditor to collect any portion of a debt not paid under the Chapter 13 plan. A creditor may also obtain relief from the stay to pursue a codebtor if continuation of the stay will result in irreparable harm to the creditor.\textsuperscript{26} The codebtor stay is limited to consumer debts in which there is an individual codebtor. The stay automatically lifts as soon as the Chapter 13 case is closed or dismissed or the protected property is no longer property of the estate.\textsuperscript{27}

Congress is considering legislation which would modify the provisions of the codebtor stay to create an exception when the debt does not exceed $25,000 and the relief would not be a substantial impediment to an effective reorganization.\textsuperscript{28} This would allow creditors to exercise their rights under state law in instances where a prohibition exists under current federal law.

E. The Automatic Stay

Chapter 13 allows the debtor the opportunity to reorganize his financial affairs under the guidance and protection of the bankruptcy court. The key element of the reorganization process is the automatic stay which gives the debtor protection from collection efforts initiated by creditors. Section 362 of Title 11 provides a stay of certain collection actions.\textsuperscript{29} The automatic stay goes into

\begin{itemize}
  \item the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—
  \begin{enumerate}
    \item such individual became liable on or secured such debt in the ordinary course of such individual’s business; or
    \item the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.
  \end{enumerate}
\end{itemize}


\textsuperscript{26} See \textit{In re} Jacobson, 20 B.R. 648, 650 (Bankr. 9th Cir. 1982).


11 U.S.C. § 362(a) of the Code provides:

\begin{itemize}
  \item [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay,
\end{itemize}

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effect immediately upon the filing of the voluntary petition. After the plan is confirmed, the automatic stay continues in effect consistent with the terms of the plan which binds both the creditors and the debtor. The confirmed plan is binding on creditors, prohibiting collection action after confirmation of the plan. Relief from the stay may be granted only for cause. The stay remains in place during the pendency of the Chapter 13 case, thereby giving debtors an opportunity for relief from creditors who are seeking to collect on certain pre-petition debts owed to them.

F. Payment to Creditors

A debtor's personal sense of morality and personal desire to pay debts should also be considered. Chapter 13 gives the debtors an opportunity to pay their creditors, at least in part, over an extended period of time. Debtors who feel an obligation to pay at least part of their debts may opt for Chapter 13 instead of Chapter 7. Individuals engaged in business may find this especially appropriate in cases where continuation of the business depends on maintaining a suitable working relationship with creditors who would discontinue the working relationship if the debt were dis-

applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgement obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.


charged with no repayment.

G. Streamlined Reorganization

Chapter 13 offers a streamlined and less expensive method of reorganization than that available under other chapters of the Bankruptcy Code. Creditors are not entitled to vote on the confirmation of the plan in a Chapter 13 case. This is distinguishable from Chapter 11 where creditors are entitled to vote on the plan.\(^{33}\) Additionally, no absolute priority rule exists under Chapter 13, making reorganization easier to accomplish.\(^{34}\) Further, a plan can be confirmed 90 days after the meeting held pursuant to section 341 without the procedural hurdles of holding hearings on a plan or preparing a disclosure statement.\(^{35}\) The Montana bankruptcy court has adopted a Local Rule, including a standard form of Chapter 13 plan, which streamlines the confirmation process.\(^{36}\) The rule enables the plan to be confirmed without evidence at a confirmation hearing, and, in some instances, undisputed valuation of collateral securing debts may be disposed of without hearing.

H. Successive Filings

A debtor may receive a discharge under Chapter 13 in addition to receiving a discharge under another chapter of the Code. Chapter 13 is not an absolute bar to a later Chapter 7 or Chapter 13 bankruptcy. In certain instances, a Chapter 7 discharge may be obtained by a debtor who previously has obtained a discharge in a Chapter 13.\(^{37}\)

The United States Supreme Court has held that a debtor does not act in bad faith by filing under Chapter 13 to restructure a mortgage lien following the debtor's discharge in a Chapter 7 case.\(^{38}\) This so-called "Chapter 20" may be useful to debtors who seek to use a Chapter 7 case to discharge unsecured debts followed by restructure of secured and nondischargeable claims under Chapter 13. This also may allow a debtor who exceeds debt limita-

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35. LOCAL BANKR. R. 22 (dealing specifically with Chapter 13).
36. LOCAL BANKR. R. 22.
37. 11 U.S.C. § 727(a)(9) (1988) (a debtor may receive a discharge under Chapter 7 if he received a discharge in a Chapter 13 case in the previous six years if the debtor paid at least 70% of the unsecured claims and was the debtor's best effort).
tions to qualify for Chapter 13.

I. Right to Convert or Dismiss

The circumstances leading up to the filing of a bankruptcy petition may change subsequent to the filing. If so, debtors have an absolute right to convert or dismiss a Chapter 13 case without a showing of cause. This absolute right to convert or dismiss does not exist under other chapters. Therefore, if debtors should either desire to convert to Chapter 7 or dismiss their case, they may do so at their discretion.

III. COMMENCING A CHAPTER 13 CASE

A Chapter 13 case commences with the filing of a voluntary petition by an individual debtor or by a husband and wife. The debtor must be an individual with regular income as defined by the Code. Corporations and partnerships are not eligible for Chapter 13 relief. Furthermore, the Code does not permit creditors to file involuntary petitions under Chapter 13.

The requirements for filing a petition and schedules under Chapter 13 are substantially the same as those under Chapter 7. The debtor must file a petition as required by the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code. The debtor must file schedules reflecting the assets and financial position of the debtor. The debtor is also required to file a plan within 15 days of the filing of the petition.

