

A NOTE ON CHAPTER 13 PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA

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I. INTRODUCTION

The purpose of this article is to document local practice in Chapter 13 cases in the Middle District of Alabama. I will assume that the reader has a good grasp of the provisions of Chapter 13 of the Bankruptcy Code. I recommend the treatise written by Keith Lunden on Chapter 13 practice. For counsel looking for a more basic text, I highly recommend the Bankruptcy Nutshell written by David Epstein.

II. THE PLAN

The Middle District has, by local rule, prescribed a form for Chapter 13 Plans. They are available in several different formats and may be downloaded from the Court's website. I recommend that practitioners use the "fillable" Chapter 13 Plan as it automatically performs the mathematical calculations.

The topic of residential mortgages arises frequently. It is usually required that regular monthly mortgage payment should be made directly by the debtor to the mortgagee. If there is a prepetition arrearage, the amount of the arrearage, the interest rate and the specified monthly payment should be set forth in the plan. Secured creditors who hold residential mortgages should file a separate claim for the arrearage. If the regular monthly payment is to be made directly to the mortgagee, it is not necessary to file a claim for the regular payments. The Chapter 13 Trustee will pay the mortgage arrearage from payments made by the debtor, while the regular monthly payments should be made directly by the debtor to the mortgagee.

If a debtor accrues a postpetition arrearage, he may amend his plan to provide for it as well, subject to the right of the Trustee and the mortgagee to object. Amendments to Chapter 13 Plans do not require a motion when the amendment is made prior to confirmation of the Plan. On the other hand, amendments made after confirmation require a motion. Such motions should be made pursuant to our "negative notice" provisions. *See*, LBR 3015(d), 9007-1. All Amended Plans should clearly indicate that they are amended, should be dated and served upon all parties in interest. It is a good practice to indicate by way of underscoring, or use of bold type, any change from a prior plan.

Debtor's counsel should bear in mind that they do not have an unqualified right to amend a Plan after confirmation to provide for a post petition arrearage. If the mortgagee objects, and if the debtor cannot prove the feasibility of his plan, the case may be dismissed. Moreover, second amended plans are rarely confirmed over the objections of the mortgagee.

When there is a variance between a filed secured proof of claim and an arrearage amount set forth in a Chapter 13 Plan, the Trustee will pay the proof of claim amount. If a debtor disputes the amount claimed by the creditor he should promptly file an objection to the claim or prevail upon the secured party to amend its claim. If the variance between the proof of claim amount and the plan amount causes a plan to become infeasible, the Chapter 13 Trustee will move to modify the Plan and increase the payment.

If a debtor files a 100% plan, the Chapter 13 Trustee will make adjustments in the event the total of the unsecured claims filed is different from amount of unsecured debt reported by the debtor. If the filed claims are less than the amount reported, the Trustee will continue to collect the plan payment amount and creditors will be paid on an accelerated basis. On the other hand, if the total of the claims actually filed is greater than the amount reported by the debtor, the Chapter 13 Trustee will move to amend the plan to increase the amount of the plan payments so that the Plan will pay out within 60 months. It is a good practice to calculate the plan payment amount using less than 60 months so that if there is a minor variance, it will not be necessary to amend the plan.

If a debtor files a composition plan, that is one which pays unsecured creditors less than 100%, variances between the amount of the claims as filed and the unsecured debt reported by the debtor, are resolved by adjusting the percentage payout to the unsecured creditors, either up or down as appropriate. If the debtor seeks to pay a certain percentage to his unsecured creditors, he should monitor the claims register and consult with the Chapter 13 Trustee as appropriate. For example, if a debtor seeks to pay at least 70% to his unsecured creditors to avoid the six-year bar of 11 U.S.C. § 727(a)(9)(B), he may need to increase his Plan payments accordingly. For example, if a debtor files a Chapter 13 Plan which states that the unsecured creditors will be paid 70% and that he will make payments in the amount of \$200 per month for 60 months, the creditors may not in fact receive 70% if a \$200 payment is not sufficient. It is the debtor's responsibility to monitor the plan and make adjustments as necessary. In general, the Chapter 13 Trustee will amend the plan only when necessary to comply with the provisions of the Code.

III. MEETINGS OF CREDITORS

All debtors are required to attend a meeting of creditors. The date, time and place of the meeting of creditors will be indicated on the Notice of Commencement of Case which is mailed several days after the filing of a bankruptcy case. If counsel need to reschedule a meeting of creditors, she should telephone the Chapter 13 Trustee and obtain a new date. It is the responsibility of debtor's counsel to send notice to all creditors and file proof of service. See, LBR 2003-1, Local Form 2. Counsel should not move the court for a continuance unless he has first attempted to resolve the matter with the Chapter 13 Trustee. Counsel should bear in mind that continuances of 341 meetings inconvenience the Chapter 13 Trustee, the Court and parties in interest. Counsel should not request continuances unless there is no reasonable alternative

In extraordinary circumstances, the court may excuse a debtor's personal appearance at a meeting of creditors. In lieu of a personal appearance, she may be permitted to testify telephonically or by way of interrogatories. The Bankruptcy Administrator has form interrogatories which may be used. See. LBR 2003-1(d). Motions to excuse a debtor's personal appearance should be filed at the earliest practicable date. Excuses based on medical necessity should be supported by a letter from a physician and those based upon military deployment abroad should be supported by copies of orders. Debtors who are unable to appear due to incarceration are usually not excused, unless they are in a joint case with a spouse who can appear and give testimony.