40. Section 1307 of the Code provides in pertinent part:
   (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.
45. Fed. R. Bankr. P. 1007 (requiring certain lists, schedules, and statements be filed in all cases).
47. Fed. R. Bankr. P. 1007 (the schedules must accompany the petition or be filed within 15 days).
days following the filing of the petition. The failure to timely file the required statements or schedules will result in dismissal of the case.

IV. THE TRUSTEE

The trustee serves as the principal administrator in every Chapter 13 case. The United States Trustee, with approval of the United States Attorney General, appoints one trustee for the jurisdiction of Montana. The trustee collects a portion of the debtor's income and makes payments to creditors in accordance with the confirmed plan. The trustee has the primary responsibility for investigating the debtor's financial affairs, accounting for any property received, examining proofs of claim, objecting to the allowance of improper claims, opposing the debtor's discharge when advisable, furnishing information concerning the estate upon request of interested parties, and making a final report and filing a final account of administration of the estate.

The Chapter 13 trustee is obligated to appear in court and be heard at any hearing that concerns any one of several issues. First, the trustee must be heard at any hearing on the valuation of property subject to a lien. The local bankruptcy rules for the District of Montana require that such valuation hearing be held when the value of the secured claim is in dispute. Second, the trustee must appear and be heard at the hearing concerning the confirmation of the plan; and, in the event a request is made to modify a plan after confirmation, the trustee must appear and be heard concerning justification for amending the plan. The trustee is under

55. Local Bankr. R. 22(l) provides:

Valuation of Secured Claims. The amount of a secured claim may not be litigated at a confirmation hearing. Unless a written consent or stipulation is filed by the affected creditor allowing the fixing of the secured claim for purposes of the Plan in a amount less than the creditor's total claim, the debtor shall move for a valuation hearing pursuant to [Fed. R. Bankr. P.] 3012 at least thirty (30) days prior to the date set for the confirmation hearing by using [Local Bankr. Form] 22. If the creditor fails to file a written objection to the debtor's alleged amount of such secured claim within twenty (20) days of the date of the notice provided by [Local Bankr. Form] 22, the amount of such creditor's secured claim shall be fixed in the amount set forth in the debtor's motion, and the creditor shall be deemed to have waived any objection to such valuation.
a statutory duty to assist and advise the debtor on matters other than legal matters during the Chapter 13 case. In the case of a business, the trustee must investigate the financial condition and the operation of the debtor's business.

Until the confirmation of the plan, the trustee is obligated to hold the interim payments which have been made by the debtor. The trustee returns the interim payments to the debtor if the plan is not confirmed. In cases that are converted after confirmation, the trustee must release interim payments to the debtor who may seek to claim the funds as exempt.

The trustee's fiduciary duty, however, extends to both secured and unsecured creditors. The Chapter 13 trustee holds the avoidance powers under sections 544, 547, 548, and 549 of the Code to initiate actions to set aside certain pre-petition and post-petition conveyances. One decision holds that such powers are vested with the trustee but implies that the debtor may request permission to initiate an avoidance action. However, no statutory authority exists that cloaks the debtor with these avoidance powers.

The trustee has the duty of monitoring the debtor's payments under the plan. In the event the debtor fails to make payment as contemplated in the confirmed plan, the trustee may move to dismiss or convert the case. The trustee, however, holds no authority to modify a confirmed Chapter 13 payment plan.

V. THE DEBTOR'S DUTIES

The Chapter 13 debtor has several unique duties that are specifically required by the Code. Most important, the debtor must commence making payments under the plan thirty days after the plan is filed. Bankruptcy Rule 3015 grants the debtor fifteen days

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60. Arkison v. Plata (In re Plata), 958 F.2d 918, 922 (9th Cir. 1992).
63. Id. at 365-67 (stating "the court adopts the holding above in [In re Driver, 133 B.R. 476, 480 (Bankr. S.D. Ind. 1991)], that a Chapter 13 Debtor lacks standing to exercise the Trustee's § 547 lien avoidance powers, absent a specific grant of authority by a statute or this Court").
64. Id. at 366-67.
65. 11 U.S.C. § 1302(b)(5) (1988) (providing that the trustee must ensure that the debtor commences making timely payments which are required by § 1326).
66. 11 U.S.C. § 1327 (1988) (providing that the provisions of the confirmed plan bind the debtor and each creditor).
67. Section 1326(a) of the Code provides:
after filing of the petition to file a plan.\(^{68}\) The debtor must file a list of creditors,\(^{69}\) cooperate with the trustee,\(^{70}\) and appear at the meeting held pursuant to section 341.\(^{71}\) The debtor has the rights and powers given a Chapter 7 trustee under section 363 of the Code with regard to the use, sale, and lease of property.\(^{72}\)

Debtors may be eligible for relief under Chapter 13 even if they have been debtors within the last 180 days and the case was dismissed.\(^{73}\) The court may examine the refiling on a case-by-case basis.\(^{74}\) Dismissal of a case under section 109(g)(2) is discretionary.\(^{75}\)

The debtor must fall within certain debt limitations specified in the Code in order to be eligible for relief under Chapter 13 of the Bankruptcy Code.\(^{76}\) Legislation has been proposed which contemplates increased debt limitations.\(^{77}\) Any debt, whether disputed or not, is included in the calculation for eligibility purposes.\(^{78}\) Contingent and unliquidated debt is not included in the calculation.\(^{79}\) The court must determine the liquidated amount of any disputed claim prior to making the computation required for eligibility. A claim is not liquidated by virtue of the nature of the claim, but rather, whether it is capable of "ready computation."\(^{80}\) Failure to fall within the debt limitations results in a denial of relief under Chapter 13.\(^{81}\) The court retains jurisdiction to convert the case in

\(\text{(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by the plan within 30 days after the plan is filed.}\)

\(\text{(2) A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of title 28.}\)

\(11 \text{ U.S.C. } \S 1326(a) \ (1988).\)

\(68. \text{ Fed. R. Bankr. P. } 3015.\)

\(69. \text{ 11 U.S.C. } \S 521(1) \ (1988).\)

\(70. \text{ 11 U.S.C. } \S 521(3) \ (1988).\)

\(71. \text{ 11 U.S.C. } \S 343 \ (1988).\)

\(72. \text{ 11 U.S.C. } \S 1303 \ (1988).\)

\(73. \text{ 11 U.S.C. } \S 109(g) \ (1988).\)

\(74. \text{ In re Luna, 122 B.R. 575, 577 (Bankr. 9th Cir. 1991).}\)

\(75. \text{ Id.}\)

\(76. \text{ Section 109(e) of the Code provides in pertinent part: "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than } \$100,000 \text{ and noncontingent, liquidated, secured debts of less than } \$350,000 \ldots \text{ may be a debtor under chapter 13 of this title." } 11 \text{ U.S.C. } \S 109(e) \ (1988).\)

\(77. \text{ S. 540, 103d Cong., 1st Sess. (1993) (raising the debt limitation to } \$1,000,000); \text{ see also } \text{H.R. 2326, 103d Cong., 1st Sess. (1993).}\)

\(78. \text{ 11 U.S.C. } \S 109(e).\)

\(79. \text{ In re Sylvester, 19 B.R. 671, 673 (Bankr. 9th Cir. 1982).}\)

\(80. \text{ In re Loya, 123 B.R. 338, 341 (Bankr. 9th Cir. 1991).}\)

\(81. \text{ In re Bos, 8 Mont. B.R. 114, 116-17, 108 B.R. 740, 742 (Bankr. D. Mont. 1989);} \text{ In} \)
the event the debtor is ineligible for Chapter 13 relief.82

Claims may be split into their secured and unsecured components.83 This splitting of claims is also applicable in the eligibility determination.84 The court may inquire into the extent to which any creditor is secured and calculate the bona fide deficiency claims of undersecured creditors to determine the unsecured debt of a Chapter 13 debtor.85

The Code also contains a provision which makes repeated filings difficult.86 The debtor may be ineligible if he was a debtor in a case which was dismissed within the previous 180 days for willful failure to obey an order of the court if the debtor requested dismissal following a creditor's motion for relief from the stay.87 Application of this prohibition on filing is within the discretion of the bankruptcy court.88

The debtor remains in possession of all assets until confirmation of a Chapter 13 plan.89 The Code does not grant power to the debtor to pursue preferential or fraudulent transfers. Such powers remain with the trustee absent a request by the debtor to pursue such transfers.90 The debtor also continues to keep all property for normal use as contemplated by the plan without losing it to the trustee or to the creditors.91 However, the rules require the debtor to submit periodic reports on income to the trustee.92

82. In re Wenberg, 94 B.R. 631, 636 (Bankr. 9th Cir. 1988).
83. See Bos, 8 Mont. B.R. at 116, 108 B.R. at 742 (holding the unsecured portion of a secured debt should be included in the § 109(e) determination, where timely objection to eligibility is raised before confirmation of the Chapter 13 plan).
84. Langemeier, 8 Mont. B.R. at 47-49.
85. Id.
86. Section 109(g) of the Code provides:
Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) The debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

87. 11 U.S.C. § 109(g); see supra note 86.
89. 11 U.S.C. § 1303.
90. Roberge, 10 Mont. B.R. at 366.
91. 11 U.S.C. § 1303.
92. LOCAL BANKR. R. 22(a) provides: "A monthly financial report shall be filed by every debtor engaged in business and served on the trustee within fifteen (15) days following the
VI. ALLOWANCE AND CLASSIFICATION OF CLAIMS

The various provisions under Chapter 5 of the Code that govern filing of personal claims, allowance of claims, administrative expense claims, secured claims, priorities, codebtor claims, and subordination of claims are applicable in Chapter 13 cases.\(^9\) A filed claim is deemed allowed unless a party in interest objects.\(^4\) In order to have an allowed claim, the creditor must file a proof of claim in writing.\(^8\) The allowed claims may then be classified and paid according to classes in the Chapter 13 plan.\(^6\) Certain provisions of Chapter 5 relate to rarely used post-petition claims for taxes and consumer debts.\(^7\) The trustee has a duty to examine and object to the allowance of improper claims.\(^8\) Objections to claims may, therefore, be filed by the trustee in addition to the debtor.

The debtor may not litigate the validity or amount of a secured claim by confirmation of the plan.\(^9\) Confirmation of the plan will not set the amount of a disputed secured claim. If the debtor objects to the amount of a secured claim, the debtor must give notice to the creditor that the creditor must object to the valuation of the collateral and its treatment in the plan. If the creditor fails to file an objection to the treatment of its claim in the plan, its objection to the valuation is deemed waived, and the plan may be confirmed.\(^10\) This provision has the effect of setting the value of the secured claim by notice to the creditor prior to confirmation of the plan.

The creditor must file a proof of claim to share in the distribu-

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end of each calendar month reflecting all of the debtor's income and expenses, for purposes of establishing the debtor's average monthly disposable income."