IV. DISMISSALS

Approximately 60 percent of Chapter 13 cases filed in this district terminate by way of dismissal rather than discharge. I suspect that this is due in large part to the fact that many of the debtors are not properly qualified at the outset. That is, many do not have sufficiently regular income to fund a Chapter 13 Plan. See 11 U.S.C. § 109(e).

Most Chapter 13 dismissals are initiated by the Chapter 13 Trustee filing a Motion to Dismiss as a result of the debtor's failure to make Plan payments. Counsel who dispute the Trustee's allegation of a default in Plan payments should attach proof of payment to their response. Our Local Rules require debtors to retain proof of payment so that disputes may be promptly resolved. A lawyer may not deny an allegation of monetary default in Plan payments unless he has a good faith basis to do so. See Rule 9011, Fed. R. Bankr. P.

In those instances where a debtor falls behind in his Plan payments yet seeks to remain in Chapter 13, counsel should promptly contact the Chapter 13 Trustee with a concrete proposal to resolve the problem. Prompt and forthright communication with the

Chapter 13 Trustee is the best way to resolve issues centering on defaults in Plan payments.

The Trustee's motion to dismiss is usually filed pursuant to our negative notice provisions. See LBR 1017-1(d). If a response is not filed within 20 days of service of the motion, an order of dismissal will be issued without further notice or hearing. Lawyers who move to vacate an order of dismissal must show not only a good faith basis to oppose the motion to dismiss but also a good cause as to why a response was not filed within the original 20 days of service of the motion.

After monetary default, the second most common basis for the dismissal of a case is the failure to file schedules, statements or papers required by the Code and the Rules. The recent overhaul of the Bankruptcy Code substantially increased the burdens upon debtors and their lawyers to file papers with the Court. It is the Court's practice to send a "Notice of Deficiency" to debtor's counsel who have not filed all of the required papers. In most instances, no other notice is sent. Therefore, a case may be dismissed if all of the required papers are not timely filed with the Court. Counsel should not assume that the Court will vacate an order of dismissal where the required papers are filed after the applicable due date.

On occasion, counsel run into difficulty because they have not filed a written response to a motion to dismiss, even if the underlying concern has been addressed. For example, assume that the Chapter 13 Trustee has filed a motion to dismiss because the debtor has not amended his plan to deal with a secured claim which has been filed but which was not provided for in the original Chapter 13 Plan. Assume further the counsel for the debtor promptly files an Amended Plan dealing with the claim, thereby resolving the difficulty. Unfortunately, our system does not interpret the substance of those pleadings and papers filed with the Court. If a motion to dismiss is filed, the debtor must file a timely response to the motion to dismiss, and properly reference or link the response to the motion, or an order of dismissal may result.

V. TAX RETURNS

The 2005 amendments to the Code require that the Debtor provide a copy of his most recent tax return to the Chapter 13 Trustee not later than 7 days prior to the meeting of creditors. 11 U.S.C. § 521(e)(2)(B). The tax return should not be filed with the Court. Rather, the tax return should be sent, via e-mail, to the Chapter 13 Trustee as follows: "taxreturns@ch13mdal.com."

VI. ATTORNEY FEES

For many years this district has provided, by way of standing order, a “no look” attorney fee. This means that the debtor’s lawyer can claim a fee in an amount set by standing order without filing an application for attorney’s fees pursuant to 11 U.S.C. § 330. This is done because it is believed that Chapter 13 cases are sufficiently fungible so as permit a one size fits all type fees. This spares the debtors’ attorneys the trouble of filing such applications and the Court the time of reviewing them.

While the Court prescribes a “no look” fee, counsel should not automatically charge the maximum fee in every case. It is expected that in smaller cases which involve the expenditure of less than the average amount of time, the lawyer will reduce her fee accordingly.

VII. MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY

One of the most frequently filed motions in Chapter 13 cases are motions for relief from the automatic stay, usually filed either by the mortgage holder on the debtor’s residence or the lender secured by the automobile. These motions are usually made on the grounds that the debtor has defaulted in her obligation to make payments to a secured party.

For the most part, either the debtor is making her payments or she is not. Counsel for the parties acting in good faith, should almost always be able to resolve any discrepancies without making a federal case of it. Yet, an astonishing number of these motions are filed and set for hearing, only to be resolved at the last minute, or more troublesome, after a continuance, resulting in more wasteful and unnecessary effort on the part of the Court. I am dismayed at how often counsel for the parties will appear at a hearing and, after the motion is called, introduce themselves to each other and begin, for the first time, to negotiate a resolution. Parties should exhaust all efforts to negotiate prior to the date of the hearing on the motion.