97. Section 1305(a) of the Code relates to post-petition claims and provides:
   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.
100. LOCAL BANKR. R. 22(1); see supra note 55.
tion from the trustee.\textsuperscript{101} Claims must be filed within 90 days of the meeting held pursuant to section 341.\textsuperscript{102} The bar date for filing proofs of claims in a Chapter 13 case is strictly construed causing late-filed claims to be denied.\textsuperscript{103} An amendment to a claim that prejudices a class may be denied.\textsuperscript{104} Local Rule 22(e) provides that late-filed claims will be disallowed after notice and an opportunity to respond given by the trustee.\textsuperscript{105} This is distinguished from late-filed claims in a Chapter 7 case which are paid after timely filed claims.\textsuperscript{106} An unsecured creditor that fails to file a claim will be discharged without receiving any payments under the plan.\textsuperscript{107}

The Code specifically provides that the plan may classify claims.\textsuperscript{108} The classification must treat similarly situated claims in a similar fashion.

The debtor's Chapter 13 plan will likely provide for the payment of several different types and classifications of debts. The standard form of plan mandated by the Local Rules provides that secured claims shall be paid prior to priority claims, which shall be paid prior to unsecured claims. If a debtor seeks to designate payments to any class in a fashion that is not contemplated by the Local Rules, the debtor must seek authority from the court or trustee to use a different form of plan.\textsuperscript{109}

Certain limitations exist on the binding effect of the confirmed plan relative to the amount of the claim. The debtor cannot bind the secured mortgage holder to the secured claim in the plan if the court later determines the amount of the secured claim to be dif-

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\textsuperscript{102} Fed. R. Bankr. P. 3002(c) (timely filing).
\textsuperscript{103} In re Tillman, 10 Mont. B.R. 63, 64 (Bankr. D. Mont. 1991).
\textsuperscript{105} Local Bankr. R. 22(e) provides:

Late Filed Claims. Late filed proofs of Claim shall be deemed disallowed, without need for formal objection by the trustee or a hearing, if the trustee sends a notice to the late filing creditor using [Local Bankr. Form] 21. A failure to respond to the notice within twenty (20) days of the date of said notice shall be deemed an admission the subject claim is disallowed.

\textsuperscript{108} Section 1322(b)(1) of the Code provides:

(1) designate a class or classes of unsecured claims, as provided in [11 U.S.C. § 1122], 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 . . . .

\textsuperscript{109} See Local Bankr. R. 22(d).
ferent. Such a result would be unlikely where the confirmation hearings are held after the claims bar date.

The plan may designate classes of unsecured claims, but may not discriminate unfairly among creditors in the same class. The court considers four basic criteria when determining whether the discrimination is unfair under section 1322:

1. Whether the discrimination has a reasonable basis;
2. Whether the debtor can carry out a plan without the discrimination;
3. Whether the discrimination is proposed in good faith; and
4. Whether the degree of discrimination is directly related to the basis or rationale for the discrimination.

If the above factors are met, the court may allow discrimination on a case-by-case basis.

Co-signed consumer debts may be classified separately. Non-dischargeable maintenance debts have been classified differently from other claims. Although there is currently no definitive statement from the Montana court, some courts have reasoned that small claims may be paid ahead of larger claims for administrative convenience. Medical bills may be paid while other unsecured claims receive nothing. A supplier’s claim may be paid before other unsecured creditors if the supplier agrees to provide post-petition financing. Student loans may be treated differently in certain cases. Additionally, child support payments may be classified differently than other unsecured claims.

Hardship discharges of nondischargeable student loans are authorized by the Code. The discharge in a Chapter 13 case, however, is not granted until the completion of the plan. The determinations are made on a case-by-case basis.

110. *In re Hobdy*, 130 B.R. 318, 321 (Bankr. 9th Cir. 1991).
111. *See Western Equities, Inc. v. Harlan* (*In re Harlan*), 783 F.2d 839, 840 (9th Cir. 1986); *Amfac Distrib. Corp. v. Wolff* (*In re Wolff*), 22 B.R. 510, 511-12 (Bankr. 9th Cir. 1982).
nation of whether a hardship discharge may be granted, therefore, must wait until the completion of payments under the plan.122

A number of debtors have proposed plans which would pay certain claims "outside of the plan."123 This procedure more correctly makes reference to payments which are made directly by the debtor rather than payments made by the trustee. Under the standard plan adopted by the Local Rules in Montana, debtors are allowed to pay unimpaired claims directly which spares the expense of paying a trustee's fee. Impaired claims and arrearages must be paid through the trustee.124 The Montana bankruptcy court has suggested that all claims must be paid through the trustee.125 Paying these claims directly, however, generally provides more favorable treatment than to the claims being paid through the Chapter 13 trustee. Courts have denied confirmation to plans which pay certain claims outside of the plan, having determined them to violate section 1322(b)(1).126 Those courts have reasoned that such treatment discriminates among creditors of the same class.

VII. CHAPTER 13 PLAN

The cornerstone of the Chapter 13 bankruptcy is the debtor's repayment plan. Only the debtor may file a plan.127 The plan must be filed with the petition or within 15 days after the filing of the petition, unless the time for filing is extended by the bankruptcy court.128 Failure to timely file the plan may be "cause" for conversion or dismissal.129 The plan may also be modified after confirmation.130

123. See In re Gall, 12 Mont. B.R. 133, 133-34 (Bankr. D. Mont. 1993) (holding all claims must be paid through the plan; therefore, no distinction exists between payments "inside" or "outside" the plan).
124. Id. at 802-03; Greenspan v. Davis (In re Glasper), 28 B.R. 6, 7 (Bankr. 9th Cir. 1983), appeal dismissed, 746 F.2d 1485 (9th Cir. 1984).
125. See Gall, 12 Mont. B.R. at 134.
130. Section 1329(a) of the Code provides:
   At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on 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
The Code allows for substantial flexibility with respect to the provisions of the plan.\textsuperscript{131} The rationale for such flexibility is that debtors should be able to tailor the plan according to their particular circumstances and needs.\textsuperscript{132} The requirements for modification after confirmation are the same as for the confirmed plan.\textsuperscript{133}

Section 1322 of the Code sets certain requirements the debtor must adhere to in proposing a Chapter 13 plan. Three specifics must be met in each Chapter 13 plan:

(1) All Chapter 13 plans must provide for the submission of all or a portion of future income or other future earnings of the debtor as is necessary for the execution of the plan.\textsuperscript{134}

(2) The plan must provide for full payment of all claims entitled to priority.\textsuperscript{135} Claims entitled to priority must be paid; however, such payments may be deferred if the creditor agrees to a different treatment.\textsuperscript{136} This provision applies to all allowed claims under section 507 of the Code including administrative claims, wage claims, and unsecured tax claims.\textsuperscript{137}

(3) If claims are classified, each claim within a particular class must be afforded the same treatment.\textsuperscript{138} If payments to any class are deferred, the present value of payments must equal the full amount of the claim with the exception of unsecured claims which must be paid at least what they would have received in a Chapter 7 liquidation.\textsuperscript{139}

Plans which provide a "zero payment" to the unsecured class may be confirmed.\textsuperscript{140} Claims may be satisfied in a fashion other than the submission of income. For example, claims may be satisfied by surrender of property of the estate or property of the 

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  \item provided for by the plan;
  \item (2) extend or reduce the time for such payments; or
  \item (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.
\end{itemize}

\textbf{11 U.S.C. § 1329(a) (1988).}

\textsuperscript{131} \textit{See, e.g., In re McGinnis, 3 Mont. B.R. 343, 345 (Bankr. D. Mont. 1986).}

\textsuperscript{132} \textit{See id. at 346.}

\textsuperscript{133} 11 U.S.C. § 1329(b) (1988).


\textsuperscript{136} \textit{See In re Schenk, 3 Mont. B.R. 317, 318-19, 67 B.R. 137, 138-39 (Bankr. D. Mont. 1986) (requiring an agreement in the record that the IRS agrees to take less than the amount of its unsecured priority proof of claim or the plan cannot be confirmed).}


\textsuperscript{140} \textit{Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118, 1121-22 (9th Cir. 1983).}
debtor.\textsuperscript{141}\footnote{141. 11 U.S.C. § 1325(a)(5)(C) (1988).} Debtors are directed to include a provision which will ensure that the trustee will have funds available to pay claims allowed under the plan.\textsuperscript{142}\footnote{142. 11 U.S.C. § 1322(a)(1).} All priority claims must be paid in full under the plan.\textsuperscript{143}\footnote{143. 11 U.S.C. § 1322(a)(2).} The form of plan adopted under Montana Local Bankruptcy Rule 22(d) specifically provides for the submission of all the debtor’s future disposable income. The use of the form prescribed in the Local Rules is mandatory; however, the court may make exceptions to its use upon application by the debtor.\textsuperscript{144}\footnote{144. \textit{LOCAL BANKR. R.} 22(d) provides: Form of Plan. The form of Plan shall conform to [Local Bankr. Form] 19 unless, for good cause, the debtor obtains leave from the trustee or the Court to submit an alternative form of Plan. Requests for such leave from the Court shall be made by employing [Local Bankr. Form] 20 accompanied by a proposed form of Order (see [Local Bankr. Form] 20-A).}

The form of plan required by Montana’s Local Rules requires only a few entries. The debtor must only date the plan, enter the amount of the secured claims and interest rate that will be paid, and enter the amount of the total distribution to be made to the unsecured creditors. The standard form of plan contemplates that the trustee will calculate the monthly payments to be made to the secured creditors. The trustee will distribute the monthly payments among those creditors in a pro rata fashion until the secured claimants are paid in full. The debtor must also insert the total amount that would be paid to unsecured creditors in a Chapter 7 case in a hypothetical liquidation and must plan to pay at least this amount with interest to the unsecured creditors through the Chapter 13 plan.\textsuperscript{145}\footnote{145. \textit{In re} Highland Acres, Inc., 9 Mont. B.R. 161, 163-65 (Bankr. D. Mont. 1991).}

Certain post-petition claims may be paid through the plan. The Chapter 13 plan may provide for the payment of post-petition tax claims or certain consumer debts which were incurred during the pendency of the Chapter 13 case.\textsuperscript{146}\footnote{146. 11 U.S.C. § 1322(b)(6) (1988) (allowing payment of claims incurred pursuant to 11 U.S.C. § 1305). Section 1305(a) of the Code provides: 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. 11 U.S.C. § 1305(a) (1988).}

The plan may provide for the assumption or rejection of executory contracts and unexpired leases by the debtor or the trust-
This action need not be undertaken by a separate motion and hearing.

Property of the estate vests with the debtor upon confirmation of the plan. The plan may contemplate, however, that property vest in some other entity, such as a secured creditor. Under this method, a claim may be satisfied by the surrender of property to a secured creditor.

The Code provides that the trustee shall make payments to creditors under the plan. The trustee collects and holds interim payments until confirmation of the plan. Upon confirmation the trustee disburses funds according to the plan. Thus, the Code anticipates that in the bulk of Chapter 13 cases, the trustee will act as a disburse agent and distribute the payments to the creditors. The Code provides that in Chapter 13 cases, a percentage of payments made under the confirmed plans must be set aside for payment of the trustee's fee and expenses.