If such a motion is set for hearing and counsel are able to resolve their differences, they should telephone chambers or the courtroom deputy and advise that they have settled. It is not necessary to make an in court appearance to announce a settlement. A proposed order should be sent, by e-mail, observing those procedures set out in a separate note regarding proposed orders. If no telephone call is made and if no appearance is made in court, the motion may be denied for want of prosecution, even if a proposed order is sent by way of e-mail prior to hearing. Due to the volume of such proposed orders, they may not be processed until several days or a week after submission.

VII. CONFIRMATION HEARINGS

Notice of the confirmation hearing will be given in the Notice of Commencement of Case, which is mailed several days after the filing of the petition. This is the same document which gives notice of the meeting of creditors. If the Chapter 13 Trustee recommends confirmation of the Plan, and if no objections are filed, neither the debtor nor his lawyer is required to attend the confirmation hearing and the Court will ordinarily confirm the Plan. If the Court raises concerns sua sponte counsel will be given notice to attend.

The Court's local rules require that objections shall be made in writing and filed at least 7 days prior to confirmation. LBR 3015-2. Debtors may rely on the local rule. If a tardy objection is filed, the Court may elect to hear the objection in the debtor's absence. If the objection is found to lack merit the Plan will be confirmed. In the event that the Court finds that the objection is at least facially valid, the Court may reset confirmation and give notice to the Debtor to appear. As neither the Bankruptcy Code nor the national Rules require that objections be filed any minimum period of time prior to confirmation, the Court may not construe a failure to comply with the local rule as a waiver of the right to object.

Chapter 13 confirmations are usually scheduled on a docket with several dozen, or as many as 100 other matters. If an objection will require an evidentiary hearing, counsel should consult in advance. If the hearing is likely to take 30 minutes or less, the Court will most likely take the objection up at the end of the docket. If the objection is expected to take more than 30 minutes, the Court will probably specially set the objection for hearing at a later date when the Court has sufficient time to hear evidence. In those instances where counsel anticipate a lengthy evidentiary hearing and where counsel does not wish to inconvenience witnesses to appear in court, only to be told to return on another day, counsel should file a motion to specially set his evidentiary hearing, signaling to the Court and other parties in interest, that evidence will not be heard at the first hearing. In these cases, the Court will use the confirmation hearing as a pretrial conference. Counsel should prepare accordingly. If there is any doubt as to how the Court may proceed, counsel may telephone chambers in advance for clarification.

In some instances, a Chapter 13 case will be called for confirmation where the debtor has not made the first Plan payment and has not appeared at the meeting of creditors. If the debtor does not have a good cause, the case will be dismissed at the confirmation hearing. LBR 3015-3. When a debtor files a case under Chapter 13, he should be made aware that he must begin making payments not later than 30 days after the date of the petition. 11 U.S.C. § 1326. Moreover, the debtor must be advised that he must also appear at a meeting of creditors. Debtor's counsel are encouraged to check the Chapter 13 Trustee's website for the status of plan payments.

VII. EARLY CONFIRMATION

The Middle District of Alabama had always been an “early confirmation” court. By that, it is meant that Chapter 13 Plans were confirmed shortly after the meeting of creditors and generally prior to the claims bar date. The 2005 amendments to the Code mandate that all courts are now “early confirmation” courts. By confirming a plan prior to the claims bar date, a problem may arise when a secured or priority claim is filed which was not anticipated by the Plan or if anticipated, the claim filed in an amount substantially greater than anticipated by the Debtor.

At the time the “Notice of Commencement of Case” is received, counsel should calendar the claims bar date and check the claims register for any unanticipated claims. If such a claim is filed, one of three things must happen. First, the Plan may be amended to provide for the claim. Second, if the debtor disputes the claim, an objection to claim should be filed. Third, if the claim is not disputed and the debtor does not have the means to amend the plan, the case should be dismissed. If such a claim is filed and if the debtor does not respond, the Court may dismiss the case after notice.

IX. 2005 AMENDMENTS

Counsel should bear in mind that the Bankruptcy Code was substantially modified in 2005. The most dramatic changes affecting Chapter 13 cases are: (1) the application of means testing to computation of disposable income, and (2) 910 claims. A detailed discussion of disposable income calculations is beyond the scope of this article, however, counsel are directed to resources which are available on this Court’s website and the website of the Chapter 13 Trustee.

Section 1325 of the Code was amended to curtail the use of lien modification on most automobile loans and certain other loans secured by personal property. The changes may be found in the unnumbered paragraph immediately preceding § 1325(b)(1). This is sometimes called the “hanging paragraph” of § 1325.

Prior to the effective date of the 2005 Act, Chapter 13 debtors frequently modified the liens on their automobile loans, as the value of their automobiles was frequently less than the balance owed to the secured lender. The hanging paragraph states that § 506 of the Bankruptcy Code does not apply to automobile loans. There appears to be a difference of opinion as to what this means, however, I believe the majority view is that lien modification is no longer allowed if the security agreement was entered into within 910 days (2 and ½ years) from the date of the petition. See, In re: Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006)(Williams, J.). However, modification of the contract rate of interest is allowed. See, In re: Wright, 338 B.R. 917 (Bankr. M.D. Ala. 2006).