The plan may not be used to unreasonably stall or harass the lawful efforts of creditors where no justification exists. The plan may not modify the claim secured only by a security interest in the debtor's principal residence except as to the curing of defaults. This rule does not apply, however, in the event that the creditor has a security interest in other collateral in addition to the residence. With regard to residential home lenders, the plan may not provide for modification of the mortgage, but may allow the

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148. Section 1327 of the Code provides:
   (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.
152. FED. R. BANKR. P. 3021.
debtor to cure any arrearages owed to the creditor with interest.\textsuperscript{158} The trustee or the creditors may, however, propose a modified plan after confirmation.\textsuperscript{159} The trustee may propose a modified plan which increases payments commensurate to a debtor's increased disposable income even if an objection was not raised by the trustee or a creditor at the time of confirmation.\textsuperscript{160}

A. Duration of Plan

The mandatory limitation on Chapter 13 debtors regarding the duration of the plan is contained in section 1322(c) of Title 11 of the Code.\textsuperscript{161} That section limits the period of plans to no longer than three years unless the court allows a longer period for cause. The longer period may not extend beyond five years. The Court routinely allows plans to extend up to sixty months for good cause. The plan may be confirmed for a period of less than thirty-six months if all of the creditors' claims will be paid in full with interest.\textsuperscript{162}

B. Optional Provisions Under Section 1322(b)

Subject to the mandatory and prohibited provisions, there are many variations of the contents of the plan. The Code specifies nine optional provisions that may be included in the plan,\textsuperscript{163} but it

\textsuperscript{160} McDonald v. Louquet (In re Louquet), 125 B.R. 267, 268 (9th Cir. 1991).
\textsuperscript{161} Section 1322(c) of the Code provides: "The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." 11 U.S.C. § 1322(c) (1993).
\textsuperscript{163} Section 1322(b) of the Code states:

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

(1) designate a class or classes of unsecured claims, as provided in [11 U.S.C. § 1122], 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
is important to appreciate that the list is not exhaustive.

Claims of secured or unsecured creditors may be modified.\textsuperscript{164} Prior defaults may be cured or waived; however, a pre-petition foreclosure sale prevents the cure of an antecedent default.\textsuperscript{165} Every secured creditor must be paid interest at a contract rate "if the contract so provides."\textsuperscript{166} Under the standard form of plan, the payment of secured claims which accrue interest prior to the other classes of claims should enhance the distribution to the unsecured claimants. This method will minimize interest expense to the debtor. An alternative form of plan may only be used after receiving authorization from the court or the trustee.\textsuperscript{167} The plan adopted provides for payment of secured claims, followed by priority claims, followed by unsecured claims.\textsuperscript{168}

Among the largest advantages of Chapter 13 is the ability of debtors to propose plans in which defaulted installments on residences will be repaid over a reasonable period of time.\textsuperscript{169} In this way debtors will not lose the substantial equity in residences which has been built up through years of regular mortgage payments. Debtors may be able to use the provisions of section \textsuperscript{1322(b)(5)} to cure any past defaults on the mortgage up until the time of sale.\textsuperscript{170} This curing of defaults results in reinstatement of the mortgage on its original terms. Therefore, if the payments due under the Chap-

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\item[(6)] provide for the payment of all or any part of any claim allowed under 11 U.S.C. \textsection{} 1305;
\item[(7)] subject to 11 U.S.C. \textsection{} 365, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
\item[(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;
\item[(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
\item[(10)] include any other appropriate provision not inconsistent with 11 U.S.C. \textsection{}\textsection{} 101-1329.
\end{itemize}


\textsuperscript{164} 11 U.S.C. \textsection{} 1322(b).

\textsuperscript{165} In re Braker, 125 B.R. 798, 800 (Bankr. 9th Cir. 1991).


\textsuperscript{167} Local Bankr. R. 22(d); see supra note 144.

\textsuperscript{168} Administrative claims must be paid prior to other classes of claims. See Shorb v. Bishop (In re Shorb), 101 B.R. 185, 186-87 (Bankr. 9th Cir. 1989). This scheme of payment may enhance the amount of the distribution to the unsecured class. In re Ferguson, 134 B.R. 689, 696 (Bankr. S.D. Fla. 1991).

\textsuperscript{169} See Nutting, 2 Mont. B.R. at 399.

\textsuperscript{170} See In re Hurt, 158 B.R. 154 (Bankr. 9th Cir. 1993).
After 13 plan are concluded satisfactorily, debtors are entitled to retain their homes and the equity they hold in them.

Courts have looked to several factors to determine the appropriate length of time to cure a default. 171 Courts use five factors to determine the reasonableness of time to cure a default:

1. the debtor's payment record;
2. the length of the repayment period on the original obligation;
3. the reason for arrearage;
4. the nature of the security; and
5. whether the proposal to cure represents the debtor's best efforts.

If the plan provides for the curing of default, the plan must also provide for the payment of current mortgage payments while the case is pending. 172 The plan may provide for the cure of defaults within a reasonable time. 173 Three years may be a reasonable time to cure defaults. 174 Currently, unimpaired monthly payments to secured creditors may be made directly, thus saving payment of a trustee's fee. 175

The plan may also provide for the assumption of executory contracts and leases. 176 Section 1322(b)(7) provides that Chapter 13 rejection of executory contracts or leases operates apart from rejection under section 365. 177 Therefore, requirement that separate approval be given by the court for rejection of executory contracts is unnecessary and inappropriate in a Chapter 13 case. 178 Such assumption or rejection may be accomplished by confirmation of the plan. 179

171. See In re King, 7 B.R. 110, 112-13 (Bankr. S.D. Cal. 1980), aff'd 23 B.R. 779 (Bankr. 9th Cir. 1982); see also Seidel v. Larson (In re Seidel), 752 F.2d 1382 (9th Cir. 1985) (plan could not provide for five-year installment payment of home mortgage with balloon payment at the end of the period where the original due date had expired without acceleration prior to the filing of the Chapter 13 petition); In re Van Gordon, 4 Mont. B.R. 63, 65, 69 B.R. 545, 546 (Bankr. D. Mont. 1987) (three years to cure mortgage default was reasonable time); In re Schenk, 3 Mont. B.R. 317, 321, 67 B.R. 137, 139 (Bankr. D. Mont. 1986) (60 months to cure default unreasonable).
172. In re Glasper, 28 B.R. 6, 6-7 (Bankr. 9th Cir. 1983), appeal dismissed, 746 F.2d 1485 (9th Cir. 1984).
173. Id.
174. See Van Gordon, 4 Mont. B.R. at 65, 69 B.R. at 546; see also supra note 171.
175. See Foster v. Heitkamp (In re Foster), 670 F.2d 478, 486 (5th Cir. 1982). Local Bankruptcy Form 19 provides for direct payment of unimpaired secured claims.
176. Benevides v. Alexander (In re Alexander), 670 F.2d 885, 888-89 (9th Cir. 1982).
VIII. CONFIRMATION OF THE PLAN

A. Requirements for Confirmation

Any interested party may object to confirmation of the plan. However, the creditors have no right to vote to accept or reject the plan, and the court is not bound to confirm the plan in the absence of such objections. The debtor has the burden of proving that each of the elements in section 1325 confirmation has been met. The burden is not on the objecting party.

Several requirements exist for confirmation under the Code.

182. Section 1325 of the Code provides:

(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 the holder of such claim retain the lien securing such claim; 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; 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 comply with the plan.

(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 period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) for purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of
By enacting the mandatory language under the section, Congress left the bankruptcy court with no discretion on confirmation if the criteria are met. If the plan meets the requirements of section 1325(a), the bankruptcy court shall confirm the plan. The requirements are:

1. The plan must comply with all provisions of Chapter 13 and the other applicable portions of the Code.
2. All fees and charges required by the Code must be paid prior to confirmation. This includes fees assessed by the clerk of the bankruptcy court.
3. The plan must be proposed in good faith and not by any means forbidden by law. The Code does not define good faith; rather, good faith requires a case-by-case inquiry. Zero percent payment plans may be approved if the debtor acted in a fair and equitable fashion in proposing the plan; proposing a zero percent payment plan by itself does not indicate lack of good faith. Further, it is not bad faith to file a Chapter 13 action to discharge debts that would not be dischargeable under Chapter 7. However, the Ninth Circuit Bankruptcy Appellate Panel has reasoned that if the plan proposes a minimal payment of a nondischargeable debt and contemplates discharge at the end of the plan, the court may give the plan heightened scrutiny.
4. The value, as of the effective date of the plan, of property to be distributed on account of each allowed unsecured claim, cannot be less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7.

The court must

expenditures necessary for the continuation, preservation, and operation of such business.

(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.


184. See McGinnis, 3 Mont. B.R. at 348 (the court must determine that the requirements of §§ 1322 and 1325 have been met "regardless [of] whether a valid objection to the Plan has been asserted by the creditor").
187. In re Street, 55 B.R. 763, 764 (Bankr. 9th Cir. 1985).
188. Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118, 1121 (9th Cir. 1983); see also Bank of Am. Nat'l Trust & Savings Ass'n v. Slade (In re Slade), 15 B.R. 910, 912 (Bankr. 9th Cir. 1981); In re Dahl, 3 Mont. B.R. 157, 159-60 (Bankr. D. Mont. 1986).
189. See Street, 55 B.R. at 764.
190. In re Warren, 89 B.R. 87, 95 (Bankr. 9th Cir. 1988) ("particular scrutiny").
determine the value of the nonexempt assets and make a hypothetical liquidation and distribution. This liquidation amount must be paid on unsecured claims over the period of the plan. The Chapter 7 liquidation analysis must be made at the time of the confirmation hearing rather than at the time of discharge. Under the form of plan adopted in the Local Rules, the debtor must calculate the minimum distribution to unsecured creditors and insert the total amount into the plan. If, after the final payment is made by the debtor, this amount has not been paid to the unsecured class, the debtor may be required to make an additional payment.

(5) The plan may modify the rights of secured creditors; however, if it impairs the right of secured creditors, the affected creditor must either accept the plan or retain its lien and receive the present value of its secured claim in future payments or property. The debtor and secured creditor may agree to treat the claim in a particular fashion. In the alternative, the debtor may pay the creditor the value of its allowed claim, over time, with interest. The debtor may surrender the collateral; however, the creditor must receive at least the value of its collateral, and any remaining balance owed by the debtor could be treated in the unsecured class.

(6) The debtor must be able to make all payments and otherwise comply with the terms of the plan. The debtor, therefore, has the burden of demonstrating the feasibility of the plan. If the trustee or an unsecured creditor objects to confirmation of the plan, the court must find that the unsecured claim will be paid in full or that the plan provides that all of the debtor's disposable income within the first three-year period will be applied to make payments. Disposable income is defined to be an income that is not reasonably necessary for the maintenance or support of the

195. See In re Rose, 2 Mont. B.R. 238, 238-39 (Bankr. D. Mont. 1986); see also In re Roberts, 8 Mont. B.R. 333, 335 (Bankr. D. Mont. 1990). Under Local Bankruptcy Form 19, the creditor would have to file a proof of claim proving the unsecured portion of its claim.
debtor or the debtor's dependents. This requires consideration of income from all sources. The debtor may not commit income to the purchase of "luxury goods" or payment of unnecessary expenses. Unnecessary expenses may include tithing, luxury items, and charitable contributions. The trustee or creditor may seek a modification in the event the debtor's disposable income increases after confirmation. The disposable income requirement is, however, limited to the first thirty-six months of the plan. The debtor need not commit all of his disposable income to the plan in instances where all of the creditors' claims will be paid in full. A debtor's plan may not be confirmed where he has an excessive cushion of income over and above his expenses when his creditors are not paid in full.

A confirmed plan is binding on the debtor and all creditors. The trustee does not have the authority to make alternative payment arrangements or modify the plan in the event the debtor desires to skip a payment or modify his plan. Deviation from the payment or distribution scheme in the plan is appropriately dealt with as a modification of a confirmed plan. A modification is

208. Marshall, 8 Mont. B.R. at 210-11, 111 B.R. at 327 (cushion of $469 per month is excessive).
210. 11 U.S.C. § 1327(a) (1988) (the plan is binding on debtor and creditors; debtor is bound by the payment scheme in the confirmed plan).
211. Subsections 1329(a) and (b) of the Code provide:
    (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.
(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of [11 U.S.C.] 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.
subject to court approval and must meet the same requirements for confirmation as were required for the confirmed plan. Confirmation makes all issues which could have been decided at the hearing res judicata. Upon confirmation, the court may order any entity from whom the debtor receives income to pay a sufficient portion of the debtor's income to the trustee to make plan payments. The trustee, or debtor, is also entitled to request a wage withholding order. A withholding order benefits the debtor as well as the creditor because it relieves the debtor of the responsibility of making a payment each month.

A confirmation hearing is held after notice is issued to all interested parties. An abbreviated hearing may be held in the absence of an objection by the trustee or an interested party. The Code does not require the debtor's presence at the abbreviated confirmation hearing. The trustee, however, is required to attend a hearing on confirmation of the plan.

B. Good Faith Standard

The court must determine that the plan has been filed in good faith to confirm the plan. Good faith depends upon all of the circumstances surrounding the filing and proposed plan in the new case. The court will be reluctant to make the determination that a case was not filed in good faith without examining all mitigating factors, including events leading up to the filing, the proposed treatment of creditors, and whether the debtor has misrepresented facts or unfairly manipulated the Bankruptcy Code.

Successive Chapter 13 filings may constitute grounds for finding that the debtor's plan in the second Chapter 13 case is not filed in good faith. However, successive filings alone do not constitute bad faith. Many factors underlie a determination that a

15. 11 U.S.C. § 1325(c).
17. Local Bankr. R. 22(c) provides: "Confirmation of Plans. If no objections to confirmation have been filed, or if any objections are withdrawn at the hearing, and the trustee has filed a report recommending confirmation, the Court may confirm a Plan at the time set for the confirmation hearing without further evidence."
19. In re Chinichian, 784 F.2d 1440, 1441 (9th Cir. 1986).
20. In re Goeb, 675 F.2d 1386, 1390 (9th Cir. 1982).
21. See In re Metz, 820 F.2d 1495, 1497 (9th Cir. 1987).
22. Id.
The debtor has filed in good faith. The court may look to the following factors:

1. The amount of the proposed payments and the amount of the debtor's surplus;
2. The debtor's employment history, ability to earn, and likelihood of future increases in income;
3. The probable or expected duration of the plan;
4. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;
5. The extent of preferential treatment between classes of creditors;
6. The extent to which secured claims are modified;
7. The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
8. The existence of special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
10. The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
11. The burden which the plan's administration would place upon the trustee.

These factors, or a combination of them, may serve as a basis of denying confirmation or for dismissal of a case. The Montana court has looked to the percentage to be paid on unsecured claims as well as the nature of the debts and income committed to the plan to determine whether a case has been filed in good faith.

C. Effect of Confirmation

When property of the estate vests in the debtor upon confirmation, it does so “free and clear of any claim or interest of any creditor provided for by the plan.” If a secured creditor who has

223. Chinichian, 784 F.2d at 1445.
229. Section 1327(c) of the Code provides: “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.”
not filed a claim is not paid in the plan, (1) section 1327(c) is not applicable, (2) the property vested in the debtor is subject to the secured creditor's lien, and (3) the secured creditor may seek relief from the automatic stay to enforce the contractual right to payment. The form of the plan prescribed by the Local Rules does not provide for payment to each allowed secured claim, except those the debtor specifies for payment. Allowed secured claims must be paid, in some fashion, through the plan. The Chapter 13 confirmation standards require that the plan also provide for the continuation of the lien unless the secured creditor accepts some other provision under the plan or the collateral is surrendered. Therefore, the plan usually provides that the security interest continue in the collateral after confirmation either to induce secured creditors to accept the plan or, in the absence of acceptance, to meet the requirements for confirmation.

Neither the Bankruptcy Rules nor the Bankruptcy Code indicates a specific time for the confirmation hearing. In the jurisdiction of Montana, the confirmation hearing is held after the claims bar date which is scheduled ninety days after the section 341 creditors' meeting. After the claims bar date, the trustee can pay creditors according to which claims are allowed. Confirmation prior to the claims bar date would lead to a post-confirmation modification in almost every case because the actual amount of the allowed claims would not be known until that time.

IX. Conclusion

Chapter 13 is becoming more important as debtors and creditors discover its advantages. Chapter 13 offers debtors a flexible method of reorganizing and discharging their debts. Creditors benefit by being paid amounts exceeding the amount they would be paid in a liquidation. Furthermore, the adoption of Montana's Local Rules has streamlined the confirmation process. Counsel can now offer their clients a quick and efficient method of reorganizing their clients' financial affairs as well as the protection of the Bankruptcy Code.